

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. AH CHONG,
DEFENDANT AND APPELLANT.***G.R. No. 5272. March 19, 1910*

Ponente: CARSON, J.

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The evidence as to many of the essential and vital facts in this case is limited to the testimony of the accused himself, because from the very nature of these facts and from the circumstances surrounding the incident upon which these proceedings rest, no other evidence as to these facts was available either to the prosecution or to the defense. We think, however, that, giving the accused the benefit of the doubt as to the weight of the evidence touching those details of the incident as to which there can be said to be any doubt, the following statement of the material facts disclosed by the record may be taken to be substantially correct:

The defendant, Ah Chong, was employed as a cook at "Officers' quarters, No. 27," Fort McKinley, Rizal Province, and at the same place Pascual Gualberto, deceased, was employed as a house boy or muchacho. "Officers' quarters No. 27" is a detached house situated some 40 meters from the nearest building, and in August, 1908, was occupied solely as an officers' mess or club. No one slept in the house except the two servants, who jointly occupied a small room toward the rear of the building, the door of which opened upon a narrow porch running along the side of the building, by which communication was had with the other part of the house. This porch was covered by a heavy growth of vines for its entire length and height. The door of the room was not furnished with a permanent bolt or lock, and the occupants, as a measure of security, had attached a small hook or catch on the inside of the door, and were in the habit of reinforcing this somewhat insecure means of fastening the door by placing against it a chair. In the room there was but one small window, which, like the door, opened on the porch. Aside from the door and window, there were no other openings of any kind in the room.

On the night of August 14, 1908, at about 10 o'clock, the defendant, who had retired for the night, was suddenly awakened by someone trying to force open the door of the room. He sat up in bed and called out twice, "Who is there?" He heard no answer and was convinced by the noise at the door that it was being pushed open by someone bent upon forcing his way into the room. Due to the heavy growth of vines along the front of the porch, the room was very dark, and the defendant, fearing that the intruder was a robber or a thief, leaped to his feet and called out. "If you enter the room, I will kill you." At that moment he was struck just above the knee by the edge of the chair which had been placed against the door. In the darkness and confusion the defendant thought that the blow had been inflicted by the person who had forced the door open, whom he supposed to be a burglar, though in the light of after events, it is probable that the chair was merely thrown back into the room by the sudden opening of the door against which it rested. Seizing a common kitchen knife which he kept under his pillow, the defendant struck out wildly at the intruder who, it afterwards turned out, was his roommate, Pascual. Pascual ran out upon the porch and fell down on the steps in a desperately wounded condition, followed by the defendant, who immediately recognized him in the moonlight. Seeing that Pascual was wounded, he called to his employers who slept in the next house, No. 28, and ran back to his room to secure bandages to bind up Pascual's wounds.

There had been several robberies in Fort McKinley not long prior to the date of the incident just described, one of which took place in a house in which the defendant was employed as cook; and as defendant alleges, it was because of these repeated robberies he kept a knife under his pillow for his personal protection.

The deceased and the accused, who roomed together and who appear to have been on friendly and amicable terms prior to the fatal incident, had an understanding that when either returned at night, he should knock at the door and acquaint his companion with his identity. Pascual had left the house early in the evening and gone for a walk with his friends, Celestino Quiambao and Mariano Ibañez, servants employed at officers' quarters No. 28, the nearest house to the mess hall. The three returned from their walk at about 10 o'clock, and Celestino and Mariano stopped at their room at No. 28, Pascual going on to his room at No. 27. A few moments after the party separated, Celestino and Mariano heard cries for assistance and upon returning to No. 27 found Pascual sitting on the back steps fatally wounded in the stomach, whereupon one of them ran back to No. 28 and called Lieutenants Jacobs and Healy, who immediately went to the aid of the wounded man.

The defendant then and there admitted that he had stabbed his roommate, but said that he did it under the impression that Pascual was "a ladron" because he forced open the door of their sleeping room, despite defendant's warnings.

