

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. APOLONIO OBNGAYAN, DEFENDANT-APPELLANT.

G.R. NO. L-29201. January 31, 1974

Ponente: ANTONIO, J.

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ANTONIO, J.:

Appeal from the judgment of the Abra Court of First Instance convicting appellant Apolonio Obngayan of the crime of murder and imposing upon him the penalty of reclusion perpetua with the consequential indemnification of the heirs of the deceased Pedro Bagay in the sum of P6,000.00.

The incident which gave rise to the crime in question occurred on a clear day at 3:00 o'clock in the afternoon of March 10, 1967 at the ricefields of Barrio Manosa, of the town of Villaviciosa, Province of Abra. At about that time, after the spouses Pedro Bagay and Alingan Bagay had loaded their palay into a carabao-drawn sled, and as Pedro Bagay goaded the carabao to move, Alingan Bagay suddenly heard a gun report. Instinctively Alingan, who was less than a meter from her husband, turned towards the east where the sound emanated, and saw appellant Apolonio Obngayan, standing on an open field less than 30 meters away, holding a gun. According to her description the gun resembled a cal. 30 carbine. Appellant was then with Nestor Taberdo and Delfin Padoail, but these two were both unarmed. After Pedro Bagay collapsed to the ground, appellant and his companions fled towards the direction of the forest. She went to succor her husband, who at that time was already prostrate and groaning with pain.

Attracted by her cries for assistance, Pedro Daet, Belino Daet and Rosario Taberdo and her other barriomates arrived at the scene of the incident. They assisted Alingan in bringing the wounded Pedro Bagay to the town of Villaviciosa, and from there the victim was brought in the jeep of the town treasurer of Villaviciosa to the clinic of Dr. Bobila in the town of Bangued, Abra, arriving there on the evening of that date.

Dr. Eleuterio Acosta, who attended to the victim that same evening, testified that when he saw Pedro Bagay he was in a semi-conscious condition, but after the emergency operation and the administration of intravenous injection and infusion of blood plasma, his condition improved and he regained fully his consciousness. He declared that the gunshot wound of entrance was at the back of the victim on the level of the waistline, "the slug hit the upper part of iliac crest on the left side going to the lateral aspect of the lumbar spine and further going inside perforating the ileum then two or three portions of the small intestines and perforating the mesentery and omentum." A cal. 30 slug was found lodged inside the body of the victim in the region of the waistline (Exhibit C).

It was while the late Pedro Bagay was in the clinic of Dr. Bobila that P.C. Investigator Emiliano Agustin was able to take his ante mortem statement (Exhibit B). According to Emiliano Agustin, he questioned the victim about the incident, and his questions, and the answers given by the latter, were written down by him, after which the victim affixed his thumbmark thereon using his own blood. These proceedings were witnessed by Severo Bello and Federico Belisario who also affixed their signatures on the same document. In the aforesaid ante mortem

statement, the deceased pointed to appellant as the person who shot him.

Pedro Bagay died at 4:30 a.m. on March 11, 1967. Dr. Gerardo Pizarro, Jr., who conducted an autopsy on the deceased on that date, declared that the cause of death was "gunshot wound, abdomen, with secondary hemorrhage and traumatic shock." Like Dr. Acosta, the surgeon who conducted the autopsy also confirmed that on the basis of the wound of entrance and the path taken by the bullet, the victim was shot from behind.

On March 14, 1967, the constabulary authorities, on the basis of the testimony of Alingan Bagay, and Severo Bello and Federico Belisario on the ante mortem statement (Exhibit B), filed a criminal complaint for murder with the Villaviciosa Municipal Court against Apolonio Obngayan, Nestor Taberdo and Delfin Padoil. The preliminary examination of witnesses Alingan Bagay, Severo Bello, and Federico Belisario was conducted by the Municipal Judge on March 16, 1967, and on the same date he issued the corresponding warrant of arrest against appellant Apolonio Obngayan, Nestor Tabero and Delfin Padoil. The three were, however, later released on bail.

