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[G. R. No. 18289. November 17, 1922]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. JOSE TAMAYO ET AL., DEFENDANTS. JOSE TAMAYO, RAMON TAMAYO, HILARIO TAMAYO, FEDERICO TIBUNSAY, AND TEODORO CASPELLAN, APPELLANTS.

D E C I S I O N

STREET, J.:

This appeal has been brought to reverse a judgment of the Court of First Instance of the Province of Pangasinan, finding the five appellants, Jose Tamayo, Ramon Tamayo, Hilario Tamayo, Federico Tibunsay, and Teodoro Caspellan, guilty of the offense of homicide, committed on July 17, 1921, in the municipality of Binalonan, Province of Pangasinan, upon the person of one Catalino Carrera, and sentencing them as follows: Jose Tamayo, Ramon Tamayo, and Hilario Tamayo, as principals, to undergo imprisonment for fourteen years, eight months and one day, *reclusion temporal*, with the accessories specified in article 59 of the Penal Code, and jointly and severally to indemnify the heirs of the deceased in the sum of P650; and Federico Tibunsay and Teodoro Caspellan, as accomplices, to undergo imprisonment for eight years and one day, *prision mayor*, with the accessories specified in article 61 of the Penal Code, and jointly and severally to indemnify the heirs of the deceased in the sum of P350; imposing also on those within each respective class, the obligation to respond subsidiarily for the indemnity imposed upon those of the other class, in conformity with article 125 of the Penal Code; and finally, requiring each to pay his proportional part of the costs.

It appears in evidence that on the morning of the day mentioned in the complaint the deceased, Catalino Carrera, in company with his brother, Francisco-Carrera, and a youth of thirteen years, named Juan Gonzales, who was living with the deceased, repaired to a field belonging to the deceased, in the barrio of San Felipe, municipality of Binalonan, to do agricultural work, preparatory to the planting of palay. For the accomplishment of these labors, it was necessary to turn water into the paddy from an irrigating ditch flowing

nearby; and the deceased accordingly intercepted the flow of the water in this ditch by constructing a dirt dam, thereby diverting the water entirely to his own land.

While the deceased was engaged in working in and around the irrigating ditch, his brother Francisco was occupied nearby in leveling the soil with a light rake, and the boy, Juan Gonzales, mounted on a carabao, was using a harrow to smoothe the surface of the field a few rods away. While the three mentioned were busy as above stated, the five appellants herein arrived from the barrio of Asingan, which is the place of their abode, to begin work preparing another plot of land for cultivation, adjacent to or near the paddy upon which the deceased was at work. Upon arriving upon the scene of their intended labors, the five appellants found that no water was available for watering the land which they intended to prepare, owing to the fact that all the water in the canal was being appropriated by the deceased. The five therefore approached the deceased and either Hilario or Ramon Tamayo asked him to allow the water, or some of the water, to flow on through the canal to their land, as it was dry and water was necessary. In reply the deceased told them to wait for the rain of heaven. The appellants were not content with this rejoinder, and the request for water was repeated, upon which the deceased told them that they should await his pleasure.

Seeing that their request for water was disregarded, the anger of the appellants was aroused, and Hilario Tamayo advanced towards the irrigating ditch, and towards the deceased, with the intention, so Hilario states, of breaking the dam with his hands, thereby releasing the water so that it would continue its course in the ditch. This movement on the part of Hilario Tamayo was met with a demonstration of resistance on the part of the deceased, and struggle ensued, the salient features of which are in our opinion established clearly enough, though some of the more minute details are obscure.

At this point it may be stated that when the five appellants approached the deceased to ask for water, Basilia Orensia, the wife of the latter, had just arrived in the field, bringing food for her husband and his assistants, as the day was getting hot and the hour was approaching when agricultural laborers are accustomed to take rest and refreshment. She therefore was present at the quarrel from the beginning and is one of the two adult witnesses for the prosecution, the other being Francisco Carrera, the brother of the deceased.

His Honor, the trial judge, as preliminary to his analysis of the facts in the appealed decision, observes that the prosecuting witnesses have in some respects grossly exaggerated the facts from the point of view of the prosecution, while the witnesses for the

defense have falsely attempted to make it appear that only two of the accused, namely, Hilario Tamayo and Jose Tamayo, were actually engaged in the assault. This observation is correct, and his Honor was entirely justified in refusing to accept the version of the affair given by either set of witnesses, the truth being evidently somewhere between the extremes.

