

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. REYNALDO KYAMKO, ALIAS "DODON"; ACCUSED-APPELLANT.

G.R. No. 103805. May 17, 1993

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

In an Information filed on 18 January 1989 with Branch 29 of the Regional Trial Court of Cebu at Toledo City, appellant Reynaldo Kyamko alias "Dodon" was charged with the crime of murder. The case was docketed as Criminal Case No. TCS-1029.

Upon his arraignment on 26 June 1989, appellant entered a plea of not guilty.[1]

On 7 March 1990, sometime after its first witness, Eleuterio Rabor, had testified on direct examination, the prosecution filed a Motion For Leave To Amend Information so as to allege that the appellant is a recidivist or "at least a habitual delinquent" by virtue of two (2) prior final convictions.[2]

Over the objection of the accused on the ground that he had already been arraigned and that the proposed amendment is not a matter of form,[3] the trial court granted the motion.[4] Thus, the following amended information was filed on 16 April 1990:

"That on or about the 2nd day of May, 1988 at 4:00 o'clock in the morning, more or less, in the Municipality of Pinamungajan, Province of Cebu, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, evident premeditation and treachery, did then and there wilfully, unlawfully and feloniously stab one Epifanio Ferrer with the use of a kitchen knife thereby inflicting upon the latter a mortal injury which caused his instantaneous death.

That the accused is a recidivist by virtue of previous two (2) final convictions embraced in the same title of the Revised Penal Code with this present case, one, in the case of People of the Philippines vs. Reynaldo Kyamko docketed as criminal case no. TCS-01 for Frustrated Murder of which he was sentenced to suffer an imprisonment of Four (4) years. Two (2) months and one day to ten (10) years and one (1) day; and second, the same accused was convicted in the case of People of the Philippines vs. Reynaldo Kyamko docketed as Crim. Case No. TCS-445 and was imposed the penalty of two (2) years, four (4) months and one (1) day to eight (8) years of imprisonment.

CONTRARY TO LAW."[5]

In due course, trial on the merits proceeded. Aside from Eleuterio Rabor, the other witnesses presented by the prosecution were Victoria Ferrer and Dr. Alfredo Soberano. The defense called to the witness stand Dennis Biasong, Dr. Jesus Cerna, Rolando Dealagdon, Jose Kyamko, Jr. and the accused.

On 20 November 1991, the trial court promulgated a judgment of conviction,[6] dated 31 October 1991, the dispositive portion of which reads:

"WHEREFORE, in view of the foregoing, finding the accused GUILTY beyond reasonable doubt of the crime of Murder under Art. 248 and there being present the aggravating circumstance of recidivism the accused having been previously convicted in Crim. Case No. TCS-01 for Frustrated Murder by Regional Trial Court, Branch 29, Toledo City, on September 12, 1988 and in Criminal Case No. TCS-445 for the crime of Frustrated Homicide by Regional Trial Court, Branch 29, Toledo City, on September 12, 1988; (sic)

It is hereby the sentence of this Court that the accused suffers the penalty of reclusion perpetua and to indemnify the Heirs of the Offended party the sum of FIFTY THOUSAND PESOS (P50,000.00).

Accused is however given full credit of his preventive imprisonment.

SO ORDERED."[7]

The evidence for the prosecution, upon which the judgment of conviction is anchored, is succinctly stated by the Solicitor General in the Brief for the Plaintiff-Appellee[8] as follows:

"On May 1, 1988, at about 3:00 o'clock in the afternoon, Eleuterio Rabor went out to the sea, along the coastal area of Pinamungajan, Cebu, to catch fish. (p. 10, October 13, 1989) The following day, May 2, at about 4:00 o'clock in the morning, he went back to the seashore to have a snack. (p. 3, TSN, *ibid.*; p.4, TSN, May 16, 1990) After parking (sic) his fishing boat at the dock, Rabor met Julito Fabular and both of them proceeded to the public market of Pinamungajan. (p. 10, TSN, October 13, 1989) On their way, they passed by a salakot store where they saw Epifanio Ferrer (victim) sleeping while sitting down, with his head resting on his arm placed on top of the back of a chair. Immediately thereafter, they saw appellant stab the victim, hitting the latter at the left side of his neck. (pp. 3-4, TSN, *ibid.*) After stabbing the victim, appellant ran away.

