

(Text of decision omitted.)

IDA ROBINSON SMITH PUTNAM (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 15, 1927, concurring opinions by Presiding Commissioner and American Commissioner, April 15, 1927. Pages 222-228.)

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Ida Robinson Smith Putnam, an American citizen, the payment of \$53,106.50 on account of the murder perpetrated by a Mexican policeman, Eleno Uriarte, on the person of the claimant's son, George B. Putnam, an American citizen, a mining engineer, on or about July 5, 1909, in Pílares de Nacozari, Moctezuma, Sonora, Mexico. It is alleged that Mexico is responsible for a denial of justice which consisted in that an entirely unjustified penalty was imposed on Uriarte and, furthermore, in that the latter was not even made to serve such sentence. The Mexican Agency presented a motion to dismiss this claim, but withdrew it on February 11, 1926.

2. The American citizenship of the claimant was challenged by the Mexican Agency in its Answer, but this defense was not again used there-

after. I am of the opinion that the documents presented by the United States prove that this claim is impressed with American nationality.

3. The evidence contained in the record of this case is very meagre and it leaves in the dark what I consider to be the most important fact, and that is the escape of the convict, Uriarte. Nevertheless, the occurrences may be established as follows: On the date of the events, George B. Putnam attended a moving picture entertainment. At the close of the performance, Putnam went out in the street alone. It was then dark and it was raining. A few minutes after his leaving, several persons heard two shots and then a scream or moan, for which reason one of said persons went to the Chief of Police and informed him that a man had just been killed. Said Chief of Police, together with another policeman and the informant, went to the place where the shots had been heard and found the lifeless body of Putnam; there was found near it a yellow raincoat. A woman testified that after the shots, looking out through a window of her house, she saw, at a distance of about three meters, a man running with a pistol in his hand, who appeared to her as policeman Eleno Uriarte. It appears that the Chief of Police later reviewed the men under his command, all of them having answered the roll call except the aforementioned Uriarte. One of the policeman declared that he recognized as his own the yellow raincoat found near Putnam's corpse and that it was the same one which the deponent had loaned to Uriarte on the previous night. In view of the foregoing circumstances, prosecution was started, a warrant was issued for Uriarte's arrest, and upon his having been arrested three weeks later, on July 29th, 1909, he was examined by the Judge of First Instance of the District of Moctezuma, before whom the prisoner confessed his guilt, declaring that he had killed Putnam through jealousy. That when Putnam left the motion picture theatre, at about ten o'clock at night, said Uriarte told him that he wanted to have a talk regarding the affair which was still open between them. That they walked together some distance; that Putnam became incensed and attempted to throw himself on the deponent; that they both wrestled and fell; that they stood up at once, and that, then, Uriarte withdrew and, thinking that Putnam was carrying an arm, fired his gun on him twice and afterwards fled. The Commission does not have before it the complete criminal proceedings that were thereupon instituted against Uriarte, but in the record of this claim appear the decisions rendered in the first instance by the Judge of First Instance of the District of Moctezuma, on October 18, 1909, and on appeal by the Highest Court of Justice of the State of Sonora, on June 22, 1910. The lower court did not consider as proven the plea of self-defense made by Uriarte and found him guilty of homicide perpetrated without provocation and with treachery, for which it sentenced him to death. The higher court modified the decree of the court below, as it considered that the homicide had been committed during an encounter and that the treachery had not been proven, and on this ground it reduced the death sentence to eight years' imprisonment and hard labor.

4. The Memorial of the claim mentions only the trial in the first instance, and alleges that instead of shooting Uriarte at once, his execution was postponed until the first day of April, 1911, when he was liberated from prison to defend the town of Moctezuma for the Federal forces against the Revolutionists. It is further, alleged that Uriarte at once joined the latter and that he was not again apprehended by the Mexican authorities, thus escaping punishment for his crime. The evidence submitted by Mexico

in the Answer shows, as has already been stated, that Uriarte was still in prison in April, 1911, because the court of appeal had commuted the death penalty to eight years' imprisonment. A document presented by the Mexican Agency during the hearing of the case, shows that Uriarte, who had been taken out of the jail of Moctezuma, escaped on May 4, 1911, and that, upon having been re-arrested in Dolores, Chihuahua, he was sent to Sahuaripa, Sonora, and from the latter place to the penitentiary of Hermosillo, Sonora, having remained in this prison from June 3, 1912, until March 29, 1913, when he was liberated therefrom by Colonel Joaquin B. Sosa, then Military Commander of the said city of Hermosillo, and his whereabouts since that date are unknown. In view of the vagueness of the evidence with respect to the facts in connection with the escape of Uriarte, the Commission asked both Agencies to present additional evidence thereon, but the Mexican Agency was not able to add anything and the American Agency only presented two letters, which reveal the lack of success in its efforts to find new facts, and a memorandum regarding the military authorities who occupied Hermosillo, Sonora, in 1913, which makes reference, at the end, to a Colonel Ramon B. Sosa who was commanding the forces of Batamotal, to the north of Guaymas, in May, 1913.

