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[G.R. No. 1532. February 23, 1904]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. CASIMIRO GASAL,
DEFENDANT AND APPELLANT.**

D E C I S I O N

TORRES, J.:

On July 1, 1903, the deputy provincial fiscal of the Island of Cebu filed an information in the Court of First Instance of that province, amending a former information, accusing Casimiro Gasal of the crime of homicide, in that on the 16th of May, 1903, between 9 and 10 o'clock at night, in the place called Nangca of the town of Consolacion, without justification therefor, he threw stones at Andres Tiro, striking him in the forehead and felling him to the ground, after which Gasal threw another stone which struck Andres in the region of the left ear, causing his death then and there in consequence of the injuries so inflicted, contrary to the statute in such case made and provided.

The court, finding that the crime had been committed and that the defendant was guilty thereof, with certain mitigating and aggravating circumstances enumerated in the decision, sentenced the defendant to the penalty of twelve years and one day of *reclusion temporal* at hard labor, with the accessories mentioned in article 61 of the Penal Code, to pay an indemnity of 1,000 Mexican pesos to the heirs of the deceased, and to pay the costs, and in case of insolvency to subsidiary imprisonment in accordance with the provisions of article 50 of the said code.

The evidence in this case shows that one day in the month of May, 1903, on or about the 16th of the month, about 9 p. m., while several men were gambling in a field in the place called Nangca, in the municipality of Consolacion, Island of Cebu, two of their number, Pio Limabug and Bernardo Vacunador, got into a

quarrel; that upon this the game stopped, there was a disturbance, and some of the players left the gambling place; that upon this Andres Tiro demanded of Casimiro Gasal the payment of four pennies which he had won from the latter in the game, and Gasal, becoming enraged, blew out the candle, picked up a stone, and threw it at Andres, striking him on the forehead and felling him to the ground; that Andres sat up and was in the act of rising when Gasal threw another stone at him at close range, striking Andres above the ear; that Andres fell to the ground unconscious, whereupon the assailant walked away; that Eleno Herrera and Felix Tiro, who witnessed the assault, then picked up the wounded man and took him to his house, where he died three days later without having regained consciousness.

Besides the two witnesses above cited, the occurrence was also witnessed by Pio Limabug and Bernardo Vacunador, who testified to the facts above related, stating that the assault was committed in an open field; that the moon was shining at the time; that before the assault Casimiro Gasal blew out the sperm candle which he held. Limabug testified that when Andres was hit by the first stone he turned around and fell to the ground. The witness Vacunador did not see that Limabug, with whom he was quarreling, carried a dagger. Three witnesses testified that while they were all confined in the municipal building, during the preliminary investigation, the defendant, Gasal, entreated them not to say that he had been the one who threw the stones at the deceased; that the witness Herrera, a relative of the defendant, replied that he would have to testify against him because he would have to tell the truth.

It is plainly proven that Andres Tiro suffered a violent death as a consequence of two stones thrown at him on the night in question in a place where a number of people had been gambling. This fact constitutes the crime of homicide, comprised in article 404 of the Penal Code, none of the qualifying circumstances enumerated in article 403, which defines the crime of murder, having been present in the commission of the offense.

Notwithstanding the fact that the defendant pleaded not guilty to the crime charged, with all the proof is sufficient to show his guilt as the sole author by direct participation and to convict him of the crime of assaulting the deceased by stoning him, as a result of which he was so seriously injured that he was unconscious from that time until his death, which took place on the third

day. It follows, therefore, that the defendant is guilty of the crime of homicide.

The denials and exculpatory allegations of the accused, as well as the testimony of the witnesses for the defense, are insufficient to overcome the result of the evidence of the prosecution against him. It has not been shown that anyone else was the slayer of the deceased, or that Gasal left the scene of the occurrence before the assault was committed. It may be true that the defendant was found in his house that night, and that Dionisio Maglasan saw him running behind him, but it must have been after he wounded the deceased at the scene of the occurrence. If in addition to this we take into consideration the contradictory statements of the accused as well as those in the testimony of the witnesses Marcelina Tolo and Matea Gasal, and that in spite of their testimony and that of the witness Maglasan, the four witnesses for the prosecution denied that a shower of stones had fallen on the players, the guilt of the defendant as author of this crime of homicide cannot be doubted.

In the commission of this crime the only mitigating circumstance to be considered is that established in paragraph 6, article 9 of the code, it having been proven by the testimony of the witnesses that the defendant Gasal was drunk that night, for which reason he must have attacked the deceased while in an intoxicated condition, and in the absence of proof to the contrary it must be presumed that that vice was not habitual with him.

The aggravating circumstances of paragraphs 6 and 20 of article 10 of the code, and the mitigating circumstances of paragraphs 3 and 8 of article 9 of the same, applied in the sentence appealed from must be rejected, inasmuch as the insistent and repeated assault made upon so light a provocation shows that it was the defendant's fixed purpose to kill the deceased. The confusion and tumult, if any—and as to this there is no proof—do not constitute a circumstance analogous to the others of the same section. The fact that a second stone was thrown at the "deceased just as he attempted to get up does not show that an attempt was made to augment unnecessarily the injuries, already inflicted upon the deceased, but rather determination of the assailant to kill his adversary. The ages of both the accused and the deceased being approximately the same, it does not appear that the accused, Gasal, failed to regard the respect due Tiro on account of his age, or that the accused abused the advantage

of youth and strength over the debility of an old man. Consequently, there being only one mitigating circumstance and no aggravating circumstances, the penalty imposed by the court below is in conformity with the law.

For the reasons stated, with the elimination of the condemnation to hard labor and the subsidiary penalties imposed by the decision of the court below, and the addition of the accessories enumerated in article 59 of the code, we are of the opinion that the decision of the trial judge, by which Casimiro Gasal is condemned to twelve years and one day of *reclusion temporal* must be affirmed, with the costs of this instance against the appellant Judgment will be entered accordingly and the case remanded for its execution, with a certified copy of this opinion.

Arellano, C. J., Cooper, Willard, Mapa, McDonough, and Johnson, JJ., concur.