

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
MAURO TIZON AND APOLINARIO TERANA, DEFENDANTS,
APOLINARIO TERANA, DEFENDANT-APPELLANT.**

G.R. No. L-29724. August 29, 1975

Ponente: MARTIN, J.

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MARTIN, J.:

On April 27, 1966, Teodorico Tizon, Mauro Tizon and Apolinario Terana were charged with the crime of Murder before the Court of First Instance of Leyte for the death of Honofre Cabaltierra allegedly committed as follows:

"That on or about the 24[th] day of April, 1966, in the Municipality of Cabucgayan, Province of Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating together and mutually helping one another, with deliberate intent to kill, with treachery and evident premeditation, and taking advantage of the darkness of the night to better accomplish their purpose, did, then and there wilfully and feloniously attack, assault and shoot one HONOFRE CABALTIERRA with a homemade shotgun commonly known as "latong" which the accused had purposely provided themselves, thereby inflicting upon the said Honofre Cabaltierra the following gunshot wounds, to wit:

"Eight gunshot wounds dispersed in the left infrascapular region of the back. These are all entrance wound(s) penetrating the body. They have the same sizes and appearance. The wounds have each a diameter of about .5 cm., oval with contused edges, and showing some degree of invagination. There are no exit wound(s)."

which caused his death.

Contrary to Article 248 of the Revised Penal Code."

Upon arraignment, accused Teodorico Tizon pleaded guilty[1] to the charge while accused Mauro Tizon and Apolinario Terana each entered the plea of not guilty.

Notwithstanding his plea of guilty, accused Teodorico Tizon took the witness stand and a hearing was conducted with respect to his plea. Thereafter, the trial court on August 29, 1966, sentenced him to suffer the penalty of imprisonment ranging from eight (8) years and one (1) day of prision mayor as minimum to fourteen (14) years and one (1) day of reclusion temporal as maximum; to indemnify the heirs of the deceased in the amount of P6,000.00 without subsidiary imprisonment in case of insolvency; and to pay one-third (1/3) of the costs.

On October 26, 1967, the trial court rendered judgment against accused Mauro Tizon and Apolinario Terana, the dispositive portion of which reads as follows:

"Wherefore, the Court finds the accused, Apolinario Terana and Mauro Tizon guilty beyond reasonable doubt of the crime of murder as charged in the information, with four (4) aggravating circumstances, and hereby sentences the accused, Apolinario Terana the maximum penalty of death, while the accused Mauro Tizon is sentenced to suffer the penalty of cadena perpetua; to indemnify the heirs of the deceased, Honofre Cabaltierra, the sum of P6,000.00, jointly and severally, and to pay the costs. So ordered." [2]

Accused Teodorico Tizon and Mauro Tizon did not interpose any appeal to the judgment.

The death sentence slapped on accused Apolinario Terana was elevated to Us on automatic review.

The records reveal that on April 24, 1966 at about 2:00 o'clock in the afternoon, Fructuoso Lamoste and Honofre Cabaltierra met at a gambling den in the Sitio of Ariquin, Barrio of Balaquid, Municipality of Cabucgayan, Leyte. The two agreed to go to Carigara in the evening[3] where they planned to take a boat for Tacloban, Leyte, to attend the trial of a murder case the next day against Honofre and Dominador, both surnamed Cabaltierra for the death of Gregorio Lamante, the brother of Juanito Lamante.[4] Juanito Lamante was the landlord of accused Apolinario Terana. As per agreement, Fructuoso Lamoste arrived at about 6:00 o'clock of the same day at the house of Honofre Cabaltierra at Sitio Ariquin, Barrio Balaquid, Municipality of Cubucgayan,[5] but as it was already dark Fructuoso Lamoste used a torch made of coconut dry leaves to brighten up their way.[6] The torch was given by Cabaltierra's wife to Lamoste. While Fructuoso Lamoste and Honofre Cabaltierra were still in the latter's yard about to leave, they heard a shot fired from the place where accused Apolinario Terana, Teodorico Tizon and Mauro Tizon were. The three were behind a big boulder which was about 2-½ meters away from the back of Honofre Cabaltierra.[7] Because of the gunshot, the wife of Honofre and Fructuoso looked back and saw the three, Apolinario Terana, Teodorico Tizon and Mauro Tizon standing about 5 meters away from them with Apolinario Terana still holding a shotgun with its butt resting on the ground.[8] Immediately thereafter, the three men fled from the scene and headed for a road leading to the coconut plantation. Meanwhile, Gregoria de Cabaltierra came to the side of her husband who readily told her his assailants. Fructuoso Lamoste then placed the victim on his lap and told Gregoria to go to her relatives and ask for help.[9] When she arrived, she was accompanied by two persons who loaded Honofre on a launch. On the way, the victim died.[10] A post mortem examination conducted by Dr. Arturo L. Glanados reveals that the victim sustained the following injuries:

- Eight gunshot wounds dispersed in the left infrascapular region of the back. These are all entrance wounds penetrating the body. They have the same sizes and appearance. The wounds have each a diameter of about .5 cm., oval with contused edges, and showing some degree of invagination. There are no exit wounds.

Cause of death: Internal hemorrhage and probable injury to the heart and lungs secondary to multiple gunshot wounds."[11]

The doctor opined that the assailant must have fired the shot at about a distance of five to ten meters from his target using probably a shotgun as there were eight pellet wounds that penetrated the back of the victim.[12]

Upon their arrest, accused Teodorico Tizon and Mauro Tizon readily gave their written statements before Sgt. Avelino Dionaldo of the 57th P.C. Co., Tacloban, in the presence of the Chief of Police of Cabucgayan, Leyte. In their statements, they pointed to Apolinario Terana as the one who induced them to come along and carry out the plot to kill the victim and as the very person who shot the victim with a homemade gun ("Latong") (Exhs. A and D). Said statements were sworn to before the Municipal Judge of Cabucgayan on April 28, 1968.

However, at the trial Teodorico Tizon declared that he was the one who shot Honofre Cabaltierra because the latter allegedly tried to stab him. He claimed that on his way home with his wife, they were stoned and chased by Honofre. So, when they reached home, he took his homemade gun and returned to the place where he left Honofre. When Honofre allegedly lunged at him and tried to stab him, he immediately shot him.[13]

In exculpation, Apolinario Terana declared that when the incident took place he was eating supper with his wife and children in their house which was about two kilometers from the place where the incident took place.[14] After eating, he smoked half a stick of cigarette and then went to sleep at about 7:00 o'clock in the evening. The following morning he heard from Igmedio Cabaltierra, the brother of the victim, that Honofre Cabaltierra was shot.[15] Igmedio Cabaltierra allegedly told him: "Apolinario Terana, you testify that you were the one who shot

so I can make you my witness as a revenge against Juanito Lamante; say that you were ordered by him to shoot Honofre." [16] When he told Igmedio Cabaltierra that his landlord Juanito Lamante did not order him to shoot Honofre Cabaltierra, Igmedio Cabaltierra allegedly threatened to put him in jail. [17]

For his part, Mauro Tizon alleged that when the incident took place he was on Cornelio Lamante's land located in the mountain of Ariquin. Cornelio is the brother of Juanito and Gregorio, both surnamed Lamante. On the day of the incident he allegedly attended to the needs of his wife who had just delivered a child. [18] He denied knowledge of any cause for his arrest, claiming that he came to know about the death of Honofre Cabaltierra from his brother, Teodorico Tizon, who allegedly advised him not to confess because he (Teodorico) was the one who allegedly shot Honofre Cabaltierra for trying to ambush him. [19] He denied having thumbmarked any statement in the presence of Sgt. Mondragon, nor having sworn to any statement before Judge Agapito Abad, although he admitted having been investigated by Sgt. Mondragon. [20]

