

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JAMES L. BROBST, DEFENDANT AND APPELLANT.***G.R. No. 4935. October 25, 1909*

Ponente: CARSON, J.

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The defendant, James L. Brobst, and another American named Mann, were engaged in work on a mine located in the municipality of Masbate, where they gave employment to a number of native laborers. Mann discharged one of these laborers named Simeon Saldivar, warned him not to come back on the premises, and told the defendant not to employ him again, because he was a thief and a disturbing element with the other laborers. A few days afterwards, some time after 6 o'clock on the morning of the 10th of July, 1907, Saldivar in company with three or four others, went to the mine to look for work. The defendant, who at that time was dressing himself inside his tent, which was erected on the mining property, when he caught sight of Saldivar, ordered him off the place, exclaiming in bad Spanish, "Sigue, Vamus!" (Begone). Saldivar made no move to leave, and although the order was repeated, merely smiled or grinned at the defendant, where-upon the latter became enraged, took three steps toward Saldivar, and struck him a powerful blow with his closed fist on the left side, just over the lower ribs, at the point where the handle of Saldivar's bolo lay against the belt from which it was suspended. On being struck, Saldivar threw up his hands, staggered (dio vueltas-spun around helplessly) and without saying a word, went away in the direction of his sister's house, which stood about 200 yards (100 brazas) away, and about 100 feet up the side of a hill. He died as he reached the door of the house, and was buried some two or three days later.

The trial court found the defendant guilty of the crime of homicide (homicidio), marked with the extenuating circumstances, defined in subsections 3 and 7 of article 9 of the Penal Code, in that the defendant "had no intention of committing so grave an injury as that which he inflicted," and that he struck the blow "under such powerful excitement as would naturally produce entire loss of reason and self-control." Sentence of six years and one day of prision mayor was imposed, and from this sentence defendant appealed to this court.

Counsel for the appellant, relying mainly on appellant's claim that he did not strike Saldivar, and that he merely pushed him lightly with the back of his open hand, and relying also on the lack of satisfactory proof of the existence of lesions or external marks of violence on the body of the deceased, contend: first, that the evidence fails to sustain a finding that the deceased came to his death as a result of injuries inflicted by the defendant; and, second, that even if it be a fact that the defendant, in laying his hand upon the deceased, contributed to his death, nevertheless, since the defendant had a perfect right to eject the deceased from the mining property, he can not be held criminally liable for unintentional injuries inflicted in the lawful exercise of this right.

Two witnesses, Dagapdap and Yotiga, who were standing close by at the time, swore positively that the blow was delivered with the closed fist, from the shoulder (de dentro para fuera), and that it was a hard blow; Dagapdap testifying that, "Al pegar el puñetazo, Simeon dio vueltas, y despues se marchó" (when the blow was struck, Simeon staggered and afterwards went away); and Yotiga that "despuies de dar el golpe se retrocedio y levanto los brazos" (after the blow was struck, he backed away and threw up his arms). The testimony of these witnesses

is clear, positive, and definite and is wholly uncontradicted, except for the improbable story told by the accused in his own behalf, when he testified that seeing Saldivar standing outside his tent, he told him twice to go away and then stepped up to him and pushed him lightly with the back of his hand, which came in contact with the handle of Saldivar's bolo, but not with sufficient force to push him back or do him any injury. If it had been necessary to use force to compel Saldivar to leave the place, it is at least highly improbable that the accused approaching him from the front would have lightly placed the back of his open right hand on Saldivar's left side, without attempting to seize him, or to compel him to give ground.

Pedro Leocampo, the only other witness called at the trial who appears to have been present when the incident occurred, corroborated the testimony of the witnesses Dagapdap and Yotiga as to all that occurred prior to the actual infliction of the blow, which he did not see. He testified that at the time when the accused, standing in his tent, ordered the deceased to leave, he, the witness, was eating his breakfast, with his back to the accused and the deceased; that hearing the order, he turned his head and saw the accused start toward the deceased with his arm outstretched, but that at that moment he turned away and did not see the accused actually come up to, strike or touch the deceased; that when he saw the accused approaching the deceased, the accused did not have his fist clenched, but that he could not say whether the blow was struck with the open hand or the closed fist, because at the moment when it is said the accused came up to and touched or struck the deceased, the witness's head was so turned that he could not and did not see what took place.

No evidence was introduced at the trial which in any wise tends to put in doubt the truth of the testimony of these witnesses as to the fact that they were present at the time when and the place where the incident occurred; and of this fact we are satisfied that there can be no reasonable doubt, although, as frequently happens when ignorant witnesses are testifying in the courts in these Islands, their evidence is conflicting as to the precise hour by the clock when it took place.

Some attempt is made to discredit the testimony of Yotiga, because it appears from the record that in answer to certain questions on his examination-in-chief, he stated that when the blow was struck he was some hundred brazas (200 yards) away. It developed, however, on examination by the trial judge, that this answer was given under the impression that the question asked was the distance from the mine to the house of the sister of the deceased, as to which considerable testimony was taken; and it is very clear from all the testimony that both these witnesses were standing within a few yards of the defendant when he struck the blow.

