

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. DONION TAN Y CUI ALIAS DIONING, DEFENDANT-APPELLANT.*G.R. No. L-22697. October 05, 1976*

Ponente: CONCEPCION, JR., J.

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This is an appeal interposed by the accused Donion Tan y Cui alias "Dioning" from the judgment of the Court of First Instance of Samar finding him guilty of killing the late Jose Sosing and sentencing him to suffer the penalty of reclusion perpetua ; to indemnify the heirs of the victim in the amount of P6,000.00; and to pay the costs.

The inculpatory facts show that at about 9:00 o'clock in the morning of June 25, 1961, the appellant Donion Tan, then a member of the municipal police force of Pambujan, Samar, approached Jose Sosing, the maintainer of a "Paitik" game,[1] and asked for a peso. Jose Sosing replied that he did not have any and offered, instead, forty centavos. Tan was not satisfied and asked to be shown the permit to operate the game. Jose Sosing did so, but soon after, Tan grabbed the coins and coconut shell used in the game. A scuffle for the possession of the coconut shell thus ensued between Tan and Sosing. In the process, Sosing was hit in the mouth while Tan suffered bruises in the left fore-arm. Surprised at the unexpected opposition of Sosing, Tan pulled out his service pistol. Fearing for his life, Sosing took hold of the gun and they wrestled for its possession. The gamblers and bystanders thereat scampered for safety.

The melee attracted the attention of PC Sergeants Juanito Irgan and Luis Amor who tried to separate the protagonists. Since neither one of them released his hold on the gun, Sgt. Amor fired over their hands and the pistol was released. Sgt. Amor then unloaded the gun and gave it to the chief of police of Pambujan who, in turn, gave it to police sergeant Jesusimo Lipata. Thereafter, Tan was told to go home.

Upon being disarmed, Tan was heard to say: "You are very thankful that soldiers arrived, if none, you are already dead now. Before sunset or before the end of this month you will be killed."

The fracas also attracted the attention of Agueda Tiu, an elder sister of Jose Sosing, who, upon being informed that her brother was involved, lost no time in going to the "paitikan", arriving thereat just in time to see PC Sgt. Amor separate Pat. Tan and her brother, Jose. She and her brother-in-law Gaudencio Acero then brought Jose Sosing to her house, escorted by PC Sgt. Juanito Irgan. On their way, Agueda Tiu reproached her younger brother for not giving the appellant the peso asked of him.

At about noontime, Jose Sosing asked permission to go home in order to eat his lunch. Although Agueda had already prepared lunch and had invited her brother to stay and eat with them, Jose was insistent. So Agueda Tiu and Gaudencio Acero accompanied Jose Sosing home. Halfway to Jose 's house, they saw Tan coming towards them. Agueda advised her brother to keep silent and to go on walking home. But, as Tan came closer, they saw Tan pull out his pistol and aim it at Jose Sosing.[2]Frightened, Jose Sosing turned and ran up the house of Juan Tan. The accused pursued him there, but his way was blocked by Conrada Tan who told the accused to go down because her children might be scared.

Jose Sosing then went to the kitchen of the house and leaped to the ground. Upon jumping, he stumbled and some of the occupants of the house screamed. Upon hearing the outcry, the accused went down and proceeded to the kitchen gate of the house, along Taft Street, where he waited for Jose Sosing to come out.

Jose Sosing came out with hands upraised and knelt before the accused, pleading that the latter spare his life saying: "Don't shoot me." The accused shot him nonetheless. Jose Sosing fell, and when he failed to rise, his assailant kicked him on the head, saying: "You stand up and fight and let all your relatives come and I'll exterminate them all." Agueda Tiu, who came to the side of her brother, knelt before the accused saying: "Don't shoot me", after which, she fainted.

Upon hearing the shot, PC Corporal Serafin Estrella, then assigned as escort of Rep. Balite and who was also at Pambujan at that time, went to the place and saw the accused standing near the prostrate body of Jose Sosing. With gun aimed at the accused, he told the latter to surrender his gun. After the accused had given him the gun, he arrested him and brought him to the municipal building of Pambujan.

The lifeless body of Jose Sosing was likewise brought to the municipal hall where the municipal health officer performed an autopsy on the cadaver.[3]

The medical officer opined that from the nature and location of the wounds, as well as the trajectory of the bullet, it is possible that the assailant was standing and the victim was kneeling down facing him.