No reasonable explanation of the remarkable conduct on the part of Pascual suggests itself, unless it be that the boy in a spirit of mischief was playing a trick on his Chinese roommate, and sought to frighten him by forcing his way into the room, refusing to give his name or say who he was, in order to make Ah Chong believe that he was being attacked by a robber.

Defendant was placed under arrest forthwith, and Pascual was conveyed to the military hospital, where he died from the effects of the wound on the following day.

The defendant was charged with the crime of assassination, tried, and found guilty by the trial court of simple homicide, with extenuating circumstances, and sentenced to six years and one day presidio mayor, the minimum penalty prescribed by law.

At the trial in the court below the defendant admitted that he killed his roommate, Pascual Gualberto, but insisted that he struck the fatal blow without any intent to do a wrongful act, in the exercise of his lawful right of self-defense.

Article 8 of the Penal Code provides that -

"The following are not delinquent and are therefore exempt from criminal liability:

"4. He who acts in defense of his person or rights, provided there are the following attendant circumstances:

"(1) Illegal aggression.

"(2) Reasonable necessity of the means employed to prevent or repel it.

"(3) Lack of sufficient provocation on the part of the person defending himself."

Under these provisions we think that there can be no doubt that defendant would be entitled to complete exemption from criminal liability for the death of the victim of his fatal blow, if the intruder who forced open the door of his room had been in fact a dangerous thief or "ladron," as the defendant believed him to be. No one, under such circumstances, would doubt the right of the defendant to resist and repel such an intrusion, and the thief having forced open the door notwithstanding defendant's thrice-repeated warning to desist, and his threat that he would kill the intruder if he persisted in his attempt, it will not be questioned that in the darkness of the night,

in a small room, with no means of escape, with the thief advancing upon him despite his warnings, defendant would have been wholly justified in using any available weapon to defend himself from such an assault, and in striking promptly, without waiting for the thief to discover his whereabouts and deliver the first blow.

But the evidence clearly discloses that the intruder was not a thief or a "ladron." That neither the defendant nor his property nor any of the property under his charge was in real danger at the time when he struck the fatal blow. That there was no such "unlawful aggression" on the part of a thief or "ladron" as defendant believed he was repelling and resisting, and that there was no real "necessity" for the use of the knife to defend his person or his property or the property under his charge.

The question then squarely presents itself, whether in this jurisdiction one can be held criminally responsible who, by reason of a mistake as to the facts, does an act for which he would be exempt from criminal liability if the facts were as he supposed them to be, but which would constitute the crime of homicide or assassination if the actor had known the true state of the facts at the time when he committed the act. To this question we think there can be but one answer, and we hold that under such circumstances there is no criminal liability, provided always that the alleged ignorance or mistake of fact was not due to negligence or bad faith.

In broader terms, ignorance or mistake of fact, if such ignorance or mistake of fact is sufficient to negative a particular intent which under the law is a necessary ingredient of the offense charged (e. g., in larceny, animus furendi; in murder, malice; in crimes and misdemeanors generally some degree of criminal intent) "cancels the presumption of intent," and works an acquittal; except in those cases where the circumstances demand a conviction under the penal provisions touching criminal negligence; and in cases where, under the provisions of article 1 of the Penal Code one voluntarily committing a crime or misdemeanor incurs criminal liability for any wrongful act committed by him, even though it be different from that which he intended to commit. (Wharton's Criminal Law, sec. 87 and cases cited; McClain's Crim. Law, sec. 133 and cases cited; Pettit vs. S., 28 Tex. Ap., 240; Commonwealth vs. Power, 7 Met., 596; Yates vs. People, 32 N. Y., 509; Isham vs. State, 38 Ala., 213; Commonwealth vs. Rogers, 7 Met., 500.)

