

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. LAMBERTO TAPENO, DEFENDANT-APPELLANT.

G.R. No. L-33573. August 29, 1988

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

Lamberto Tapeno and Dominador Castro were charged before the Circuit Criminal Court of Pasig, Rizal with the crime of murder in an information which reads:

"The undersigned Assistant City Fiscal accuses PAT. LAMBERTO TAPENO Y VISMANOS and PAT. DOMINADOR CASTRO of the crime of MURDER committed as follows:

"That on or about the 18th day of March, 1970, in Quezon City, Philippines, the above-named accused, conspiring together, confederating with and mutually helping each other, did, then and there, wilfully, unlawfully and feloniously, with intent to kill with evident premeditation and treachery, and without any justifiable cause, assault, attack and employ personal violence upon the person of one JAIME RAMOS Y ALMAZAN, by then (sic) and mauling him and shooting him with a .38 caliber pistol on his head, thereby inflicting upon said Jaime Ramos y Almazan serious and mortal wounds which were the direct and immediate cause of his death, to the damage and prejudice of the heirs of said victim in such amount as may be awarded under the provisions of the Civil Code.

"Contrary to Law."

(Rollo, p. 3)

The facts according to the prosecution evidence are as follows:

"About past midnight on March 18, 1970, inside the La Loma cockpit in Quezon City, the deceased, Jaime Ramos y Almazan, who allegedly did not pay his bet ('nangangabet'), was apprehended by Accused Dominador Castro, a policeman of the Quezon City Police Department (pp. 9-10, t.s.n., September 29, 1970). Accused Castro mauled the deceased by giving him fist blows and also by kicking him (p. 11, id.). The deceased fell down and Pat. Castro frisked him but found nothing (pp. 11-12, id.).

"At this stage, appellant, Lamberto Tapeno, arrived at the scene of the commotion and joined his co-accused Castro in kicking the deceased at his chest, stomach and sides of the body (pp. 12-14, id.; pp. 7-9, t.s.n., October 20, 1970).

"While this commotion was going on, Ben Torres and Mang Totong, both members of the Quezon City Police Department arrived and pacified Castro and Tapeno (p. 15, t.s.n., September 29, 1970; pp. 9-10, t.s.n., October 20, 1970). Ben Torres helped the deceased (sic) to stand up and he, together with Mang Totong, brought him (deceased) to the office inside the cockpit; Tapeno and Castro followed behind (p. 16, id.; p. 10, id.). Mang Totong talked to the deceased inside the office. Thereafter, Tapeno took the deceased, put him inside a wooden cage-like cell (Exhs. A and B), where persons who do not pay their bets are placed, entered the cage, and then and there mauled and kicked him with such a force that rocked the cage (pp. 17-19, t.s.n., September 29,

1970). After about three minutes, Mang Totong entered the cage and brought Tapeno out, leaving the deceased inside, helpless and unable to stand up (p. 20, id.). Once outside the cage, Tapeno approached Castro and they whispered to each other (p. 21, id.). Then Tapeno went towards the cage and wanted to enter again. This time Mang Totong dissuaded him from entering. Frustrated because of his inability to get inside the cage, Tapeno pulled out his gun, inserted it between the wooden bars of the cage, and shot the deceased, hitting him in the head (pp. 22-23, id.). At the time he was shot, the deceased Jaime Ramos was slumped on the ground, his left leg bent and the right hand touching the ground (p. 24, id.). After the shooting, Mang Totong embraced Tapeno and led him out of the cockpit (pp. 24-25, id.).

"As a result of the gunshot wound in his head, Jaime Ramos died ." (pp. 2-4, Brief for Appellee).

Upon arraignment on July 23, 1970, the accused pleaded not guilty. Tapeno alleged that he acted in self defense. His version of the facts is found in the sworn statement of Atty. Jesus Agustin, an alleged eye-witness. Agustin stated:

x x x

x x x

x x x

"That on March 18, 1970 at about 12:30 o'clock in the morning I was inside the La Loma Cockpit, located at Retiro Street, La Loma, Quezon City.

