

[G.R. No. 1102. May 06, 1903]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. JOSE TENGCO,
DEFENDANT AND APPELLANT.**

D E C I S I O N

TORRES, J.:

On the morning of August 7, 1902, the municipal policemen Antonio Mariano, Guillermo Cabrera, Agapito Lara, and Jose Tengco were returning to Arayat from the town of Concepcion, Tarlac. They had with them Toribio Macapinlac, whom they had arrested in Concepcion on the charge of stealing a carabao belonging to Vicente Mangune. In crossing the estero at Talabangca the policeman Jose Tengco struck Macapinlac, who was at that time tied elbow to elbow, two blows with the butt of his gun for having refused to confess that he was guilty of the theft. The blows were received on the abdomen and on the back, and as a result thereof, in less than half an hour, Toribio Macapinlac fell to the ground, and shortly after died in consequence of internal hemorrhages and the rupture of the spleen, as appeared in the examination held by a physician who was a member of the board of health of Arayat,

The facts stated constitute the crime of murder, defined and punished in article 403 of the Penal Code. The deceased was struck with the butt of a gun, and, in consequence of the blow so received, he died in less than half an hour, owing to injuries received by the spleen or some other vital organ. At the time the blow was struck the deceased was unable to defend himself or ward off the attack, and, although he was not tied for the purpose of killing him, but because he was being conveyed as a prisoner charged with theft, it is unquestionable that his aggressor acted with safety to himself, employing means which were conducive to the accomplishment of his purpose without any risk arising from an attempt at self-defense. Therefore the attack must be regarded as a treacherous one (*alevosia*), which circumstance converts the violent death of the deceased into murder and

demands a heavier penalty.

The defendant, Jose Tengco, pleaded not guilty and testified as a witness in his own behalf. He stated that he had struck the deceased, Toribio Macapinlac, two blows with the butt of the gun he was carrying because Macapinlac had lied, although he alleged that he had struck the deceased by order of Corpl. Antonio Mariano.

This allegation, denied by the corporal, and which was. apparently made by the defense in the belief that it exempted the defendant from responsibility, has not been proven in the trial. Even if it had been; in order that the person who actually performs the act may be exempt from criminal liability it is indispensable that the order be lawful, and the act done or ordered to be done must also be lawful. Under these conditions obedience is due. Without these conditions—that, is, when the order is unlawful or the act ordered to be done is unlawful—no obedience is due, for over and above the superior who orders the execution of such an unlawful act is the law itself, which prohibits the commission of any act contrary to its precepts. Therefore before the penal law the accused can not be regarded as exempt from liability.

Apart from his explicit confession, the record contains sufficient oral evidence to fully convince the mind of the guilt of the defendant, who attacked the deceased in the presence of witnesses whose testimony supports the charge.

In the commission of the crime we must consider and apply mitigating circumstance No. 3 of article 9, and also the mitigating circumstance of article 11 of the Penal Code, inasmuch as the accused, owing to his nativity and ignorance, erroneously believed that he had a right to punish the deceased for lying. In so doing it is unquestionable that he had no intention of killing him, but simply of punishing him by beating him with a gun—an unlawful act The aggravating circumstance No. 11 of article 10 of the Penal Code can not be applied, as it was not necessary for the accused, Tengco, to have availed himself of his capacity as a member of the municipal police in order to ill treat the deceased, Toribio Macapinlac.

Upon these considerations, and finding the existence in a marked degree of the two mitigating circumstances referred to, without the concurrence of any aggravating circumstance, we must apply the provisions of article 81, paragraph 5, of the Penal Code, imposing upon the defendant the penalty immediately inferior to that corresponding to the crime of murder, as designated in article 403, in its inedium grade, to wit, the penalty of *presidio mayor* in its maximum degree to cadena temporal in its minimum and medium

degrees.

With respect to the motion for a new trial, made and overruled in the court below and again brought forward in the appellate court, we regard it as unsustainable, as it does not fall within section 42 of General Orders, No. 58, it not having been alleged that it was impossible to introduce the evidence¹ now offered on account of some sufficient reason, or that a favorable result of the evidence would be of notorious influence upon the defense of the accused. Furthermore, the motion is not supported by the affidavits of the witnesses by whose testimony it is proposed to introduce new evidence of the defendant's innocence.

We consider, therefore, that the decision of the court below overruling the said motion for a new trial was correct, upon the grounds therein stated. As we have already said, even if it were proven that the accused ill treated the deceased by order of a third person, it can not be considered that, he acted in accordance with the obedience due to a superior, because the act was unlawful; nor could the accused allege that he had acted in the performance of a duty or in the lawful exercise of a right, inasmuch as he had no right to beat Toribio Macapinlac with the butt of his gun without reason, and upon a futile pretext, to such an extent as to deprive him of life.

For the reasons stated we are of the opinion that the judgment appealed must be reversed and the accused, Jose Tengco, condemned to the penalty of fourteen years of *cadena temporal*, the medium period of the penalty immediately inferior to that prescribed by article 403, together with the accessory penalties of civil interdiction during the period of the penalty and absolute, perpetual disqualification, and subjection to the vigilance of the authorities through his life, and to the payment of 1,000 Mexican pesos to the heirs of the deceased, Toribio Macapinlac, and to the payment of the costs of both instances. So ordered.

Arellano, C. J., Cooper, Willard, Mapa, and Ladd, JJ., concur.

McDonough, J., did not sit in this case.

