

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
EDUARDO GUTIERREZ ALIAS EDUARDING AND BERNABE MISLANG
ALIAS BERNING, DEFENDANTS-APPELLANTS.**

G.R. No. L-30314. March 15, 1982

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal from a judgment of the Court of First Instance of Pangasinan, Branch X, at San Carlos City, which reads as follows:

"WHEREFORE, the Court finds both accused, Eduardo Gutierrez @ Duarding and Bernabe Mislang @ Berning guilty beyond reasonable doubt of the crime of Murder, without any aggravating or mitigating circumstance attending the commission of the crime, and hereby sentences each to the penalty of reclusion perpetua with the accessory penalties prescribed by law; to indemnify the heirs of the deceased, Gerardo Estabillo in the sum of P12,000.00, and each to pay one-half of the cost."

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

"At about 9:00 o'clock in the evening of May 2, 1964, Barrio Captain Carlos Cagampan together with Rural Policeman Gerardo Estabillo, Domingo Cabaliw and Barrio Lieutenant Anastacio Ellorda were patrolling the barrio of Caturay, Bayambang, Pangasinan, because of the complaint of their barriomates that their carabaos and chickens were being stolen (pp. 3, 4, t.s.n., Dec. 8, 1966). During the course of their patrol, the group saw two persons sitting on the side of the road (p. 2, t.s.n., Feb. 1, 1966). Domingo Cabaliw and Carlos Cagampan focused their flashlight at a distance of about six meters on the two sitting persons whom they recognized as the accused Eduardo Gutierrez and Bernabe Mislang and found each of them holding a carbine (pp. 5, 6, t.s.n., Dec. 8, 1966). At this juncture, the accused Eduardo Gutierrez shouted at Domingo Cabaliw, 'Cuya Doming, don't get near; if you will get near you will be in danger', to which Cabaliw answered: 'Duarding, don't fire at us because we are on patrol this night' (pp. 5, 6, 7, t.s.n., Feb. 1, 1966). Immediately after Cabaliw uttered this remark, the accused Bernabe Mislang suddenly fired his carbine at the group, followed by accused Eduardo Gutierrez who also fired his carbine (p. 6, t.s.n., Dec. 8, 1966). Cagampan, Cabaliw and Ellorda at once ran for cover, but unfortunately their companion, Gerardo Estabillo, was hit and die instantly on the spot (pp. 7, 8, t.s.n., Id.). Thereafter, the two accused ran away (p. 14, t.s.n., Id.)

"At 4:00 o'clock in the morning of the following day, Domingo Cabaliw and Carlos Cagampan reported the killing to the Chief of Police of Bayambang who immediately dispatched two of his men to proceed to the scene of the crime and to arrest the suspects (pp. 3, 4, 5, t.s.n., May 3, 1967.) Upon arriving, thereat, Sgt. Tamondong, together with Patrolman Paningbatan and Dr. Amado Layug found the lifeless body of Gerardo Estabillo (pp. 6, 7, t.s.n., Id.). About twenty meters from the place where the victim fell and died, the police officers also found three empty shells fired from a carbine (p. 7, t.s.n., Id.; Exhs. "E", "E-1", "E-2"). After Dr. Amado Layug had examined the body of the deceased, it was brought to his house for autopsy and was later interred on May 5, 1964 in the Municipal Cemetery of Urbiztondo, Pangasinan (pp. 8, 9, 15, t.s.n., Id.)." (Appellee's brief, pp. 2-3.)

Accordingly, Eduardo Gutierrez and Bernabe Misleng were charged of murder in an information which reads as follows:

"That on or about the 2nd day of May, 1964 at about 10:30 in the evening, barrio of Caturay, Bayambang, Pangasinan, Philippines and within the jurisdiction of this Honorable Court the above-named accused with treachery and evident premeditation, with intent to kill, taking advantage of night time and with the use of firearms, did then and there criminally, unlawfully and feloniously shoot to death GERARDO ESTABILLO, a duly appointed Rural Policeman while in the performance of his official duty who was then on patrol duty in company with Barrio Captain, Carlos Cagampan thus inflicted gun shot wounds upon the person of GERARDO ESTABILLO which caused his instantaneous death."

