

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PEDRO MALAZZAB, ACCUSED-APPELLANT.*G.R. No. L-39136. April 15, 1988*

Ponente: GANCAYCO, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/26965be3f634/>**GANCAYCO, J.**

On December 10, 1970 at about 11:00 o'clock in the morning, Primitivo Javier with his son Elmer were walking towards their house in Sta. Teresita, Cagayan. Suddenly, they heard a gun report and when they looked at the direction where it came from, they saw policeman Pedro Malazzab with a small gun at his waist and a long gun on his shoulder. At this juncture, Pedro, who was then in a kneeling position, pointed his long gun at Primitivo and Elmer so both father and son raised their hands and pleaded with Pedro not to kill them. With their hands still raised, Pedro fired successive shots hitting Primitivo on the right thigh and left arm, causing him to fall, his buttock touching the ground, with his left arm supporting his body. During the successive shots. Elmer ran for safety to a distance of 2 and Vi meters from his father. Then, Pedro went near Primitivo and shot the latter again at the right breast, after which shot, Primitivo died. Immediately thereafter, Pedro placed his long gun over his right shoulder and went northward.

Dr. Wilson Payaoan, the medical health officer of the town performed the postmortem examination and issued his postmortem findings as follows:

""Wound, gunshot (entrance) oval in shape, 0.8. cm. in diameter, surrounded by contuso-abraded collar, 0.2. cm. in width almost evenly distributed around the gunshot wound, located at the lateral aspect of the thorax, right side, anterior axillary line, 6th inter-space, 11 cm. from the anterior median line, 7 cm. from the right nipple, directed medially and anteriorly, penetrating the skin, subcutaneous tissue, and muscle, grazing the lower lobe of the right lung, involving the left ventricle of the heart and lower lobe of the left lung, fracturing the 7th rib, left side, then making a wound (exit) stellate in shape. 1.5 cm. by 1., cm. located at the anterior aspect of the thorax, left side, at the mid-clavicular line, at the level of the 7th rib.

""Wound, gunshot (entrance) oval in shape, 0.8. cm. in diameter, surrounded by contuso-abraded collar. 0.2. cm. in width, almost evenly distributed around the gunshot wound, located at the lateral aspect of the forearm, 1 cm. above the elbow, directed medially penetrating the skin subcutaneous tissue and muscle, fracturing the humerus bone, then making a wound (exit) roughly oval in shape 2 cm. in diameter, located at the medial aspect of the forearm, 1 cm. I mm the left elbow. ""Wound, gunshot (entrance) oval in shape. 0.8. cm. in diameter, surrounded by contuso-abraded collar. 0.2. cm. in width, almost evenly distributed around the gunshot wound, located at the medial aspect of the right thigh, just 3 inches below the right inguinal 20 cm. above the right knee directed laterally and upward penetrating the skin, subcutaneous tissue and muscle, then making a wound (exit) stellate in shape. 1.5 cm. by 1.3 cm. located at the lateral aspect of the thigh, right 22 cm. from the right knee.

""Wound, gunshot elongated in shape. 0.8 cm. by 1.5 cm located at the scapular region, left side. 10 cm. from the shoulder, left side. 6 cm. from the posterior median line, involving only the skin.

"Abrasion wound. 2 cm. by 1 cm. located at the forehead, right side.

"Cause of death: 'Multiple gunshot wound.'[1]

An information for murder was filed in the Court of First Instance of Cagayan against Pedro Malazzab by the Provincial Fiscal that reads:

"The undersigned, Provincial Fiscal, accuses Pedro Malazzab of the crime of Murder, defined and penalized under Article 248, the Revised Penal Code, committed as follows:

"That on or about December 10, 1970, in the municipality of Sta. Teresita, province of Cagayan, and within the jurisdiction of this Honorable Court, the said accused Pedro Malazzab, armed with guns, with intent to kill and with readiness, did then and there unlawfully and feloniously assault, attack and shoot one Primitivo Javier, inflicting upon him several wounds on his body which wounds caused his death.

