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Ethel Morton (U.S.A.) v. United Mexican States

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ETHEL MORTON (U.S.A.) *v.* UNITED MEXICAN STATES

(April 2, 1929, concurring opinion by Mexican Commissioner, April 2, 1929.
Pages 151-161.¹)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. While off duty and drunk a Mexican army officer, without cause or provocation, fired upon and killed an American subject. *Held*, no direct responsibility of respondent Government will arise from such act.

DENIAL OF JUSTICE.—FAILURE OF AUTHORITIES TO CALL EYE-WITNESSES OF MURDER. Failure of authorities to call known eye-witnesses of murder *held* an improper discharge of judicial function.

FAILURE ADEQUATELY TO PUNISH. Sentencing to four years' imprisonment an officer who, while drunk and without provocation, killed American subject, no part of which sentence was ever served, since officer was allowed his freedom, *held* to justify award.

Commissioner Nielsen, for the Commission :

Claim in the amount of \$50,000.00 with interest thereon is made in this case by the United States of America against the United Mexican States in behalf of Ethel Morton, widow of Genaro W. Morton, an American citizen, who was killed in Mexico City in the year 1916. The claim is grounded on contentions to the effect that Mexican authorities conducted an improper prosecution of the person who killed Morton resulting in the imposition of an inadequate punishment on the murderer. The Memorial contains allegations with respect to the killing of Morton and the prosecution of his slayer, in substance as follows:

During and previous to the month of September, 1916, Genaro W. Morton resided at *Calle Mesones* No. 83, Mexico City, with his brother and an American named J. E. Landon. A *cantina* known as "La Hoja de Lata" was located in the immediate vicinity of Morton's home. Morton at times went to this place to play dominoes. During the early evening of September 20, 1916, he proceeded to the *cantina* and engaged in a game of dominoes with several friends or acquaintances. At the time Morton was thus quietly enjoying himself there were in the same *cantina* several Mexican army officers, including Lt. Col. Arnulfo Uzeta, a member of the staff of General Francisco Serrano, the latter being Chief of Staff of Gen. Alvaro Obregon, Minister of War. About 7:30 p. m. on the day just mentioned, J. E. Landon, with whom Morton was then living, entered the *cantina* to inform Morton that supper was ready. After conveying this message, Landon started to leave the *cantina* for his home, unaccompanied by Morton, who apparently tarried to finish the game of dominoes before proceeding to supper. Lt. Col. Uzeta, who was in a state of intoxication, thereupon ran to the door and dragged Landon back into the *cantina*, stating that he must take a drink

¹ References to page numbers herein are to the original report referred to on the title page of this section.

with him and his companions. Landon courteously asked to be excused, but Lt. Col. Uzeta insisted and Landon was obliged to drink with the Mexican officer and his party and took a glass of lemonade. Previous to this occurrence Landon had spoken to Morton in English, the latter's native tongue. Landon succeeded in leaving Lt. Col. Uzeta and his friends and thereupon proceeded to his home for supper. Within a few moments after the departure of Landon, Lt. Col. Uzeta approached the table where Morton was seated playing dominoes, and without cause or provocation deliberately fired upon and instantly killed Morton, the bullet penetrating the chin and neck, and also wounding one of Morton's companions.

The local police authorities entered upon the scene of the murder and took Uzeta into custody. He was subsequently brought to trial before the Fourth Court of Instruction in Mexico City. On or about February 6, 1917, the judge of that court found Uzeta guilty of the crime of homicide and imposed upon him the wholly inadequate sentence of four years. This sentence was affirmed by the Fifth *Sala* of the Superior Court of the Federal District of Mexico on March 17, 1917.

Notwithstanding the lenient and inadequate sentence thus imposed upon the murderer by the aforesaid Court of Mexico, it appears that the criminal did not serve such sentence, but on the contrary was allowed his freedom.

Allegations to the effect that the accused did not serve his sentence were not made in the American brief nor in the oral argument of counsel for the United States. They were supported solely by a statement contained in a letter written by the brother of Genaro W. Morton to the American Agency under date of October 30, 1926, and by a statement made by Balbino Arias, a Spaniard, who was an eye-witness of the killing of Morton made on January 18, 1917, this statement being to the effect that Arias heard that the assassin of Morton was free. This point may therefore be dismissed from consideration in formulating an award. The same is true of allegations contained in the American brief with respect to undue influence brought to bear on the court by Mexican military authorities. These allegations apparently are based solely on a letter written by a friend of Uzeta from which it appears that the former was interested in assisting the latter. Evidence adduced in regard to this point does not warrant a conclusion with respect to improper conduct such as is charged. But the Commission, in the light of the record before it, is constrained to sustain the contention of the United States that there was an improper prosecution of Uzeta culminating in a manifestly inadequate sentence.

