

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
HERMILO ARCAMO ALIAS “MILO” AND NICASIO DIOLA
ALIAS “CANIE DIOLA”, DEFENDANTS-APPELLANTS.**

G.R. No. L-34217. July 24, 1981

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PER CURIAM:

Automatic review of the decision of the Court of First Instance of Bohol in Criminal Case No. 41 convicting Hermilo Arcamo and Nicasio Diola of the crime of robbery with homicide; sentencing them to death; and requiring them to pay P12,000.00 to the heirs of the deceased Epimaco Balabag and P3,500.00 to Lim Tiaoco Sons, Inc., as restitution of the amount taken from the company's salesman - Joventino Lumactud.

In an information dated February 25, 1971, the Provincial Fiscal of Bohol charged Hermilo Arcamo, alias "Milo", and Nicasio Diola, alias "Canie Diola", before the Court of First Instance of Bohol of the crime of robbery with homicide allegedly committed as follows:

"That on or about the 13th day of February, 1970, in the municipality of Dauis, province of Bohol, Philippines, the above-named accused, both armed with firearms, with intent of gain, and conspiring, confederating and helping each other, did then and there willfully, unlawfully and feloniously shoot treacherously Epimaco Balabag, a driver who was then driving a Lim Tiaoco Sons, Inc. delivery truck, inflicting upon him serious physical injuries which caused his immediate death, and immediately thereafter said accused by continued serious intimidation took and carried away from Joventino Lumactud, a salesman of said Lim Tiaoco Sons, Inc. who was also on the said delivery truck, cash money amounting to P3,500.00, Philippine Currency, belonging to the said Lim Tiaoco Sons, Inc., to the damage and prejudice of the heirs of the deceased Epimaco Balabag, of Joventino Lumactud and of said Lim Tiaoco Sons, Inc.

"The accused Hermilo Arcamo committed the said crime with the additional aggravating circumstance of habituality, he having been pre-viously punished for murder, an offense to which the law attaches an equal penalty with that for which he is presently charged.

"Acts committed contrary to the provisions of Article 293 and 294, no. 1 of the Revised Penal Code."

Upon being arraigned, both accused pleaded not guilty. Where-upon, the court proceeded with the trial of the case and on August 31, 1971 rendered the following judgment:

"FROM ALL THE FOREGOING CONSIDERATIONS, both defendants Hermilo Arcamo and Nicasio Diola, with deep regrets, have to be, as they are hereby sentenced to death for robbery with homicide; and to pay P3,500.00 to Lim Tiaoco Sons, Inc., for which Joventino Lumactud is accountable to the latter, and P12,000.00 for the death of Epimaco Balabag payable to his heirs, both to pay the costs."

The evidence on record reveals the following:

In the morning of February 13, 1970, a cargo truck of Lim Tiaoco Sons, Inc., driven by Epimaco Balabag, left Tagbilaran, Bohol, for Panglao, Bohol, to deliver corn grits, corn grain, corn bran and salt to the customers of said company. Joventino Lumactud, a salesman of the company, was the "jefe de viaje" and Policarpo Horcerada was

the "cargo boy". They made several stops in the different barrios on their way to Panglao in order to sell the merchandise.

At about 2:30 in the afternoon, the cargo truck was on its way back to Tagbilaran. Again, it had to make several stops in order to collect some payments for the corn grits and corn bran. During its last stop at barrio Songcolan, Dauis, Bohol, two students hitched a ride on the truck, followed by the two appellants, Hermilo Arcamo and Nicasio Diola. The two students sat on the front seat with driver Balabag and salesman Lumactud while the two appellants sat at the back with the cargoes and with "cargo boy" Horcerada. Arcamo was about a meter from Horcerada while Diola was about one fathom from said "cargo boy".

The cargo truck had just negotiated a distance of less than one kilometer from barrio Songcolan when Arcamo shouted: "Para! " Balabag stopped the truck and looked back. Arcamo then drew his pistol and aimed it at the driver, shouting: "Nobody move! You bring the truck up to the corner!" But immediately thereafter, Arcamo shot Balabag while Diola aimed his pistol at Lumactud. Hit by Arcamo's bullet, Balabag slumped down. Stricken by fear, Horcerada and the two students ran away. Lumactud likewise went down the truck and was about to run away when one of the appellants, who was still on board the truck, ordered him to raise his hands and demanded money from him. As he was ordered to raise his hands, Lumactud put the bag containing his collections and receipts on the seat of the truck. The appellants then took the bag, with all its contents, and ran away escaping through the bushes. Lumactud likewise ran away, following the road, and proceeded to the office of Lim Tiaoco Sons, Inc. to report the incident.

