

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. ALFREDO ZAPATERO AND JOSE ZAPATERO, DEFENDANTS AND APPELLANTS.

G.R. No. L-31960. August 15, 1974

Ponente: AQUINO, J.

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AQUINO, J.:

Alfredo Zapatero and Jose Zapatero appealed from the decision of the Court of First Instance of Abra, finding them guilty of murder, sentencing each of them to reclusion perpetua and ordering them to pay to the heirs of Demetrio Botanes an indemnity “of P12,000 to be divided proindiviso between” them and to pay the costs (Criminal Case No. 713). The facts proven by the prosecution are as follows:

At about nine-thirty in the morning of March 17, 1968, Demetrio Botanes, together with his wife, Salvacion Patenio, and children, Jaime and Jess, rode in the family car and proceeded to Barrio Matit, Penarrubia, Abra. They were on their way to attend a birthday party being given by Lea Alzate at her resort known locally as Calm Spring. Riding with them in their car were Lea, her husband and their children and some lady guests. At the poblacion of Penarrubia, Salvacion Botanes saw the brothers, Alfredo Zapatero and Jose Zapatero. She knew them because they were formerly her neighbors at Barrio Lubong, Penarrubia.

The picnickers arrived safely at Calm Spring. They had a good time. At about four o'clock in the afternoon, they decided to break up and go home. Since the car was parked on the road which was at some distance from the resort, they walked towards the vehicle, some going ahead of the others. The child, Jaime Botanes, and some ladies were the first to go to the car. They were followed by Demetrio Botanes and his wife.

Because some of their companions were still gathering firewood, Demetrio, Salvacion and their children waited for the others near their car. While Demetrio was playing with his eight-month-old child whom Mrs. Botanes held in her arms, a shot was suddenly fired from behind. It hit Demetrio, Salvacion, who was facing her fallen husband, looked at the direction where the shot came from. She saw at a distance of about seven or eight meters Jose Zapatero, the twenty-six-year-old gunwielder. At his side was his brother, Alfredo. (See sketches Exhs. B and B-1). They were poised to run.

The assailants immediately fled from the scene of the shooting. Salvacion, carrying her baby, ran after them towards the forest. But realizing the futility of following them, she returned to her husband who expired shortly thereafter. Her companions, Rosalina Paguyo and Carolina Alzate, on hearing the gunfire, left the roadside and took refuge in the house of Mrs. Alzate's tenant. Salvacion shouted, for help but no one came to her aid. She ran along the road to Bangued and reported the incident to the local Constabulary detachment.

Constabulary Sergeant Irineo Obra and Police Sergeant Domingo Valera, together with Salvacion and some relatives, repaired to the scene of the crime. After the Constabularymen had finished their investigation, they brought the body of the thirty-five-year-old victim to the Abra Provincial Hospital where an autopsy was conducted by Doctor Gerardo Pizarro, the Assistant Provincial Health Officer.

He found a "penetrating-perforating circular wound at the right side of the nape" or upper back portion of the neck, about nine millimeters in diameter, directed superomedially. That was the wound of entry. The wound of exit was a gaping circular wound over the left eye about two inches in diameter. The brain stem and left eye were affected. The left eyeball was blown out. Death was attributable to the gunshot wounds, hemorrhage and traumatic shock (Exh. A). Doctor Pizarro concluded that a .30 caliber gun was used and that the assailant was behind the victim at a lower elevation, an observation confirmed by Mrs. Botanes (20 tsn; Exh. B).

On the basis of the sworn statement of Mrs. Botanes which was taken in the evening of March 17th (the date of the shooting) and which implicated the Zapatero brothers in the killing, a complaint for murder was filed against them on March 20, 1968. A warrant for the arrest of the accused was issued. They were not arrested. They were reported to be in Cagayan. On July 18, 1968 Alfredo Zapatero was surrendered by his counsel to the Constabulary detachment at Camp Juan Villamor, Jose Zapatero was surrendered to the Municipal Court by his counsel on July 20, 1968.

The accused waived the second stage of the preliminary investigation. On October 7, 1968 the Provincial Fiscal filed against them an information for murder. After trial, the lower court rendered the judgment of conviction already mentioned.