The testimony of Dagapdap is also criticised because, in answer to the opening questions on the examination-in-chief, he spoke of the blow inflicted as a bofetada (a slap with the open hand on the cheek), which, later on in his testimony, he changed to the word puñetazo (a blow with the fist), as a result, it is intimated, of suggestive questions by counsel for the prosecution. We do not think this criticism well founded, or that the language of the witness on which it rests sustains the inference sought to be drawn therefrom. In the first place, it must not be forgotten that the witness was manifestly an ignorant man, unskilled in the use of words, and testifying in a remote province in a native dialect; and that his testimony was interpreted into the Spanish of the record by an interpreter who might well have been mistaken in selecting the precise Spanish equivalent of the word or words actually used by the witness, and whose use of Spanish throughout the record does not demonstrate such precision and nicety in the use of words as to justify the laying of too much stress on the phrasing adopted by him in the haste of interpretation in the course of a trial in open court: so that, in our opinion, the detailed description of the manner in which the blow was inflicted, as given by the witness without suggestion or assistance of any kind, is much more decisive as to its nature than the word by which reference to it was made. And in the second place, as appears from the *Diccionario Enciclopedico de la Lengua Castellana* and the *Diccionario de la Lengua por la Academia Española*, the word "bofetada," when used strictly, connotes not merely

a blow with the open hand, but such a blow struck on the cheek or side of the face, a meaning which the whole testimony of the witness clearly discloses it was not his intention to give to whatever word he did actually make use of in referring to the act. The definition of the word "bofetada," as given in the former dictionary, is "a blow which is given on the cheek (mejilla) with the open hand," and in the latter is "a blow given with the open hand, on the side of the face (carrillo) or cheek (mejilla) of another."

It has also been suggested that the testimony of the witnesses for the prosecution is inherently improbable, because, as it is said, if the blow had been struck as described by them, the injured person would necessarily have "doubled up or over and not, as appears from their testimony, thrown up his hands and staggered away. No expert testimony was introduced at the trial upon this point, and while it may, perhaps, be admitted that if the blow took effect in the abdominal region, common experience would justify us in expecting as a result of the blow, that the injured person would "double up or over," it must not be forgotten that the blow having been delivered over the ribs on the left side, it may as well have taken effect in the region of the heart; in the absence of expert testimony, we do not think that in that event, evidence that the injured person threw up his hands and staggered away is necessarily in conflict with the evidence of the witnesses for the prosecution as to the weight of the blow and the place where it was inflicted.

We are satisfied that the evidence of record leaves no room for reasonable doubt that the defendant struck Saldivar a powerful body blow with his closed fist; and that whatever authority the defendant may have had to eject the deceased from the mining property and to use physical force to that end in case of need, the blow thus struck was far in excess of such authority, and was, therefore, unlawful, and can not be excused or justified as an exercise of necessary force in the exercise of a right. The defendant's own testimony does not indicate that there was any danger to be apprehended from Saldivar, and there is nothing in the record which would indicate that the defendant had reasonable ground to believe that he would offer a violent or even a substantial resistance to an attempt to expel him from the mining property.

We are satisfied also that the deceased came to his death as a result of the blow inflicted by the defendant. Two or three days prior to his death he was employed as a laborer in defendant's mine; his sister testified that on the morning of the day he died, he left her house in apparent good health and went to the mines to look for work; a short time afterwards he received a violent blow on his lower left side, a region of the body where many of the vital organs are located; and immediately thereafter, he started up the short trail leading to his sister's house, and died as he reached the door. In the absence of evidence of any intervening cause, we think there can be no reasonable doubt that his death resulted from the blow.

Counsel for appellant suggest that death may have been the result of some cause unknown, such as a fall, an assault by robbers, or perchance a suicidal frenzy, intervening between the time when the accused was last seen starting up the 200-yard trail to his sister's house, and the time when, as she testified, he died just as he reached her door, on his way back from the mine; and that the accused is entitled to the benefit of the doubt. But the doubt which must be decided in favor of an accused person in a criminal trial is a reasonable doubt, and not a mere whimsical and fanciful doubt, based upon imagined but wholly improbable possibilities, unsupported by evidence; and while we do not hold that it is absolutely and morally impossible that some other cause could have intervened to bring about the death of Saldivar, we do hold that there can be no reasonable doubt in the mind of a reasonable man that death was in fact brought about by the blow inflicted by the accused, and was not the result of some independent cause intervening during the very short period of time prior to his death, during which he was not under observation by witnesses called at the trial.

Counsel for the appellant enlarge on the fact that accepting defendant's statement that he sent the deceased away from the mines about a quarter past six, it would appear from the testimony of the sister of the deceased that about

two hours may have elapsed between that time and the time when he arrived at her house. The sister fixed the time of the arrival of her brother at from 7 to 8 o'clock or possibly a little later; but she appears to have been an ignorant woman who did not know how to read the face of a clock, and it is quite clear that hers was no more than a rough estimate, based on the height of the sun, and the most that can fairly be inferred from the testimony is that the deceased was struck early on the morning in question, and that not long afterwards on the same morning, he died at the door of his sister's house 200 yards away. But even if it be granted that two hours actually did elapse from the time the deceased left the mines, until he reached his sister's house, this interval is not long enough to materially weaken the inference that the death resulted from the blow.

It is true that no autopsy was had on the body of the deceased, and that a medical officer called in by the accused who saw the body, but who does not appear to have examined it very closely, certified that he found no outward lesions or marks of violence; but this evidence is not sufficient to negative the existence of internal lesions, for the medical authorities inform us that death may and often does result from a blow over or near the heart or in the abdominal region, notwithstanding the fact that the blow leaves no outward mark of violence; and there is evidence in the record of the discovery on the cadaver of two suspicious black spots, one about the place where the blow was struck, and another at or near the umbilicus, though the evidence fails to disclose the precise nature of these discolorations. (Medical Jurisprudence, Taylor, 12th Am. Ed., pp. 310 and 388; Moulin's Treatise on Surgery, Hamilton, part 2, chap. 1, p. 151; Tratado de Medicina Legal por Legran de Sulle, Vol. II, pp. 206, 207.)

