6 Phil. 55

[G.R. No. 2400. April 03, 1906]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. HOMER E. GRAFTON, DEFENDANT AND APPELLANT.

D E C I S I O N

TRACEY, J.:

The defendant, charged with the crime of murder (*asesinato*), was convicted of homicide and sentenced to a term of imprisonment of twelve years and one day. He was a private in the United States Army, and when on guard at a military reservation at Camp Jossman, Guimaras, shot and killed two Filipinos, Florentino Castro and Felix Villanueva. For this offense he was tried by court-martial and acquitted, but thereafter was prosecuted by the people in the present action for the death of Felix Villanueva.

The first inquiry is, Was the shooting justified? It occurred on Sunday afternoon, July 24, 1904, between 2 and 3 o'clock; the deceased were both employed as boatmen in the united States quartermaster's department and were at the time in a road used as a public thoroughfare which the sentry was patrolling.

The defendant's testimony is as follows:

> "I was at the east end of my post about starting to the west post. I arrived at about half way between Lieutenant Harrell's quarters and the storehouse. Two natives came on my post about half way between the storehouse and the coal pile on the left. They had climbed over the stone wall and passed over my post. They advanced directly toward my post. When I arrived at the corner of the storehouse they were about the corner of the same storehouse at the other end. Just as I started to cross those stones, one of the natives reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife

> under his arm from my view. Upon seeing that, I looked back toward the building on the right of the road coming toward the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point toward me and made a rush at me. At the same time the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the. magazine, and fired at him. The other native jumped back toward the quartermaster building. I loaded my rifle and fired at him. Immediately after firing at the second native I hallooed for the guard. As soon as I hallowed for the guard I looked in the direction the guard was coming from."

Of being interrogated by his counsel, he further testified that as the native approached him he had left his path immediately before the shooting and walked from 15 to 18 feet away toward the southerly storehouse. Upon cross-examination he testified, putting his testimony into narrative form:

> "Florentino was running when I shot him and was distant from me when I fired about four paces; he dropped practically right where I shot him; the other man followed right behind him on the run; I don't know exactly where he was when I shot him, but the distance was about [indicating about 35 feet]. He was not coming toward me when I fired; he jumped back toward the quartermaster building before I fired; he had no weapon that I Saw; he was crouching; there was an interval between the two shots, time to load my magazine; there had to be a little space of time to work the magazine; first he started running toward me, a little to the right and to the rear of the other man who was rushing upon me with a knife; he changed his attitude and started the other way when I fired the first shot; I did not see any weapon in his hand or on his person."

He further testified that on looking around he saw no other native than the two upon whom he fired; that he shot them because they were trying to do him injury; that he considered his life in danger; that he fired but two shots, and that neither of the natives moved from the spot where they fell prior to the arrival of Lieutenant Harrell, who came almost immediately after the shooting.

Lieutenant Harrell, the commanding officer of the defendant, who saw the bodies where

they fell, measured the distance and made a memorandum about forty-five minutes after the shooting, swore that the body of Florentino Castro lay 10½ feet from Private Grafton and that of Felix Villanueva 30 feet from Florentino; that the distance from the defendant to the wall where Felix Villanueva lay was 45 feet, and that the center of the two bullet holes in the wall above the body of Felix Villanueva were about 1½ inches apart.

On several points the defendant's testimony was disputed by Government witnesses, chiefly by two Filipino laborers employed in the quartermaster department at Guimaras, who swore that they saw the occurrence from the road near the coal pile; that the knife was carried by Felix, not by Florentino, and that he was trimming his nails with it; that he left the road only after the soldier pointed his rifle at him; that three shots were fired, two of them at Felix, who dropped first. The knife, which is before the court, is of the kind commonly carried by boatmen and is 10 inches long, including the handle. This testimony was contradicted by the position of the knife which lay between the sentry and Florentino and by the many military witnesses who united in saying that they heard only two shots. As to the number of shots, it is supported not only by a thii«d witness but also by the singular fact that the two bullet holes in the storehouse wall, near enough together to be covered by the palm of a hand, were both immediately above the body of Felix, a result scarcely conceivable had one of them first passed through the body of Florentino where he is reported to have stood. As to the knife, they may have been in error in regard to the person carrying it, or it may have changed hands (as inferred by the learned trial judge) while the men came along the road. In other respects their testimony is not uncorroborated and if given full credence would lead to the conviction of the defendant. We shall, however, for the purpose of this judgment, accept the defendant's version of the facts.

