

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. JOSE PARDO, AGAPITO DE LA CRUZ AND TOMAS PESARIO, DEFENDANTS, JOSE PARDO, APPELLANT.

G.R. No. L-562. November 19, 1947

Ponente: TUASON, J.

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TUASON, J.:

Jose Pardo was prosecuted in the Court of First Instance of Zamboanga together with Agapito de la Cruz and Tomas Pesario, charged with "double murder." De la Cruz and Pesario were discharged and used as state witnesses. This is an appeal by Pardo from a judgment of conviction sentencing him to death.

Between 7 and 8 o'clock in the evening of March 27, 1946, the appellant fired two shots at Capt. Berthram Burchfield of the United States Army with a .45 caliber automatic pistol. One of the shots struck the intended victim and from its effects he died at the Zamboanga General Hospital at 9:30 o'clock of the same night. The other shot missed the target and hit Francisco Cañete who was instantly killed. Both Capt. Burchfield and Cañete were seated a few meters apart inside a former army mess hall watching a vaudeville show, and the appellant sent the bullets from the outside through a side galvanized iron wall of the building. The gun he used belonged to Agapito de la Cruz although he had one of his own, a .25 caliber pistol which, according to De la Cruz, was handed to him by Pardo.

The appellant says he was forced to shoot by Agapito de la Cruz at the point of his (appellant's) own gun pressed against the nape of his neck. The prosecution says on the other hand that the appellant discharged the firearm of his own volition unaided and uncoerced.

The two theories are set out by the parties in their respective briefs. According to the evidence for the prosecution, the crime was committed under the following circumstances:

On March 27, 1946, between 7 and 8 o'clock in the evening, a stage show was going on at the Galley Building, the former GI mess hall which was converted into a show-house, located at Isabela de Basilan, City of Zamboanga (pp. 48, 64, 100, 115, 139, t. s. n.). Among the many spectators were Jose Pardo, Agapito de la Cruz, Tomas Pesario and Captain Berthram Burchfield. While Agapito de la Cruz was sitting down in one of the one-peso seats (Butaca) watching the performance Jose Pardo approached him and called him to one of the corners inside the theater (point 2 in Exh. K, pp. 48,123, t. s. n.). There, Jose Pardo asked his friend Agapito what had happened between Captain Burchfield and one Miguel Nuñal (pp. 45, 101, t.s.n.). Agapito answered that all he knew about the incident was that the Captain kicked Miguel (p. 49, t. s. n.). Thereafter, all of a sudden, Jose snatched the .45 caliber automatic pistol sticking out between Agapito's shirt and pants, simultaneously stating "let me have it, to shoot the Captain" (pp. 47, 102, 125, 176, t. s. n.). Once in possession of the aforesaid automatic, Jose Pardo pulled out his .25 caliber revolver, handed it to Agapito as an exchange in the meantime, and left (pp. 50, 125, t. s. n.). Afraid lest Pardo might carry out his threat, Agapito requested Tomas Pesario, who was then beside them and heard the conversation, to look after "Pepito because he might shoot the Captain" (pp. 49, 50, 90, t. s. n.). Tomas immediately went and followed Jose Pardo outside the

theatre (point 4 in Exhibit K). There, he saw the accused, armed with the .45 caliber automatic pistol, peeping through the slit on the wall on the right side of the door as one enters the building (point 5 in Exhibit K) ascertaining the position of Captain Burchfield, who was seated on top of the back of a chair located against the wall at a point one meter from the door (letter X in Exh. K; pp. 51, 116, 126, t. s. n.). Whereupon, Tomas called Pepito but the latter, instead of desisting, took off his shirt and threw it to the former (p. 127, t. s. n.). A moment later, and right when Agapito arrived outside the theatre looking for Tomas Pesario and Jose Pardo, he (Agapito) saw Jose wearing a camiseta with a .45 caliber automatic pistol in his right-hand finger on the trigger (pp. 51, 52, t. s. n.). Almost simultaneously thereafter, he saw Jose fired two shots (pp. 54, 70, 128, t. s. n.). Out of fear, Agapito returned inside the show-house while the accused, Jose Pardo and Tomas Pesario ran (pp. 54, 70, 71, 129, t. s. n.).