The defense interposed by the two accused in the trial court was alibi which is also their defense on appeal. Their claim is stated in their brief as follows:

"The evidence for the defense are clear. The two accused had never been found to be hardened criminals or had been engaged in the commission of crimes during the past in their own place or anywhere. That in April 1964 and or prior thereto, the two accused left Caturay and went to Manila to look for a job. That they were able to land a job as truck helper in San Mateo, Rizal under Jose Vinluan and since they started working they never took their vacation in Caturay, Bayambang, Pangasinan except when they were informed that the authorities of Bayambang were looking for them due to their being suspected as the perpetrators of the killing of Gerardo Estabillo on the night of May 2, 1964. That both of them stated that on the night of May 2, 1964, or prior thereto, they never took their vacation in Caturay. They both slept in the house of Jose Vinluan at San Mateo, Rizal, that night which is more than three hundred kilometers away from the scene of the incident. That they had no grudge against the deceased Gerardo Estabillo and there was no reason for them to kill him. That their presence in San Mateo, Rizal the whole day and night of May 2, 1964 and in the following day was confirmed by witness Jose Vinluan (p. 67, t.s.n., hearing of Dec. 8, 1968). This witness testified that on May 2, 1964 and up to 10:00 o'clock in the evening he was with the two accused Eduardo Gutierrez and Bernabe Misleng at San Mateo, Rizal, because they were his companions in delivering sand and gravel. It was therefore impossible for the two to reach Bayambang or their presence on the scene of the crime on the night of the killing of Gerardo Estabillo." (Appellants' brief, pp. 14-16.)

The defense of alibi must fail. The desideratum is the credibility of witnesses and on this point We have to leave untouched the finding of the trial court which, according to our examination of the record, has not overlooked a fact or circumstance which would have warranted our intervention.

Eduardo Gutierrez and Bernabe Misleng were positively identified as the perpetrators of the crime by Carlos Cagampan and Domingo Cabaliw.

Carlos Cagampan testified that he was the barrio captain of Caturay, Bayambang, Pangasinan; that he knew Eduardo Gutierrez and Bernabe Misleng long before 1964 because the two were residents of barrio Caturay; and that he witnessed the killing of Gerardo Estabillo as follows:

"Q [Atty. Esteves, private prosecutor] Do you remember where were you in the night of May 2, 1964 ?

A I can remember sir.

Q Will you please tell this Hon. Court ?

A We went to patrol along the dikes.

Q What particular barrio did you go to patrol?

A In the barrio of Caturay, Bayambang, Pangasinan.

Q You said 'we' when you went to patrol who are your companions when you went to patrol on May 2, 1964 ?

A My rural policeman sir.

Q Who is that rural policeman?

A Gerardo Estabillo Sir.

Q Who else besides Gerardo Estabillo?

A When we were along the road sir we met this Domingo Cabaliw and Anastacio Ellorda.

Q When you and your rural policeman Gerardo Estabillo met Domingo Cabaliw and Anastacio Ellorda where did you proceed?

A We went to the barrio of Maliwais, Bayambang, Pangasinan.

Q Why did you go and patrol on that night of May 2, 1964 ?

A We usually do that because the barrio people reported to me that there are some bad things that are happening in the barrio.

Q What particular bad things that was reported happening in that barrio?

A The barrio people reported to me that their hens and carabaos are being stolen that is why as barrio captain in that barrio I am doing my duty as a barrio captain.

Q While you are patrolling with your companions Domingo Cabaliw and Gerardo Estabillo was there anything unusual that happened?

Atty. Barti [defense counsel]:

We object, question misleading?

Court:

Objection sustained.

Atty. Esteves:

Q While you were patrolling with Gerardo Estabillo and Domingo Cabaliw and Anastacio Ellorda where did Domingo Cabaliw and Anastacio Ellorda go after you meet them?

Atty. Barti:

We object, they proceeded already.

Court:

Objection overruled let him answer.

A They went to the barrio of Maliwis but I told them that I will wait for them in the boundary of Caturay because that is within the territory.

Q Were you able to meet Anastacio Ellorda and Domingo Cabaliw in the place where you are supposed to meet them?

A Yes sir I was able to meet them.

Q While you, Gerardo Estabillo and Anastacio Ellorda and Domingo Cabaliw were already together was there anything unusual that happened?

A I can remember sir.

Q Will you please tell us what happened?