A soldier guarding the property of the Government and the lives of his comrades can not be held to a too rigid accountability if he acts in the honest exercise of his judgment and with reasonable regard to human life. The defendant was proved to be a man of good character, of intelligence, and of sound judgment. This shooting occurred in the time of peace; there was no insurrection or disorder; the day was Sunday; the movements of the natives, not unusual on that day of the week, had aroused the suspicion of the defendant, who, being a newcomer, was unfamiliar with them and he reported them to his superior officer; this had worked upon his fears and nerves. He had some time before seen the bodies of some soldiers who had been surprised and killed, and the remembrance of that scene helped to unfit him to judge calmly the events before him. In these circumstances his leaving the path in order to avoid these natives was an act of prudence, and when the first native, Florentino Castro, holding a knife in his hand, approached the sentry, it was allowable for him to

anticipate an attack and to defend himself as he did. This may be conceded, even though we do not accept the defendant's statement that the native was making a rush upon him or pointing the knife at him, particulars in which he is apparently contradicted by the probabilities of the case, as well as by the native witnesses. In any case Florentino must have known that in going out of'his way to approach an armed sentry on duty, whether in threat or in sport, he was taking his risk, and the sentry can not be punished for acting upon his own construction of that movement.

It is not, however, for the killing of this native that he was tried, but for that of Felix Villanueva, who was following his comrade. The defendant's own testimony makes it plain that the interval between the shots was long enough not only to enable him to throw a new cartridge from the magazine of his rifle into the barrel and to suffer Felix to reverse his career and run back a distance of about 25 feet and crouch down, but also to permit the defendant to observe these things.

In our judgment the observation by the defendant that the native, instead of advancing upon him was fleeing from him and was protecting himself in a crouching attitude against the wall, was sufficient to apprise him that there was no danger and to deprive him of any justification for the shooting. The sacredness of Government property or of the life of the soldier is not greater than that of the life of a citizen, and a sentry with a loaded rifle in his hand, in the full possession of his senses, is bound to use reasonable judgment, and is accountable for human life taken by him without the justification of immediate defense of himself or of his charge. The great trust conferred upon him is the measure of his high responsibility and he may not act without forethought in the heat of strife. This soldier, observing that Felix had fled from him and had reached a point where flight was no longer possible, should have been conscious that he was in no bodily danger and he should not have fired the second shot. The defendant sets up several defenses under the law, the first being the defense of twice in jeopardy. Immediately after the shooting and before the death of Florentino Castro, the civil justice, when seeking to take his dying statement, was warned by the officer in command "to keep out of it;" that he was on a military reservation and he would have to leave the things to the officer, and if he did not Tie would be put off or into the guardhouse. Later on, however, before holding the court-martial, the department commander offered to submit the case to the Court of First Instance of the district. It does hot appear what action the judge of that court took thereon.

The court-martial proceeded and was terminated by the acquittal of the accused, and that acquittal is pleaded in bar.

Applying to these Islands the principle of the fiftlj. amendment to the Constitution of the United States, Congress enacted on July 1, 1902, the Philippine bill, which provides:

> "And no person for the same offense shall twice be put in jeopardy of punishment." (Sec. 5.)

In the Colley case,[1] December 12, 1903 and the Tubig case,[2] January 23, 1904, this court has decided that trial by United ,States Army court-martial in time of war or insurrection is a bar to an after prosecution by this Government for the same offense, holding that the qualification of the doctrine of jeopardy found in the dual sovereignty of the several States and of the General Government has no place here, inasmuch as both Governments, civil and military, derive their being and powers from the one sovereign—the United States. In these decisions, however, the doctrine is expressly limited to courts-martial held in time of war. Does it apply to those held in time of peace? The matter is governed by the sixty-second article of war, which reads as follows:

> "ART. 62. All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It differs from article 58 applying to cases of war, which expressly punishes murder and under which the jurisdiction of these tribunals has' been held to be exclusive. The construction of the sixty-second article has not been settled. It has been contended on the one hand that the constitutional provision in aid of liberty and for the security of the citizen should be given the broadest construction and that no prosecution should be twice had by the same sovereign for the same offense; that having a right to select the tribunal, his selection should be final and he should abide by the result, and it is argued that this fundamental principle will be nullified if cumulative proceedings are allowed. In favor of this construction stand the provisions of the fifty-ninth article of war, directing that an officer or soldier accused of a crime punishable by the laws of the land shall be turned over upon application to a civil magistrate.

It has been said by a text writer on the authority of cases which he cites:

> "If the court in which the defendant was formerly prosecuted was legally constituted and had jurisdiction, it makes no difference what court it was. The former jeopardy will bar a subsequent prosecution by the same sovereign in any tribunal whatever.
>
> "Where two separate courts of the same sovereign have concurrent jurisdiction of the same offense, the one which first rightfully assumes jurisdiction acquires control to the exclusion of the other." (Clark's Criminal Procedure, 388.)

