

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. AGUSTIN CLEMENTE, DEFENDANT AND APPELLANT.

G.R. No. 6574. March 19, 1912

Ponente: MORELAND, J.

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MORELAND, J.:

The accused in this case, who is the appellant, was convicted of the crime of homicide committed against a peace officer who was seeking to arrest him at the time. The crime is denominated in Spanish *atentado contra los agentes de la autoridad con homicidio*. He appealed to this court alleging that the facts of record are not sufficient to support the conviction.

It appears that on or about 7 o'clock of the night of the 12th of October, 1909, three municipal policemen, Hipolito de la Cruz, Martin N. Cruz, and Joaquin Flores, acting under the orders of the provincial governor of Bulacan, Teodoro Sandiko, and accompanied by Alejandro Carpio as guide, went to the house of the accused, Agustin Clemente, located in a place called Anibong, barrio of Daquila, pueblo of Santa Maria, in the municipality of Malolos, for the purpose of raiding a gambling game known as "jueteng." They arrived there just as the money which had been bet upon the game was being delivered to the banker. The policemen mixed with the crowd and waited until the game should be finished before making any arrests. They were strangers in that locality and were unknown to the defendant. Before entering the house they had dressed in the ordinary garb of the civilian of that locality and wore nothing that would indicate that they were officers except their badges which, before going into the house, they had concealed under their camisas. Their purpose was to prevent being known as police officers. After the balls bearing appropriate numbers had been placed in the bottle and thoroughly shaken up, the accused drew the lucky ball. Just as he drew it forth one of the policemen who was stationed near the table, Hipolito de la Cruz, seized the hand of the accused which held the bottle and fired his revolver. These acts threw everything into confusion, and there followed the struggle in which Martin N. Cruz was killed.

Hipolito de la Cruz testified for the prosecution as follows in relation to the occurrence:

"There were four of us, three policemen and a private person, I think his name is Alejandro Carpio. We went to raid a 'jueteng' game. When we went into the house of the accused we arrived just at the moment in which the money for the bets was being placed upon the table. Although we arrived just at the moment the money was being bet, we were not able to do anything for the reason that the bottle with the balls in it had not yet been produced. While we were thus waiting for the appearance of the bottle we heard the accused, Agustin, say: 'I have a presentiment that this game is going to be raided.' But he said also the following: 'But even in case the game is raided, I shall not be taken alive.' He then turned to his companions there present and said: 'Be very careful, inasmuch as we have gone so far we had better be ready for anything that may happen.' He said further: 'Let those who are not ready to resist go out.' A short time afterwards the bottle for the drawing appeared and the accused said: 'We had better decide as to the manner in which we shall resist. The bottle is here, and let us put ourselves in condition for resistance.' He then called to the people that were there that he was going to draw the ball from the bottle to determine who won the game. Before he did this he shut the windows and the doors of the house. The accused then said to the people; 'What do you prefer, to count the

