

## **PEOPLE OF THE PHILIPPINES, PLAINTIFF- APPELLEE, VS. ALBERTO VIADO, JR. Y REYES AND ERNESTO VIADO Y REYES, ACCUSED-APPELLANT.**

Ponente: REYES, JR., J.C., J.

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### **REYES, JR., J.C., J.:**

Brothers Alberto Viado, Jr. y Reyes (Alberto) and Ernesto Viado y Reyes (Ernesto) are before the Court seeking the reversal of the Decision dated September 12, 2006 of the Regional Trial Court (RTC), Branch 122 of Caloocan City, in Crim. Case No. C-56115 (1999) which found them guilty of Frustrated Homicide for which they were sentenced to suffer six (6) months and one (1) day of prision correccional as minimum, to six (6) years and one (1) day of prision mayor as maximum, plus damages.

The Information filed on March 23, 1999 charged Alberto and Ernesto of Frustrated Homicide in this wise:

“That on or about the 21st day of March, 1999 in Caloocan City, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, conspiring together and mutually helping with one another, without any justifiable cause, with deliberate intent to kill, did then and there wilfully, unlawfully and feloniously attack, hit with a bottle and stab with a bladed weapon on the back portion of his head one Narciso Tapia y Castro, thus, performing all the acts of the commission of the crime of Homicide, but nevertheless did not produce it by reason or causes independent of the will of the herein accused, that is, due to the timely, able and efficient medical attendance rendered to the victim at the MCU Hospital, this city, which prevented the latter's death.

Contrary to law.” (Records, p. 1).

At their arraignment on May 10, 1999, the two pleaded “not guilty”. (Records, p. 55).

Trial ensued and the prosecution presented the testimonies of: the victim Narciso Tapia (Narciso), his aunt Crisanta Avanzado (Crisanta), SPO3 Eliseo Gargaritano (SPO3 Gargaritano) and Dr. Michael E. Matias (Dr. Matias). The prosecution also presented: receipts covering Narciso's medical expenses; Narciso's statements at the hospital; pictures taken inside the operating room as well as at the police detachment, and; medical certificate and other records of the victim. (Records, pp. 161-166).

According to Narciso, he attended a birthday party of a neighbor at an alley near their house, around 7 p.m. of March 21, 1999. At about 11 p.m., he saw some of the visitors at a next table, barangay councilors which included herein appellant-Alberto, mauling a man. When the man ran away, Narciso and his companions stood up and were about to leave the party. When he was about three steps from the place, Ernesto suddenly jumped on his back and said “are you going to help”? Ernesto then repeatedly boxed the right side of his face even when Narciso already fell to his knees. Ernesto took a bottle and hit Narciso's head several times. Then he stabbed the left side of Narciso's neck with the use of the bottle causing blood to ooze from Narciso's neck. Narciso's aunt, Elena Tapia, asked what they were doing to him which prompted Ernesto to stand up and go inside the celebrant's house. Narciso also stood up and went to his house where his wife gave him a towel for his wound. While waiting for his

wife, who left to get money they will use to bring him to the hospital, Alberto and Ernesto arrived. Ernesto said, "Putang ina kuya patayin na natin yan si Narciso." Alberto, who was then in possession of a 2 ½ feet-long samurai, responded "Mga putang ina ninyo kayo ang mga salot sa Mascardo." Alberto thereafter hit Narciso twice with a samurai on the side of his neck while Ernesto blocked Narciso's path. Narciso struggled to enter his house and when he got there, he passed out, regaining consciousness only at the hospital. (TSN, February 21, 2000, pp. 4-11).

Crisanta, Narciso's aunt, testified on the medical and legal expenses of the family. (TSN, August 17, 1999, pp. 2-7, September 14, 1999, p. 19, Exhs. "A" to "A-126"). SPO3 Gargaritano, meanwhile testified on the conduct of investigation, the statements taken from Narciso at the hospital right, as well as on the photos taken at the hospital and the police detachment. (TSN, September 14, 1999, pp. 3-9; October 18, 1999, p. 2).