Bearing this circumstance in mind, we have carefully examined the evidence, and after conceding to some of the accused the benefit of a reasonable doubt upon minor features of the case, we find the facts more immediately connected with the homicide to be substantially as follows: When Hilario Tamayo found himself confronted by the deceased in a threatening attitude, he at once closed in upon the deceased and, seizing him firmly by the neck, began choking him, with the result that the deceased was rendered incapable of effectual resistance. Upon this Francisco Carrera ran to his brother's assistance and taking Hilario by the belt, pulled him away, whereupon a minor altercation apparently ensued between these two and during the remainder of the affray Hilario remained separated a few meters from Catalino Carrera.

As soon as Hilario had been thus drawn away from the deceased, Ramon Tamayo at once took Hilario's place and continued choking the deceased until the latter had become visibly weak; and it was at this moment that Jose Tamayo, a son of Ramon, ran up and delivered a blow with a bamboo stick on the side of the head of the deceased just above the left ear. The deceased at once gave down, but Ramon Tamayo continued to choke him for a few moments until life was extinct. Seeing what had been thus accomplished, the five accused went away, leaving the body where it had fallen.

The physician who examined the cadaver found that the longitudinal blow on the side of the head had broken through the skin and fractured and depressed the skull over a length of eight centimeters. Death was evidently caused by the direct shock produced by the blow, in connection with a cerebral hemorrhage which had ensued. Upon examining other parts of the body, this physician found no other sign of violence.

While the scene above depicted was being transacted, Federico Tibunsay and Teodoro Castellan were standing close by; and we are prepared to believe the testimony of Francisco Carrera when he says that while the altercation with Catalino Carrera was in progress Federico Tibunsay indicated his sympathy with his companions and encouraged them by exclaiming "Go ahead! go ahead!" *(!*Sigue*!!*Sigue*!*).

Basilia Orensia further states that Teodoro Caspellan cooperated in the attack by delivering blows with his fist on the back of the deceased while the latter was held by Hilario and Ramon Tamayo. Francisco Carrera corroborates her to a certain extent upon this point, but the proof on this point is not entirely clear, and if such blows were delivered by this appellant, he had apparently desisted from the attack before Jose Tamayo intervened.

After life was extinct, Federico Tibunsay approached the body and removed a large bolo with which the deceased was provided, drawing it, so the witnesses for the prosecution testify, from the sheath in which it was reposing. This bolo, it may be observed, was afterwards found in the hands of Hilario, by whom it was delivered to the justice of the peace. The evident explanation of this circumstance is that Federico Tibunsay delivered the bolo to Hilario after the appellants had departed from the scene of homicide, with a view to the corroboration of the tale which they then concocted, to the effect that only Jose and Hilario had been present at the tragedy.

When Hilario Tamayo was arrested he exhibited a slight cut on the left forearm, which he claims to have received while he was engaged with the deceased. The proof for the prosecution tends to show that the deceased did not use his bolo at all, and a suspicion is suggested that the cut exhibited by Hilario was designedly made by himself, or some one acting at his instance, in order to give plausibility to a pretense that he had acted in self-defense. We consider the point to be of little fundamental importance, for even supposing that this cut on Hilario’s arm was inflicted by the deceased, the evidence in our opinion shows that Hilario was not acting in legitimate self-defense.

It does not appear that there was any antecedent grudge or ill-feeling between the five appellants and the deceased, and there is nothing to show that the latter had previously conspired together to engage in the unlawful aggression which cost the deceased his life. It was clearly a case of a casual quarrel, culminating in violence; and the trial judge was right in so finding.

Having outlined the proof connecting the five appellants with the homicide, we pass to a feature of the case upon which we have not hitherto touched. This has relation to five other individuals, namely, Pastor Caspellan, Nicomedes Caspellan, Domingo Cañiza, Alejandro Destor, and Felipe Obejo, who were jointly accused with the five appellants. It appears that these persons are laborers who upon the occasion in question were engaged in agricultural work not far away from the paddy of the deceased, and when the trouble arose they gathered quickly around the combatants. In the excited state of her imagination, and owing

perhaps to some manifestation of sympathy on their part with the appellants, Basilia supposed that these five had also come to cooperate in the attack on her husband, and she claims that while the fight was going on one or more of them encouraged the appellants by calling out "go ahead !" (/sigue*!*). Upon this circumstance the fiscal considered it proper to include the whole ten in the complaint; but the trial judge very properly, upon the conclusion of the evidence for the prosecution, ordered that the complaint as against these five should be dismissed for lack of proof. Upon the facts above stated it is obvious that the offense committed was properly designated by the trial judge as simple homicide; and Jose Tamayo was rightly condemned as principal in the commission of said offense. We are of the opinion that there is no aggravating or mitigating circumstance to be taken into account in estimating said offense, and it results that the penalty imposed by the trial judge upon Jose Tamayo, or imprisonment for fourteen years, eight months and one day, reclusion temporal, with the accessories specified in article 59 of the Penal Code, was not incorrect.

