

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE BALICTAR ALIAS BODO, SOFIO ADA, TITO NALE ALIAS BANDOT AND PEDRO DUARTE, DEFENDANTS-APPELLANTS.

G.R. No. L-29994. July 20, 1979

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal interposed on December 6, 1968, by the accused Pedro Duarte from the decision of the Court of First Instance of Samar, 13th Judicial District, Laoang, Samar, sentencing him to suffer the penalty of reclusion perpetua, to indemnify the heirs of the victim in the amount of P6,000.00 and to pay 1/4 of the cost. In view of the imposition of the death penalty with respect to the accused Tito Nale, Duarte's case is simultaneously on review by this Court.

Prefatory to the determination of the merits of the appeal, it is to be noted that on April 3, 1968, at the outset of the trial, the accused Jose Balictar withdrew his original plea of "Not Guilty" and made leave that he be allowed to plead guilty to the lesser offense of homicide. Without any objection on the part of the prosecution and with the approval of the Court, the said accused when arraigned anew pleaded guilty to the offense of homicide and thereby admitted having stabbed to death Lucio Lebeco, Sr. Accordingly, he (Balictar) was sentenced "to an indeterminate penalty of 8 years and one day of prision mayor as minimum to 14 years, 8 months and one day of reclusion temporal as maximum and to indemnify the heirs of Lucio Lebeco, Sr. in the amount of P6,000.00 and to pay 1/4 of the cost of suit."

Also to be noted, is that the trial court in its decision acquitted Sofio Ada, one of the accused, for the reason that it entertained reasonable doubt as to his participation in the commission of the crime.

This appeal, therefore, concerns only Tito Nale and Pedro Duarte.

On October 6, 1964, the Assistant Provincial Fiscal of Samar filed an information for murder against Jose Balictar alias Bodo, Sofio Ada, Tito Nale alias Bandot and Pedro Duarte, which reads as follows:

"That on or about the 6th day of May, 1964, at about 3:00 o'clock in the afternoon, in barrio Bañgon, municipality of Gamay, province of Samar, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating together and mutually helping one another, with intent to kill, with evident premeditation and treachery and taking advantage of superior strength, did then and there wilfully, unlawfully and feloniously attack, assault and stab Lucio Lebeco with bolos, which the said accused had conveniently provided themselves for the purpose, thereby inflicting upon the person of Lucio Lebeco fatal wounds on the different parts of his body, which wounds directly caused the instantaneous death of the latter.

That in the commission of the crime the aggravating circumstance of quasi-recidivism was present with regard to accused Tito Nale, he having been convicted in a final judgment rendered by this Hon. Court on July 2, 1958, in Crim. Case No. 2116 for Homicide, sentencing him to an indeterminate penalty ranging from 6 years, and 1 day of prision mayor as minimum to 14 years, 6 mons. and 1 day of reclusion temporal as maximum and

to indemnify the heirs of the victim in the amount of P3,000.00 and to pay the cost."

It appears that in the morning of May 6, 1964, Lucio Lebeco, Sr., his wife, Felisa Melindo and their sons, Lucio Lebeco, Jr. and Romy or "Etik," residents of Sitio Tigbauan, went to Barrio Bañgon, Gamay, Samar, in order to sell 31-1/2 kilos of abaca.

After selling the abaca to Bocoy Alvario, at about 3:00 o'clock in the afternoon of the same day, Lebeco, Sr. and Lucio, Jr. went out for a stroll around the barrio leaving Felisa Melindo and Romy (Etik) at Alvario's place. On their way, father and son passed by the house of Pantaleon Rebay, where Tito Nale and Pedro Duarte together with Sofio Ada and Jose Balictar alias Bodo were drinking Tian Po Tong, a Chinese wine. Nale invited the Lebecos to join the group but because Lebeco, Sr. did not drink Tian Po Tong and preferred tuba instead, the group including the Lebecos proceeded to the house of Maria Laodeño, where tuba was sold. In the course of the drinking spree, Lebeco, Sr. instructed his son to get carabao meat from the house of Bocoy Alvario for their "somsoman." After Lucio, Jr. returned with the meat, Balictar sliced it with his knife called "mais-mais." Moments later, Nale got the French cap of Lebeco, Sr. and exchanged it with his own "buri" hat.

