

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. FRANCISCO DIAZ AND GERARDO DIAZ, DEFENDANTS-APPELLANTS.

G.R. No. L-24002. January 21, 1974

Ponente: AQUINO, J.

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AQUINO, J.:

This is an appeal of defendants Francisco Diaz and Gerardo Diaz from the decision of the Court of First Instance of Samar convicting them of murder.

Gerardo was sentenced to reclusion perpetua, while Francisco was sentenced to an indeterminate penalty of ten (10) years and one (1) day of prision mayor to seventeen (17) years of reclusion temporal. Both appellants were ordered to pay solidarity to the heirs of Quintin Tadia an indemnity in the sum of six thousand pesos (P6,000) and to pay the costs proportionately. (Criminal Case No. 202-CC).

There should be no difficulty in resolving the appeal. The case is classic in its simplicity. The prosecution's evidence consists of eyewitness testimony or direct evidence, not deceptive circumstantial evidence. Appellant Francisco Diaz admits that he killed Tadia. He justifies the killing on the ground of self-defense. His younger brother Gerardo denies any participation in the killing. He has set up the easily contrivable defense of alibi.

So, the main issue is whether credence can be accorded to Francisco Diaz's plea of self-defense and Gerardo's alibi.

The alternative issues are whether the brothers conspired to kill the victim and whether treachery and evident premeditation should qualify the killing as murder. The trial court did not pass upon those ancillary issues.

The evidence for the prosecution shows that at about two o'clock in the afternoon of September 4, 1963 Remegia Carasos, a fourteen-year old girl, and her first cousin, Anita Pacaira (Pakaira), eleven years old, were gathering camotes in a farm located at a place fittingly called Sitio Camotian, Barrio Perito, municipality of Sta. Margarita, Western Samar.

In that peaceful, rustic scene, there suddenly appeared Francisco Diaz (Ansing or Francng), a twenty-four year old unmarried farmer of that place, whom Remegia and Anita had known for many years. Without any preliminaries, he embraced Remegia from behind and against her will and held her breast. He knelt behind her while she was gathering camotes. She shouted for help, saying: "Anita (Aning), help me because I am being embraced". Reacting to Remegia's cry for help, Anita, with a bolo, struck Francisco on the head and hands. Francisco released Remegia and fled. He suffered some injuries in consequence of those blows. The injuries were treated at the puericulture center by the sanitary inspector (Exh. D and D-1).

The two girls left the camote farm and hastened to the house of Quintin Tadia (Tadya), their grandfather, in Sitio Ilawod. They informed him that Francisco Diaz had embraced and abused Remegia. Remegia had been brought up by her grandfather. She was then staying with him. Anita was living with her parents in a house about six brazas from Tadia's house.

Tadia immediately reported the incident to the barrio lieutenant. He gave Tadia a note for the municipal authorities so that the proper complaint could be filed against Francisco Diaz.

At around seven o'clock in the morning of the following day, September 5th, Tadia, accompanied by his teenage granddaughters, Remegia and Anita, was on his way to the poblacion of Sta. Margarita to file the complaint. He was unarmed. He was carrying on his back a catopis, an oblong basket about four by two "palms' length" containing provisions of boiled camotes. He was walking ahead, followed by Remegia and Anita one braza behind him.

While they were ascending the hill or cliff (pangpang in Waray dialect) in Sitio Ilawod, Francisco Diaz and his younger brother Gerardo (Adong), twenty-one years old, appeared on the crest of the hill. Both were wearing denim pants and white shirts. Gerardo was armed with a locally made shotgun called bardog (Exh. C), about fifty inches long. He immediately fired sidewise at Tadia while about four meters from the latter, hitting him in the neck. The shot felled Tadia. He rolled down the lower part of the cliff near the Alao Creek and lay there flat on his back with his catopis.

Then, the brothers jumped to the lower part of the cliff. Gerardo told his brother: "Go ahead, Francisco, stab that fellow". Francisco placed his foot on the prostrate body of Quintin Tadia, bent over him and repeatedly stabbed him in different parts of his body. Francisco was armed with a bolo commonly called utak which is used in gathering firewood.