The question whether the four other appellants have been shown to be guilty of criminal complicity in the offense of homicide and, if so, in what character, is not free from difficulty; and inasmuch as the acts respectively done by them differ somewhat in the case of each individual, it is necessary to consider the responsibility of each in turn. In so doing we begin with an examination of the relation of Ramon Tamayo to the crime, for he was holding the deceased when the fatal blow was struck, and the case against him is perceptibly stronger than that against the remaining three. Moreover, it will be convenient to discuss the case of this appellant, first, with reference to the question whether he can be held as a principal, or coauthor, of the homicide; and, secondly, if not responsible as a principal, whether he can be held responsible in the character of an accomplice.

In considering the responsibility of this appellant, the following circumstances should be borne in mind, namely, first, that no previous concert among the accused to commit aggression upon the deceased is shown; secondly, that in the inception of the encounter there was no apparent intention on the part of any of the accused to take the life of the deceased or even to inflict upon him serious bodily harm; and, finally, that the delivery of the fatal blow by Jose Tamayo was the act of a person suddenly coming into the fight without having been previously involved in the quarrel.

In this connection, it is to be remembered, that none of the appellants were armed or had on their person even so much as a bolo; and the only individual supplied with a dangerous weapon was the deceased, who had a bolo and, as the trial judge found, used it with some effect upon Hilario Tamayo. In considering whether Ramon Tamayo is guilty as a principal

in this homicide, the first impression must be that, if he is responsible in that character, it is because of his direct participation in the commission of the deed; but when the facts proved are carefully considered in the light of the jurisprudence relating to criminal responsibility, it will be seen that he cannot properly be held responsible in the character of principal, for the reason that participation on his part in the criminal design of Jose Tamayo, the actual slayer, is not sufficiently proved.

The very first words of comment upon article 13 of the Penal Code found in the pages of Viada are to the effect that the expression "those who take a direct part in the commission of the deed," in subsection 1 of that article, means "those who, participating in the criminal resolution, proceed together to perpetrate the crime and personally take part in its realization, executing acts which directly tend to the same end." (Vol. I, p. 341.) Immediate participation in the criminal design entertained by the slayer is therefore essential to the responsibility of one who is alleged to have taken a direct part in the killing, as a principal, but who has not himself inflicted an injury materially contributing to the death. Moreover, this guilty participation in the criminal resolution of the slayer is a substantive fact that must be clearly deducible from all the circumstances taken together.

Upon this aspect of the case the following decisions of this court appear to be decisive.

In United States vs. Manayao (4 Phil., 293), it appeared that a state of enmity existed between one Simeon Manayao and the deceased, Mateo Margarejo, and that upon a certain occasion an altercation arose between them at a village store, in which a number of their friends took sides. Upon departing for their homes, the quarrel was renewed between the deceased and one of his friends on the one side, and Simeon Manayao, with Angel Manayao, on the other. In the course of this altercation Simeon Manayao drew his pocketknife and stabbed Mateo Margarejo in the side, inflicting a wound from which death ensued. It was held that Angel Manayao was not responsible for the homicide. Said the court:

> "The proof shows that the deceased received but one wound, and, while it is true that Angel Manayao took sides with said Simeon Manayao in the quarrel, there is nothing in the evidence to show that he joined in the commission of the *homicidio*, either as principal or accomplice. There is nothing to show concerted action between the said Angel Manayao and Simeon Manayao in the use of the knife and in the stabbing which resulted in the death of the said Margarejo, nor that the said Angel Manayao had any reason to believe that his companion

> intended to make a deadly attack on the deceased." (XL S. vs. Manayao, 4 Phil., 293, 294.)