"When Agapito went inside the theatre, he found Captain Burchfield wounded and bleeding, lying opposite where Jose Pardo had fired the mortal shots (pp. 52, 53, t. s. n.). Agapito also saw another wounded, a Filipino, lying down in line with the deceased Captain a few meters away and who was later identified as Francisco Cañete (p. 54, t. s. n.). Just then Agapito, seeing a child who must have lost his way due to the confusion, accompanied him home and, later, he tried to look for Tomas Pesario (pp. 54, 55, t. s. n.)."

The foregoing evidence was supplied by Agapito de la Cruz and Tomas Pesario.

Following is the appellant's account of the shootings, to which no eye-witness testified in his behalf besides himself:

"That accused-appellant Jose Pardo, early in the evening, went to the theater with a jug of tuba and went inside one of the two dressing rooms to chat with the performers with whom he had been acquainted long before the night of the incident. (Testimony of Juan Atilano, t.s.n., p. 260; Aurora Capadocia, idem., pp. 297-299.)

"That in the evening in question, one Miguel Nuñal was creating trouble for the show, by crashing the gate of the theater at the point of a gun and misrepresenting himself as a member of the military police, acting in a very disorderly manner, telling the people they could enter, free of charge, and every now and then, he would go out from the theater building, and bring with him inside the theater towns-people including children, without paying for their entrance, boasting that he was 'King' of Isabela (Testimonies of Agustin Atilano, Aurora Capadocia, and Juan Abedillo, particularly, t. s. n., pp. 260-262, 267; 289-294; and 313-314).

"That later in the evening, Agapito de la Cruz, in an insolent manner, also entered without a ticket, and also misrepresenting himself to be a member of the military police (Testimonies of Agustin Atilano, Aurora Capadocia and Juan Abedillo (t. s. n., pp. 260-261; 299 and 313).

"That afterwards Tomas Pesario also entered without a ticket. (Testimony of Juan Abedillo, t. s. n., p. 314.)

"That Miguel Nuñal was kicked and afterwards ordered placed under arrest by the deceased Capt. Berthram C. Burchfield, for the trouble he had created, by making people enter the theater, free of charge, and for throwing stones at the theater building. (Testimony of Agapito de la Cruz, t. s. n., p. 49; Agustin Atilano, pp. 262-275, Aurora Capadocia, pp. 289-297).

"That the two fatal shots were fired from the pistol in the hands of defendant-appellant, while he was in a drunken condition.

"That the fatal .45 caliber pistol that killed Captain Burchfield, had been given by Agapito de la Cruz, a co-accused, who was made a prosecution witness, notwithstanding the fact that defendant-appellant himself that evening had been carrying his own .25 caliber automatic pistol, which was taken from him by said Agapito de la Cruz.

"That the killing of Francisco Cañete was a mere incident to the shooting of Captain Burchfield.

* * * * *

"That while there inside the dressing room, defendant-appellant Jose Pardo, who was already intoxicated, was approached by Agapito de la Cruz, who had been going in and out of the theater, who told him that Miguel Nuñal, the leader of the underworld characters in Basilan and a known bully, wanted to see him and talk to him (testimony of Aurora Capadocia, t. s. n., pp. 299-302; Jose Pardo, 239-330);

"That defendant-appellant went outside the building with Agapito de la Cruz, but Miguel Nuñal was not there; and Agapito de la Cruz then ordered defendant-appellant, who was already in a drunken condition, to surrender his .25 caliber pistol, and gave him his own .45 caliber pistol, Exhibit G, and took him outside to the exact spot behind Captain Burchfield, who was sitting in a corner inside the building (Testimony of Aurora Capadocia, t. s. n., p. 302; Juan Abedillo, 317-318; Jose Pardo, 329-330);

"That Agapito de la Cruz then ordered defendant-appellant to shoot Captain Burchfield, at the point of a gun stuck on the back of his (Jose Par do's) neck and from behind, by Agapito de la Cruz, who was threatening him with death (Testimony of Jose Pardo, t. s. n., pp. 331-333).

