

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ABE ROSARIO, ERWIN RIVERA AND MELCHOR BALANAY, ACCUSED, ABE ROSARIO AND ERWIN RIVERA, ACCUSED-APPELLANTS.

G.R. No. 108789. July 18, 1995

Ponente: FELICIANO, J.

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FELICIANO, J.:

Abe Rosario, Erwin Rivera and Melchor Balanay were charged with Attempted Robbery with Homicide in an information which read as follows:

"That on or about 13 July 1990, at about 11:15 o'clock at night, in Brgy. Manarang, Vintar, Ilocos Norte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another with intent to gain and being then heavily armed with high-powered firearms, did then and there wilfully, unlawfully and feloniously force their way to the house of Crispin Diza and while inside, with violence and intimidation against persons, demanded from the inmates of the house to bring out their money, but when the latter failed to do so, Abe Rosario shot Crispin Diza on the face, thereby inflicting upon him a mortal gunshot wound which inevitably caused his instantaneous death. The killing is aggravated with treachery.

Contrary to law."^[1]

At arraignment, Rosario, Rivera and Balanay entered a plea of not guilty. Trial ensued and judgment was rendered by the trial court on 21 January 1992 as follows:

"WHEREFORE, in view of all the foregoing, the Court hereby renders judgment CONVICTING the accused Abe Rosario and Erwin Rivera guilty beyond reasonable doubt of the crime of Attempted Robbery with Homicide and Melchor Balanay guilty beyond reasonable doubt of the crime of Attempted Robbery.

Article 297 of the Revised Penal Code provides:

Attempted and Frustrated Robbery committed under certain circumstances. — When by reason or on [occasion] of an attempted or frustrated robbery a homicide is committed, the person guilty of such offenses shall be punished by reclusion temporal in its maximum period to reclusion perpetua, unless the homicide committed shall deserve a higher penalty under the provision of this code.

The word homicide includes all kinds of killing. So that if in the killing there is an attendant circumstance qualifying it to murder, the penalty for murder shall be imposed. In the case at bar, the killing of the late Crispin Diza is one of Murder as there is the qualifying circumstance of treachery. Against all the accused, there is the aggravating circumstance of the crime committed at night time.

As there is no more death penalty, the penalty imposable upon the accused Abe Rosario and Erwin Rivera is reclusion temporal in its maximum period (17 years, 4 months and 1 day to 20 years) to reclusion perpetua. There being no mitigating circumstance and one aggravating circumstance which is that the crime was committed at night time specially sought, the court hereby imposes upon the accused Abe Rosario and Erwin

Rivera the maximum penalty of imprisonment of Reclusion Perpetua with the accessory penalties as provided by law, and to indemnify the heirs of the late Crispin Diza in the amount of P50,000.00 and to pay P20,000.00 in actual damages to said heirs pro rata without subsidiary imprisonment in case of insolvency.

The crime of Robbery as defined and penalized under paragraph 5 of Article 204 of the Revised Penal Code is prison correccional in its maximum period (4 years, 2 months and 1 day to 6 years) to prison mayor in its medium period (8 years and 1 day to 10 years.) The accused being convicted of the crime of Attempted Robbery the penalty imposable upon the accused is Arresto Menor in its maximum period (21 to 30 days) to Arresto Mayor in its medium period (2 months and 1 day to 4 months). The Court hereby imposes upon the accused Melchor Balanay a straight penalty of four (4) months imprisonment of Arresto Mayor with the accessory penalties as provided for by law.

All the accused to pay the cost proportionately.

SO ORDERED."[2]

Melchor Balanay did not appeal from the trial court's decision; he applied for parole instead.[3]

The prosecution's version of the facts may be summarized from the testimonies of the prosecution witnesses.

