

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ENRIQUE DUNGAO Y ARCA, ACCUSED-APPELLANT.

Ponente: BARRIOS, J.

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BARRIOS, J.:

At about 12:45 in the morning of November 26, 2000 and while in the course of a police “buy-bust” operation, SPO2 Alberto Lizarondo (or SPO2 Lizarondo for brevity) was shot dead at E. Jacinto St., Sangandaan, Kalookan City. He was hit once on the trunk.

The principal and only suspect, there and then identified, was the appellant Enrique Dungao y Arca (or Dungao). He was charged with Murder on the allegation that the killing was attended by treachery and evident premeditation.

The prosecution presented as eyewitnesses police officer SPO2 Filemon Arenas (or SPO2 Arenas) and police asset Gladys Jurado (or Jurado), who incidentally is a man. Among the Exhibits it presented were “A”, the Medico-Legal Report No. M-736-00, “C”, the Physical Report No. D-1343-2000, and “D”, the Salaysay of Gladys Jurado.

Aside from the victim’s widow Jeanette Lizarondo, no witness was presented at the turn of the defense. Not even the accused Dungao testified. He relied though on the peripheral testimony of Jeanette Lizarondo and her Affidavit of Desistance (Exh. “E”), as well as that of Jurado who flip-flopped when re-took the witness stand at the behest of an accommodating prosecutor.

According to the prosecution, SPO2 Lizarondo and SPO2 Arenas were members of the Drug Enforcement Unit of the Kalookan City police assigned to Bagong Barrio, and the drug user Jurado was their “asset”. Jurado reported that he had just bought shabu in Jacinto St. in Sangandaan where drug trafficking was rampant. His pusher went by the monicker of Ricky Tuloy, and who turned out to be Dungao.

SPO2 Lizarondo and SPO2 Arenas decided to operate against Dungao, and that next day of November 26, 2000 at about 12:45 a.m. they went to this place utilizing Jurado. They found Dungao sitting in front of his house, and he was approached by Jurado who told him that his companions wanted to buy P100.00 worth of shabu. They struck a deal, and money and the drugs were exchanged between them. Jurado then gave their pre-arranged signal of scratching his head, but this tipped off the wary Dungao who ran inside his house. He was chased by Jurado and SPO2 Lizarondo, while SPO2 Arenas trailed them. Dungao was not in the ground floor nor found in the second floor. With Jurado leading, they were on the way to the third floor when Jurado stopped upon seeing Dungao on the roof holding a gun. He warned his companions, but SPO2 Lizarondo disregarded this blurting “Anong barrel” and continued the pursuit. Three (3) gunshots rang out and SPO2 Lizarondo slumped moaning. Jurado saw Dungao fire the shots at SPO2 Lizarondo, but SPO2 Arenas because of his position did not see who did it. SPO2 Arenas nonetheless fired his gun in the direction from where the shots came from to dissuade the gunman from further shooting. They then tended to SPO2 Lizarondo and brought him to the hospital, but he was pronounced dead on arrival.

As said, Jurado came back to testify under curious circumstances. This time he said that although he saw Dungao holding a gun, he was not too sure that it was Dungao who shot SPO2 Lizarondo. He explained that there were many persons drinking who then scampered away when they came, but that they had zeroed in on Dungao. The widow Jeanette Lizarondo also testified to put in a good word for Dungao and submitted her Affidavit of Desistance (Exh. "E").

Subsequently a case for Violation of R.A. 6425 was filed too against Dungao.

After all was said and done, the trial court rendered judgment in this case finding Dungao guilty of Murder, and disposing that:

In the Light of all the Foregoing, the Court hereby finds accused Enrique Dungao y Arca guilty of Murder, qualified by treachery, beyond reasonable doubt, and hereby sentences him to suffer the penalty of Reclusion Perpetua. He is ordered to pay the heirs of the victim P50,000.00, as indemnity ex-delicto, P25,000.00 as temperate damages, and P50,000.00 as exemplary damages. (Decision, p. 182, record)

This is assailed by Dungao in this appeal where he alleges that the court a quo committed these reversible errors:

I

THE TRIAL COURT GRAVELY ERRED IN NOT GIVING FULL WEIGHT AND CREDENCE TO THE RETRACTION MADE BY PROSECUTION WITNESS GLADYS JURADO.

II

THE TRIAL COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANT GUILTY BEYOND REASONABLE DOUBT OF THE CRIME CHARGED. (Appellant's Brief, p. 45, rollo)

In homicide (by dolo) and in murder cases, the prosecution is burdened to prove: (a) the death of the party alleged to be dead; (b) that the death was produced by the criminal act of some other than the deceased and was not the result of accident, natural cause or suicide; and (c) that defendant committed the criminal act or was in some way criminally responsible for the act which produced the death (Quinto vs. Andres, G. R. No. 155791, March 16, 2005). These elements were proven by the prosecution beyond reasonable doubt notwithstanding that Jurado, one of the eyewitnesses, blew hot and then cold on his identification of the gunman.

