44 Phil. 478

[G.R. No. 19233. February 05, 1923]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. FORTUNATO CAÑETE, DEFENDANT AND APPELLANT.

D E C I S I O N

STREET, J.:

This appeal has been brought to procure a reversal or modification of a judgment of the Court of First Instance of the Province of Occidental Negros, finding the appellant, Fortunato Cañete, guilty of the offense of murder and sentencing him to undergo the penalty of *cadena perpetua*, with the accessories prescribed in article 54 of the Penal Code, to indemnify the heirs of the person slain in the amount of P500, and to pay the costs.

It appears in evidence that on January 15, 1922, the deceased, Narciso de la Cruz, was playing a game called *hantak*, with certain individuals on the *hacienda* of Cubay, in the municipality of San Carlos, in the Province of Occidental Negros. Among those present at the time was the accused, Fortunato Cañete, who offered to wager 3 centavos against a like amount of Narciso de la Cruz, but the latter refused the wager, saying that he and the accused were friends. Fortunato took this as an affront and assaulted Narciso with a knife, inflicting upon him a deep and lengthy gash on the thigh. In order to escape from this attack Narciso fled, but he was pursued by the accused. After running a short distance, Narciso fell face downwards on the ground, and before he could arise to continue his flight Fortunato seized him by the neck with one hand and with the other gave him a fatal thrust in the back with the knife. After inflicting this wound, the accused desisted from the attack while Narciso arose and again started to run. However, after going a distance of about 80 meters, he fell to the earth and died almost immediately. These facts are indubitably proved by the testimony of various persons who were present at the time the deed

was committed, and the force of their testimony is not arrested by the weak and incredible story of the accused in which he pretends that the deceased, with others, was the aggressor. The trial judge therefore was not in error in finding the accused to be the responsible and guilty party.

The record, however, presents one question of law which merits attentive reflection. This is the question whether, upon the facts above stated, the commission of the offense was characterized by *alevosia* in the sense necessary to constitute murder, or whether the crime was only that of simple homicide.

Upon this point we are constrained to adopt the conclusion reached by the Attorney-General and to hold that the qualifying circumstance of *alevosia* was not present. The accused, therefore, should have been found guilty of simple homicide; and, instead of being sentenced to *cadena perpetua*, he should have been required to undergo imprisonment for fourteen years, eight months and one day of *reclusion temporal*.

In this connection it should be noted that the original assault was begun by a direct frontal attack and there was momentary struggle between the accused and the deceased before the first knife wound was inflicted on the thigh of the deceased; and it was at this point that the deceased turned to flee. Moreover, pursuit by the accused followed immediately, after the deceased started to run, and the assault was practically continuous from the beginning to the end. The fall of the deceased in the course of his flight must be considered to have been in the nature of a mere accident which did not materially change the conditions of the struggle. In every fight it is to be presumed that each contending party will take advantage of any purely accidental development that may give him an advantage over his opponent in the course of the contest. It follows that *alevosia* cannot be predicated of this homicide from the mere fact that the accused overtook and slew the deceased while the latter was endeavoring to rise from the ground.

In its main features the case now before us is identical with one noted by Viada to the following effect: Between the accused and the person slain a fight had taken place, provoked by the former, in which the contestants exchanged some ugly words and the accused received a shove from the deceased which caused him

to strike against a wall. As the two attempted to engage again, some friends seized the accused, who nevertheless escaped from the persons who were holding him and ran after the deceased, who was then fleeing. In the course of his flight the deceased tripped and fell to the ground; whereupon the accused at once precipitated himself on his fallen antagonist and, holding him with one hand, struck him with the other with a jackknife, producing a wound which caused death. In the court of the Audiencia of Almeria the accused was declared to be guilty of murder, but this judgment was reversed by the Supreme Court. (Viada, 2 Supp., 298, reporting decision of Dec. 26, 1891.) In the course of this decision the court observed that although the trouble had begun in a barber shop and the homicide occurred on the outside, nevertheless the contest should be viewed as a single series of acts without any appreciable break in the continuity of action. The homicide was accordingly declared not to be qualified by *alevosia*.

