

PEOPLE OF THE PHILIPPINES AND FAUSTINO F. TUGADE AND W. ESPIRITU TAGANAS, IN THEIR CAPACITY AS PRIVATE PROSECUTORS, PETITIONERS, VS. HONORABLE ONOFRE A. VILLALUZ, IN HIS CAPACIT...

G.R. No. L-33459. October 20, 1983

Ponente: PLANA, J.

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PLANA, J.:

Private respondent Pedro Berroya was charged with murder before the then Circuit Criminal Court at Pasig, Rizal presided over by former Judge Onofre A. Villaluz. In the course of the trial, the prosecution presented all its witnesses except two vital ones (Alejandro Gon-zaga and Alfredo Gadiar) for the reason that they could not be located despite the combined efforts of national and local law enforcement agencies to do so for the pur-pose of executing the orders of arrest issued by the trial court to compel them to appear and testify.

Since the two witnesses could not be found, Lydia Ver, the attending stenographer during the preliminary investigation of Berroya before the Quezon City Fiscal's Office, was presented to establish the authenticity of the transcripts of stenographic notes of the testimony of Gonzaga and Gadiar taken by question and answer, in-cluding their extensive cross-examination by Berroya's counsel.

Thereafter, the prosecution offered the trans-cripts in evidence, but the same was rejected as hearsay by the respondent judge, although on reconsideration they were admitted as part of the testimony of stenog-rapher Ver.

From the said ruling, the present petition was filed praying for an order to annul the ruling of the trial court and commanding it to admit the above transcripts not merely as part of the testimony of stenographer Ver, but as "testimony at a former trial" pursuant to Section 41, Rule 130 of the Rules of Court.

As the accused in a criminal case has the right of confrontation, the witnesses against him must be produced to testify, subject to cross-examination. This right however is not absolute. For it is generally re-cognized that it is sometimes impossible to produce again a witness who has already testified in a previous proceeding, as when the witness has died or is otherwise unavailable, in which event, his previous testimony in its entirety is made admissible as a distinct piece of evidence, as an exception to the hearsay rule, parti-cularly where the party against whom the evidence is offered had the opportunity to cross-examine the witness who gave the testimony. (See 29 Am Jur 2d 807-809.)

The reason for the exception has been aptly expressed:

"Because such testimony has been de-livered under the sanction of an oath and subject to the right of the adverse party to cross-examine the witness giving it, it is not open to the objections ordinarily urged against hearsay evidence. It is admitted on the principle that it is the best of which the case admits. x x x

"The real basis for the admission of testimony given by a witness at a former trial is to prevent the miscarriage of justice where the circumstances of the case have made it unreasonable and unfair to exclude the testimony."

(Ibid.)

The legal provision invoked by petitioners reads:

"Testimony at a former trial. - The testimony of a witness deceased or out of the Philippines, or unable to testify, given in a former case between the same parties, relating to the same matter, the adverse party having had an opportunity to cross-examine him, may be given in evidence." (Rules of Court, Rule 130, Section 41.)

More specific however is the rule prescribed in Rule 115, Section 1 (f) of the Rules of Court in respect of the admissibility in evidence in a criminal case of the previous testimony of unavailable witnesses.

"... Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the defendant or his attorney, the defense having had an opportunity to cross examine the witness, the testimony or deposition of the latter may be read, upon satisfactory proof to the court that he is dead or incapacitated to testify, or can not with due diligence be found in the Philippines."

The above provision used to be a part of paragraph 5 of Section 15 of General Orders No. 58. Commenting thereon, this Court had occasion to note that "this provision does not refer to testimony taken in a civil case, where the accused was one of the parties, but to the preliminary investigation or prior trial of the criminal case in which such deposition is offered." (Aldecoa vs. Jugo & Martinez, 61 Phil. 374 at 379. Emphasis supplied.)

In the case at bar, there is no question that Gonzaga and Gadiar gave their testimony in the preliminary investigation of Berroya precisely for the same crime for which he is now on trial; that the said testimony was taken by question and answer in the presence of Berroya or his counsel; that the defense had the opportunity and in fact actually cross-examined the said Gonzaga and Gadiar extensively when they testified at the said preliminary investigation; and that the said witnesses could not be found and arrested despite the combined efforts of national and local law enforcement agencies, including the NBI and the Philippine Constabulary.

On the given facts and the law, the transcripts of the previous testimony of Gonzaga and Gadiar are clearly admissible and should have been admitted in evidence as such.

The case of Toledo vs. People (85 SCRA 355), where this Court rejected the admission in evidence in a criminal case (murder) of the testimony of a witness in the preliminary investigation of the same murder charge in the fiscal's office, is not applicable. For there, the witness was available; he merely ignored the sub-poenas seeking his appearance. And the trial court did not issue an order for his arrest.

WHEREFORE, the petition is granted. The assailed ruling of the trial court is set aside and the said court is hereby ordered to admit in evidence the transcripts of the testimony of Alejandro Gonzaga and Alfredo Gadiar. Costs against private respondent.

SO ORDERED.

Teehankee, (Chairman), Relova, and Gutierrez, Jr., JJ., concur.

Melencio-Herrera, J., concur on the basis of section 1(f), Rule 115, Rules of Court.

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