5. The above-mentioned facts, although meagre, as heretofore noted, establish, nevertheless, the lack of responsibility of Mexico in the present case, as regards the charge imputed to her by the United States, of having violated its international duty by imposing on the slayer of Putnam a penalty out of proportion to his crime. The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. (Case of Margaret Roper, Docket No. 183, paragraph 8.) A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law. We have now before us an appellate decision, rendered by the highest court of the State of Sonora. Nothing appears to show that the proceedings which that decision ended may have been dilatory or inadequate. The charges presented against it are based, not on facts, but on conjectures, such as inferring premeditation from Uriarte's confession that he was jealous of Putnam, and imagining that there was no self-defense due to the fact that the criminal fled after his crime. It is also charged that the Supreme Court of Sonora reduced the sentence without receiving new evidence. The courts of appeal in Mexico usually do not receive new evidence, but they study the case to see if the facts have been weighed correctly by the lower court and to see, especially, if the latter has applied to the case the corresponding legal precepts. This is what the Highest Court of Justice of Sonora did and had the right to do. Neither is the commutation itself of the death penalty to eight years, imprisonment sufficient to establish a denial of justice. The penalty is notoriously unjust only when there is imposed for a crime a penalty which does not correspond to the classification of said crime or when an unusual penalty is imposed for it. But to impose, for example, on a voluntary homicide one of the various penalties that are imposed for its different grades, aside from the death penalty, where there are doubtful circumstances concerning its perpetration, can never mean *prima facie* a wide deviation from

justice, and in no manner, on the other hand, does it involve pardon or amnesty as the American brief seems to indicate. The sentence of the Highest Court of Justice of Sonora is subject to no further examination, and the Mexican Government is not responsible on account of it.

6. The claimant Government alleges that the Mexican Government entirely failed in its obligation to punish the murderer of Putnam, as Uriarte escaped from the jail where he was imprisoned, and that he was never again apprehended. The evidence presented shows two escapes—one about 1911, after Uriarte, as alleged, had been taken out of the jail of Moctezuma to defend the town against the rebels, but he was then reapprehended; and the other about 1913, after the prisoner was taken out of the jail of Hermosillo by a Colonel Joaquin B. Sosa, no information appearing about this reapprehension. The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquin B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See George W. Hopkins case, Docket No. 39, paragraphs 11 and 12.) In the light of these vague facts it is impossible to fix precisely the degree of international delinquency of the respondent Government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it can not be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and therefore Mexico is responsible for the denial of justice resulting from such conduct.

7. On the above grounds, due to the circumstances of the case, and in view of the standards set forth in paragraph 25 of the opinion rendered in the Janes case, Docket No. 168, I believe the claimant can properly be awarded the sum of \$6,000.00 (six thousand dollars), without interest.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

I agree with the conclusions reached by Commissioner MacGregor with respect to the liability of the respondent Government. The claim preferred by the United States is grounded on an assertion of a denial of justice. The charge of a denial of justice is predicated, first, on the action of the appellate court in setting aside the death penalty imposed on Eleno Uriarte and substituting a term of eight years, imprisonment, and, second, on the failure of Mexican authorities to carry out the sentence imposed by the appellate court.

Appellate courts in some countries do not have the power to reduce the sentence of an accused person, but I do not understand that the United States finds fault with the Mexican law under which this power is vested in Mexican higher courts. Without entering into any discussion of the considerations which may have prompted the appellate court to reduce the sentence of the accused, I am of the opinion that no showing has been

made which could warrant the Commission in reaching the conclusion that the reduction of the sentence resulted in a denial of justice as that term is understood in international law.

The other point in the case, the fact that the accused did not serve the entire sentence of eight years imposed upon him raises more difficult questions. These difficulties confronting the Commission result from the scarcity and vagueness of the evidence in the record. There is evidence of fault, but nothing more. Therefore, it is, as stated in the opinion of Commissioner MacGregor, impossible to fix precisely the degree of delinquency on the part of the respondent Government. The instant case, therefore, differs materially from other cases passed upon by the Commission in which there has been considerable evidence of negligence and in which the Commission has rendered larger awards.

Decision

The Commission decides that the United Mexican States are obligated to pay to the United States of America on behalf of Ida Robinson Smith Putnam \$6,000 (six thousand dollars), without interest.

GERTRUDE PARKER MASSEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 15, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, April 16, 1927. Pages 228-241.)

PROCEDURE, ADMISSIBILITY OF DEFENCE RAISED IN BRIEF NOT THERETOFORE RAISED IN PLEADINGS. It is questionable whether a defence raised for the first time in the brief, and as to which relevant facts have not been produced, may be considered by tribunal. Defence in question *held* not well founded in law in any event and hence unnecessary to be considered further.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MISCONDUCT AS A BAR TO CLAIM. An American subject was killed by a Mexican, who was thereafter arrested and imprisoned. The assistant jail-keeper unlawfully permitted the accused to escape. Evidence was not shown that the appropriate authorities took effective action to apprehend the accused. *Held*, the fact that the jail-keeper allowed the escape of the accused entrained responsibility on the part of respondent Government without regard to whether the jail-keeper was subsequently punished. When misconduct of any official, whatever his status or rank, results in failure of a State to perform its international obligations, it is responsible. The circumstance that deceased American subject may have been guilty of misconduct *held* no bar to claim.

Cross-references: Am. J. Int. Law. Vol. 21, 1927, p. 783; Annual Digest, 1927-1928, p. 250; British Yearbook, Vol. 9, 1928, p. 162.