The circumstance that the trial by the civil authorities was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory; The identity of the offenses is determined not by their grade but by their nature. One crime may be a constituent part of the other. The criterion is, does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of double jeopardy.

On the Other hand, the great preponderance of text writers of judicial dicta and the reported opinions of Attorneys-General of the United States concur in regarding the same criminal act in its relation to the civil law and to the military law as constituting two distinct offenses,, the one being contrary to a criminal statute and the' other to military regulations, and therefore a mere breach of military discipline. It is urged that this construction is required both in the interest of civil law and military discipline, neither of which necessarily interferes with the other. In this view, the military sentence is not the punishment of a civil crime but only the enforcement of military order.

In the case of United States vs. Clark (31 Fed. Rep., 710) an escaping prisoner, who was a soldier, was shot upon a military reservation in time of peace. The military court of inquiry had acquitted the defendant of blame. Justice Brown, presiding in the circuit, directed the discharge of the prisoner on the merits, but in reaching his conclusion refusing to be bound by the holding of the military court, said:

> "If the civil courts have jurisdiction of murder, notwithstanding the concurrent

> jurisdiction by court-martial of military offenses, it follows logically that the proceedings in one can not be pleaded as a bar to proceedings in the other, and if the finding of such court should conflict with the well-recognized principle of civil law, I should be compelled to disregard it."

In Cashiels' Case (Fed. Cases, No. 14744) the district judge appears to have been of the same opinion.

In *Ex parte* Mason (105 U. S., 699) the Supreme Court, considering the jurisdiction of a court-martial to try a soldier who when on duty had assaulted a citizen prisoner, waived this question, saying:

> "Whether after trial by court-martial he can again be tried in the civil courts is a question we need not now consider."

Thus the question is left open by that tribunal. We favor the construction, long acted upon by both military and civil courts, that conviction of a civil crime does not bar military punishment for the same act in its character as a breach of discipline, that the rule applies conversely, and that trial in neither jurisdiction is a bar to proceedings in the other. The defense of double jeopardy is therefore overruled.

The defendant sets up as additional defenses that the Insular courts had no jurisdiction for the reason that the offense was committed upon a military reservation of the United States; that having been committed by a soldier of the United Staten in the performance of his duty, it was not cognizable by the said courts, which can not be regarded as "United States courts;" and that the right of trial by jury, while denied to American citizens voluntarily in these Islands, is preserved to soldiers coming here under orders. We do not consider the discussion of these points necessary for the reason that they appear to be judically settled.

The sentence of the lower court is hereby affirmed. So ordered.

Arellano, C. J., Torres, and *Mapa, JJ.,* concur.

DISSENTING

WILLARD, J., with whom concurs **JOHNSON** and **CARSON, JJ.:**

The sentry voluntarily left the path beside the road to avoid a meeting with the two men, Castro and Villanueva. There was no occasion for their leaving the path and advancing toward him. That Castro did this with an open knife in his hand is conclusively proved by the fact that the knife and his body were found in the middle of the road. As to him the case is brought fully within the provisions of article 8, paragraph 4, of the Penal Cod.e, and the sentry is relieved from responsibility for his death.

That Villanueva participated in the wrongful aggression must, I think, be accepted as true. As to him two of the requisites of article 8, paragraph 4, are proved, viz, an unlawful aggression and the absence of previous provocation. The question is whether the third requisite was also proved, viz, reasonable necessity for the means employed to repel the aggression.

The time elapsing between the firing of the first and second shots does not appear, but it seems to me from the testimony of Orafton quoted in the opinion that it could not in any event have exceeded five seconds. Looking at the case now, after a lapse of nearly two years, we can see that the killing of Villanueva was not necessary, and that Graf ton committed an error of judgment in firing the second shot; but the case must be determined not by the way it now presents itself to us, but as it presented itself to Grafton, upon whom an unlawful aggression was being made by the two men, acting together In repelling the aggression he performed two acts within five seconds of each other. Relieved from responsibility for the first act, to hold him responsible for the second is to require of him the same serenity of mind in the excitement and stress of action as in the repose of meditation and reflection. In the case of the United States vs. Juan Salandanan (1 Phil. Rep,, 478) this court said;

> "We can not require a man who finds himself so forcibly and persistently attacked as was the accused to retain the presence of mind necessary to pick and choose, and employ some other less violent means, more especially when we remember the natural rapidity witji which the defense must necessarily be made if it is to produce the effect of repelling the aggressor."

See also the case of the United States vs. Bernardo Patala (2 Phil. Rep., 752).

We think that the judgment should be reversed and the defendant acquitted.

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[1] 3 Phil. Rep., 58.

[2] 3 Phil. Rep., 244.

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