It has been suggested that the deceased may have had a weak heart or some other diseased organ, and that but for such physical defect death might not have ensued from the mere force of the blow inflicted by the defendant. There is no evidence to this effect, and on the contrary there is testimony in the record that on the morning before he died he was in apparent good health; and the fact that a few days before, he was able to work in the mines, and that he came to the mines that day in search of work, renders it highly improbable that he was suffering at that time from any grave organic weakness. But however this may have been, it has been frequently and justly decided that where death results as a direct consequence of the use of illegal violence, the mere fact that the diseased or weakened condition of the injured person contributed to his death, does not relieve the illegal aggressor of criminal responsibility. (U. S. vs. Luciano, 2 Phil Rep., 96; U. S. vs. Montes, 6 Phil. Rep., 443; see also decisions of supreme court of Spain, March 10, 1871, and June 26, 1880.)

Counsel for appellant also contend that even if it be granted that in unlawfully exercising force upon the person of the deceased, the appellant caused or contributed to his death, nevertheless he should at most be convicted of homicidio por imprudencia temeraria (homicide as a result of reckless negligence), because, manifestly, the unlawful act was not committed with intent to kill, and because, as counsel contend, the striking of the blow by the appellant was not an act adapted, or likely (idoneo) to inflict a death wound under ordinary circumstances, or reasonably calculated so to do. In support of this contention counsel cite decisions of the supreme court of Spain of November 9, 1885, February 10, 1876, July 5, 1888, and July 12, 1890, and appears to rely especially on the former decision wherein sentence of homicidio por imprudencia temeraria was imposed, the court holding "que es condicion esencial del delito de homicidio, que el hecho material de que resulte sea impulsado por voluntad libre encaminada por acto idoneo a causar la muerte o algun mal fisico que por consecuencia natural la produzca."

In that case, however, it was proven, and the court found that not only did the defendant not intend to kill the deceased but also that he did not intend to do him any physical injury whatever; but in the case at bar the evidence conclusively establishes the voluntary, intentional, and unlawful infliction by the accused of a severe blow on the person of the deceased; and while it is true that the accused does not appear to have intended to take the life of his victim, there can be no doubt that in thus striking the deceased, he intended to do him some injury, at least to the extent of inflicting some degree of physical pain upon him, and he is, therefore, criminally responsible for the

natural, even if unexpected results of his act, under the provisions of article 1 of the Penal Code, which prescribes that-

"Any person voluntarily committing a crime or misdemeanor shall incur criminal liability, even though the wrongful act committed be different from that which he had intended to commit."

In such cases the law in these Islands does not excuse one from liability for the natural consequences of his illegal acts merely because he did not intend to produce such consequences, but it does take that fact into consideration as an extenuating circumstance, as did the trial judge in this case.

What has been said sufficiently disposes of all errors assigned by counsel for appellant, except certain alleged errors of procedure in the court below which we do not think it necessary to discuss, because even if it be admitted that such errors were committed, they do not appear to have in any wise prejudiced the substantial rights of the defendant.

The judgment of conviction and the sentence imposed by the trial court should be and are hereby affirmed, with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, and Mapa, JJ., concur.

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MORELAND, J., with whom concurs JOHNSON, J., dissenting:

The facts in this case, as claimed by the Government, are as follows:

The defendant, James L. Brobst, and another American, named Mann, were engaged in working a mine belonging to them, located in the municipality of Masbate, where they gave employment to a number of native laborers. Mann discharged one of these laborers, named Simeon Saldivar, ejected him forcibly from the premises and warned him not to come back, and told the defendant not to employ him again or permit him to be upon the premises because he was a thief and a disturbing element with the other laborers. A few days afterwards, at about 6 o'clock in the morning on or about the 10th of July, 1907, Saldivar, in company with three or four others, went to the mine ostensibly to look for work. The defendant, who at that time was dressing himself inside his tent, which was erected on the mining property, catching sight of Saldivar, ordered him off the place. Saldivar made no move to leave, and, although the order was repeated, still did not leave, although he said and did nothing whatever; whereupon, as claimed by the Government, the defendant became enraged, took three steps towards Saldivar and struck him a powerful blow with his fist on the left side, just over the lower ribs. Saldivar turned around, without saying a word, and went in the direction of his sister's house, which stood about 200 yards away and about 100 feet up the side of a hill. He was not seen by anybody after starting toward the house. About two hours later, slightly more or less, he came to the front door of the house in a dying condition. He died just after being carried into the house and was buried two or three days later.

The trial court found the defendant guilty of the crime of homicide, marked with the extenuating circumstances defined in subsections 3 and 7 of article 9 of the Penal Code in that the defendant had no intention of committing so grave an injury as that which he inflicted and that he struck the blow under such powerful excitement as would naturally produce entire loss of reason and self-control. Sentence of six years and one day of prison mayor was imposed, and from this sentence the defendant appealed to this court.

The claim of the defendant is that he was not enraged, that he did not strike Saldivar, the decedent, a blow with his fist or a blow in any other manner, but that he simply stepped up to the decedent, put his open hand against him and pushed him gently backwards.

To secure a conviction it was necessary for the Government to prove, first, that the defendant unlawfully injured the decedent, and, second, that the decedent died because of that injury.

