

5 Phil. 464

[G.R. No. 2453. December 28, 1905]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. INOCENTES ANDRADA,
DEFENDANT AND APPELLANT.**

D E C I S I O N

JOHNSON, J.:

This defendant was charged in the Court of First Instance of the Province of Capiz with the crime of frustrated homicide. After a consideration of the evidence adduced during the trial in the court below, the judge of the inferior court found the defendant guilty of discharge of firearms, punishable under article 408 of the Penal Code, and sentenced him to be imprisoned for a period of eight months of *presidio correctional* and to pay the costs. From this sentence the defendant appealed to this court.

The defendant claims that the inferior court committed an error in convicting him of the crime of discharge of firearms under a complaint in which he was charged with the crime of frustrated homicide, claiming that the offense of which he was convicted is not necessarily included in the charge in the complaint.

Section 29 of General Orders, No. 58, provides that—

“The court may find the defendant guilty of any offense or of any frustrated or attempted offense the commission of which is necessarily included in the charge in the complaint or information.”

An examination of the complaint is necessary, therefore, for the purpose of ascertaining whether the crime of discharge of firearms is

necessarily included in the facts set out in said complaint. The facts contained in the complaint presented against the defendant are as follows:

“Que en la noche del dia 11 de Noviembre del ano 1904 estando Eutiquio Andrada en su casa situada en el barrio de Guibungan-Dacu del municipio de Panay, Capiz, I. F., hablando con Iniego Andrada delante de una mesa, se presente el acusado Inocentes Andrada en la puerta de la casa muy cerca del sitio donde aquellos estaban hablando y disparo un tiro de revolver contra el primero o sea contra Eutiquio Andrada, pasando el proyectil en medio de ambos, con infraccion de la ley.”

A description of the offense of discharge of firearms, in the Penal Code is found in article 408, and is as follows:

“El acto de disparar un arma de fuego contra cualquiera persona sera castigado con la pena de prision correccional en sus grados minimo y medio, si no hubieren concurrido en el hecho todas las circunstancias necesarias para constituir frustrado o tentativa de parricidio, asesinato, homicidio o cualquier otro delito a que este” senalada una pena superior por alguno de los articulos de este Codigo.”

A comparison of the facts set out in the complaint with the facts constituting the offense in said article 408 shows clearly that the crime described in the complaint is included in the offense described in article 408; therefore, our conclusion is that while the defendant was accused of frustrated homicide, the offense of which he was convicted is necessarily included in the complaint.

The evidence discloses the fact that Eutiquio Andrada, the person at whom the defendant discharged his revolver, was a brother of the accused. This fact must be taken into consideration as an aggravating circumstance in accordance with paragraph 1 of article 10 of the Penal

Code.

Article 408 of the Penal Code provides that the punishment shall be *prision correccional* in its minimum and medium degrees, etc. The penalty included within these two degrees is one year eight months and twenty-one days to two years eleven months and ten days. There being one aggravating circumstance and no extenuating circumstances, the defendant must be punished in the maximum degree. Therefore it is the judgment of this court that the sentence of the inferior court be modified and that the defendant be imprisoned for a period of two years eleven months and ten days and to pay the costs. So ordered.

Arellano C. J., Mapa, Carson, and Willard, JJ., concur.

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