The general proposition thus stated hardly admits of discussion, and the only question worthy of consideration is whether malice or criminal intent is an essential element or ingredient of the crimes of homicide and assassination as defined and penalized in the Penal Code. It has been said that since the definitions there given of these as well as most other crimes and offenses therein defined, do not specifically and expressly declare that the acts constituting the crime or offense must be committed with malice or with criminal intent in order that the actor may be held criminally liable, the commission of the acts set out in the various definitions subjects the actor to the penalties described therein, unless it appears that he is exempted from liability under one or other of the express provisions of article 8 of the code, which treats of exemptions. But while it is true that contrary to the general rule of legislative enactment in the United States, the definitions of crimes and offenses as set out in the Penal Code rarely contain provisions expressly declaring that malice or criminal intent is an essential ingredient of the crime, nevertheless, the general provisions of article 1 of the code clearly indicate that malice, or criminal intent in some form, is an essential requisite of all crimes and offenses therein defined, in the absence of express provisions modifying the general rule, such as are those touching liability resulting from acts negligently or imprudently committed, and acts done by one voluntarily committing a crime or misdemeanor, where the act committed is different from that which he intended to commit. And it is to be observed that even these exceptions are more apparent than real, for "There is little distinction, except in degree, between a will to do a wrongful thing and indifference whether it is done or not. Therefore carelessness is criminal, and within limits supplies the place of the affirmative criminal intent" (Bishop's New Criminal Law, vol. 1, s. 313) ; and, again, "There is so little difference between a disposition to do a great harm and a disposition to do harm that one of them may very well

be looked upon as the measure of the other. Since, therefore, the guilt of a crime consists in the disposition to do harm, which the criminal shows by committing it, and since this disposition is greater or less in proportion to the harm which is done by the crime, the consequence is that the guilt of the crime follows the same proportion; it is greater or less according as the crime in its own nature does greater or less harm" (Ruth. Ints. C. 18, p. 11); or, as it has been otherwise stated, the thing done, having proceeded from a corrupt mind, is to be viewed the same whether the corruption was of one particular form or another.

Article 1 of the Penal Code is as follows:

"Crimes or misdemeanors are voluntary acts and omissions punished by law.

"Acts and omissions punished by law are always presumed to be voluntary unless the contrary shall appear.

"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."

The celebrated Spanish jurist Pacheco, discussing the meaning of the word "voluntary" as used in this article, says that a voluntary act is a free, intelligent, and intentional act, and roundly asserts that without intention (intention to do wrong or criminal intention) there can be no crime; and that the word "voluntary" implies and includes the words "con malicia," which were expressly set out in the definition of the word "crime" in the code of 1822, but omitted from the code of 1870, because, as Pacheco insists, their use in the former code was redundant, being implied and included in the word "voluntary." (Pacheco, *Codigo Penal*, vol. 1, p. 74.)

Viada, while insisting that the absence of intention to commit the crime can only be said to exempt from criminal responsibility when the act which was actually intended to be done was in itself a lawful one, and in the absence of negligence or imprudence, nevertheless admits and recognizes in his discussion of the provisions of this article of the code that in general without intention there can be no crime. (Viada, vol. 1, p. 16.) And, as we have shown above, the exceptions insisted upon by Viada are more apparent than real.

Silvela, in discussing the doctrine herein laid down, says:

"In fact, it is sufficient to remember the first article, which declares that where there is no intention there is no crime * * * in order to affirm, without fear of mistake, that under our code there can be no crime if there is no act, an act which must fall within the sphere of ethics if there is no moral injury." (Vol. 2, *The Criminal Law*, folio 169.)

And to the same effect are various decisions of the supreme court of Spain, as, for example in its sentence of May 31, 1882, in which it made use of the following language:

"It is necessary that this act, in order to constitute a crime, involve all the malice which is supposed from the operation of the will and an intent to cause the injury which may be the object of the crime."

And again in its sentence of March 16, 1892, wherein it held that "considering that, whatever may be the civil effects of the inscription of his three sons, made by the appellant in the civil registry and in the parochial church, there can be no crime because of the lack of the necessary element or criminal intention, which characterizes every action or omission punished by law; nor is he guilty of criminal negligence."

