

1 Phil. 575

[G.R. No. 960. December 19, 1902]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. BIBIANO CAPISONDA,
DEFENDANT AND APPELLANT.**

D E C I S I O N

COOPER, J.:

The defendant, Bibiano Capisonda, is charged with the crime of homicide punishable under article 404 of the Penal Code, he having killed Lucila Marasigan, a girl 15 years of age, by a shot from a gun. He was adjudged guilty by the lower courts and condemned to the punishment of fourteen years eight months and one day of *reclusion temporal* with the corresponding accessories and the costs of suit, and in case of insolvency to subsidiary imprisonment, and the right to indemnification was reserved to the family of the deceased, from which judgment he has appealed to this court.

It appears from the evidence in the case that on the 12th day of February last, at 8 o'clock at night, the defendant, who was then sergeant of police of the town of Gumaga, was standing in front of the municipal *presidencia*, which was the police quarters, when the deceased, Lucila Marasigan, being directly across the street in front of the presidencia was fired at by the defendant and was struck in the left shoulder, the wound producing almost instant death. He attempts to justify the act under paragraph 11, article 8, which exempts from criminal liability an officer who acts in the fulfillment of his duty.

The defendant testified in the case, and stated that he fired the shot under the following circumstances:

That an order had been given by the lieutenant of police that after 8 o'clock at night no person should be permitted on the streets, and that any person found after that hour should be given the order "halt" three times, and should such person refuse to obey the order he should be fired upon. He states that while standing with the sentinel at the place indicated

he saw at a distance of about 30 *varas* a person advancing in his direction; that he gave the word "halt" three times to which the reply "insurrecto" was made, and that not being able to distinguish the person who gave the reply he discharged his gun at the deceased.

Francisco Villapando, Emeterio Capito, and Juan Barreto, policemen of the city, who were present or near by at the time, testified in the case. They were comrades of the defendant, and apparently are not unfriendly toward him. Francisco Villapando testified to the fact of the shooting of the deceased by the defendant; that the deceased was at a distance of about seven steps at the time; that the deceased was in front of the house of her sister at which place the deceased lived, and was about to enter the house when the shooting occurred; that the shooting occurred at 8 o'clock at night, just as the clock was striking that hour; that there was a lamp in the house of the deceased which gave light to the particular place where the deceased was standing; that the light was sufficient for a person to be recognized by; that witness was ignorant as to the motive of the defendant in shooting the deceased. This witness stated that the order from the lieutenant of police was, that all persons found on the streets at 8.30 p. m. should be halted. He corroborates the defendant in the statement that the defendant gave the word "halt" three times, and afterwards fired, but does not know to whom the word "halt" was given because he was within the *presidencia*; that upon hearing the shot he went out and saw the defendant, and also saw the deceased stretched upon the ground; that he heard the word "insurrecto," but did not know who uttered this word. He testifies to having seen the deceased, Lucila, passing just before the shot was fired and recognized her clothed as a woman. He knows that the defendant was personally acquainted with the deceased; that deceased was well known in the town.

The witness Emeterio Capito testifies that the deceased was coming from a neighboring house to the place where she lived, opposite to where the defendant was standing; that when the deceased was in front of the defendant the defendant raised his gun and fired; that the deceased was about 6 *varas* distant from the defendant; that the shooting occurred at 8 o'clock; that there was a lamp whose light shone clearly in the streets at that time; that the deceased could have been recognized by the light; that he does not know the motive of the defendant for killing the deceased; that the defendant said nothing before the shooting, and that he heard the deceased say nothing; that when the shooting occurred the sentinel, whose name is Leon Hernandez, was standing guard with the defendant, and seized the defendant and carried him into the police quarters. He states that the defendant and the deceased were old acquaintances, but he does not know whether there was any enmity between them or not; that he did not hear the defendant give the word "halt." This witness testifies that the defendant was accustomed to drinking *whio*, and thinks that he was drunk

that night.

