

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF?APPELLEE, VS. PEDRITO (PIDDY) WONG, ET AL., DEFENDANTS?APPELLANTS.

G.R. Nos. L-22130-L-22132. April 25, 1968

Ponente: ANGELES, J.

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ANGELES, J.:

On October 12, 1961, a shooting incident occurred at the market place of Tubigon, Bohol. Shortly after the occurrence of said incident, five criminal informations were filed in the Court of First Instance of that province.

In Criminal Case No. 3361, Pedrito (Piddy) Wong, Vicente Montoya, Julian (Ejac) Binasbas, Crisostomo (Mongmong) Vedra and Rolando (Boy) Montoya were charged with the crime of murder allegedly committed on the person of Jacinto Carmona.

In Criminal Case No. 3372, Rolando Montoya was charged with attempted homicide, committed according to the information on the person of Elpidio Anova.

In Criminal Case No. 3373, all the five defendants (in case No. 3361) were charged with the crime of frustrated murder, committed as alleged in the information on the person of Teodula Lopez.

In Criminal Case No. 3374, Rolando Montoya was charged with illegal possession of firearms.

And in Criminal Case No. 3375, Pedrito Wong, Vicente Montoya and Crisostomo Vedra were accused of attempted murder with direct assault upon an agent of a person in authority, with Policarpo Elle as the victim according to the information.

Julian Binasbas and Crisostomo Vedra, being at large, were neither arraigned nor tried.

After presentation of the prosecution evidence in chief, the court dismissed the case of illegal possession of firearms for failure of the prosecution to prove the same. The trial of the four other cases having been concluded, decision was rendered by the court disposing as follows:

"PREMISES CONSIDERED, the court renders judgment in criminal case No. 3361 finding accused Pedrito (Piddy) Wong, Vicente Montoya and Rolando Montoya alias Boy guilty of the crime of murder, punished by Article 248, par. 1 of the Revised Penal Code, without the attendance of any aggravating or mitigating circumstance, and each of them is hereby sentenced to suffer the penalty of reclusion perpetua.

"The above mentioned accused are further sentenced to indemnify jointly and severally the heirs of the deceased in the amount of six thousand pesos (P6,000.00); but they shall not suffer subsidiary imprisonment in case of insolvency. They are finally sentenced to pay three-fifth (3/5) of the costs.

"THE COURT RENDERS JUDGMENT IN CRIMINAL CASE No. 3373 finding accused Pedrito (Piddy) Wong, Vicente Montoya and Rolando Montoya guilty of the crime of less serious physical injuries, punished by Article 265 of the Revised Penal Code, with the aggravating circumstance of treachery, and sentencing each of them to suffer the penalty of six (6) months of arresto mayor, and to pay three-fifths (3/5) of the costs.

"The court refrains from making any pronouncement as to the civil liability of the three accused, since the offended party had reserved the right to institute a separate civil action for damages.

"Pursuant to Article 70 of the Revised Penal Code, the court orders that the three accused shall begin to serve the penalty imposed herein after they have fully served the penalty imposed upon them in criminal case No. 3361.

"THE COURT ALSO RENDERS JUDGMENT IN CRIMINAL CASE No. 3372 finding accused Rolando Montoya alias Boy guilty of the crime of slight physical injuries, punished by Article 266 of the Revised Penal Code, and sentencing him to suffer a penalty of ten (10) days of arresto menor, and to pay the costs.

"The court refrains from making any pronouncement as regards the civil liability of the accused, because the offended party had reserved the right to institute a separate civil action for damages.

"Pursuant to Article 70 of the Revised Penal Code, accused Rolando Montoya shall begin to serve the penalty imposed herein after he has completed serving the penalty imposed in criminal case No. 3373.

"FINALLY, THE COURT RENDERS JUDGMENT IN CRIMINAL CASE No. 3375 acquitting accused from the crime charged in the information with costs de oficio, and cancellation of their bail bonds."

Dissatisfied with the judgment, the three accused who stood trial, appealed to this Court.

EVIDENCE OF THE PROSECUTION:

A number of witnesses were presented by the prosecution but only two of them claim to have witnessed the incident.

Teodula Lopez testified that on October 12, 1961, at about 5:00 o'clock in the afternoon, while she was conversing with Romeo Cosare and Gregoria Andaman at the gate of the public market of Tubigon, a jeep suddenly parked in front of Cosare store. As soon as the jeep stopped, Vicente Montoya, Pedrito Wong, Mongmong Vedra, Rolando (Boy) Montoya and Julian Binasbas fired their guns. (tsn p. 64, Oct. 25, 1961). The shots were directed at the deceased Jacinto Carmona, who was 4 or 5 meters away from her. The deceased was seated on a bamboo bench called "lantay". The shots hit Jacinto Carmona and herself. She was hit on the right jaw and lower right cheek. (p. 65, Ibid.) After the shooting, the jeep sped away. But one of the men in the jeep, Boy Montoya, jumped out. Another man grappled with Boy for the possession of a pistol. She did not come to know the result of the grappling because she was brought inside a tailoring shop where she was given a first aid treatment. Later, she was taken to the clinic of Dr. Falcon where she stayed for one night and a half day. Then, she was transferred to the Bohol Provincial Hospital where she has been confined for two weeks.

