

ESTELITA BERNABE, PETITIONER-APPELLANT, VS. ANDRES BOLINAS, JR., AS ASST. PROVINCIAL FISCAL OF ILOILO AND ALFONSO B. BAGUIO, AS PROVINCIAL FISCAL OF ILOILO, RESPONDENTS-APPELLEES.

G.R. No. L-22000. November 29, 1966

Ponente: BARRERA, J.

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BARRERA, J.:

Estelita Bernabe, wife of Sedesias del Castillo, who died of injuries inflicted on his person on the night of November 25, 1962, filed a petition for mandamus in the Court of First Instance of Iloilo (Civil Case No. 6323), seeking to compel the respondent Provincial Fiscal of Iloilo to amend the information in Criminal Case No. 9624 of the same court, from homicide to murder, with aggravating circumstance of use of motor vehicle.

It was alleged therein that in connection with the death of petitioner's husband, a complaint for homicide through reckless imprudence was first filed by the Chief of Police of Sara, Iloilo, against Pedro del Castillo, Jr., which complaint was later amended to charge him, together with Pedro del Castillo, Sr., with the crime of homicide. When the case was remanded to the court of first instance for further proceedings, petitioner widow requested the provincial fiscal for reinvestigation, maintaining that the accused should properly be charged with murder. However, after such reinvestigation, the Assistant Provincial Fiscal reproduced the complaint for homicide. Thus, the widow instituted the action, claiming that in refusing to amend the information from homicide to murder, the respondents Provincial Fiscal and Assistant Provincial Fiscal acted with grave abuse of discretion and neglected the performance of an act which the law enjoined them to do.

Respondents moved for the dismissal of the mandamus case. It was their contention that from the affidavits of the witnesses for the government, there was no treachery attending the stabbing and killing of the victim, for which reason they found that the offense committed was only homicide. As the government prosecutors have the discretion to determine not only the sufficiency or insufficiency of evidence establishing a prima facie case, but also the nature or kind of offense committed, it is claimed that mandamus will not lie to compel them to change the information already filed. Sustaining the foregoing allegations, the court, in its order of June 28, 1963, granted the motion and dismissed the petition for mandamus for lack of legal basis. Petitioner filed the present appeal.

From the affidavits of the witnesses, which were attached to the complaint and presented during the investigation by the prosecuting officers, the incident appeared to have happened as follows;

In the evening of November 25, 1962, the deceased Sedesias del Castillo, one Fernando Castromayor and the accused Pedro del Castillo, Sr., after a drinking spree in a store, were forced to seek shelter from the rain in the house of one Tinong in Aguinaldo street, Sara, Iloilo. While thereat, Pedro del Castillo, Sr. and Castromayor engaged in a fight where Pedro was bested. After they were separated by Sedesias, the latter and Castromayor left together. They met a policeman to whom the incident was reported. At about 9:30, and while they were on their way home (Sedesias, Castromayor and the two other witnesses), a speeding jeep came heading to their direction

which caused Sedesias to shout to his companions, "get away from the road, there is a jeep". The vehicle veered toward Sedesias, bumping and throwing him to the ground. Thereupon, Pedro del Castillo, Sr. jumped from the jeep, struck the fallen man with something on the head and then stabbed the latter twice in the neck. When Castromayor saw this, he ran away pursued by Pedro. When it was realized that the stricken man was Sedesias, and not Castromayor, Pedro del Castillo, Jr., who was driving the jeep, tried, with others, to bring the former to the doctor, but Sedesias expired without receiving medical treatment. With the foregoing version of the facts by the supposed eyewitnesses, the Fiscals concluded that there was no treachery in the commission of the offense, and thus reiuftu to amend the information for homicide, to murder, as prayed for by the petitioner-appellant.

The issues presented by this appeal are (1) whether considering the affidavits of the supposed eye-witnesses which are also the basis of the homicide-charge, there was abuse of discretion committed by respondents-appellees when they refused to amend the information to murder; and (2) if there was such abuse of discretion, whether respondents-appellees may be compelled by mandamus to amend the information.

To justify their action of refusing to amend the information, respondents-appellees capitalize on appellant's contention that when the incident happened, the night was dark. They argue that if this were so, the supposed witnesses could not have seen, as they alleged to have seen, the striking of the head and stabbing of the neck of the victim by the accused. Furthermore, it is maintained that since it was the deceased himself who warned his companions of the coming of the jeep of the accused, the attack cannot be considered sudden to qualify the slaying to murder.

It may be pointed out that appellees do not claim insufficiency of evidence of the probable guilt of the accused for the death of the victim. They only say that in their appreciation or appraisal of the facts as narrated by the witnesses, there was no treachery attending the commission of the crime. It is the established jurisprudence that for *alevosia* to exist, the aggressor must have adopted a mode of attack intended to facilitate the commission of the crime without risk to himself. (People v. Caflete, 44 Phil. 478; U.S. v. Balagtas, 19 Phil. 194; People v. Calinawan, 83 Phil. 642; People v. Tagaro, G.R. No. L-18518, Jan. 31, 1963; People v. Baloyo, G.R. No. L-11215, Jan. 30, 1960.) What is necessary to determine, therefore, is whether the attack or infliction of the fatal injuries on the victim in this case was made in such a manner as to insure the commission thereof with ease and without danger to the accused, of retaliation or defense that might be put up by the deceased.

The supposed eyewitnesses, Virgilio Palencia, Rizalino Patanao, and Fernando Castromayor, unanimously declared under oath that after the deceased was bumped, in all appearances, intentionally, by the jeep in which the accused was riding, the latter jumped off the vehicle, struck Sedesias on the head while prostrate on the ground, and then stabbed him twice in the neck. Under the situation as declared by these witnesses, there can hardly be any doubt as to the helpless condition of the victim when he received the injuries which caused his death. The fact that he had seen the coming of the vehicle does not justify the conclusion that he could have been prepared for the attack by the accused. The fact that the victim was bumped by the jeep seems to indicate that he was not anticipating that he would be bumped or hit by it, much less that while he was lying on the ground, somebody would come around and inflict injuries on him.

With regard to the other issue of the propriety of the remedy of mandamus, it may be true that, as appellees aver, it is a relief for official inaction. It is claimed that with the filing of the information for homicide, appellees have already performed their duty and, therefore, there is no cause of action against them. It must be remembered, however, that a prosecuting officer is sworn, under his oath of office, not merely to file charges against an accused, but to file the corresponding complaint or information in accordance with the facts and/or evidence obtaining in a case. Considering the circumstances stated above, there was created and imposed upon herein respondents-appellees a legal duty to file the information which, in view of the declarations of the alleged

eyewitnesses, should be for murder. Clearly, their failure to do so rendered the respondents Fiscals subject to the writ of mandamus.[1]

WHEREFORE, the order appealed from is hereby reversed and set aside. Respondents-appellees are hereby directed to amend the information in Criminal Case No. 9624 of the Court of First Instance of Iloilo accordingly. No costs.

SO ORDERED.

Concepcion, C.J., Reyes, J. B. L., Regala, Makalintal, Bengzon, J. P., Zaldivar, Sanchez and Ruiz Castro, JJ., concur.

Dizon, J., took no part.

[1] See *De Castro v. Castañeda*, G.R. No. L-15139, April 28, 1961; *Guiao v. Figueroa*, 50 O.G. 4828.

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