Jurado in his Salaysay (Exh. "D", p. 23, record) taken on November 26, 2000 or the very day of the incident, and in his testimony given on April 19, 2002, said in no uncertain terms that he saw Dungao holding a gun, and with it he shot and killed SPO2 Lizarondo. But then during the hearing of March 25, 2004 the prosecutor melodramatically announced that he had received a vital information that he was going to share by recalling Jurado. That very instant Jurado was presented, and this time he said he was not sure that it was Dungao who shot SPO2 Lizarondo. Jurado explained that he pointed at Dungao earlier because he was then confused and because they had a misunderstanding before. He has since thought about it and decided to rectify things.

Whatever it is that made Jurado do a volte face years later, the rule is that a mere retraction by a prosecution witness does not necessarily vitiate his original testimony. A retraction is generally unreliable and is looked upon with considerable disfavor by the courts. Like any other testimony, it is subject to the test of credibility based on the relevant circumstances (People vs. Minon, G. R. Nos. 148397-400, July 7, 2004). The recantation of Jurado appears to be a mere afterthought and is suspect considering his inadequate explanation for his change of mind and heart. We look with disfavor upon retractions of testimonies previously given in court. The rationale for the rule is obvious: Affidavits of retraction can easily be secured from witnesses, usually through intimidation or for a monetary consideration. Recanted testimony is exceedingly unreliable (People vs. Ayuman, G. R. No. 133436, April 14, 2004).

But even without Jurado, the testimony of SPO2 Arenas standing alone already proved that Dungao is the assailant. This is notwithstanding that he candidly admitted that from where he was, he did not see who was shooting at them. Conviction need not come from direct testimony alone, circumstantial evidence can suffice to prove guilt beyond reasonable doubt when the following requisites concur: (1) there is more than one circumstance, (2) the facts from which the inferences are derived are proven, and (3) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt (*Mallari vs. People*, G. R. No. 153911, Dec. 10, 2004).

SPO2 Arenas was also in the chase and was close at the heels of Dungao and SPO2 Lizarondo. Except for him and Jurado, there was no one else in the third floor with SPO2 Lizarondo, and the shot came from the roof where there was no one else except Dungao. The totality of the circumstances were such that they exclude the possibility that it was not Dungao but someone else who shot and killed SPO2 Lizarondo. The guilt of Dungao was thus proven beyond reasonable doubt even without the testimony of Jurado.

The court a quo also correctly disregarded the aggravating circumstance of evident premeditation, but erred in appreciating treachery against the appellant. For evident premeditation to apply, it is necessary that the prosecution prove the following elements: (1) the time when the accused decided to commit the crime; (2) an overt act showing that the accused had clung to their determination to commit the crime; and (3) the lapse of a sufficient period of time between the decision and the execution of the crime, to allow the accused to reflect upon the consequences of the act (*People vs. Roma*, G. R. No. 147996, Sept. 30, 2005). There is nothing in the records to show that Dungao planned the killing in advance or in accordance with a pre-conceived plan. As for treachery, the elements for it to be appreciated as a qualifying circumstance are: (a) the employment of means of execution which gives the person attacked no opportunity to defend himself or retaliate; and (b) the means of execution is deliberately or consciously adopted (*People vs. Parreno*, G. R. No. 144343, July 7, 2004). As said there was no showing of a plan to kill, let alone the mode by which this was to be executed. The essence of treachery is the swiftness and unexpectedness of the attack on the unarmed victim but which was not present in this case. Besides SPO2 Lizarondo was forewarned that Dungao was lurking with a gun, but in his zeal he just dismissed this with “Anong baril baril”.

It is axiomatic that qualifying and aggravating circumstances, like treachery and evident premeditation, must be proven with equal certainty as the commission of the crime charged. Such circumstances cannot be presumed; nor can they be based on mere surmises or speculations. In case of doubt, the same should be resolved in favor of the accused (*People vs. Torpio*, G. R. No. 138984, June 4, 2004). For this reason, while the conviction of Dungao must be affirmed, it should only be for Homicide and not Murder as charged.

WHEREFORE, the appealed Decision finding Dungao guilty is AFFIRMED, but with the MODIFICATION that this is for the felony of Homicide and for which he is hereby meted the penalty of imprisonment for an indeterminate term ranging from Ten (10) Years of prison mayor as minimum to Seventeen (17) Years and Four (4) Months of reclusion temporal as maximum.

SO ORDERED.

Guariña, III and Romilla-Lontok, JJ., concur.

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