Elpidio Anova testified that on October 12, 1961, at about 5:00 o'clock in the afternoon, he was in front of the Tubigon market, seated on a tartanilla. He saw a jeep running towards the place where the deceased Jacinto Carmona was seated, which was about three brazas distant to the store of Cosare. The deceased was seated on a bench called "lantay", about 2 feet high from the ground, drinking beer. Inside the jeep were the five accused. Seeing that the occupants of the jeep were armed and knowing that Vicente Montoya and the deceased quarrelled the day before, "I shouted at Jacinto (Carmona) to be careful." (tsn p. 187) The persons riding in the jeep fired their guns as soon as the jeep stopped.

After the shooting, as the jeep started to run, Rolando Montoya jumped off the vehicle and went after the deceased who was crawling towards a store. Rolando fired again at the deceased, although Anova cannot tell whether the deceased was hit. He (witness) jumped from the tartanilla and grappled with Rolando for the possession of a .45 caliber pistol the latter was then holding. Before he could grab the pistol, Rolando hit him on the head with the butt of the gun and he was wounded. After he had grabbed the pistol, Rolando ran to the store of

Sosing Wong, father of appellant Pedrito Wong. Said store was about 15 brazas distant to the place where the shooting incident happened. He pursued Rolando in the store, but the latter threw a bottle at him, injuring him at the wrist. Wounded, he ran to the municipal building to surrender the gun to the police. The next day, he was treated of his injuries at the Bohol Provincial Hospital.

Policemen of Tubigon claim to have seen the accused with the exception of Rolando Montoya proceeding in a jeep to Tagbilaran after shots were heard near the market place at Tubigon. Pat. Policarpo Elle went as far as to say that when he met the jeep of the accused, on his way to the Cosare store, Pedrito Wong and Vicente Montoya fired at him with their rifles. He sought shelter behind Bohol transit Bus No. 104 and it was the mudguard of said bus that was hit. This claim, however, did not impress the trial court. The court acquitted the accused in criminal case No. 3375 upon the following considerations:

"With respect to the case of the alleged offended party Policarpo Elle in criminal case No. 3375, we seriously entertain doubt regarding the facts established by the prosecution. In the first place, only Policarpo Elle had declared about the fact that he was fired at by the accused. His testimony had been contradicted by the accused and other witnesses for the defense.

"It is hinted that the hole on the front side of the truck, as it appears on the pictures (Exhibits L and M) came from the bullet fired by accused. Defense, however, offered the testimony of the owner of the truck to the effect that such hole was caused by a person who was drunk and who struck with a piece of iron that front part of the truck. The prosecution failed to prove that the bullet causing the alleged hole on the fender had also hit the interior thereof, thus raising doubt as to whether or not the hole was in reality caused by a bullet coming from the jeep used by accused." (p. XLIX, appellants' brief)

Dr. Godofredo Ganade, junior resident physician at the Bohol Provincial Hospital testified that at around 7:00 p.m. on October 12, 1961, the deceased Jacinto Carmona was admitted at the aforesaid hospital. An operation was commenced, but when the surgeons were opening the abdomen, the patient vomitted blood which choked him. Death occurred one and a half hour after admission.

Sgt. Pacomo Galve of the Philippine Constabulary testified that at about 7:00 o'clock in the evening of October 11, 1961, Vicente Montoya, accompanied by Atty. Zafra and three others, came to camp Dagohoy at Tagbilaran to complain that he was mauled by the deceased Jacinto Carmona and the latter's companions at about 1:00 o'clock in the afternoon of that day at the market place in Tubigon. An affidavit of Vicente Montoya was prepared, but the same was not signed.

"Q.- And this Exh. B does not contain any signature, can you explain why?

A.- That was not signed because when I made that, Vicente Montoya promised that he would sign it at 8:00 O'clock in the morning in the following day when he would come back or if not, he said, we will meet in the office of the clerk of court. The following day, he did not come, so I went to the office of the clerk of court but he did not come also." (p. 51, tsn. Oct. 25, 1961.)

However, Sgt. Zenon Sarmiento, also of the PC, testified that in the morning of October 12, 1961, Pedrito Wong, Vicente Montoya and Mongmong Vendra came to Camp Dagohoy. Pedrito Wong declared that he saw the mauling of Vicente Montoya the day before. He reduced the statement of Wong in writing, Exhibit H, but the same was not signed.

EVIDENCE OF THE DEFENSE:

The evidence for the defense tended to establish that the deceased Jacinto Carmona was of a violent character, and that he was shot by Rolando Montoya in defense of his brother, Vicente Montoya.

Vicente Montoya testified that in the elections of 1961, he sided with congressional candidate Jose Zafra while Jacinto Carmona supported Bartolome Cabangbang. In the afternoon of October 11, 1961, Carmona asked Vicente to side with Cabangbang. When he refused, the deceased clubbed him on the head with an empty bottle. Carmona's companions, Diego, Francino and Elpidio Anova were then present. Vicente lost consciousness. Upon regaining consciousness, Vicente noticed that he was surrounded by the deceased and his companions. The chief of police of Tubigon took Vicente to the clinic of Dr. Falcon for treatment.