In this case the death is admitted. The cause of death is in dispute. The Government seeks to prove the cause of death by circumstantial evidence. The prosecution asserts that it has proved by direct evidence a blow or push delivered by the defendant to the person of the decedent, and, the subsequent death being admitted, asks the court to make the deduction that the one resulted from the other. No autopsy was had. No examination of the body, either before or after death, which merits the slightest consideration, was made by the prosecution. No expert testimony worthy of the name was produced by the Government as to the cause of death. Such as was given is not only wholly valueless, but positively ridiculous.

The prosecution claims to have proved by reliable evidence, and rests its case wholly upon that proposition, that the defendant administered to the decedent a powerful blow with the closed fist in the lower left side; that the death of decedent occurred very soon thereafter, and that, therefore, the irresistible inference is that the injury caused the death. The claim of a proper conviction rests upon the proposition laid down generally by the authorities that where there has been inflicted an injury sufficient to produce death, followed by the demise of the injured person, the presumption arises that the injury was the cause of death, and, if no other cause is suggested by the evidence, the conclusion becomes practically irresistible and need not be corroborated by expert testimony. It should be noted here, however, in order to avoid confusion, that if there is no injury sufficient to produce death, then that presumption does not arise and no conclusion as to the cause of death can be indulged without additional proof.

The first question to be decided in this case is, Was the blow one which, in the ordinary acceptance of the term, was sufficient to produce death? If it was, and that fact is established by the evidence beyond a reasonable doubt, then the conviction of the defendant might possibly be sustained—a proposition not necessary to decide under my view of the case. If it was not, then, there being an absolute failure of proof as to the cause of death, the judgment of conviction must be reversed.

The resolution of this question depends, in this particular case, wholly upon the nature and character of the blow delivered.

After a very careful and thorough examination of the proof adduced at the trial, I can not bring myself to believe that the prosecution has established satisfactorily that the blow complained of was sufficient to produce death.

I am not convinced that the claim of the Government that the alleged blow was delivered with the clenched hand, or fist, has been sustained. Three witnesses were sworn on behalf of the Government to the question of the blow alleged to have been delivered by the defendant to the decedent. One of them, Pedro Leocampo, testified flatly and directly that the push or blow (he does not designate by express words which it was) was administered with the open hand. At page 19 and following pages of the evidence he declares that, at the beginning of the incident in question between the defendant and the decedent, he had his back toward the participants, eating his breakfast; that he heard the defendant say to the decedent, "Fuera, go ahead, vamos," and immediately turning his head he saw the defendant with his open hand extending toward and touching the body of the decedent; that he saw decedent then turn and walk away. Later, in replying to questions put by the trial judge, he said he was not quite sure whether the open hand of defendant actually touched decedent's body or not. It is unquestionable, however, that the movement of the defendant's hand which he saw was the blow or push which it is claimed caused the fatal injury; because it is admitted by all, and the evidence also on that point is undisputed, that what the witness saw was at least the critical part of the incident—the delivery of the alleged blow. Moreover, it is conceded that the alleged blow was not delivered until after the defendant had uttered the words referred to and had stepped forward

at least one pace; and it is nowhere asserted or claimed by anybody that the defendant extended his hand toward the decedent more than once or that more than one blow was given. It is evident, therefore, that what the witness saw was the delivery of the very blow or push which the prosecution claims was the cause of death. If can not well be imagined, in view of the testimony given by this witness, how the Government could fairly claim otherwise. These conclusions are, I am convinced, fully supported by the testimony as it is found in the record. In answer to a question put by the fiscal on direct examination he said:

"T. Que estuve de espalda con ellos y el americano no ha dicho nada y momentos despues dijo: 'fuera, 'go ahead,' le vi que tenia la mano abierta y esta mano toco el cuerpo de Simeon, pero no he visto como estaba."

After cross-examination the court questioned the witness as follows:

"J. ¿Oyo Vd. ruido de algun golpe cuando el acusado Brobst dijo 'fuera de aqui?'-T. No he oido el golpe.

"J. En el momento de decir 'fuera de aqui,' ¿a que distancia estaba Simeon del acusado?-T. A distancia de mas de una vara.

"J. De modo que en aquel momento ¿estaba el occiso Simeon al alcance del acusado Brobst?-T. Si, señor,

"J. ¿Y vio Vd. al acusado empujar al occiso Simeon?-T. No puedo decir si el acusado empujo a Simeon.

"J. ¿Vio Vd. a Simeon Saldivar retroceder en el momento de decir el acusado 'fuera de aqui?'-T. He visto retroceder y dar las espaldas.

"J. Cuando hizo el ademan de empujarle, ¿como tenia el puño-cerrado o abierto?-T. Tenia la mano abierta.

"J. ¿En que forma?-T. Tenia abierta la mano."

The testimony of this witness clearly discloses the fact that he saw the critical part of the event, that is, the part wherein the hand of the defendant touched the body of the decedent in the alleged blow. At that moment the hand of the defendant was open.

The witness Miguel Yotiga, another witness called by the Government, testified on pages 2, 3, and 4 of the record that during the month of July, 1907, he was at the place where the dispute in question occurred. Then follow these questions and answers, among others:

"F. ¿Sabe Vd. si durante el mes de Julio de 1907 que estuvo Vd. trabajando alli ha ocurrido alguna cosa extraordinaria?-T. Si, señor.

"F. ¿Que es?-T. El haber abofeteado el americano a un tao.

"F. ¿Estaba Vd. presente?-T. Si, señor.

