1 Phil. 56

[G.R. No. 60. November 08, 1901]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. ISIDRO FERRER, DEFENDANT AND APPELLANT.

D E C I S I O N

MAPA, J.:

This action was commenced by virtue of the information of the prosecuting attorney accusing the defendant of having fired two shots from his revolver at Don Manuel Rojas, killing him instantly and wounding at the same time Don Anastasio Franco y Francisco, without causing his death, however. It was considered that both crimes were the result of a single act and that the attack was made with treachery (*alevosia*), and the information charged the compound crime of murder and grave assault (*lesiones graves*). The defendant pleaded not guilty.

It appears proved at the trial that on the morning of May 7,1900, the agents of the steamer *Don Jose*, which was anchored in the river in this city at the time, and of which the accused was captain, dismissed the latter from said position, ordering him to turn over command of the vessel to the first mate of the same. With or without cause the defendant attributed his dismissal to a difficulty that he had previously had with Rojas, who was the engineer of the same steamer, and he so stated to the employee of the agents who notified him of his discharge. This took place in the office of the said agents, and upon the return of the defendant to the steamer *Don Jose* there occurred on board of the same the act which is here prosecuted.

The accused fired two shots from a revolver—the first aimed at Rojas, who fell dead on the spot, and the second aimed at Anastasio Franco, who was standing near Rojas at that moment, causing the latter wounds which were healed in twenty-eight days. Thus Franco testifies positively, and his testimony is likewise confirmed by the defendant’s own witnesses. All of them saw the latter disputing angrily with the deceased; some say that he

had a revolver in his hand at that moment; others saw the revolver immediately after hearing the shots, and still others affirm that it was he who fired the said shots. These statements considered together produce the complete conviction that the accused was the author of the act complained of.

His very defense concedes the truth of the fact that he caused the death of Rojas, although he alleges that he did it in self-defense. The defense endeavored to establish that Rojas assaulted the accused with an iron instrument and that the latter found himself obliged to fire the revolver which he was carrying in order to repel the attack. Three witnesses were offered for this purpose. One of these affirms that he saw the deceased raise his hand to assault the defendant with an iron instrument, while the remaining two confine themselves to stating in vague and general terms that they saw the deceased in the attitude of assaulting the accused with said instrument, without defining the concrete fact of in what the attitude consisted. The remaining witnesses for the defense were not offered to prove this point and do not say a single word concerning any such attack.

The first witness is without doubt the most important for the purpose of the defense. This witness was a member of the crew of the steamer *Don Jose*, and says that he saw the attack made by the deceased, because at that moment he was passing by the scene of the occurrence in order to go to the bow of the steamer. If the witness was on the spot at the precise moment when the deceased attacked the defendant, and the latter fired the revolver for the express purpose of preventing the assault, as is alleged by the defense, it would be natural and logical that the said witness would likewise have witnessed the firing of the revolver, because both acts must have been simultaneous or at least must have succeeded each other without appreciable interval of time. If the act occurred in any other way, even though there had really been an attack, the alleged defensive action would not be fully justified in the eyes of the law. If any time intervened between the supposed attack of the deceased and the firing of the revolver by the defendant, the latter's actions would cease to have the true character of a real defense, which, in order to be legally sufficient, requires primarily and as an essential condition that the attack be immediately present. The witness could not observe the one and be ignorant of the other if a true act of self-defense is in question. The firing of the revolver would necessarily have been witnessed by him, as well as the attack which the defendant is supposed to have tried to stop thereby. In such event he would not be ignorant of the fact that the death of the victim was the result of the dispute which occurred between the latter and the accused. Yet the witness states that he is ignorant of all this, giving us to understand that he did not witness the death of Rojas nor the firing of the revolver which caused the same, although these things must have occurred

exactly at the moment when he found himself on the scene of the happening or very close thereto, if his testimony and the allegations of the defense be true. From another point of view his testimony can not serve in any way to establish the case of defense alleged by the prisoner, inasmuch as he does not know how the death of Rojas occurred, which is equivalent to saying that he is ignorant of the details and circumstances under which the act complained of took place.

The foregoing comments are applicable likewise in a certain way to the two witnesses who state that they saw the deceased in the attitude of attacking the defendant. They testify that in passing along the levee near which the steamer *Don Jose* was anchored and when they were some thirty yards distant therefrom, they saw Rojas in that attitude disputing hotly with the accused. They continued on their way and a few moments later heard two shots which seemed to them to proceed from the place where the former were disputing. One of the witnesses had walked ten paces when he heard the shots, the other could not estimate the space of time that had intervened between the two periods. Both had learned later only by hearsay from other persons that the defendant had killed Rojas. If examined carefully it appears from the testimony of these witnesses that they did not witness the occurrence in question but merely a detail which might be called preliminary thereto. They did not witness the defendant's act of discharging the revolver, neither did they witness the death of Rojas; therefore their testimony even considered as wholly veracious does not and can not avail to determine the manner in which occurred that fact which is the most important and essential in the trial. Although they had actually seen the deceased in the attitude of attacking the accused, their testimony would not serve the purpose of the defense since it does not necessarily imply the act which the attitude threatened. As a general rule the *mere attitude* of attack does not itself constitute a real attack, that conclusive and positive aggression which justifies the defense of one's person. In the present case if the said attitude had been a real attack and the defendant had made use of his revolver necessarily to prevent or repel the same, this defensive act must needs have occurred at the very moment at which the supposed attack was made, in which case the witnesses who saw the attack would not have failed to see the use of the revolver, nor would there have intervened between the one and the other the interval of time which they give to understand in their respective statements.