In behalf of Mexico it was contended that Mexican authorities fulfilled all duties imposed on them by the penal laws of Mexico in prosecuting the person responsible for the crime in strict conformity with those laws. Denial was made of all allegations in the Memorial purporting to establish responsibility on the part of the Mexican Government.

It is unnecessary to discuss the principles of international law applicable to this case. The responsibility of a nation under international law for failure of authorities adequately to punish wrongdoers has frequently been discussed by this Commission. See the *Neer* case, *Opinions of the Commissioners*, U. S. Government Printing Office, Washington, 1927, p. 71; the *Swinney* case *ibid.* p. 131; the *Youmans* case, *ibid.* p. 150; and the *Roper* case, *ibid.* p. 205. And, specifically, the question of an inadequate sentence was discussed in the *Kennedy* case, *ibid.* p. 289. The failure to summon witnesses, a point which is given prominence in the record in the instant case, was considered

by the Commission in the *Chattin* case, *ibid.* p. 422, and in the *Swinney* case, *ibid.* p. 131.

Attention may briefly be called to portions of the evidence accompanying the Memorial. If it be considered that this evidence contains accurate information respecting the details of the killing of Morton, then the crime must be regarded as an utterly unprovoked murder.

Under date of September 26, 1916, Emilio Fernandez, proprietor of the saloon in which Morton was killed, made a statement before an American representative in Mexico City. Fernandez said in his statement that Morton and three other gentlemen were playing in a quiet and peaceful manner and that suddenly without any notice Uzeta left the counter in the saloon and when about a meter and a half from the table where the game of dominoes was being played pulled out his gun and shot, wounding one of the men, a Spaniard, and instantly killing Morton. Fernandez asserted that he considered it his duty to make it known that there was no motive for the killing. He explained that Morton spoke to a companion, J. E. Landon by name, but that Uzeta should not have been offended on this account, as the tragedy occurred some time after Morton had spoken in English. Fernandez closed his statement with the declaration that the killing of Morton was cold-blooded assassination and that there was absolutely no cause for the deed.

Under date of September 28, 1916, Daniel Sosa, a clerk in the saloon, also made a statement before the American representative. He confirmed the assertions contained in the statement made by Fernandez. He stated that one of Morton's companions (evidently Landon) left the saloon when Uzeta and his companions entered, and that Uzeta, possibly thinking that the Americans had talked about him, without meditation or saying a word, pulled his pistol, shot Morton and wounded one of his associates. He further asserted that he considered it his duty to say that from his own free will he made his statement concerning the tragedy, which appeared to him to be one of extreme criminality.

Another statement was made on January 18, 1917, by Balbino Arias, a Spaniard who was playing dominoes with the Americans when Morton was killed. Arias, who it appears was wounded by the bullet which killed Morton, stated that the persons engaged in playing dominoes were insulted in violent language by the officers; that he saw Morton, while seated, lift up his hands imploringly when he saw that a gun was pointed at him.

Under date of September 21, 1916, J. E. Landon made an affidavit containing allegations substantially the same as those made in the Memorial. Landon stated that when he re-entered the saloon he saw there ten or twelve policemen and that Morton was lying on the floor by the side of his chair; that he had been sitting in a chair behind a table in a little corner or nook in the wall with a man on each side of him, and the table over which he had been shot, in front; and that obviously there had been no struggle or encounter of any kind. He further stated that about an hour after the policemen took Morton's body away he went to the police station in company with a lawyer to view the remains of Morton, and at this time the authorities asked the two men to sign a statement of identification of the body of Morton, which they did.

The evidence which has been briefly described is not part of the record of the trial of Uzeta, except the statement made by Fernandez which after having been sent to the Mexican Foreign Office was from there sent to the Mexican judge and incorporated into the judicial record in the case.

