

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
CRISTITUTO LARIOSALIAS “TOTOT”,
ACCUSED-APPELLANT.**

G.R. No. L-38562. July 31, 1981

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

Cristituto Lariosa alias "Totot" appeals from the decision of the Court of First Instance of Zamboanga del Norte convicting him of the crime of murder and sentencing him to reclusion perpetua, and to indemnify the heirs of the victim; P10,000.00 for moral damages; P10,000.00 for exemplary damages and P10,000.00 for the loss of earning capacity and P5,000.00 for actual damages, without subsidiary imprisonment in case of insolvency by reason of the nature of the penalty imposed upon him and by operation of law, and to pay costs.

As recited in the People's brief, the facts as established by the prosecution's evidence, upon which the judgment of conviction was based, are as follows:

"On September 17, 1972, at around 7:00 o'clock in the morning, Fernando Adaro, a 19 year old farmer, was in the ricefield of Primitivo James, alias Tivo, in Sinaman, Dipolog City, driving maya birds therefrom. Shortly thereafter, Primitivo James arrived and joined Adaro in driving the maya birds from the ricefield (p. 9, tsn, January 17, 1973). Primitivo James stayed in the ricefield the whole day, and at 5:00 o'clock in the afternoon, he left for home, telling Adaro that he would go ahead as Dipolog was quite far. Adaro saw him leaving the ricefield, taking the upward trail toward the national road (p. 10, tsn, *ibid*).

"Suddenly thereafter, Fernando Adaro heard three gun reports coming from the direction of the hillside trail. When he turned his face and looked towards the upper portion of the trail where Primitivo James already was, Adaro saw Cristituto Lariosa, alias "Totot", standing about two fathoms away from Primitivo James. The appellant was holding a long-barrelled gun pointed at Primitivo James, and he saw him shoot the latter. Primitivo James retaliated and fired back, but the appellant took to his heels and remained unscathed (pp. 11-12, and p. 20, tsn, *ibid*).

"The wounded victim retraced his steps to the ricefield (p. 12, tsn, *ibid*), and forthwith, Fernando Adaro went to meet him. Primitivo James told Adaro that he was shot by Totot, and in addition, he said "Bay, maybe I will be dying of these wounds". Adaro saw at once that Primitivo James sustained wounds on his arms and on his abdomen (p. 13, tsn, *ibid*).

"Adaro has known Totot for a long time, because he is the common-law husband of one of the daughters of the victim (p. 14, tsn, *ibid*).

"Immediately, Fernando Adaro helped Primitivo James go to the national road, and on their way, they met Eleno Solarte, the barrio captain of Sinaman, Dipolog City, Adaro and the barrio captain then loaded the victim on a motorcab and brought him to the clinic of Dr. Ames (*Ibid*). The victim also told Eleno Solarte that probably he would die of his wounds, and that he was shot by Cristituto Lariosa. In response, the barrio captain told the victim to hold his breath as much as possible until they reach the doctor's clinic (p. 15, tsn, *ibid*).

"Upon arrival at the doctor's clinic, Dr. Ames asked Primitivo James who shot him, and the latter, who could still talk but already in a low voice, answered, "I was shot by Totot in barrio Sinaman." (Ibid).

"Meanwhile, at about 6:00 o'clock that same evening, the Mayor of Dipolog City received a report that Primitivo James was shot. In immediate response, he summoned Lt. Ciriaco Gonzales, the Deputy Chief of Police of the Dipolog City Police Force, and instructed him to proceed to the clinic of Dr. Ames to investigate (pp. 41-42, tsn, ibid). He took the ante-mortem statement of Primitivo James wherein the following questions and answers were included:

Question No. 2 "Why are you in this hospital?"

Answer: "I was shot in Sinaman."

Question No. 3 "Who shot you?"

Answer: "Cristituto Lariosa."

Question No. 7 "Do you know why he shot you?"

Answer: "Because he has an axe to grind against me."

Question No. 8 "Do you think you will die as a result of your injuries?"

Answer: "I think I will die." (Exhibits D, D-1, D-3, D-5, & D-6; pp. 43-44, tsn, ibid).

The ante-mortem statement which was identified on the witness stand by Lt. Gonzales was witnessed by Engr. Miranda (Exhibit D-9; p. 45, tsn, ibid and pp. 4-6, tsn, March 12, 1973). It bears the bloodstains of the victim on the right hand corner thereof (Exhibits D-10 and D-11), as testified to by Lt. Gonzales (p. 46, tsn, ibid).