A When we were walking we meet Eduardo Gutierrez and Bernabe Mislang.

Q When you met these two persons the accused Eduardo Gutierrez and Bernabe Mislang what did you do?

A We halted them.

Q Besides halting them what else did you do?

A We flashlighted them.

Q When you flashlighted them were you able to recognize immediately these two persons?

A We were able to recognize them.

Q When you heard them and you were able to flashlight them what happened then if any?

A They took cover in the corn field and they fired several times.

Q Do you know who fired the first shot?

Atty. Barti:

We object, it is not established that they are carrying firearms.

Court: Reform the question.

Atty. Esteves:

Q When you met the two accused do you know what were they carrying if any?

A There was sir.

Q What is being carried by Eduardo Gutierrez?

A It is a carbine sir.

Q How about Bernabe Mislang?

A Carbine also sir.

Q Do you know who of the two fired the first shot?

A I know him sir.

Q Who fired the first shot?

A Bernabe Mislang sir.

Q What makes you believe that it was Bernabe Mislang who fired the first shot?

A Because the barrel of his gun sparked with fire.

Q Do you know if Eduardo Gutierrez fired also?

A Yes he fired also.

Q What makes you say that Eduardo Gutierrez fired his carbine?

A It's the same, the barrel of his gun sparked.

Court:

Q When the two fired at the group was anybody hit?

A There was sir.

Q Who was hit in that incident?

A Gerardo Estabillo sir the rural policeman.

Atty. Esteves:

Q Do you know where Gerardo Estabillo is now?

A He is already dead sir.

Q Do you know the cause of his death?

Atty. Barti:

Incompetent your Honor?

Court:

The witness may answer.

A He was shot sir.

Atty. Esteves:

Q Did he die on the spot?

A Yes he died on the spot." (TSN, Dec. 8, 1966, pp. 3-8.)

Domingo Cabaliw testified that in 1964 he was a councilman of barrio Caturay, Bayambang, Pangasinan; that he had known Eduardo Gutierrez and Bernabe Mislang since childhood because he lived with them in the same barrio; that in the evening of May 2, 1964, he went to the house of Domingo Mendoza together with Carlos Cagampan, Gerardo Estabillo and Anastacio Ellorda; that they went to Mendoza's house because "Anastacio Ellorda wanted to talk to Domingo Mendoza because Ellorda wanted to get coconuts but they prevented him"; that after leaving Mendoza's house, he "flashlighted Bernabe Mislang and Eduardo Gutierrez sitting"; and that an unusual event took place as follows:

"Atty. ESTEVES:

x x x

Q On your way back home was there anything unusual that happened and you said 'yes'. You said that there was something unusual that happened while you were on your way back home. What was that unusual thing that happened?

A Bernabe Mislang and Eduardo Gutierrez shot at us.

Q Why do you know that the accused Eduardo Gutierrez and Bernabe Mislang fired at you?

A Because I flashlighted their faces and they pointed their gun to us and said 'don't get near'.

COURT:

Q When you were shot at did you not receive wounds or you were not hurt?

A They fired at us but we were not hit.

Atty. ESTEVES:

Q Do you know if your companions were hit in that firing incident?

A When the police investigated us already that was the time I came to know that one of my companions was shot.

Q Who was that companion of yours who was shot that you came to know?

A Gerardo Estabillo, a rural police.

Q Before you met Eduardo Gutierrez and Bernabe Mislang do you know if Eduardo Gutierrez and Bernabe Mislang recognized you four in that incident?

Atty. BARTI:

Incompetent, Your Honor. That is supposing that the other party can recognize them, Your Honor. The witness is incompetent, Your Honor.

Atty. ESTEVES:

The question is very material, Your Honor, because while it was nighttime there is a probability that this witness knew that the assailant recognized them because of some incident, the accused might have uttered some words and they fired at them.

Atty. BARTI:

But the ground of my objection is not materiality but incompetence.

COURT:

Objection sustained.

Atty. ESTEVES:

Q Before you were fired at do you know what happened if any or was there anything that was uttered by the accused Eduardo Gutierrez and Bernabe Mislang?

Atty. BARTI:

Leading, Your Honor.

COURT:

Objection sustained.

Atty. ESTEVES:

Q Before you were fired at by the accused Eduardo Gutierrez and Bernabe Mislang was there anything that happened between your group and the two accused?

