

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. LEOVIGILDO DAVID, DEFENDANT AND APPELLANT.

G. R. Nos. 39708, 39709. April 16, 1934

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This case comprises two appeals taken by the defendant Leovigildo David from the judgment rendered by the Court of First Instance of Bataan in criminal cases Nos. 3310 (G. R. No. 39708) and 3296 (G. R. No. 39709), the dispositive part of which reads as follows:

"Wherefore, in criminal case No. 3310, for frustrated murder, the court finds the defendant Leovigildo David guilty of frustrated murder, without any aggravating nor mitigating circumstance and, therefore, sentences him to twelve (12) years and one (1) day of reclusion temporal with the accessory penalties of the law, to indemnify the offended party Jose V. Reyes in the sum of one thousand pesos, with no subsidiary imprisonment in case of insolvency, and to pay the costs.

"The penalty of reclusion has been imposed instead of cadena following the doctrine laid down in the case of *People vs. Orifon* (57 Phil., 594).

"In criminal case No. 3296, for discharge of firearms with less serious physical injuries, the court finds the defendant Leovigildo David guilty of the said crime and sentences him to two (2) years, eleven (11) months and eleven (11) days of prision correccional, with the accessory penalties of the law, and to pay the costs. So ordered."

In support of his appeal, the defendant-appellant assigns the following alleged errors as committed by the trial court in its aforesaid decision, to wit:

"1. In holding the defendant-appellant guilty of the crime of frustrated murder charged in the above entitled case No. 3310, and consequently in sentencing him to reclusion temporal, to indemnify the offended party and to pay the costs.

"2. In holding the defendant-appellant guilty of the crime of discharge of firearm with less serious physical injuries with which he was charged in the above entitled case No. 3296 and sentencing him, by virtue of the same, to prision correccional, with costs.

"3. In adopting the prosecution's theory that the defendant, with deliberate intent to kill Jose V. Reyes, fired from behind four revolver shots at the latter.

"4. In not accepting the theory of the defense that the defendant, in firing his revolver at the offended party, did not intend to kill the latter but he did so in defense of his father and while the offended party was facing him.

"5. In not acquitting the defendant-appellant of the charges in the two above entitled cases."

The two cases at bar arose from two informations filed by the provincial fiscal of Bataan in the justice of the peace court of Dinalupihan, the one against Leovigildo David and Teodoro David for frustrated murder

committed on the person of Jose V. Reyes at the time, place and in the manner described in the corresponding information, and the other against said Leovigildo David for discharge of firearm with less serious physical injuries committed on the person of German Pinili at the time, place and in the manner described in the corresponding information. After preliminary investigations had been duly conducted and the cases forwarded to the Court of First Instance of Bataan, the same provincial fiscal filed the following informations:

"On or about April 18, 1931, in the municipality of Dinalupihan, Province of Bataan, Philippine Islands, and within the jurisdiction of this Court of First Instance, the above named defendant Leovigildo David willfully, illegally and criminally shot at German Pinili with his revolver, the bullet penetrating the latter's left side and lodging itself in the left scapula, as a result of which said German Pinili was under medical treatment for about 25 days.

"That on or about April 18, 1931, in the barrio of Luacan, municipality of Dinalupihan, Province of Bataan, Philippine Islands, and within the jurisdiction of this court, the said defendant, without any justifiable motive whatsoever and with deliberate intent to kill Jose V. Reyes with treachery and evident premeditation, willfully, illegally and criminally, fired four revolver shots at Jose V. Reyes, who then had his back toward the defendant, inflicting upon him a serious bullet wound at the back above the left clavicle, the medical treatment of which lasted about seventy-seven (77) days, having thereby performed all the acts of execution which should have, as a consequence, produced the crime of murder on the person of the said Jose V. Reyes, which, nevertheless, was not consummated by reason of causes independent of the will of the said defendant. The offended party spent about one thousand pesos for the treatment of his wound.

"The defendant is a recidivist, having been formerly convicted of the offense of less serious physical injuries in criminal case No. 2901 of this court, by virtue of a final and executory judgment dated December 8, 1927, the penalty of which was served by the said defendant.

"Contrary to the provisions of article 403, in connection with those of article 3, paragraph 2, of the Penal Code, and with the aggravating circumstance of recidivism."