"That while I was inside the said La Loma Cockpit on said date and hour, I witnessed an incident involving Patrolman Lamberto Tapeno of the Quezon City Police Department on one hand and a person who I came to know later as Jaime Ramos on the other, that I saw Lamberto Tapeno brought Jaime Ramos near the Office of the La Loma Cockpit which is located inside said cockpit and once there, Lamberto Tapeno ordered Jaime Ramos to sit down there and not to go away, then Lamberto Tapeno turned his back against Jaime Ramos and began walking towards where they came from, when suddenly Jaime Ramos jumped from his feet, caught the waist of Lamberto Tapeno and tried to wrest the service gun of Tapeno which was then tacked in his waist, both Jaime Ramos and Lamberto Tapeno grappled for the possession of the gun but Tapeno was able to hold it firm in his right hand, then later Ramos disengaged. Jaime Ramos pulled a knife from his pocket shirt, Lamberto Tapeno and move backward (sic) and said tried to avoid Jaime Ramos who continued advancing towards Lamberto Tapeno and at the same time thrusting his knife at him. When Lamberto Tapeno was moving backward to avoid the thrust of Jaime Ramos, Lamberto Tapeno's gun went off hitting Jaime Ramos on the right temple. Ramos was then brought to the hospital after that." (Appellant's brief, pp. 8-9)

On April 30, 1971 the trial court, after weighing the evidence on record, rendered judgment against the accused Tapeno while accused Castro was acquitted for insufficiency of evidence. The dispositive portion of the decision reads:

"WHEREFORE, finding the accused Lamberto Tapeno, GUILTY, beyond reasonable doubt, of the crime of Murder as defined under Article 248 of the Revised Penal Code, as charged in the information, the Court hereby sentences him to suffer the penalty of RECLUSION PERPETUA; to indemnify the heirs of the deceased Jaime Ramos y Almazan, the amount of P12,000.00; to pay the amount of P5,000.00 as moral damages and another P5,000.00 as exemplary damages; and to pay the costs.

For insufficiency of evidence accused Dominador Castro is ACQUITTED and the bond for his provisional liberty is declared cancelled and of no further effect.

SO ORDERED." (Rollo, p. 50)

The case is now before us on appeal with the accused-appellant raising the following assignments of errors:

I

"THE LOWER COURT ERRED IN NOT ACQUITTING THE APPELLANT ON THE GROUND THAT HE WAS ACTING IN THE FULFILLMENT OF DUTY OR IN THE LAWFUL EXERCISE OF A RIGHT OR OFFICE.

II

"THE LOWER COURT ERRED IN NOT HOLDING THAT THE APPELLANT ACTED IN LEGITIMATE SELF-DEFENSE.

III

"THE LOWER COURT ERRED IN FINDING THAT THE COMMISSION OF ACT UNDER REVIEW WAS ATTENDED BY TREACHERY AND THE AGGRAVATING CIRCUMSTANCE OF TAKING ADVANTAGE OF PUBLIC POSITION.

IV

"THE LOWER COURT ERRED IN GIVING WEIGHT AND CREDENCE TO THE BIASED AND PERJURED TESTIMONIES OF SEVERINO HERNANDEZ AND EMETERIO ADRANO. (pp. 1-2, Brief for Defendant-Appellant.)

The first and second assignments of errors are discussed jointly since they are closely related.

The appellant contends that he was acting in the fulfillment of his duty as a police officer and that the succeeding struggle and shooting were done in self-defense. There is no question that Tapeno was at the La Loma Cockpit in his capacity as a police officer at the time of the incident. He was ordered by Sgt. Nadonga to conduct a routine investigation after Jaime Ramos was turned over to him while Nadonga and the rest of the police officers assigned to the cockpit pacified the milling crowd. However, the statement of the appellant regarding self-defense is clearly inconsistent with his own facts and self-serving. Tapeno cannot claim self-defense while at the same time alleging that the reason for the death of Jaime Ramos was the accidental firing of his service pistol. Had the reason really been self-preservation due to the series of attacks, including the use of a knife, waged by the victim, then Tapeno could have merely employed reasonable means to repel the attacks. And if there was a need to use a gun to save his life, as claimed, it could not have been fired accidentally. Tapeno would have used it deliberately to render his aggressor powerless.

Furthermore, the alleged use of the balisong knife by the victim is not credible as it is a standard procedure for police authorities to frisk those whom they apprehend to make sure that no deadly weapons are concealed in their bodies. The appellant's claim that Ramos was not frisked on account of the swiftness of the events is untenable. Eyewitness Severino Hernandez testified that Patrolman Castro frisked Ramos. This is believable because the victim was a notorious police character.

The appellant's claim of self-defense is further negated by other circumstances as his failure to tell the police authorities who were themselves his companions, that he killed the deceased in self-defense. There was no blood on his sando and underwear which were allegedly slashed, inspite of a wound which surprisingly was left untreated by the appellant. Tapeno's acts under the circumstances are not the natural reactions of an innocent man and are least expected of him as police officer for if he were truly innocent, then he would have voluntarily given his statement to his fellow police.

Ramos could not have been an aggressor because he was beaten up and mauled by the two accused until he could barely move. And he was inside a cage when the appellant shot him from outside.

As cited in *People v. Balmaceda*, (148 SCRA 194) and *People v. Abagon and Ongonion*, (G.R. No. 68940, May 9, 1988) "for self-defense to prosper, the following elements should have been proved by appellant: (a) unlawful aggression; (b) reasonable necessity of the means employed to prevent or repel it and (c) lack of sufficient provocation on the part of the person defending himself."