The gravamen of accused-appellant's defense is that he has not been positively identified as the gun wielder of the victim. Assessing the evidence, We find that the widow of the victim knew all the three accused since childhood. So with Fructuoso Lamoste, the companion of the victim at the time of the shooting. Aside from Apolinario, he also knew Mauro Tizon and Teodorico Tizon, being his barrio mates. The widow of the victim and Lamoste could not have committed a mistake in the identity of accused-appellant as the gun wielder because at the time of the incident the moon was bright and they could easily recognize the faces of the three accused. Besides, Fructuoso Lamoste was using a lighted torch which he was holding over his head to have a clear sight of their way. The wife of the victim and Lamoste claimed that immediately after they heard the shot, they looked back and saw accused-appellant Apolinario Terana, Teodorico Tizon and Mauro Tizon standing behind a boulder with Apolinario Terana still holding his shotgun, its butt resting on the ground. It was under these circumstances when the wife of the victim and Lamoste were able to identify with certainty the victim's assailants. Aside from the positive identification of the assailants by the wife of the victim and Lamoste, Teodorico Tizon and Mauro Tizon admitted in their sworn statements their participation in the commission of the crime and pointed to Apolinario Terana as the gun wielder. [21] This Court cannot understand why Teodorico Tizon and Mauro Tizon would implicate Apolinario Terana, their own cousin-in-law, in their statements to the PC and police if he (Apolinario Terana) was not in fact with them on the night of the shooting. Considering that said statements were given spontaneously at the time when the facts relating to the incident in question were still fresh in their memory and before they could have an opportunity to concoct or fabricate a story of the incident, the same certainly deserve credence.

In the light of the positive and direct evidence that accused-appellant was the real gunwielder and perpetrator of the crime, the trial court did correctly rule out the accused-appellant's defense of alibi. Cases are legion where this court has held that alibi cannot prevail over the clear and positive identification of the accused as the very person who perpetrated the crime. [22] Besides, accused-appellant's defense of alibi was not supported by positive, clear and satisfactory evidence. His bare allegation was that at the time when the questioned incident took place, he was dining with his wife and children in their house which was about 2 kilometers from the place where the crime was committed. Appellant, however, failed to show that he was not only at said place for such period of time, but it was physically impossible for him to be present at the scene of the crime. [23] Along the same line, this Court had occasion to declare that a distance of 1 to 2 kilometers from the scene of the crime does not exclude the accused from the possibility of committing the crime. [24]

Accused-appellant further depreciates the testimony of the victim's wife to the effect that her husband allegedly told her that his only assailants were accused Mauro Tizon and Teodorico Tizon and that she did not do anything to rectify the error of her husband. Such declaration of the victim's wife does not necessarily mean that she did not

see the assailants of her husband. What is important is that she was unwavering in her identification of her husband's assailants. Accused-appellant argues that if the wife really saw her husband shot by his assailants why did she keep silent and did not ask for help. Each individual has his or her own peculiar way of reacting to things that happen around her. It could be that the wife of the victim upon seeing her husband shot by his assailants was so stunned or frightened that she could not say a word about the incident.

Accused-appellant makes capital of the recantation of Teodorico Tizon when he testified in court for accused-appellant that he alone was the one who shot the victim. But the trial court correctly considered the fact that in admitting the sole authorship of the crime, Teodorico had nothing to lose, instead he would be gaining by saving his brother, Mauro Tizon and cousin-in-law, Apolinario Terana, from being convicted of such a grave offense.[25] By making incriminatory and exculpatory statements in their affidavits dated April 25 and April 28, 1966, accused Teodorico Tizon and Mauro Tizon have shown the voluntariness of their confession.[26] They admitted therein that they were induced by accused-appellant Terana to come along with him in carrying out the plot to kill the victim; that they went with accused-appellant Terana to Honofre Cabaltierra's yard and hid themselves behind a boulder and waited for a chance to kill the latter; that accused-appellant Terana carried a shotgun which he used in shooting the victim at the back; and that they did nothing to prevent the killing of the victim. The foregoing statements clearly show that all the three were united in carrying out their plan to kill the victim. While the aforementioned affidavits executed by Teodorico Tizon and Mauro Tizon are admissible against the declarants and not against accused-appellant who had no participation in the execution of said affidavits, nevertheless the same may be used as a corroborative evidence of other facts which tend to establish the guilt of their co-accused.[27] Besides, the presence of Teodorico Tizon and Mauro Tizon at the scene of the crime tended to exert moral assistance and ascendancy to their co-accused Apolinario Terana so as to encourage and move him to execute the conspiracy.[28] As the existence of conspiracy among the perpetrators of the crime has been established, the statement of each of them is admissible against the others for the rule is well entrenched that in conspiracy the act of one is the act of all.[29]

