

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
TIA FONG ALIAS AH SAM, DEFENDANT AND APPELLANT.***G.R. No. L-7615. March 14, 1956*

Ponente: LABRADOR, J.

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This is an appeal by Tia Fong alias Ah Sam against a judgment of the Court of First Instance of Misamis Oriental finding the said Ah Sam, Maximo Alcantar, Florencio Bahala and Rufino Palarca guilty of homicide and sentencing each of them to suffer the indeterminate penalty of from eight (8) years and one (1) day of prison mayor to fourteen (14) years and eight (8) months of reclusion temporal, to indemnify the heirs of the deceased Lian Kaw in the amount of P3,000 and to pay the costs. Only the said Ah Sam has appealed.

It appears that early in the morning of February 21, 1950 the Municipal Mayor of Mambaiiao, Misamis Oriental, was informed that a dead body was lying in the coconut plantation of one by the name of Juan Neri in said municipality. The Mayor and some of his policemen and the President of the Sanitary Division went to the place indicated, and there they found the dead body of a Chinaman named Lian Kao, 28 years of age, son of Chinaman Wong Kiat. The President of the Sanitary Division found the body in a state of rigidity and calculated that death must have occurred from 9 to 12 hours before the discovery. He found an incised wound one inch in length on the right brow, a depressed wound ½ inch in depth at the vertex of the head, ecchymosis with slight tumefaction of the head and the upper part of the neck above a line which appeared to be the line of strangulation. The body was found with a belt tied around the neck, and the president of the sanitary division was of the opinion that death was caused by suffocation or by strangulation after the victim had become unconscious.

The authors of the crime could not be immediately determined until a lieutenant of the Constabulary by the name of Alberto N. Chavez was detailed to conduct the investigation. He began making inquiries in and about the place. He suspected Florencio Bahala, who was living in the neighborhood, and subjected him to a rigid questioning. He noticed that his statements did not agree with those of his common-law wife. After some time Chavez succeeded in convincing him, through the help of the wife, to own his part in the crime. Bahala made a confession, on March 9, 1950. The confession of Maximo Alcantar and Rufino Palarca were also secured. So an information was filed on March 9, 1950. This was amended on March 10, 1950. The persons accused were the three above-mentioned who has confessed, and Heracleo Limbaco and the appellant Tia Fong alias Ah Sam. Both Limbaco and Ah Sam denied complicity in the crime. At the trial, the other defendants repudiated the confessions they had made. This notwithstanding, the court found four of them guilty. Heracleo Limbaco was acquitted of the charge. As only Ah Sam has appealed the decision, only such facts as are relevant to the charge against him, "will be considered.

Sometime before the incident, Ah Sam was in partnership with Wong Kiat and other Chinamen. Ah Sam separated from Wong Kiat and the others and established a store of his own. A compadre of his by the name of Hermogenes Tago testified that at eight o'clock in the evening of February 20, 1950, after he had closed the store and while he was outside, he saw Tia Fong pass by and had occasion to converse with the latter. Ah Sara complained that his business was flying because Wong Kiat, the father of the deceased, and his companions

would not sell him bread to sell in his store. Ah Sam after a while said it is better that Wong Kiat and Lian Kaw be whipped.

The evidence mainly relied upon for the conviction of Ah Sam is his silent participation in the reenactment of the crime by his co-accused Florncio Bahala, Maximo Alcantar and Rufmo Palavca. With the confessions of these three accused on hand, Lt. Chavez and a subordinate of his, Sgt. Fernandez, asked the accused to reenact the crime and photographs of the acts reenacted were caused to be taken. In all the most important incidents and details of the commission of the crime. Ah Sam took part, although silently, under the direction of the Constabulary and his three co-accused.

In Exhibit "Q" Tia Fong reenacted his position while wailing for his co-accused. In Exhibit "II" he reenacted his own position when he and his co-accused were talking together planning the commission of the crime. In Exhibit "R" Ah Sam also reenacted his own position or participation while he and his co-accused were waiting for Erak (Heracleo Limbaco), who had gone out to look for the intended victim and present him to them. In Exhibit "K" Ah Sam also re on acted his own position in relation lo the other accused when Erak accompanied the victim and the other accused followed them—Erak and tho victim.

Exhibit "M" represents the positions of all the accused, Ah Sam included, as the victim fell unconscious after he had been assaulted. In this same exhibit, Ah Sam re-enacted the part he took in untying the belt of the' victim, In Exhibit "N" Ah Sam played his own part, shoving the method in which he strangled the victim. Exhibit "U" is the photograph of the manner in which appelant tied the belt which he took from the victim's waist .and with which the latter was strangled, while Exhibit "W" reenacts the distribution of the money by him to his co-accused.