And to the same effect in its sentence of December 30, 1896, it made use of the following language:

" * * * Considering that the moral element of the crime, that is, intent or malice or their absence in the commission of an act denned and punished by law as criminal, is not a necessary question of fact submitted to the exclusive judgment and decision of the trial court."

That the author of the Penal Code deemed criminal intent or malice to be an essential element of the various crimes and misdemeanors therein defined becomes clear also from an examination of the provisions of article 568, which are as follows:

"He who shall execute through reckless negligence an act that, if done with malice, would constitute a grave crime, shall be punished with the penalty of *arresto mayor* in its maximum degree, to *prision correccional* in its minimum degree, and with *arresto mayor* in its minimum and medium degrees if it shall constitute a less grave crime.

"He who in violation of the regulations shall commit a crime through simple imprudence or negligence shall incur the penalty of *arresto mayor* in its medium and maximum degrees.

"In the application of these penalties the courts shall proceed according to their discretion, without being subject to the rules prescribed in article 81.

"The provisions of this article shall not be applicable if the penalty prescribed for the crime is equal to or less than those contained in the first paragraph thereof, in which case the courts shall apply the next one thereto in the degree which they may consider proper."

The word "malice" in this article is manifestly substantially equivalent to the words "criminal intent," and the direct inference from its provisions is that the commission of the acts contemplated therein, in the absence of malice (criminal intent), negligence, and imprudence, does not impose any criminal liability on the actor.

The word "voluntary" as used in article 1 of the Penal Code would seem to approximate in meaning the word "willful" as used in English and American statutes to designate a form of criminal intent. It has been said that while the word "willful" sometimes means little more than intentionally or designedly, yet it is more frequently understood to extend a little further and approximate the idea of the milder kind of legal malice; that is, it signifies an evil intent without justifiable excuse. In one case it was said to mean,, as employed in a statute in contemplation, "wantonly" or "causelessly;" in another, "without reasonable grounds to believe the thing lawful." And Shaw, C. J., once said that ordinarily in a statute it means "not merely 'voluntarily' but with a bad purpose; in other words, corruptly." In English and the American statutes defining crimes "malice," "malicious," "maliciously," and "malice aforethought" are words indicating intent, more purely technical than "willful" or "willfully," but "the difference between them is not great;" the word "malice" not often being understood to require general malevolence toward a particular individual, and signifying rather the intent from which flows any unlawful and injurious act committed without legal justification. (Bishop's New Criminal Law, vol. 1, sees. 428 and 429, and cases cited.)

But even in the absence of express words in a statute, setting out a condition in the definition of a crime that it be committed "voluntarily," "willfully," "maliciously," "with malice aforethought," or in one of the various modes generally construed to imply a criminal intent, we think that reasoning from general principles it will always be found that, with the rare exceptions hereinafter mentioned, to constitute a crime evil intent must combine with an act. Mr. Bishop, who supports his position with numerous citations from the decided cases, thus forcefully presents this doctrine:

"In no one thing does criminal jurisprudence differ more from civil than in the rule as to the intent. In controversies between private parties the *quo animo* with which a thing was done is sometimes important, not always; but crime proceeds only from a criminal mind. So that -

"There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness, without which it can not be. And neither in philosophical speculation nor in religious or moral sentiment would any people in any age allow that a man should be deemed guilty unless his mind was so. It is

therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it can not exist. We find this doctrine confirmed by -

"Legal maxims. - The ancient wisdom of the law, equally with the modern, is distinct on this subject. It consequently has supplied to us such maxims as *Actus non facit reum nisi mens sit rea*, 'the act itself does not make a man guilty unless his intention were so;' *Actus me invito factus non est meus actus*, 'an act done by me against my will is not my act;' and others of the like sort. In this, as just said, criminal jurisprudence differs from civil. So also -

"Moral science and moral sentiment teach the same thing. 'By reference to the intention, we inculcate or exculpate others or ourselves without any respect to the happiness or misery actually produced. Let the result of an action be what it may, we hold a man guilty simply on the ground of intention; or, on the same ground, we hold him innocent.' The calm judgment of mankind keeps this doctrine among its jewels. In times of excitement, when vengeance takes the place of justice, every guard around the innocent is cast down. But with the return of reason comes the public voice that where the mind is pure, he who differs in act from his neighbors does not offend. And -