All told, the crime committed was Murder qualified by treachery. The evidence shows that all the three accused agreed to execute their pre-planned plot to kill their victim by hiding themselves behind the boulder and waiting for their intended victim; that when their victim arrived unarmed and totally unaware of the coming attack, they suddenly shot him at the back without any warning. In executing the crime, the three accused deliberately and consciously adopted such means, methods and manner that would insure themselves from any risk of defense which the victim may take.[30] However, in the imposition of the penalty to the accused-appellant, the presence of the aggravating circumstance of nighttime can no longer be considered as a modifying circumstance because it is deemed absorbed by treachery.[31] The same is equally true with respect to the aggravating circumstance of dwelling which was not purposely sought by the accused-appellant in the commission of the crime. The crime was not committed in the house of the victim but on the trail coming from his yard. Similarly, evident premeditation cannot be considered as an aggravating circumstance as there is no evidence to show that sufficient time had elapsed between the concerted plan to commit the crime and its execution so as to afford full opportunity to the appellant for reflection and meditation of his criminal act.[32] Consequently, there being no modifying circumstance in the commission of the crime of Murder, the penalty to be imposed against the accused-appellant should be in the medium period.

IN VIEW OF THE FOREGOING, accused-appellant is hereby sentenced to life imprisonment, to indemnify the heirs of the deceased Honofre Cabaltierra in the sum of P12,000.00[33] and to pay the costs.

SO ORDERED.

Makalintal, C.J., Castro, Fernando, Teehankee, Barredo, Makasiar, Esguerra, Muñoz Palma, Aquino, and Concepcion, Jr., JJ., concur.

Antonio, J., on leave.

[1] tsn., p. 2, Hearing of August 29, 1966.

[2] Rec., pp. 82, 98.

[3] tsn., pp. 2-3, Hearing of December 12, 1966.

[4] tsn., pp. 20, 26, 27, Hearing of August 14, 1967.

[5] tsn., p. 6, Hearing of December 12, 1966.

[6] tsn., p. 18, Hearing of Dec. 12, 1966.

[7] tsn., p. 6, Hearing of December 12, 1966.

[8] tsn., p. 8, Hearing of December 12, 1966.

[9] tsn., p. 10, Hearing of December 12, 1966.

[10] tsn., p. 11, Hearing of December 12, 1966.

[11] p. 9, Folder of Exhibits.

[12] tsn., pp. 8-9, Hearing of November 15, 1966.

[13] tsn., pp. 5, 7, 12, Hearing of August 29, 1966.

[14] tsn., pp. 2-3, Hearing of August 14, 1967.

[15] tsn., p. 6, Hearing of August 14, 1967.

[16] tsn., p. 8, Hearing of August 14, 1967.

[17] tsn., p. 10, Hearing of August 14, 1967

[18] tsn., p. 36, Hearing of August 14, 1967

[19] tsn., p. 40, Hearing of August 14, 1967

[20] tsn., p. 42, Hearing of August 14, 1967

[21] Exh. C, p. 3, Folder of Exhibits.

[22] People vs. Aquino, No. L-27184, May 21, 1974, 57 SCRA 43; People vs. Genoquin, No. L-23019, March 28, 1974, 56 SCRA 181.

[23] People vs. Lumantas, L-28355, July 16, 1969, 28 SCRA 764; People vs. Resayaga, L-23234, Dec. 26, 1973; People vs. Cortez, No. L-31106, May 31, 1974, 57 SCRA 308.

[24] People vs. Derejen, No. L-31155, April 22, 1974.

[25] People vs. Bato Balonto, No. L-11345, Nov. 29, 1969.

[26] People vs. Opiniano, Nos. L-18547-48, Jan 29, 1968

[27] People vs. Simbojon, L-18073-75, Sept. 30, 1965, 15 SCRA 83; People vs. Aquino, No. L-27184, May 21, 1974; People vs. Cortez, No. L-31106, May 31, 1974.

[28] People vs. Cortez, *supra*.

[29] People vs. Puno, No. L-31594, April 29, 1974, 56 SCRA 659.

[30] People vs. Tingson, No. L-31228, Oct. 24, 1972; People vs. Samonte, No. L-31225, June 11, 1975.

[31] People vs. Piring, 63 Phil. 546; People vs. Balagtas, et al. 68 Phil. 675; People vs. Magsilang, 82 Phil. 271; People vs. Young 83 Phil. 702; People vs. Sespense, et al., No. L-17530, Oct. 30, 1962.

[32] People vs. Renegado, No. L-27031, May 31, 1974, 57 SCRA 275.

[33] People vs. Pantoja, 25 SCRA 468.

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