

## PEOPLE OF THE PHILIPINES, PLAINTIFF-APPELLEE, VS. FLORENCIO ORDIALES, DEFENDANT-APPELLANT.

*G.R. No. L-30956. November 23, 1971*

Ponente: REYES, J. B. L., J.

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### REYES, J. B. L., J.:

Direct appeal to this Court in view of the capital punishment imposed against accused-appellant, Florencio Ordiales, by the Court of First Instance of Rizal, Branch VII, Pasay City, in its Criminal Case No. 8114-P. The dispositive portion of the said court's decision follows:

"WHEREFORE, this court after having thus considered very carefully the evidence of the pro-secution and the defense, both testimonial and documentary, and the exhaustive Memorandum of the Defense, finds accused FLORENCIO ORDIALES guilty beyond reasonable doubt of the crime of murder, punishable under Art. 248 of the Revised Penal Code, committed with the aggravating and the mitigating circumstances above mentioned, and hereby sentences him to suffer the penalty of death in the manner provided by law, to in-demnify the heirs of the deceased Vicente Bayona in the amount of TWELVE THOUSAND PESOS (P12,000.00) and to pay the costs."

The Amended Information charged accused-appellant Florencio Ordiales of the crime of murder committed as follows:

"That on or about the 4th day of November, 1968, in Pasay City, Philippines, and within the jurisdiction of this Honorable Court, the abovenamed accused, Florencio Ordiales y Abaro, being then a Confidential Agent of the City Mayor, Pasay City, duly appointed and qualified as such taking advantage of his public position with deliberate intent to kill, and with evident premeditation, and treachery aforethought, suddenly and unexpectedly, did then and there wil-fully, unlawfully and feloniously attack, assault and shoot for several times on the vital parts of the body, unarmed Vicente Bayona, with a carbine the herein accused was then provided with, which treacherous acts tended to directly and specially insure its execution, without risk to himself, from the defense that Vicente Bayona may make, thereby inflicting upon the latter several mortal wounds, which caused his instantaneous death.

That at the time of the commission of this offense the accused-Florencio Ordiales y Abaro was provided with a motor vehicle, which he took advantage of, to facilitate his escape from the scene of the crime.

All contrary to law, with the qualifying circumstance of alevosia, and the aggravating circumstances of (1) his public position, (2) evident premeditation, and (3) the use of a motor vehicle."

The evidence for the prosecution shows that on 4 November 1968, at 5:30 in the afternoon, Vicente Bayona, with two companions, Daniel Brown, Jr., and Rolando Cruz, were at the airconditioned room of Nad's restaurant, Libertad Street, Pasay City. While they were starting to drink pepsi-cola and gin, accused-appellant Florencio Ordiales entered, asking Vicente Bayona, "Sino ba ang minumura mo?" immediately firing at the latter a U. S. carbine, caliber .30, in rapid succession. The victim was unable to answer because he was hit. Accused-appellant then put down his firearm to look at Bayona, after which he left the restaurant and boarded a yellow jeep parked

outside. Two other persons were in the said jeep by the names of Bayani and Magsakay.

Daniel Brown, Jr., ran away after the first shot, while the victim's other companion, Rolando Cruz, was literally frozen with fear in his seat. Vicente Bayona died of multiple gunshot wounds at 6:10 that same afternoon upon arrival at San Juan de Dios Hospital, Pasay City.[1] The assailant shot him at a distance of two and a half (2 1/2) yards, more or less.[2] The slaying is admitted by the accused.

The defense's own version of the incident was that accused-appellant saw Lt. Delfin Hernandez at the lobby of the Pasay City Hall in the morning of 4 November 1968. The former asked the latter if he could have his carbine M-1 converted to an automatic one or M-2. Since the accused-appellant did not have the carbine with him at the time, they agreed to meet at Nad's restaurant at 5:30 that afternoon so he could deliver the carbine.

At past five of the said afternoon, accused-appellant went to the Nad's restaurant to keep the appointment. While accused-appellant was looking for a place to sit in the airconditioned room, Vicente Bayona whistled at him, motioning him to come near. As soon as accused-appellant approached Bayona, the latter said, "Tell the mayor that next year he will lose." Accused-appellant answered, "Huwag naman ganon. Bakit hindi kayo magkasundo. Dati kayo magkasama." Vicente Bayona, however, shouted, "Basta sabihin mo talo na siya sa isang taon!" Accused-appellant shouted back, saying, "Why don't you tell him? You are sending me to tell him!"