Appellant Duarte, who came all the way from Barrio Malindong, for the purpose of helping make a coffin for a dead friend at Bañgon, asked to be excused from the group after drinking a glass of tuba, while Lebeco, Sr., his son and Sofio Ada went to the former's tailor to get a pair of trousers. Nale and Balictar were left behind and continued to drink.

Preparatory to their going home, Lebeco, Sr. squatted on the street to wait for Nale, who had his French cap. Not long after, Nale and Balictar arrived and approached Lebeco, Sr., who then asked for his cap. Nale pretended to hand over the cap but jestingly, each time Lebeco, Sr. reached for it, Nale would withdraw the same. This was repeated for at least three times. Balictar enjoying the game teased Lebeco, Sr. by saying, "You are a weakling. You cannot even get your cap from Tito." This prompted Lebeco Sr. to throw Nale's buri hat on the cement floor and in a challenging manner said, "This will be the time that the 'tough guys' of Lomoy and Bañgon will meet." (Lebeco, Sr. and Balictar were known to be "tough guys" of Lomoy and Bañgon, respectively. In fact, in a Petition for Reconsideration of the death sentence imposed on Tito Nale, the prosecuting fiscal said: "It had come to the knowledge of the prosecution also that the victim Lucio Lebeco, Sr. has a string of criminal cases ranging from Physical Injuries, Frustrated Murder to Homicide as well as Illegal Possession of Firearm. In Criminal Case No. 402 filed October 23, 1950, the case was returned to the Municipal Court of Gamay on December 26, 1951. In Criminal Case No. 448 for Homicide filed March 12, 1951, he was convicted on July 31, 1951. In Criminal Case No. 2322 for Frustrated Murder filed on March 17, 1958, he was convicted on May 13, 1958. Criminal Case No. 2554 for Frustrated Murder and Criminal Case No. 2555 for Illegal Possession of firearm filed on June 22, 1959, were dismissed on July 13, 1964, on motion of the prosecution because then the accused Lucio Lebeco, Sr., was already dead having met his death on May 6, 1964 - the subject of the present Murder charge. These cases proved the vicious character of the victim.")

After the challenge and more hot exchange of words, Balictar suddenly snatched the bolo of Lebeco, Sr. from the latter's waist, and thrust it into the abdomen of Lebeco, Sr., wounding him. Lebeco, Sr., already weaponless, asked for his son's bolo but the latter did not give it. Lebeco, Sr. then picked up a piece of wood to parry Balictar's attack. Balictar, however, made another thrust at the abdomen of Lebeco, Sr., wounding him for the second time.

At this juncture Felisa Melindo and her other son Romy rushed to the scene. Felisa, however, ran away and cried for help after seeing her husband wounded but nobody gave succor for the residents of the nearby houses shut their doors and windows.

Meanwhile, Lebeco, Sr. fled to the river bank and it is at this point where the prosecution's evidence and that of

the defense differ.

The prosecution claims that Pedro Duarte, Tito Nale, Jose Balictar and Sofio Ada pursued Lebeco, Sr. and when he was overtaken, he was stabbed immediately by appellants Pedro Duarte and Tito Nale.

The appellants' version is that when Nale saw Balictar stab Lebeco, Sr. for the first time, he (Nale) tried to stop Balictar. Meanwhile Lebeco, Jr. slashed Balictar with his bolo but missed and instead slightly wounded Nale. Meantime, Duarte arrived trying to pacify Nale saying, "Do not stay there because you might be involved."

Misunderstanding the intentions of Duarte, Lebeco, Jr. slashed Duarte with his bolo slightly wounding him on the forehead. In self-defense, Duarte drew his scythe and swung it at Lebeco, Jr., wounding him on the arm. The boy then ran away because of the wound inflicted upon him.