The second stage of the preliminary investigation was set by the Municipal Judge on June 5, 1967, at which hearing the three accused pleaded not guilty and waived their right to present their evidence. On July 6, 1967, the Provincial Fiscal filed the corresponding information for murder against the three accused. At their arraignment on August 15, 1967, the appellant and his co-accused, with the assistance of their counsel de parte, Atty. Agripino Brillantes, pleaded not guilty. The defense of the appellant was alibi. He denied that he was at the scene of the incident, on the time and date in question, claiming that he was then constructing a fence near his house at Barrio Callao which is adjacent to Barrio Manosa, where the spouses Pedro and Alingan Bagay resided. It was while he was thus engaged that he heard later in the afternoon that Pedro Bagay was shot. While he knew Pedro Bagay, he did not go to Bagay's house, much less attended the victim's funeral, because he was allegedly afraid. No evidence was presented to corroborate the alibi of appellant. On May 28, 1968, the judgment in question was promulgated convicting the appellant but acquitting his two co-accused, Nestor Taberdo and Delfin Padoil.

Appellant assigns in this appeal the following errors: (1) Irregularity in the conduct of the preliminary investigation viz: the alleged lack of notice to appellant and the failure of the investigating magistrate to accord him the opportunity to cross-examine the prosecution witnesses; (2) the unusual zeal of the trial judge in cross-examining appellant and in propounding questions favorable to the prosecution, thus allegedly showing his manifest partiality; and (3) the trial court's error in giving more credence and weight to the ante mortem statement (Exhibit B) and the testimony of Alingan Bagay than to the testimony of appellant.

I

Apart from the inaccuracy of the factual and juridical basis of appellant's first assignment of error, as he was actually notified of the preliminary investigation proper, and at that stage he is not entitled as a matter of right to cross-examine the witnesses presented at the preliminary examination, there are fundamental reasons why such assignment is without merit.

It is already a settled law that where the accused has already entered a plea of not guilty to the information he is deemed to have foregone his right to preliminary investigation and to have abandoned his right to question any irregularity that may have attended the same.[1] Moreover, appellant posted bail after his arrest, waived the preliminary investigation proper and failed to raise in issue the validity of the preliminary investigation at any stage of the proceedings in the trial court. We have held in *Luna vs. Plaza*[2] that where the accused has filed bail and waived the preliminary investigation proper, he has waived whatever defect, if any, in the preliminary examination conducted prior to the issuance of the warrant of arrest. And in *People vs. Baluran*[3] We have emphasized that where appellant has waived the preliminary investigation and failed to raise in issue the validity of said preliminary investigation at any stage of the proceedings in the trial court, the same question may not be

raised for the first time on appeal.

II

We have examined the record of the trial and We find no basis for appellant's contention that the trial judge has asked improper questions which manifest a patent partiality in favor of the prosecution to the prejudice of the defense. A reading of the questions propounded merely indicate the trial judge's concern to ascertain the truth. There are obviously certain rights inherent to the trier of facts due to the nature of his function. Among these is the right to question a witness with a view to satisfying his mind upon a material point which presents itself during the trial and as to the credibility of such witness.[4] In thus cross-examining an accused and his witnesses, the trial judge merely makes use of this inherent right, and this actuation, if exercised within reasonable bounds, does not amount to a denial of the fundamental right of the accused to a fair and impartial trial guaranteed by the due process clause of the Constitution.

We do, however, advert to the need that such power should be exercised sparingly and judiciously, in order to obviate any criticism on the part of counsel, and in such a manner as not to detract from the norm of conduct compatible with the public faith and trust, of the citizenry in the impartiality and sense of responsibility of those entrusted with the solemn duty of administering to them justice.

III

Appellant assails the credibility of Alingan Bagay. He does not dispute, however, the fact that Alingan Bagay was present at the time of the incident and that she was only a meter away from her husband when the latter was shot. Neither does appellant deny that he was known to her, having lived in adjacent barrios of the same town, nor the fact that at the time the incident occurred, it was a clear afternoon and the locale of the shooting was an open field, and, therefore, there was nothing that could have obstructed the view of said witness.