Edna Diza, the wife of the victim Crispin Diza, testified that on the evening of 13 July 1990, she was in their house at Brgy. 22, Manarang, Vintar, locos Norte, sleeping, when she was awakened by the barking of a dog. Edna Diza woke her husband up and they proceeded to the "sala" and turned on the lights because they heard knocks on the wall and door of their house. Crispin Diza opened the northern door and they saw Abe Rosario, Edwin Rivera and Melchor Balanay pointing their guns at them. Edna and Crispin Diza closed the door immediately. One of the appellants, Erwin Rivera, then warned them that if they did not open the door, they would spray the house with bullets and throw a grenade. Edna Diza went to the southern door of their house and opened it. The appellants were now standing in the porch located near the southern door. Appellant Rivera then demanded from the spouses two thousand pesos (P2,000.00). When Edna Diza told appellants that they did not have the money, Rivera asked Crispin Diza to come out of the house. Crispin Diza went out on the porch and sat down on a bed there. Edna Diza and their son, Sherwin, followed Crispin and the three of them sat side by side. Rivera fired his gun upwards; then appellant Rosario approached Crispin Diza and shot him in the face. After Crispin Diza was shot, appellants Rosario and Rivera kicked the body of Crispin and then entered the house. Edna Diza followed them. Appellants searched the master's bedroom and their closet for about ten (10) minutes until Melchor Balanay (who had stood in front of the porch door throughout the whole incident) shouted that they should be leaving because the "situation had already gotten worse." Then Rosario, Rivera and Balanay ran away. Edna Diza then shouted for help. Her mother-in-law Beatriz Diza, brother-in-law Esmenio Diza and a neighbor Bobby Ojeda responded to her call.[4]

Sherwin Diza, the son of Edna and the late Crispin Diza, corroborated the testimony of his mother. He confirmed that on the night of 13 July 1990, he was awakened by his mother's voice. She was pleading with Rivera, Rosario and Balanay. Recognizing the voices of the three (3) men, Sherwin got up and went and stood by the side of his mother. Then he saw appellants and Melchor Balanay outside the house. They were wearing bonnets and holding long firearms. When the three men asked his father to come out of the house, Crispin went out and sat on a bed. Sherwin followed and then he saw Abe Rosario aim a gun at his father's head and pull the trigger. Appellants Rosario and Rivera then entered their house. After a while, appellants left and at this point, Abe Rosario fired a gunshot into the air.[5]

Pat. Leland Benigno (Integrated National Police, Vintar, Ilocos Norte assigned to the Intelligence Investigation and Operation Section, Laoag City) recalled that on 14 July 1990, he had received a report regarding the death of

Crispin Diza from Esmenio Diza but the names of the perpetrators were not revealed to him. A team was organized to conduct an investigation. On 15 July 1990, the team went to the house of the victim and there they recovered a slug of a carbine rifle bullet near the spot where Crispin Diza was shot. At first, Edna Diza was hesitant to reveal the identities of perpetrators. However, she relented as the team was about to leave. A spot report on the results of the investigation was made but it did not mention the names of the suspects because it could prejudice the investigation of the case. The authorities feared that word would leak out to the suspects and make it more difficult to apprehend them.[6]

Esmenio Diza, a brother of the victim, testified that on the night of 13 July 1990, he was awakened by the sound of a gunshot coming from the direction of Crispin Diza's house. Soon thereafter, he heard Edna Diza shout for help. He then proceeded to the house of Crispin Diza with his neighbors, Bobby Ojeda and Alberto Trinidad. There, he was told that Crispin Diza had been shot by Abe Rosario in the company of Erwin Rivera and Melchor Balanay. They found two (2) empty shells of a carbine rifle at the scene of the shooting which were given to the police. His mother, sister-in-law Edna Diza and he decided to report the incident to the police the next morning, but they agreed to keep secret the names of the perpetrators because they feared that they would return.[7]

The autopsy conducted on the victim revealed the following:

"Findings:

1. Gunshot wound, 1 cm. diameter, 3 cm. below the lower eyelid, 2 cm. from the nose, left side of the cheek, penetrating the cranial cavity, direction posteriorly perforating the brain tissue.
2. Gunshot wound, 3 cm. diameter, skull fractured, occipital area.

Cause of death: Intracranial Hemorrhage

Brain Injury

Gunshot Wound"[8]

Appellants denied authorship of the crime and relied mainly on alibi for their defense.

Erwin Rivera contended that around eleven o'clock in the evening on 13 July 1990, he was alone at home because his parents slept in their homestead's camarin. That night, he did not go out of the house and he did not see Abe Rosario and Melchor Balanay.[9]

Abe Rosario similarly insisted that he did not see Erwin Rivera and Melchor Balanay on 13 July 1990. He claimed that he was a resident of Barangay Paninaan, Bacarra since the last week of June that year, while Rivera and Balanay were residents of Barangay Manarang. Moreover, he had been in the house of his brother-in-law, Sabas Visitacion, in Barangay Paninaan, the night Crispin Diza was killed.[10]

To corroborate Abe Rosario's testimony, the defense presented Pedrito Galapon, a housemate of Abe Rosario. Galapon declared that on the night Crispin Diza was allegedly shot by Rosario, the latter was with him at home, watching television. They had stayed up until midnight and then retired to their rooms. At five thirty a.m. the next morning, the whole household, including Abe Rosario ate breakfast together before they proceeded to the field for the day's work.[11]

The lone error assigned by appellants is that the trial court erred in convicting accused-appellants of the crime charged despite the failure of the prosecution to prove their guilt beyond reasonable doubt.