The defense maintains that it was only Balictar who pursued Lebeco, Sr. to the river bank and was the lone assailant in inflicting the last 3 wounds. As for Nale, it is claimed that he arrived too late for he had to attend to Duarte who was then nursing the wound inflicted by Lebeco, Jr.

Much later, Felisa Melindo, seeing her husband mortally wounded and his pursuers no longer around, approached him and bandaged his abdomen with his shirt. She then brought her husband to a house near the river bank and summoned Martin Capoquian, the barrio captain of Bañgon to take Lebeco, Sr.'s statement which he did. Shortly thereafter, Lebeco, Sr. died.

The ante-mortem statement (Exhibits "B", original and "B-1", translation) was delivered to the Chief of Police of Gamay.

The Chief of Police and the Sanitary Inspector of Gamay went to see the victim. The Sanitary Inspector upon examination of the victim's cadaver found 5 stab wounds on the body detailed as follows:

"No. 1. - Stab wound at the right side of the back behind the shoulder, 1 inch in length, 1/4 inch wide and about 5 inches deep.

No. 2. - Stab wound near wound No. 1; 4 & 1/2 inches in length, 1 inch wide and about 5 inches deep.

No. 3. - Stab wound at the center of the back, 1 & 1/2 inches in length, 1 inch wide and about 5 inches deep.

No. 4. - Stab wound on the left side of the abdomen, 3 inches in length, 1 & 1/2 inches wide and about 5 inches deep.

No. 5. - Stab wound near wound nos. 4, 5 inches in length, 1 & 1/2 inches wide and about 7 inches deep.

Cause of death: 5 fatal wounds, internal and external hemorrhage." (Exhibit "A")

Appellants' counsel assails the finding of the trial court, "that from the description of the wounds, more than two weapons were used," thereby implicating Nale and Duarte because they were allegedly armed with a bolo and a scythe at the time of the offense. It is asserted that such a finding runs contrary to the testimony of the Sanitary Inspector who examined the cadaver of the victim that: "there were two (2) kinds of weapons, one is big and the other is small." Counsel argues further, that the size of the wound is not determinative of the size of the weapons used for the size of a wound depends upon several and varied factors, among which are: the strength of the blow; the position of the blade upon entry and withdrawal; the movement of the blade or body of victim upon withdrawal.

The Solicitor General in refuting the above argument, states:

"Appellants Pedro Duarte and Tito Nale were armed with a bolo and a scythe, respectively, when they

approached the victim squatting in the street (pp. 42 and 43 Tsn. id.). After appellants had caught up with Lebeco, Sr., who ran towards the river after having been stabbed by Balictar, they then took turns in stabbing him (Lebeco, Sr.) (p. 53 tsn, id) until he fell mortally wounded (p. 30 tsn, id). With these stubborn facts bold and clear on the records, the conclusion is in-escapable that more than two weapons were used by the victim's assailants."

An examination of the records discloses that the prosecution relied heavily on the testimony of Lucio Lebeco, Jr. to prove the participation of Duarte and Nale thus:

"x x x

Q: To what place was your father pursued?

A: To the river.

Q: Was your father overtaken?

A: Yes, sir.

Q: And what transpired when your father was overtaken by these 4 persons?

A: Tito and Pedro stabbed him immediately.

x x x"

(p. 53, tsn, April 4, 1968)

It is to be noted, however, that the ante-mortem statement does not mention Pedro Duarte as one of the assailants. The English translation of the ante-mortem statement reads:

"DECLARATION OF LUCIO LEBICO TAKEN BY THE VICE CAPTAIN OF BARRIO BAÑGON, GAMAY, SAMAR ON MAY 6, 1964.

