

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
ROGACIANO CUEVAS, DEFENDANT-APPELLANT.***G.R. No. L-5844-45. May 30, 1955*

Ponente: CONCEPCION, J.

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This is an appeal, taken by Rogaciano Cuevas, a decision of the Court of First Instance of Batangas, in Criminal Cases Nos. 28 and 29 of said court, which, by agreement of the parties, were jointly triad. In case No. 28, the court convicted Cuevas of the crime of murder, with which he is charged, and sentenced him to an indeterminate penalty (?) of 17 years and 4 months of reclusion temporal to reclusion perpetua, to indemnify the offended party in the sum of P3,000, and to pay the costs. In case No. 29, in which Cuevas was charged with frustrated murder, he was convicted of attempted murder and sentenced to an Indeterminate penalty ranging from 4 years and 2 months of prision correccional to 6 years, 1 month and 11 days of prision mayor, and to pay the costs.

The main facts are correctly set forth in the decision appealed from, from which we quote;

"About 7:00 o'clock in the evening of March 17, 1950, Julian Masagpag, Paulino Abarquez, Florencio Magpantay, Dominador Castillo, Jr., Teofilo Cusi and Marcelino Abraham, arrived in a car at the store of Miss Holgado, situated in barrio Aplaya, Bauan, Batangas. Into the said store, where they started to drink beer and coke, later walked the herein accused Rogaciano Cuavas alias Rohing. The latter engaged Dominador, Jr. in conversation which in the end degenerated into a verbal altercations As Julian Masagpag tried to pacify them, the accused punched Masagpag in the mouth and the two came to blows. Separated, the accused left the store ahead of Masagpag and his companions. Half an hour thereafter, the latter got into their car and drove towards home. At the wheel was Marcelino Abraham, while seated beside him on the front seat were Paulino Abarquez and Florencio Magpantay. Occupying the rear seat were Julian Masagpag, Dominador Castillo, Jr. and Teofilo Cusi. in the order named. As they were cruising along a road called 'Daang Dagat', they were met by a hail of shots from a distance of about five armlengths on the right side of the road. The photographs Exhibits B and O of the car show that it received at least seven bullet holes on its front and right side. As a result of the shooting, Julian Masagpag received the following wounds from which he died:

(1) Wound, gunshot, with point of entrance at first lumbar one inch lateral to spinal column and bullet lodged at the interspace mid-clavicular, left.

(2) Fracture, complete, 8th rib at mid-clavicular line.

Paulino Abarquez, in turn received the following wounds:

(1) Wound, gunshot, thru and thru, foot, right, with point of entrance at the planter aspect, one inch from lateral border and exit at 1/2 inch, dorsum of lateral border of foot, right."

(Appellant's brief, pp.44-45.)

The appeal hinges on the sufficiency, of the evidence to the effect that the lethal shots were fired by herein appellant. In convicting him, His Honor, the trial Judge, relied upon the following (1) Exhibit D, which purports

to be the dying declaration of Julian Masagpag, naming appellant Rogaciano Cuavaa as his assailant; (2) the testimony of Pulino Abarquez to the same effect; (3) on cross-examination by the defense, Abarquez testified that, immediately after the shooting, his co-passenger, Florencio Magpantay stated that appellant herein was the one who fired at them; (4) Josefa Castillo, the widow of Masagpag declared that, when she saw her husband, in the hospital, in the evening of the occurrence, at about midnight, he said that he had been "held up by Rohing," referring to appellant Rogaciano Cuevas, "with a gun;" (5) about thirty (30) minutes prior to the occurrence, appellant had a fist fight with Julian Masagpag; (6) two attempts were made, on behalf of appellant herein, to settle the case with Mrs. Masagpag, one by appellant's mother, and another by his uncle and aunt, the spouses Dominador Cuevas and Josefa Bejasa; and (7) the alleged flight of defendant-appellant.

As regards Exhibit D, appellant says that it is neither signed nor thumbmarked by Masagpag; that it does not appear to have been read by, or to, him; and that these omissions have not been satisfactorily explained by the prosecution. It appears that Exhibit D was written, with a colored pencil, by Sgt. Felix Sistona of the municipal police force of Bauan, Batangas, and that the questions appearing therein were propounded by Cesar Arad, Chief of Police of said municipality. Both testified that said questions were propounded to Julian Masagpag in the Batangas Provincial Hospital, in the evening of March 17, 1950, and that the answers contained therein were those given by him on that occasion, in reply to said questions. Inasmuch as, owing to his serious condition, Masagpag could not sign Exhibit D, Sgt. Sistona went around the hospital to look for a stamp pad, but found out that there was none. When he returned to the room of Masagpag, to make him thumbmark Exhibit D with ink, Masagpag had already been brought to the operating room, where he was not allowed to enter. Sistona tried to see Masagpag twice the next day, but the doctor said that he could not do so, because of the precarious condition of Masagpag. Upon inquiry by telephone made by Sistona on March 19 and 20, 1950, he was given the same advice. Masagpag died on March 21, 1950, at about 3:00 a.m. We agree with the lower court that the foregoing facts, which were established by the testimony of Sgt. Sistona, corroborated, as regards the taking of the statement Exhibit D, by that of Chief of Police Cesar Arada, satisfactorily explain the omissions stressed by the defense. Moreover, it has been proven by said testimony that Masagpag made the declarations contained in Exhibit D knowing that he was in imminent danger of death, not only because of the nature of his injury, but, also, because he told his wife that he was going to die in consequence thereof. Hence, Exhibit D partakes of the nature of an ante-mortem statement and was properly regarded as such.