"F. Relate Vd. fielmente en este juzgado todo lo que Vd. ha presenciado desde el principio hasta el fin.-T. Yo he sido asalariado por el para acarrear arroz. Cuando llegue en las minas era ya de noche, y al requerir nuestro salario nos dijo Cristobal que nos dormiriamos alli porque el americano estaba ya durmiendo y que Vds. pueden salir muy temprano por la mañana. Se nos dio el salario por el acarreo del arroz, y despues de darnos el salario se nos dijo que quedaramos para desayunar. Despues de desayunar llegaron tambien 4 hombres; el cocinero me dijo: 'Miguel, presente Vd. a estos 4 hombres por si el Sr. Brobst los quiere emplear en el trabajo.' Los 4 individuos fueron uno tras otro. Yo dije al Sr. Brobst si aun pueden trabajar esos 4 hombres. El Sr. Brobst se levanto para ver a aquellos 4 hombres, al ultimo de los cuales le pego una bofetada, y yo habia visto la bofetada que le dio en la cintura en elbolo colocado en la cintura, e inmediatamente el hombre se dirigio a la casa de su hermana.

"F. ¿Á que distancia estaba Vd. de Mr. Brobst cuando dio el puñetazo a aquel individuo?-T. Una distancia de

10 metros.

"F. ¿Sabe Vd. por que el acusado habia dado puñetazo a aquel?-T. Que yo le he visto pegar con 61 bofeton, pero que no se el motivo.

"F. ¿Cruzaron entre ellos alguna disputa 6 riña antes que el acusado haya dado el golpe?-T. No se nada, unicamente he visto que cuando llegaba Mr. Brobst dio el puñetazo."

Later on the witness says, in reply to leading questions, that the blow was struck with the closed hand and was a heavy one.

It will be observed from this testimony that the witness, in making his statement in narrative form and without the influence which particular words in questions frequently exerts on simple-minded witnesses, used the words abofeteado and bofetada in speaking of the kind of blow which the defendant administered to the decedent. The word bofetada, as well as abofeteado, means a blow with the open hand. It does not mean a severe blow, and particularly not a blow with the fist or closed hand. It is much nearer in character to a push than it is to a puñetazo, which is always a blow with the fist. It is a light slap rather than a blow. It is the diminutive of the word bofeton; that is to say, if it can be called a blow at all, it is a gentler blow than would be signified if the word bofetdn were use. All of the dictionaries say that puñetazo is a blow with the clenched hand, or fist, and that bofetada is a blow with the open hand. The dictionaries also say, in giving the definition of bofeton, that it is the aumentativo de bofetada. In his testimony on pages 2, 3, and 4, the witness continually and persistently used the word bofetada in describing the blow given by the defendant to the decedent until the word puñetazo was suggested to him or put into his mouth, as it were, by the questions of the fiscal. Then the witness himself picked up the word and thereafter used it. No amount or species of word torture can make the word "slap" mean a blow with the fist. No more can bofetada be made to mean puñetazo. A witness who, in describing the same blow, first uses the word bofetada and then, after suggestion, changes it to puñetazo, provokes a contradiction in his testimony, which, if not explained, militates strongly against his credibility. This is especially so when the change in the word goes to the very essence of the cause of action, as it does in this case. This whole case depends upon whether the word puñetazo or the word bofetada correctly describes the event out of which this action grows:

It is but repeating the general experience of those familiar with the trial of causes to say that suggestions to a witness by the form and specific wording of a question are of very frequent occurrence. The suggestion produces the same result whether wilfully made and received or innocently indulged, as was undoubtedly the case here on the part of the fiscal. In the case of an ignorant or simple-minded witness, his vocabulary being limited, he catches very readily, as a rule, the words used by the interrogator and, in his answers, uses the exact words in which the question is propounded, without, perhaps, being in the least conscious that the words he assumes do not exactly, sometimes not at all closely, represent what he really wants to express. These suggestions display one of the vices found by the courts in what are termed "leading questions," and furnish a reason for the rule uniformly enforced in trial courts that they will not be permitted.

The questions and answers already quoted illustrate this vice forcibly as to the use by the witness Yotiga of the words bofetada and puñetazo. On page 5 of the evidence occurs another illustration. There the fact sought to be elicited was whether the blow was gentle or severe. "F. ¿Hizo despacio o fuerte?-T. Fuerte." On pages 12, 19, and 24 the following occurs:

"F. ¿Donde toco-directamente en el cuerpo o en el bolo?-T. Dio en el bolo.

"F. ¿En que parte del bolo-en la vaina o en el puño?-T. En el puño del bolo.

"F. ¿Era fuerte el puñetazo o flojo?-T. Fuerte.

"F. Cuando el acusado pego a Simeon Saldivar, ¿estaba riendose o estaba furioso?-T. Furioso.

"F. ¿Tenia cerrado el puno o abierto la mano?-T. Cerrado la mano."

In these illustrations, it will be observed, the witness is presented by the questions with only two words to make use of in answering-one word the very extreme in one direction and the other word the very extreme in the other. The ignorant or simple-minded witness whose vocabulary is extremely limited, who is unused to court proceedings, is strongly tempted, and in many instances is virtually forced, to accept one word or the other and thereby assume one extreme or the other in making his answers, although the word made use of may not within many degrees express his real meaning. All of these questions were leading and suggestive, and, judging from the testimony given anterior to those questions, especially by the witness Yotiga, led to very marked contradictions of, or, at least, changes in, the evidence as previously presented.