Even if there had been unlawful aggression by the victim against the appellant, yet it cannot be said that there was reasonable necessity for the means employed to prevent such unlawful aggression and neither was the absence of provocation on the part of Tapeno present in this case. The evidence on record shows that Tapeno and Patrolman Castro mauled the deceased prior to the shooting, and that the accused kicked the deceased with "such force that rocked the cage" (pp. 17-19, t.s.n., September 29, 1970). The fact of mauling obviously negates the claim of self-defense.

The position of the gunshot wound further weakens the appellant's claim of self-defense. If Tapeno's claim were to be believed, the trajectory of the bullet would have been different. The bullet could not have caused the gunshot wound. According to the NBI expert who testified, the appellant must have been standing while the victim was squatting or sitting when the gun was fired. This finding is corroborated by the two (2) witnesses for the prosecution who testified that Ramos was slumped on the ground when shot. On the other hand, the appellant's statement is not supported by credible evidence. Under these circumstances, the commission of the crime was clearly without risk to the appellant. There could be no resistance from the victim as he was inside the cage, disabled and defenseless.

We agree with the Solicitor General that the appellant failed to prove self-defense by clear, convincing and satisfactory evidence (*People v. Galo*, 143 SCRA 193). Because the burden of proof had shifted to the defense, the accused must rely on the strength of his evidence and not on the weakness of that of the prosecution. The prosecution evidence cannot be totally disbelieved considering that the accused had already admitted that he killed the victim.

We likewise agree with the Solicitor General that the crime was not attended by treachery. While it is true that the shooting was sudden and unexpected and committed on a helpless victim, there is no showing that the appellant adopted this mode of attack consciously and that he knowingly intended to ensure the accomplishment of his criminal purpose without any risk to himself arising from the defense the victim might offer. The shooting was only an aftermath of the mauling, kicking, and boxing. The appellant pulled out his gun when he was led out of the cage. It is also an established rule that the aggravating circumstance of treachery must be present from the commencement of the attack.

As to the fact of the appellant's taking advantage of his official position, we find no error in the lower court's taking that into account. There is proof from the records of the case that the appellant indeed took advantage of his position. If it were not for his being a policeman he would not have mauled and beaten up the victim. He could not have committed the crime if he were an ordinary civilian because the police would have arrested him if he mauled the victim in front of them and much more so if he used a gun. His being a policeman in effect gave him license to commit the felonious act under the guise of lawful punishment. It is, therefore, clear that the appellant abused his office.

Finally, the defense stressed the character of the victim and the witnesses, claiming that the latter are perjured witnesses and that their character as well as that of the victim are highly questionable they being *Sigue-Sigue* Gang members. He states that "evidence to be believed must not only proceed from the mouth of a credible

witness, it must be credible in itself - such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. xxx" (Borguilla v. Court of Appeals, 147 SCRA 9).

The appellant has failed to show why we should disturb the findings of the trial court. This court has repeatedly ruled that the findings of trial courts on the credibility of the witnesses are generally not to be disturbed for these courts have the privilege of examining the deportment and demeanor of witnesses and, therefore, can discern if such witnesses are telling the truth or not (People v. Ramilo, 147 SCRA 102).

From the evidence presented, Lamberto Tapeno is guilty of the crime of homicide, not murder, considering the absence of treachery in the commission of the crime. Homicide is penalized by Article 249 of the Revised Penal Code with reclusion temporal, i.e. twelve (12) years and one (1) day to twenty (20) years.

There being only one aggravating circumstance which was offset by the lone mitigating circumstance of voluntary surrender, the penalty shall be imposed in its medium period, which is fourteen (14) years, eight (8) months and one (1) day to seventeen (17) years and four (4) months. Applying the Indeterminate Sentence Law, the proper imposable penalty is one with a minimum within the range of prision mayor, the penalty next lower to reclusion temporal, or a minimum of from six (6) years and one (1) day to twelve (12) years, and a maximum within the medium degree of reclusion temporal or anywhere from fourteen (14) years, eight (8) months and one (1) day to seventeen (17) years and four (4) months.

WHEREFORE, the judgment appealed from is hereby AFFIRMED with the modification that appellant Tapeno is found guilty of the crime of homicide and is sentenced to suffer an indeterminate penalty of seven (7) years, four (4) months and one (1) day of prision mayor as minimum, to sixteen (16) years and two (2) months of reclusion temporal as maximum, and to pay an increased indemnity of THIRTY THOUSAND PESOS (P30,000.00).

SO ORDERED.

Fernan (Chairman), Feliciano, Bidin and Cortes, JJ., concur.

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