Vicente Bayona suddenly stood up with hands on waist and was able to approach accused-appellant, holding the barrel of the latter's carbine. The victim's two companions also rushed at accused-appellant, whereupon, the latter stepped backward and fired at Bayona. The said companions ran away after Bayona was fired upon.

Accused-appellant left the restaurant after Bayona fell and took a taxi at Taft Avenue near Pasay Commercial Center with the intention of surrendering to the mayor. In the corner of Malibay, accused-appellant met Francisco Villa (who was going to be appointed Chief of Police of Pasay City later), so he stopped and told him that he shot somebody and that he was going to surrender. Villa, however, advised him to surrender instead to the NBI. Accused-appellant, accompanied by Mr. Villa, then proceeded to Bankal to see NBI agent Mr. Aragon. Mr. Aragon, who arrived in his house later was told what happened. He, in turn, accompanied accused-appellant, to the NBI where the latter surrendered to one Mr. Bayani with the carbine used in the shooting.

The court a quo found the aggravating circumstances of (a) abuse of official position, (b) evident premeditation, and (c) use of superior force. However, it considered the use of superior force as absorbed by the qualifying circumstance of treachery. The said court also found the mitigating circumstance of voluntary surrender, offsetting one of the two remaining aggravating circumstances. Hence, the death penalty was imposed. The use of motor vehicle which was likewise alleged in the Amended Information was not appreciated by the court a quo for the reason that the jeep was not used as a means to commit the murder.

The following are assigned as errors in accused-appellant's brief: The lower court erred in -

1. Convicting accused-appellant of the crime of murder qualified by treachery;
2. Giving full credence to the testimonies of the witnesses for the prosecution which are full of serious and material contradictions, inconsistencies and manifestly false assertions;
3. Sentencing accused-appellant to suffer the penalty of death;
4. Finding that the aggravating circumstances of (1) abuse of Official position and (2) evident premeditation are present in the commission of the offense;
5. Not acquitting accused-appellant of the crime charged on the ground of self-defense; and

6. Not acquitting accused-appellant on the ground of reasonable doubt.

There is nothing on record to warrant a reversal of the court a quo's finding that treachery attended the killing of the deceased. The sudden and unexpected shooting of the victim with a carbine constituted treachery. Authorities are clear that even when in attack or aggression is made face to face, treachery or *alevosia* is nevertheless present when the attack is sudden and unexpected to the point of incapacitating the victim to repel or escape it.[3] Accused-appellant's account as to what precipitated the shooting could not be believed. The statement, "Tell the mayor that next year he will lose," or "Basta sabihin mo talo na sa isang taon", could not be attributed to the deceased, who, being an avid compaigner of local mayoralty candidates, at least from Mayor Cuneta's time up to the election of Mayor Jovito Claudio, certainly could not have ignored that 1969 was not a mayoralty election year. On the other hand, it is admitted by the prosecution that the deceased and his twin brother, Reynaldo, had repeatedly slandered the incumbent mayor, since the latter disregarded the promise to make Reynaldo the chief of his confidential agents stating that the promise was merely a joke. In fact, on the afternoon before the shooting and when the brothers met at Shanghai restaurant, Pasay City, the victim told Reynaldo that he slandered the mayor again because the mayor refused to sign something which the victim asked him to sign. The version of the prosecution that it was accused-appellant who first confronted the victim with, "Sino ba ang minumura mo?" becomes more believable in the light of what happened, and especially since it is not disputed that accused-appellant was present at least in one of those occasions when the mayor was slandered. Defense witness Pedrito Caballes impliedly so admitted by quoting Vicente Bayona as saying to accused-appellant before he was shot, "huwag mo akong pakialaman." Finally, prosecution witnesses Daniel Brown, Jr., and Rolando Cruz corroborated each other in quoting accused-appellant as having said, "Sino ba and minumura mo?" as against the lone denial of accused-appellant.