Finally, Dr. Matias, surgeon at the MCU Hospital, testified that were it not for timely medical intervention, Narciso would have died. At the time Narciso was brought to the hospital, his blood pressure was 70/40. Blood was oozing profusely from a transected (completely severed) major blood vessel, the sternocleidomastoid vein connected to the superior vena cava of the heart, as well as from the partial transection of the other veins. Dr. Matias also explained that Narciso's injuries affected the functions of his eyes as well as his ability to rotate his neck. (TSN, October 9, 2000, pp. 25-33).

Specifically, Narciso suffered:

"Multiple hacking wound[s]:

Incised wound, 10 cm. submandibular area (L) with complete transection of proximal sternocleidomastoid m. (L), external jugular vein, stylohyoid m. submandibular gh. (L) partial transection of facia art. & vein.

Lacerated wound, 6 cm. stellate (L) occipital area incised wound 2 cm. pinna (L) ear." (Medical Certificate, Exh. "F").

For the defense, both Alberto and Ernesto took the witness stand. Alberto's partial direct testimony however was stricken off the record, as he did not continue with his testimony despite the opportunity given him. (See Records, pp. 237, 242, Rollo, p. 27).

As for Ernesto, he averred that Narciso's cousin, Edilberto, was mad at one of the visitors, a certain Raul, whom Edilberto tried to box but in the process hit Alberto. A melee ensued ("nagkagulo na"). Narciso approached Alberto and Ernesto tried to pacify him (Narciso). Ernesto pulled Narciso's arms until Narciso fell to the ground. A certain Dante pacified them and brought Ernesto inside the gate. When Narciso stood up, he went to the gate and challenged Ernesto to a fistfight. Ernesto denied having anything to do with the charges against him and claimed that that he does not know any reason why Narciso would accuse him of frustrated homicide. (TSN, April 19, 2005, pp. 6-12).

On September 12, 2006, the RTC rendered the herein assailed Decision:

"WHEREFORE, premises considered, accused ERNESTO VIADO and ALBERTO VIADO JR., are found GUILTY beyond reasonable doubt of the crime charged, and are hereby sentenced to suffer the penalty of Six (6) months and One (1) day of Prison Correccional, as minimum, to Six (6) years and One (1) day of Prison Mayor as maximum, for each of them.

Further, both the said accused are hereby ordered to pay jointly and severally the private complainant the amount of Seventy Five thousand Fifty Eight Pesos and Sixty Four Centavos, (P75,058.64) as civil liability, representing the medical expenses incurred by the victim and the amount of P50,000.00 as attorneys fees.

SO ORDERED.” (Rollo, pp. 30-31).

The trial court held that the prosecution was able to establish that both Alberto and Ernesto performed all the acts of commission of the crime of homicide but nevertheless did not produce the intended outcome for reasons independent of their will, that is, due to the timely medical intervention that was administered to the victim. (Rollo, p. 28).

Appellants Alberto and Ernesto are now before the Court claiming that:

## I

THE TRIAL COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANTS GUILTY OF THE CRIME CHARGED NOTWITHSTANDING THE PROSECUTION'S FAILURE TO PROVE THEIR GUILT BEYOND REASONABLE DOUBT.

## II

THE TRIAL COURT GRAVELY ERRED IN HOLDING ACCUSED-APPELLANTS LIABLE FOR ATTORNEY'S FEES. (Rollo, p. 84).

Appellants aver that the prosecution was not able to establish with moral certainty that they intended to kill Narciso as the altercation started between Edilberto and Raul. Narciso's wounds was supposedly caused by a broken bottle which supports their claim of lack of intent to kill. Appellants also assert that the trial court erred in giving weight to Narciso's testimony who tended to distort facts in his favor. No witness corroborated his claim despite the fact that there were other persons in the scene. The prosecution likewise failed to prove the existence of conspiracy, while the trial court erred in awarding attorney's fees without discussing the propriety thereof. (Rollo, pp. 92-96).

The People, through the Office of the Solicitor General meanwhile maintains that the prosecution has proven appellants' guilt beyond reasonable doubt. (Rollo, p. 125).