The third and last witness for the Government who testified as to the blow was Fermin Dagapdap. In describing the blow this witness from the first used the word puñetazo. This witness, however, stated that he was at the time of the occurrence about 100 brazas (600 feet) from the participants. Later in his testimony he attempts to claim that he gave 100 brazas as the distance which the decedent was from his brother's house at the time of the occurrence. This, however, is very difficult to believe in view of the evidence which he gave, as shown on page 25, which follows:

"F. ¿Á que distancia estaba Vd. de los dos cuando dio el puñetazo?-T. Unas 100 brazas.

"F. ¿Vd. estaba a 100 brazas de distancia?-T. Si, señor.

"F. Indique Vd. aqui la distancia aproximadamente de las 100 brazas que Vd. dice.-T. Aquella casa de techo de hierro.

"F. ¿Esa es la distancia donde Vd. estaba cuando dio el puñetazo a Simeon Saldivar?-T. Si, señor."

If, after all that questioning as to the distance he was away from the scene of the occurrence, and if, after all the effort which the fiscal evidently made to induce in him a proper comprehension of the nature of the question, the witness did not then understand, he displayed qualities, or the lack of them, which justly lead to the conclusion that his testimony ought not to be given any weight whatever, especially where it is in conflict with the testimony of any witness more reliable. Moreover, his manifest evasions on cross-examination materially weaken any claim which may be made in favor of his credibility.

These witnesses for the Government are in conflict in other particulars. Yotiga declared that the incident occurred at eight o'clock in the morning. Dagapdap swore that it occurred at four o'clock in the morning. Yotiga declared that it happened while the workmen were eating breakfast; Dagapdap averred that it took place after breakfast and while the men were working.

It seems to me, therefore, that the direct testimony adduced by the Government to prove that the defendant delivered against the body of decedent a blow with his fist, is conspicuously weak, particularly when we take into consideration that one of the Government witnesses flatly contradicts the other two in every important point; and that testimony, taken in connection with all the circumstances surrounding and accompanying the incident, seems rather to support the testimony and claim of the defendant that he did not strike the decedent with his fist but gave him a push with his open hand.

The following are the said circumstances, present at the very time the act complained of was committed, which go to prove that the blow, alleged to have been delivered against the body of the decedent, was not a blow at all in the real sense of the word and was wholly insufficient ordinarily speaking, to cause any injury whatever:

The decedent at the time showed absolutely no signs of having been injured in the slightest degree.

(a) The three witnesses for the prosecution above referred to, Yotiga, Dagapdap and Leocampo, if their testimony is to be believed, unite in declaring that they were looking the decedent full in the face when the alleged blow was struck and that they saw thereon nothing but a perfectly natural expression. There is not the slightest evidence to show that the countenance of the decedent betrayed even the faintest appearance of pain, distress or discomfort at the time the blow was delivered or at any time thereafter so long as he was observed.

(b) Nobody heard any blow struck. It is conceded by every witness for the Government that there was no sound of a blow. There were at the place where the incident occurred about twenty men, all of them as close to the participants as were the three witnesses for the Government and yet, so far as can be gathered, not a person heard the sound of a blow. In fact, only three of the twenty (the witnesses for the Government) knew that anything unusual had happened at all.

(c) The decedent gave no cry of pain, made no exclamation, uttered no sound. This is the uncontradicted proof.

(d) The decedent did not reel or stagger backward, forward or sideways, nor did he lose his equilibrium in any way.

This is established by uncontradicted proof. Every witness for the Government declares that after the delivery of the alleged blow the decedent remained in a perfectly upright attitude and in a natural position; and that immediately after receiving the blow he turned and walked away.

One of the witnesses, after being sharply questioned by the fiscal, stated that on the delivery of the blow the decedent stepped back, threw up his arms and walked away. The following is his testimony:

"El Sr. Brobst \* \* \* le pego una bofetada y yo habia visto la bofetada que le dio en la cintura en el bolo colocado en la cintura e inmediatamente el hombre se dirigio a la casa de su hermana.

"F. ¿En que posicion se quedo aquel individuo en el mismo momento de recibir el golpe?-T. Que inmediatamente de haber recibido el puñetazo se marchó.

"F. Yo le pregunto a Vd. en el mismo momento de haber dado el puñetazo.-T. Que despues de dar el golpe se retrocedio y levanto los brazos y en seguida se marchó."

It will be observed, from the evidence quoted, that the witness testified at first that the decedent did nothing on receiving the blow except to turn and walk away. This testimony the witness repeats in response to a second question of the fiscal. The third question as to the same point was evidently very sharply put by the fiscal, and that effort drew from the witness the additional statement, quite inconsistent with his two previous ones, that the decedent stepped back and threw up his arms. Neither of the other two witnesses for the Government saw this latter manifestation on the part of the decedent. One of them, Leocampo, testifies directly that no such thing happened, and the other, Dagapdap, although one of those who claimed to have been an eyewitness of the whole affair and who assumed to describe the whole incident in detail, fails to mention the very important fact, if it is a fact, that the decedent threw up his arms. He testified that the decedent simply whirled around and walked away.

The claim of the prosecution that the decedent staggered at the time of the alleged blow is based upon the translation of "dio vueltas." One of the Government's witnesses says that on the delivery of the blow the decedent "dio vueltas y se marchó." So far as my researches go, no such interpretation can be given those words. They do not mean that he "staggered." They mean simply that he turned or whirled around. This might follow a blow or a push. No other witness uses these same words; but the other two witnesses for the Government, in describing the same act of the decedent, used words which, it may fairly be assumed, in order to maintain as much harmony as

possible in the testimony of the Government's witnesses, were intended to mean the same thing. Such words are "se dirigió a la casa," and "volvi la cara y se marchó el difunto." These words were used by the other two Government witnesses in describing the very same act to which the other Government witness applied the description "dio vueltas." Those words can not possibly be construed to mean that the decedent staggered.