After witnessing the assault, Remegia Carasos ran in the direction of her house. Anita Pacairo hid herself among the bushes or tall grasses "sitting, crouching and peeping" and "seeing all that was happening" (78 tsn). Tadia died on the spot where he fell. Gerardo placed his bardog on a moss-covered stone called palanas about three brazas from Tadia's body. Remegia informed her father and the inhabitants of the barrio about the ambushade and the killing of her grandfather. Gerardo Diaz went home while Francisco surrendered to the authorities.

Doctor Tecla Tagle Valley, the town's municipal health officer, performed an autopsy on the body of the deceased Quintin Tadia. Her medical findings indicate that the following injuries caused the death of the sixty-two year old victim:

- "1. Internal hemorrhage due to penetrating wounds on the chest about two and one-half inches long and five inches in depth, penetrating the lower lobe of the right lung, superior vena cava and the right ventricle of the heart.
2. Punctured wound, one inch long and one inch in depth, left mandibular region.
3. Stab wound, one inch long and one half inch in depth below left ear.
4. Penetrating wound, four inches in depth, about one centimeter in circumference, occipital region.
5. Penetrating wound, four inches and one half in depth, about one centimeter in circumference at the nape.
6. Stab wound, one-half inch in depth and three inches long, left shoulder.
7. Punctured wound, left leg, about two inches long, penetrating thru the side portion." (Exh. A).

Doctor Valley found two pellets (perdigones or birdshot) in the two gunshot wounds. The pellet found in the nape is Exhibit B.

On September 6, 1963 Gerardo Diaz was arrested in Barrio Perito by Policemen Venancio Melka and Simplicio Calibo. He did not resist arrest. He was in good physical condition. On September 9, 1963, or four days after the killing, Remegia and Anita executed before the municipal judge sworn statements wherein they recounted the

antecedents and details of the killing (pages 3 to 8 of the Record). On that same date the chief of police filed in the municipal court a complaint for murder against the Diaz brothers.

They waived the preliminary investigation. The case was remanded to the Court of First Instance at Calbayog City where, on November 6, 1963, the fiscal filed against them an information for murder.

As already noted, appellant Francisco Diaz, while assuming sole responsibility for the killing, set up the exculpatory plea of self-defense. His version was that he and Tadia were neighbors. Because he did not accede to Tadia's request for a pig, Tadia allegedly followed him to his abaca plantation near the Alao River. When Francisco again refused to grant Tadia's request for the pig, the latter allegedly hacked Francisco with his bolo, wounding him in the hand between the middle and index fingers and in the left side of his head. Francisco retreated, but when he was cornered, "he pulled the trigger of" his shotgun, causing Tadia "to release his bolo". Francisco then picked up Tadia's bolo (note that Francisco himself had his own bolo). He threw away his gun and repeatedly stabbed Tadia. After the stabbing he surrendered to the authorities.

The inveracity of Francisco's version is quite apparent. The wounds, which according to Francisco were inflicted by Tadia, were the injuries which were inflicted on him on the preceding day by Anita Pacaira (Exh. D-1). The improbable facets of his story induce disbelief. A trivial cause may possibly provoke a man to assault another person. But it was unlikely in this case that Tadia, a sexagenarian grandfather, would have gone to the extent of assaulting the twenty-four year old Francisco Diaz who was armed with a gun and a bolo, just because the latter refused to give him a pig.

The prosecution eyewitnesses, Remegia Carasos and Anita Pacaira, positively identified Gerardo Diaz as the gunwielder who with his brother, Francisco, ambushed Tadia on the cliff. Such an unmistakable identification cannot be negated by the alibi interposed by Gerardo Diaz. He claimed that on September 5, 1963 he was in his house "having a headache and his bones were aching" (p. 7, Appellant's Brief). He said that he was treated by Honorio Albite. His mother said that Gerardo was treated by Liloy Diaz. Gerardo said that he was already sick on September 2, 1963. His mother, who does not know the months of the year, said that he got sick on September 4th. These discrepancies weaken Gerardo's alibi. Modesto Diaz, the father of Gerardo, tried to corroborate his alibi. Modesto, a "hopelessly illiterate" person, did not know the month and year when Gerardo was sick.