"In the spontaneous judgment which springs from the nature given by God to man, no one deems another to deserve punishment for what he did from an upright mind, destitute of every form of evil. And whenever a person is made to suffer a punishment which the community deems not his due, so far from its placing an evil mark upon him, it elevates him to the seat of the martyr. Even infancy itself spontaneously pleads the want of bad intent in justification of what has the appearance of wrong, with the utmost confidence that the plea, if its truth is credited, will be accepted as good. Now these facts are only the voice of nature uttering one of her immutable truths. It is, then, the doctrine of the law, superior to all other doctrines, because first in nature from which the law itself proceeds, that no man is to be punished as a criminal unless his intent is wrong." (Bishop's New Criminal Law, vol. 1, sees. 286 to 290.)

Compelled by necessity, "the great master of all things," an apparent departure from this doctrine of abstract justice results from the adoption of the arbitrary rule that *Ignorantia juris non excusat* ("Ignorance of the law excuses no man"), without which justice could not be administered in our tribunals; and compelled also by the same doctrine of necessity, the courts have recognized the power of the legislature to forbid, in a limited class of cases, the doing of certain acts, and to make their commission criminal without regard to the intent of the doer. Without discussing these exceptional cases at length, it is sufficient here to say that the courts have always held that unless the intention of the lawmaker to make the commission of certain acts criminal without regard to the intent of the doer is clear and beyond question the statute will not be so construed (cases cited in Cyc, vol. 12, p. 158, notes 76 and 77) ; and the rule that ignorance of the law excuses no man has been said not to be a real departure from the law's fundamental principle that crime exists only where the mind is at fault, because "the evil purpose need not be to break the law, and it suffices if it is simply to do the thing which the law in fact forbids." (Bishop's New Criminal Law, sec. 300, and cases cited.)

But, however this may be, there is no technical rule, and no pressing necessity therefor, requiring mistake in fact to be dealt with otherwise than in strict accord with the principles of abstract justice. On the contrary, the maxim here is *Ignorantia facti excusat* ("Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse"). (Brown's Leg. Max., 2d ed., 190.)

Since evil intent is in general an inseparable element in every crime, any such mistake of fact as shows the act committed to have proceeded from no sort of evil in the mind necessarily relieves the actor from criminal liability, provided always there is no fault or negligence on his part; and as laid down by Baron Parke, "The guilt of the accused must depend on the circumstances as they appear to him." (*Reg. vs. Thurborn*, 1 Den. C. C, 387; *P. vs. Anderson*, 44 Cal., 65; *P. vs. Lamb*, 54 Barb., 342; *Yates vs. P.*, 32 N. Y., 509; *Patterson vs. P.*, 46 Barb., 625;.

Reg. vs. Cohen, 8 Cox C. C, 41; P. vs. Miles, 55 Cal., 207, 209; Nalley vs. S., 28 Tex. Ap., 387.) That is to say, the question as to whether he honestly, in good faith, and without fault or negligence fell into the mistake is to be determined by the circumstances as they appeared to him at the time when the mistake was made, and the effect which the surrounding circumstances might reasonably be expected to have on his mind, in forming the intent, criminal or otherwise, upon which he acted.

"If, in language not uncommon in the cases, one has reasonable cause to believe the existence of facts which will justify a killing - or, in terms more, nicely in accord with the principles on which the rule is founded, if without fault or carelessness he does believe them - he is legally guiltless of the homicide; though he mistook the facts, and so the life of an innocent person is unfortunately extinguished. In other words, and with reference to the right of self-defense and the not quite harmonious authorities, it is the doctrine of reason, and sufficiently sustained in adjudication, that notwithstanding some decisions apparently adverse, whenever a man undertakes self-defense, he is justified in acting on the facts as they appear to him. If, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he thus supposes the facts to be, the law will not punish him though they are in truth otherwise, and he has really no occasion for the extreme measure." (Bishop's New Criminal Law, sec. 305, and large array of cases there cited.)