Rabor, who saw the incident, ran towards his fishing boat. He met Victoria Ferrer, mother of the victim, and told her about the stabbing incident. (p. 5, TSN, *ibid.*; p.4, TSN May 16, 1990)

Dr. Alfredo Soberano, Municipal Health Officer of Pinamungajan, Cebu, conducted a post-mortem examination and testified that the wound on the neck of the victim was fatal. He also opined that the victim was probably stabbed from behind. He noted that the victim did not suffer any defensive wounds, and concluded that the victim did not have the chance to defend himself. (p. 5, TSN, July 5, 1990)"[9]

During the trial, the appellant raised the defense of alibi which he developed through his testimony and that of his witnesses. His version is summarized in the Brief for the Accused-Appellant in this wise:

"That on May 2, 1988 at around 4:00 o'clock dawn when the victim was allegedly stabbed by an assailant inside a salakot store at the plaza of Pinamungajan, Cebu, the accused was at Cebu City; and that the accused had nothing to do with the killing of Epifanio Ferrer.

On May 1, 1988, at around 10:30 o'clock in the evening, (about 5½ hours before Epifanio Ferrer was stabbed at around 4:00 o'clock dawn on May 2, 1988) the accused, together with Dennis Biasong, Henry Kyamko and Oscar Peña, was outside the recreation center where a dance was being held located at the back of the municipal building of Pinamungajan, Cebu. Suddenly, Ricardo Ferrer (brother of Epifanio Ferrer), Arnold Ferrer and Dading Ferrer assaulted the accused. During their brief encounter the accused was stabbed and wounded by Ricardo Ferrer. Epifanio Ferrer was not present during this encounter. Being outnumbered, the accused ran away and sought the help of a cousin Jose Kyamko, Jr. nicknamed 'Bebot.'

At around 11:00 o'clock that same evening of May 1, 1988, the accused accompanied by Jose Kyamko, Jr. boarded a passenger bus bound for Cebu City via Carcar, a route which is about 85 kilometers to Cebu City. Due to the delay of their travel caused 'by loading passengers and cargoes along the way, they arrived at Cebu City at

past 2:00 o'clock dawn on May 2, 1988, and stayed in the boarding house of the accused's sister named Virgie. At around 7:00 o'clock in the morning of that same date, they went to the house of Dr. Jesus Cerna who examined the injuries of the accused.

The following day, May 3, 1988, the accused went back to Pinamungajan to attend the town fiesta until May 4, 1988. On May 5, 1988, he went back to Cebu City and continued working at the Pepe Art Sign. After that he went back to Pinamungajan for several times until his arrest on October 10, 1988 at Naga, Cebu while he was attending the town fiesta."[10]

According to the trial court, the defense of alibi was unavailing because the accused was positively identified by Eleuterio Rabor. We quote verbatim what it said:

"In short accused raised the defense of DENIAL and alibi. From the evidence of the prosecution Eleuterio Rabor testified in a straightforward manner, sincere and with candor positively asserted that he actually saw the accused with his hands holding a knife stabbing the deceased on the side of his neck. He is familiar and acquainted with both accused and the deceased and the place where the victim was stabbed was well lighted aside from the lights coming from the street. Said witness even testified to where the victim was hit and that was on the side of his neck. Testimony of prosecution witness who positively identified the accused as the malefactors (sic) was corroborated by the findings and testimony of Dr. Soberano, Municipal Health Officer of Pinamungajan. Prosecution witness saw (sic) the incident was only a few feet away from the victim when the accused stabbed the former with a knife. Said fact is sufficient to exclude any doubt in the identification of the accused (People vs. Macabenta, G.R. No. 72496, 14 Feb. 1989)." [11]

Moreover, the trial court ruled that the accused had failed to prove that it was physically impossible for him to be at the scene of the crime at the time it was committed. Even granting that he was in Cebu City as he claimed, the trial court noted that:

"In the case at bar the killing took place at 4:00 o'clock dawn of May 2, 1988. So, considering that it takes only two hours utmost (sic) from Pinamungajan to Cebu City specially passing by Toledo City, it would therefore not be physically impossible for the accused to commit the killing and thereafter immediately go to Cebu City and arriving there at 6:00 o'clock in the morning and proceed to the house of Dr. Jesus Cerna." [12]

Unable to accept the verdict, the accused interposed an appeal from the decision to this Court on questions of fact and of law.[13]

In his appeal, accused submits that the trial court erred:

"I

X X X IN GIVING WEIGHT TO THE MANIFESTLY BIAS[ED], UNCORROBORATED AND UNRELIABLE TESTIMONY OF PROSECUTION WITNESS ELEUTERIO RABOR, WHO ALLEGEDLY WAS AN EYEWITNESS TO THE STABBING OF THE VICTIME (sic) EPIFANIO FERRER BY THE ACCUSED.

