

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JESSE T. WORTHINGTON, DEFENDANT AND APPELLANT.

G.R. No. 9801. August 20, 1914

Ponente: JOHNSON, J.

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JOHNSON, J.:

This defendant was charged with the crime of frustrated homicide. The complaint alleged:

"That on or about the 5th day of February, 1914, in the city of Manila, Philippine Islands, and in the night time, the said Jesse P. Worthington being then and there a duly appointed, qualified, and acting police officer of the said city of Manila, did then and there, willfully, unlawfully, and feloniously, with the intent to kill and armed With a deadly weapon, to wit, a revolver, which then and there was loaded with cartridges, gunpowder, and leaden bullets, shoot off and discharge at and upon Enrique Ayerdi, Lino Eguia de Dios, Jose Garcia Margenant, Manuel Llorca, W. H. Williams, and Leon Hernandez, then and there occupying an automobile, thereby, and by thus striking one of the occupants of the said automobile, to wit, Leon Hernandez, with one of the said leaden bullets, inflicting on the left forearm a wound; the said Jesse P. Worthington performing all of the acts of execution which should have produced the crime of homicide as their consequences, but which, nevertheless, did not constitute it, by reason of causes independent of the will of the said Jesse P. Worthington. Contrary to law."

After hearing the evidence, the Honorable Richard Campbell, judge, found the defendant guilty of the crime charged in the complaint and sentenced him to be imprisoned for a period of six years and one day, to suffer the accessory penalties provided for by law, and to pay the costs. From that sentence the defendant appealed to this court. In this court the defendant made the following assignments of error:

"First. The court erred in holding that the evidence was sufficient to prove the defendant guilty of the crime of frustrated homicide. Second. The court erred in finding the defendant guilty of the crime of frustrated homicide. Third. The court erred in failing to find that the defendant was exempt from criminal liability by reason of the fact that he acted in defense of his person."

Said assignments of error present a question of fact only and may therefore be discussed together.

From an examination of the evidence brought to this court we find that the following facts are proved beyond a reasonable doubt—in fact, except for a few contradictions, they are practically admitted by the witnesses both for the plaintiff and the defense:

First. That the defendant, Jesse P. Worthington, on the night of the 5th day of February, 1914, accompanied by two Filipino women, whose names were Teoflsta Beray and Felisa Marabibe, went in a calesa to a dance hall located in the barrio of Maypajo, a suburb of the city of Manila, with the admitted purpose of enjoying a few dances, and remained there until about 10.30 p. m.

Second. That the defendant, Jesse P. Worthington, was on the day in question a policeman, duly appointed and acting in the city of Manila.

Third. That the defendant and the said Teofista Beray, upon arriving at the dance hall entered and took some part in the dancing that was going on in said hall.

Fourth. That later, on the same evening, and before the defendant and his two Filipino women companions left the dance hall, W. H. Williams, a clerk in the employ of the Executive Bureau of the Insular Government, Enrique Ayerdi, Manuel Llorca, Lino Eguia, Jose Garcia, and Leon Hernandez, the injured person, arrived at the dance hall in an automobile. The said Leon Hernandez was acting as chauffeur of the automobile.

Fifth. That after said automobile party arrived at the dance hall, all of them, except perhaps Lino Eguia, entered the dance hall and one or more of them engaged in dancing with the said Teofista Beray.

Sixth. That after the said Teofista Beray had been engaged in dancing for some time, she told the defendant that she wanted to go home. During the time the defendant had remained in the dance hall he evidently had a talk with a sailor, and the sailor suggested that they should hire an automobile, evidently for the purpose of taking the two girls for a ride. The defendant went outside the dance hall and spoke to one of the automobile party who had remained in the automobile, concerning the hiring of it, when he was informed that the automobile was not for hire.

Seventh. Later and almost immediately after the attempt of the defendant to hire the automobile, he and his two women companions got into their calesa and started on their return to Manila. Almost immediately Williams and his companions also started for Manila in the automobile, following the calesa occupied by the defendant and his companions.

Eighth. The defendant and his companions had gone but a short distance when he ordered the calesa to stop. Evidently the said Teofista Beray had told him something concerning a remark or remarks made by one of the occupants of the automobile concerning him. The defendant got out of the calesa and went to the automobile and after some conversation, the exact import of which does not appear of record, offered, as he says, to settle their differences there; in other words, it appears that the defendant offered to fight the occupants of the automobile.

Ninth. The defendant again returned to his calesa and started on his way in the direction of Manila, being followed by the automobile.