balls or classify them as if they were cards.' The people said: 'It is better that the balls be not counted since we also fear that we will be caught.' Agustin consented to return the balls. I placed my two companions in the hallway of the house for the reason that the game was being carried on in the interior of the house and I went inside for the purpose of making the arrests. On drawing the ball out of the bottle, I think No. 35 was the one that won the prize. I was awaiting an appropriate moment to seize the bottle. I waited until Agustin should raise the bottle in his hand and after he drew out No. 35 and in the moment of putting it in the bottle I seized his hand that held the bottle and with the other I discharged my revolver and said: 'Let nobody move, because I am an officer.' At the time I discharged my revolver Agustin Clemente tried to take the bottle from my hand and succeeded in doing so and with it he struck at my face, which blow I evaded with my hands and with the revolver. Thereupon Agustin still holding the bottle started to leave the room. When I saw him holding the bottle in his hand I tried to take it away from him, using one hand for the purpose and with the other I tried to strike him with my revolver. By reason of the force of the blows which I struck him he let loose of the bottle. He cried at the same time: 'Attack them, attack them.' and as he was unable to get his own weapon he went outside towards the place where my two companions were. Then he took his large bolo out of its sheath and at that moment he was seen by my other companion Martin N. Cruz who, placing himself behind Agustin, seized him by the waist for the purpose undoubtedly of preventing him from drawing his bolo from the sheath. The other policeman, Flores, who at that moment arrived, tried to prevent the other people from getting away or escaping. In one of his turns he met the accused and then facing him and pointing his revolver at him said: 'Don't you move because I am also an officer.¹ I do not know how he managed to snatch the revolver from him but when the accused succeeded in taking the revolver away from the policeman Flores, that is to say, the revolver which he had and which he was pointing at the accused, the latter having come into the possession of the weapon turned half-way around and facing the policeman who was back of him, that is, Martin N. Cruz, who was holding him by the waist, fired at him but immediately thereafter the owner of the revolver, Flores, succeeded in wresting the gun from the accused. Then and at that time the man who died uttered the following words: 'Hipolito, I have just suffered this misfortune. The old man is the one who shot me with his gun.' While this defendant was wrestling with the policeman Flores, the latter said: 'Do not be excited. Recognize us as officers.' And while the accused with one hand was wrestling with the policeman Flores, he at the same time was attempting to draw his bolo from the sheath. I noticed this movement on the part of the accused and approached him and with my revolver struck him on the back and said: 'Mr. Agustin, do not excite yourself.. Recognize us as officers and surrender,¹ but he said: 'If you are agents of the authorities please show me. your warrant of arrest,' I said: 'Do not make any further resistance and we will show you the warrant.' The accused refused to submit. In the meantime the house was being deserted for the reason that we were trying to capture the accused and we could not pay any attention to the other people who were there and, who were able to escape. We policemen endeavored to take the accused to one corner to compel him to submit and when we succeeded in putting him to one of the corners of the house, we heard the voice of a person from the outside toward the terrace and who turned out to be one of our companions and the agent of the governor and his name is Alejandro. The accused would not give up in the fight that we had with him but I was able to take the bolo from his belt and then the accused stopped further resistance."

Further on in his testimony this witness said:

"We were wearing at the time citizens' clothing like that usually worn in that part of the country, a Chinese camisa. We did not wear anything which would indicate who we were except the police badge which we wore hidden beneath our camisas."

Later on in his testimony appear these questions and answers:

"Q. Did Martin N. Cruz have the accused by the waist when the latter took the revolver from Joaquin Flores?—
A. Yes, sir; he had his two hands around the waist of the accused.

"Q. How was Joaquin Flores able to regain possession of the revolver from the accused?—A. As Joaquin Flores was in front of the accused when the latter snatched the revolver from him and shot Martin N. Cruz who was

behind him, the policeman Flores instantly snatched the revolver from him and fired at him. I am unable to explain how he was able to take the revolver away from the accused because he was several paces away from them at the time. "Q. What did you policemen do there in the house that night, because in one of your previous answers you said that you agreed with the people there present when they told Agustin Clemente that it was better that he count the balls instead of shuffling the cards?—A. I did not go there to gamble nor in such answer did I wish it to be understood that I was gambling. I did that simply so as not to attract suspicion.

"Q. And your companions did the same as you did?—A. Yes, sir."

The witness Joaquin Flores, generally speaking, tells about the same story as the above witness, although he denies positively that Hipolito de la Cruz was present at the time the deceased was shot, stating that Hipolito was in another part of the room and came to where they were only after the shot was fired. He says in part:

"Q. You say that the accused snatched the revolver from you. Tell us how he did it.—A. I had the revolver in the right hand and was pointing it at the stomach of the accused, when he seized the hand that held the revolver, and twisting it succeeded in taking the revolver from me.

"Q. And immediately on obtaining the revolver he discharged it?—A. Yes, sir."