"That in the commission of the crime, the following aggravating circumstance was present, to wit: that the accused had taken advantage of his official position, he being a Municipal Police (officer) of Sta. Teresita, Cagayan, at the time of the incident.

"Contrary to law."

After arraignment wherein the accused entered a plea of not guilty and the trial on the merits, a decision was rendered on December 8, 1972 convicting the accused of the offense charged in this manner:

"WHEREFORE, in view of the foregoing circumstances, the Court finds the accused Pedro Malazzab guilty beyond reasonable doubt of the crime of MURDER, qualified by treachery, defined and penalized under Article 248 of the Revised Penal Code, with one mitigating circumstance and one aggravating circumstance offsetting each other, and hereby sentences said accused to suffer a penalty of RECLUSION PERPETUA; to indemnify the heirs of the victim in the amount of P2,000.00 without serving subsidiary imprisonment in case of insolvency, and to pay the costs.

The accused having been a detention prisoner and having signed the agreement required of detention prisoners as provided for by Article 29 of the Revised Penal Code as amended by Republic Act 6127, is hereby given full credit of his preventive imprisonment."

Not satisfied therewith the accused interposed this appeal alleging that the trial court committed the following assigned errors:

"I

THAT THE LOWER COURT ERRED IN BELIEVING THE PROSECUTION WITNESSES ISIDRA CABACCANG AND ELMER JAVIER.

"II

THAT THE LOWER COURT ERRED IN NOT FINDING THAT THE ACCUSED-APPELLANT ACTED IN SELF-DEFENSE AND/ OR IN THE PERFORMANCE OF A DUTY.

"III

THAT THE LOWER COURT ERRED IN NOT ACQUITTING THE ACCUSED-APPELLANT OF THE CRIME CHARGED."

The theory of the appellant is that he acted in self-defense. His version is summarized in his brief —

"That on or about December 10, 1970, the accused-appellant was a policeman of Sta. Teresita, Cagayan and he had been such since 1968. (pp. 2-3. t.s.n., September 4, 1972). From 7:00 o'clock in the morning, while he was

thus patrolling towards Masi Barrio road. he heard a gun report from the south, (p. 12. *ibid.*) and he met children running from the same direction and they told him. when he asked them, that Primitivo Javier, (deceased) was drunk and he had a gun. (pp. 9, 11, 12. 15, decision; pp. 3-4-5. *t.s.n.*, September 4. 1972). As a police officer, he proceeded to the south towards the place where a gun report was heard and the place where the deceased was then at the time. (p. 4. *ibid.*) When he was about 8 meters from Primitivo Javier, he noticed that the former was drunk and was walking in a zigzag manner holding a gun like a tube (*palsuot*). (p. 5. *ibid.*: p. 26. *t.s.n.*, Sept. 4. 1972. Soliven). He shouted to the deceased. 'Stop, ka Piring.' but the deceased pointed immediately at the appellant his gun like a tube (Exhibit '2', '2-A' to '2-D'). (pp. 40-12, decision). The appellant knelt on one foot and fired his .38 caliber service pistol hitting the deceased on his right leg. (*ibid.*), (p. 69. *t.s.n.*, Jan. 13, 1972). Before appellant shot him the deceased tried to aim and pushed the tubes together (p. 6. *t.s.n.*, Sept. 4. 1972) and appellant heard a 'click' (*t.s.n.*, pp. 7, 18-20. *ibid.*). After deceased was shot on the right thigh, he stumbled (*nakasikig*) swayed to and fro and changed the position of the tube-gun (Exh. '2') (*balvesta*) and tried again to press both tubes together to fire aiming at the appellant. (pp. 7-8-9, 16. *ibid.*). The appellant then shot him successively and the deceased laid flat on the ground, (p. 19. *ibid.*)."

