

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ALFREDO VERGARA @ BALOGONG, JOEL BELDAD, LEVY TAN, JOVENAL TAN AND WILLY ONGO, ACCUSED, ALFREDO VERGARA, ACCUSED-APPELLANT.

G.R. No. 103313. May 05, 1993

Ponente: QUIASON, J.

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QUIASON, J.:

This is an appeal from the decision of the Regional Trial Court, Branch 15, Cebu City, finding Alfredo Vergara alias Balogong guilty beyond reasonable doubt of Murder as penalized under Article 248 of the Revised Penal Code and sentencing him to suffer the penalty of "Twenty (20) years of Reclusion Temporal as minimum to Thirty (30) years of Reclusion Perpetua as maximum, and to indemnify the heirs of the victim Dominador Ocarol in the amount of Thirty Thousand Pesos (P30,000.00), together with all accessory penalties provided for by law." (Decision, p. 7; Rollo, p. 22)

In the information filed with the trial court and docketed as Criminal Case No. CBU-6452, Alfredo Vergara alias Balogong, Joel Beldad, Levy Tan, Jovenal Tan and Willy Ongo, were charged with Murder, committed as follows:

"That on or about the 28th day of October, 1985, at about 7:00 p.m., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, conniving and confederating together and mutually helping one another, with deliberate intent to kill and with treachery and evident premeditation, did then and there suddenly and unexpectedly attack, assault and shot one Dominador dela Cerna Ocarol with a gun, hitting the latter upon (sic) vital parts of his body, thereby inflicting upon him the following physical injuries:

"GUNSHOT WOUNDS, CHEST AND UPPER LEFT EXTREMITY"

and as a consequence of these injuries Dominador dela Cerna Ocarol died few minutes later. " (Rollo, pp. 6-7)

In view of the death of three of the accused, namely Joel Beldad, Jovenal Tan and Willy Ongo, only the appellant and Levy Tan stood trial. However, Tan withdrew his plea of "not guilty" and instead pleaded "guilty" to the lesser offense of homicide and was sentenced accordingly. Thus, trial ensued only against appellant.

The prosecution's narration of facts, which was accepted by the trial court as the correct version of the incident, was summarized in the brief submitted by the Office of the Solicitor General as follows:

"Dominador dela Cerna Ocarol a resident of Spolarium St., Duljo, Cebu City, was a dealer in second-hand appliances from where he earned a living for his family. (p. 6, TSN, November 14, 1988) He also worked as a barangay tanod and became instrumental in the arrest of certain criminal elements in their locality. Among those whom he arrested were appellant and Willy Ongo. Enraged by his apprehension, appellant made a threat on the life of Dominador. (p. 14 TSN, April 18, 1989)

Determined to take revenge against Dominador, appellant, accompanied by Levy Tan and Willy Ongo, swooped down the street of Spolarium at about 7:30 of that fateful evening of October 28, 1985 in search of their target, with Jovenal Tan and Joel Beldad acting as look-outs. Upon seeing Dominador who was sitting on the bench in front of the house of a certain Villahermosa, appellant, Levy and Willy approached him, and after calling Dominador by his nickname "Doming," appellant fired four (4) shots at the latter.

Dominador, who was down on the ground, was able to stand up and run away towards the public market but he was chased by the trio who kept on firing at him, until he collapsed in front of the house of a certain Sable. The trio then quietly walked away.

Teodoro Laborte, a classmate of the assailants who witnessed the shooting while on his way to the billiard hall, was so stunned that he hurriedly went home.

After regaining his composure, Teodoro reported the matter to the police authorities and executed a sworn statement narrating how the killing of Dominador was perpetrated and identifying the persons responsible therefor. (TSN, April 18, 1989, pp. 3-14)" (Rollo pp. 63-64)

The defense presented Felipe Veloso, who testified that appellant was not at the scene of the crime. Veloso's testimony was summarized by the trial court as follows:

"That he worked in the Carreta Cemetery from October 23, 1985 to November 3, 1985; x x x that accused Alfredo Vergara is his co-employee in Carreta Cemetery before the accused was detained in jail; that this annual job is only from October 23 to November 3 and his duty is to watch over materials like lumber and electric wires for installations in the cemetery; that accused, were in Carreta doing their job as watchman; that he and Vergara arrived in Carreta, fifteen minutes before 6:00 P.M., and stayed there until 6:00 A.M. the following day; that while at Carreta; they roamed around the cemetery watching for things; that there was never any occasion that Vergara went home from 5:45 P.M. to 6:00 A.M. of October 29, 1985; neither was there any occasion that accused Vergara ever left the premises; that Vergara is poor and does not own a motorcycle; he claimed that he cannot say anything to the charge of murder against Vergara because he and the accused were together in the cemetery at the time of the incident doing their jobs as watchmen.

On cross-examination, he admitted that Carreta Cemetery is very big and it comprises almost one block; that he was hired by Sammy Salvador to watch over lights, wirings, receptacles and posts; that it was Sammy Salvador who paid for his salary, and that he is entered in a mini payroll since he is not a regular employee; he also admitted that some of these lights are installed in the northernmost portion, near the concrete fence; he also admits that there are niches attached to the walls of the cemetery and that the lights are attached in front of the niches, some of which are located also in the interior, and in the central portion of the cemetery. He admits that every alley of the cemetery is named after names of saints; that in the alley named San Geronimo, one does not see the lights, and posts from the other alleys, because of the walls, that is why Sammy Salvador hired watchmen; he also admitted that watchmen were given a special area to watch. He admitted that a watchman would not be able to actually tell the activities of another watchman who is assigned to another portion of the cemetery x x x." (Decision, p. 6; Rollo, pp. 20-21)

The trial court rejected the version of the defense and accordingly pronounced its verdict of conviction and imposed the penalty on appellant, after taking into consideration the fact that the crime was committed with treachery, which qualified it to Murder. The trial court considered the circumstances of nighttime and evident premeditation as absorbed in treachery, but took into account the presence of the aggravating circumstance of abuse of superior strength. (Rollo, p. 22)

In this appeal, appellant raised the following lone assignment of error that:

"THE TRIAL COURT ERRED IN GIVING CREDENCE TO THE TESTIMONY OF TEODORO LABORTE."

(Appellant's Brief, p. 7)

Appellant brands the testimony of Laborte as fabricated and contrary to human experience. He cites the failure of Laborte to talk to or greet him and the other accused when they, according to Laborte were at such a close proximity to him shortly before the incident happened. Such behavior, appellant maintains, is too unusual for someone like Laborte who was well acquainted with all the accused. (Appellant's Brief, p. 9)

Appellant's contention is untenable.

The absence of conversation between Laborte and appellant and his co-accused was satisfactorily explained by Laborte during his testimony on cross-examination, thus:

“Q - If your distance is (sic) only one meter, did you know that at that time Balogong saw you?

A - They did not see me because they were ahead of me, and they were looking around to (sic) the people.

x x x

Q - Since you said that you were just one meter from Alfredo Vergara during the time of the shooting, and a few meter (sic) from the other accused. Did you not open a conversation with Vergara?

A - No.

Q - As you said, you were friends. Why is it that you did not try to open a conversation?

A - They were in a hurry."

(TSN, April 18, 1989, p. 11; underscoring supplied)

Appellant also cites as another improbability the failure of his companions to alert him of the presence of Laborte in the vicinity. Account should be taken of the fact that the crime happened in the early evening of October 28, 1985, along the busy street of Spolarium, Duljo, Cebu City. At that time, the street teemed with people and the presence of Laborte in the vicinity was not something out of the ordinary as to impel the two look-outs to alert appellant thereof.

Appellant also claims that it was physically impossible for the victim to be able to run a distance of 60 meters after being shot and hit in vital parts of the body. He argues that gunshot wound No. 2 was sufficient to cause instantaneous death. Dr. Jesus P. Cerna, who conducted the post-mortem examination, was not able to give a categorical opinion on the time of death of the victim. Neither did he state that gunshot wound No. 2 caused the instantaneous death of the victim. What Dr. Cerna simply stated was that the gunshot wound No. 2 "could cause instantaneous death." (TSN, December 19, 1988, p. 5)

As to the credibility of Laborte, the trial court made the following significant observation, to wit:

"x x x His testimony is airtight, and replete with all the necessary details that convinces the court that indeed, he was an eyewitness to the killing.