Gerardo's supposed indisposition could not have prevented him from going to the cliff with Francisco and waylaying the unsuspecting and unfortunate Tadia. To establish an alibi, the accused must show that he was at another place for such a period of time that it was impossible for him to have been at the place where the crime was committed at the time of its commission (*People vs. Resayaga*, L-23234, December 26, 1973; *People vs. Lumantas*, L-28355, July 17, 1969, 28 SCRA 764, 768). The alibi of Gerardo Diaz cannot be sustained. His counsel de oficio agrees "that the defense of alibi is inherently weak and is generally received with caution". In this case, it was evidently a manufactured alibi.

The trial court carefully observed the demeanor of Remegia Carasos and Anita Pacaira while testifying. It found them to be "candid and trustworthy" eyewitnesses. The killing was perpetrated in broad daylight. Remegia was even able to recollect the garments worn by the Diaz brothers.

As appropriately observed by the trial court, the brothers conspired to kill Tadia to prevent him from filing a charge of abusos deshonestos. Moreover, Francisco Diaz might have felt aggrieved because Anita Pacaira had hit him with a bolo and wounded him in the head and hand (Exh. D-1).

The alternative contention of appellant Gerardo Diaz is that he did not conspire with his brother Francisco in assaulting Tadia and that he should be held liable only for lesiones for shooting the victim. That contention is

belied by the record.

Doctor Valley found that two gunshot wounds were inflicted. One was a penetrating wound in the occipital region and another was a penetrating wound in the nape (Nos. 4 and 5, Exh. A). She testified that, because those wounds were not treated, they contributed to the victim's death. Gerardo was the one who inflicted those wounds. He used a deadly weapon. He fired at the vital parts of the victim's body. He desisted from firing further because the victim had fallen on the river bank below the cliff as a result of the first shot and was beyond the range of his gun, which was intended for hunting birds.

The conspiracy between the brothers to kill Tadia may be inferred from the antecedents and circumstances surrounding the killing. The lascivious or vexatious act committed by Francisco Diaz on Remegia Carasos was reported to the barrio lieutenant. He advised Tadia to go to town and lodge a complaint with the proper authorities. That fact must have been known to Francisco Diaz. He wanted to forestall that eventuality. To accomplish that objective, he decided to liquidate Tadia. It was natural or probable that he should seek the collaboration of his younger brother Gerardo.

The two brothers appeared together on the cliff on that fateful morning of September 5, 1963 to ambush Tadia. Gerardo was armed with a deadly weapon that could be employed at a distance without exposing himself to any immediate retaliatory act of the victim. He commenced the assault by firing at Tadia. Then, when Tadia fell down the cliff, Gerardo maliciously induced or instructed Francisco to continue the assault by stabbing the fallen Tadia. Francisco obeyed that injunction by inflicting five stab wounds on the defenseless victim. These circumstances reveal that the brothers acted in concert, impelled by their common design to kill Tadia. Their liability for the killing is collective, not individual or separate.

The appellants' defenses are untenable in their transparent flimsiness and fabricated character. It results that the strong, clear and convincing evidence of the prosecution on the felonious killing perpetrated by the appellants may be regarded as conclusive. Their guilt has been established beyond reasonable doubt.

The crime committed by the appellants is murder qualified by treachery as alleged in the information. There was treachery (*alevosia*) because the brothers made a deliberate surprise or unexpected assault on Tadia. They literally ambushed him. They waited for him on the cliff, a high ground which rendered it difficult for him to flee or maneuver in his defense. Tadia was shot sidewise while he was ascending the hill or cliff burdened by his catopis or food basket. That was another circumstance which handicapped him in resisting the assault. The initial attack was successful. Tadia fell and rolled down the cliff and landed near the creek below. In that helpless state, he was ruthlessly stabbed by Francisco Diaz.

The appellants resorted to means of execution which directly and specially insured the killing without any risk to themselves arising from any defense which the victim could have made. Actually, he was not able to make any defense, unarmed and attacked unaware as he was. The treacherous mode of attack is incontrovertible (Par. 16, Art. 14 and Art. 248, Revised Penal Code).

The attack was also attended with abuse of superiority. Two armed young men unexpectedly assaulted an unarmed sexagenarian. However, abuse of superior strength is merged with treachery.