Subsequently, Horcerada, who ran towards the river and stayed there for about ten minutes, went back to the delivery truck where he saw Balabag sprawled in blood and dying. Horcerada noticed a wound at the left portion of Balabag's nape where Arcamo previously aimed his gun. Not long thereafter, a certain Boy Cimafranca, with some companions, arrived on a jeep from Tagbilaran City. They brought Balabag to the Provincial Hospital where he was attended to by Dr. Rosalinda Timaan, the medico-legal officer on duty. But shortly thereafter, Epimaco Balabag died.

Dr. Rosalinda Timaan, assisted by Dr. Henry Doliente, conducted an autopsy of the body of Balabag and found that his death was due to severe bleeding and injuries to the brain caused by the bullet which penetrated his skull and reached the other side of his head. The slug (Exh. A-3) was found on the right side of the upper part of Balabag's head.

Six days after the incident, the bag which was taken from Lumactud was retrieved in barrio Songcolan, Dauis, Bohol. It was found under the bushes near the house of a certain person surnamed Ongkayo. Inside the bag was a notebook (containing a list of debtors) and three receipt booklets; but the amount representing the payments for the merchandise was no longer there.

The appellants have assigned two errors which were supposedly committed by the court a quo. In the first assignment of error they claim that the lower court erred in giving credence to the testimony of Horcerada and in not giving credence to the testimony of the defense witnesses, including the appellants themselves. The second assignment is pro forma and is a consequence of the first; in it the appellants claim that the lower court erred in convicting them.

Policarpo Horcerada was the only person who positively identified the appellants as the ones who boarded the Lim Tiaoco Sons, Inc. delivery truck at barrio Songcolan, Dauis, Bohol, along with the two students, and sat near him at the back of the truck. Likewise, it was Horcerada who testified having actually seen Arcamo shoot Balabag while Diola aimed his gun at Lumactud. It is understandable, therefore, why appellants' counsel de oficio, in the first assignment of error, assails the action of the trial court in giving credence to the testimony of this eyewitness.

But in order to successfully assail the conclusion of the trial court regarding the credibility of Horcerada, the appellants have to satisfy Us that the trial court had "plainly overlooked certain facts of substance and value that, if considered, might affect the result of the case" (People v. Mercado, et al., L-39511-39513, April 28, 1980, 97 SCRA 232, citing a long line of cases). For settled is the rule that "when the issue is one of credibility of witnesses, appellate courts will generally not disturb the findings of the trial court, considering that it is in a better position to decide the question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial" (People v. Reyes and Sajines, L-41537-41538, February 24, 1981, citing a long line of cases). The appellants' counsel de oficio points to certain circumstances which allegedly destroy the credibility of Horcerada but were not considered by the trial court. But upon a careful analysis of said circumstances, We are of the opinion that they do not constitute sufficient justification for disturbing the conclusion of the trial court.

The appellants' counsel de oficio first points to the fact that when Horcerada was testifying, he could not look straight at the appellants and that he kept answering in a low voice. Appellants' counsel de oficio would infer from the behaviour of Horcerada that he was relating a fabricated story and that his conscience was bothering him.

We find the inference to be unwarranted. For as correctly pointed out by the Solicitor General, said demeanor was only to be expected from a 19 year old "cargo boy" who did not even finish second grade in school and who was then testifying against two persons with prior criminal records - Arcamo having been previously convicted of murder (Exh. D) while Diola had a pending case for robbery in band. (Diola was acquitted in a decision dated April 22, 1970, after Horcerada had testified. Exh 2.) In fact, Horcerada admitted in open court that he was afraid of the appellants as they might nourish hatred against him. And no evidence whatsoever was presented to show any motive on the part of Horcerada to testify falsely against Arcamo and Diola. Thus, to question his credibility would be to unreasonably and unjustifiably impute evil or wrongful intention upon a person who, despite fear of reprisal by the appellants, had undergone the ordeal of testifying against them in court if only to bring justice to the death of his co-worker.

The appellants' counsel de oficio next points to the fact that when asked by a certain schoolteacher by the name of Mrs. Asuncion Circulado whether her house-helper, Nicasio Diola, was one of the perpetrators of the crime, Horcerada replied in the negative. But this answer was sufficiently explained by Horcerada upon cross-examination.

"Q In the direct examination you testified that the accused Nicasio Diola alias Canie Diola was one of the robbers; on cross-examination you told the Court that when you were confronted by a certain lady teacher who presented to you the accused Nicasio Diola alias Canie Diola and asked you in Tamblot, Tagbilaran City, whether the said person was one of the robbers and you answered her 'No, he was not', now, which is the true fact now?

"A I was afraid to tell the truth because the school teacher fumed or was angry."

(T.s.n., Horcerada, April 7, 1970, pp. 34-35; underscoring supplied.)