He said further:

"At the time he was shot Martin N. Cruz was at the left side of the accused, because the latter on taking the revolver from me turned half-way around toward the left and discharged it.

* * * * *

"Q. When you policemen were within the house, did you make it known that you were policemen before you raided the game?—A. No, sir.

"Q. When did you tell the accused that you were policemen?—A. When he took my revolver. At that time I told him I was a policeman."

The doctor who attended the deceased during his last hours, Catalino Buktao, testified in part as follows:

"It was a gunshot wound in the abdominal region. The bullet entered the navel and took a direction from the front toward the back, downward and toward the right. * * * I was called to attend the injured man between 10 and 11 o'clock at night.

* * * * *

"Q. State to the court, if you please, what, according to the data which you have, was the position which the person who fired the shot must necessarily have occupied to produce the wound.—A. The position of the one who fired the shot must have been in front of the deceased.

"Q. Were the two standing at the time the shot was fired?—A. They were standing.

"Q. The one in front of the other?—A. Yes, sir.

"Q. According to the direction of the bullet, is it not possible that the person who was wounded was at the left side of the one firing the shot?—A. In turning they would find themselves face to face.

* * * * *

"Q. Do you mean to say that the shot could not have been fired if the one who fired it was at the right side of the one wounded?—A. Yes, sir."

The witness Alejandro Carpio, who was the cochero of Governor Sandiko and the guide of the policemen to the

gambling house on the night in question testified as to what occurred in the house at the time the deceased was mortally wounded as follows:

"The policeman Joaquin Flores and the accused were struggling over the possession of the tambolo and the other policeman, whose name I do not know, pointed his revolver at the accused. The accused thereupon with his hand made a motion to knock the revolver away from his body. With that act the revolver was discharged and the bullet hit the body of the policeman Martin."

He also swore, on being recalled by the prosecution, that he reported the raid to Governor Sandiko that very night and told him that during the raid a policeman had accidentally been shot.

The witness Geronimo Victoria testified in substance that, as he was passing along the street on the night in question, he saw some persons carrying a body; that, being curious, he followed them to the presidencia; that they turned out to be the policemen who had arrested the accused with their wounded companion; that while there, awaiting the arrival of the justice of the peace and the doctor, he heard a conversation between the wounded policeman and his companion, in which the former charged the latter with having been the one who shot him. Thereupon the one so charged replied: "It would be better for you to say that the one who shot you was the old man." (Meaning the accused.) To this statement the wounded man did not reply because of his weakened condition.

The prosecution sought to show that this witness was not at the presidencies on the night in question by recalling Hipolito de la Cruz, who testified:

"Q. Did you see any person in the presidencia at the time?—A. I did not see anyone there who was not a policeman.

"Q. (Placing Geronimo Victoria before the witness.) Do you know this person?—A. Yes, sir.

"Q. Did you see him in the presidencia on the night of the shooting?—A. I did not look sharply to see him. I was giving all of my attention to my wounded comrade.

"Q. Would you have been able to see him then?—A. No, sir; I do not remember; I did not give any attention to that."

The accused, who is in the neighborhood of 60 years of age, testified that up to the time when he was seized and a revolver fired at him, as he supposed, he did not know that there was a policeman in the room and did not expect that the game would be raided or he arrested. He denied having made the statement attributed to him by Hipolito de la Cruz to the effect that he expected the game would be raided and that he would not be taken alive and advising resistance to arrest. He states that while the game was going on peaceably he was suddenly seized by an unknown person, who at the same time shot at him with a revolver; that the instant the revolver exploded a great uproar occurred and confusion reigned, and that he did not hear Hipolito de la Cruz say that he was a policeman; that he did not know that the man who was assaulting him was a policeman until after the deceased had been shot. He asserted that just prior to being assaulted, he had received a considerable sum of money which had been wagered on the game and that just as he was about to pay the money to the winner the assault was made upon him; that one hand was suddenly seized and a revolver flashed in his face; that immediately thereupon the one who assaulted began to strike him in the face with his revolver; that about that time he felt himself seized from behind around the waist and at the same time he was confronted by another person who rushed up, Seized him by the breast, and pointed a revolver at him; that, fearing his life was about to be taken, he struck the revolver to one side; that with the blow the revolver exploded, wounding the person who was holding him about the waist. He sturdily maintains that he never had the revolver in his possession at all and that whatever resistance he made was made before he knew of the fact that the persons assaulting him were policemen; that his resistance up to that time