Irrespective of the question of the accuracy of this and other evidence accompanying the Memorial, and irrespective of any question as to the conclusions which the Commission may be justified in drawing from it, the evidence has, as argued by counsel for the United States, an important bearing on the contention that an improper prosecution resulted in an obviously inadequate penalty. Statements embraced by this evidence emanate from persons who were eye-witnesses either to all or to some of the occurrences surrounding the tragedy. Yet the testimony of several such persons was not obtained by the *Ministerio Público* in court, nor were these persons summoned by any judicial officer. José F. Morton, J. E. Landon, Alejandro Anguiano and Balbino Arias did not testify. The record reveals that a summons was issued for Anguiano, but that he was not found.

It is contended in the American brief that the failure to summon eye-witnesses to the killing of Morton is responsible for an inadequate punishment of the murderer. Even though assertions to this effect may involve an element of speculation, assuredly the failure to take any steps to obtain the testimony of such witnesses justifies the conclusion that the appropriate authorities were wanting in a proper discharge of their solemn duties with respect to the tragic occurrences with which they were called upon to deal in their official capacity.

It need not be observed that obviously the argument made in behalf of Mexico to the effect that friends of Morton should have presented themselves spontaneously, and that the Mexican authorities can not be blamed for their non-appearance, is untenable. The authorities were charged with the prosecution of a grave crime which was an offense against the State as well as against the victim. Likewise the failure to summon these witnesses can not be explained by speculations such as are contained in the Mexican brief with respect to the uselessness of the evidence that might have been obtained from these witnesses. It can not be plausibly conjectured that testimony of eye-witnesses to a homicide would be useless. Even Landon who was present shortly before the shooting and shortly thereafter might have furnished very important evidence not only on the point whether Morton was, as stated in the sentence of the accused, the aggressor by word or by deed, but also on the important point of the location of the body immediately after the shooting, a fact from which important deductions might be drawn respecting the question whether Morton was the aggressor in a fight.

It is proper to give particular consideration to some parts of the record of the evidence on which the trial judge based his sentence of four years.

Sosa, the man who made a statement before an American representative, presented himself to the police authorities on September 20, and said among other things "that at one of the tables several men were seated playing dominoes, and Uzeta went toward them, and without the occurrence of any squabble pulled out his pistol and without the speaker noticing his act he heard a shot and saw an individual fall to the floor whom he afterwards learned was named Genaro Morton."

Sosa later appeared in court and ratified the statement given at the Commissary of Police, and further stated: "When Uzeta finished his drink he went to the table where Genaro Morton was seated and without any reason Uzeta pulled out his pistol and shot him in the forehead; that the declarant is not informed as to the reasons which Uzeta had for shooting Morton, but he believes that it was done without any reason whatever."

Subsequently, on November 27, in a military hospital in the presence of Uzeta and before a judicial officer, Sosa said: "When he gave his first

declaration he was very much excited, but that now he changes it and agrees to what Lopez Uzeta has stated, because the American certainly insulted Uzeta, laughing at him, together with his companions, and joking in English." He also stated that the men playing dominoes approached Uzeta who, when he saw he was about to be attacked, fired. He further stated that Morton was "very hot-tempered" because whenever he was playing he ended with a quarrel with those with whom he played. With respect to this last statement it may be of interest to note that Fernandez, the owner of the saloon, stated in court that Morton was not a customer of the saloon and had been there only two or three times.

Fernandez, who made a statement out of court before an American representative, which was later incorporated into the judicial record, appeared on November 21, and acknowledged this statement as his declaration, but changed it by adding the following:

"That he did not state that Lieut. Col. Uzeta was in an incomplete state of intoxication because he does not know what would be a complete or incomplete state of intoxication; that he also changes the statement which the American Legation makes to the effect that he had said that the act was a murder without any motive; because the truth of the affair is that Morton was speaking in English, a thing which the declarant did not understand, but that one of the companions of Uzeta did understand him, who told him what Morton had said and that then Uzeta, indignant, got up and fired at Morton; that the Spaniard who was wounded received the same bullet since Uzeta only fired once; that the Spaniard was called Arias whose residence the declarant does not know."

On December 11, Fernandez stated before a judicial officer that he did not see whether the attackers of Uzeta got up before or after the shooting and did not notice whether the men were quarreling. On December 16, Fernandez in court stated that the declaration which he had made before an American representative and which was incorporated into the judicial record was presented to him by a relative of Morton and that he (Fernandez) signed it without knowing what was stated in it. This last statement was made by Fernandez in response to an interrogatory submitted to him at the request of counsel for Uzeta. On November 21, Fernandez, as has been mentioned, acknowledged as his declaration the statement which he now repudiated.