In United States vs. Magcomot (13 Phil., 386), it appeared that upon the occasion of a game of cards, two persons, Isidro and Clemente Magcomot, quarreled with one Pedro Magnave; and in the course of an altercation which resulted, they threw him down and overpowered him, when Epifanio Magcomot, father of Isidro and Clemente, arrived upon the scene and inflicted a fatal blow upon Pedro Magnave by stabbing him, while the first two had him down. It was held that Isidro and Clemente were not responsible for the homicide. Said this court, speaking through Mr. Justice Mapa:

> "In view of all the circumstances of the case we are satisfied that the assault was committed without the concurrence of the will of Isidro and Clemente Magcomot, and in the absence of that volition, which is the fundamental source of criminal liability, these codefendants cannot lawfully be held liable for the aggression and its consequences. On the other hand, it cannot be pleaded that the acts committed on the body of the deceased by said codefendants and by Epifanio were perpetrated at the same time, because this simultaneousness does not of itself demonstrate the concurrence of wills nor the unity of action and purpose which are the bases of the responsibility of two or more individuals, and in the absence of which it is strictly just, in accordance with the sound principles of law, that each one should only be held liable for the acts perpetrated by him." (U. S. vs. Magcomot, 13 Phil., 386, 389.)

In United States vs. Reyes and Javier (14 Phil., 27), it appeared that one Javier got into a fight with the deceased, named Legaspi; and while Javier was holding Legaspi firmly so that the latter was disabled from making any effectual resistance one Reyes struck Legaspi on the head several times with a heavy cudgel inflicting wounds of which the latter died. There was no previous concert between Javier and Reyes and the latter had primarily intervened with the intention of separating the two original combatants. It was held that Javier was not responsible for the homicide committed by Reyes. Said the court:

> "It is impossible to say from the record whether Javier or Legaspi was the original aggressor in the fight which was in progress when Reyes intruded

> himself between them, and it well may be that Javier, who was wholly unarmed, was within his rights when he took hold of Legaspi to prevent him from making use of his club; but, however this may be, it is quite clear from all the record that he did not take hold of Legaspi or continue to hold him for the purpose of aiding Reyes in striking Legaspi upon the head; and that there was no concerted action between Javier and Reyes nor voluntary cooperation on the part of Javier, in the homicidal attack, the sudden and unexpected intervention of Reyes not having given any opportunity therefor." (U. S. vs. Reyes and Javier, 14 Phil., 27, 30.)

In United States vs. Macuti (26 Phil., 170), six defendants had been convicted of the crime of homicide committed upon the person of one Martino Jalea. Three of these six were acquitted upon appeal to this court for the reason that, while the proof showed that they had been present upon the occasion of the homicide, there was not sufficient evidence to show further participation by them in the offense. As to two other appellants, to wit, Florentino and Agaton Macuti, it appeared that they were engaged in a fight with Jalea at the time the latter was stabbed by Modesto Macuti, the actual slayer. In acquitting them, this court said:

> "Assuming that Florentino and Agaton Macuti were fighting with Jalea at the time Modesto Macuti stabbed him, can they be held responsible as principals? We have already stated that the record shows no prearranged plan to kill the deceased. It has been the constant holding, not only of this court, but also of the supreme court of Spain, that in the absence of a previous plan or agreement to commit a crime the criminal responsibility arising from different acts directed against one and the same person is individual and not collective, and that each of the participants is liable only for the acts committed by himself." (U. S. vs. Macuti, 26 Phil., 170, 177.)

From the foregoing discussion it is evident that the judgment finding Ramon Tamayo guilty as principal, or co-author, in this homicide cannot be sustained, and we proceed to consider whether he can be adjudged guilty in the character of 'accomplice, under article 14 of our Penal Code, by reason of having cooperated in the commission of the deed by previous or simultaneous acts. On this branch of the case also it will be found that, by the overwhelming weight of authority, the same community of purpose and intention is necessary to justify the conviction of an accused person in the character of accomplice that is necessary to sustain

conviction in the character of principal. In this connection we may quote words that have been so often repeated by the supreme court of Spain as to constitute a classical formula for the expression of a generally recognized truth. Say the court: "It is an essential condition to the existence of complicity, not only that there should be a relation between the acts done by the principal and those attributed to the person charged as accomplice, but it is furthermore necessary that the latter, with knowledge of the criminal intent, should cooperate with the intention of supplying material or moral aid in the execution of the crime in an efficacious way." (Decision, May 23, 1905; Viada, 5 Supp., 169; decision, June 28, 1901; Viada, 4 Supp., 196.)