In addition to this, the physical evidence consisting of the injuries sustained by the victim as testified to by Dr. Jesus Cerna, PC-INP, Medico-Legal Officer of Cebu City is on all fours with the testimonial evidence adduced by the prosecution in this case." (Decision, p. 7; Rollo, p. 22)

There is no cogent reason to disturb the findings of the trial court since it had the opportunity to observe the behavior, demeanor, conduct and attitude of the witnesses at the trial. (People v. Briones, 202 SCRA 708 [1991]; People v. Belibet, 199 SCRA 587 [1991])

More importantly, the testimony of Laborte was straightforward and clearly revelatory of what he witnessed. No dubious motive was shown why he would bear false witness against appellant. (People v. Santito, Jr. 201 SCRA 87 [1991]; People v. Lacao, Sr., 201 SCRA 317 [1991])

The defense of alibi of the appellant cannot prevail over the positive identification made by the prosecution's witness. (People v. Bugho, 202 SCRA 164 [1991])

For alibi to prosper, it must be demonstrated that it was physically impossible for the accused to be at the scene of the crime at the time of its commission. (People v. Lacao, Sr., 201 SCRA 317 [1991]) As aptly observed by the trial court:

"The defense of the accused Vergara which is alibi must be brushed aside, considering that he could have been at the scene of the crime in Pasil, even if he came from the Carreta Cemetery where he claimed he came from, and where he was working as a watchman. The distance is only less than 8-10 kilometers and the place is accessible by all means of transportation." (Decision, p. 7; Rollo, p. 22)

The trial court was correct in finding the presence of treachery and qualifying the offense to murder. The attack on the victim, who was sitting on a bench, was sudden and unexpected, thus rendering the victim defenseless. (People v. Espiritu, 191 SCRA 503 [1990]; People v. Alcantara, 206 SCRA 662 [1992]; People v. Sorio, 190 SCRA 548 [1990])

The trial court was also correct in finding the presence of the aggravating circumstance of nighttime even if it was not alleged in the information. Being a mere generic circumstance, it need not be alleged in the information. (People v. Godinez, 106 Phil. 597 [1959]) The trial court properly considered said circumstance as absorbed in treachery. (People v. Sespeña, 102 Phil. 199 [1957])

Likewise, the trial court was correct in finding the presence of the aggravating circumstance of abuse of superior strength even if it was not alleged. If a qualifying circumstance, such as abuse of superior strength, is not alleged, it cannot be used to qualify the offense but it can still be appreciated as a generic aggravating circumstance. (People v. Joveliano, 56 SCRA 156 [1974]) The trial court however, should have considered said aggravating circumstance as absorbed in treachery. (People v. Sespeña, 102 Phil. 199 [1957])

The trial court erred in finding the presence of evident premeditation. There is no evidence to show the planning and preparation made to kill the victim. To be considered an aggravating circumstance, the premeditation must be evident and manifest. (People v. Samson, 176 SCRA 710 [1989])

The prescribed penalty for murder is "reclusion temporal in its maximum period to death," which is seventeen (17) years, four (4) months and one (1) day to death, albeit the imposition of the death penalty has been constitutionally proscribed. There being no mitigating nor aggravating circumstances present, the penalty prescribed by law shall be imposed in its medium period (Art. 64, Revised Penal Code) or reclusion perpetua. (People v. Muñoz, 170 SCRA 107 [1989]) The trial court erred in imposing an indeterminate sentence of twenty (20) years of reclusion temporal as minimum to thirty (30) years of reclusion perpetua as maximum. The Indeterminate Sentence Law does not apply to persons convicted of offenses punished with an indivisible penalty. (People v. Amores, 58 SCRA 505 [1974])

The indemnity of P30,000.00 should be increased to P50,000.00. (People v. Yeban, 190 SCRA 409 [1990])

WHEREFORE, the judgment appealed from is MODIFIED and appellant is sentenced to suffer the penalty of reclusion perpetua.

SO ORDERED.

Cruz, (Chairman), Griño-Aquino, and Bellosillo, JJ., concur.

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