(e) The decedent, according to the testimony of the prosecution, did not attempt to ward off, dodge or escape the blow in any way.

He had abundant opportunity to do so. It is nowhere denied, but always admitted, that the defendant twice ordered the decedent to leave the place and after delivering the order the second time advanced toward him a pace or two. The decedent was fully warned. Yet the witnesses of the prosecution claim that, up to the time the blow touched him, he made no move whatever. It is unbelievable that the decedent would permit the defendant to walk up to him, after due warning, and plant a powerful blow in his abdomen without any effort to dodge or escape and without the slightest effort to ward off the blow by movement of body, hand, or arm. The throwing of the arms down to protect the abdomen in such a case is involuntary and almost inevitable; and the fact that he did not do so points strongly to the conclusion that he was not struck as claimed.

(f) The body of decedent exhibited no external sign of injury after death.

Two witnesses were sworn by the prosecution, as to signs of injury upon the body of the decedent. One, the father of decedent, laborer, testified that at 4 o'clock of the afternoon of the day after the alleged injury (the alleged injury occurred at about 6 a. m.) he examined the body of decedent and found a black spot about the size of a peso on the left side. The other witness, Alejandro Santiago, 70 years, farmer and herbalist, declared that he examined the body, he does not remember when, and found a black spot on the ribs (he does not remember on which side of the body) and another one on the navel. The cause of these spots, if they really existed, is pure speculation. Certainly one blow could not make both. They may have been caused by the decedent falling or by handling the body at the time of or subsequent to death, or by ecchymosis. No one knows. Certain it is that an examination of the body by a licensed physician, Hans Hoch, made the day of the alleged injury, some hours thereafter, disclosed, so the physician testified, absolutely no external sign or evidence of injury. While the absence of external signs of injury is not conclusive that there was no injury, still such signs are usual in cases of this character and their absence is significant and important.

The weight of the testimony produced seems, therefore, to be that there were no external signs of injury upon the body of decedent—certainly none that were fairly traceable to the blow, even if delivered in the manner and with the force claimed by the Government.

It seems to me, therefore, that there is an essential and fatal conflict in the evidence of the prosecution. The prosecution claims (and portions of the direct testimony of some of its witnesses tend to prove) that the defendant gave the decedent a powerful blow with his fist, full in the left side; on the other hand, other portions of that testimony are utterly and destructively contradictory to that claim. It is contrary to the universal experience of life to assert that a man, receiving in his lower left side a powerful blow with the fist, a blow which, it is claimed, was sufficiently forcible to cause death within a short time, can maintain an erect and natural posture and exhibit absolutely no signs of pain. Experience also demonstrates that it is little short of the impossible that one receiving such a blow would throw his arms up. I do not believe a case can be cited where that has occurred. It is the experience of mankind that under such circumstances the person always throws his arms down. Such a blow in or about the abdomen or in the lower ribs produces such a shock to the nervous system, causes such a contraction of all the muscles thereabouts, induces such a difficulty of respiration, and such great pain, that the person so struck is not only wholly unable to throw his arms up but he is absolutely incapable of maintaining the body in an erect

position. He involuntarily and inevitably throws the arms down over the abdomen and bends the body forward at the hips. In other words, using a phrase which almost universal experience has taught accurately describes the position necessarily assumed by one receiving such a blow, he would "double up like a jackknife." The claim that the blow was a powerful one delivered with the fist is so utterly inconsistent with the appearance and conduct of the decedent at the time of the assault and subsequent thereto as to lead almost necessarily to the conclusion that no such blow was struck. Granting such a blow, it would be little short of the impossible, it certainly would be most extraordinary, for the decedent to exhibit no signs of pain, maintain an erect and natural position, preserve perfectly his equilibrium with the exception of stepping backward a little, turn in the ordinary way and walk off the premises at his usual and natural gait and with his usual and natural carriage. The entire absence of symptoms or evidence of injury at the time of the act complained of is, in my judgment, of the very gravest importance. It speaks louder and stronger and clearer than all the other evidence in the case as to whether or not the decedent was actually injured at that time.

On the other hand, the theory and claim of the defendant, that he simply stepped forward and pushed the decedent backward lightly with the open hand, after ordering him to leave, explains fully and satisfactorily every fact and every circumstance above mentioned as being so utterly inconsistent with the claim of the prosecution.

(1) It explains why the decedent did not try to dodge or escape or protect himself by movement of the body, or by using the hands and arms to defend himself from the assault of this enraged and furious man. There was no violence from which he needed to protect himself.

(2) It explains why there was no cry of pain, no appearance of distress, no reeling, staggering, falling, doubling up or other exhibition or sign of injury. It explains why he did not at once drop to the ground, as he naturally and almost inevitably would on receiving a blow such as is sought to be established by the prosecution. There was no violence or force to cause any of these things.

(3) It explains why decedent was able to walk away promptly at his usual gait and with his customary carriage.

(4) It explains why there was no satisfactory proof of marks of violence or external signs of injury on the body of the decedent.

(5) It explains why nobody of all who were present heard the sound of a blow, not even the witnesses for the prosecution.

(6) It explains why, among the twenty persons there present, only a very small per cent knew that anything unusual had taken place.