A similar doctrine, with respect to the indispensable concert, mediate or immediate, with the author of a crime in order that the aggressive acts of a third person against the injured party can be qualified as acts of criminal complicity, is established in terms equally expressive and explicit in another decision, where the supreme court of Spain says:

> "Considering that the principal element of every punishable complicity consists in the concurrence of the will of the accomplice with the will of the author of the crime, which presupposes the mediate or immediate agreement of both to carry out the commission thereof; and that when such concurrence is lacking, although there may be participation by action, the person committing acts directly connected with the passive subject, either prior to, or simultaneously with, the commission of the crime, may incur any responsibility, but cannot be criminally responsible as accomplice of the actual perpetrator of the crime in the juridical sense of the word." (Decision, Nov. 4, 1892; Viada, 2 Supp., 116.)

As the same court observed, in its judgment of May 23, 1905, from which we have already quoted, there is a total lack of basis upon which to found the relation of solidarity between the act of the principal and one charged as accomplice where the facts proved disclose the absence of the moral element of design (*intencionalidad*) on the part of the accomplice.

In a decision of December 4, 1889, the following case was presented: Two persons, one of whom was in a state of intoxication, were misbehaving on the streets, upon which a third person came up to protest against their conduct. As the intervening third person approached the two misdemeanants one of them raised a cudgel to strike, while the other who was in a state of intoxication inflicted a serious wound with a rapier. It was held by the supreme court that the person using the stick was not guilty of the offense of *lesiones*

graves caused by his companion. (Decision, Dec. 4, 1889; Viada, 2 Supp., 116.)

In a decision of November 14, 1892, the following case was presented: Two individuals passing along a street met a third; and, upon certain cause of offense, one of the two slapped the third and drew a knife to attack him, at which moment the companion from behind discharged a pistol at the person who had been thus attacked, causing an injury from which he died. It was held by the supreme court of Spain that without further data it would be improper to find the first assailant guilty as an accomplice in the crime of murder committed by the other. (Decision, Nov. 14, 1892; Viada, 2 Supp., 124.) In a decision of November 20, 1895, a case was presented 'where two individuals had simultaneously assaulted a third. One of the assailants inflicted a slight hurt with a cutting instrument. The other inflicted a serious injury with a firearm, as a result of which the person assailed died within a few days. The jury found that the two had not acted upon previous concert and with the same design. The supreme court of Spain held that the one who had inflicted the slighter injury was not guilty of the offense of homicide in the character either of principal or accomplice. (Decision, Nov. 20, 1895; Viada, 3 Supp., 140.)

The doctrine sustained in the Spanish decisions, upon the point now under consideration, was adopted by this court in United States vs. Guevara X2 Phil., 528), where the language of a decision from the supreme court of Spain was quoted with approval to the following effect: " 'The responsibility of the accomplice is to be determined by acts of aid and assistance, either prior to or simultaneous with the commission of the crime, rendered knowingly for the principal therein, and not by the mere fact of having been present at its execution, unless the trial court finds that the object of such presence was to encourage the delinquent or to apparently or really increase the odds against the victim, and in the absence of such an intent specifically shown, concurring with some overt act, which together form the basis of the responsibility of the indirect author of the crime, such a conclusion is erroneous and constitutes an infraction of article 15 of the Penal Code.' " (Decision, June 25, 1886.)

In United States vs. Bello (11 Phil., 526), the crime of robbery had been committed by certain convicts who had improperly been permitted to go at large by the sentry placed on guard at their quarters; and the sentry was convicted in the lower court of the offense of robbery. It did not appear that, when he permitted the authors of the crime to go at large, he had any knowledge of their intention to commit any crime. It was held that the conviction could not be sustained as to the sentry, even in the character of accomplice; and the doctrine applicable to the case was elegantly expressed by Mr. Justice Mapa in the following words: "The cooperation that the law punishes is the assistance knowingly or intentionally

rendered, which cannot exist without previous cognizance of the criminal act intended to be executed."

The doctrine above enunciated to the effect that criminal complicity in the character of an accomplice necessarily reposes on knowledge of the criminal design on the part of the principal and participation therein, is further illustrated in United States vs. Romulo (15 Phil., 408) ; and it is also inferentially, if not expressly, recognized in all of the cases referred to in the first branch of this discussion, namely, United States vs. Manayao (4 Phil, 293); United States vs. Magcomot (13 Phil., 386); United States vs. Reyes and Javier (14 Phil., 27) ; United States vs. Macuti (26 Phil., 170).