Late in the afternoon of that date, candidate Zafra fetched Vicente from his house and took him to the PC barracks at Tagbilaran. He failed to sign the affidavit because Zafra told him not to sign until he (Zafra) had returned, and Zafra did not come back the following morning. The following morning, Vicente and Piddy Wong returned to the PC headquarters. The affidavit of Wong was prepared. Lt. Lara of the PC told them to come back in the afternoon, but Vicente answered that they could not come back because Zafra instructed them to proceed that afternoon to barrio Tugois in the town of Lila, around 19 to 20 kilometers distant from Tagbilaran, to campaign.

In the afternoon of October 12, 1961, Vicente, Pedrito Wong, Mongmong Vedra and Herminiano Salera went to Tugois, arriving there at 1:00 o'clock. When they arrived, Zafra had already left for the town of Butuan, leaving a note that Vicente and his companions should not follow to Butuan but must return to Tubigon. Hence, the group of Vicente went to Tubigon in the house of Atty. Salustiano Baura, which served as the campaign headquarters of Zafra. After about one-half hour, Pedrito Wong extended an invitation for snacks at their store near the market place of Tubigon. Vicente Montoya and Mongmong Vedra went with Wong, and they were joined by Roldando Montoya, younger brother of Vicente, and Julian Binasbas who were at the headquarters at the time.

Reaching the market of Tubigon, the accused parked their jeep in front of one of the block tiendas, the Panyang store. Opposite the said store, was the store of Sosing Wong, father of Pedrito Wong. Next to the Panyang store on the same side of the street was the Cosare store. As soon as the accused had all alighted from the jeep, Vicente noticed the presence of Jacinto Carmona. The deceased was standing with left foot on top of a bamboo bench outside the Cosare store. Aiming a pistol at Vicente Montoya, the deceased remarked: "You are here again, ha? You are not afraid of what happened yesterday?" (p. 148, tsn, Oct. 18, 1962) Vicente Montoya answered: "I even went to the PC headquarters to report the incident between us." (p. 149, tsn, Ibid)

"Q.- Again, in answer to the question of the Hon. Fiscal, you said that even after Jacinto Carmona had pointed his gun to you telling you that you still have come back despite the incident of the day before, what was your purpose in telling him that the day before you even went to the PC to complain about that incident?

A.- I told him that fact so that he will not shoot me.

x x x x x

Q.- What made you believe that your telling him that you went to the PC the day before would prevent him from shooting you?

A.- Because we would be investigated by the PC.

x x x x x

Q.- What do you want us to understand by that statement that it will be investigated or settled?

A.- With that word I mean to say that the PC officers would call us and would ask each of us what were our gripes." (tsn. pp. 174-177, Oct. 18, 1962)

But the answer of Vicente did not produce the desired effect. Carmona retorted: "So you went to the PC because you want this case to be serious?" He cocked his pistol and said: "It is better to finish you now." (tsn. p. 150 Ibid.)

Rolando Montoya testified that as they were leaving the house of Salustiano Baura, Crisostomo Vedra, driver of the jeep, handed a pistol to him saying: "Boy, take hold of my pistol because it is bulging in my pocket." (tsn. p. 350, Oct. 19, 1962) As he received the pistol, he was told: "You better take good care of it because it is already loaded and it is ready to fire." (tsn. p. 351, Ibid.) He held the gun in his right hand. Sensing near the Cosare store that the life of his elder brother was in peril, he fired at Jacinto Carmona with the pistol entrusted to him by Vedra. The first shot found its mark at the left thigh of the deceased. Carmona whirled to the left but held his pistol still, so he fired a second shot at him hitting him on the right side. The deceased held on to his gun, so he shot him again.

"Q.- When you fired the third shot what was his position

A.- His back turned to me.

Q.- Why did you still fire at him in that position?

A.- Because he was still holding his pistol.

Q.- So what if he was still holding his pistol?

A.- Because I believe that while he was still alive he would retaliate and he would kill us and that is why I killed him." (TSN, p. 359, Ibid)

After being hit by the third shot, the deceased fell on his head, bumping against a pile of Pepsi-Cola bottles and then against the pavement. Because the companions of Carmona were coming, he shouted to his brother: "Noy, you run because they are many." He ran towards the store of Pedrito Wong, while the four other accused drove off in the jeep to the direction of Tagbilaran. As Rolando Montoya was running to the store of Wong, Elpidio Anova pursued him with a long dagger in hand. He fired at Anova but the pistol jammed. Anova overtook him and stabbed him on the wrist. The pistol he was holding dropped to the ground. Anova picked up the gun and chased Rolando to the store. Inside the store, Rolando sought shelter behind the ice-box where there was a pile of beer bottles. He threw bottles at Anova hitting him on the forehead. Anova ran outside the store towards the body of Carmona. He picked up the pistol of Carmona and went to the municipal building.