"That on that occasion, Agapito de la Cruz was reinforced and emboldened by the menacing presence of Tomas Pesario, another member of the underworld, and the terrible name of Miguel Nuñal (alias MIKE), their common leader and self-styled 'King' of Isabela de Basilan, whose past deeds had been impressed upon the mind of defendant-appellant Jose Pardo (Testimony of Juan Atilano, t. s. n., pp. 265-268; 261; Aurora Capadocia, idem. pp. 290-294; Juan Abedillo, idem, p. 314; Jose Pardo, idem, pp. 332; 377-378; 384-385).

In a lengthy brief, appellant's counsel have made ten assignments of error. On the general issue they assert that the lower court "erred in giving greater weight and credit to the evidence for the prosecution than that of the defense, notwithstanding the fact that the latter is more logical, coherent, trustworthy and probable."

In our opinion it is the other way around. The evidence for the prosecution is convincing. It is the testimony of the appellant that appears to us illogical, incoherent, untrustworthy and improbable.

If Nuñal, De la Cruz and Pesario had wanted to kill Burchfield, it would have been senseless for them to carry out their purpose in the manner alleged by the appellant. The method was very crude, highly uncertain of accuracy, and exposed them to greater danger of being betrayed without the slightest compensating benefit. The place from which the shots were fired was a vantage point and if De la Cruz and company were the hardened and much feared hoodlums and gunmen they are pictured to be, they could have accomplished their objective just as well as, if not better than, one who was under the influence of fear and compulsion. They knew that if one of them did the firing there would be no stranger, let alone a hostile stranger, who could witness the deed and reveal their identity. They knew that an unwilling tool could not be depended upon to make a correct aim, a performance which even under normal conditions requires willingness, concentration of attention, and experience in handling firearms. They knew that even a good marksman if under duress could wreck their plan by tilting the gun at the moment of pulling the trigger, if indeed they could at any time control this part of the operation. And they knew that even if Pardo succeeded in hitting the target their criminal liability would not be diminished by the fact that another person discharged the pistol. No, from whatever angle we may look at it, the scheme Nuñal, De la Cruz and Pesario are said to have adopted does not square with the calculations of normal intelligence.

The fact that Miguel Nuñal sat dangerously close to Captain Burchfield clashes with the statement that Nuñal was a party to the shooting. And the conduct and movements of Jose Pardo, Agapito de la Cruz and Tomas Pesario after the killing do not comport with the testimony that Pardo had been cowered and had acted by order of his two former co-defendants and Nuñal. The impression to be gathered from the evidence, considered as a whole, is the exact reverse. The evidence tends to show that Jose Pardo was the leader of the gang, a position which was naturally his by reason of his higher education and higher social position. No less than De la Cruz's, Pesario's and

Nuñal's, Pardo's seemed to be a disordered life, as witness his behavior on the night in question before the killing.

Again Pardo carefully hid the gun in his house and after his arrest refused to disclose where it was. He denied that he had put it away. This conduct was a clear sign of a guilty conscience. And Pesario slept at Pardo's house under circumstances which tend to disprove that Pesario had moral ascendancy over the appellant. Pesario slept on the ground floor with only a mat and a pillow furnished by Pardo's wife while Pardo spent the night upstairs and did not concern himself with his companion.

The appellant's confession agrees in essential particulars with Pesario's and De la Cruz's testimony. It is admitted that no physical violence or intimidation was used to obtain it. This confession is repudiated on the alleged ground that the appellant relied "on the promise of immunity" said to have been made to him by Detective Pedro Basilio. The appellant said that "Pedro Basilio told me to tell him all what happened and to sign the statement, and that he will take care of me and nothing will happen to me, so I relied on him." It is pointed out that this testimony was not denied by Pedro Basilio who, it is said, was not presented as a witness in rebuttal.