II

X X X IN REJECTING THE ACCUSED-APPELLANT'S DEFENSE OF ALIBI." [14]

The first assigned error is premised on the claim that Rabor was very close to the deceased and to the latter's mother from whom Rabor usually borrowed money, and that he acted in a manner contrary to human experience by not attempting to rescue or extend a helping hand to the victim and by not reporting the incident to the police

authorities although the police station was just across the road at a distance of "20 fathoms." [15] Rabor's claim that he did not do so because he was frightened is assailed as being incredible since he had a companion, Julito Fabular, and the accused had already fled. Moreover, it is contended that his statement in court on the position of the victim is in conflict with what he had stated in his affidavit. Finally, accused tries to depreciate the evidence for the prosecution because Fabular was not presented as a witness.

The second assigned error merely elaborates on the appellant's defense of alibi which he insists should have been favorably considered by the trial court.

This appeal is devoid of any merit and must accordingly be dismissed.

Credibility of witnesses is the core issue in the assigned errors. Deeply embedded in Our jurisprudence is the rule that when the issue of the credibility of witnesses is concerned, appellate courts will generally not disturb the findings of the trial court considering that the latter is in a better position to decide the question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial, unless certain facts of value have been plainly overlooked which, if considered, might affect the result of the case. [16] The trial court gave full faith and credit to the testimony of Eleuterio Rabor. As observed by it, the said witness testified in a straightforward manner and with sincerity and candor. These are reliable indications of truthfulness which only the trial court had the singular opportunity to observe. As this Court said in *United States vs. Macuti*: [17]

"The emphasis, gesture and inflection of the voice are potent aids in understanding the testimony of witnesses. The trial court has the opportunity and is presumed to take advantage of these aids in weighing the testimony of the witnesses. But as they cannot be incorporated into the record, this Court has no assistance in the examination of the testimony and we must therefore rely on the good judgment of the lower court."

Our own review of Rabor's recorded testimony confirms the direct and straightforward manner by which he gave his answers -- a conduct consistent with sincerity and candor. The rigorous cross-examination failed to cast a shadow of doubt on his truthfulness or to unravel an ulterior motive for him to testify for the prosecution and against the accused. There is no evidence, and nothing on record tends to indicate, that the said witness was actuated by any improper motive. The presumption then is that he was not so actuated and his testimony is entitled to full faith and credit. [18] For, indeed, if an accused had really nothing to do with the crime, it is against the natural order of events and of human nature and against the presumption of good faith that the prosecution witness would falsely testify against the former. [19]

That Rabor is a close friend of the victim and his mother, as claimed by the appellant, does not vitiate his testimony, but, on the contrary, strengthens it as his natural interest in securing the conviction of the guilty would deter him from implicating innocent persons, for, otherwise, the perpetrator would thereby gain immunity.

The foregoing discussion refutes the imputation of bias against Eleuterio Rabor.

The failure of Eleuterio Rabor to help the victim or to report the incident to the police authorities after the appellant had ran away does not make his testimony less worthy of credence. Such failure can be attributed to the shock and fear instilled in the mind of Rabor upon seeing a violent crime. [20] Not every witness to a crime can be expected to act reasonably and conformably to the expectation of mankind. "Human nature teaches us that people may react differently to the same situation. One person's spontaneous or unthinking, or even instinctive, response to a horrid and repulsive stimulus may be aggression while another's may be cold indifference." [21] We have taken judicial notice of the fact that witnesses in our country are reluctant to volunteer information to the authorities. [22] In any event, Rabor did in fact immediately inform the victim's mother of the stabbing incident. [23] This was sufficient to remove any doubt that he had witnessed the commission of the crime.