The witnesses for the prosecution especially Lt. Chavez, testified that Ah Sam took part in the reenactment of the crime and without any opposition on his (Ah Sam's) part. He (Ah Sam) neither opposed nor denied to take part. On one occasion Ah Sam himself, according to Lt. Chavez, corrected his co-accused as they were reenacting their respective positions as Exhibit "K" was being taken, as witness the following testimony—

" * * *

A. Tia Fong did not object neither did he show signs of complaint when his co-accused indicated their relative positions in the picture.

Q. In what pictures or scenes which were photographed, was it in all occasions in which Tia Fong ever made any correction or complaint regarding their relative positions?

A. As a matter of fact, in one of those picture, Tia long after his co-accused indicated his relative position in the picture, complained to the fact that his position was not right, and consequently, he said that he was not supposed to be on the right side of the picture but on the extreme left of the road or street.

* * * "

Ah Sam testified that before the reenactment of the crime ho was told before hand to obey whatever instructions Sgt. Fernandez would give, and that he (Ah Sam) tried his best to obey said instructions According to him, Sgt. Fernandez would first read the paper (confession of his co-accused), then direct the accused to assume the positions, and lastly ordered pictures to be taken. Ah Sam further declared that he Just followed the directions given by Sgt. Fernandez because he had already been maltreated. The supposed maltreatment consisted in having been boxed in the solar plexus as a result of which he involuntarily urinated.

The trial judge held that the guilt of Ah Sam was proved by his participation in the reenactment of the crime. His counsel, on this appeal, argues that it was error for the trial court to consider said participation as an evidence against; him, because all that the appellant did during the entire period of the reenactment was to remain silent and do what he was told and directed to do. Against this contention the Solicitor General argues that the appellant

himself voluntarily took part in the reenactment and in one instance corrected the position which he was directed to take.

We have carefully reviewed the evidence, especially the testimony of the appellant on the circumstances leading to his participation in the reenactment, and we find no evidence to sustain the claim that he was forced against his will to participate therein. It is true that Ah Sam stated that he was boxed on the solar plexus, and was later brought to a toilet where he was compelled to put his face in the bowl, but these supposed instances of maltreatment relate to attempts to extract a confession from him, not to compel him to take part in the reenactment of the crime. He stated that Sgt. Fernandez had warned him to obey his orders in the reenactment otherwise he would again be subject to maltreatment, but we find nothing to corroborate the making of the supposed threat and appellant's willing conduct throughout the reenactment does not evince the supposed threat. We have searched the record in vain for any act or word of protest from appellant, either before the reenactment or during the entire period thereof, against his taking part therein. Appellant's counsel himself admits that the appellant was silent, doing what he was told to do.

But counsel for the appellant contends that as the appellant was under arrest at the time of the reenactment, his taking part therein should not be considered as evidence against him.

The principle that may govern the relevancy and admissibility of appellant's participation in the reenactment is stated in section 8 of Rule 123 of the Rules, which provides:

"Sec. 8. Admission by silence.—Any act or declaration made in the presence and "within the observation of a party who does or says nothing when the act or declaration is such as naturally to call for action or comment if not true, may be given in evidence against him."

In the case decided by us, *U. S. vs. Bay*, 27 Phil., 495, the defendant was accused before the councilman of a barrio with having criminally assaulted the offended party. The defendant kept silent as the latter explained the assault, neither admitting nor denying the imputation. At the trial he alleged that the imputation was false, but we held that if it were so, he would have instantly and indignantly denied the imputation when made before the councilman.

But in another case, we also said that if a defendant remains silent during an official investigation by a fiscal, such silence is no evidence of his guilt, as said official investigation was no occasion for denying the imputation then being made against him (*U. S. vs. De la Cruz*, 12 Phil., 87).

There are other related principles, in connection with the silence of an accused in criminal cases, namely, that his failure or refusal to testify may not be taken as evidence against him (Rule 111, section 1 [c], and that he may refuse to answer an incriminating question [Rule 123, section 79]. It has also been held that while an accused is under custody his silence may not be taken as evidence against him as he has a right to remain silent; his silence when in custody may not be used as evidence against him, otherwise his right of silence would be illusory.