Revenge was the motive for the killing. According to a sworn statement of Botanes dated January 10, 1968, Felix Zapatero, appellants' father, a policeman, was allegedly engaged in robbery, thievery and terrorism in Barrio Lubong. The barrio residents looked upon Demetrio Botanes, a native of that barrio, as their leader (he was a salesman of Alemars, a well-known department store at Rizal Avenue, Manila. He was a holder of the degree of Bachelor of Science in Education).

In his statement Botanes disclosed that at about two o'clock on Christmas day, December 25, 1967, while he was in front of his residence at Penarrubia, the Zapatero brothers shot him. He sustained wounds in his right forearm and in the fingers and palm of his left hand. His impression was that the attempt on his life was masterminded by Felix Zapatero. He revealed that at a meeting of some residents of Barrio Lubong, it was decided to liquidate Felix Zapatero. Botanes implemented that decision by designating Emeterio Bandayrel as the triggerman. Bandayrel carried out his mission by assassinating Felix at noontime on January 8, 1968 in Barrio Lubong. His three companions buried the remains of Felix in the communal forest known as Pongis. Later, his remains were exhumed.

The foregoing circumstances, which were recounted in Botanes' statement to justify the killing of Felix Zapatero, served as the background for his own assassination by the Zapatero brothers on March 17, 1968 (Exh. D-1). Botanes was charged in court for the killing of Felix Zapatero (Criminal Case No. 695, Abra CFI; Exh. D).

In this appeal, the Zapatero brothers contend that the trial court erred in finding that Botanes' wife and son saw them at the scene of the crime, in convicting them of murder, and in holding that there was evident premeditation.

In support of their alibi the Zapatero brothers declared that from February to May, 1968 they were in Gattaran, Cagayan. They helped in harvesting the palay. They boarded at the house of Artemio Cortes. They left Gattaran when they received a letter from their mother, apprising them that they had been charged with murder.

The main issue in this case is one of credibility or the veracity of the identification of the appellants, by Mrs. Botanes and her son, Jimmy, as the two persons whom she saw at the scene of the crime right after she heard the gunshot which felled her husband and which caused her to exclaim: "Natayen ni tatangen".

The Botanes and Zapatero families used to be neighbors in Barrio Lubong. A distance of one hundred twenty meters separated their houses. According to Alfredo Zapatero, Demetrio Botanes was his second cousin. Mrs.

Botanes had known the appellants for two years. She used to see them almost daily. They used to go to her house. They were neighbors also in the poblacion of Penarrubia. The store of Botanes was adjacent to the house in the poblacion where the Zapateros resided.

The trial court made an ocular inspection of the scene of the crime. Its findings confirmed the testimonies of Mrs. Botanes and her son, Jimmy. It concluded that, while the appellants really went to Gattaran, they did so after the commission of the offense in order to hide and prepare their defense.

The appellants resorted to a diversionary tactic. They proved that on December 25, 1967 Zacarias Dangani and Walter Idao were charged with frustrated murder for having shot Botanes (Exhs. 5 and 6). The implication is that Dangani and Idao might have been the assailants of Botanes and not the appellants. We hold that that charge is not sufficient to generate a reasonable doubt as to appellants' guilt. Mrs. Botanes, who was cited as a witness in that case, would have known if Dangani and Idao, and not the Zapatero brothers, were the malefactors whom she saw at the scene of the crime in Barrio Matit. She identified the Zapatero brothers and not Dangani and Idao. No reason has been adduced as to why Mrs. Botanes would frame up the Zapatero brothers and favor Dangani and Idao.

The appellants assail Jaime (Jimmy) Botanes' testimony on the ground that he was not listed as a prosecution witness and he did not give any statement to the Constabulary and police investigators. Appellants' position is not tenable. The prosecution is not precluded from calling as a witness a person who was not listed as a witness in the information (People vs. Bagsican, L--13486, October 31, 1962, 6 SCRA 400). Jimmy was only eight years old when his father was shot (he was already nine when he testified and he was a Grade IV pupil). Because of his tender age, it was to be expected that his mother would endeavor, if possible, not to involve him in the case. He had already suffered a traumatic experience when he witnessed his father's assassination. To require him to testify about it might not have a wholesome effect on his young mind and future outlook in life. But, as there was no other available eyewitness to corroborate his mother's testimony, the prosecution had no other recourse but to use him as a witness.