In support of their assignment of error, appellants claim that the testimonies of the prosecution witnesses were flawed by inconsistencies on material points. Appellants, however, did not indicate what the alleged material

contradictions or inconsistencies were.

Reviewing the records of this case, we note that the prosecution witnesses' narration of the events which occurred on the fateful night of 13 July 1990 slightly varied but only with respect to insignificant details which do not bear upon the basic aspects of the crime, i.e., who among the neighbors had actually responded to Edna Diza's call for help; who among the malefactors fired a shot into the air and when that shot was actually fired. Variances of this kind do not affect the credibility of the witnesses. It has been held that the recollection of different witnesses with respect to the time and place and other circumstances of a criminal event would naturally differ in various details.[12] Moreover, discrepancies on minor details frequently tend to strengthen rather than diminish the credibility of the prosecution witnesses.[13]

Appellants also fault Edna and Sherwin Diza for not disclosing the names of the malefactors immediately. They point out that Edna and Sherwin Diza admitted that the perpetrators were familiar to them because they had long known each other and lived close to each other, yet, they did not immediately reveal the identities of the three (3) malefactors to the police. This showed, it is claimed, that the true identities of the perpetrators were not really known to Edna and Sherwin Diza.

We are not persuaded. Considering that the perpetrators lived near the victim's family and that one of the appellants was a member of the New People's Army,[14] the witnesses' fear of reprisal is understandable. The delay in revealing the names of the three (3) malefactors does not, by itself, impair the credibility of the prosecution witnesses and their testimony.[15]

Generally, people in rural communities know each other both by face and name. Edna and Sherwin Diza testified that because of the length of time they had known appellants the voices of the latter were familiar to them. We find nothing improbable about this testimony. In any event, the porch of the Diza house was well-lit by an electric lightbulb and the appellants were clearly visible.

Sherwin Diza testified that the three (3) malefactors wore black masks but that their faces could still be seen. Appellants impugn this testimony as improbable and contrary to human experience. They assert that this was unlikely because one who disguised himself would make sure that his identity would not be ascertainable so easily.

Again, appellants' argument must fail. A close study of the records reveals that what Sherwin Diza was referring to were black bonnets worn by appellants and Melchor Balanay on their heads. Although Sherwin had stated that the appellants wore masks, he had added that their faces could be seen. On re-direct examination, Sherwin used the word "bonnet" (boniti) instead of "mask" (abungot) and explained that the bonnets merely covered the forehead, hair and nape of the men,[16] as a hood or cap would. After examining Sherwin's revelations, we do not find any real inconsistency. There was no reference made to any disguise used by the men. The witness was merely describing to the court what the appellants were wearing on the night of the shooting to support his positive identification of the perpetrators. In analyzing the testimonies of witnesses, the whole impression or effect of what had been said or done must be considered and not individual words or phrases alone.[17]

The trial court gave weight and credence to the testimonies of Edna and Sherwin Diza and the other prosecution witnesses and, we believe, rightly so. We find no basis — and appellants have shown none — for departing from the rule that the findings of the trial court on the credibility of witnesses should not be disturbed on appeal, unless some facts or circumstances have been overlooked that would affect the disposition of the case.[18] Besides, the record is bereft of any showing that any of the prosecution witnesses were moved by improper motive to testify falsely against appellants.