Major Augustin Lopez, who accompanied Uzeta in the saloon, testified in court on December 9, 1916. He mentioned the men playing dominoes, observing that they were speaking English, and further said: "Uzeta assumed that they were talking of him and their companions, and going up to the table asked them why they did not talk Spanish. Mr. Anguiano got mixed up in the question as he spoke English, and he told Uzeta what they were saying; Uzeta became angry and pulled out his pistol and an individual of the four who were seated at the table stood up in an aggressive attitude, rolled up his sleeves and approached Uzeta, grabbing him by one hand; the other three individuals who were with the first mentioned stood up in the same attitude; Uzeta fired his gun, wounding two of his assailants'".

On September 20, Uzeta stated before police authorities that he remembered absolutely nothing of what occurred in the saloon, being entirely intoxicated; that one of his friends committed the crime; and that they desired to make him appear as guilty, since he was the most intoxicated.

On September 23, the personnel of the court went to the district jail, and a statement was taken from Uzeta. Uzeta ratified his statement

made before the police authorities and he further said that he did not yet "recall killing any one, but if it was so that it must have been done because the latter said something to him". He remembered that he had been drinking a great deal on the day that he shot Morton, but he remembered nothing he said of acts which were said to have taken place in the saloon "La Hoja de Lata".

The personnel of the court again went to the district jail on October 2, 1916, and Uzeta amplified his previous statement. He then stated that he remembered "more clearly how the acts occurred at the saloon 'La Hoja de Lata' and that he will now relate the facts". During the course of his statement he said:

"that these parties were speaking in English and were casting glances at the table at which the declarant and his friends were seated, and particularly at the declarant; that for this reason the latter asked them what was the matter and why they were directing their glances towards him and his friends and if there was anything they had against the declarant and his friends, that they should repeat it in Spanish in order to receive an answer; that the individuals in question paid no attention, as if in contempt for the words of the declarant; that the five men stood up at the same time in an attitude of striking the declarant, and a gringo rolled up his sleeves as if about to throw himself upon the declarant; that all of them assumed the same attitude, and the declarant pulled out the pistol, at which moment his friends Anguiano and Lopez went away, that the declarant, with the pistol in his hand, and before giving time for them to strike him, since they were proceeding toward him, fired the pistol, killing a gringo; that the same bullet wounded another of those who accompanied him, that is to say, the gringo; that he does not know why the wounded person did not present himself; that the victim struck the declarant a blow and the latter faintly remembers that he grappled with him and for that reason he pulled out the gun and fired; but that when the gringo advanced upon him he gave the declarant a 'riñazo' on the little finger of his left hand, which wound is now healing."

On November 27, the personnel of the court went to a military hospital where there was a confrontation between Sosa and Uzeta. Uzeta then stated that "if he fired upon the American he did so because the latter addressed insulting remarks to him in English". Uzeta proceeded to state that he was about to be attacked and he therefore shot Morton. In one breath he stated that *if* he shot Morton it was because the latter made insulting remarks; in the next breath he explains that he shot because he was attacked. Uzeta could himself not understand English, and although other witnesses make reference to insulting remarks, nowhere does the record contain any specific information as to the nature of the remarks attributed to Morton.

On December 11, Uzeta, before the personnel of the court which had gone to the military hospital, stated that *if* he fired his pistol it was because the dead man had grabbed him by his left hand. Previously he had testified that "If he fired upon the American he did so because the latter addressed insulting remarks to him (Uzeta) in English."

The judge in sentencing Uzeta evidently accepted the latter's testimony. He found and declared that Uzeta was the person attacked. When the conflicting and vague record of testimony upon which the judge based his sentence is considered, it becomes obvious how important it was that eye-witnesses to the tragedy should have been summoned.

Even if we disregard the failure of the authorities to obtain important, available evidence, and even if the view be taken that the act of Uzeta was

not unprovoked, cold-blooded murder, as contended by the United States, punishable under Mexican law by death, and even if full credence is given to Uzeta's testimony and to all other testimony that could be considered most favorable to him, clearly the punishment inflicted on him must be considered to have been inadequate under Mexican law. If Uzeta was told that offensive remarks concerning him had been made by Morton or by his companions, the proper form of redress for any such offense would have been a resort to a civil or criminal action and not to homicide. And under Mexican law all acts of aggression do not justify the killing of an aggressor. With respect to this point attention may be called to the following provisions of the Mexican Criminal Code of 1871:

“Murder or Homicide:

ART. 560. *Homicidio calificado* is one committed with premeditation, with advantage, by stealth or by treachery.