"All persons who, having organs of sense, can perceive, and perceiving, make known their perception to others, may be witnesses". "Children who appear to the court to be of such tender age and inferior capacity as to be incapable of receiving correct impressions of the facts respecting which they are examined, or of relating them truly" cannot be witnesses (Secs. 18 and 19, Rule 130, Rules of Court).

The testimony of a seven-year-old girl and that of an eight-year-old boy was admitted in certain cases (U.S. vs. Tan Teng, 23 Phil. 145; People vs. Sasota, 52 Phil. 281, 286, 287; U.S. vs. Buncad, 25 Phil. 530; People vs. Bustos, 51 Phil. 385, 389). The trial court noted that Jimmy Botanes testified "in almost straight forward manner, continuously and flawlessly, despite his tender years" and that he was not shaken during the cross-examination.

The appellants impugn the testimony of the thirty-two-year-old widow, Mrs. Botanes, on the ground that she did not immediately report to the investigators that Jose Zapatero was the gunwielder. They point out that the Constabulary's spot report mentioned an unknown assailant (Exh. 7). The truth is that Mrs. Botanes, in her statement to Sergeant Obra at eight o'clock in the evening of March 17, 1968, the day of the shooting, identified Jose Zapatero as the assailant and named Alfredo Zapatero as his companion. She said that she knew the Zapatero brothers because they were her neighbors in Barrio Lubong. She explicitly stated, as the motive for the killing, the circumstance that the Zapatero brothers suspected her husband of having directed the killing of their father, Felix. According to Mrs. Botanes, they had announced that they would not stop until they had killed her husband (Exh. C). She rebutted Sergeant Obra's assertion that her statement was taken on March 18, 1970.

Presumably, on the basis of that statement, the Constabulary progress report on the case for the following day,

March 18th, specified that the suspects were the Zapatero brothers, and that the motive was revenge, since the victim was believed to have masterminded the killing of the suspects' father. It was indicated in the progress report that there was a pending case against Demetrio Botanes in the Municipal Court of Bangued in connection with the killing of Felix Zapatero (Criminal Case No. 174) and that there was also a pending murder case against Alfredo Zapatero (Exhs. E, 8).

The appellants argue that there was a discrepancy in Mrs. Botanes' testimony because, according to her sketch, Exhibit B, the assailant "was at the back to the left side of the deceased", whereas, according to Doctor Pizarro, the gunman "must have stayed at the back to the right of the victim".

The alleged discrepancy is more fancied than real. Doctor Pizarro merely conjectured the relative positions of the assailant and the victim. On the other hand, Mrs. Botanes testified on what she had actually seen, as graphically indicated in the sketch which supported her testimony. According to her sketch and testimony, the victim, her husband, was standing near his car which was facing north in the direction of Bangued. The car, which was parked near the trail going to Calm Spring, was on the eastern side of the road, facing north. Mrs. Botanes was standing in front of her husband, who was facing the eastern side of the road going to Bangued (the south or opposite direction led to the town of Pilar). She was facing the assailant who was in the forested area on the western side (if one faces Penarrubia-Bangued) near the canal which goes to the Sinalang river (Exh. B).

The appellants contend that it was physically impossible that Botanes could have been shot in the nape. That contention is not well-taken. Inasmuch as Botanes was facing the eastern side of the road and the assailant was in the western side, he (Botanes) was hit in the nape or the back of his neck. Appellants' argument that the assailant should be "at the back to the right of the victim", as surmised by Doctor Pizarro, and should not be "at the back to the left side of the deceased", as deducible from Mrs. Botanes' testimony, is a confusing and baseless assertion.