We also find no inconsistency between Rabor's testimony and his statement in his affidavit as to the position of the victim at the time he was stabbed by the accused. In his direct examination, Rabor testified that the victim was "leaning on a chair with his chin laying (sic) on the right hand," which testimony he reiterated on cross-examination.[24] In his affidavit, Rabor declared that the victim "was sleeping, sitting down with his head suspended on the backchair; that it was on this state that I saw Reynaldo Kyamko raising his hand with a kitchen knife and stabbed Fanny Ferrer by the side of his neck downward (lusong-lusong)."[25] What is thus clear is that the affidavit did not give in minute detail the precise position of the victim at the time he was stabbed. The inconsistency then is more apparent than real. In any event, the finding of Dr. Soberano as to the location and cause of the wound sustained by the victim confirms Rabor's testimony in open court and his statement in the affidavit.

The failure of the prosecution to present the other eyewitness, Julito Fabular, neither diminished the credibility of Rabor nor impaired the evidence for the prosecution. In *People vs. Samillano*,[26] this Court held:

"It has, time and again, been held that the non-presentation of certain witnesses by the prosecution is not a sufficiently plausible defense (*People v. de la Cruz*, 184 SCRA 461 [1990]) and the matter of whom to present as witness by the prosecution is addressed to the sound discretion of the fiscal or the prosecution handling the case (*People v. Fernandez*, 186 SCRA 830 [1990]); *People v. Nabunat*, 182 SCRA 52 [1990]); *People v. Marilao*, 177 SCRA 271 [1987]); *People v. Campana*, 124 SCRA 271 [1983]). There should, thus, be no unfavorable inferences to be made from the failure of the prosecution to present Ruben. Moreover, if the appellant believes that Ruben's testimony would bolster his theory, then it is the defense who should have presented Ruben. The coercive processes of the Court were at the appellant's disposal if Ruben refused to testify.[27]

Besides, the testimony of Fabular would only be corroborative and, thus, dispensable. The non-presentation of Fabular as a witness did not then imply suppression of evidence.[28]

Finally, it is an oft-repeated rule that the testimony of a single witness, if credible and positive and if it satisfies the court as to the guilt of the accused beyond reasonable doubt, is sufficient to convict.[29]

As to the second assigned error, the trial court correctly rejected the accused's defense of alibi. It is a fundamental juridical dictum that alibi is an inherently weak defense as it is so easy to fabricate and difficult to disprove; it cannot prevail over the positive testimony of the prosecution witness and his clear identification of the accused as the perpetrator of the crime.[30] Furthermore, for it to prosper, it must be shown that the accused was at another place at the time when the crime happened and that it was physically impossible for him to have been at the place where the crime was committed.[31] The trial court found that "there are no more passenger buses traveling from Pinamungajan to Cebu via Aloguinsan and Carcar past 4:00 o'clock in the afternoon and [that] from Pinamungajan to Cebu City, it will take only one hour by car and about two hours at most by truck." [32] Thus, it was not physically impossible for the accused to have been at the scene of the crime at the time it was committed -- at about 4:00 o'clock in the morning of 2 May 1988 -- and thereafter to leave for Cebu City and to arrive thereat at about 6:00 o'clock that same morning.

The qualifying circumstance of treachery, which was alleged in the amended information, attended the killing of Epifanio, Ferrer. The attack was so sudden and unexpected that the victim was unable to defend himself, thus insuring the execution of the crime without risk to the appellant. As a matter of fact, the victim was absolutely defenseless as he was then asleep. Treachery is present when the offender commits any of the crimes against persons, employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[33]

It was also proven that the appellant is a recidivist. A recidivist is one who, at the time of his trial for one crime,

shall have been previously convicted by final judgment of another crime embraced in the same title of the Revised Penal Code.[34] Appellant was convicted on 12 September 1988 for frustrated* murder in Criminal Case No. TCS-01 and for frustrated homicide in Criminal Case No. TCS-445 by the court a quo. The decisions therein became final before the filing of the original and amended informations in this case, and the crimes subject of this and in the said cases are all embraced in Title Eight, Book II of the Revised Penal Code.

