

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
DONALD MOSQUERA AND DOMINGO MOSQUERA, JR.,
DEFENDANTS-APPELLANTS.**

G.R. No. L-40445. September 29, 1983

Ponente: CONCEPCION, JR., J.

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CONCEPCION, JR., J.:

This is an appeal from the judgment of the Court of First Instance of Antique, Branch II, finding the accused Donald Mosquera and Domingo Mosquera, Jr., guilty of the crime of murder and sentencing the former, as principal, to suffer reclusion perpetua, and the latter, as accomplice, to imprisonment of from six (6) years and one (1) day of prision mayor as minimum, to twelve (12) years and one (1) day of reclusion temporal as maximum; to indemnify the heirs of the deceased Ricardo Guillermo, Jr. in the amount of P12,000.00 without subsidiary imprisonment in case of insolvency, and to proportionately pay the costs.

The accused Donald Mosquera and Domingo Mosquera, Jr. were charged with the crime of murder committed as follows:

"That on or about the 12th day of June 1972, in the municipality of Patnongan, province of Antique, Republic of the Philippines and within the jurisdiction of this Honorable Court, the above-named accused together with one Juan Crespo, Jr. alias 'Juaning' who is still at large, confederating and mutually helping one another with intent to kill and with evident premeditation and treachery and abuse of superior strength, did then and there wilfully, unlawfully and feloniously attack, assault and stab one Ricardo Guillermo, Jr., thereby inflicting upon the latter the following wound, to wit:

'Wound, 1/2 inch long, left iliac region with omental and intestinal avisceration'

which wound caused the death of said Ricardo Guillermo, Jr. shortly thereafter.

"Contrary to the provisions of Article 248 of the Revised Penal Code."[1]

The People's version of the facts is as follows:

"As part of the Independence Day celebration of Patnongan, Antique, the municipal government of said town sponsored a dance on the evening of June 12, 1972 which was held in the premises of the municipal hall. On that occasion, Gervacio Dubria went to the dancing place to watch, taking his position at the bandstand facing the municipal hall. At about eleven o'clock, he looked for his two sons among the crowd and, failing to find them, went outside and walked towards the bakery of Romulo dela Cruz located about 130 meters from the place where the dancing was taking place (pp. 10-12, 21, tsn., Aug. 27, 1973). As he was approaching the gate of the bakery, he saw the brothers Donald and Domingo Mosquera, Jr. holding the hands of Ricardo Guilderma, Jr., Donald was holding the right hand while Domingo, Jr. was holding the left hand of the victim. And while in this position, Donald shouted: 'Stab him', and another person whom Gervacio Dubria did not recognize stabbed Guillermo, Jr. Domingo Mosquera, Jr. did not utter any word (pp. 12-13, 14, Id.). Gervacio could not recongize the man who stabbed Guillermo, Jr. because it was dark and he never saw that man in

Patnongan before (pp. 13, 19, 25, Id.). However, Gervacio was able to recognize the brothers Mosquera, whom he knew since their childhood, because of the light on the 'hasag' or petromax lamp coming from and passing thru the railings of the bakery which illumined the place where the brothers were stand-ing. Gervacio was only one (1) braza away from then (p. 17, Id.).

"After witnessing the incident, Gervacio Dubria went home immediately and did not bother anymore to look for his sons because he was already 'scared' (pp. 14, 18, Id.), although he still had the time to inform the victim's parents about the fate of their son (pp. 13, 14, Id.).

"The victim was brought to the Rural Health Center of Patnongan which is near the municipal hall where Dr. Pepito Nietes, the rural health physician, gave him first aid treatment (pp. 36-40, tsn., Oct. 14, 1974). Dr. Nietes also recommended that the patient be brought to the hospital. (Id.)

"It was while the victim was being attended to at the rural health center that Patnongan Police Sgt. Modesto Cresencio took his dying declaration at about 11:30 p.m. (Exh. '1', De-fense Folder of Exhibits; pp. 8-12, tsn., Nov. 12, 1973). Ricardo Guillermo, Jr. stated that he was stabbed by Junior Crespo, son of Juaning Crespo, at the bakery of a certain Moling; that Junior Crespo had no companion; and that he felt he was in danger of dying.

"From the Patnongan Rural Health Center the victim was rushed to the Antique Provincial Hospital at San Jose, Antique and, upon arrival at 12:05 o'clock in the morning of June 13, 1972, was attended to by Dr. Honesto Magdaug, Jr., a resident physician of said hospital (pp. 2-3, 5 tsn., Aug. 27, 1973). When admitted, the victim was still alive and 'still conscious' even if he did not know what was happening around him (pp. 5, 6, 9, Id.). Dr. Magdaug put his patient on dextrose, injected adrenalin and requested blood for transfusion (p. 6, Id.).