"Section 1259 (d) Silence under Arrest. Some of the courts have held that the fact that one is under arrest and in the custody of an officer, when he is silent under accusation, prevents his silence or the statements themselves from being admissible against him, on the ground that under such circumstances he is not called upon to speak. Other courts have held that this circumstance alone does not render the evidence inadmissible, and that an accusation of crime calls for reply even from a person under arrest or in the custody of an officer, -where the circumstances surrounding him indicate that he is free to answer if he chooses so to do. * * *", (16 C. J. 633.)

"Sec. 574. Accused under Arrest or in custody.—The authorities are divided as to the effect on the admissibility of an incriminating statement made in the presence, of an accused, and not denied by him, of the fact that lie

was Tinder arrest or in custody under a criminal charge at the time the statement was made. According to some decisions, the mere fact of arrest, alone, is not sufficient to render the testimony inadmissible, but such, fact deserves consideration only as one of the circumstances under which the accusation was made, in determining whether the accused was afforded an opportunity to deny and whether he was naturally called to do so. Another view supported by many authorities is that the mere fact that an accused was under arrest is sufficient to render inadmissible the fact of the failure of the accused to deny accusatory statements made in his presence and bearing. According to this view, it is common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused, whether he, is guilty or innocent. * * * " (20 Am, Jur. 486.)

But the better rule is to consider the circumstances in each case and decide the admissibility of the silence accordingly.

"(4) Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party is at the time under arrest creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule is to allow some flexibility according to circumstances: * * * " (IV Wigmore, pp. 80-81.)

Let us now examine the facts and circumstances of the reenactment in view of the above principles.

The reenactment of the crime was not a part of a formal official investigation like one conducted by a justice of the peace or a provincial fiscal. The reenactment was a policy contrivance, designed, to test the truthfulness of the statements of the witnesses who had confessed the commission of the offense. If the appellant herein had not really taken part in the commission of the crime, his immediate reaction when he became aware that the crime was to be reenacted, should have been to protest against the implication of-the reenactment or to refuse his indicated participation therein. One of the accused, Heraeleo Limbaco, did not admit participation in the crime. Like the appellant, he did not confess yet he was not asked to participate in the reenactment. On the other hand the appellant readily took part therein. If he did own participation in the offense he should have refused, at least in the beginning, to participate in the reenactment or to follow the directions indicated. Far from doing so, he acquiesced and willingly took part in the reenactment as directed. If the appellant had the courage to refuse to own his guilt when he was boxed on the solar plexus, or when he was forced to put his face in the toilet bowl, why did he not have the courage to protest his participation in the reenactment before or while it was being conducted ?

It is to be noted that the implication of guilt in the case at bar is not derived from mere silence; it is inferred from appellant's silent acquiescence in participating in the reenactment of the crime. More than mere silence, appellant committed positive acts without protest or denial when he was free to refuse.. Had he not actually participated in the commission of the offense for which he is charged, he would have protested being made to take part in the reenactment thereof; he would have- informed the public officials at the time of the reenactment, or immediately prior thereto, that he did not actually take part in the commission of the offense. We, therefore, find that the trial court committed no error in taking into account appellant's participation in the reenactment as voluntary and in considering it as evidence against him.

The circumstances or evidence submitted against the appellant in this case are as follows: he was the only one among the accused who had a motive for causing the death of Lian Kaw; had he not actually participated in the commission of the offense he would have been able to introduced positive evidence that he was either not present or was somewhere else and, therefore, could not have taken part in the said crime; the confession of his co-accused as to the reason for the killing and as to the manner in which the offense was committed corroborates or indicates the probability of the appellant having participated therein; and his silent acquiescence in taking part in the reenactment and his voluntary and ready participation therein produce conviction as to his actual

participation in the commission of the offense. The above circumstances convince us that the appellant Ah Sam participated in the commission of the crime, inducing his co-accused to help him perpetrate it, he himself actually taking direct part therein. We find, therefore, that the trial court committed no error in finding him guilty as charged.

The Solicitor General calls attention to the fact that the crime committed is not mere homicide, but murder. The information charges murder, and the facts found show that the killing of the deceased is attended by one qualifying circumstance, that of evident premeditation. The other aggravating circumstances, possibly attending the commission of the crime cannot be imputed to the appellant herein, so the offense with which he may be convicted is that of simple murder qualified by the circumstance of evident premeditation.

The judgment appealed from is hereby modified and instead of homicide the appellant Tia Fong alias Ah Sam is found guilty of murder, without any aggravating or mitigating circumstances. The sentence imposed upon him by the trial court is therefore raised to that of reclusion perpetua. In all other respects, the sentence imposed is hereby affirmed, with costs against the appellant.

Parás, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Bautista Angelo, Reyes, J. B. L., and Endencia, JJ., concur.

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