Pedrito Wong corroborated the testimonies of his brothers-in-law, the Montoya brothers, in their material details. Cresencio Ybanez testified to corroborate the claim that Jacinto Carmona aimed a pistol at Vicente Montoya. Guillermo Coscos corroborated the claim that Anova pursued Rolando Montoya to the store of Wong. Ti-moteo Pilagre tried to corroborate the account of the incident made by Rolando and Vicente from the time Carmona aimed a pistol at Vicente until the deceased was felled by the gun of Rolando.

The defense also tried to prove that Jacinto Carmona was a heavy drinker of tuba and liquor. Once, in the town of Clarin, he asked for liquor money. He was given P10.00, but in spite of this, he stabbed the giver when he became drunk. He was trigger-happy and a tough guy. On another occasion one from Calape was selling cooked meat in Tubigon. Carmona and his gang ate all the meat. When the seller demanded payment, Carmona struck him with a Coca-Cola bottle on the head.

A decision of the Court of First Instance of Cebu was presented by the defense wherein it was found that in the evening of March 10, 1959, or more than two years before the incident at bar occurred, Jacinto Carmona shot to death and with much ceremony, a 17-year old shine-boy in the vicinity of Freedom Park, Cebu City. (Exhibit 2) Likewise presented is a certification by the clerk of court of the City Court of Cebu showing that the deceased was charged with offenses, such as less serious physical injuries, slight physical injuries, malicious mischief, public disturbance, resistance and disobedience to an agent of a person in authority, and estafa. (Exhibit 3)

Appellants raise the following errors in their brief:

1. The court below erred in holding that a conspiracy existed among appellants to kill the deceased Jacinto Carmona.
2. The court erred in giving credence to the testimonial evidence of the prosecution and accepting it over that of the defense.
3. The court erred in not considering that the entrance wounds indicated in Exhibits A and A-2 are actually the exit wounds in view of testimonial and other evidence for the prosecution and of natural and physical laws.
4. The court erred in holding that the crime of murder was committed in the shooting of Jacinto Carmona.
5. The court erred in finding that the appellants are guilty beyond reasonable doubt of murder for the death of Jacinto Carmona and in not acquitting the appellants.
6. The court erred in not acquitting Rolando Montoya for the injury of Elpidio Anova and all the appellant for the injuries of Teodula Lopez.

1. - The first vital question to be resolved is which of the two opposing versions of the incident should merit credence. On the basis of the testimonies of the prosecution witnesses Teodula Lopez and Elpidio Anova, the court a quo held all the three appellants guilty of murder for the death of Jacinto Carmona and of physical injuries for the wounds sustained by Teodula Lopez. At this instance, the appellants assail the testimonies of said witnesses. It being an established principle in criminal cases that the prosecution must rely on the strength of its own evidence and not on the weakness of the proof of the defense, it behooves - this Court to re-examine the testimonies of the prosecution witnesses.

Teodula Lopez started with the declaration that a single person fired his gun.

"Q.- When that jeep stopped, what did you observe?

A.- Somebody fired his gun. (TSN, p. 64, Oct. 25, 1961)

But when the promotor fiscal, in the next question, asked her who "were the ones" who fired the gun, the witness responded by naming all the five accused.

"Q.- Who were the ones who fired the gun, do you know? Will you please mention their names?

A.- Vicente Montoya, Pedrito Wong, Mongmong Vendra, Rolando Montoya and Julian Binasbas. (TSN, p. 64, Ibid)

After a few questions, Teodula Lopez toned down her testimony by saying that all the accused were armed.

"Q.- Why did you say that they were armed?

A.- Why should I not say when the arms were pointed at us.

Q.- Who were the ones who were pointing it then?

A.- All of them. (TSN, p. 67-68, Ibid)

Before the start of the cross-examination, the court propounded questions to the witness. She reverted to the former position that all the five accused fired their guns.

"Q.- You said the five accused had fired their guns?

A.- Yes.

Q.- Did you actually see when they fired their guns?

A.- Yes, because I was facing at them. (TSN, p. 71, Ibid)

The court was skeptical:

"Q.- Were you not telling a lie when you said that the five of them had fired their guns?

A.- I am telling the truth. (TSN, pp. 70-71, Ibid)

Witness was reminded of her moral responsibility as a witness, but she stuck to her claim that all the five accused discharged their firearms.

"Q.- Are you conscious of the fact that your testimony is very serious, and the crime here is very serious that the accused might be sentenced to death once convicted, therefore, you must be honest in your testimony?

COURT: (After translating his warning into the Visayan dialect)

"Q.- After hearing my warning, the warning that the court has translated to the Visayan dialect couching you of your responsibility before God, do you insist that you actually saw the five accused discharge their firearms?

A.- Yes, I insist. (TSN. p. 71 (Ibid)

She then proceeded to describe the participation of each of the accused, upon questions propounded by the court.

"Q. - Who was the first person who fired his gun?

A.- I did not notice which one was fired first but the firing was simultaneous.

Q.- What was the gun used by Pedrito Wong?

A.- I did not recognize the gun used but the length is as long as this (witness demonstrating a length of about 14 inches)

Q.- Did you actually see the gun?

A.- Yes.

Q.- Did you see the bullet coming the muzzle (sic) of the gun?