Under the first assigned error the appellant assails the testimonies of prosecution witnesses Isidra Cabaccang and Elmer Javier because of serious inconsistencies therewith. The Solicitor General effectively rebutted this issue when he stated:

"1. Isidra Cabaccang testified that Primitivo was hit on the left arm and right thigh while Elmer declared that his father was hit on the right thigh.

Comment/Refutation

We see nothing inconsistent in their testimonies considering that Elmer on this point testified that his father was hit on the right thigh and on his left arm (pp. 70, 71. *t.s.n.*, Jan. 12, 1972). This is exactly the declaration of Isidra Cabaccang.

2. Isidra Cabaccang declared that after the first shot accused Malazzab moved forward about one meter and shot Primitivo again hitting the latter on his right breast which went through his back while Elmer testified that Malazzab went northeast and shot again his father who was hit on the right side of the breast and went thru the left side of the body.

Comment/Refutation

That there might be some seeming inconsistencies in the description of the exact location of the point of exit of the bullet in the victim's body and the direction where the accused went after the incident is understandable considering that not all persons who witness an incident are impressed in the same manner and it is but natural that, in relating their impressions, they disagree on the minor details and that there are contradictions in their testimony (*People v. Limbo, et al.*, 49 Phil. 94).

3. It is impossible for Isidra Cabaccang to have seen her son (the victim) still standing and raising his hands considering that the first shot of the accused found its mark on the right thigh of the deceased.

Comment/Refutation

Appellant was under the wrong impression that when prosecution witness Isidra Cabaccang went out. the victim had already been shot. On the contrary, an examination of her testimony on this point shows that when she went out immediately after hearing the first gun report, that was the only time the accused was aiming his gun at the victim and the latter's son; thus she pleaded not to kill her son. after which she heard successive gun reports which hit her son and caused his death (pp. 19-22, *tsn.* Nov. 15. 1971; p. 74. *tsn.*, Jan. 12, 1972). It is, therefore, clear that accused had not yet shot the victim when prosecution witness Isidra Cabaccang went out to the street. It was then

not impossible for the victim to have been seen by his mother still standing and raising his hands when the accused was about to shoot him.

4. If Isidra Cabaccang was present at the place of the incident, she should have given a statement to the police of officers who arrived and not to the fiscal two weeks after the incident.

Comment/Refutation

This point has been sufficiently explained by the prosecution witness Isidra Cabaccang who testified as follows:

"Q Do I understand that there was really an investigation made by the policemen?

'A

They only measured the place where he died.

xxx xxx xxx

"Q

And as a mother and having sympathy to your son. did you not tell to the investigator that Pedro Malazzab killed your son?

'A I told them. sir.

'Q May we know why you did not go to the municipal building of Sta. Teresita but instead you proceeded to Aparri?

xxx xxx xxx

'A

After the death of my son he was embalmed for more than 10 days, and after the burial we went to the office of the Chief of Police and they informed me that they have filed the case without informing us. So we asked copies of the affidavits and they refused to give us. that is why we went to the office of the Fiscal, (p. 30. 31. 33. 34. tsn.. No. 15. 1971 I.

"If the policemen did not take the affidavits of prosecution witnesses Elmer Javier and Isidra Cabaccang it was probably because the accused was a member also of the police force of Sta. Teresita, Cagayan. Consequently. Isidra Cabaccang was forced to take the matter to the Fiscal's Office of Cagayan soon after the burial of the victim.

5. It is impossible for wound No. 1 to be inflicted on the right and make an exit on the left side of the body if the same was sustained in a 35 degree position as alleged by Isidra Cabaccang.

Comment/Refutation

We find no impossibility in the said testimony. Dr. Puyaoan, the prosecution witness who conducted the autopsy on the victim's cadaver testified on this point as follows:

'Q

Could you indicate doctor in your body the point of entrance of wound No. 1 in the postmortem findings?

'A

Here on this point. (The witness indicate the right side of his body).