That Mrs. Circulado was indeed fuming in anger was manifest in the way she presented her house-helper before Horcerada. For as Mrs. Circulado herself admitted, she literally dragged Nicasio Diola towards Horcerada before asking him whether her house-helper was one of the perpetrators of the crime. Expectedly, the intimidating posture of Mrs. Circulado elicited a negative answer from the young witness.

Furthermore, the negative reply of Horcerada was in obedience to the instruction given to him by Sgt. Sofronio Lonod (the PC officer who accompanied him in looking for and identifying the persons who perpetrated the crime) before he was confronted by Mrs. Circulado. On direct examination, Sgt. Lonod testified -

"Q Upon reaching the place, what happened?

"A After arrival, after a few minutes on our arrival, a person arrived with a motorcycle, later known as Nicasio Diola.

"Q What did you do when the person riding on a motorcycle arrived?

"A I asked Policarpo Horcerada if he is the same person who was with...

"Q What do you mean he is the same person?

"A Because I do not know yet the person of Nicasio Diola; only Policarpo Horcerada knows him. I asked him if he is the person with Milo Arcamo on the 13th.

"Q Now, that person who arrived riding on a motorcycle, did he have a companion that afternoon of February 17?

"A. He was alone riding a motorcycle.

"Q Then, when you asked Policarpo Horcerada, what did the latter tell you?

"A. I asked if he is Canie Diola. He told me that he is. I cautioned him not to pin-point him anymore.

"Q Whom did you caution?

"A Policarpo Horcerada.

"Q When Policarpo Horcerada told you that that man riding on a motorcycle who arrived is Canie Diola, was that within the hearing distance of Nicasio Diola?

"A No, sir. It was just few meters, around five meters from the place where we were staying.

"Q Could Nicasio Diola hear that?

"A No, sir.

"Q Now, why did you caution Policarpo Horcerada not to point anymore?

"A I just cautioned him because he might evade from us if he heard his words.

"Q At that time was there a warrant of arrest with you?

"A There was none."

(T.s.n., Lonod, June 16, 1970, pp. 99-101, underscoring supplied.)

It can thus be seen that before he was confronted by Mrs. Circulado, Horcerada had already revealed to the investigating officer that Nicasio Diola was the companion of Hermilo Arcamo in perpetrating the crime and that said witness was cautioned by the investigating officer not to pin-point him as he might evade them before they could secure a warrant for his arrest. It is understandable therefore why Policarpo Horcerada had to give a negative reply when asked by Mrs. Circulado, in the presence of Nicasio Diola, whether Diola was one of the perpetrators of the crime.

The appellants' counsel de officio next contends that Horcerada's testimony was an "eleventh hour fabrication" since, allegedly, "it was only after the fourth day, when the peace officers could not find any clue, that witness Horcerada revealed the identities of the two accused?appellants." We find the contention to be entirely bereft of factual support. According to Sgt. Dominador Tabalado, Chief of the Intelligence Section of the Philippine

Constabulary, Bohol, on the very day of the commission of the offense (i.e., February 13, 1970), Policarpo Horcerada and Joventino Lumactud reported the incident to the P. C. headquarters and they gave him the descriptions of the culprits. It was precisely on the basis of the information given by said witnesses that the Philippine Constabulary of Bohol conducted a surveillance of Arcamo and Diola for a period of three days. What perhaps misled appellants' counsel de oficio into believing that Horcerada revealed the identities of the appellants "only after the fourth day" was the fact that it was only on February 17, 1970, or after said three day period of surveillance or what the P.C. investigators called the "covered" or "discreet" phase of investigation, that the said investigators picked up the appellants for formal questioning. For it was only after said "covered" or "discreet" investigation that the Philippine Constabulary conducted its "open" or "overt" investigation (see: testimony of P.C. Sgt. Domingo Fabricante, May 11, 1970, pp. 54-56, Remolador.)

Appellants' counsel de oficio likewise assails the trial court's action of disregarding the testimonies of the defense witnesses who tried to establish defendants' alibi. But as We have already satisfied ourselves with Horcerada's credibility and since said witness had positively identified the appellants as the perpetrators of the crime, We find no reason to still dwell on the issue of credibility of the defense witnesses and the validity of defendants' alibi. For settled is the rule that the defense of alibi cannot prevail over the positive identification of the accused by credible witnesses as the authors of the crime (*People v. Mercado, et al.*, L-39511-39513, April 28, 1980, 97 SCRA. 232, citing a long line of cases).