A.- I did not see but I heard only the gun report and at that moment I was hit here (witness pointing at her cheek (sic) and jaw.

Q.- Where was Pedrito Wong when he discharged the gun at the front, in the front or at the back seat?

A.- In the front seat.

Q.- Did you see Vicente Montoya actually fired (sic) his gun?

A.- Yes.

Q.- What kind of gun was he using?

A.- The same as with the one Piddy Wong was using.

Q.- Did you actually see the gun?

A.- Yes.

Q.- How about Julian Binasbas, did you see the gun used?

A.- No.

Q.- Why did you say that he fired his gun?

A.- The five of them fired their guns but I did not see the kind of gun Julian was using.

Q.- Did you see Mongmong Vedra fired (sic) a gun?

A.- Yes.

Q.- What kind of a gun?

A.- A short gun.

Q.- How short was it?

A.- It was like a revolver.

Q.- Did you see Rolando Montoya fired (sic) a gun?

A.- Yes.

Q.- What kind of gun?

A.- The same as a revolver." (pp. 71--73, Ibid)

After the series of questions by the court, the session was adjourned. At the resumption of the hearing the next day, the fiscal asked leave to propound additional questions. The witness switched to the claim that only Vicente Montoya and Pedrito Wong aimed their firearms.

"Q.- Yesterday when you were testifying you testified that the persons who were in the jeep, as well as about the person who fired at you, who aimed their rifles or firearms at you, inasmuch as your testimony in as far as this representation is concerned, seems to be somehow vague on that point. Will you please illustrate to the Hon. Court exactly who actually you saw the persons aiming the firearms at you in that after-noon?

A.- Vicente and Pidding Wong.

x x x x

Q.- How about the other persons that you have mentioned who were inside the Jeep, what were they doing at the precise time that they were aiming their firearms at you?

A.- They were also holding their fire-arms.

Q.- Who were holding their firearms, will you please mention them?

A.- Julian Binasbas, Mongmong Vedra and Boy Montoya. (TSN, p. 81, Oct. 26, 1961)

Q.- Did you actually see the persons who actually aimed their firearms at Jacinto Carmona?

A.- Yes, sir, Vicente and Pidding Wong.

x x x x

Q.- Do you mean to say that they pointed also differently their firearms at you or they pointed at another occasion their firearms at Jacinto Carmona?

A.- Only Jacinto Carmona was pointed to but the guns seems to be pointed to-ward me.

Q.- What did (you mean), therefore, by your testimony yesterday, when you said all the five persons fired at you, will you please explain to the Court?

A.- When Pidding Wong and Vicente Mon-toya fired their guns, the other three persons were holding their guns so that it seems that all of them fired their guns. (TSN. pp. 82-83, Ibid)

On cross-examination, the witness declared that as soon as the jeep stopped, she heard gun reports and saw Vicente Montoya and Pedrito Wong pointing their guns at Jacinto Carmona and herself.

"Q.- When you saw the jeep parked at point 3 of Exhibit D the five per-sons, according to you inside the jeep, immediately fired their guns, is that true?

A.- When the jeep stopped, I heard several gun reports and at that moment, I saw Piddy Wong and Vi-cente Montoya pointing their guns to us.

x x x x

Q.- When you heard the shots and you saw Vicente Montoya and Piddy Wong firing their guns they were still in the jeep, is that true?

A.- Yes, sir.

Q.- You did not see Julian Binasbas, Mongmong Vedra and Boy Montoya fir-ing their guns?

A.- I did not see them pointing their guns to us. (pp. 93-94, Ibid)

Q.- When you saw, according to you, Vicente Montoya and Piddy Wong fired their guns, were they in standing position?

A.- They were about to stand when they fired their guns. It seems they were not exactly seated, they were standing and in the action of firing."

(p. 111, Ibid)

On re-direct examination, Teodula Lopez declared that Vicente Montoya held the gun with both hands and the color of the gun was tan, darker than the table in the courtroom.

"Q.- How many hands of Vicente Mon-toya were holding the firearm when you saw that he was aim-ing?

A.- Two hands. (p. 115, Ibid)

Q.- As compared to this piece of wood here in front of you, which was darker, the firearm held by Vicente Montoya or this? (Fiscal pointing the top of the table in front of the witness)

A.- The gun of Vicente Montoya is darker.

Q.- Slightly darker or very much dark-er compared to this?

A.- I cannot define clearly but it is not the same color of this piece of wood (witness pointing the table of the Court).