The common illustration in the American and English textbooks of the application of this rule is the case where a man, masked and disguised as a footpad, at night and on a lonely road, "holds up" his friend in a spirit of mischief, and with leveled pistol demands his money or his life, but is killed by his friend under the mistaken belief that the attack is a real one, that the pistol leveled at his head is loaded, and that his life and property are in imminent danger at the hands of the aggressor. No one will doubt that if the facts were such as the slayer believed them to be he would be innocent of the commission of any crime and wholly exempt from criminal liability, although if he knew the real state of the facts when he took the life of his friend he would undoubtedly be guilty of the crime of homicide or assassination. Under such circumstances, proof of his innocent mistake of the facts overcomes the presumption of malice or criminal intent, and (since malice or criminal intent is a necessary ingredient of the "act punished by law" in cases of homicide or assassination) overcomes at the same time the presumption established in article 1 of the code, that the "act punished by law" was committed "voluntarily."

Parsons, C. J., in the Massachusetts court, once said:

"If the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition killed him, although it should afterwards appear that there was no such design, it will not be murder, but it will be either manslaughter or excusable homicide, according to the degree of caution used and the probable grounds of such belief." (Charge to the grand jury in Self ridge's case, Whart. Horn., 417, 418, Lloyd's report of the case, p. 7.)

In this case, Parker, J., charging the petit jury, enforced the doctrine as follows:

"A, in the peaceable pursuit of his affairs, sees B rushing rapidly toward him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A, who has a club in his hand, strikes B over the head before or at the instant the pistol is discharge; and of the wound B dies. It turns out the pistol was loaded with powder only, and that the real design of B was only to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol is loaded - a doctrine which would entirely take away the essential right of self- defense. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." (Lloyd's Rep., p. 160.)

To the same effect are various decisions of the supreme court of Spain, cited by Viada, a few of which are here set

out in full because the facts are somewhat analogous to those in the case at bar.

"Question III. When it is shown that the accused was sitting at his hearth, at night, in company only of his wife, without other light than that reflected from the fire, and that the man with his back to the door was attending to the fire, there suddenly entered a person whom he did not see or know, who struck him one or two blows, producing a contusion on the shoulder, because of which he turned, seized the person and took from him the stick with which he had undoubtedly been struck, and gave the unknown person a blow, knocking him to the floor, and afterwards striking him another blow on the head, leaving the unknown lying on the floor, and left the house. It turned out the unknown person was his father-in-law, to whom he rendered assistance as soon as he learned his identity, and who died in about six days in consequence of cerebral congestion resulting from there blow. The accused, who confessed the facts, had always sustained pleasant relations with his father-in-law, whom he visited during his sickness, demonstrating great grief over the occurrence. Shall he be considered free from criminal responsibility, as having acted in self-defense, with all the circumstances related in paragraph 4, article 8, of the Penal Code? The criminal branch of the Audiencia of Valladolid found that he was an illegal aggressor, without sufficient provocation, and that there did not exist rational necessity for the employment of the force used, and in accordance with articles 419 and 87 of the Penal Code condemned him to twenty months of imprisonment, with accessory penalty and costs. Upon appeal by the accused, he was acquitted by the supreme court, under the following sentence: 'Considering, from the facts found by the sentence to have been proven, that the accused was surprised from behind, at night, in his house beside his wife, who was nursing her child, was attacked, struck, and beaten, without being able to distinguish the person or persons attacking, nor the instruments with which they might have executed their criminal intent, because of the fact that the attack was made from behind and because there was no other than fire light in the room, and considering that in such a situation and when the acts executed demonstrated that they might endanger his existence, and possibly that of his wife and child, more especially because his assailant was unknown, he should have defended himself, and in doing so with the same stick with which he was attacked, he did not exceed the limits of self-defense, nor did he use means which were not rationally necessary, particularly because the instrument with which he killed was the one which he took from his assailant, and was capable of producing death, and in the darkness of the house and the consternation which naturally resulted from such strong aggression, it was not given him to know or distinguish whether there was one or more assailants, nor the arms which they might bear, nor that which they might accomplish, and considering that the lower court did not find from the accepted facts that there existed rational necessity for the means employed, and that it did not apply paragraph 4 of article 8 of the Penal Code, it erred, etc.' (Sentence of supreme court of Spain, February 28, 1876.)" (Viada, Vol. I, p. 266.)