P. LUCIO LEBICO

This 1964 6, This May 6, 1964 at Bangon, Wednesday, I sold abaca weighing 31 1/2 kilos. After I was paid I was called by Banday Nale. I did not go because I was called for a drinking in the house of Guillermo Rebay Sofio brought three bottles of Soktong and Sofio was forcing me to drink then I was invited by Bodo to drink tuba then Bandoy Nale arrived and I left. Then Sofio went with me to get my sawed clothes and when I returned home Bandoy Nale got my hat saying I will be the one to wear and at that time I asked it from him. It was Bodo, Bandoy Nale and Sofio who stabbed. When I was going home they ran after me to stab.

(THUMBMARKED)

TRANSLATED BY

(SGD) FRANCISCO V. GAMPIS

Interpreter"

(p. 236, Record)

Relating the failure to mention Duarte in this ante-mortem statements to the claims of the appellants, that Duarte was unable to pursue the victim to the river bank because he was then nursing the wound inflicted upon him by Lebeco, Jr. there is every reason to doubt Duarte's participation in inflicting any of the stab wounds. The evidence, therefore, strongly suggests that appellant Duarte was not at the river bank and could not have inflicted any of the wounds on the victim, contrary to the contention of the Solicitor General.

With respect to Tito Nale, however, aside from the testimony of Lebeco, Jr., that he saw Nale and Duarte stab his father, the ante-mortem statement explicitly mentions his name as one of the assailants. While Nale disclaims participation, he admitted having gone to the river bank for the purpose of stopping Balictar from further inflicting injuries upon the person of Lebeco, Sr. The presence of Nale at the river bank was therefore, duly established.

Collating the antecedent facts that: (1) Nale's acts precipitated the unfortunate incident; (2) Nale was wounded by Lebeco, Jr. when the latter missed his aim at Balictar; and (3) Lebeco, Jr. wounded Nale's father-in-law, Pedro Duarte, it is exceedingly hard to believe that Nale's purpose in going to the river bank was to stop Balictar from further attacking Lebeco, Sr. The more natural reaction for Nale was for him to join Balictar in killing Lebeco, Sr.

The question as to the number of weapons used is explained in the light of the above findings.

Appellants' counsel in attempting to discredit the probative value of the ante-mortem statement contends that the same could not be a dying declaration because it has not been shown that the victim was conscious of an impending death at the time of its execution. It is said that the victim was sitting at the time he made the statement; that he was even able to scold the Barrio Chief of Police so that the latter had to desist from taking his statement; that the wife of the victim left him to fetch their children; that the victim was under the influence of alcohol; and that the victim was a "tough guy." The defense claims that the appreciation of the ante-mortem statement by the trial court was tinged with vacillation because while it relied on the statement to convict Tito Nale, the court disregarded it to acquit Sofio Ada, and again disregarded it to prove the innocence of Duarte.

The People have countered by citing the testimony of Capoquian that the declarant was moving uneasily and that after making the statement, the victim died.

We disagree with appellants. The fact that the declarant (victim) was "moving uneasily" ("restless" is more appropriate) and immediately expired after making the statement more than satisfies the requisite element as to the victim's consciousness of an impending death. Accordingly, we find the trial court did not err in holding the ante-mortem statement of the victim as a dying declaration.

Appellants seek to impugn the credibility of the prosecution witnesses Felisa Melindo, widow of the victim and Lucio Lebeco, Jr., son of the deceased citing no less than six (6) instances wherein their testimonies were inconsistent or at least contradictory.

Apart from the general rule that the question of credibility is for the trial court to determine, (People v. Espejo, et al., L-27708, Dec. 19, 1970, 36 SCRA 401) the Court finds the alleged inconsistencies and contradictions so minor and inconsequential that they cannot negate their evidentiary value.