'Q

And could you point also Doctor the point of exit in your body of said wound?

'A

Here. (The witness indicate the point of exit as the left side of the breast at the mid clavicular line), (p. 5. tsn. Nov. 15. 1971).'

The foregoing testimony of the doctor confirmed the declaration of prosecution witness Isidra Cabaccang that the bullet entered the right side of the body and made an exit at the left side.

Appellant alleges that there was no motive for him to kill the deceased.

We disagree. Lack of motive is not proof of innocence of the accused (*People v. Ragsac*, 61 Phil. 146)."[2]

Under the second assigned error the appellant argues that having acted in lawful self-defense he is entitled to acquittal. The essential elements of this justifying circumstance are —

- Unlawful aggression:
- Reasonable necessity of the means employed to prevent or repel it; and,
- Lack of sufficient provocation on the part of the person defending himself.[3]

There can be no self-defense until there has been unlawful aggression on the part of the person injured or killed by the accused.[4]

In this case, assuming the version of appellant to be correct, the appellant saw the victim drunk, walking in a zigzag manner carrying a crude gun like tube (palsuot) and when he shouted at the victim to stop, the latter pointed his gun-like tube at appellant so appellant knelt and fired at the victim with his .38 caliber pistol hitting him at the right thigh. Thereafter, the appellant shot at the victim successively.

It appears that there was unlawful aggression at the beginning when the victim aimed his gun-like tube at the appellant. However, the appellant was able to disable the victim by firing at his right thigh. The unlawful aggression had ceased and there was no more reasonable necessity of the means employed by the appellant of firing at the victim successively thereafter. The story of appellant that the victim even after he staggered due to the wound on his thigh still attempted to aim the gun-like tube at him is not credible as in fact the victim fell to the

ground thereafter. There was therefore no more unlawful aggression that warranted the subsequent shooting of the victim.[5]

Thus even under the theory advanced by the appellant the justifying circumstance of having acted in lawful self-defense has not been established.

Indeed, as above discussed, the version of the prosecution as found by the court a quo should be upheld. There is no reason to disturb the finding of the lower court on the matter of credibility of the witnesses.

However, the Court is not persuaded that the commission of the offense is qualified by treachery. While it is not denied that the shooting of the victim by appellant was sudden and unexpected, it was done frontally and in the open. The suddenness of the attack does not, of itself, suffice to support a finding of alevosia, even if the purpose was to kill, so long as the decision was made all of a sudden and the victim's helpless position was accidental.[6] The mode of attack must be thought of by the offender, and must not sprung from the unexpected turn of events.[7]

The crime committed, therefore, is homicide penalized under Article 249 of the Revised Penal Code and not murder. As the appellant was correctly credited by the trial court with the mitigating circumstance of voluntary surrender which, however, is offset by the aggravating circumstance of taking advantage of his public position as a policeman, applying the Indeterminate Sentence Law, the appellant should be as he is hereby imposed the indeterminate penalty of imprisonment of eight (8) years and one (1) day of prison mayor as minimum, to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal as maximum. The indemnity to the heirs of the victim should also be increased to P30,000.00.

With the above modification as to the offense committed, the penalty and the indemnity, the decision appealed from is affirmed in all other respects with costs against appellant.

SO ORDERED.

Teahankee, C.J., Narvasa, Cruz, and Grino-Aquino, JJ., concur.

[1] Exhibit A.

[2] pp. 5-9. Appellee's Brief.

[3] Article II, par. 1. Revised Penal Code.

[4] People vs. Apolinario, 58 Phil. 586.

[5] People vs. Alconga, 78 Phil. 366; U.S. vs. Rivera, 41 Phil. 472; People vs. Adviar, 56 Phil. 98.

[6] People vs. Ardisa, 55 SCRA 245.

[7] People vs. Tumaob, 83 Phil. 742; People vs. Saez, 1 SCRA 937; People vs. Abalos, 84 Phil. 771.

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