Appellant, however, makes capital of certain alleged inconsistencies in the testimony of Alingan Bagay and of her failure to mention the name of the appellant as the author of the crime to some people immediately after the incident. The alleged inconsistency consists of the fact that Alingan stated in her affidavit dated March 16, 1967 before the Municipal Judge that after the incident she went to Barrio Manosa for help, whereas on the witness stand, she declared that she cried for help after which her neighbors in Barrio Manosa arrived. Considering that this incident occurred in the ricefields of Barrio Manosa, she could have gone to the houses of her barriomates thereat while she was shouting for help. Besides, the same is trivial as it refers to an inconsequential or insignificant matter and, therefore, could not have impaired the credibility of her testimony, as it has been found to be consistent on material and important points.[5]

On the claim that Alingan Bagay's credibility is impaired by her failure to disclose to some people immediately after the incident the identity of her husband's assailant, suffice it to state that appellant on cross-examination admitted that when he was investigated by the constabulary authorities on March 11, 1967 on his involvement in the incident, said authorities informed him that Alingan Bagay reported to them that she saw appellant holding a gun when the shooting occurred. (Tsn, April 1, 1967, p. 25). And she explained that her failure to inform the police of Villaviciosa on the matter was due to her fear that the perpetrator of the offense may inflict harm upon her, considering that he was then at large. At any rate, there is no question that she identified appellant as the one who shot her husband when investigated by the constabulary authorities and when she executed her affidavit on March 16, 1967 before the Municipal Judge. Delay of a witness in informing other people of what he knew about a criminal offense would not affect his credibility where the delay was satisfactorily explained.[6]

Much stress has been made by appellant on the trial court's admission of the ante mortem (Exhibit B) on the

ground that the victim was not conscious when the same was taken and that in any event the said victim could not have seen his assailant after he was shot, because, according to Dr. Acosta, the victim had no chance to look around as he was in a state of traumatic shock. It will be observed, however, that Dr. Acosta's statement that a person who is shot with a cal. 30 bullet in the manner indicated would suffer immediate shock and loss of consciousness, is a mere expression of opinion. "The question as to whether a certain act could have been done after receiving a given wound," according to Wharton and Stilles,[7] "is always one that must be decided upon the merits of a particular case." They cited a case from Vibert's *Precis de Med Leg.*, 4th ed., p. 286 where a man after being shot in the chest threw a lamp at his adversary. The lamp started a fire; and to extinguish the fire, the wounded man fetched a pail of water from the court yard. When the fire was extinguished, the man lay down on bed and died. Vibert performed the autopsy, and found that the left ventricle of the heart had been perforated by the revolver's bullet. It is evident from the foregoing that Dr. Acosta's assertion that the victim of a gunshot wound immediately loses consciousness, after infliction of the wound may not be true in all cases. The circumstances in the case at bar did not preclude the possibility that the victim saw his assailant. As a matter of fact, Alingan Bagay testified that even when her husband was lying on the ground he was still conscious. Dr. Acosta himself admitted that when he first saw Pedro Bagay on the evening of March 10, 1967, he was in a "semi-conscious" condition and although delirious he was able to make the statement contained in Exhibit B.

"Q.

So that when you said in delirious state, he was able to make statement in Exh. B?

A.

Delirious state does not blur your mentality, he would be stating some statements which are true.

Q.

So it is possible that the deceased could give those answers to the questions made by Sgt. Agustin?

A.

Yes, sir."

(Tsn, April 1, 1968, pp. 12-13).

Dr. Pizarro, who conducted the autopsy, also confirmed the possibility that the victim was sufficiently conscious, enough to answer the question of the constabulary investigator.

"Q.

The traumatic shock may not be strong enough to eliminate the possibility of the ability to talk, correct?

A.

Yes, Your Honor.

Q.

Because said here he was able to talk to the policeman and that he was able to talk on the way to Villaviciosa to Bangued and that he was able to talk while in the hospital when he was investigated by the P.C. soldier as testified to by the widow?

A.

Yes, it is possible that the victim was able to talk, sir." (Ibid., p. 20).

Appellant further questions the admissibility of the ante mortem statement (Exhibit B) on the ground that there is no evidence that the statement was read to or acknowledged by the victim before his thumbmark was impressed thereon by the constabulary investigator. Undoubtedly, a written dying declaration which is not read by the declarant or read to him by another and is not signed or in any way recognized by him after it is written, is not admissible in evidence.[8] This error, however, is of no moment, considering that the P.C. Investigator, Emiliano Agustin, before whom the declaration was given, testified as a witness in the case, and he related the statements made to him by Pedro Bagay, and these statements are clearly admissible as a dying declaration of the latter. The admissibility of dying declarations is not dependent on their being made in any particular form. It may have been an oral statement or ejaculation made to a casual bystander, a mere formal statement to a physician, relative or friend, or answers to questions put by the person to whom the declaration is made, or a writing signed by the declarant, or an affidavit.[9]