FISCAL JESUS N. BORRAMEO:

"I wish to make of record that the table in front of this witness is painted tan." (pp. 116-117, Ibid)

The foregoing shows up Teodula Lopez as a vacillat-ing witness, who would change her testimony as a chame-leon would vary its hues. Her tendency to exaggerate is patent, and she has very little respect for her oath as a witness. Thus, from the claim that a single person fired a gun, her testimony soon metamorphosed into the

pre-tense that all the five accused discharged their firearms. No sooner had she made this pretense then she switched to the claim that the five accused were only "armed". After a few questions, however, she reverted to the claim that all the five accused fired their guns, only to change her stand the next day by saying that only Vicente Montoya and Pedrito Wong fired their guns. Even as to the participation of the two accused, she is not certain whether they fired their guns or merely aimed them. To Teodula Lopez, mere impressions are facts. Simply because gun reports were heard, and the accused, according to her, were armed, she concluded that all the five accused fired their guns. The witness' propensity for falsehood is also evident. At one time, she admitted that she did not see Julian Binasbas holding a gun; in a later stage of her testimony, she contradicted herself and said that Julian had a gun. She pretends to know the color of the gun of Vicente Montoya, but more noticeable objects that would immediately arrest the attention of even a casual observer, such as the windshield of the jeep, escaped her notice.

"Q.- Did you notice that the jeep had windshield?

A.- I do not remember.

Q.- At the side of the jeep, aside from the windshield, near the windshield, was there glass or were there glasses on both side?

A.- I do not remember." (p. 111, Ibid)

The truth is that, at the first burst of gunfire, Teodula Lopez was hit as she herself admitted. (pp. 71--72, tsn. supra.) And she was brought up by her companions to the nearby Esquire Tailoring Shop where she was employed. (pp. 74-75, tsn. Ibid) Under the circumstances, the opportunity for a detailed observation did not present itself to the witness as borne out by her mercurial testimonies, and when she claimed, as she did at the trial, that she observed even the minutest of details, Lopez only exposed herself as an unreliable witness.

Elpidio Anova began with the claim that all the riders in the jeep fired at Jacinto Carmona.

"Q.- Did you recognize the faces of the persons who were inside that jeep?

A.- Yes, sir.

Q.- Will you please point to them if they are here in Court?

A.- That one Piddy Wong Vicente Montoya, Boy Montoya, x x x.

Q.- Were they the only persons there in that jeep?

A.- They were five.

Q.- What did these persons do when the jeep stopped or went near Jacinto Carmona?

A.- They fired their guns toward Jacinto Carmona." (pp. 174-175, tsn. Oct. 26, 1961)

Asked to specify, he could name only three:

"Q.- Who of them specifically did you see pointing firearms at Jacinto Carmona?

A.- Piddy Wong, Vicente Montoya and Boy Montoya." (p. 175, Ibid)

But he maintained that all five were armed, thus -

"Q.- With respect to those persons on the jeep, whom did you see with firearms clearly?

A.- The five of them.

Q.- How was Mongmpng Vedra, for example, the driver, where did you see the firearm of Mong?mong Vedra?

A.- In his right hand.

Q.- What firearm?

A.- A .45 caliber pistol.

Q.- How about this Piddy Wong, what firearm was he carrying?

A.- He had a Thompson gun.

Q.- How about the other persons sit-ting on the front seat. How about Vicente Montoya, what was he carrying?

A.- A pistol, .45 caliber.

Q.- How about that Eyac, what was he carrying?

A.- Carbine.

Q.- How about Boy Montoya?

A.- .45 caliber pistol." (pp. 183--184, Ibid)

Then, he was confronted with his affidavit, Exh. G, where-in he stated that "Vicente Montoya, holding a .45 caliber revolver, aimed at Cinto Carmona." And he was asked in court to point to the person of Vicente Montoya. The ac-cused he fingered, however, was Rolando Montoya.

"Q.- At the time when you executed this statement in the hospital, will you please point to the person if he is in Court, whom you refer to as Vicente Montoya, or whom did you mean by Vicente Montoya?

A.- I refer to that person (witness pointing to accused Rolando Montoya alias Boy." (p. 118 Ibid)

In his affidavit, he also stated that "Mongmong with a .45 caliber who was the one driving, did not fire and one whom I do not know, was also holding a .45 caliber but did not also fire." Asked in Court to point to the other person who did not fire, Anova pointed to Vicente Montoya.

"Q.- The person mentioned in your affidavit whom you said there was someone whom you do not know who was holding a .45 ca-liber who did not fire whom did you refer? If he is in Court, will you please point where he is?

A.- That Vicente Montoya (witness pointing to accused Vicente Montoya) [p. 189 Ibid]

The foregoing reveals that the same defects which taint the testimony of Teodula Lopez vitiates the testi-mony of Elpidio Anova. In the beginning, this witness tried to impress the Court that all the accused fired their guns at the deceased. Later, he reduced the num-ber of the assailants to three, but he was careful to include appellant Vicente Montoya. Confronted with a con-tradictory statement in his affidavit, the witness relent-ed and excluded Vicente Montoya from amongst those who discharged their firearms. He tried to disguise the con-tradiction by mistaking Rolando Montoya for Vicente Mon-toya. But this appears to us as a mere pretext consider-ing that this witness knew the Montoyas and he could pin-point Rolando Montoya as the one who jumped from the jeep and with whom he grappled for the possession of the .45 caliber pistol. The defense has reason to complain in their brief that Elpidio Anova has an axe to grind against the appellants because he was a henchman of the deceased Jacinto Carmona, not to speak of the fact that in the encounter on October 12, 1961, he sustained in-juries. It is patent that the purpose of the witness in claiming that Vicente Montoya was the principal and mov-ing spirit in the

slaying of the deceased, is to give some semblance of truth to the theory of the prosecution that the shooting on October 12 was done in retaliation of the maltreatment of Vicente Montoya, the day before. A rigid cross-examination exposed Elpidio Anova as an untrustworthy witness, and we are not prepared to base the factual setting of this case upon his narration of this incident.