The defense brands the testimony of Paulino Abarquez as doubtful and highly improbable, as well as unworthy of credence. Besides, it tried to prove, through the testimony of Teofilo Cusi, that Abarquez was drunk at the time of the occurrence. But this was denied by Abarquez, and the lower court believed him, and, evidently, gave no credence to Cusi. The record before us does not warrant interference with the appraisal thus made by His Honor, the trial Judge, who was in a better position than we are to gauge the veracity of the opposing witnesses indeed, Abarquez had no reason to implicate appellant herein, if he were not the real culprit, for his (Abarquez') true assailant would then be relieved from responsibility. Again, being on the front seat of the car, which was running slowly, Abarquez was favorably situated to recognize, by the beam of the headlights, the appellant herein, whom he knew well and was standing on the sidewalk, barely five fathoms ahead of said vehicle, when said witness saw him. That this was the position of the culprit, in relation to the car, at the beginning of the attack, is borne out by the fact that the front part of said vehicle was hit by two bullets.

The testimony of Abarquez to the effect that, immediately after the shooting, Florencio Magpantay said that their assailant was appellant herein, is now contested as hearsay evidence. It will be recalled, however, that Abarquez gave said testimony on cross-examination by defense counsel, who did not object thereto, and hence, must be deemed to have waived such right as he may have had to confront Magpantay and cross-examine him. Moreover, the aforementioned statement of Magpantay was spontaneously made, without premeditation, under the influence

of the startling event which he had witnessed, and referred to the circumstances surrounding the same. It is, accordingly, a part of the *res gestae*, one of the exceptions to the hearsay rule.

The defense maintains that "the court a quo committed an error in attributing motive to the accused for the shooting of Julian Masagpag and Paulino Abarquez." This pretense is clearly devoid of merit, it being admitted that, about thirty (30) minutes before the shooting, appellant had had a fist fight with Julian Masagpag. Although the former had no motive to try to kill Abarquez, it is apparent that the latter was wounded accidentally by a bullet aimed at Masagpag.

Contrary to appellant's pretense, the statement of Masagpag to his wife, concerning the identity of the culprit, is an ante-mortem declaration, entitled to consideration and weight as such, it appearing that Masagpag made it with knowledge of his impending death.

The defense would, also, have us believe that appellant had no knowledge of, and had not authorized, the attempt of his uncle and aunt, Dominador Cuevas and Josefa Bejasa, and then of his mother, to settle the case amicably. However, the lower court found his biased testimony to this effect unworthy of credence and we do not see why this finding should be disturbed, considering that he did not even dare introduce the testimony of said spouses and his mother, to corroborate him.

Appellant testified that he was playing mahjong, in a club near the scene of the shooting, when the same took place; that he did not leave Bauan, Batangas, until March 19th, when he went to Manila for business purposes, not to escape arrest or prosecution; and that, when he learned in Manila, about three (3) weeks later, that he was being suspected as the culprit, he returned to Bauan and contacted its Chief of Police. This defense cannot even be considered as an alibi, for appellant testified that he heard the shooting while he was allegedly playing mahjong, so that it was not physically impossible for him to have been at the scene of the crime, when it was committed. Furthermore, his testimony to the effect that he did not leave Bauan until two (2) days after the occurrence, is contradicted by the Chief of Police and Sgt. Sison, for they testified that both repaired to the place of the shooting, immediately after the occurrence; that, upon investigation conducted on the spot, they found out that appellant was the culprit and this was confirmed by Masagpag's ante-mortem declaration, made, in the hospital, later that evening; that, thereupon, they tried to apprehend appellant, but he could not be found anywhere, either in Bauan, Batangas, or in Manila, where the Chief of Police went twice, provided with a search warrant; and that, about a month later, appellant showed up, ready to post the corresponding bail bond. The lower court, did not err in holding that appellant's flight had been established and in considering this circumstance as indicative of his guilt, which has been proven beyond reasonable doubt.

The crime committed, in connection with Criminal Case No. 28 G. R. No. L-5844, is murder, qualified by treachery. Although the offense was perpetrated at night time, this fact should not be considered to aggravate the offense, for apart from being, under the circumstances surrounding the case, included in treachery, it was not sought purposely, the aggression having been provoked evidently by the fist-fight that had preceded the same. No modifying circumstance having attended the commission of the offense, the penalty for murder should be imposed in its medium period, namely, life imprisonment. Hence, appellant should be sentenced to this penalty only, without the benefit of the Indeterminate Sentence Law, which is not applicable to this case.

As regards Criminal Case No. 29 (G. R. No. L-5845), the lower court considered the crime committed as attempted murder, merely because the injuries sustained by Paulino Abarquez were not necessarily mortal. This fact, does not suffice, however, to warrant the conclusion drawn by the lower court. It having been established that appellant had performed all the acts of execution necessary to kill, and yet did not produce the desired result, the crime committed is frustrated murder, not attempted murder. Hence, he should be sentenced in Case No. 29 to

an indeterminate penalty ranging from four (4) years, two (2) months and one (1) day of prision correccional to twelve (12) years and one (1) day of reclusion temporal.

Thus modified as to the penalty in both cases, the decision appealed from is hereby affirmed. in all other respects, with costs against appellant Rogaciano Cuevas.

IT IS SO ORDERED.

Pablo, Bengzon, Montemayor, Reyes, Bautista Angelo, Labrador, and Reyes, J.B.L., concur.

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