But while the authorities above collated conclusively show that a man cannot be an accomplice in a crime without participating in the criminal design of the principal, something remains to be said about the acts from which such participation in the criminal design can be proved. Upon this point it is undoubtedly true that concert of action at the moment of consummating the homicide, and the form and manner in which assistance is rendered, may determine complicity where it would not be otherwise evident. Thus, in a decision of December 29, 1884, the case was that after two individuals had beaten another and thrown him to the ground, the accused got upon him, trampling his breast and face. As a consequence of the injuries received from the beating by the first two, the injured person died. It was held by the supreme court of Spain that the accused was guilty in the character of accomplice, saying: "Although the accused did not intervene in giving the mortal injury caused by the cudgel, for which reason he is not comprehended in article 13, he simultaneously trampled upon the deceased who was on the floor; and this simultaneity of acts contributing to the homicide makes him an accomplice in the same." (Decision, Dec. 29, 1884; Viada, vol. 1, p. 375.)

In a decision of June 13, 1904, a case is reported to the following effect: The person slain appeared with a razor in hand in the street, from which point he called to two others to come out from the inn where they were lodging. In response to this challenge one of them emerged with, jack-knife in hand, the other bearing the blade of a pair of pruning shears. In the fight which resulted, the first of the two slew the challenger. It was held by the supreme court of Spain that the second had not taken a direct part in the fatal assault in the sense necessary to make him a principal but that he was criminally responsible in the character of accomplice. (Decision, June 13, 1904; Viada, 5 Supp., 167.)

In a decision of the supreme court of Spain of January 5, 1909, it appeared that three

persons took part in an aggression which resulted in the death of the person assaulted. The fatal wound was inflicted by the discharge of a gun or pistol in the hands of one of the three assailants, and at the time the fatal wound was inflicted one of the other two was holding the victim by the neck, choking him. The other was at the same time engaged in holding him by the arms, with the result that the victim was unable to move and defend himself when the slayer fired the fatal shot. The supreme court of Spain held that the accused who caused death was principal and that the other two were accomplices, although it did not appear that there was any previous concert. The court observed that there was concert at the moment of consummating the act, and that the acts of the accomplices implied criminal complicity from the form and manner in which assistance was rendered. (Decision, Jan. 5, 1909; Viada, 6 Supp., 152.)

Other cases in which the Spanish court has declared complicity to exist, from the cooperation on the part of the accomplice, as evidenced in simultaneous acts, are found in decisions as follows: Decision, Dec. 1, 1873; Viada, vol. 1, p. 371; decision, July 6, 1881; Viada, vol. 1, p. 374; decision, July 3, 1900; Viada, 4 Supp., 194.

Now although, as thus demonstrated, participation on the part of an accomplice in the criminal design of the principal is essential to the same extent as such participation is necessary on the part of one charged as coprincipal, nevertheless, it is evident,—and the cases above cited abundantly prove—that, as against an accomplice, a court will sometimes draw the inference of guilty participation in the criminal design from acts of concert in the consummation of the criminal act and from the form and manner in which assistance is rendered, where it would not draw the same inference for the purpose of holding the same accused in the character of principal. This is because, in case of doubt, the courts naturally lean to the milder form of responsibility.

The preceding discussion prepares the way for the consideration of the concrete question whether Ramon Tamayo can be convicted as an accomplice in the homicide committed in this case by Jose Tamayo on the person of Catalino Carrera; and if our review of the authorities has not been unfruitful it will be recognized that the test here to be applied is to be found in the question whether Ramon Tamayo, in holding and choking the deceased when the latter was struck by Jose Tamayo, was acting in furtherance of the criminal design entertained against the deceased by Jose Tamayo, In this connection it becomes important to note that both Basilia Orensia and Francisco Carrera repeatedly testify that after the deceased had received the fatal injury, Ramon Tamayo continued to hold and choke the deceased, then evidently on the ground, until after life was extinct. We consider it unlikely

that the accusing witnesses could be mistaken about so dramatic and brutal a fact; and, if true, it shows that Ramon Tamayo approved of the blow struck by his son Jose Tamayo; and a participation in the criminal design of the latter was thereby shown, sufficient to make Kamon responsible as an accomplice. This incident in fact makes the case indistinguishable in principle from those decided by the supreme court of Spain upon the dates respectively of December 29, 1894, and January 5, 1909, *supra*; and a majority of the Justices participating in this decision are of the opinion that this accused must at least be adjudged guilty as an accomplice in the homicide which is the subject of this prosecution.

