

D'Ottavio and Others Case

Italian Court of Cassation,
Criminal Section I
Judgment of 12 March 1947, no. 270*

The Facts

For some time two former Yugoslav war prisoners, escaped from a concentration camp, had been roaming in the fields around Altavilla, a village in the municipality of Montorio al Vomano [in the province of Teramo, central Italy]. On 19 May 1944, these two prisoners, who had gone to the village fountain, were suddenly surrounded by four local individuals. While one of the two former war prisoners, known as captain Mirko, managed to flee, the other man was instead hit by two gunshots fired by D'Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man, later identified as Giovanni Vusović, was wounded on his right arm. This wound was left unattended for 48 hours, and the man developed tetanus and septicaemia, infections which caused his death 11 days later, on 30 May, in the hospital of Teramo.

In questioning by the doctor and the police, the wounded man stated that, while sitting quietly and unarmed by the fountain, he and his companion were attacked by four individuals of whom he only knew one, by the name of Berardo [D'Ottavio]. According to him, Berardo had probably acted out of jealousy over one or two women. He added that Berardo had also struck two blows on his head with the rifle butt. [2]

The accused were arrested on 23 March 1945, but on 7 May they managed to escape from the Florence prison where they had been transferred because of the need to evacuate the area where they were being detained. [3]

The Law

[The Teramo Court of Assize tried the four accused *in absentia*. It had rejected the plea based on self-defence (the accused had alleged that the two prisoners

* The original text, in Italian, is handwritten and runs to eight pages. It is deposited with the Central Public Record Office in Rome (*Archivio Centrale dello Stato*). A photograph is on file with the *Journal*. It was translated by A. Cassese. The pagination of the Italian text, as it appears in the original, is indicated in square brackets.

had a hand-grenade and had threatened them). The Court had also held that the accused had not intended to kill. With regard to the defendants other than D'Ottavio it had applied Article 116 of the Italian Criminal Code, providing that '[w]henever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission. If the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence.' The Court had applied the extenuating circumstance provided for in such rule and sentenced D'Ottavio to 12 years' imprisonment, Valeri and Pia to eight years' imprisonment and Forti (a minor) to five years and four months' imprisonment.

The four accused appealed the sentence. D'Ottavio invoked self-defence; the other three claimed that Article 116 of the Italian Criminal Code had been misapplied: they had intended only to capture Vusović, hence the crime *ex hypothesi* attributable to them was only the attempt to illegally detain the victim. With regard to Forti, it was claimed that the Court had wrongfully failed to establish his mental competence.

The Court of Cassation dismissed the appeal. It found that self-defence did not apply, on the facts. As for the application of Article 116 of the Italian Criminal Code, the Court stated the following:]

The complaint concerning the application of Article 116 is also without merit. [5]

By virtue of this provision, where the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission. In order for a criminal event to be held to constitute the consequence of the participant's action, it is necessary that there be a causation nexus — which is not only objective but also psychological — between the fact committed and willed by all the participants and the different fact committed by one of the participants. This is so because the participant's responsibility envisaged in Article 116 is grounded not in the notion of collective responsibility (provided for in Article 42(3) of the Italian Criminal Code)¹ but in the fundamental principle of concurrence of interdependent causes, upheld and specified in Articles 40 and 41 of the Criminal Code.² By virtue of the latter principle, all the participants answer for a crime both when they are the direct cause of the crime and when they are the indirect cause, in accordance with the canon *causa causae est causa causati*³ [the cause of a cause is also the cause of the

1 'The law determines the cases where the result is otherwise attributed to the agent as a result of his action or omission' (the other provisions of the same Art. regulating cases where instead the result is the consequence of an act consciously intended by the agent). [Ed.'s note.]

2 Art. 40 regulates the causal nexus and Art. 41 regulates the cases where there is a concurrence of causes. [Ed.'s note.]

3 This canon goes back to Thomas Aquinas' *Responsio de 30 Articulis*, ad 2 ('*Ad secundum dico quod hoc ex necessitate sequitur si Angeli sunt causa motus caeli qui est causa generationis et corruptionis in inferioribus corporibus ut Dionysius dicit IV cap. de divinis nominibus quod enim est causa causae est causa causati*'). [Ed.'s note.]

thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime].

It is this concurrence of causes that also in this particular case of participation re-establishes the requirement of legal identity of the fact that is the precondition of the cooperation 'in the commission of the same crime'. This identity is at least generic if not specific in that all the defendants have effectively contributed to the first crime that was the cause of the second.

Here lies the nexus of objective causation: all participants have directly cooperated in the crime of attempted illegal detention of persons (provided for in Article 605 of the Criminal Code) by surrounding and chasing two fugitive prisoners of war, armed with a gun and a musket for the purpose of unlawfully capturing them. [6] This crime was the indirect cause of the subsequent and connected event consisting of the rifle shot that D'Ottavio alone fired at one of the fugitives, a rifle shot that caused a wound followed by death (see Article 584 on manslaughter [*omicidio preterintenzionale*]).

There also exists a psychological causation in that all the participants shared the conscious will to engage in an attempt to unlawfully detain a person while foreseeing a possible different crime, as can be inferred from the use of weapons: it was to anticipate that one of them might have shot at the fugitives with a view to achieving the common purpose of capturing them.

The Court of Assize was then right when it found that Valeri, Pia and Forti participated in the crime of manslaughter committed by D'Ottavio, granting them the extenuating circumstances provided for in Article 116(2) on account of the lesser intensity of the criminal intention [*dolo*] relating to the more serious offence, lesser intensity that is indicative of lower criminal propensity.

Similarly, the last ground of appeal against the judgment must be rejected. Indeed, the judgment contained a sufficiently reasoned decision concerning the mental capacity of the accused minor Forti, by establishing such capacity through all the factual circumstances and on the basis of his written interrogation. [7] [...]