From the documentary as well as the oral evidence presented at the joint trial of the two cases, the following pertinent facts, which are necessary for the resolution of the questions raised in these appeals, have been proven beyond reasonable doubt, to wit:

The herein defendant-appellant Leovigildo David is the son of Teodoro David, a democrata candidate for municipal president of Dinalupihan, and the offended party Jose V. Reyes is the brother of Emilio Reyes, nacionalista candidate for member of the provincial board of Bataan, both during the general elections of 1931.

While Emilio Reyes and Teodoro David were engaged in an argument after the former had quarreled with the aforesaid defendant-appellant, then an election inspector, because said Emilio Reyes wanted to see the list of registered voters, Jose V. Reyes, the complainant in criminal case No. 3310 and brother of Emilio Reyes, arrived at the scene and asked who was making trouble. Upon hearing him, Teodoro David, in a contemptuous tone, said in Tagalog: "Phse, ichura mong lalake" (Pshaw, you are but a shrimp) and, opening the door of the car where he was, rushed upon his interlocutor and the two engaged in a hand-to-hand fight during which both fell to the ground. Teodoro David fell on his right side, face downwards, Jose V. Reyes on top of him. The two constabulary soldiers present, who had arrived in the same car with Teodoro David a few moments before, tried to prevent them from coming to blows but due to the presence of many people who were witnessing the quarrel, were unable to make timely intervention and succeeded in separating the combatants only after they had already fallen to the ground, Cirilo Dullas raising Jose V. Reyes and holding him aside, while Esteban Aninang did the same to Teodoro David and took him to his car. While Jose V. Reyes was on top of Teodoro David, there was heard a first shot, which did not hit its mark, fired by the herein defendant Leovigildo David, later followed by another which

hit the stock of the gun carried by the constabulary soldier Cirilo Dullas in his right hand as he held Jose V. Reyes with his left hand after separating the latter from Teodoro David. Upon hearing the second shot and feeling the bullet hit the stock of his gun, Dullas instinctively shoved Jose V. Reyes, whom he continued to hold by the left arm with his left hand, causing the latter stagger and stoop to the right side, his back toward the north whence the shots came. While Jose V. Reyes was thus stooping, a third shot was heard, which hit the upper left hand side of Reyes' body, whereupon he fell to the ground. Immediately thereafter, there rang a fourth shot which hit the left axilla of the boy German Pinili, who was perched on top of a fence witnessing the fight between Jose V. Reyes and Teodoro David. Jose V. Reyes was immediately brought by his brother Emilio Reyes and others to Dr. Gonzalo Nuguid's clinic in Orani, Bataan, where he was given first aid, while the constabulary soldiers seized the revolver of the defendant Leovigildo David and placed him under arrest. In the chamber of the revolver of the defendant Leovigildo David were found four empty cartridges. Constabulary Captain Cirilo Legaspi, who had been notified of the incident, immediately ordered the seizure of Jose V. Reyes' revolver which was found in a box in the Tatter's house, while he, accompanied by his brother Emilio Reyes, was being treated by the doctor.

The first question to be decided in this appeal, in connection with the criminal case for frustrated murder, is one of fact and consists in whether or not Jose V. Reyes had his back toward Leovigildo David when the latter shot at him.

The witnesses for the prosecution testified in the affirmative, while those for the defense testified in the negative stating that when the defendant fired the shot which hit Jose V. Reyes, the latter was on top of Teodoro David, the defendant's father, and in the act of hitting Teodoro on the forehead for the second time with the butt of his revolver. The testimony of the constabulary soldier Esteban Aninang, who stated that the violent shove given Jose V. Reyes by his companion Cirilo Dullas caused the said Jose V. Reyes to stagger and stoop to the right side and at the same time to turn his back toward the defendant simultaneously with the third shot, corroborates the testimony of the witnesses for the defense that Jose V. Reyes was facing the defendant.

The second question of fact to be decided is whether or not Jose V. Reyes had struck Teodoro David with the butt of his revolver, while the latter was under him, and was in the act of striking said Teodoro David for the second time when Leovigildo David fired the shot which hit him.

On this point, the testimony of the two constabulary soldiers, who may be regarded as impartial witnesses, is unanimous in that when Jose V. Reyes received the bullet wound, he was already standing far from Teodoro David and beside the constabulary soldier Cirilo Dullas who had dragged him away from said Teodoro David.