"Meanwhile, in the town plaza of San Jose, a dance celebrating Independence Day was being held where many people attended among whom were Governor Javier of Antique and Assistant Provincial Fiscal Enrique Gumban. The relatives of Ricardo Guillermo, Jr. approached the Governor and requested for blood. The Governor had to go to the provincial jail to solicit for blood donors and asked Fiscal Gumban to accompany him (pp. 27, 33, tsn., Aug. 27, 1973). They reached the hospital at about 1:00 o'clock in the morning (p. 28, Id.). By 1:15 a.m., as there was neither PC nor police authorities around and not knowing that a previous dying declaration was taken of the victim, Fiscal Gumban took the victim's dying declaration on the operating table where the victim was lying (pp. 28, 34, Id.; Exhs. 'B', 'B-2', pp. 3 & 477, rec.). He wrote Exhibit 'B' writing thereon the answers given by Guillermo, Jr. thumbmarked the document with his own blood after which Messrs. Oscar Panaguition and Romeo Villavert signed as witnesses (pp. 29-30, 31, tsn., Aug. 27, 1973). Guillermo, Jr. stated therein that he felt as if he would die, that Junior Crespo, Donald Mosquera and Ontoy Mosquera stabbed him; that he did not know why they stabbed him; and that they stabbed him near the bakery. He was still alive, lying on the operating table at the emergency room of the hospital, when Fiscal Gumban left him right after taking Exhibit 'B'. (Id.).

"Dr. Magdaug pronounced Guillermo, Jr. dead at 3:40 o'clock in the morning of June 13, 1972 (p. 5, Id.). At 6:30 a.m., said doctor conducted an autopsy on the cadaver of Guillermo, Jr. at the hospital morgue (p. 3, Id.). His medical findings were reduced to writing (Exh. 'A', p. 5, rec.). The cause of death was recorded as follows: 'Shock secondary to hemorrhage, severe, due to stab wound abdomen' (pp. 7-8, tsn., Aug. 27, 1973). According to the doctor a sharp-bladed weapon, like a knife, could have caused the wound at the 'left iliac region' (left of stomach) and which wound was fatal and affected the small and large intestines (pp. 4-5, Id.)."[2]

The defense of the accused is an alibi. They alleged that although they were near the scene of the crime on the night of June 12, 1972, they had nothing to do with the stabbing of the deceased Ricardo Guillermo, Jr. because they were inside the bakery of Romulo dela Cruz drinking beer. Donald was in the company of Mayor Felix

Barrientos, Dr. Querico Escaño, and his father, Domingo Mosquera, Sr. while Domingo, Jr. was in the company of Councilor Miguel Baculna. Mayor Felix Barrientos and Dr. Querico Escaño corroborated the testimony of Donald. Councilor Miguel Baculna corroborated the testimony of Domingo, Jr.

There is no merit in the appeal. The defense of alibi cannot stand where there is no convincing proof that it was physically impossible for the accused to be at the scene of the crime when it was committed considering that the scene of the crime was only one braza from the bakery of Romulo dela Cruz. Also the accused had been positively identified by Gervacio Dubria, a witness for the prosecution, as the assailants of the deceased Ricardo, Jr. Gervacio could not have been mistaken in his identity as the place was illuminated by the petromax light coming from the bakery and the accused was well known to him. Well-settled is the rule that alibi cannot prevail over positive identification by a witness as the perpetrator of the crime.[3] Also there is nothing in the records to show that Gervacio had a reason to testify against the accused.

The trial court correctly gave more weight to the second dying declaration of the deceased Ricardo, Jr. and made it the main basis in finding the guilt of the accused. The accused, however, alleged that the second dying declaration did not meet one of the requirements of a dying declaration that is admissible in evidence in that the deceased Ricardo, Jr. was no longer competent as a witness at the time Fiscal Gumban took his dying declaration because he was already in a very weakened condition to such an extent as to affect his mental faculties. This is not tenable. Dr. Magdaug testified that the deceased Ricardo, Jr. was still conscious or semi-conscious, although he did not care about or know the activities going on inside the emergency room of the hos-pital when Fiscal Gumban took his second ante mortem statement implicating the accused to the crime charged. The fact that the deceased did not know what was happening around him, suggesting his weakened condition does not necessarily render the deceased Ricardo, Jr. incompetent as a witness for the purpose of the admissibility of the second ante mortem statement. The deceased was still aware of what happened to him. He still had the capacity to articulate intelligently what was in his mind. His second ante mortem statement as translated, reads:

"DYING DECLARATION OF RICARDO GUILLERMO, JR. TAKEN BY FISCAL ENRIQUE GUMBAN, 1:15 A.M., JUNE 13, 1972, APH, SAN JOSE, ANTIQUE