We do not believe any such promise was made by Basilio. De la Cruz and Pesario had already made statements accusing the appellant as the principal if not the sole party responsible for the murders. There was no need to resort to deceptions and other improper means to make him own the crimes.

If the statement attributed to Detective Basilio was made, still we do not believe the appellant took it in the sense that he would be freed or that the confession would not be used against him. Basilio, it should be stated, was a rankless detective and was not the one who directed the investigation. Lieut. Frazer, an agent of CID who came from Manila, and other American Army officers were in charge of the investigation, and Frazer and Detective Bella let the appellant know that it was his constitutional right not to incriminate himself or sign Exhibit O. Pardo is sufficiently intelligent and educated to realize that Basilio had no authority to make commitments such as that he is said to have made, or to make good the promise.

That the confession was not sworn to does not make it incompetent. There is no legal provision which makes it necessary that a confession be made under oath. (U. S. vs. Corrales, 28 Phil., 362-363.) It is not even required to be in writing. (People vs. Batañgan, 54 Phil., 834.)

As to the procedure used in taking the confession, it has been held that a statement written in language which the accused does not speak or understand is admissible provided it was translated to him. (16 C. J., 732; People vs. Nicolas, 72 Phil., 104.) In the present case Detective Basilio, who acted as interpreter, translated the confession into Chavacano; and it was he who as a witness swore of his own knowledge to what the accused had said. Detective Ramon Bella of the Zamboanga Police Force, who was also present at the questioning, corroborated Basilio regarding the translation of Exhibit O to the accused. Moreover, James Frazer testified that the appellant himself speaks English.

It is idle to challenge the legality and necessity of the exclusion of the appellant's two co-defendants and their use as prosecution witnesses, in the face of a uniform holding by this Court that any error committed in these respects does not invalidate the testimony given by such co-accused. The sole object of Act No. 2709, (now section 9, Rule 115 of the Rules of Court), "is to prevent unnecessary or arbitrary exclusions from the complaint of persons guilty of the crime charged and it has nothing to do with the admissibility of their testimony or their competency as witnesses." (People vs. Castañeda and Fernandez, 63 Phil., 480; U. S. vs. Abanzado, 37 Phil., 658; U. S. vs. Enriquez, 40 Phil., 603; U. S. vs. Alabot, 38 Phil., 698; People vs. Badilla, 48 Phil., 718.)

The trial court found that "the crime committed by the accused is that of complex crime defined by article 48 of the Revised Penal Code, as amended," In the judgment or so-called dispositive part of the decision the Court finds

"the accused guilty of double murder." Although the trial judge says premeditation and treachery have concurred, His Honor considers them as aggravating circumstances.

Treachery is undeniably present in this case and it should be considered not as an aggravating but as a qualifying circumstance to elevate the crimes to murders. When the appellant fired the fatal shots, his victims were inside the building and did not have the slightest intimation of his devilish plan. He was not even seen by Burchfield or Cañete. He was thus afforded every opportunity to insure the commission of his crimes without any danger to himself.

But the trial court erred in holding that the offenses in question constitute a complex crime. The two murders were not the result of a single act. The death of Captain Burchfield was produced by a shot different from that which killed Francisco Cañete. It will be recalled that two shots were fired, and this is made additionally clear by the other fact that two holes were found in the wall, about a foot apart, and that a slug lodged in the left leg of Burchfield while another bullet was found not far from the prostrate body of Francisco Cañete.

In *People vs. Layos* (60 Phil., 224, 232), this Court said:

"It is noted, however, that the trial court did not consider such findings strictly in conformity with the law inasmuch as it considered the act committed by the appellant as merely constituting the complex crime of double homicide when such is not the case, taking into consideration the spirit and the text of article 48 of the Revised Penal Code. According to said article, in order that the crime may be considered double homicide, it is necessary that it be the result of a single act, as in the case of killing two persons at the same moment with the single stroke of the bolo or with a single shot."