A There was, sir.

Q What happened?

A Estabillo was hit.

COURT:

Q The question is before that was there anything that happened between your group and the two accused?

A Yes, there was, sir.

Q What happened?

A Estabillo was hit.

COURT:

Q The question is before that was there anything that happened between your group and the two accused?

A Before they shot at us I was able to flashlight on their faces--Eduardo Gutierrez and Bernabe Mislang.

Q Why did you flashlight?

A I noticed two persons by the side of the road, so I flashlighted.

Atty. ESTEVES:

Q When you flashlighted at these two people and were able to recognize them as you testified what did they tell you, if any?

A There was.

Q What did they tell you?

A 'Cuya Doming, don't get near; if you will get near you will be in danger.'

Q Who uttered those words?

A Eduardo Gutierrez.

Q After Eduardo Gutierrez uttered those words what did Cuya Doming answer, if any?

A 'Duarding, don't fire at us because we are on patrol this night. If you will fire at us you will answer something because we are on patrol at this time and I am with Captain Cagampan and Estabillo and Lieutenant Ellorda.'

Q And when you told this statement to the accused what happened? What did they do, if any?

A They fired at us.

Q When they fired at you what did you do, if any?

A We deployed and took cover.

Q You said that your companion Estabillo was shot. Why do you know that Estabillo was shot that night?

A I knew that my companion Estabillo was shot in the morning when we returned to the place to investigate with municipal policemen.

COURT:

Q Were you not together at the time they fired at you?

A We were together.

Q What did you do when they fired at you? You disappeared in the place?

A We deployed.

Q And then you did not see each other anymore?

A No more, sir.

Q You went home alone?

A Yes, sir." (TSN, Feb. 1, 1966, pp. 5-8)

While it is true there are discrepancies in the statements of Cagampan and Cabaliw, the discrepancies are minor and may be attributed to the lapse of time between the event and the testimony as well as to the circumstance that the witnesses do not appear to have reached the level of education and sophistication which would make their testimony completely congruent. On the positive side, the discrepancies are indicative of credibility for completely congruent testimony is suspect considering that different persons obtain differing impressions.

The trial court correctly found that there was no evident premeditation. There is nothing in the record to show that the two accused had planned the crime. Neither can it be said that there was treachery as found by the trial court. There was treachery, it is said, because the attack on the patrol was sudden and without warning. But the People's version of the facts shows that Eduardo Gutierrez shouted to Domingo Cabaliw, "Cuya Doming, don't get near; if you will get near you will be in danger."

In view of the foregoing, it is Our opinion that the crime which was committed at the spur of the moment was the complex crime of homicide with direct assault against an agent of a person in authority considering that the deceased Gerardo Estabillo was a barrio rural policeman. Hence, the penalty for homicide, the more serious offense, should be imposed in its maximum period. (Art. 48, Revised Penal Code.)

WHEREFORE, the judgment of the court a quo is hereby modified in that the appellants are hereby found guilty of the complex crime of homicide with direct assault and each of them is sentenced to an indeterminate penalty of seven (7) years of prision mayor as minimum to seventeen (17) years and six (6) months of reclusion temporal as

maximum; and the indemnity of P12,000.00 shall be paid by them jointly and severally to the heirs of the deceased. No costs.

SO ORDERED.

Barredo, (Chairman), Concepcion, Jr., De Castro, Ericta, and Escolin, JJ., concur.
Aquino, J., see dissent.

DISSENTING IN PART

AQUINO, J.:

I concur but in my opinion the imposable indeterminate penalty should consist of a minimum taken from reclusion temporal medium and a maximum taken from reclusion temporal maximum, following *People vs. Lawas*, 97 Phil. 975; *People vs. Gayrama*, 60 Phil. 796 and *People vs. Catacutan*, 64 Phil. 107, 111.

Hence, the accused may be sentenced to seventeen years of reclusion temporal medium as minimum to twenty years of reclusion temporal as maximum.

In the majority opinion, the procedure for graduating the penalty for the complex crime, laid down in *People vs. Gonzalez*, 73 Phil. 549, was the one followed.

I disagree with the ruling in the *Gonzalez* case. The correct ruling is that announced in the *Gayrama* case and in *People vs. Co Pao*, 58 Phil. 545.

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