The appellant does not deny having shot Jose Sosing which caused the latter's death. In exculpation, he claims that he acted in the fulfillment of his duty, in that, as municipal policeman, he was merely trying to disarm the deceased and then shot the latter because "he was in the poise of taking something, which he thought was a pistol, from his pocket." The appellant testified that after having been disarmed at the "paitikan", he went home, as ordered by his brother, the chief of police, and put on his uniform in order to patrol the streets. On passing the municipal building, police sergeant Lipata called him and returned his pistol since he was on patrol duty. Along Del Rosario Street, and near the house of Juan Tan, he met Jose Sosing, Agueda Tiu, and Gaudencio Acero. Upon their meeting, Jose Sosing said: "You are strict as policeman, there will be time that you will become civilian;" to which he replied: "You are the one who is mad when in fact you were the one who is to blame." After this exchange of words, he saw Jose Sosing in the act of taking something from his pocket which the accused tried to grab but was unable to since Jose Sosing went up the house of Juan Tan. Believing that Jose Sosing was armed with a pistol and should be disarmed, he followed Jose Sosing, but his way was blocked by the wife of Juan Tan who told him not to proceed as her children might be scared. Upon hearing the screams emanating from the kitchen of the house, he went down the house and saw Jose Sosing jump to the ground and go towards the gate at Taft Street. "He (Jose Sosing) faced me and he was in the poise of taking something from his pocket and so I shot him." Asked by the court to re-enact, the appellant said that Jose Sosing was running towards him in a crouching position with his left hand placed on the knee and with the right hand touching inside the right pocket of his trouser.

The defense of fulfillment of a duty is an affirmative allegation which must be demonstrated with convincing credibility. The statement of facts made by the accused and his witnesses is lacking in truth; it is rather an afterthought and contrary to human nature. But, even taking the same to be true, the attitude adopted by the deceased in putting his hands in his pocket is not sufficient to justify the appellant to shoot him. Appellant admitted that the deceased does not own a firearm so that he could have first warned the deceased, as the latter was coming towards him, to stop where he was, raise his hands, or do the things a policeman is trained to do, instead of mercilessly shooting him upon a mere suspicion that the deceased was armed. Appellant, therefore, had no justification at all in shooting the deceased.

Appellant also contends that the crime committed, if any, is not murder, the qualifying circumstances of evident premeditation and treachery being absent.

Indeed, We find that the crime is not attended by evident premeditation. The rule is settled that the qualifying circumstance of evident premeditation is satisfactorily established if it is proved that the accused had deliberately planned to commit the crime and had persistently and continuously followed it, notwithstanding that he had ample and sufficient time to allow his conscience to overcome the determination of his will, if he had desired it, after meditation and reflection. In other words, it contemplates cold and deep meditation and tenacious persistence in the accomplishment of the criminal act.[4] In the instant case, there is no doubt of the determination of the accused to kill the deceased, as shown by his utterances soon after he was disarmed at the "paitikan", but no sufficient time had elapsed from its inception to its fulfillment for meditation and re-flection to justify a finding of evident premeditation. Only about two hours had intervened between his rage and his consummation of the criminal act so that the defendant had no ample opportunity to coolly and serenely think and deliberate on the meaning and consequences of what he said he would do.

However, there is treachery because the accused fired at the victim who, with hands upraised, was kneeling before the accused and pleading that his life be spared.[5] Treachery, therefore, qualifies the crime to murder.

Finally, counsel for the appellant contends that the court failed to take into consideration, the mitigating circumstances that (a) sufficient provocation or threat on the part of the deceased immediately preceded the act; the accused acted upon an impulse so powerful as naturally to have produced passion or obfuscation and the accused had voluntarily surrendered himself to a person in authority or his agents.

Provocation, to constitute a mitigating circumstance, must, in the language of the law, be sufficient; that is, adequate to excite the person to commit the wrong and must accordingly be proportionate to its gravity and must also immediately precede the act. The provocation relied upon by the appellant is based on his testimony that when he met the deceased Jose Sosing, the latter said to him: "You are strict as policeman, there will be time that you will become civilian," to which he replied: "You are the one who is mad when in fact you were the one who is to blame." After this exchange of words, the deceased allegedly was in the poise of taking something from his pocket, which the accused immediately tried to grab, but the deceased went up the house of Juan Tan. This claim cannot be sustained. It can hardly be said that the utterances of the deceased, that the appellant is strict, would constitute a sufficient cause for the defendant to shoot the deceased. Besides, these statements, if indeed said, did not immediately precede the criminal act since the deceased was slain after he had fled to the house of Juan Tan and thence to Taft Street where the accused was waiting for him. Provocation given by an adversary at the commencement and during the first stage of a fight, cannot be considered as a mitigating circumstance where the appellant pursued and killed the former while fleeing, and the deceased, from the moment he had fled after the first stage of the fight to the moment he died, did not give any provocation for appellant to pursue, much less further attack him.[6]

Neither could said statement that the appellant is "strict" have aroused the defendant to such an extent that it can be said he acted upon an impulse so powerful as naturally to have produced passion or obfuscation, considering his condescending reply to the deceased that the latter is "the one who is to blame." The accused was actuated more by the spirit of lawlessness than by any sudden impulse of natural and uncontrollable fury.