was made entirely in self-defense; that he never for a moment had any intention of killing anyone, especially a policeman; that he had a fighting bolo in his belt, which he did not draw or attempt to draw from its sheath; that as soon as he knew that the persons assaulting him were officers of the law he ceased resistance and went with them peaceably; that he had no intention of resisting officers of the law, much less assaulting them, and was acting, as he honestly believed, in self-defense.

The defendant also asserts that at the time the policeman was shot he, the wounded policeman, charged Joaquin Flores with being the cause of his injury, and that as they were removing him from the room they besought him to charge that the defendant was the one who had shot him, and that he refused to do so.

In this connection it is significant to note that immediately after the shot was fired the revolver was found in the possession of Joaquin Flores, one of the policemen, who held it continuously thereafter. In other words, it is admitted in this case that Joaquin Flores had the revolver in his hands immediately before the shot was fired and immediately after it was fired. He asserts in explanation of this fact that the accused took the revolver away from him and fired the shot, immediately after which he, in turn, took it away from the accused.

The testimony of the defendant as given in this case is corroborated by that of his wife, of Alejandro Carpio and several other witnesses.

We have, then, in this case, an old man, with a considerable sum of money intrusted to his care, suddenly assaulted and shot at by a stranger, who persisted in the assault by beating him over the head and face with his revolver; suddenly seized from the rear and made helpless by a second person, who appeared to be assisting in the assault already made; immediately confronted by a third person, a complete stranger, who seized him violently by the breast and pointed a revolver point blank at his stomach; a sudden discharge of the revolver and the wounding of the person who held the old man by the waist; the possession of the revolver by the stranger immediately before its explosion and immediately after; the information thereupon given to the old man that the persons who had assaulted him were policemen; and his instant expression of willingness to go with them.

What does this condition of things reasonably indicate?

- It indicates that while the policeman Hipolito de la Cruz had a perfect right to arrest the accused at that time and place he did arrest him he was clearly in the wrong in the method which he adopted in making the arrest. He himself admits that he said not a word to the old man before he seized him and discharged his revolver. His words are:

"I seized his hand that held the bottle and with the other I discharged my revolver and said: 'Let nobody move, because I am an officer.'"

From his own statement it might easily, and probably naturally, be inferred that he made the assault and fired the revolver before he made the statement that he was an officer. It is at least impossible to draw from his statement anything more favorable to his case than that the statement that he was an officer occurred simultaneously with his assault and the discharge of the firearm. In either event it is more than likely that the accused did not hear what the policeman said. He certainly could not have heard it if it was coincident with the discharge of the revolver and it is equally improbable that he could have heard it after the revolver was discharged, the reason being that confusion and uproar instantly followed, with people running here and there seeking to escape. The policeman was clearly in the wrong and that wrong made it appear to the old man that he was being assaulted by strangers who intended to take his life and doubtless rob him of the money that was then on the table. To him it was an unprovoked and deadly assault and he saw no remedy and no hope except in a stout resistance. Joaquin Flores testified that he did not tell the accused that he was a policeman until after the shot had been fired that wounded his comrade. The dying declaration of Martin N. Cruz, the policeman who was shot, contains no mention as to

when, if at all, the accused was notified that the persons who were assaulting him were policemen. The fourth person, Alejandro Carpio, who accompanied the policemen as guide and who saw the events leading up to the shooting of the policeman, corroborates the story of the accused in regard to this point. These facts indicate in the first place, then, that although the policemen had the right to arrest, they were guilty of gross misconduct in the manner in which they sought to arrest the accused. It is not intended by us to assert that the policemen did not have a right to make the arrests at the time and in the place they did. The point to which we call attention is the method in which it was done. The manner of doing it led the appellant to believe, and naturally, that he was being assaulted and not arrested.