The witness Juan Barreto testifies that he knew the deceased for a number of years; that he was not present at the time of the shooting—he was just inside the police station in front of which the defendant was standing, and heard the shot; that Juan Robinson and Emilia Marasigan, sister of the deceased, hastened to the aid of the deceased; that the deceased was dead at the time he reached her; that defendant knew the deceased, and that she was well known in the town; that the deceased fell in front of her house; that there was a light in the house of the deceased, burning low; that he did not think it was sufficient to recognize a person by from the police station nor to distinguish a man from a woman; that a lamp was placed in the window of the store underneath the residence of the deceased to light the store; that the light shone both inside and outside. This witness testifies that the defendant gave the word “halt” three times; that on the night in question the *insurrectos* were not far from the town; that orders were given the police to halt all passers at 9 o’clock; he also testified that the defendant’s eyesight was bad.

The question in the case is whether the defendant was acting in the bona fide discharge of his duty as sergeant of police at the time of the killing, or whether the killing of the deceased was wrongfully and intentionally done.

The defendant, having admitted the killing, has assumed the task of establishing his defense, not that the burden of proof shifted in the case, but it was necessary for him to establish his defense to the satisfaction of the court.

A very material point in which the testimony of the defendant is contradicted is as to the hour of the night at which all persons were prohibited from appearing upon the streets. The defendant testifies that his orders were to halt all persons found on the streets at 8 o’clock. In this he is contradicted by all the witnesses in the case. Francisco Villapando, who was teniente of the police guard, testifies that the order was to prohibit walking after 8.30 p. m.

Juan Barreto testifies that the hour fixed was 9 p. m.

Emeterio Capito fixes the hour also at 9 p. m.

The deceased met her death precisely at 8 o’clock. The time is definitely fixed by one of the witnesses, who states that the bell of the church clock was just finishing the 8 o’clock stroke.

That the defendant should have halted the deceased an half hour before the time fixed for the halting of persons is sufficient to raise a very serious doubt as to the good faith of the defendant in shooting the deceased.

That the deceased when halted should have uttered the word "insurrecto," as the defendant testifies, is highly improbable. What motive could she have had in doing so? Besides, the defendant certainly ought to have been able to distinguish the voice of a girl of 15 years of age from that of a man.

One witness testifies that he heard the word "insurrecto" uttered before the shooting; another testifies that the word "insurrecto" was spoken after the shooting. It is quite probable that when the shot was fired some person near by supposed an *insurrecto* had approached from the fact that the shot was fired, and it was such person who uttered the word "insurrecto."

The statement of the accused that the deceased was standing in the dark and that he was not able to distinguish her is not borne out by the testimony.

The witness Villapando testified that there was a lamp in the house of the deceased, which gave light to the particular place where the deceased was standing, and that the light was sufficient to recognize a person by.

The witness Capito testified that the lamp shone clearly in the street, and that the defendant could have recognized the deceased by the light.

We think the testimony in the case is entirely sufficient to disprove the defense.

What the motive for the crime was, so far as appears from the record, must be left in mystery. But it is sufficient that the accused killed the deceased, and not having established his defense he must suffer the consequences which the law imposes for the taking of human life.

We wish to call the attention of the trial judges and the prosecuting attorneys to the fact that evidence taken upon a preliminary examination has no place in the record; that such testimony except in the cases mentioned in the statute is inadmissible upon the trial and can not be considered by this court when placed in the record.

The defendant, Bibiano Capisonda, is adjudged guilty of the crime of homicide as defined in article 404, and we hereby fix his punishment at seventeen years of *reclusion temporal*, with

the corresponding accessories and costs of suit, and further condemn him to the payment of 1,000 pesos indemnification to the heirs of the deceased.

Personal subsidiary liability on account of insolvency can not be imposed upon a person condemned to a penalty higher in the general scale than that of *presidio correccional*, and the judgment of the lower court was, in this respect, erroneous.

The judgment of the Court of First Instance, with the modification herein made, is affirmed. So ordered.

Arellano, C. J., Torres, Smith, Willard, Mapa, and Ladd, JJ., concur.