The Court DENIES the appeal.

The elements of Frustrated Homicide are:

- (1) intention on the part of the accused to kill his victim, as manifested by his use of a deadly weapon in his assault;
- (2) fatal or mortal wound/s sustained by the victim who did not die because of timely medical assistance; and
- (3) absence of any of the qualifying circumstance for murder under Article 248 of the Revised Penal Code. (Josue v. People, December 10, 2012).

Here, the appellants allege that the prosecution failed to prove that they intended to kill the victim.

Evidence to prove intent to kill, in crimes against persons, may consist of the means used by the malefactors; the conduct of said malefactors before, at the time of, or immediately after the killing; and the nature, location and number of wounds sustained by the victim. (Escamilla v. People, 692 SCRA 203, 212 [2013]).

Narciso alleged that he heard Ernesto say “Putang ina kuya patayin na natin yan si Narciso” while Alberto uttered “Mga putang ina ninyo kayo ang mga salot sa Mascardo” while holding a 2 ½ feet samurai (TSN, February 21, 2000, pp. 7-8).

As narrated by Narciso, Ernesto attacked him:

“A- After hitting [me] with a bottle which was [broken], he  
[Ernesto] thrust the broken bottle on my neck.

Q- Which portion of your body did he thrust the broken bottle?

A - Witness pointing to the left side of his neck.

Q- What happened to you [when] Ernesto Viado thrust the broken bottle on the left side of your neck?

A- When I was stab with that broken bottle on my left side neck, the blood suddenly ooze from that wounded part of my neck, and I heard Ate Lina asked, what did they do to my neck.

ATTY. NARA:

I would like to make on record that the left side of the neck the witness having still a scar.

7 inches and there is a two criss-cross scar around 1 ½ inch and 1 inch.” ( TSN, November 15, 1999, pp. 7-8).

As for Alberto, Narciso testified that:

“Q- ...What was your position when the accused Alberto Viado 1st hack you?

A- I was about to ran and when I went around he hack me, sir, with the said bladed weapon on my head.” (sic) (TSN, April 17, 2000, pp. 17-18).

As reflected in the medical records and as testified to by the doctor, Narciso's wounds were so serious that he would have died were it not for the timely medical intervention applied on him. (TSN, Dr. Michael E. Matias, October 9, 2000, p. 26).

These circumstances---the appellants' demeanor and utterances before and during the attack, the weapons used, the location, number and gravity of the wounds---all belie appellants' claim that they had no intent to kill. Again, intent to kill is often inferred from the means the offender used and the nature, location and number of wounds inflicted on the victim. (Colinares v. People, 662 SCRA 266, 275-276 [2011]).

While appellants assail the trial court's assessment of Narciso's credibility, We find nothing in the records that would justify a reversal thereof.

Findings of fact of the trial court, its calibration of the testimonies of witnesses and its assessment of the probative weight, as well as its conclusions based on said findings are accorded high respect if not conclusive effect.

(People v. Lanuza, 656 SCRA 293, 304 [2011]). This is because trial courts have the distinct advantage of being able to observe the deportment of witnesses during trial. Their findings will generally not be disturbed on appeal in the absence of clear showing that they overlooked, misunderstood or misapplied some facts or circumstances of weight and substance that could have altered the conviction of the accused. (Zarate v. RTC, 591 SCRA 510, 520-521[2009])

The conviction of an accused may be had on the basis of a credible and positive testimony of a single witness (Zarate v. RTC, supra, p. 520). Here, the witness is not any ordinary witness, but the victim himself who survived the attack despite the serious wounds inflicted on him.

Narciso knew the appellants since they were young as they were neighbors in Bagong Barrio. (TSN, November 15, 1999, pp. 3-4). He could not have mistaken therefore the identities of the two. Positive identification, where categorical and consistent and not attended by any showing of ill motive, prevails over alibi and denial. (Escamilla v. People, supra, p. 211; Zarate v. RTC, supra, p. 520).