"Primitivo James was transferred to the Chung Hua Hospital in Cebu City (p. 53, tsn, February 22, 1973; & p. 7, Decision, Rec.) where he expired on September 19, 1972, due to "general peritonitis secondary to gunshot wounds", as evidenced by his death certificate attached to the records as Exhibit F. He was buried in Sangkol, and his burial was attended by witness Fernando Adaro (p. 16, tsn, January 17, 1972).

"At the time of his death, the victim was a barrio captain of Barrio Sangkol, Dipolog City, and he was the lone support of 12 children (pp. 12-17, tsn, March 12, 1973). The widow of the deceased, Heronica James, testified that at the Ames Clinic, she spend P550.00; at the Chung Hua Hospital, P2,845.00; for embalming the body of the victim, P750.00; for subsistence when taking care of the victim, P300.00; boat fare for her and the body of the victim, P30.00; for funeral expenses, P800.00 and incidental expenses, P172.00, so that she is asking the court to sentence the appellant to pay P20,000.00 as actual and compensatory damages, and P40,000.00 as moral damages (pp. 17-18, tsn, ibid).

"The post-mortem examination (Exhibit A) conducted by Dra. Leorosa Orendain, Rural Health Physician of Katipunan, and the PHO Form No. 2, or the diagram of the body of the victim (Exhibit B), show that Primitivo James sustained a bullet wound on the abdomen which was fatal, as it perforated the intestines (pp. 37-38, tsn, February 22, 1973), and three other bullet wounds on the left wrist, on the left forearm, and on the left arm (Exhibits B-3, B-5, & B-7; pp. 38-39, tsn, ibid). Dra. Orendain was able to extract a slug from the body of the victim (Exhibit C-1; p. 37, tsn, ibid).

"At least two witnesses, namely, Pablito Lumactod, a security guard of the Dumingag Timber Corporation, and Silvino Lacaya, a provincial guard of Olingan, Dipolog City, testified that they saw Cristituto Lariosa board a logging truck of the Dumingag Timber Corporation, first at Malala, Polangco, Zamboanga del Norte, then at Maligaya, Sergio Osmeña, Sr., going towards the cutting area, and travelling away from Dipolog City, in the early morning of Sept. 18, 1972 (pp. 2-5, tsn, Jan. 17, 1973; and pp. 23-24, tsn, ibid). Lumactod stated that he has known Lariosa for a long time, because he used to see him (Lariosa) hunting or inspecting with the

Governor (p. 4, tsn, *ibid*). Silvino Lacaya, on the other hand, testified that he came to know Lariosa when the latter was accused of the crime of robbery and was committed at the provincial jail in Katipunan, Zamboanga del Norte (p. 25, tsn, *ibid*).

"Prosecution evidence likewise show that Lariosa was also detained once at the Dipolog City jail for Frustrated Murder, the complainant of which was Primitivo James, the same victim of murder in this case (p. 47, tsn, February 22, 1973). In the investigation conducted in connection with said Frustrated Murder case, Cristituto Lariosa admitted that he was not in good terms with Primitivo James, because the latter was objecting to his marrying Primitivo's daughter Helen James (p. 51, tsn, *ibid*). Lariosa also executed an extra-judicial confession, Exhibit E, wherein he admitted the attempt he made on the life of Primitivo James sometime in April 1972, or only five months previous to the killing of the same vic-tim (pp. 47-51, tsn, *ibid*).[1]

In his three assignments of errors, appellant assails the trial court's assessment of the evidence particularly the ante-mortem declaration (Exhibit D)[2] of the deceased and the testimony of Fernando Adaro, the eye-witness to the shooting, who saw appellant fire at the victim.

In impugning the credibility of the ante-mortem declaration (Exhibit D), appellant contends that the deceased could not have seen his assailant to be able to name him. Appellant would back up this assertion with the relative positions of the entrance and exit of the wounds sustained by the deceased, Primitivo James, to show that his assailant was at his back, not in front of him. The assailant then ran away so fast that the victim was not able to recognize him even as the deceased tried to turn around to see who fired at him from behind in quick succession.

The attempt of appellant to show that the assailant was at the back of the deceased, unseen by the latter when he first fired, and unrecognized when he turned around to run away from sight, is effectively foiled or frustrated with how the Solicitor General very persuasively demonstrates, with the same means as those resorted to by appellant, that the assailant was not at the back of the victim, but in front of him, as the eye-witness, Fernando Adaro, so testified when, he pointed to appellant as the gunman. Thus, to quote from the appellee's brief:

"x x x It will be clearly seen from the position of the injuries sustained by the victim, as enumerated and reproduced by the appellant in his brief (pp. 6-8, *ibid*) , that the gunshot wounds inflicted on Primitivo James were frontal in nature. Wound No. 1 in the post mortem findings is on the abdomen of the deceased, at 45 degrees angle from the umbilicus (p. 6, *ibid*). The wounds on the left wrist and left forearm were from the dorsal to the ventral sides, while the wound on the upper left arm is from the ventral to the dorsal side. Analyzing the relative positions of the entrance and exit of the wounds, and the trajectory of the bullets which admittedly indicates that they were fired from a higher elevation than the place where the victim was at the time (p. 9, Appellant's brief), we are of the opinion that the victim was fired upon as he was negotiating the upward trail, and that his assailant was in the upper portion of the trail, a little to the right side of the victim. This is borne out by the wound on the upper left arm of the victim, the entrance of which is on the ventral side. We contend that this was the first wound inflicted, and by reflex action, out of pain, the victim who was then in a walking position, bent his arm and rested his left forearm on his abdomen. This explains the entrance wounds on the dorsal side of the mid-forearm and on the left wrist of the victim. x x x"[3]

A careful analysis of the foregoing exposition by the Solicitor General on how the shooting took place, particularly the relative positions of the gunman and the deceased, as well as the comparative elevation of their respective positions at the time of the firing, would show a greater degree of plausibility of the theory of the prosecution than that of the defense which is explained in appellant's brief as follows:

"Now, from the relative positions of the entrances and exits of the four bullet-wounds on Primitivo James, let us now reconstruct how James moved and reacted upon having been shot by his assailant. Primitivo James, upon having been hit and wounded on his left arm by the first three bullets, he may have made a swift clock-wise turn or from left to right movement to face his assailant. However, when Primitivo James was a bit

more than one-half (1/2) of his pivoted turn, he was hit by the last and fourth bullet by his assailant on the right hypochondriac, (Exhibit 'B-1'), penetrating through the small intestines. It is obvious, that the assailant of Primitivo James fired his gun in rapid succession, (t.s.n., p. 19, Jan. 17, 1973). Because, the incident was too fast and momentary. Hence, we respectfully submit, that under the above momentary movements of the assailant and the assaulted, Primitivo James could not have recognized his assailant, who turned his back and ran away as soon as James was in a turning position to face his supposed assailant. And that is the reason when Primitivo James retaliated and fired his magnum revolver at his assailant for four (4) times, (t.s.n., p. 19, Jan. 17, 1973), yet he was not able to hit his assailant; and his assailant must have been at a longer distance from James. We respectfully submit, therefore, that neither Fernando Adaro nor Primitivo James could have recognized the real assailant of the latter. Due to the simple reason that the incident of shooting took place not on the upward trail on the hill, but on the downward trail of the same (see Finding No. 3 or Exhibit 'B-3', the trajectory of bullet was downward), Fernando Adaro who was on the side of the upward trail of the hill could not see the other side of the hill nor the people thereat. Thus, his testimony that he saw the accused, Cristituto Lariosa shoot Primitivo James could not have any factual truth. Again, we respectfully submit that Primitivo James would not likewise be able to identify his assailant, due to the fact that Primitivo James was shot in four rapid successions while his back was turned toward his assailant. The shooting was so fast and momentary, that when he was about to come face to face with his assailant, the latter turned and ran away. x x x"[4]

As may be seen, appellant's theory is pure speculation, wanting in any corroboration which the prosecution's theory counts with, from the testimony of Fernando Adaro that he heard only three shots before the victim fired back, although four wounds were sustained. One shot could have caused two wounds, the wound on the left wrist and that on the abdomen. Taking a downward trajectory from the higher elevation it was fired, the bullet hit the left wrist of the victim resting on his abdomen as a reflex action after the first wound on the upper left arm was inflicted. A direct corroboration is, of course, Adaro's eye-witness testimony pointing to the appellant as the gunman, having seen him holding a long-barrelled gun, pointing it and shooting at the victim. (pp. 11-12; 20, t.s.n. January 17, 1973).

Equally strong evidence against the appellant, if not even stronger, is the ante-mortem declaration of the deceased, in which he named appellant as his assailant (Exhibit D),[5] which is the document to which was reduced his statement first, to Adaro, to whom he said with his wounds, he was going to die, next to Barangay Captain Solarte, then to Dr. Ames, and finally, to the Deputy Chief of Police, as he progressively neared death, that appellant was the person who shot him. Thus, even as mere *res gestae*, the declaration would be of similar probative value. Hence, it is evidently futile for appellant to assail the dying declaration of the deceased with his assertion that it was motivated by the victim's hatred against him for having taken his daughter as a common-law wife and his desire to put an end to the disgraceful relationship.

In the first place, the deceased was not shown to have done anything before the fatal shooting incident against appellant indicative of the existence of the alleged, motive against him by the deceased. That the relationship came into being at all would rather show that the victim's attitude towards said relationship was one of passive indifference, not of active disapproval or determined opposition that could nurse a motive as that appellant would attribute to the deceased.