Tenth. At some point between the starting place at Maypajo and the city of Manila, the defendant, as he admits, fired four shots with a revolver, which he was then carrying, in the direction of the automobile. He asserts that he fired all of the shots but one at the front tires of the automobile and that the fourth shot was fired at the engine of said automobile. The proof shows that one of the shots entered the arm of the chauffeur, Leon Hernandez, and caused a serious injury. The defendant asserts that he fired the shots because the people in the automobile were shouting at him and making threats against him. The defendant asserts that he believed that the people in the automobile intended to run down the calesa. The defendant also asserts that the occupants of the automobile threw stones at the calesa, one of which struck him in the back of the head.

Eleventh. When the calesa occupied by the defendant and his two companions arrived in the city of Manila, at the corner of Calles Solis and Juan Luna, the defendant called to a Filipino policeman, by the name of Pablo Reyes, and asked him to take the number of the automobile that was following behind. At that point the defendant got out of the calesa and was talking to the policeman Reyes, when the automobile came up. When the automobile arrived at the point where the defendant was standing, Williams got out of the automobile and entered into a conversation with the defendant, resulting in a quarrel and threats one against another. During the quarrel Williams, as he says, believing that the defendant made a move to pull from his pocket a revolver, struck him a blow in the face and the defendant, as a result of said blow, fell to the ground. When the defendant fell to the ground as a result of the

blow, Williams took from him his revolver and its holster, and took them to the police station and turned them over to the desk sergeant.

Twelfth. As was said above, the defendant claims that while he was riding in the calesa in front of the automobile, some one of the occupants of the automobile threw a stone at him and wounded him in the back of the head. It is admitted that the defendant on the night in question received a wound in the back of his head. We are of the opinion, i however, that the wound was caused at the time he fell to the ground as a result of the blow inflicted by Williams.

Thirteenth. There is a labored attempt on the part of the defense to show that the occupants of the automobile were trouble makers and were attempting not only to annoy but to do him harm; that the occupants of the automobile were the aggressors; that they were attempting to pick a quarrel with the defendant. In our opinion that contention' is unsupported by the proof; at least, there seems to be but little ground upon which such a charge can be based.

Fourteenth. The defendant admits that he fired the four shots and that one of them entered the arm of Leon Hernandez. He denies, however, that the shots were fired with the intention of doing any one harm. The defendant himself testified:

"I fired one shot. The two lights were shining in my face; I could see nothing but the lights. I just had to guess what I was shooting at. At that time they were close by me—a distance not very far—and they were still shouting, some in Spanish and some in English. I could not understand all they said because I don't understand Spanish very well. I waited possibly a minute and a half to give them an opportunity to stop, and as they did not but kept on coming, I fired again. After the third shot I waited probably thirty seconds, and then they slowed up. The first two shots I fired at the tires and the others I shot at the engine; I could guess where it was and I shot at it. I did not like to shoot into a load of men I had no quarrel with to hit 'em. When I fired at the machine the horse was jumping—scared. I fired between the lights for the engine after I couldn't hit the tires."

Fifteenth. There is nothing in the record to justify the contention that the occupants of the automobile, and especially the injured person, Leon Hernandez, attempted in any way, by threats, intimidation, or otherwise, to cause the defendant any bodily harm.

Sixteenth. The record does not show very clearly the extent of the injury received by the said Leon Hernandez. The injury was received on the night of the 5th of February., The record does not disclose on what day the trial was had. The decision of the court was rendered on the 21st day of February. At the time of the trial Leon Hernandez testified that he was still unable to use his arm.

From an examination of the entire record, considering the admitted and disputed facts, we have arrived at the conclusion that the defendant, at the time of the shooting in question, did not intend to kill any of the occupants of the automobile. That he fired at the automobile and in the direction of the occupants of the same is undisputed. That one of the bullets entered the arm of Leon Hernandez is not denied. We have held in numerous cases where the facts were analogous to the facts in the present case, that when it appears that the accused discharged a firearm at another, but under circumstances which clearly indicated that an intent to kill was absent, his offense falls within the provisions of article 408 of the Penal Code. (U. S. vs. Sabio, 2 Phil. Rep., 485; U. S. vs. Pineda, 4 Phil. Rep., 223; U. S. vs. Addison, 10 Phil. Rep., 230; U. S. vs. Kosel, 10 Phil. Rep., 409; U. S. vs. Samonte, 10 Phil. Rep., 643; U. S. vs. Marasigan, 11 Phil. Rep., 27.)

In the foregoing decisions this court followed the interpretation given article 408 by the supreme court of Spain. (3 Viada, 47; decisions of the supreme court of Spain, February 12, 1872; March 7, 1872; February 26, 1874; December 19, 1882; January 30, 1884.)

The defendant was charged with the crime of frustrated homicide as described in the complaint set out above. He was found guilty and sentenced to be imprisoned for six years and a day for that crime. In our judgment the sentence of the lower court should be revoked and the defendant should be sentenced for the illegal discharge of a firearm, in accordance with the provisions of article 408 of the Penal Code.