Passing to the case of Hilario Tamayo, it is apparent in the light of the authorities above cited, that he must be absolved from all responsibility for the homicide; for at the time Jose Tamayo intervened in the affray Hilario had desisted from his own acts of aggression against the deceased; and he did nothing whatever to assist Jose in the immediate commission of the homicide. Moreover, such acts as were done by Hilario prior to the commission of the deed were evidently done without knowledge of the criminal design on the part of Jose, for that design had not then been revealed. It results that this accused is guilty only of the misdemeanor involved in his previous assault upon the deceased.

The trial judge found Federico Tibunsay guilty as an accomplice, for the reason that he stood by and is supposed to have animated the other assailants by calling out more than once "go ahead! go ahead!" (/signe/ /signe/). Upon this point we note that though Francisco Carrera, the most reliable of the two accusing witnesses, testified that Federico Tibunsay used said expression, Basilia Orensia attributed it to the five laborers from nearby fields who were attracted to the scene when the quarrel first began and who, although included in the complaint, were discharged by the trial judge, when the prosecution concluded its case, for lack of sufficient incriminatory evidence; and Basilia insisted at the hearing that Federico Tibunsay did not say "go ahead" /sigue*!*) at all. She admitted in effect, however, that at the preliminary hearing before the justice of the peace, she had stated that Federico Tibunsay had used that expression. We further note that after having been subjected to a lengthy examination in the forenoon, this witness returned to the stand during the afternoon session and for the first time stated that just before Jose Tamayo struck the deceased, Federico Tibunsay called out "kill him" ("*matadle*"), which expression was used only once. Francisco Carrera does not corroborate this; and in the contradictory state of the proof, it would be exceedingly dangerous to the cause of justice to find that the expression last mentioned was in fact used by this accused. Of course, it goes without saying that if the proof showed beyond a reasonable doubt that, at the crisis of the assault, Federico Tibunsay had called out to the assailants to kill Francisco Carrera, and Jose Tamayo had struck the

fatal blow in response to this suggestion, Federico Tibunsay would be guilty, at least as an accomplice, if not indeed as a coprincipal, in having directly induced the commission of the deed.

Assuming, however, as we well may, that Federico Tibunsay used the expression "go ahead!" (*sigue!*) more than once while the unlawful assault was being committed, it does not follow that his complicity in the offense of homicide is shown. In this connection it was held by the supreme court of Spain, in a decision from which we have already quoted, that the mere circumstance that a person, present at a quarrel, says aloud, so as to be heard by one of the contending parties, "there you have them," "now they are yours," "strike them," "this is the time," is not sufficient to fix complicity upon such person as an accomplice in the crime of homicide, where other facts show that the spokesman did not speak said words with the intention that the person slain should be wounded. (Decision, May 23, 1905; Viada, 5 Supp., 169.)

Again, in a decision of March 13, 1884, the case was that the accused was present at the commission of the crime of murder by his brother upon the person of a common enemy of both, with whom both brothers had had a previous dispute. While the deed was being committed, the accused was heard to have uttered some threatening words, the exact nature of which is unknown, nor was it clearly shown to whom the words were directed. It was held by the supreme court of Spain that this was not sufficient data to fix upon the accused complicity in the crime. Said the court:

> "Although the accused gave rise to the first dispute, and later accompanied the aggressor and was present at the commission of the crime, uttering some threatening words, the exact nature of which is unknown, nor does it appear to whom they were directed, these isolated facts, without any antecedents to explain them, cannot be given great importance, nor can they be presumed to indicate participation or cooperation in the criminal act, which is what legally determines complicity in a crime, without thereby incurring a serious mistake." (Decision, March 13, 1884; 1 Viada, 375.)

The same high tribunal has pointed out that the question whether a person can be held guilty as coprincipal by induction, from the use of an excited expression such as is attributed to Federico Tibunsay in the case before us, depends upon whether the words are of a character, and are spoken under conditions, which give to them a direct and

determinative influence upon the main actor; and a distinction is pointed out between the words of command of a father to his sons, under conditions which determine obedience, and excited exclamations uttered by an individual to whom obedience is not due. The moral influence of the words of the father may determine the course of conduct of a son where the words of a stranger would make no impression. (Decision, June 21, 1882; decision, Dec. 22, 1883; 1 Viada, 357.)