In the second place, having made the declaration at the point of death, the truth thereof can hardly be disputed with the well-known verity that truth lies in the lips of a dying man. And even if a grudge dwelt in his heart against appellant, forgiveness would instantly replace it to generate the sentiment and wish to speak nothing but the truth as one closes his eyes in death.

What is apparent from the evidence is the existence of a motive on the part of appellant to do away with Primitivo James, the deceased. It appears that he had made an earlier attempt against the life of the deceased, committed on

April 3, 1972, because of the latter's objection to appellant's marriage to Jame's daughter, Helen James. He made a confession of the criminal act, for which he was charged with frustrated murder, although the case was dismissed for lack of corroborative evidence.

Appellant also tried to discredit the eye-witness testimony of Adaro by asserting that the latter could not have seen the incident because it took place at the side of the hill opposite that where Adaro stated he was. From what has been said earlier that appellant frontally inflicted the wounds, not from behind as claimed by appellant, this contention seeking to dispute the truth of Adaro's testimony finds no factual basis. In fact, on ocular inspection as requested by the defense itself, the trial court found against the claim of appellant that Adaro could not have seen who the assailant of Primitivo James was. Thus, the trial court said in its decision:

"After the trial was terminated, the defense asked for an ocular inspection claiming that witness Adaro could not have seen the incident because it happened more than two kilometers away from the camarin where witness Adaro claimed he was at the time of the shooting. At the inspection which was conducted by the Court, neither counsel for the accused nor any representative of the accused appeared. The prosecution was represented by the prosecuting fiscal, Arquipo La Adriatico. From actual ocular inspection, the place where the shooting took place, according to this witness Adaro, was about 50 to 60 meters away from the camarin and even at the time when the inspection was conducted when the hillside was quite grassy, it is possible that the assailant in that incident could have been seen by witness Adaro because from the place where the assailant allegedly stood, the camarin and the spot under the camarin where the witness was allegedly at, at the time, was visible to the Court. Adaro on his testimony on the ocular inspection declared that the hill-side was then cleared because it was newly planted to cassava."[6]

With all the positiveness with which appellant was identified as the killer of Primitivo James, consisting of the testimony of eye-witness Fernando Adaro, and the ante-mortem declaration of the deceased, appellant's defense of alibi is unavailing.[7] His pretension of having been in Titay, Zamboanga del Sur, working in the Marcelo Rubber Plantation using the name of Renato Cesante, with David Gumaba as his capataz from September 17 to 22, 1972 had not a bit of corroboration. Helen James' testimony as a defense witness is only to the effect that appellant told her that he was going to Titay, but did not go with him to Titay, and so was never with him there. His other witness, Juanito James, involved himself in a mesh of contradictions, and even admitted having doubts as to the wisdom of testifying for appellant, because the victim was his grandfather who was shot on September 17, 1972.[8] His alleged capataz, David Gumaba, refused to appear in court to corroborate appellant's alibi. He could have not chosen to do otherwise in the face of the testimony of two very reliable witnesses, Pablito Lumactod and Silvino Lacaya, security and provincial guards, respectively, that in the early evening of September 18, 1972, the day following the shooting, they saw appellant going away from the direction of Dipolog City where the shooting incident took place, riding on a logging truck headed for the cutting area of the Dumingag Timber Corporation. With no interest or bias against appellant, they testified only out of a civic duty to help in the prosecution of criminal offenders and their punishment if convicted. Whatever inconsistencies may have been committed by them with which their testimony is assailed by appellant, is no ground to deny them the credibility they deserve which is not affected by inconsistencies on minor and inconsequential matters, which is what the alleged inconsistencies actually are.

The judgment appealed from found no modifying circumstance, not even that of evident premeditation as alleged in the information to have attended the commission of the crime, which the court found to be that of murder, with treachery as the qualifying circumstance. We find the evidence fully supporting these findings of the trial court.

WHEREFORE, the judgment appealed from is affirmed, with costs.

SO ORDERED.

Barredo, (Chairman), Aquino, Concepcion, Jr., and Abad Santos, JJ., concur.

[1] pp. 2-8, Appellee's Brief, p. 79, rollo.

[2] p. 55, Index of Exhibits.

[3] pp. 10-11, Appellee's Brief, p. 79, rollo.

[4] pp. 10-11, Appellant's Brief, p. 73, rollo.

[5] Supra.

[6] pp. 15-16, Appellee's Brief; p. 79, rollo.

[7] People v. Aguel et al., 97 SCRA 795; People v. Estrada, 22 SCRA 111.

[8] p. 14, Decision, p. 13, Appellant's brief, supra.

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