Third, we seriously doubt if Elpidio Anova had not distorted the true facts, for pretending to have observed the incident even before the firing at Jacinto Carmona, yet there is in the record a categorical admission of Anova that when he jumped from the *tartanilla* and approached Carmona, "the shooting was finished already." (tsn. p. 196)

Vital contradictions are found in the testimonies of the two prosecution witnesses who allegedly witnessed the occurrences. Upon an examination of their declarations, independently of each other, substantial discrepancies are also revealed by a comparison of their respective testimonies. Thus, while the net result of the testimony of Teodula Lopez is to the effect that Pedrito Wong and Vicente Montoya were the only ones who fired at the deceased, Elpidio Anova on the other hand, finally admitted that Vicente Montoya did not discharge his fire-arm. This leaves only one accused, Pedrito Wong, as the supposed triggerman. But we are not persuaded to believe that this accused is responsible for the death of the deceased. From the record, he has absolutely no reason to lay his hands on the deceased. The most logical assailant would either be Vicente Montoya or Rolando Montoya, who are brothers, if we are to concede momentarily and for arguments sake that the slaying was done in a spirit of vengeance for what Jacinto Carmona had done to Vicente Montoya on October 11, 1961. Inasmuch as prosecution witness Elpidio Anova, however, admitted that Vicente Montoya did not fire his gun, only Rolando Montoya remains as the triggerman. And this is precisely the version of the defense, to wit: that only Rolando Montoya fired at the deceased Jacinto Carmona.

Two vital facts weaken the theory of the prosecution that the deceased was gunned down by the accused. First, the incident was unexpected, as the evidence reveals. In the words of the lower court which deserve our approval:

"If we took into account that accused were using a jeep of Jose Zafra, candidate for Congressman, because their mission was to make a campaign for the candidacy of the latter; if we took further into account that the incident was rather unexpected, there would be reason to say that the evident premeditation alleged in the information has not been proved beyond reasonable doubt." (p. XLV, Brief of Appellants)

Second, even the lower court doubted that all the accused were armed. As stated in the decision appealed from:

"There is also doubt as to whether or not the five accused, who were riding on the jeep, were armed because while Teodula Lopez asserted that the five accused pointed their guns at Jacinto Carmona, witness Elpidio Anova said that only accused Vicente Montoya, Pedrito (Piddy) Wong and Rolando Montoya had pointed their guns at the deceased. Moreover, it is beyond human comprehension why accused Crisostomo (Mong-mong) Vedra should be using firearm, when his mission in the jeep was to drive it. There is, therefore, doubt as regard the fact that more than three persons were armed with unlicensed firearms, although this might be possible." (p. XLVI, Ibid)

Indeed, the mind inquires why, if the accused were really all armed, supposedly with high-powered guns at that, they scampered towards the jeep and sped away, leaving Rolando Montoya behind, at the mere warning that the companions of Jacinto Carmona were coming. The more probable is that only Rolando Montoya tarried behind because he alone was armed.

The claim of the defense that only Rolando Montoya fired the shots, is corroborated by the fact that the deceased sustained no more than three gunshot wounds, as appears in the medical certificate, Exhibit A.

It could well be that the gunshot wound sustained by Teodula Lopez, also came from the gun of Rolando

Mon-toya, for as this prosecution witness admitted, she was hit and wounded at the first burst of gunfire.

2.- The next question that confronts the Court is whether or not conspiracy among the accused existed. In holding the affirmative, the lower court took into consideration three factors, namely: that the accused, Vicente Montoya and Rolando Montoya are brothers and the other accused, Pedrito Wong is their brother-in-law; these accused made a common cause in retaliating against the late Jacinto Carmona in consequence of the bloody incident that have taken place on October 11, 1961, whence the victim was Vicente Montoya; and that after Jacinto Carmona had been hit by the bullets, accused Rolando Montoya still had the temerity of approaching the victim and causing additional injuries on the head of the latter, indicating that all the accused had the absolute determination of snuffing out the life of the victim (p. XXXIX, Brief of the Appellants). We are unable to agree with the first and second factors cited by the lower court in support of its finding of a conspiracy. The finding of the lower court itself that the incident was rather unexpected, which is borne out by the evidence, immediately precludes the idea that the brothers Montoya and their brother-in-law Wong, agreed or made a common cause to retaliate against the deceased, Jacinto Carmona. As regards the third factor, we cannot see our way clear through the reasoning that the act of one of the alleged co-conspirators, after all his companions had left the scene of the crime, could be considered as the act of said companions. Not even the presence of the appellants Vicente Montoya and Pedrito Wong, while Rolando Montoya was shooting the deceased, could be taken as evidence against the two appellants, that they conspired with their co-appellant in committing the crime. There being no evidence of a prior agreement to assault the deceased, those who were present but who did not actually inflict injuries, cannot be considered as co-conspirators.