As earlier noted, appellants invoke the defense of alibi and denial to support their plea for an acquittal. The Court has often enough emphasized that alibi is one of the weakest defenses, not only because it is inherently weak and unreliable but also because it is easily fabricated. For alibi to prosper, the requisites of time and place must be strictly met. It must be shown that it was physically impossible for the accused to have been at the scene of the crime at the time it was committed or it must be established by clear and convincing evidence that the accused was at some other place and for such a period of time as to negate his presence at the time when and the place where the crime was committed.[19]

In the instant case, appellant Rosario testified that the distance between Barangay Manarang and his residence in Barangay Paninaan, Bacarra was about two (2) kilometers and that if one traveled by foot, it would take more than two hours to get from one barangay to the other. However, if a motor vehicle were used, this time would be lessened to thirty (30) minutes.[20]

Appellant Rivera, upon the other hand, testified that he resided in the same barangay as Crispin Diza, and that their houses were about one (1) kilometer away from each other and that if one walks hurriedly, it would take only five (5) minutes to get to Diza's house.[21]

The constant doctrine has been that alibi and denial cannot prevail over the positive affirmations like those of Edna and Sherwin Diza who had pinpointed appellants as the perpetrators of the crime. Greater weight should accordingly be given to the categorical identification of appellants by the prosecution witnesses.[22]

The trial court found that treachery attended the commission of the crime. We do not agree. Treachery is not to be presumed, but must be proved as conclusively as the act it qualifies. The same degree of proof, i.e., beyond reasonable doubt, is required before treachery may be considered as an aggravating or qualifying circumstance. Further, it has long been declared that the qualifying circumstance of treachery must be based on some positive and convincing proof and not only upon hypothetical facts or on mere suppositions or presumptions.[23] In the case at bar, such requisite proof had not been submitted. There is no showing that appellants deliberately employed a means of attack which offered no risk to them from any defense or retaliatory act which the victim might have taken.[24]

Nighttime was appreciated as an aggravating circumstance by the trial court. Once more, we do not agree with this finding.

Nocturnity is not aggravating when, as in the case at bar, other than the time of the crime, there is no evidence that appellants had purposely sought the cover or took advantage of the darkness of the night to commit the crime. Nor was there evidence that nighttime had facilitated the commission of the crime.[25] Besides, the place where the incident took place was well-lighted according to Edna and Sherwin Diza.[26] Where the scene of the crime was well-illuminated, nighttime is not generally considered aggravating.[27]

Upon the other hand, considering that the incident began with the shooting of Crispin Diza in the porch of the house followed by a futile search for money in the master's bedroom, the Court considers that dwelling should be appreciated as an aggravating circumstance in this case.

As for the civil aspect of the case, the trial court had overlooked certain evidentiary facts in its award of damages. To justify a grant of actual damages, it is necessary to prove with a reasonable degree of certainty, premised upon competent proof and on the best evidence obtainable by the injured party, the actual amount of loss.[28]

The court a quo's award of actual damages in the amount of Twenty Thousand Pesos (P20,000.00) is not sustained by the evidence of record. Of the expenses allegedly incurred, the Court can only give credence to those supported by a receipt and which appear to have been genuinely incurred in connection with the death, wake or burial of the

victim.[29] The only expenditure supported by a receipt is the payment made to the funeral parlor in the amount of Three Thousand Five Hundred (P3,500.00).[30] Therefore, the Court puts the expenses proved by the heirs of the victim at Three Thousand Five Hundred Pesos (P3,500.00).

For the crime of attempted robbery with homicide, article 297 of the Revised Penal Code imposes the penalty of imprisonment ranging from reclusion temporal in its maximum period to reclusion perpetua. Since the crime was attended by the aggravating circumstance of dwelling, without any mitigating circumstance to offset it, the penalty must be imposed in its maximum period, or reclusion perpetua.

WHEREFORE, in view of the foregoing, the decision in Criminal Case No. 5076-16, insofar as Abe Rosario and Edwin Rivera are concerned, is hereby AFFIRMED,[31] with the modification that both appellants shall be solidarily liable for actual damages in the amount of Three Thousand Five Hundred Pesos (P3,500.00) in addition to civil indemnity in the amount of Fifty Thousand Pesos (P50,000.00) for the death of Crispin Diza.

SO ORDERED.

Romero, Melo, Vitug, and Francisco, JJ., concur.

[1] Rollo, p. 8

[2] RTC Decision, 21 January 1992, pp. 41-42; Rollo, 62--63.

[3] Appellant's Brief, p. 4.

[4] TSN, Testimony of Edna Diza, 31 October 1990, pp. 2--18; 7 November 1990, pp. 3-4.

[5] TSN, Testimony of Sherwin Diza, 13 December 1990, p. 34.

[6] RTC Decision, pp. 8-11; Rollo, pp. 29-32.