Q. How do you feel?

A. As if I will die.

Q. Who stabbed you?

A. Junior Crespo, Donald Mosquera, Ontoy Mosquera.

Q. Why did they stab you?

A. I do not know.

Q. Where did they stab you?

A. Near the bakery."[4]

Also the records show that the first dying declaration was taken at 11:30 o'clock in the evening of June 12, 1972. The second dying declaration was taken at 1:15 o'clock in the morning of June 13, 1972 and the deceased Ricardo Jr. died at 3:40 o'clock in the morning of June 13, 1972. The second dying declaration was taken at a time more proximate to his death than the taking of the first dying declaration. At 1:15 a.m. of June 13, 1972, the condition of the deceased Ricardo, Jr. was more in extremis than at 11:30 p.m. of June 12, 1972. Thus, the second dying declaration is more trustworthy as a dying declaration than the first dying declaration.

On the question involving the credibility of witnesses, the Court reiterates the rule that where the issues raised hinges on the credibility of witnesses, appellate courts will give due respect to the assessment of the fact made by the lower court, said court having had the opportunity of hearing the witnesses and observing their deportment and manner of testifying.[5]

The lower court found the accused Domingo, Jr. guilty as an accomplice. The evidence adduced, however, shows that Donald and Domingo, Jr. cooperated in the commission of the crime of murder against the deceased Ricardo, Jr. They both held the hands of the deceased when Juan Crespo, Jr. stabbed the latter. As such they are all guilty as principals.

Gervacio testified that:

"Q. When you went to that place which you referred to as near the bakery owned by Ro-mulo dela Cruz, what unusual incident did you see, if any?

A. While I was there at the gate near the bakery of Romulo dela Cruz, I saw these two persons, Donald Mosquera and Domingo Mosquera, Jr., and the other one whom I do not know the name holding the two hands of Ricardo Guillermo, Jr.

"Q. Who in particular were holding the hands of Ricardo Guillermo, Jr. when you saw Ricardo, Jr.?

A. The two of them, Domingo Mosquera and Donald Mosquera.

"Q. Will you demonstrate how Domingo Mosquera and Donald Mosquera held Ricardo Guillermo, Jr.?

A. (Witness demonstrating how the two accused held the two hands of Ricardo Guillermo, Jr. That according to him, Donald Mosquera was holding the right hand of the deceased, while Domingo Mosquera was hold-ing the left hand of the victim).

"Q. You mean to tell the Court that the two accused were holding the two hands of the victim?

A. Yes, Sir.

"Q. At the time that you saw Donald Mosquera holding the deceased in the manner demonstrated, do you know what happened?

A. While they were on that act, Donald Mosquera shouted: 'Stab him.' And one person stabbed Ricardo Guillermo, Jr."[6]

Treachery qualified the killing of Ricardo, Jr. to murder. The hands of the deceased were held by the accused when he was stabbed. The victim was defense less and helpless enabling the accused to commit the crime without risk to themselves.

The aggravating circumstances of abuse of superior strength and evident premeditation cannot be considered in this case. Although it was duly proved that the accused cooperated in the stabbing of Ricardo, Jr. in such a way as to secure advantage from their superiority of strength, still abuse of superior strength cannot qualify the crime committed because the same is deemed absorbed by treachery. With respect to evident premeditation, there is no evidence to establish the same. There is no showing that the accused meditated, planned and tenaciously persisted in the accomplishment of the crime.

The crime of murder, under Article 248 of the Revised Penal Code is punishable by reclusion temporal in its maximum period to death. Since there are neither aggravating nor mitigating circumstance, the penalty prescribed by law in its medium period or reclusion perpetua shall be imposed upon the accused.

IN VIEW OF THE FOREGOING, the appellant Domingo Mosquera, Jr. is hereby sentenced to suffer the penalty of reclusion perpetua. Thus, modified, the judgment appealed from should be, as it is hereby, affirmed in all respects. With costs against the appellants.

SO ORDERED.

Makasiar, (Chairman), Aquino, Guerrero, Abad Santos, and Escolin, JJ., concur.
De Castro, J., on sick leave.

[1] Original Records, p. 31.

[2] pp. 2-5, Appellee's Brief; p. 67, Rollo.

[3] People vs. Pizarra, 108 SCRA 612, L-35915, Oct. 30, 1981; People vs. Alfaro, et al., 110 SCRA 204, L-32461, Dec. 15, 1982; People vs. Castillo, 120 SCRA 381; L-39152, Jan. 28, 1983.

[4] Exhibit "B", p. 3, Original Record; p. 4, Original Record; p. 10, Appellant's Brief; p. 51, Rollo.

[5] People vs. Aposaga, et al., 108 SCRA 574, No. L-32477, Oct. 30, 1981; People vs. Cardenas, et al., 118 SCRA 458, No. L-39503, Nov. 19, 1982.

[6] pp. 11-13, tsn., Aug. 27, 1973.

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