

2 Phil. 545

[G.R. No. 1166. September 29, 1903]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. FREELAND MCCRAY,
DEFENDANT AND APPELLANT.**

D E C I S I O N

TORRES, J.:

On December 18, 1902, an information was filed by the provincial fiscal in the Court of First Instance of Batangas, charging Freeland McCray with the crime of homicide, in that, at about 10 o'clock at night on the 17th of December, 1902, in the course of a quarrel with one John King in the house of a man named Harvey, located in the town of Batangas, capital of the province of the same name, he fired several shots at King with a revolver, inflicting upon him three wounds, two of which were mortal, causing his death within a few minutes.

The testimony of the Army physician who held the autopsy on the body is to the effect that the deceased received one bullet in the left side, the ball penetrating the left lung, and another in the back, near the liver, perforating the stomach, and that he sustained a third superficial wound on the left forearm. The physician stated that in consequence of the first two wounds, which were necessarily fatal, King expired shortly afterwards in the hospital to which he was taken.

The facts stated constitute the crime of homicide, John King having died as a result of the wounds inflicted upon him with a revolver in the course of the quarrel with the defendant, Freeland McCray. The evidence does not disclose the existence of any qualifying circumstances which would justify the classification of the crime as murder and the imposition of the corresponding penalty, as the wound in the back of the deceased was due not to the first shot fired by the aggressor but to a subsequent shot fired in consequence of a similar assault on the part of the deceased.

The defendant, McCray, pleaded not guilty and alleged that he killed the deceased in self-

defense. However, notwithstanding this exculpatory statement, two eyewitnesses affirm that while the accused, McCray, was in Harvey's house, John King arrived there, and that after an altercation between them McCray went out into the yard, challenging King to come out and engage in a fist fight with him. King remained in the house, held back by the witness Holland, and did not answer. McCray then re-entered the house, whereupon one Purple seized him by the arms and pushed him toward the kitchen, in order to prevent his approaching King. The latter thereupon drew his revolver and fired at McCray. He then endeavored to leave the house; but McCray, who had been wounded in the right side of the neck, as shown by the testimony of the physician who examined him, in turn drew his revolver and shot at King. The latter managed to make his way into the yard of the house, the two continuing to fire at each other until King, who had gone into the street, fell to the ground.

The witness William Scott, who was also present at the occurrence, testified to the same effect, although he said that the first shot which he heard was fired while he was standing with his back toward the combatants. He states, however, that it was fired at King, and he therefore believes that the accused, McCray, was the aggressor. This statement of Scott is contradicted by the testimony of the two other witnesses who were present at the occurrence.

The accused in his sworn testimony stated that he and the deceased were friends and lived in the same house, but that in consequence of some trouble between them concerning a woman he had gone to live in another house, as he knew that whenever King made his mind up to do a thing he always endeavored to carry it out; that it is true he had an altercation with King in the house in question and that he challenged the deceased to a fist fight, which ' challenge King did not accept; that upon returning to the house and while he was prevented by Purple from approaching King, the latter, with the remark that he was going to kill him, fired two shots at him, and that on this account he in turn fired at King.

The evidence in the record is contradictory. Two witnesses testify that they heard King say in the hospital, before dying, that he had fired three times and that he was the one who fired the first shot. Two other witnesses, however, testify that they heard King say, shortly before expiring, that the defendant, McCray, was the one who fired the first shot. The judge below, on January 3 of the current year, convicted the defendant and condemned him to ten years of *prision mayor*, with the accessory penalties, and to the payment of costs.

The crime of homicide having been proven and the defendant, McCray, having admitted that

he was the one who caused the violent death of John King, it only remains for us to decide whether in the commission of the crime there was in effect a complete exemption from criminal responsibility on the ground of self-defense, or merely an incomplete exemption.

Of the three requisites prescribed by article 8, section 4, of the Penal Code, it is evident in this case that there was an unlawful aggression on the part of the deceased, John King, who fired two shots at the defendant, McCray, one of which wounded him in the neck. It can not be questioned that this aggression was entirely unlawful, as there was no motive or reason which could possibly justify it.

The witness Scott, when testifying that he believed the attack was commenced by the defendant, McCray, and not by King, gave as a reason for his belief the fact that he heard a firearm discharged behind him and at King. John L. Woodruffe and B. Harviner, two other witnesses, testify that they heard King say, shortly before his death, that it was McCray who fired the first shot; but against the testimony of these witnesses we have that of the witnesses Chapell and Haywood to the contrary; that is, they testify that they heard King say it was he who fired the first shot, and this statement is corroborated by the testimony of two eyewitnesses to the affray; and it must therefore be considered as proven that the assault was commenced by King.

Upon this supposition it is undeniable that the accused had a right to defend himself against the unlawful attack upon him, and which put his life in imminent peril, particularly when it is considered that he had already been wounded by one of the two shots fired at him by the deceased; and hence it follows that there was a reasonable necessity for the employment of a weapon similar to that used by the assailant, for the purpose of impeding or repelling the attack of the latter.

With respect to the third requisite of lack of provocation on the part of the person assaulted, the evidence discloses that this circumstance in favor of the defendant does not exist. It is a fact fully proven in the record that McCray had repeatedly challenged the deceased to fight and that, the challenge not having been accepted, he again entered the house in an aggressive attitude and endeavored to approach King, but was prevented from doing so by the witness Holland, who seized him by the arms and pushed him toward the kitchen. It is evident, therefore, that provocation was given by the accused. Consequently, there being present only two of the three requisites established by the criminal law for complete exemption of criminal responsibility, the accused can avail himself of only the incomplete exemption granted by section 86 of the Penal Code. The penalty to be imposed upon the

accused is therefore that immediately inferior to the one prescribed for the crime of homicide, and should be imposed in its medium grade.

For the reasons stated we are of the opinion that the judgment appealed should be affirmed, with a reduction of the penalty, however, to eight years and one day of *prision mayor* and the accessories of suspension from all public office and the right of suffrage during the period covered by the penalty, to the payment of 1,000 Insular pesos to the heirs of the deceased, and to the costs of both instances.

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