Ernesto himself admitted in open court that he does not know of any reason why Narciso would accuse him of such crime. He also admitted being at the scene and at the center of the melee when the attack on Narciso happened. His only defense is his denial that he inflicted wounds on the victim.(TSN, April 19, 2005, pp. 6-12).

Denial and alibi, if not substantiated by clear and convincing evidence, are negative and self-serving undeserving weight in law. The defense of alibi and denial cannot prosper in the light of the positive identification of the victim that the appellants were the ones who stabbed him. (See Zarate v. RTC, supra, p. 520). For alibi to prosper, the accused must establish by clear and convincing evidence that he was in another place at the time of the offense and that it was physically impossible for him to be at the scene of the crime. (Escamilla v. People, supra, p. 213).

Such is not the case here, as Ernesto admitted that he and his brother were at the scene, and that he even held Narciso's arm until the latter fell to the ground (TSN, April 19, 2005, pp. 6-12).

The prosecution, contrary to the appellants asseveration, also sufficiently established the presence of conspiracy.

Conspiracy exists when two or more persons come to an agreement concerning a felony and decide to commit it. It may be inferred from the acts of the accused, before, during or after the commission of the offense which, when taken together, would be enough to reveal a community of criminal design, as proof of conspiracy is frequently made by evidence of a chain of circumstances. (People v. Basao, 683 SCRA 529, 546 [2012]). Where the acts of the accused collectively and individually demonstrate the existence of a common design towards the accomplishment of the same unlawful purpose, conspiracy is evident and all the perpetrators of the offense are liable as principals. (People v. Sumalinog, 422 SCRA 55, 70 [2004]).

In this case, conspiracy may be inferred from the fact that when the victim was trying to escape the attack of Alberto, Ernesto was blocking his way, depriving him of a way out thereby ensuring the accomplishment of their intent to inflict mortal wounds on him. Based on Narciso's narration and consistent with the wounds he sustained, the brothers aided each other in inflicting fatal wounds on him. (TSN, Narciso Tapia, April 17, 2000, pp. 17-18).

As for the attorney's fees, the trial court correctly awarded the same as records show that the Narciso's family had to secure the services of a lawyer to prosecute the instant case. (See Mahawan v. People, 574 SCRA 737, 757 [2008]).

Consistent with recent jurisprudence, the victim is likewise entitled to an award of moral damages in the amount of P25,000.00. (People v. Lanuza, 656 SCRA 293, 306 [2011]).

As for the length of imprisonment meanwhile, the same should be modified in view that Article 249 of the

Revised Penal Code (RPC) provides that the penalty for the crime of consummated homicide is reclusion temporal, or twelve (12) years and one (1) day to twenty (20) years. Under Article 50 of the RPC, the penalty for a frustrated crime is one degree lower than that prescribed by law. Hence, frustrated homicide is punishable by prision mayor, or six (6) years and one (1) day to twelve (12) years. Absent any mitigating or aggravating circumstances, such as in the case at bar, the maximum of the indeterminate penalty should be taken from the medium period of prision mayor which is eight (8) years and one (1) day to ten (10) years. The minimum meanwhile, should be taken from prision correccional, which ranges from six (6) months and one (1) day to six (6) years. (*Abella v. People*, G.R. No. 198400, October 7, 2013; *Josue v. People*, 687 SCRA 675, 680 [2012]).

WHEREFORE, the Court finds NO MERIT in the appeal. The Decision dated September 12, 2006 of the Regional Trial Court, Branch 122 of Caloocan City, in Crim. Case No. C-56115 (1999) is hereby AFFIRMED with the MODIFICATION in that Alberto Viado, Jr. y Reyes and Ernesto Viado y Reyes are sentenced to suffer the penalty of Six (6) months and One (1) day of Prision Correccional, as minimum, to Eight (8) years and One (1) day of Prision Mayor, as maximum. In addition to civil liability and attorney's fees, the accused-appellants Alberto Viado, Jr. y Reyes and Ernesto Viado y Reyes are also ORDERED to jointly and severally pay private complainant Narciso Tapia y Castro the amount of P25,000.00 as moral damages.

**SO ORDERED.**

Lopez, M.V., and Inting, S.B., JJ., concur.

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