Nor is the appellant entitled to the mitigating circumstance of voluntary surrender. The testimony of PC Corporal Serafin Estrella is very explicit that he arrested the accused and brought him to the municipal hall. Besides, in his own spontaneous declaration,[7] the appellant admitted that he "was arrested by Cpl. ESTRELLA & Pfc BUGNA."

With the modification that the indemnity to the heirs of the deceased be increased to P12,000.00, the judgment appealed from should be, as it is hereby affirmed. With costs against the appellant.

SO ORDERED.

Fernando, (Chairman), and Aquino, JJ., concur.

Barredo, J., concurs. He agrees with Justice Antonio that under the peculiar circumstances of this case, appellant acted on impulse rather than premeditation.

Antonio, J., concurs in separate opinion.

[1] " 'Paitik is played by spinning two coins and later covered with a coconut shell while the coins are still moving and the gamblers would bet whether the coins would turn tails or heads and the result of the game is determined by pure luck because the winner or the person who will guess right will be declared the winner." (p. 11, rollo)

[2] After the incident at the "paltik" game, Tan went home and put on his uniform. He then went to the municipal building and took his service pistol from Sgt. Lipata. (Exhibit B-3, p. 5)

[3] Autopsy Report Exhibit D.

[4] People vs. Sarmiento, 8 SCRA 263.

[5] People vs. Ricohermoso, 54 SCRA 431.

[6] People vs. Alconga, 78 Phil. 366.

[7] Exhibit B-3.

CONCURRING OPINION

ANTONIO, J.:

I agree that from 9:00 a.m., since Sosing and Tan scuffled for the possession of the coconut shell and Tan suffered bruises, until about noontime when Tan shot Sosing, there was no opportunity for the latter to coolly and serenely think and deliberate on the meaning and consequences of what he planned to do, no interval long enough for his conscience and better judgment to overcome his criminal desire.

The criteria in ascertaining whether or not the offender had sufficiently meditated on his criminal intention has been stated, thus: "The period of time necessary to justify the inference that there is known premeditation is a period sufficient in the judicial sense to give the accused full opportunity for meditation and reflection, and sufficient to allow the conscience of the actor to overcome the resolution of his will if he desires to hearken to its warnings." [1] As to what is a sufficient lapse of time varies on the circumstances.

In People v. Lazada, [2] the period of four (4) hours that lapsed from the moment the assailant was enraged until he attacked the victim was considered sufficient, in a judicial sense, to qualify the killing with the circumstance of evident premeditation. Three and one-half (3-1/2) hours was considered sufficient in People v. Mostoles, [3] where the appellant and his confederates deliberately planned the commission of the crime at about 4:00 o'clock in the after-noon and commenced the execution thereof at about 7:30 in the evening. Where the scheme to kill

Estrada was plotted and decided by the appellant and Canitan at about 5:30 p.m. of September 24, 1951 and it was about 8:00 p.m. of that day when the slaying was done, the Court held that evident premeditation preceded the commission of the crime.[4]

But in *People v. Pantoja*,^[5] where the appellant had only about half an hour for meditation and reflection from the time he left the house, went to his camp, put on his fatigue uniform, got a Garand rifle and returned to the house of Estelita, followed the serenaders a short distance and then fired two shots, this Court held that the time lapse was insufficient in the juridical sense. Where the evidence shows that from the school grounds the appellants hurried to the house of their co-appellant, Vicente Mendoza, and soon thereafter, they went to the house of the victim where they killed him, this Court ruled that the interval was so short that there was no time or sufficient period for meditation and reflection.^[6]

In sum, in order that evident premeditation may exist, it must be evident that the defendant has deliberately planned to commit the crime, and had persistently and continuously followed it notwithstanding that he had ample time to allow his conscience to overcome his evil desire, if he had desired, after meditation and reflection, to hark-en to its warnings.

[1] Guevara, Commentaries, Revised Penal Code, 5th Ed., p. 56.

[2] 70 Phil. 525.

[3] 85 Phil. 883, 892.

[4] *People v. Canitan*, 8 SCRA 358.

[5] 25 SCRA 468.

[6] *People v. Mendoza, et al.*, 91 Phil. 58.

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