

[ G. R. No. 935. December 05, 1903 ]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. MARCELO ALVAREZ, DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**TORRES, J.:**

In the year 1901, Frank Clark, a sergeant of volunteers in the United States Army in these Islands, was taken prisoner by the insurgents in the town of San Jose, Province of Batangas, and subsequently sent to Calapan, the capital of the Province of Mindoro. Later, about the month of June of that year, he was taken to the town of Abra de Hog, in the same Province of Mindoro, in charge of the defendant, Marcelo Alvarez, who was at that time a commissary captain of the insurgent forces under Maj. Deogracias Leyco, commander of the military zone of Abra de Hog. The prisoner remained in Alvarez's house some three weeks. During this period several persons heard him complain of the illtreatment which he received. The witness Jose Ramos testified that Clark told him once that the defendant treated him like a servant and made him work as such. Clark also stated to another witness, Rosalio Miciano, at that time municipal president of Abra de Hog, that the defendant made him hull rice and cut wood for the kitchen.

This circumstance, which, by the way, shows the ungenerous sentiment entertained by the defendant for the prisoner, Clark, appears wholly probable in view of the testimony of Deogracias Leyco to the effect that the accused, Alvarez, was a man of a somewhat inhuman and brutal character.

After Marcelo Alvarez, a number of other persons successively had charge of Clark. The last one who had the custody of him was Saturnino Gandula, a resident of a place called Songson, Avithin the township of Abra de Hog. This was between October and November, 1901. Gandula testified that Clark was delivered to him by two insurgent soldiers whom he did not know, and who were acting under orders, according to their statement, of the

defendant. Alvarez. It appears to be a fact, however, for Deogracias Leyco so testified, that it was the latter who gave the order and not Alvarez.

Be this as it may, however, it is of no importance with respect to the decision of this case. It is a fact that after that time the prisoner, Clark, was very ill. One Enrique Richter testified that he saw him in October, 1901, and that he was then very sick. Deogracias Leyco also testified that Clark's illness was one of the reasons which induced Mr to send the prisoner to Songson in charge of Saturnino Gandula. The latter and his wife, Norberta de la Coresta, testified that during the thirteen days they had Clark in their house not a day passed in which he was not attacked with fever and ague.

Such was Clark's condition of health at the time he was killed. Saturnino Gandula related the circumstance of his killing. He stated that at about 4 o'clock on the afternoon of the thirteenth day of Clark's stay in the house he can not remember the date, but asserts that it was the day following that on which a fight had occurred between the Government forces and the insurgents at the town of Abra de Hog, which according to the evidence in the record, occurred on November 7, 1901 the defendant, Alvarez, came to his house, armed with a gun and accompanied by a servant of his, a Visayan named Eusebio. Without entering the house, the defendant called to Clark, saying. "Come here, Frank." When Clark heard this, he left the house without saying anything and started to walk away with Alvarez, Clark walked along ahead leaning on Eusebio, on account of his weakness, as he had just suffered an attack of fever. Alvarez walked behind. They had covered scarcely 20 yards when the witness heard a shot and a few moments afterward Alvarez called him by name three times. The witness thereupon went to the place where Alvarez was and there found Clark's dead body stretched out face upward on the ground. The witness states that he had a bullet wound in the left side just below the stomach and that Alvarez was standing a very short distance from the body with his gun in his hand, as if he had just discharged it. The man Eusebio also stood near, at the right of Alvarez. The latter ordered the witness to dig a grave and bury Clark's body, which he did. After this they all went away, leaving the witness there alone. The latter states that he then put a wooden cross over the grave and fenced it in with bamboo pickets to protect it from animals.

Gandula's wife, Norberta de la Coresta, corroborates the testimony of her husband in every particular. She saw the defendant arrive, armed with a gun and accompanied by Eusebio, and saw him stop in front of the house. She heard Alvarez call to Clark to come out and saw the latter leave the house and go with the defendant. A few minutes later she heard the discharge of a firearm and then the voice of the accused calling to her husband,

and finally she saw the latter leave the house and go to answer Alvarez's summons. This witness adds that very shortly after her husband returned to the house to get a mat, saying that they had killed Clark and that Alvarez had told him to bury the body. On having returned to the house again some two hours afterwards, her husband told her that he had buried Clark, and on the following day, she saw the grave, her husband pointing it out to her.

The defense draws attention to the fact that while Saturnino Gandula testified that when Clark left his house he went along ahead, leaning on Eusebio, and that Alvarez walked behind, this witness' wife, Norberta de la Coresta, testified that Eusebio followed Alvarez and that Clark walked along in front of both of them; and furthermore that, according to the latter, her husband returned to the house to get a mat before burying Clark, while Gandula testified that he returned to the house after having buried the deceased. These differences in the opinion of the attorney for the defense constitute such serious contradictions as to make the witnesses mentioned unworthy of credence.