As suggested in this and a similar decision of February 10, 1892, before *alevosia* can be found to be present in a homicide it must clearly appear that the method of assault adopted by the aggressor was deliberately chosen with a special view to the accomplishment of the act without risk to the assailant from any defense that the party assailed may make. (Viada, 2 Supp., 3d ed., p. 76, reporting decision of Feb. 10, 1892.) This cannot be said of such a situation as that now before us, where the slayer acted instantaneously upon the advantage which resulted from the accidental fall of the person slain.

It is undoubtedly true that *alevosia* may be exhibited in the final consummation of a homicide where said factor has not been present in the inception of the difficulty. For instance, it is the uniform doctrine of this court that if a person is first seized and bound, with a view to rendering him incapable of defense, and he is then slain either by the person who reduced him to this helpless state or by another, the crime is murder (U. S. *vs.* Elicanal, 35 Phil., 209, 218, and cases there cited). In a case of that kind it is obvious that the binding of the victim of the aggression introduces a material change in the conditions of the homicide; and in slaying a person so circumstanced, the author of the crime obviously avails himself of a form or means directly tending to insure the execution of the deed without risk to himself from any defense on the part of the person slain.

In United States *vs*. Baluyot (40 Phil., 385), the majority of the members of this court held that *alevosia* was present in a homicide committed under the following circumstances: The accused, according to the majority, suddenly and without provocation attacked the deceased by firing a pistol upon him, when the deceased was unarmed. Upon this the deceased attempted to get away and took refuge in a closet, closing the door after him and calling aloud for help. The accused then tried to force open the door but did not succeed, owing to the resistance of the deceased from within. However, judging the position of the head of the deceased from the cries emitted, the accused fired his pistol in the direction thus indicated. The bullet passed through the panel of the door and, entering the head of the deceased, produced death.

A somewhat similar case is noted by Viada from the decisions of the supreme court of Spain as follows: It appeared that an altercation had taken place between the accused and certain persons in a house from which the accused was thereupon ejected and the door shut after him. The accused from without then fired his revolver through a crack in the door, causing the death of one of the persons within. It was held that the offense was qualified by *alevosia* and that the act was constitutive of murder, the court observing that the accused availed himself of the door in order that he might accomplish the deed through it without risk to himself and against which no means of defense whatever were available. (1 Viada, 4th ed., p. 260.)

The present case differs from the cases above cited and their congeners in the circumstance that here the assault, evidently of a homicidal character from the beginning, but not treacherous in its inception, was continuous; and no factor intervened to alter the fundamental conditions of the crime. The circumstance that the deceased had fallen to the ground gave to the accused, it is true, the opportunity, of which he promptly availed himself, to come up with the deceased and to dispatch him at once. But the act of so doing cannot be interpreted as evincing a design to employ a method indicative of *alevosia*. The contrary is true in the case where the victim is bound before being slain or is driven to take refuge behind the closed door of a closet.

The doctrine applicable to the present case appears to have been correctly stated in United States *vs*. Balagtas and Jaime (19 Phil., 164), where the

deceased was first knocked down and rendered senseless, after which—and while still unconscious and powerless to make resistance—he was dragged to a pond, into which he was thrown and left exposed, face downwards. The court held that the various acts in the accomplishment of the homicide followed each other in such rapid succession that they all constituted a single transaction, and that the crime was not qualified by *alevosia*. Said the court: "One continuous attack, such as the one which resulted in the death of the deceased Flores, cannot be broken up into two or more parts and made to constitute separate, distinct, and independent attacks so that treachery may be injected therein and considered as a qualifying or aggravating circumstance."

From what has been said it results that the judgment appealed from must be modified; and instead of being adjudged guilty of the crime of murder with the penalties incident thereto, the appellant must be sentenced for the crime of simple homicide, with the corresponding accessories, and without aggravating or mitigating circumstance. That is to say, he will be required to undergo imprisonment for fourteen years, eight months and one day, *reclusion temporal*, with the accessories prescribed in article 59 of the Penal Code. As thus modified, the judgment will be affirmed, with costs. So ordered.

Araullo, C.J., Malcolm, Avanceña, Villamor, and *Romualdez, JJ.,* concur.

DISSENTING

OSTRAND, J., with whom concurs **JOHNS, J.:**

In my opinion the judgment of the court below should have been affirmed *in toto*.

Date created: September 27, 2018