It is, therefore, hereby ordered and decreed that the defendant be sentenced to be imprisoned for a period of two years eleven months and eleven days of prision correccional, and to pay the costs. So ordered.

Arellano, C. J., Torres, Carson, and Araullo, JJ., concur.

CONCURRING AND DISSENTING

MORELAND, J.

I doubt if the crime is properly qualified by the court in this case.

In order to bring a case within article 408 of the Penal Code, which punishes the discharge at another of a firearm "if, the circumstances of the case are such that the act cannot be held to constitute a frustrated crime of parricide, murder, or homicide, or an attempt to commit any one of these crimes, or any other crime for which a higher penalty is prescribed by any of the articles of this code," it is necessary that it appear that the discharge of the firearm did not result in an injury to the party against whom the attempt was made. If a serious injury is caused by the discharge, such as may be termed under the Penal Code lesiones graves, the person who fired the arm is guilty of two crimes, namely, that defined by article 408 referred to and that of lesiones graves. In such case he should be punished for the crime of lesiones graves in its maximum degree in pursuance of article 89 of the Penal Code. (Supreme court of Spain, judgment of 13th of May, 1873; 3 Viada, 49.) If the discharge resulted in injuries which may be termed under the Penal Code lesiones menos graves, the same rule applies. Two crimes have, in such case, been committed, one, that defined in article 408, the other that of lesiones menos graves; and the accused must be sentenced for the gravest crime in its maximum degree. (U. S. vs. Marasigan, 11 Phil. Rep., 27; decisions of supreme court of Spain of 12th of February, 1872, and 26th of February, 1874; 3 Viada, 48.)

In the case before us the court finds that the discharge of the firearm "caused a serious injury." It appears from the record that the injury was caused on the 5th day of February and that on the day of the trial, the 18th of February, plaintiff's left arm, which was the member injured by the shot, was still bandaged and he was unable to use it. Articles 416 and 418 define the crimes of lesiones graves and lesiones menos graves. The injury which causes lesiones menos graves is one which, not falling within articles 416 and 417, incapacitates the offended party for labor for eight days or more or makes medical attendance necessary for the same period. It is very likely that, if the facts had been developed and the time required by article 416 had been allowed to expire, the injury would have been found to be sufficient upon which to found the charge of lesiones graves. As the record stands, there is sufficient evidence to find that the injuries caused constituted lesiones menos graves. That being so, the accused should have been pronounced guilty of two crimes, namely, the discharge of a firearm as defined in article 408 and the crime of lesiones menos graves as defined by article 418 of the Penal Code, and he should have been punished in the maximum degree of the gravest crime. This is the law as laid down by this court in United States vs. Marasigan (11 Phil. Rep., 27), where it was stated:

"The discharge of a firearm by the accused against the injured party, inflicting on the latter lesiones menos graves about the head, according to the criminal law produced two offenses, one being for discharging a firearm against a given person, defined by article 408 of the Penal Code, and the other, that of lesiones menos graves, penalized under article 418 of said code, and as both offenses were the result of one sole criminal act,

the adequate penalty, according to article 89 aforesaid, is that imposed by the law upon the more serious one, the same being applied in its maximum degree. No mitigating or aggravating circumstance is present in the commission of the crime herein, therefore the penalty should be imposed in the medium grade of the maximum degree, and the penalty of three years and six months of prision correccional and accessories imposed on the accused, is in accordance with the law."

In the case before us the accused was found guilty simply of the crime of discharging a firearm in violation of article 408, and although no aggravating circumstance was proved and none was found by this court in its judgment of conviction, nevertheless, the accused is sentenced in the maximum degree of the crime of which he is convicted. I agree to the penalty, but on grounds already stated.

In order to avoid any misunderstanding relative to the rule in cases of attempted homicide, or murder, or parricide, I call attention to the fact that the decision contains a statement that "we have held in numerous cases where the facts were analogous to the facts in the present case, that when it appears that the accused discharged a firearm at another, but under circumstances which clearly indicated that an intent to kill was absent, his offense falls within the provisions of article 408 of the Penal Code." While this is true,, of course, it does not, as I understand it, correctly express the rule laid down by this court, which is that, where one person discharges a firearm at another, and it does not clearly appear that he intended to kill, he cannot be held for frustrated or attempted murder or homicide but for some other crime. The rule is correctly stated in *United States vs. Sabio* (2 Phil. Rep., 485), where the court says, at page 487:

"In order to convict the defendant in this case of the crime of frustrated murder, it was necessary to prove that the defendant with deliberate premeditation intended to kill Reyes."

We have never held, as might be inferred from the decision in this case, that, to bring his acts within article 408, the accused must clearly show that the intent to kill was absent. The rule, as I have said, is quite the contrary. To make the case one of attempted or frustrated homicide, murder, or parricide, the Government must clearly show that the accused shot to kill. The burden of proving the intent is on the Government.

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