As a matter of fact, no such contradictions exist; but if there were such contradictions they are matters of mere detail and do not affect the essential facts testified to by these witnesses. Neither Gandula nor his wife testified that as they walked along the accused and his companions constantly maintained the same relative order as that expressed in their respective statements. Norberta de la Coresta refers to the time that they left her house. It is probable that, since Clark could not walk alone on account of his weakness, it became necessary for Eusebio to assist him. They doubtless subsequently continued to walk along in this way and it was probably then that Gandula saw them. At all events it does not appear that both witnesses refer to the same moment.

With respect to the other objection, it is true that Gandula testified that after burying Clark he returned to his house, but he does not state that he did not return to the house before burying the body, as his wife testified he did. Far from this, he gives us to understand, on the contrary, that his wife's statement is true, because he says he wrapped Clark's body up in a mat before burying it. Of necessity lie must have returned to the house to get this mat, as lie did not take it with him when he went the first time.

The testimony of these witnesses with respect to the violent killing of Clark is corroborated by the evidence of Capt. J. B. Shaw and Lieut. W. Weeks, of the Thirtieth United States Infantry. These testified that they witnessed the exhumation of the body of Frank Clark in March, 1902, and saw that the shirt which he wore had a hole in it on the left

side toward the lower part of the abdomen, some 5 or 6 inches from the navel. They stated that the edges of the hole were black, as though they had been burned, and that the hole was of such a character that it appeared to have been caused by the discharge of a gun at a very short distance from the deceased. Captain Shaw further stated that the clothing on the body was stained with blood.

The defense states that the testimony of these witnesses is improbable, because when stating that the shirt was punctured they said nothing about the trousers and undershirt, which, according to their testimony, were still on the body, as well as the shirt. "It is impossible to believe," the counsel for the defense says, "owing to the situation of the wound, that the trousers and the undershirt could have failed to be in the same condition as the shirt." This remark has more subtlety than solidity in it. The witnesses said nothing about the trousers and the undershirt, because it was sufficient for the purpose of the investigation, so far as they were concerned, for them to testify as to the condition of the shirt. The interrogation addressed to Captain Shaw was as follows: "Did you observe whether or not the clothing showed any indication of having been pierced by a bullet?" The witness then testified to the circumstance which, in his judgment, constituted an indication of this fact that is, that there was a hole in the shirt, with the edges burned. This latter detail, and not the hole in itself, which could as well have been caused by a stabbing Aveapon or by any other cylindrical instrument capable of making a puncture like the hole observed, as by a bullet, was what indicated in the judgment of the witness that Clark had been shot and that the shot had been fired at short range. Otherwise there would not have been upon the clothing or body of the victim such marks as those left by shots fired point blank. It is possible and even probable that Clark's undershirt and trousers, although similarly punctured, did not show, at least in a manner so clear and noticeable to the witness, the indication of a powder burn. This would of course more directly affect the exterior than the under clothing. If this be so we have an explanation of the reason why neither this witness nor Lieutenant Weeks made any mention of these garments in answering the questions addressed to them. Furthermore, it may be that the witnesses thought that the mark found upon the shirt was sufficient proof of the matter concerning which the court was making inquiry, without referring to the other garments upon the body at the time it was exhumed. But however that may be, the reply given fully answered the question and is in our judgment entirely satisfactory.

The defendant attempted to refute all this when testifying as a witness in the case. He denied that he had a gun on or about the date in question. He also denied that he had attached to him at that time any servant, and finally denied that he had been in Songson on

the date mentioned. He alleged that he was sick with fever and ague and unable to leave his house, not only on the day on which Clark was supposed to have been killed but also for several days subsequent to and before that event.

However, the witnesses mentioned by him in his testimony have flatly contradicted him on every point. Pilar Jove, his stepdaughter, one of these witnesses, testified that the accused did have a gun at that time and also two servants, one of whom was called Eusebio. This corroborates the testimony of Saturnino Gandula and his wife upon these matters. The witness Doiia Jove also testified that the defendant was at that time in good health, and the same statement was made by the witness Deogracias Leyco, who was also referred to by the defendant in his testimony. Only two days after the engagement at Abra de Hog, which would of course be the day following that on which Clark was killed, Leyco found the defendant somewhat unwell, in consequence, he was informed by the latter's family, of having fallen off his horse. This, however, did not prevent the defendant from going with Leyco on the following day to a place called Calubia, several hours' journey from Balantoy, Avhere, according to the defendant's own testimony, he lived.

The facts related fully prove the guilt of the defendant. In their testimony Saturnino Gandula and Norberta de la Coresta, who were eyewitnesses to the commission of the crime, gave precise and detailed information as to its execution and designate the defendant as Clark's slayer. The marks found upon Clark's body by Officers Shaw and Weeks confirm the statements of the two witnesses above referred to as to the nature of the attack and the wound which caused the death of the deceased. The testimony of Pilar Jove, the stepdaughter of the defendant and a witness called by him, in disproving the false denials of the defendant has corroborated the fact testified to by Gandula and la Coresta and denied by the accused, to the effect that he did have a servant called Eusebio who accompanied him, and a gun which he used to kill Clark. Considering in connection with this the evident falsity of the alibi set up by the defendant as his sole defense, based upon a supposititious illness the existence of which the defendant not only failed to prove but which on the contrary appears to have been fully disproven, the whole constitutes evidence of so complete and conclusive a character as to leave no room for doubt that Frank Clark was killed by violence and that the defendant, Alvarez, was his slayer.