It is true that the deceased had two companions while accused-appellant was alone, but superiority in number does not necessarily mean superiority in strength.[4] These three men were all seated and unarmed, and their movement was impeded by the table at which they sat. Their positions even gave accused-appellant more advantage especially since he carried two firearms, a carbine and a revolver. However, as correctly held by the lower court, abuse of superior strength is absorbed in treachery and is inherent in the same.[5]

It is accused-appellant's contention, and error was assigned in this regard, that the testimonies of the prosecution witnesses should not be given full credence because of alleged serious and material contradictions, inconsistencies and manifestly false assertions. Our review of the evidence demonstrates that the contradictions were not on material points. The rule is settled in this jurisdiction that appellate courts seldom disturb a trial court's appreciation of the credibility of witnesses, in view of its opportunity to observe the demeanor and conduct of the witnesses while testifying on the witness stand; and that said appreciation of the court below will generally be accepted and acted upon favorably by the appellate courts, unless there is a material circumstance which consequently might affect the result of the case.[6] As already noted earlier, the exception does not obtain in this case, hence, the finding of treachery is sustained.

We come next to the question of whether the aggravating circumstances of abuse of public position and evident premeditation really attended the commission of the crime as found by the court a quo. For abuse of public position under Article 14, paragraph 1, Revised Penal Code,[7] to be appreciated, it is not only necessary that the person committing the crime be a public official; he must also use the influence, prestige or ascendancy which such office gives him as a means by which he realized his purpose. The essence of the matter is presented in the inquiry, "Did the accused abuse his office in order to commit the crime?"[8] It is not shown that accused-appellant took advantage of his position as confidential agent of Mayor Claudio in shooting the victim, or that he used his influence, prestige or ascendancy" in killing the deceased. Accused-appellant could have shot Bayona without

having occupied the said position. Thus, in the absence of proof that advantage was taken by accused-appellant of his being a confidential agent, the aggravating circumstance of abuse of public position could not be properly appreciated against him. The Solicitor General also concedes this.[9] The court a quo's finding that the said aggravating circumstance is present can not, therefore, be sustained.

The aggravating circumstance of evident premeditation has not likewise been proven beyond reasonable doubt. The mere fact that accused-appellant killed Bayona does not necessarily prove in itself that the former hatched a plan to kill the latter. As there was no direct evidence of the planning or preparation, the court's conclusion may not be endorsed, since it is not enough that premeditation be suspected or surmised, but the criminal intent must be evidenced by notorious outward acts evincing the determination to commit the crime.[10] Much less is there a showing of opportunity for reflection and the persistence in the criminal intent that characterize the aggravating circumstance of evident premeditation.[11] The court a quo therefore erred in appreciating the said aggravating circumstance against accused-appellant. The Solicitor General likewise concedes this finding.[12]

As regards the plea of self-defense under Article 11, paragraph 1, of the Revised Penal Code, the rule is that the same must be proved by clear and convincing evidence.[13] The three concurring requisites should be present, namely, (a) unlawful aggression on the part of the victim; (b) reasonable necessity of the means employed to repel the aggression; and (c) lack of sufficient provocation on the part of the accused.[14]

We find no proof of unlawful aggression on the part of the victim. He was seated and unarmed. This Court finds it hard to believe that he suddenly stood up with hands at his waist, which allegedly led accused-appellant to think that the former would draw a gun. The victim, fully aware that he was not armed, and knowing that his adversary carried a carbine, would not bluff at so great a risk. We find it still harder to believe that the victim arose and approached or rushed at accused-appellant, and suddenly held the barrel of the latter's carbine without first being shot at, for the reasons that (a) a table obstructed his way;[15] (b) accused-appellant was at least 2 1/2 yards away from the victim,[16] which distance could not have been easily and quickly traversed from where the alleged aggressor was seated, considering the obstruction; and (c) according to his own version, accused-appellant already warned that he would shoot if the victim approached him. It would have been foolhardy and suicidal for the victim to act in the manner that accused-appellant would like this Court to believe, knowing that the accused-appellant was poised to shoot if the victim should make a move to approach him, and this holds likewise of the victim's companions, who were not themselves armed. Yet, accused-appellant would like Us to believe that he shot the victim only after the latter held the barrel of the gun and only after he had first stepped backward. The statement of Daniel Brown, Jr.,[17] that the victim fell from his seat to the cement floor like "a burning candle", belies further the claim of accused-appellant that the deceased was shot only after he approached accused-appellant. Under the circumstances, accused-appellant's plea of self-defense can not be sustained, since he was himself the aggressor.

We are convinced that the guilt of accused-appellant has been proven beyond reasonable doubt. However, the death penalty should be reduced in the absence of the aggravating circumstances of abuse of public position and evident premeditation which were erroneously found by the court a quo.

