

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. RUFINO BAYBAY, DEFENDANT AND APPELLANT.*G.R. No. 8957. November 10, 1913*

Ponente: CARSON, J.

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The plea of self-defense set up by counsel for the defendant must be rejected if we believe the testimony of the complaining witness. On the other hand if we believe the testimony of the accused, he must be held to be exempt from criminal liability on the ground that in inflicting the wound on the complaining witness he was acting in lawful defense of his person from an unprovoked and murderous assault. The trial judge, who saw and heard the witnesses testify, accepted as substantially true the account of the incident as given by the complaining witness, and declined to believe the testimony of the accused. We find nothing in the record which would justify us in disturbing his findings in this regard; and on the contrary, we think the bolo slash which the trial judge found on the handle of the wounded man's bolo strongly confirms his statement that the accused struck at him while his bolo was still hanging at his side, and rebuts the claim of the accused that the complaining witness attacked him with bolo in hand, and that he inflicted the wound in defending himself from this attack.

We agree with counsel for the appellant, however, that there is no evidence in the record in support of the findings of the trial judge that the commission of the crime was marked with the aggravating circumstances of alevosia (treachery) and nocturnity. The meeting of the accused and the wounded man would appear to have been accidental, and there is nothing in the record which would justify the inference that in committing the crime the accused took any advantage of the darkness of the night. The accused was alone and his adversary was accompanied by a friend. They had had a quarrel some days before the night in question and it is fair to assume that it was renewed on that occasion. The wounded man had a bolo by his side. His friend carried a heavy stick. Under such circumstances we do not think that the assault can be said to have been a treacherous one in the absence of satisfactory proof that the accused took the wounded man and his companion unawares, and took such measures in delivering his attack as would "insure its execution without risk to himself arising" from the defense" of his victim.

As to the criticism of counsel directed to the failure of the prosecution to put the wounded man's companion on the witness stand, it is sufficient to say that the record shows that a subpoena was issued to secure his presence at the trial, but the sheriff's return discloses that he could not be found, as for some reason unknown he had absented himself from his home. It also appears from the record that the accused offered no objection to proceeding with the trial without this witness, and made no effort whatever to secure his presence. Under these circumstances no inference unfavorable to the contentions of the prosecution can be drawn from the failure to call him as a witness at the trial.

The judgment of the trial court convicting and sentencing the appellant, modified by declaring that the commission of the offense charged was not marked by aggravating circumstances, and by substituting the penalty of two months and one day of arresto mayor for so much thereof as imposes four months and one day of arresto

mayor and a fine of 1,350 pesetas, should be and is hereby affirmed, with the costs of this instance against the appellant.

Arellano, C. J., Torres, Moreland, and Trent, JJ., concur.

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