There being a generic aggravating circumstance of recidivism, which is not offset by any mitigating circumstance, the penalty for the crime for murder, which is reclusion temporal maximum to death, should be applied in its maximum period.[35] Death then would have been the imposable penalty. However, in view of Section 19(1), Article III of the 1987 Constitution which prohibits the imposition of the death penalty, and the rule laid down in *People vs. Muñoz*,[36] the penalty to be imposed should be reclusion perpetua.

WHEREFORE, the trial court having committed no reversible error, the appealed judgment in Criminal Case No. TCS-1029 of Branch 29 of the Regional Trial Court of Cebu at Toledo City is hereby AFFIRMED, with costs against accused REYNALDO KYAMKO alias "Dodon."

SO ORDERED.

Feliciano, (Chairman), Bidin, Romero, and Melo, JJ., concur.

[1] Original Records (OR) 34.

[2] Id., 113-114.

[3] OR, 136-137.

[4] Id., 144-145.

[5] Id., 162-163; Rollo, 3-4.

[6] OR, 296-302; Rollo, 17-23. Per Judge Gualberto P. Delgado.

[7] Id., 301-302; Id., 22-23.

[8] Id., 63, et seq.

[9] Appellee's Brief, 3-5.

[10] Brief for the Accused-Appellant, 5-6.

[11] OR, 300.

[12] Id., 301.

[13] Id., 305.

[14] Rollo, 32.

[15] A fathom is a nautical measure of six (6) feet in length (Black's Law Dictionary, 5th ed., 547).

[16] *People vs. Garcia*, 89 SCRA 440 [1979]; *People vs. Bautista*, 92 SCRA 465 [1979]; *People vs. Abejuela*, 92 SCRA 503 [1979]; *People vs. Florida*, G.R. No. 90254, 24 September 1992; *People vs. Ponce*, G.R. No. 90297-98, 11 December 1992.

[17] 26 Phil. 170, 182 [1913].

[18] *People vs. Simon*, 209 SCRA 148 [1992], and the cases cited therein.

[19] *People vs. Balili*, 92 SCRA 552 [1979].

[20] TSN, 16 May 1990, 5-7.

[21] *People vs. Ferrera*, 151 SCRA 113 [1987]; *People vs. Gonzales*, 99 SCRA 697 [1980].

[22] *People vs. Bigcas*, 211 SCRA 631 [1992].

[23] TSN, 13 October 1989, 5.

[24] *Id.*, 10.

[25] OR, 9.

[26] 207 SCRA 50, 55 [1992].

[27] See also *People vs. Ruedas*, 194 SCRA 553 [1991]; *People vs. Gadiana*, 195 SCRA 211 [1991]; *People vs. Mandapat*, 196 SCRA 157 [1991]; *People vs. Atilano*, 204 SCRA 278 [1991].

[28] *People vs. Capulong*, 160 SCRA 533 [1988]; *People vs. Fernandez*, 209 SCRA 1 [1992].

[29] *People vs. Francia*, 154 SCRA 495 [1987]; *People vs. Egaras*, 163 SCRA 692 [1988]; *People vs. Javier*, 182 SCRA 830 [1990]; *People vs. Clores*, 184 SCRA 638 [1990]; *People vs. Sampaga*, 202 SCRA 157 [1991].

[30] *People vs. Badilla*, 48 Phil. 718 [1926]; *People vs. Mercado*, 97 SCRA 232 [1980]; *People vs. Almenario*, 172 SCRA 268 [1989]; *People vs. Carpio*, 191 SCRA 108 [1990]; *People vs. Damaso*, 190 SCRA 595 [1990]; *People vs. Beringuel*, 192 SCRA 561 [1990]; *People vs. Lee*, 204 SCRA 900 [1991].

[31] *People vs. Nabor*, 185 SCRA 615 [1990]; *People vs. Petil*, 149 SCRA 92 [1987]; *People vs. Sorio*, 190 SCRA 548 [1990].

[32] Decision, 5; Rollo, 21.

[33] Paragraph 16, Article 14, Revised Penal Code; *People vs. Buka*, 205 SCRA 567 [1992].

[34] Paragraph 9., *Id.*

[35] Article 248 in relation to Article 64 of the Revised Penal Code.

[36] 170 SCRA 107 [1989]; see also, *People vs. Barba*, 203 SCRA 436 [1991]; *People vs. Lee*, *supra*.

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