Under Article 248 of the Revised Penal Code,[18] the penalty for murder is reclusion temporal in its maximum period to death. There being only one mitigating circumstance, that of voluntary surrender, and no aggravating circumstance to offset the same, the imposable penalty is the minimum pursuant to Article 64, paragraph 2, of the same Code, which is the maximum period of reclusion temporal under Article 248, *supra*. The Indeterminate Sentence Law (Act 4103, as amended by Act 4225) applies in view of the nature of the penalty. Under this law, the judgment sentencing the accused to a prison term provides for a minimum within the range of the penalty next lower in degree to be fixed in any of its periods in the discretion of the court.[19] Under Article 61, paragraph 3,

of the Revised Penal Code when the penalty prescribed for the crime is composed of one or two indivisible penalties and the maximum period of another divisible penalty, as in this case, the penalty next lower in degree shall be composed of the medium and minimum periods of the proper divisible penalty and the maximum of that immediately following in said respective scale. The penalty next lower in degree in the instant case therefore ranges from the maximum of prision mayor to the medium degree of reclusion temporal.

FOR THE FOREGOING REASONS, the decision appealed from is accordingly modified, sentencing accused-appellant to suffer an imprisonment of 14 years, 8 months and 1 day of reclusion temporal as minimum to 20 years of reclusion temporal as maximum Said decision is affirmed in all other respects. Costs against appellant.

Concepcion, C.J., Makalintal, Zaldivar, Castro, Fernando, Teehankee, Barredo, Villamor, and Makasiar, JJ., concur.

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[1] See the Certificate of Post-Mortem Examination, Exhibit "O-1", dated 5 November 1968, and the Necropsy Report, Exhibit "L", dated 19 November 1968, both of the NBI.

[2] See Exhibit "A", Statement of Daniel Brown, Jr., dated 5 November 1968, page 198, Rollo.

[3] See *People vs. Noble*, 77 Phil. 93; *People vs. Pulido, et al.*, L-2447, 4 March 1950; *People vs. Martinez Gadinez*, 106 Phil. 597.

[4] See *People vs. Elizaga*, L-2487, 18 May 1950, 86 Phil. 364.

[5] *People vs. Redoña*, 87 Phil. 743; *People vs. Agustin, et al.*, L-18368, 31 March 1966, 16 SCRA 467, citing *People vs. Tiongson*, L-1866-67, 28 November 1964.

[6] *People vs. Braganio, et al.*, L-10121, 29 December 1960, citing *People vs. Pinsol, et al.*, L-8349, 22 January 1957.

[7] Art. 14, par. 1, of the Revised Penal Code, states:

"Art. 14. Aggravating circumstances. - The following are aggravating circumstances:

1. That advantage be taken by the offender of his public position."

[8] *U.S. vs. Rodriguez*, 19 Phil. 150, cited in Padilla's Revised Penal Code Annotated, Book One, page 296, 1964 ed.

[9] Page 19, Brief for the Appellee. Thus in the case of *Montilla vs. Judge Hilario*, 90 Phil. 49, also a murder by a public officer, the Supreme Court ruled (at page 52) –

"By the same token, the fact that, as alleged, the defendants made use of firearms which they were authorized to carry or possess by reason of their positions, could not supply the required connection between the office and the crime. Firearms however and wherever obtained are not an ingredient of murder or homicide. The crime in question, for example, could have been committed by the defendants in the same or like manner and with the same ease if they had been private individuals and fired with unlicensed weapons."

See also *People vs. Pantoja*, 25 SCRA 468.

[10] *People vs. Mendova, et al.*, L-7030, 31 January 1957, 100 Phil. 811.

[11] *People vs. Custodio, et al.*, L-27442, 24 October 1955, and other cases cited. See also *People vs. Cadag*,

L-13830, 31 May 1961.

[12] Pages 18-19, Brief for the Appellee.

[13] People vs. Berio, 59 Phil. 533.

[14] See People vs. Balansag, 60 Phil. 266 and Art. 11, par. 1, Revised Penal Code, supra.

[15] Exhibit "Q-1", page 230, Rollo.

[16] Exhibit "A", supra.

[17] Exhibit "A", supra.

[18] Article 248 of the Revised Penal Code.

[19] People vs. Ducosin, 5 Phil. 109, cited in Padilla's Revised Penal Code Annotated, Book One, page 672, 1964 ed.

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