"Although four persons were pre-sent when a fatal assault was made upon another and each of the four contributed somewhat to the unlawful aggression, nevertheless, in view of the fact that no prior conspiracy was shown and the acts done did not clearly show community of purpose, it was held that the individual who inflicted the fatal blow was alone responsible in the character of principal." (People v. Tumayao, et al., 56, Phil. 587)

The principal element of every punishable complicity in any crime consists in the concurrence of the will of the co-conspirators with the direct author of the crime, pre-supposing the mediate or immediate agreement of all to carry out the commission of an offense. Where such concurrence is lacking, as in the case at bar, conspiracy cannot be said to have existed.

3.- It is agreed on behalf of the appellants that even Rolando Montoya should be acquitted because in slaying the deceased, he acted in defense of his brother. Settled is the rule that an accused invoking self-defense or for that matter, defense of a relative, must prove his case clearly and convincingly otherwise, conviction would follow from his admission that he killed the victim.

We are not impressed by the claim that Rolando Montoya happened to have a pistol on that fateful afternoon because Crisostomo Vedra temporarily entrusted a gun to him. Assuming that Vedra would be inconvenienced in his driving with a gun tucked in his waist, there was the seat of the jeep beside him, if not a compartment in the vehicle, where he could place his revolver. Our disbelief is heightened by the claim that the gun entrusted to Rolando Montoya was cocked and ready to fire.

Neither is it credible that the deceased although he had a gun, as testified to by the witness for the defense, cocked his pistol before Rolando Montoya started shooting. Considering, according to the defense, that the deceased was trigger-happy and a man of violence, Rolando Montoya would not emerge from the encounter unscathed, if the deceased and Rolando Montoya confronted each other, face to face, and the former cocked his pistol. The fact is that the number and nature of the injuries sustained by the deceased completely negates the claim of defense of a relative.

Counsel for the appellants countered, however, that Rolando Montoya did not act treacherously when he shot Jacinto Carmona. On this point, the evidence show that when the jeep where the accused were riding, passed by the side of Elpidio Anova, the latter shouted at Jacinto Carmona and warned of the presence of the accused. There is evidence that for a short time, the deceased and Rolando Montoya were face to face before the shooting occurred, as shown by the testimony of Rolando Montoya that the first shot found its mark on the thigh of the deceased, and when the latter turned to the left, pre-sumably due to the force of the impact of the bullet, the assailant fired the second shot hitting the victim on the other side, which clearly show that the attack was not treacherous because it gave the victim a chance to defend himself. The evidence does not clearly show the presence of treachery in the commission of the crime. In the process of the shooting of Jacinto Carmona, Rolando Montoya inflicted injuries on Teodula Lopez, albeit without the least intent of killing. For all these considerations, We find Rolando Montoya responsible for the death of Jacinto Carmona, qualified as homicide without the presence of any modifying circumstance, and for the physical injuries suffered by Teodula Lopez.

4.- The case involving complainant Elpidio Anova, however, is different. Said complainant claims that before he succeeded in wresting the gun from Rolando Montoya, the latter shot him three times without hitting him because he dodged. We reject this as incredible. The fact is that Elpidio Anova, as soon as he noticed that his leader, Jacinto Carmona, was felled by the bullets of Rolando Montoya, pursued the latter and wrestled his gun. This was testified to by Rolando Montoya, which testimony is corroborated by the declaration of Teodula Lopez. Anova was not content with wresting the gun from Rolando Montoya, He pursued the latter to the store of Sosing Wong, determined to kill him. Thus, he declared:

"Q.- You followed Vicente Montoya (actually he meant Rolando) to the house of Sosing because you were determined to kill him is it not?

A.- Yes, sir." (pp. 201, 202, Oct. 26, 1961)

Under the circumstances, the infliction of injuries upon him by Rolando Montoya was clearly done in self-defense.

WHEREFORE, the appealed judgment is modified as follows:

1. In Criminal Case No. 3361, accused Rolando Montoya is hereby found guilty of the crime of homicide and sentenced to ten (10) years and one (1) day of prison mayor to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal, to indemnify the heirs of the deceased in the sum of six thousand pesos (P6,000. 00), without subsidiary imprisonment in case of insolvency, and to pay one-fifth (1/5) of the costs. Appellants Vicente Montoya and Pedrito Wong are acquitted of the crime charged in this criminal case with costs de oficio.

2. In Criminal Case No. 3373, the accused Rolando Montoya is found guilty of the crime of less serious physical injuries, without any modifying circumstance, and sentenced to four (4) months of arresto mayor, and to pay three-fifths (3/5) of the costs. Appellants Vicente Montoya and Pedrito Wong are acquitted of the crime charged in this criminal case.

3.- In Criminal Case No. 3372, accused Rolando Montoya is acquitted of the crime charged with costs de oficio.

As thus modified, the appealed judgment is affirmed in other respects.

Reyes, J.B.L., (Acting C.J.), Dizon, Makalintal, Bengzon, J.P., Zaldivar, Sanchez, Ruiz Castro, and Fernando, JJ., concur.

Concepcion, C.J., on leave.

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