- These conditions indicate also that the killing of the deceased was accidental and occurred while the revolver was in the hands of Joaquin Flores. This fact is positively asserted by the accused himself and is directly and thoroughly corroborated by the testimony of Alejandro Carpio, who was the person who, on the order of the provincial governor, accompanied the policemen when they went to make the raid and the arrests. Both of them state that Flores pointed the revolver at the abdomen of the accused, who, fearing that he was about to be shot, struck it aside with his hand, at which it exploded and wounded the deceased. It is corroborated also by the fact, which is admitted in this case, that Joaquin Flores was found in possession of the revolver immediately after the discharge. The story of the accused as to the method in which the gun was discharged is also corroborated by the fact, undisputed in the record, that the revolver was defective in its mechanism and that, by reason of such defect, it was liable to explode at any time if at all roughly handled. Moreover, the story of the accused is far more reasonable than that of the prosecution. It seems more or less unreasonable to believe that an old man who had been assaulted with a revolver by one policeman and seized from behind and held around the waist and arms by another, could still assault and take a revolver away from a third policeman and with it shoot the person who was holding him, when it is conceded that all three of the policemen were strong and vigorous young men. It is also difficult to see just how the accused could have shot the deceased in the manner in which he is alleged to have done it. With his arms fast at the elbow he could do nothing more than use his forearms. How he could, when thus handicapped, snatch a revolver away from another policeman and turn and shoot the one who was holding him squarely in the navel is difficult to perceive. Moreover, it should be noted that the direction of the bullet was downward and toward the right. Given the position in which the accused is alleged to have been at the time, the direction of the bullet would more probably be upward and toward the left, it being claimed by the prosecution that the policeman when shot was at the left side of the accused. The accused is also corroborated in this particular by the testimony of Geronimo Victoria, who as a witness stated that he heard a conversation between the wounded policeman and one of his comrades while they were waiting at the presidencia for the coming of the doctor and the justice of the peace, in which the wounded man asserted that Joaquin Flores was the person who had shot him. Nor is this story of the accused directly impugned by the dying declaration of the deceased. That declaration is susceptible of one construction at least favorable to the accused. It is that, although the accused succeeded in getting the revolver in his hands, it went off accidentally and was not fired voluntarily and directly by the accused himself. Said declaration is as follows:

"STATEMENT MADE BY THE DECEASED MARTIN N. CRUZ, MUNICIPAL POLICEMAN OF CALUMPIT, THREE HOURS BEFORE HIS DEATH.

"I, with a commission from the provincial governor to apprehend jueteng, games, went together with two fellow policemen and the governor's driver to a place which was new to me. We arrived at a small house in which it was said they were going to play jueteng. Once inside the house, an old man said: 'Be ready, because we are going to be caught and will have to fight.' Then the old man shook the tambolito vial and proceeded with the drawing, whereupon my companion Hipolito de la Cruz attempted to snatch the vial from the old man, but having failed in his attempt, the latter struck him on the head with the vial. Then the old man attempted to seize the revolver which my companion Flores had, and once the weapon was in the former's hands it went off and

the ball hit me. Immediately after the shot my companion Flores snatched the revolver from the old man. In the house there were many men and women with sickles. This happened at 7.30 p. m., October 12, 1909.

"The accused Agustin Clemente was presented by the justice of the peace to the deceased at the time the latter made his declaration, and was identified by him as the person who snatched the revolver from the policeman Flores on account of which the weapon went off and wounded the deceased, ;

(Signed.) "R. DE LEON,

"Justice of the Peace."