[7] TSN, Testimony of Esmenio Diza, 21 January 1991, pp. 2-8.

[8] Marked as Exhibit "J".

[9] TSN, Testimony of Erwin Rivera, 16 July 1991, p. 4.

[10] TSN, Testimony of Abe Rosario, 6 June 1991, pp. 2--4.

[11] TSN, Testimony of Pedrito Galapon, 16 August 1991, pp. 2-10.

[12] People vs. Orehuela, G.R. Nos. 108780-81, 29 April 1994; People vs. Fuertes, G.R. No. 104067, 17 January 1994; People vs. Arbois, 138 SCRA 24 (1985).

[13] People vs. Silon, et al., G.R. No. 110830, 23 May 1994.

[14] RTC Decision, p. 4; Rollo, p. 25.

[15] People vs. Ompad, Jr., G.R. Nos. 93730-31, 10 June 1994; People vs. Pascua, 206 SCRA 628 (1992); People vs. Aldeguer, 184 SCRA 1 (1990); People vs. Valdez, 159 SCRA 152 (1988); People vs. Rosario, 134 SCRA 497 (1985).

[16] RTC Decision, pp. 15-16; Rollo, pp. 36-37.

[17] People vs. Gagas, et al., G.R. No. 96951, 13 June 1994.

[18] *People vs. Orehuela*, supra; *People vs. Caras*, G.R. No. 112731, 18 July 1994; *People vs. Verchez, et al.*, G.R. Nos. 82729-32, 15 June 1994; *People vs. de Guzman, et al.*, G.R. No. 92537, 25 April 1994; *People vs. Lizada*, 225 SCRA 708 (1993).

[19] *People vs. Paglinawan*, G.R. No. 107804, 28 June 1994; *People vs. Albarida, et al.*, G.R. No. 96951, 13 June 1994; *People vs. Silong, et al.*, G.R. No. 110830, 23 May 1994; *People vs. Ocampo*, 226 SCRA 1 (1993).

[20] TSN, Testimony of Abe Rosario, 6 June 1991, pp. 8--9.

[21] TSN, Testimony of Edwin Rivera, 16 July 1991, p. 5; RTC Decision, p. 31; Rollo, p. 52.

[22] *People vs. Paglinawan*, supra; *People vs. Parangan*, supra; *People vs. Silong*, supra; *People vs. Amador*, 226 SCRA 241 (1993); *People vs. Jaralba*, 226 SCRA 602 (1993).

[23] *People v. Rivera*, 221 SCRA 647 (1993); *People vs. Cabarrubias*, 223 SCRA 363 (1993).

[24] *People vs. Gapasin*, G.R. No. 73489, 25 April 1994; *People vs. Ruelan*, G.R. No. 106152, 19 April 1994; *People vs. Javar*, 226 SCRA 103 (1993); *People vs. Dural*, 223 SCRA 201 (1993).

[25] *People vs. Boyles*, 11 SCRA 88 (1964); *People vs. Bato*, 21 SCRA 1445 (1967); *People vs. Moral*, 132 SCRA 471 (1984); *People vs. Toring*, 191 SCRA 38 (1990).

[26] RTC Decision, pp. 2-3 rollo, 23-24; TSN, Testimony Sherwin Diza, supra, p. 20.

[27] *People vs. Moral*, supra; *People vs. Toring*, supra.

[28] Article 2199, New Civil Code.

[29] *People vs. Degoma*, 209 SCRA 266 (1992).

[30] TSN, Testimony of Edna Diza, 31 October 1990, pp. 4-7; RTC Decision, p. 12; Rollo, p. 33.

[31] The decision is not affirmed insofar as Melchor Balanay is concerned, for here the trial court clearly erred in finding Melchor guilty only of attempted robbery. Since the three (3) robbers had clearly acted in concert, and since the killing of Crispin Diza had occurred by reason of, or on the occasion of, the robbery, all three (3) were guilty of attempted robbery with homicide, even though only one had fired at Crispin (See, in this connection, *People v. Timple*, 237 SCRA 52 [1994]; *People v. Catubig*, 195 SCRA 505 [1991]; *People v. Villanueva*, 215 SCRA 22 [1992]; *People v. Degoma*, 209 SCRA 266 [1992]; *People v. Punzalan*, 203 SCRA 364 [1991]). This is, of course, moot since Melchor Balanay did not appeal from the trial court's decision, which became final as to him long ago.

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