"Question XIX. A person returning, at night, to his house, which was situated in a retired part of the city, upon arriving at a point where there was no light, heard the voice of a man, at a distance of some 8 paces, saying: 'Face down, hand over your money!' because of which, and almost at the same moment, he fired two shots from his pistol, distinguishing immediately the voice of one of his friends (who had before simulated a different voice) saying, 'Oh! they have killed me,' and hastening to his assistance, finding the body lying upon the ground, he cried, 'Miguel, Miguel, speak, for God's sake, or I am ruined,' realizing that he had been the victim of a joke, and not receiving a reply, and observing that his friend was a corpse, he retired from the place. Shall he be declared exempt in toto from responsibility as the author of this homicide, as having acted in just self-defense under the circumstances defined in paragraph 4, article 8, Penal Code ? The criminal branch of the Audiencia of Malaga did not so find, but only found in favor of the accused two of the requisites of said article, but not that of the reasonableness of the means employed to repel the attack, and, therefore, condemned the accused to eight years and one day of prison mayor, etc. The supreme court acquitted the accused on his appeal from this sentence, holding that the accused was acting under a justifiable and excusable mistake of fact as to the identity of the person calling to him, and that under the circumstances, the darkness and remoteness, etc., the means employed were rational and the shooting justifiable. (Sentence supreme court, March 17, 1885.)" (Viada, Vol. I, p. 136.)

"Question VI. The owner of a mill, situated in a remote spot, is awakened, at night, by a large stone thrown against his window - at this, he puts his head out of the window and inquires what is wanted, and is answered 'the delivery of all of his money, otherwise his house would be burned' - because of which, and observing in an alley adjacent to the mill four individuals, one of whom addressed him with blasphemy, he fired his pistol at one of the men, who, on the next morning was found dead on the same spot. Shall this man be declared exempt from criminal responsibility as having acted in just self-defense with all of the requisities of law? The criminal branch of the Audiencia of Zaragoza finds that there existed in favor of the accused a majority of the requisites to exempt him from criminal responsibility, but not that of reasonable necessity for the means, employed, and condemned the accused to twelve months of prision correccional for the homicide committed. Upon appeal, the supreme court acquitted the condemned, finding that the accused, in firing at the malefactors, who attacked his mill at night in a remote spot by threatening robbery and incendiarism, was acting in just self-defense of his person, property, and family. (Sentence of May 23, 1877)." (I Viada, p. 128.)

A careful examination of the facts as disclosed in the case at bar convinces us that the defendant Chinaman struck the fatal blow alleged in the information in the firm belief that the intruder who forced open the door of his sleeping room was a thief, from whose assault he was in imminent peril, both of his life and of his property and of the property committed to his charge; that in view of all the circumstances, as they must have presented themselves to the defendant at the time, he acted in good faith, without malice, or criminal intent, in the belief that he was doing no more than exercising his legitimate right of self-defense; that had the facts been as he believed them to be he would have been wholly exempt from criminal liability on account of his act; and that he can not be said to have been guilty of negligence or recklessness or even carelessness in falling into his mistake as to the facts, or in the means adopted by him to defend himself from the imminent danger which he believed threatened his person and his property and the property under his charge.

The judgment of conviction and the sentence imposed by the trial court should be reversed, and the defendant acquitted of the crime with which he is charged and his bail bond exonerated, with the costs of both instances de oficio. So ordered.

Johnson, Moreland, and Elliott, JJ., concur.

Arellano, C. J., and Mapa, J., dissent.

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