ART. 561. Intentional homicide shall be punished by the death penalty in the following cases:

I. When executed with premeditation and not in a fight. If committed during a fight the penalty shall be twelve years of imprisonment.

II. When executed with advantage to the extent that the person committing the homicide does not incur any risk whatever of being killed or wounded by his adversary and when he is not acting in legitimate self-defense.

III. When executed by stealth.

IV. When executed by treachery.”

In the light of the most favorable view that may be taken of Uzeta's act it appears that the sentence should have been considerably in excess of four years.

Having in mind the principles asserted by the Commission dealing with cases involving charges of improper prosecution and particularly the *Kennedy* case, *supra*, an award in favor of the claimant can properly be made in the sum of \$8,000.00.

Fernández MacGregor, Commissioner:

I concur with Commissioner Nielsen's opinion that in this case an award must be granted. Although I think that in some cases in which very important witnesses have not been summoned and examined a denial of justice can be predicated, my decision in this case is based, rather than in the failure of the Judge to receive some testimonies, in the consideration that the facts that the Mexican Judge considered as proven did not sustain his legal conclusions, which, I think, were widely at variance with the provisions of the Penal Code of the Federal District of Mexico.

As a matter of fact, in the decision rendered by the Court of Fourth Instruction of Mexico City, the Judge summarized the facts concerning the murder of Morton in the following manner:

“Whereas, Third: From the declarations of the accused and of Major Agustín Lopez, it appears that the facts in substance took place as follows: Morton made some remarks in English, addressed to Uzeta and his companions; Alejandro Anguiano informed Uzeta in Spanish what Morton had said, this being somewhat offensive to Uzeta; Uzeta requested Morton to state in Spanish what he had been saying in English. Morton instead of doing so, stood up in an aggressive attitude, rolling up his sleeves and advancing upon Uzeta, caught him by the left hand, and at the same time the companions of Morton assumed a similar aggressive attitude; Uzeta by reason of these

acts fired the pistol which he had shortly before pulled out and so killed Morton....”

On the basis of these facts, the Judge states in the Fourth whereas (*considerando*) :

“... There was, therefore, on the part of both individuals acts of mutual contention, first by words and afterwards by deeds, aggressive acts on the part of Morton which Uzeta accepted and aided in assuming greater proportion, which constitutes the fight, which is defined in the latter part of article 553 of the Penal Code...”

The provision of the Penal Code to which the Judge refers in his last paragraph reads as follows:

“By fight is understood, the combat, the engagement or the physical struggle and not one of words between two or more persons.”

There is no doubt that the Penal Code of the Federal District requires a real struggle or in other words physical acts of aggression or defense between the two combatants. I do not think that either the aggressive attitude of Morton, to which the Judge refers, in rolling up of his sleeves and advancing towards Uzeta, or his holding him by the left hand, can be construed as a real struggle and therefore I do not think that Article 553 of the said Code should be applied. The assumption of a fight, on the part of the Judge, changed completely the aspect of the homicide perpetrated by Uzeta and, consequently, the penalty to which he was sentenced was widely and unwarrantedly different from the penalty he deserved for his brutal aggression on Morton. No appeal was entered against this decision by the Attorney for the State.

In view of the foregoing, I am of the opinion that an award should be made on behalf of the claimant in the sum of \$8,000.00 without interest.

Decision

The United Mexican States shall pay to the United States of America on behalf of Ethel Morton the sum of \$8,000.00 (eight thousand dollars) without interest.

AMERICAN BOTTLE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 2, 1929, concurring opinion by American Commissioner, April 2, 1929. Pages 162-167.)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Fact that claim had been filed with Special Claims Commission, United States and Mexico, will not preclude the tribunal from exercising jurisdiction it possesses under the *compromis*. Since claim is a contract claim in nature rather than based on a revolutionary seizure, *held*, tribunal has jurisdiction.

CONTRACT CLAIMS.—CONTRACT WITH GOVERNMENT INTERVENTOR OR CUSTODIAN OF SEIZED PROPERTY. A brewery was seized by Carranza