The information alleges that the offense was attended with the aggravating circumstances of evident premeditation, treachery and abuse of superior strength. However, we see no reason for their appreciation against the appellants considering the factual backdrop of the fight that: earlier in the afternoon before the fray, the appellants, the two other accused, the victim and his son had been in a drinking spree. The evidence on record fails to show any indication whatsoever that there was a preconceived plan among the accused to kill the victim. Rather the killing was an impulse of the moment. It came about because of the jesting amongst Lebeco, Sr., Nale and Balictar. For these reasons there could have been no evident premeditation nor treachery. (People v. Gonzales, 76 Phil. [1946]; People v. Sagayno, L-15961-62, Oct. 31, 1963, 9 SCRA 360)

The trial court therefore, correctly ruled out the presence of the aggravating circumstances of evident premeditation and treachery in its decision, thus –

"At the inception of the offense, Jose Balictar made a sudden move by grabbing the bolo of the victim which was used to stab the latter. While the said act of Balictar was immediate and fast the same does not appear to

have been deliberately adapted in order to insure the killing of the deceased because the said deceased himself had created an atmosphere in which his adversary was incited and emboldened by what he did because of the throwing of the buri hat on the cement after his own cap was not delivered to him by Nale. The throwing of the buri hat on the cement was a dare or challenge thrown against the accused and the deceased must have anticipated what would come next by his challenge, so that, the act of Balictar would not be treachery. When the accused Balictar had already stabbed the deceased and the latter had attempted to escape to the river but the accused Tito Nale, Pedro Duarte and Balictar pursued him with their weapons and attacked him when he was already weaponless and defenseless, the accused committed the offense with abuse of superior strength which qualified the crime to that of murder."

The appellants claim however that the trial court erred in appreciating the presence of abuse of superior strength in the commission of the crime as to qualify the killing to murder.

In support of their claim, appellants' counsel argues that the odds at the inception of the fight as established by the evidence on record shows that: Lebeco, Sr. was originally armed with a bolo, (after his bolo was grabbed, he was still able to pick up a piece of wood) Lebeco, Jr. was armed with a bolo and "Etik", a 10-year old boy was also armed with a bolo; while on the part of the assailants, Balictar was armed with a bolo and a knife, Tito Nale (according to the defense was unarmed but the prosecution attempted to establish that he had either a bolo or a scythe), Pedro Duarte was armed with a scythe and Sofio Ada was weaponless. Counsel concludes that from the above presentation, the disparity in the number of the two contending groups was not so great so as to warrant the finding of abuse of superior strength and to qualify the crime to murder.

We agree. For as stated in *People v. Elizaga*, 86 Phil. 364, 383, (1950), "superiority in number does not necessarily mean superiority in strength. It is necessary to prove, besides, that the attackers 'cooperated in such a way as to secure advantage from superiority of strength.' (U.S. vs. Trumata, 49 Phil. 192; Albert's Commentaries on the Revised Penal Code, New Edition, p. 126.)" So also was it held in *People vs. Diokno, et al.*, 63 Phil. 601, 607 (1936), quoting *U.S. vs. Devela*, 3 Phil. 625, 630 (1904) that "the mere fact that the number of the assailants is superior to that of those attacked by them is not sufficient to constitute the aggravating circumstance of abuse of superiority."

In the light of the foregoing, the crime committed is homicide only which is punishable by reclusion temporal.

WHEREFORE, we hereby acquit appellant Pedro Duarte, because his guilt has not been established beyond reasonable doubt.

With respect to appellant Tito Nale, the record shows that he surrendered voluntarily to the authorities. However, this mitigating circumstance cannot off-set the qualifying aggravating circumstance of quasi-recidivism (he was previously convicted of homicide for which he was on parole surveillance at the time of the commission of the crime) so that the penalty has to be applied in its maximum period (*People v. Perete*, No. L-15515, April 29, 1961, 1 SCRA 1290). Modifying the judgment of the lower court and applying the Indeterminate Sentence Law, Tito Nale is hereby sentenced to an indeterminate imprisonment of 12 years of prision mayor as minimum to 18 years of reclusion temporal as maximum, to indemnify the heirs of Lucio Lebeco, Sr. in the amount of P12,000.00, and to pay 1/4 of the cost.

SO ORDERED.

Fernando, C.J., Teehankee, Barredo, Makasiar, Antonio, Aquino, Concepcion, Jr., Fernandez, Guerrero, De Castro, and Melencio-Herrera, JJ., concur.

Santos, J., no part.

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