Our conclusion is that the defendant-appellant is guilty of two separate crimes of murder. (*People vs. Mabug-at*, 51 Phil., 967.)

The lower court thinks that these crimes were committed in contempt of or with insult to a public authority. As the Solicitor General correctly says, this is a mistake. The only evidence on the official status of Captain Burchfield is that he was an officer of the United States Army. There is not an iota of proof that he had been detailed to the police department of Zamboanga city to take charge of peace and order. Now, being an officer of the United States Army does not confer public authority within the meaning of our penal laws (*U. S. vs. Smith*, 39 Phil., 553; *People vs. Yboa*, 77 Phil., 420). Besides, "these circumstances cannot be taken into account where it is the public authority himself who is injured by the committal of the offense." (*People vs. Siojo*, 61 Phil., 307, citing *U. S. vs. Rodriguez*, 19 Phil., 150; *Decision of the S. C. of Spain* dated Jan. 24, 1881; 1 Viada, 310.)

The aggravating circumstance of nocturnity is likewise unavailable. It is apparent that night time was not sought to insure the commission of the crimes or for the purpose of immunity. From the evidence of the prosecution itself, it appears that the notion to kill Captain Burchfield was conceived only shortly before its commission, prompted by the punishment inflicted on Miguel Nuñal by the Captain as a result of Nuñal's making trouble in and outside the show. Moreover, it is a settled rule that nocturnity may not be taken as an aggravating circumstance separate and independent of that of treachery. (*U. S. vs. Salgado*, 11 Phil., 56; *People vs. Bumanglag*, 56 Phil., 10; *People vs. Madrid*, No. 41967, Nov. 9, 1934; *People vs. Banguy*, 52 Phil., 87.) The reason for this rule is that night time forms part of the peculiar treacherous means and manner adopted to insure the execution of the crime.

Proof of evident premeditation is entirely lacking. One of the essential requisites of evident premeditation is that sufficient time had elapsed between the determination to commit the crime and the execution to allow the offender to reflect upon the consequences of his act. In the present case only a few minutes had transpired from the time the appellant told Agapito de la Cruz that he was going to take Burchfield's life to the time of the actual

shooting. In fact the firearm used by the appellant was grabbed from Agapito de la Cruz almost immediately before he opened fire, an incontestable proof that the resolution to carry out the criminal intent had not been planned beforehand.

The lower court appreciated two mitigating circumstances,—intoxication and voluntary confession of guilt. Neither of these circumstances may be taken into account. There is no evidence that the appellant was drunk at all when he committed the double murder. The fact that he had a gallon of "tuba" with him does not in itself show that he was under the influence of liquor. There is not a single testimony, not even by the accused himself, that he was intoxicated. On the contrary, his movements as described in the record conspire to indicate that he was sober. There is no proof that if he carried "tuba" to the theater he drank much of it himself. De la Cruz and Pesario were with him, and he offered drinks to girl members of the troupe whom he visited in the dressing room. There is no evidence that the wine was totally consumed.

The extrajudicial confession made by the accused is not the voluntary confession which paragraph 7, article 13, of the Revised Penal Code contemplates. The confession was made outside of the court, quite apart from the fact that he repudiated or attempted to repudiate it insinuating that it was involuntary. This repudiation is at war with the philosophy underlying the extenuating circumstance in question.

The judgment of the lower court is modified so that the appellant is hereby found guilty of two separate murders without the presence of any modifying circumstance to aggravate or to mitigate the appellant's criminal liability, and he shall be sentenced to reclusion perpetua for each crime with the accessories of law, subject to the provision of article 70 of the Revised Penal Code that the duration of the imprisonment shall not exceed forty years. The judgment as to indemnity and payment of costs is affirmed. It is so ordered, with costs of this instance.

Moran, C.J., Paras, Feria, Pablo, Perfecto, Hilado, Bengzon, Briones, and Padilla, JJ., concur.

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