In the case before us, when Federico Tibunsay is supposed to have used the expression "go ahead!" (/sigue*!*), a mere assault was being made, and it does not appear that he intended anything more than that the deceased should receive a sound beating. It results that Federico Tibunsay must also be absolved from complicity in the homicide.

Upon similar considerations Teodoro Caspellan must be acquitted, as his alleged, but doubtful, participation was limited to the striking of blows upon the back of the deceased while the latter was held by Hilario or Ramon Tamayo.

From what has been said it results that the judgment appealed from must be affirmed in so far as it finds Jose Tamayo guilty of the offense of homicide and sentences him to undergo imprisonment for fourteen years, eight months and one day, *reclusion temporal*, with the accessories prescribed in article 59 of the Penal Code and requires him to pay indemnity to the heirs of the deceased in the amount of P650; with proportional costs of this instance against the appellant. The judgment must be reversed as to all the other appellants; and as to Ramon Tamayo, judgment will be entered declaring him guilty of homicide, in the character of accomplice, and requiring him to undergo imprisonment for eight years and one day, *prision mayor*, with the accessories prescribed in article 61 of the Penal Code, and imposing upon him liability to indemnify the heirs of the deceased in the amount of P350, and to pay proportionate costs of both instances; it being understood that as between Jose Tamayo and Ramon Tamayo the satisfaction of indemnity shall be effected in accordance with article 125 of the Penal Code. Hilario Tamayo will be sentenced for assault and battery (*malos tratos de obra*), under No. 1 of article 589 of the Penal Code, to confinement for five days, *arresto menor*, and to pay proportionate costs of both instances. Federico Tibunsay and Teodoro Caspellan will be acquitted, with proportionate costs of both instances *de oficio*. So ordered.

Araullo, C. J., and *Villamor, J.,* concur.

Johnson, J., dissents.

CONCURRING AND DISSENTING

AVANCEÑA and ROMUALDEZ, JJ.,

We are in accord with the principle enunciated in the majority opinion, but we do not agree with the findings of fact contained in the decision insofar as Ramon Tamayo is concerned. We do not believe that it has been sufficiently proven that this defendant had continued strangling the deceased after the latter had been struck by Jose and the defendant cannot be presumed to be connected in any way with Jose in the criminal intent. We believe that Ramon Tamayo is responsible only for the misdemeanor punished by article 589 of the Penal Code.

CONCURRING AND DISSENTING

OSTRAND, *J.*,

I concur in the sentence imposed upon the defendant Jose Tamayo and reluctantly agree with the disposition made of. the case as to Ramon Tamayo, but I emphatically dissent from the rest of the majority opinion and believe that a closer approximation to complete justice would have been attained by affirming the judgment of the court below *in toto*.

The deceased was upon his own land where he had the right to be; he was irrigating the land with water which he admittedly had the right to use. The defendants, residents of another municipality, went upon the land of the deceased with the evident purpose of taking the water by force, if necessary.

Upon the refusal of the deceased to grant them the water, he was assaulted by apparently as many of the defendants as could lay their hands on him, was beaten and choked into a state of exhaustion and finally killed by a blow upon his head, all as a result of the assault.

The majority of the court finds that no common design to kill the deceased is shown and that therefore only the person who struck the fatal blow and the person who held the deceased firmly by the neck while the blow was struck are guilty, the first as principal and the second as an accomplice. The other defendants who, upon the deceased's own premises, had beaten and choked him and reduced him to a state of exhaustion go scot free. He was a robust man, armed with a bolo, and would probably have been able to defend himself against two assailants; he was unable to do so against a mob assailing and threatening him from .all sides. It therefore seems clear that all those who took part in the attack upon him are, in a measure, responsible, for his death, though the responsibility of each may vary in degree.

It may well be conceded that there was no conspiracy or premeditated common design to kill the deceased; had such been the case the defendants would have been guilty of murder instead of homicide. It may also be conceded that none of the defendants originally intended to kill the deceased. But there was a common design to assault and beat him and as the result of such assault and battery the deceased died. For his death all those who took part in the unlawful and criminal assault should suffer punishment,

MALCOLM, J.:

I concur with the opinion of Mr. Justice Ostrand. Judgment should be affirmed.

JOHNS, J.:

I concur in this dissent.

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