The commission by Hermilo Arcamo and Nicasio Diola of the crime of robbery with homicide had been proven beyond reasonable doubt. Policarpo Horcerada had positively identified them as the ones who boarded the cargo section of the Lim Tiaoco Sons, Inc. delivery truck at barrio Songcolan, Dauis, Bohol, and upon reaching a bushy area of said barrio, drew their guns and, with Diola aiming his gun at salesman Lumactud, Arcamo shot driver Balabag who thereupon slumped down. Joventino Lumactud, on the other hand, testified that immediately thereafter, one of the appellants ordered him to raise his hands and demanded money from him and that both appellants then took the bag containing the cash representing the payments for the merchandise which they have sold during the day and both escaped through the bushes. That Epimaco Balabag died of the bullet wound was established by Dr. Rosalinda Timaan, the medico-legal officer who performed an autopsy of the body of the victim. While it is true that Joventino Lumactud stated at the witness stand that he did not recognize the face of the person who demanded money from him, this does not, however, mean that the robbers were not sufficiently identified. For said witness was categorical in stating that the persons who took the bag containing his collections were the two persons who boarded the back of the truck, and, as heretofore stated, appellants Hermilo Arcamo and Nicasio Diola were positively identified by witness Policarpo Horcerada as the persons who boarded the back of the delivery truck.

The trial court imposed upon the appellants the penalty of death. It held that the crime of robbery with homicide was committed with the attendance of the aggravating circumstances of evident premeditation, firearm, uninhabited place, and habituality (as regards appellant Arcamo), without any mitigating circumstance to offset the same. While We find the aggravating circumstances of uninhabited place and habituality (as regards appellant Arcamo) as sufficiently established, We cannot, however, agree with the trial court in considering evident premeditation and use of firearm. Its reliance on the fact that the appellants acted in concert from the time they boarded the truck up to the time they disappeared as its basis for finding the existence of evident premeditation cannot be sustained. For, while such concert of actions proves conspiracy, it does not necessarily show the existence of evident premeditation. To establish evident premeditation, it is necessary to prove: (a) the time when the offender determined to commit the crime; (b) an act manifestly indicating that the culprit had clung to his determination; and (c) a sufficient lapse of time between the determination and the execution of the crime to allow him to reflect upon the consequences of his act and to allow his conscience to overcome the resolution of his will

(People v. Beralde, L-32832, June 29, 1979, 91 SCRA 125, citing a long line of cases). Such essential elements cannot be inferred from the mere fact that the appellants acted in concert. Apparently, the prosecution did not intend to prove evident premeditation as it did not even allege the same in the information. And as regards the use of firearm, the same cannot be considered an aggravating circumstance in the complex crime of robbery with homicide.

The trial court failed to appreciate the aggravating circumstance of treachery and, with respect to appellant Diola, the mitigating circumstance of voluntary surrender. Treachery was sufficiently established by the fact that Epimaco Balabag was shot at the back and that the shooting was so sudden and unexpected that the victim did not have the slightest opportunity to defend himself. Page 9 of the expediente shows that Diola surrendered to the Chief of Police of Tagbilaran on February 19, 1970.

Since the crime of robbery with homicide was committed by the accused-appellants with the attendance of the aggravating circumstances of uninhabited place, treachery and, with respect to appellant Arcamo, habituality, with no sufficient mitigating circumstance to offset the same (there being none for appellant Arcamo and only one for appellant Diola), the trial court correctly imposed upon the appellants the penalty of death.

The amount of P3,500.00 required by said trial court to be paid by the appellants to Lim Tiaoco Sons, Inc. should, however, be reduced to P700.00 since, according to Lumactad himself, such was the actual cash amount taken from him by the appellants. The difference between the amount stated in the information (P3,500.00) and the amount actually taken from the salesman (P700.00) allegedly represents the amount which the company could no longer collect from its debtors by reason of the fact that the notebook containing the list of its debtors was likewise taken by the appellants. But the record shows that the notebook containing the list of the debtors of the company was recovered six days after the incident, along with the bag and the receipt booklets. Thus, no legal justification exists for requiring the appellants to pay the company the full amount of P3,500.00, or P2,800.00 in excess of the amount actually taken from its salesman.

Except for the foregoing modifications, the decision under review is hereby affirmed in all respects.

WHEREFORE, appellants Hermilo Arcamo and Nicasio Diola are hereby convicted of the complex crime of robbery with homicide and each of them is sentenced to suffer the penalty of death and to pay jointly and severally P12,000.00 to the heirs of the deceased Epimaco Balabag and P700.00 to the Lim Tiaoco Sons, Inc., repre-senting the amount taken from its salesman, Joventino Lumactud. Costs de officio.

SO ORDERED.

Teehankee, Barredo, Makasiar, Concepcion, Jr., Fernandez, Guerrero, Abad Santos, De Castro and Melencio-Herrera, JJ., concur.

Aquino, J., in the result.

Fernando, C.J., no part.

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