In view of the foregoing considerations we hold the testimony of the said witnesses insufficient to prove the fact of the attack attributed to the deceased. We are confirmed in this view by the testimony of the wounded man, Anastasio Franco, who was standing by the deceased when the occurrence in question took place. He gives positive assurance that the deceased had not committed any act of aggression when he was attacked by the defendant.

It is likewise noteworthy that none of the remaining witnesses offered by the defendant say a single word concerning any such attack. One of them saw the act of the defendant's firing upon the deceased; he describes the relative position occupied by the one and the other, marks the distance which separated the two, and finally he saw Rojas fall wounded by the shot. This witness seems to have attentively observed the principal details of the occurrence and nevertheless he makes no mention of that supposed attack. If the latter actually existed it is not probable that the witness, placed in such circumstances, would have failed to see it, and it is even less probable that, having seen it, he would have omitted to mention the same in his testimony, especially as a witness for the defendant.

Inasmuch as the said attack is not proved it is not necessary to enter upon an examination of the remaining requisites which the Penal Code establishes as necessary for the exemption from responsibility on the ground of self-defense. Since the unlawful attack is the basis and foundation of this defense, when the same does not exist it is not possible to imagine a case of defense in the true meaning of the law.

The doctors who held the autopsy upon the remains of the deceased make it appear that the projectile entered the latter's chest and left the body at the shoulder, from which it is to be deduced that he was in front of the aggressor when he received the wound. This is likewise testified to by several witnesses, others stating besides that they saw the parties disputing hotly between themselves a few moments before they heard the reports and that the deceased then held in his hand an iron instrument some two hands in length.

Under these circumstances it can not be maintained with reason that the attack which caused the death of Rojas was committed with treachery, as set forth in the complaint, in order to characterize the act complained of as murder. The act having been preceded by a dispute which on account of its heat partook of the character of a genuine quarrel, the deceased was enabled to guard himself in time against the consequences that the affair might lead to, and to provide himself against any act of force which his adversary might commit to the peril of his person, especially as the deceased was armed with an iron instrument which was large enough to serve as no inconsiderable medium of defense. Furthermore it does not appear that the prisoner employed means which would tend to render impossible any attempt at defense on the part of the deceased, and this it is which constitutes the characteristic and essential element of treachery (*alevosia*). For this reason the act in question should be classed as homicide defined and penalized in article 404 of the Penal Code and not as murder, since the circumstance of treachery was not involved in its commission, nor any other one of the remaining qualifying circumstances which article 403

of said Code mentions in its limitations.

There is to be considered in the commission of the said crime the mitigating circumstance of passion and obfuscation induced by the belief which the defendant entertained, with or without reason, that the deceased was the cause of his dismissal. The chagrin of that dismissal and the consideration of the damage it might cause him not only in his material interests but also in his reputation were without doubt sufficiently powerful reasons for confusing his reason and impelling him to commit the attack of which the deceased was the victim.

There is no opportunity in the present case to pronounce any judgment concerning the injuries to Anastasio Franco. These were not caused by the same shot which caused the death of Rojas. The latter was killed by the first shot. The defendant then discharged his revolver a second time, and that was when he wounded Franco. Upon the firing of the second shot the deceased had already fallen to the ground; wherefore it is apparent that the same was not aimed at the latter but at Franco, who testifies conclusively. Under such circumstances, although the two shots were fired successively, they do not constitute a single act, but two acts wholly distinct, not only on account of their own intrinsic duality but also on account of the fact that they were directed against two different persons. Therefore the provision of article 89 of the Penal Code is not applicable to these acts. The said injuries constituting, then, a distinct act, independent of the homicide committed upon the person of Rojas, they should be made the subject of another proceeding or action separate and independent of the present case in accordance with section 11 of General Orders, No. 58.

By virtue of all of the foregoing, we are of the opinion that there should be imposed upon the defendant the penalty of twelve years and a day of *reclusion temporal* with the corresponding accessory punishments, the payment of an indemnity of 1,000 pesos to the heirs of the deceased, but without the personal subsidiary responsibility in case of insolvency by virtue of the provisions of article 51 of the Penal Code, and the costs of this instance. It is so ordered.

Arellano, C. J., Cooper, Willard, and *Ladd, JJ.,* concur.
Torres, J., did not sit in this case.

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