The prosecution, realizing the equivocal and uncertain, character of the declaration, presented several witnesses to testify that the wording of the document was not in strict conformity with the statements of the deceased. It is significant to note that one of these witnesses, Ramon de Leon, the justice of the peace who wrote the declaration, taking it from the lips of the deceased himself, testified as follows:

"Q. What were the questions that you put to the deceased and what were his answers in making this dying declaration?—A. I refer you to the written declaration signed by him,"

The necessary conclusion from this answer is that the declaration was written precisely as it was given by the deceased.

As we have already intimated, the policemen testified that just prior to the drawing of the lucky ball from the glass bottle the accused paused long enough to make this statement:

"I have a presentiment that this game is. going to be raided and I shall not be taken alive. Take care you people who are intending to do this because we are ready for anything. Let him who is unable to fight go outside."

This testimony is denied by the accused and his witnesses, he stating, and they corroborating, that he had no knowledge that any policemen were in the house as he had no expectation that the game was going to be raided and that he, therefore, could have had no reason whatever for making any such statement.

It seems to us that this statement of the policemen does not bear the marks of truth. The policemen took the greatest precaution to prevent their presence being known. They disguised themselves, hid their badges beneath their camisas, and mixed quietly with the crowd. It nowhere appears how the accused could have ascertained their presence. But if he had known of it, would the course of conduct described by the policemen have been reasonable? Would he have needlessly and recklessly exposed himself to certain arrest and imprisonment? Would he thus have warned the very men whom he was intending to kill that they might the better be prepared to resist him and his companions? Would he thus have continued the game and thereby freely given the policemen the very opportunity they were seeking? These questions have not been satisfactorily answered by the prosecution. The story told by the accused and his witnesses is the more reasonable. Besides, if the killing was accidental and was done while the revolver was in the hands of one of the policemen, it would not be exceedingly strange if those policemen, in an endeavor to exculpate themselves, should seek to place the blame on other shoulders. If such were the case the testimony that the accused threatened to resist and assault them is easily explained.

As to the position of the prosecution that, although the evidence be held to be not sufficient to convict of murder or homicide, nevertheless there is evidence sufficient to convict of the crime of resisting officers of the law, we are convinced that it is not tenable under the record. It is true that there is some evidence that, after the accused was fully informed of the fact that the persons whom he supposed were assaulting him were in reality policemen and were endeavoring to effect his arrest, he still resisted their authority. But that evidence, under all the circumstances, is not sufficiently clear, or, if clear, not sufficiently reliable, to warrant a conviction. It is largely the testimony of Hipolito de la Cruz upon which we would have to rely to support that conviction. Under our

holding that the accused is not guilty of the death of the deceased, the testimony of this witness is necessarily discredited. In reaching that result we, in effect, rejected substantially everything he said unfavorable to the theory of accidental homicide. With that rejection went, very largely, his credibility. At the very least, that rejection makes it extremely difficult for us, conscientiously, to rest a conviction for any crime upon any portion of his declaration. This is especially so when we recall the other evidence in the case. The defendant denies resistance, or even disobedience, after knowledge that the persons detaining him were policemen. His witnesses corroborate him. It appears that, immediately on the wounding of the deceased, the remaining policemen left the defendant to himself and attended to their wounded companion, carrying him to one side and laying him down in as comfortable a position as possible. The accused sought to use his temporary liberty neither to attack nor to flee. He quietly remained where he was until the policemen returned and took him to the presidencia.

We believe upon the whole case that there is a reasonable doubt of the guilt of the accused. (Supreme court of Spain, 13 April, 1901; 11 May, 1896; 19 October, 1895.)

The judgment of conviction is hereby reversed and the accused acquitted.

Torres, Johnson, Carson, and Trent, JJ., concur.

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