There is no question that the declaration was made with full realization on the part of the deceased that he was in a dying condition. Considering the degree and seriousness of the wound, and the fact that death supervened shortly afterwards, such circumstances may be considered as substantial evidence of such consciousness.[10]

It is plain from the evidence of record that appellant was identified as the assailant of the deceased, not only because of the ante mortem declaration, but also by the clear and positive testimony of Alingan Bagay. Appellant concedes that Alingan Bagay was not actuated by improper motives in implicating him in the commission of this serious offense. We have held that a prosecution witness' lack of motive to make a false imputation against the accused strengthens the credibility of said witness.[11]

Needless to state, the alibi interposed by appellant is one of the weakest defenses available in criminal cases, and cannot prevail over the positive identification of appellant by Alingan Bagay, corroborated by the ante mortem statement of the deceased, as the perpetrator of the offense. On the basis of the evidence, the guilt of appellant has been established beyond reasonable doubt.

The trial court awarded the amount of P6,000.00 in favor of the heirs of the deceased as civil indemnity. The award should be increased to P12,000.00.[12]

WHEREFORE, the judgment appealed from is affirmed with the modification that appellant is ordered to pay the heirs of the deceased the amount of P12,000.00 as civil indemnity.

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

[1] Zacarias vs. Cruz, L-25899, November 29, 1966, 30 SCRA 728, citing Lozada vs. Hernandez, 92 Phil. 1051, 1054; People vs. Casiano (1961) 1 SCRA 478, 483; People vs. De la Cerna (1967) 21 SCRA 569, 572.

[2] (1968), 26 SCRA 310, 321-322; Zacarias vs. Cruz, *idem*.

[3] 32 SCRA 71, 79-80.

[4] U.S. vs. Hudieres and Sagun, 27 Phil. 45; U.S. vs. Lim Tiu, 31 Phil. 504; Ventura vs. Judge Yatco, 105 Phil. 294:

"x x x While judges should as much as possible refrain from showing partiality to one party and hostility to another, it does not mean that a trial judge should keep mum throughout the trial and allow parties to ask the

questions that they desire, on issues which they think are the important issues, when the former are improper and the latter, immaterial. If trials are to be expedited, judges must take a leading part therein, by directing counsel to submit the evidence on the facts in dispute by asking clarifying questions, and by showing an interest in a fast and fair trial. Judges are not mere referees like those of a boxing bout, only to watch and decide the results of a game: they should have as much interest as counsel in the orderly and expeditious presentation of evidence, calling attention of counsel to points at issue that are overlooked, directing them to ask the question that would elicit the facts on the issues involved, clarifying ambiguous remarks by witnesses, etc. Unless they take an active part in trials in the above form and manner, and allow counsel to ask questions whether pertinent or impertinent, material or immaterial, the speedy administration of justice which is the aim of the Government and of the people cannot be attained. Counsel should, therefore, not resent any interest that the judge takes in the conduct of the trial, they should be glad that a trial judge takes such interest and help in the determination of truth."

[5] *People vs. Valera*, L-15662, August 30, 1962.

[6] *People vs. Lao Wan Sing*, L-16379, Dec. 17, 1966; *People vs. De Gracia*, L-21419, Sept. 29, 1966; *People vs. Sampang*, March 31, 1966, L-15843; *People vs. Equal*, May 27, 1965, L-13469, L-14340, L--14209; *People vs. Telan*, June 29, 1962, L-17921, L-17922; *People vs. Delfin*, July 31, 1961, L-15230, etc.; *People vs. Collado*, Nov. 23, 1960, L-12002.

[7] Vol. III, *Medical Jurisprudence*, p. 212.

[8] *People vs. Dizon*, 44 Phil. 267, 270; *People vs. Andia*, 2 SCRA, 423--425.

[9] *McKelvey on Evidence*, 5th Ed. (1944), p. 479; Vol. V *Wigmare on Evidence*, Sec. 1445.

[10] *People vs. Chan*, 50 Phil. 182; *People vs. Andia*, *Ibid.*, p. 426.

[11] *People vs. Sawah*, L-15333, June 29, 1962, 5 SCRA 385; *People vs. Valera*, L-15662, August 30, 1962, 5 SCRA 910.

[12] *People vs. Pantoja*, L-18793, October 11, 1969, 25 SCRA 468.

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