From the foregoing, it may be stated as a conclusion of fact that when Leovigildo David fired the shot that hit Jose V. Reyes, the latter was facing him, and if the bullet hit Reyes on the back, it was due to the fact that his position was changed upon being shoved by the constabulary soldier; and that when the said defendant Leovigildo David fired the same shot, said complainant was already far from Teodoro David.

Now then, do the above facts, which were proven beyond reasonable doubt at the trial, constitute the crime of frustrated murder for which the defendant Leovigildo David has been convicted and sentenced?

Inasmuch as the defendant fired the shot facing the victim and in the presence of many people, he did not employ means, methods and forms in the execution of the crime, which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make (article 10, No. 2, of the old Penal Code). The very fact that Jose V. Reyes had been shoved by the constabulary soldier Cirilo Dullas shows that he could have evaded the shot and thereby frustrate the defendant's intent. Therefore, the circumstance of treachery was not present in the commission of the crime.

Did the defendant Leovigildo David have the intention of killing Jose V. Reyes?

The defendant-appellant invokes the defense of a relative to exempt himself from criminal liability (article 8, No. 5, of the old Penal Code). It has been shown that when the said defendant fired at Jose V. Reyes, the aggression had already ceased and, therefore, the motive for defense; and in firing at his victim, the defendant's intention could not have been only to repel the aggression against his father but also to kill Jose V. Reyes. Therefore, the intention of the defendant Leovigildo David to kill Jose V. Reyes is obvious.

The third question to be decided is whether or not the defendant Leovigildo David, having intended to kill Jose V. Reyes, had performed all the acts of execution which should have produced the latter's death, but did not produce it by reason of causes independent of his will (article 3 of the old Penal Code).

The doctors, who testified as experts on whether or not the wound received by Jose V. Reyes was necessarily mortal, are not unanimous.

Dr. Anzures testified as follows: "As to the seriousness of the wounds, I can only make approximate statements, not accurate ones, because in order to determine the seriousness of a wound a doctor should see the organs internally affected, by it. No doctor can with certainty state the seriousness of a wound for it is determined only during the autopsy. * * *" (T. s. n., pp. 144, 145.) "On the basis of general principles, the wound was not mortal. The general principles I am referring to relate to the normal positions of the organs and tissues." (T. s. n., p. 151.) "Judging from the position of the scars, I am of the opinion that the left lung was affected but the affected part is near the border." "It would be perforated. The effect should be internal hemorrhage but the flow of the blood would be mortal because the blood vessels in that region are small."¹ "All the wounds, including those caused at the base of the lungs, are not mortal." (T. s. n., p. 152.)

It will be seen that the testimony of Dr. Anzures is purely hypothetical because he has seen nothing but the scars, but nevertheless he is of the opinion that if the lung had been perforated, it would result in an internal hemorrhage and the flow of the blood would be mortal because the blood vessels of that, part are small.

Dr. Afable, who may be said to have saved the offended party's life, testified as follows: "Taking all the above stated facts into consideration, I arrived at the conclusion that the blood found in the lung of Mr. Reyes had its origin in the injury or wound in the upper left part of the chest." (T. s. n., p. 6.) "I am of the opinion that had not the fluid been drained from the patient's lung, it could have caused his death, taking into consideration the condition in which he was then found." (T. s. n., p. 8.) Answering a question regarding the accumulation of the fluid in the pleural region due to the congestion of the lung, he said: "That is one of the causes of death in this case, and a continuous internal hemorrhage might cause death as well" (T. s. n., p. 16.)

From all the above expert testimony, it may be inferred that had it not been for the timely and adequate medical intervention, the offended party Jose V. Reyes would have succumbed from the wound in his lung. A wound that may, by itself alone, produce a similar consequence, is mortal.

The defendant-appellant Leovigildo David, in firing his revolver and hitting Jose V. Reyes on the upper left hand part of his body, piercing it from side to side and perforating the lung, then performed all the acts of execution which should have produced the latter's death but did not produce it by reason of the timely and adequate intervention of medical science, which was completely independent of his will.