(7) It explains why the witness Yotiga first used the word "bofetada" instead of "puñetazo" or "golpe."

(8) It explains why the witness Leocampo testified that the defendant's hand was open at the very time of its contact with decedent's person.

(9) It explains the entire lack of reason or motive on the part of defendant inducing him to inflict on the decedent punishment as severe as would follow such a blow.

It seems, therefore, to be demonstrated from the evidence that the prosecution has not only not sufficiently substantiated its claim that the blow was delivered with the fist, but has failed as well to show that any blow, in the real sense of that term, was struck. Rather the strong tendency of the proof, taken as a whole, together with all the circumstances, is to support the contention of the defendant that he simply pushed the decedent back with the open hand. That being so, it is perfectly apparent that such an act was utterly insufficient to produce death.

As stated at the outset, the Government rests its case wholly upon the proposition laid down by the authorities that

where there has been inflicted an injury sufficient to produce death, followed by the demise of the injured person, the presumption arises that the injury was the cause of death, and, if no other cause is suggested by the evidence, the conclusion becomes practically irresistible and need not be corroborated by expert testimony. But it must always be remembered that the basis of and the reason for that presumption is the injury sufficient to produce death. If the injury is not one capable of producing death, ordinarily speaking, then no such presumption can possibly arise. The law invariably requires that there be established by clearest proof the connection between the injury and the death, making the one the result of the other. Where the injury is one capable of producing death that connection of cause and effect is established between the injury and death by the inherent nature of the act-its sufficiency to produce death. But where the act is one not sufficient to produce death, then the relation of cause and effect is not established for the reason that the act fails of the very quality from which the presumption of cause and effect springs, namely, its capability of producing death. In such a case, when the Government has proved simply the injury and death, it has done nothing. The connection between the two is wholly lacking. It is indispensable to a conviction in such case that the Government prove the cause of death; and that cause must be proved in addition to the fact of injury. This the Government has wholly failed to do. No effort was made to do so. The Government rested its case entirely upon the presumption, which it assumed arose by reason of the injury and death, to establish the relation of cause and effect between them. No autopsy was held. No one knows the cause of death. The incident occurred at about 6 o'clock a. m. The decedent died at about 8 o'clock the same morning. He left the scene of the event instantly. He was not seen again by anybody, so far as the evidence shows, until the very moment of his death. Where he was, what he did, and what happened to him during the two hours intervening, the evidence does not disclose.

It being fairly established by the evidence that the defendant simply pushed the decedent, the remaining question is simple. The land and premises where the event transpired belonged to the defendant. The decedent, according to the evidence, was known to the defendant as a thief and as a maker of mischief among the workers in the mines. Only two days before the event from which this suit arose defendant had seen the decedent forcibly ejected from these same premises by one Mann, a partner of defendant; and the defendant was at that time advised by Mann that the decedent was a mischief-maker and a thief and should not be allowed about the mines. The defendant had a right to protect his property from invasion, particularly by such a person as he believed decedent to be; and if, being upon the premises, decedent refused to leave when given fair warning, the defendant had a right to eject him there-from using no more force than was necessary to that end. (Cooley, Torts, 1st Ed., 167; *McCarty vs. Fremont*, 23 Cal., 196; *Woodman vs. Howell*, 45 111., 367; *Bucher vs. Parmelee*, 9 Vt, 352; *People vs. Payne*, 8 Cal., 341; *People vs. Batchelder*, 27 Cal., 69.)

That he did not use more force than was necessary is established by the evidence as shown by the preceding discussion.

Wills, on Circumstantial Evidence, says on page 291:

"(3) In the proof of criminal homicide the true cause of death must be clearly established; and the possibility of accounting for the event by self-inflicted violence, accident or natural cause, excluded; and only when it has been proven that no other hypothesis will explain all the conditions of the case can it be safely and justly concluded that it has been caused by intentional injury. But, in accordance with the principles which govern the proof of every other element of the corpus delicti, it is not necessary that the cause of death should be verified by direct and positive evidence; it is sufficient if it be proven by circumstantial evidence, which produces a moral conviction in the minds of the jury, equivalent to that which is the result of positive and direct evidence."

In the *People vs. Bennett* (49 N. Y. 144) the court said:

"In determining a question of fact from circumstantial evidence, there are two general rules to be observed: (1) The hypothesis of delinquency or guilt should flow naturally from the facts proved, and be consistent with them all, (2) The evidence must be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence."

"On an indictment for murder, the prosecutor must prove that the blows caused the death; but, if he proves that the blows were given by a dangerous weapon-were followed by insensibility or other alarming symptoms, and soon afterwards by death; this is sufficient to impose it on the accused, to show that the death was occasioned by some other cause." (U. S. vs. Wiltberger, Fed. Cas. No. 16738.)

"On trial for murder, the State's failure to prove by what means the deceased came to his death is fatal to its case." (Cole vs. The State, 59 Ark., 50.)

"In order that a defendant may be properly convicted by circumstantial evidence, all the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and, at the same time, inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt." (12 Cyc, 488; U. S. vs. Reyes, 3 Phil. Rep., 3; People vs. Ward, 105 Cal., 335; Carlton vs. The People, 150 111., 181; State vs. Vinson, 37 La. Ann., 792; Commonwealth vs. Costley, 118 Mass., 1; People vs. Aikin, 66 Mich., 460; U. S. vs. Reder, 69 Fed. Rep., 965.)

The judgment of conviction should be reversed, the defendant declared not guilty and his discharge from custody ordered.

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