Equally baseless and devoid of merit is appellants' contention that Mrs. Botanes was able to tell Sergeant Obra that the gunshot came from the east because her husband was facing east. That contention is refuted by the opening paragraph of appellants' brief, wherein it is clearly articulated "that at the time said Demetrio Botanes was shot, he was directly facing east and his wife, Mrs. Salvacion Botanes, was facing west", meaning that the assailant was on the western side of the road (in the direction of Bangued). Because of that position, Mrs. Botanes saw the assailant, Jose Zapatero, and his brother, Alfredo, who was beside him. She saw Jose holding the gun that had just been fired. The Zapatero brothers were fleeing into the forested area on the western side of the road near the canal, leading to the Sinalang river. Her testimony, as corroborated by her son, Jimmy, proves appellants' guilt beyond reasonable doubt and negates their alibi, a defense that is easy to fabricate (People vs. Carunungan, 109 Phil. 534).

Appellants' alternative contention is that only Jose Zapatero should be held criminally liable because, according to the prosecution, he was the gunwielder. It is argued that the fact that Alfredo was beside Jose when the crime was committed did not make him a co-principal.

That contention is not sustainable. Jose and Alfredo were co-conspirators. They confabulated in the killing of Botanes. Their conspiracy may be implied from their common desire to avenge their father's death, the fact that they were side by side when Jose fired the fatal shot, and the circumstance that they fled together from the scene of the crime after Mrs. Botanes had espied them.

Alfredo was not an apathetic spectator who viewed with detachment his brother's felonious conduct. He had community of design with his brother. He accompanied Jose in order to give him encouragement and a sense of security and, if need be, material assistance to repel outside interference had anyone sought to prevent them from effectuating their plan to liquidate Botanes (People vs. Carunungan, supra).

It is alleged in the information that the crime was attended with treachery, evident premeditation, use of a firearm, aid of armed men and despoblado. Use of a firearm is not aggravating. It is not among the circumstances enumerated in article 14 of the Revised Penal Code. Uninhabited place was not proven. The shooting was perpetrated on the shoulder of a road forming part of the highway which was near a resort. It is reasonable to suppose that pedestrians and motorists passed that road. It cannot be sensibly characterized as uninhabited.

Treachery (alevosia) was correctly appreciated as the qualifying circumstance. Jose Zapatero, in strategically placing himself in a forested area near the highway and firing at the unsuspecting victim at a distance of eight meters (Exh. B-1), employed a mode of execution that insured the consummation of the killing without any risk arising from any defense that the victim could have made (Art. 14[16], Revised Penal Code). Indeed, the hapless victim was not able to make any defense at all. One shot was adequate to snuff out his life.

The trial court and the Solicitor General argue that there was evident premeditation because the motive was revenge and, therefore, the appellants had planned the killing. Premeditacion conocida cannot be appreciated in all killings that were the product of a scheme conceived and nurtured for sometime. To authorize a finding of premeditation, it must affirmatively appear from the overt acts of the accused that he has definitely resolved to commit the offense; that he has from then on coolly and dispassionately reflected both on the means of carrying his resolution into execution and on the consequences of his criminal design, and that such an appreciable length of time has elapsed to expect an aroused conscience to otherwise relent and desist from the accomplishment of the proposed crime (People vs. Fuentesuela, 73 Phil. 553; People vs. Marasigan, 70 Phil. 583; U.S. vs. Gil, 13 Phil. 530).

It is not sufficient to suspect that premeditation preceded the crime. The criminal intent evident from outward acts must be notorious and manifest, and the purpose and determination must be plain and have been adopted after mature consideration on the part of the persons who conceived and resolved upon the perpetration of the crime, as a result of deliberation, meditation and reflection sometime before its commission (U.S. vs. Banagale, 24 Phil. 69). The statement of Botanes dated January 10, 1968 that the appellants on December 25, 1967 made an attempt on his life cannot, in justice to them, be regarded as a notorious manifestation of their preconceived plan to kill him because that imputation is hearsay. It was not confirmed by any complaint of Botanes to the authorities. We hold that evident premeditation is not aggravating in this case.

There being no generic modifying circumstances, reclusion perpetua, the medium period of the penalty for murder, was properly imposed by the trial court (Arts. 64[1] and 248, Revised Penal Code).

WHEREFORE, the lower court's judgment is affirmed with the modification that the appellants are held solidarily liable for the indemnity (Art. 110, Revised Penal Code). Costs against the appellants.

SO ORDERED.

Zaldivar, (Chairman), Fernando, Barredo, and Fernandez, JJ., concur.
Antonio, J., took no part.

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