The facts proven at the trial as committed by the defendant-appellant Leovigildo David constitute the crime of frustrated homicide, defined and penalized in article 404 of the old Penal Code which was in force at the time of the commission of the crime. The penalty prescribed by law for the said crime, if consummated, is reclusion temporal in its full extent. Inasmuch as the crime with which Leovigildo David is charged herein is merely

frustrated, the said penalty should be one degree lower, that is, prision mayor in its full extent, the duration of which is from six years and one day to twelve years. In order to determine the penalty, the presence of the mitigating circumstance of immediate vindication of a grave offense committed against an ascendant (article 9, No. 5, of the old Penal Code) should be taken into consideration, without any aggravating circumstance to compensate the same, for which reason the said penalty should be imposed in its minimum period, that is, from six years and one day to eight years of prision mayor (article 81, rule 2, of the old Penal Code).

As to the offended party German Pinili, the evidence shows beyond reasonable doubt that one of the shots fired by the defendant Leovigildo David hit him on the left axilla, the treatment of the wound having lasted about twenty-five days.

Although it is true that the shot, which hit the boy German Pinili, was not aimed at him, however, it cannot be considered accidental because, it having been voluntarily aimed at Jose V. Reyes, the defendant-appellant Leovigildo David is liable for the consequences of his act, in accordance with the provisions of article 1, paragraph 3, of the old Penal Code, which provides that "any person voluntarily committing a felony (delito) or misdemeanor (falta) shall incur criminal liability, although the wrongful act done be different from that which he intended."

Although the crime, which the defendant Leovigildo David had intended to commit against Jose V. Reyes, was homicide, the crime committed by him against the boy German Pinili is discharge of firearms with less serious physical injuries, and the penalty which should be imposed upon him is that which corresponds to this complex crime, in its maximum period (article 64, paragraph 2, of the old Penal Code). However, inasmuch as he is charged only with the said complex crime, the only penalty that may be imposed upon him is that corresponding to this offense of discharge of firearms with less serious physical injuries, defined and penalized in article 408, in connection with article 418 of the old Penal Code, with prision correccional in its minimum and medium periods, that is, from six months and one day to four years and two months, which should be imposed in its maximum period, that is, from two years, eleven months and eleven days, to four years and two months, in accordance with the rule established in article 39, paragraph 2, of the same Code. There being no modifying circumstance to be taken into consideration, the said penalty should be imposed in its medium period, that is, from three years, four months and eight days to three years, nine months and three days.

In both cases, Act No. 4103, otherwise known as the Indeterminate Sentence Law, is applicable to the defendant-appellant, and consequently the maximum of the penalty, which he should suffer in case No. 3310, should be the maximum of that which should be imposed upon him under the law, that is, eight years of prision mayor; and the minimum, a penalty embraced within that next lower in degree to that prescribed by law for the crime of frustrated homicide, which is prision correccional in its full extent, the duration of which is from six months and one day to six years, that is, one year and one day of prision correccional. Therefore, the total extent of the penalty to be imposed upon the defendant for the crime of frustrated homicide should be from one year and one day to eight years.

In criminal case No. 3296, for the complex crime of discharge of firearms with less serious physical injuries, the maximum of the penalty, which should be imposed upon the defendant, is the maximum period of the penalty prescribed by the law, that is, three years, nine months and three days of prision correccional, and the minimum, four months and one day of arresto mayor, a penalty embraced within that next lower in degree which is arresto mayor in its medium and maximum periods, the duration of which is from four months and one day to six months, and consequently the full extent of the penalty which should be imposed upon him is from four months and one day to three years, nine months and three days.

The total amount of the expenses incurred by the offended party for medical assistance is P1,030.79.

Wherefore, the judgment appealed from is hereby modified, and the defendant Leovigildo David is declared guilty of the crime of frustrated homicide in criminal case No. 3310 of the Court of First Instance of Bataan (G. R. No. 39709) and sentenced to one (1) year and one (1) day of prision correccional to eight (8) years of prision mayor and to indemnify the offended Rarty Jose V. Reyes for damages in the sum of P1,030.79; and in criminal case No. 3296 of the said Court of First Instance of Bataan (G. R. No. 39708), he is declared guilty of the crime of discharge of firearms with less serious physical injuries, and sentenced to four months and one day to three years, nine months and three days, with the costs of both instances in the two cases against the appellant. So ordered.

Malcolm, Abad Santos, Butte, and Diaz, JJ., concur.

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