We must consider the presence of the circumstance of *alevosia* in the commission of the crime. At the time of the assault which cost him his life, Clark was in a condition of debility and prostration, the result of a long illness. His weakness must have been extreme, as, unaided he could not walk even the short distance of 20 yards, and was obliged to lean

upon some other person for support. Furthermore, he was absolutely unarmed and it was therefore impossible for him to defend himself against the attack made by the accused. This is especially true in view of the fact that he had no reason to expect or foresee such an attack, in the first place, because he had had no quarrel with the accused and no provocation had been given for such an attack, and in the second place because of the apparently friendly manner in which he was invited by the accused to leave the house and go with him. Under these circumstances the assailant could and did act with perfect safety to himself, absolutely free from any risk which might arise from an attempt at self-defense on the part of his victim, and this, in law, constitutes *alevosia*. Frank Clark, enfeebled as he was by his protracted ill health, was certainly unable to make any defense, more especially against an assault with a weapon such as that used by the defendant. The circumstance of *alevosia* qualifies the criminal act as murder under article 403 of the Penal Code, as the court below correctly held in the judgment now before us for review.

In addition to the qualifying circumstance of *alevosia* the judgment of the court below also finds present the generic circumstances of evident premeditation, abuse of superiority, and the commission of the crime in an uninhabited place. We can not concur in this view with respect to the first of these circumstances. The record contains no evidence showing that the defendant had, prior to the moment of its execution, resolved to commit the crime, nor is there proof that this resolution was the result of meditation, calculation, reflection, and persistence. Under the Penal Code these elements are necessary to constitute evident premeditation. With respect to the second generic circumstance, the presence of this can not be considered because the abuse of superiority was precisely one of the factors which made *alevosia* possible in this particular form. This circumstance, therefore, must be regarded as merged in the other and can not be considered separately. With the judge's finding as to the presence of the last of the three generic circumstances that is, the commission of the crime in an uninhabited place we can not concur because, although it is true that Saturnino Gandula apparently gives us to understand that the place where the crime was committed was a solitary and uninhabited spot, the contrary may be inferred from the testimony of Deogracias Leyco. The latter stated that Onofre Callos, Maria Callos, and Prudencia Magdumlan, also residents of Songson, knew about the delivery of Clark to Saturnino Gandula, which took place at that town, and that these people were, *according to his information, neighbors of Gandula*. Supposing that these persons were really neighbors of Saturnino Gandula, and the testimony of Leyco gives ground for such a belief, the place could not, strictly speaking, be termed uninhabited. We know that at least Gandula's house and those of the other persons

above mentioned were situated there. At all events, the evidence in the record is not so conclusive as to exclude doubt upon this point, and it is a rule of law that the defendant is entitled to the benefit of a reasonable doubt. Aggravating circumstances can be applied only when they are as fully proven as the crime itself. Without clear and evident proof of their presence the penalty fixed by the law for the punishment of the crime can not be increased.

As the generic aggravating circumstances found present by the court below do not exist and as there are no other generic aggravating circumstances to apply, and, on the other hand, there being no mitigating circumstances to consider in favor of the accused, he, therefore, as author of the crime of murder, must suffer the medium degree of the penalty prescribed for this crime by article 403 of the Penal Code that is, life imprisonment (*cadena perpetua*).

The defense has asked for a new trial upon the ground of newly discovered evidence, and has presented affidavits of Norberta de la Coresta, Eusebio Hernandez, and Onofre Magdumlan, in which it is stated or such is the tendency and purpose of the new evidence offered that Frank Clark died a natural death as a result of fever and ague, from which he had been suffering for some time.

These statements were refuted at the trial. The spots of blood and other indications of violence above mentioned, which were found on Clark's body when it was exhumed and to which credible witnesses have testified, constitute material and incontrovertible evidence that Clark met a violent death, as stated by the eyewitness Saturnino Gandula and as stated at the trial by the witness Norberta de la Coresta, whose testimony the defense now offers as newly discovered evidence. The evidence given at the trial can not be overcome by the affidavits mentioned, more especially when it is remembered that no testimony whatever is offered to show proof of the fact which the woman Coresta asserts to be the reason for her retraction that is, that one Lucas del Castillo threatened to kill her unless she would falsely testify in the trial against the defendant. There is a legal presumption that testimony given before a court is given freely and spontaneously, unless the contrary is proven. A careful study of the case leads us to the conclusion that the testimony of the new witnesses cited by the defendant would not affect the result.

For these reasons, a new trial is denied, since section 42 of General Orders, No. 58, provides that in order to authorize a new trial on the ground of newly discovered evidence the evidence offered must be material to the defense. This is not so with respect to the

evidence offered in this case.

We therefore convict the defendant, and condemn him to the penalty of life imprisonment (*cadena perpetua*) and its accessories and to the payment of an indemnity of 1,000 Insular pesos to the heirs of the deceased, reversing the judgment reviewed in so far as it imposes the death penalty, with the costs of this instance to the defendant.

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

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