The circumstance of old age cannot be considered aggravating. There was no evidence that the accused deliberately intended to offend or insult the age of the victim. That circumstance may be absorbed in treachery (*People vs. Gervacio*, L-21565, August 30, 1968, 24 SCRA 960; *People vs. Mangsant*, 65 Phil. 548; *People vs. Limaco*, 88 Phil. 35, 44).

The trial court did not make any finding as to the degree of instruction of the offenders. Hence, on appeal, that

alternative circumstance cannot be considered in fixing the penalty on the appellants (*People vs. Casillar*, L-28132, November 25, 1969, 30 SCRA 352, 358).

As to Francisco Diaz, evident premeditation should be appreciated. It should be recalled that the embracing incident was reported by Tadia to the barrio lieutenant after two o'clock in the afternoon of September 4, 1963. That functionary advised Tadia to file a complaint with the authorities in the town of Sta. Margarita. It may reasonably be assumed that Francisco Diaz became aware that same afternoon that Tadia, who was his neighbor, was going to the poblacion to lodge a complaint against him. That would explain why early in the morning of the next day, September 5th, at about seven o'clock, he and his brother were already in the hill or cliff waiting for Tadia who was on his way to town. The trial court said:

"Francisco having been boloed on the head, he and his younger brother must have decided to, and thus conspired, to retaliate. For this purpose they armed themselves. Second, having come to know that the deceased was going to the poblacion, in company with Remegia Carasos and Anita Pacaira to file the corresponding complaint against Francisco Diaz for abusing Remegia Carasos, both accused must have decided and, so deciding must have confabulated, to waylay the deceased so as to prevent him from pursuing his plan."

Thus, there was a sufficient interval of time, more than one-half day, within which appellant Francisco Diaz had full opportunity for meditation and reflection and to allow his conscience to overcome the resolution of his will (*vencer las determinaciones de la voluntad*) had he desired to hearken to its warnings (*U.S. vs. Gil*, 13 Phil. 530, 547).

However, with respect to Gerardo Diaz, premeditation conocida should not be appreciated. Obviously, he participated in the assault in order to help his elder brother who exercised some moral ascendancy over him and who was the one directly affected by the embracing incident which preceded the killing (*People vs. Talok*, 65 Phil. 696, 707; Art. 62, Revised Penal Code).

Premeditation, which was alleged in the information as a qualifying circumstance, should be considered only as a generic aggravating circumstance with respect to Francisco Diaz since treachery has already been used to qualify the killing as murder (See *People vs. Ubiña*, 97 Phil. 515, 535). In his case, it is offset by the mitigating circumstance of voluntary surrender to the authorities.

The penalty for murder, which is reclusion temporal maximum to death, should be imposed in its medium period on Francisco Diaz. He should be sentenced to reclusion perpetua (Arts. 64 [4] and 248, Revised Penal Code).

With respect to Gerardo Diaz, as no generic aggravating and mitigating circumstances can be considered in his case, he was properly sentenced by the trial court to reclusion perpetua (Arts. 64 [1] and 248, Revised Penal Code).

The indemnity which the appellants should pay to the heirs of Quintin Tadia should be raised to twelve thousand pesos (P12,000).

The ironical twist in this case is that an old man paid with life for his attempt to abide by the law, that is, to vindicate his granddaughter's honor through lawful means. He lost his life because the appellants chose to take the law into their own hands. For such flagitious lawlessness, full and condign retributory punishment should be meted.

ACCORDINGLY, the judgment of the trial court should be modified. Francisco Diaz is sentenced to reclusion perpetua with its accessory penalties. The appellants are ordered to pay solidarily to the heirs of Quintin Tadia the sum of P12,000 as indemnity (Art. 110, Revised Penal Code). In other respects, the trial court's judgment is

affirmed with costs against the appellants.

The benefits of article 29 of the Revised Penal Code, regarding preventive imprisonment, may be extended to the appellants if the conditions laid down in Republic Act No. 6127 are satisfied.

SO ORDERED.

Zaldivar, (Chairman), Fernando, Barredo, Antonio, and Fernandez, JJ., concur.

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