

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EUTQUIO APA-AP, JR. ALIAS JUNIOR ANTIK AND ONE ALIAS BENIE, ACCUSED-APPELLANT.

G.R. No. 110993. August 17, 1994

Ponente: MELO, J.

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MELO, J.:

Accused was charged with murder committed as follows:

That on or about the 26th day of September, 1987, at about 11:30 p.m., at barangay Balwarte, Municipality of Buenavista, Province of Bohol, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping each other, with intent to kill, evident premeditation, and treachery by hiding under a cart and suddenly attacking the victim without giving him the opportunity to defend himself, did then and there, willfully, unlawfully and feloniously attack, assault and stab with sharp bladed instruments one Ciriaco Diacor, thereby inflicting multiple mortal wounds on his body, as shown in the Certificate of Death, which directly caused the death of the victim; to the damage and prejudice of the heirs of the deceased in an amount to be proved during the trial of the case.

Acts committed contrary to the provisions of Article 248, in relation to Article 14 of the Revised Penal Code with the qualifying aggravating circumstance of nighttime being purposely sought for or taken advantage of by the accused to facilitate the commission of the crime.

(p. 3, Rollo.)

After trial, the court a quo found accused-appellant guilty as charged in a decision dated January 25, 1993, the dispositive portion of which reads as follows:

PREMISES CONSIDERED, the Court finds the accused EUTQUIO APA-AP, JR. guilty of the crime of Murder punished under Article 248 in relation to Article 14 of the Revised Penal Code and hereby sentences him to suffer an imprisonment of RECLUSION PERPETUA, with the accessories of the law and to pay the cost.

The accuse Eutiquio Apa-Ap, Jr. is further ordered to indemnify the parents of the deceased victim Pablo Diacor in the amount of P50,000.00 representing indemnity and P5,000.00 representing funeral expenses. In both instances without subsidiary imprisonment in case of insolvency.

(p. 15. Rollo.)

Hence, the instant appeal, with accused-appellant contending that -

The court a quo erred in admitting the dying declaration of the victim considering the fact that same did not comply all the essential requisite for it to be admissible in evidence;

The court a quo erred in not appreciating the defense of alibi interposed by the accused.

(p. 2, Appellant's Brief; ff. p. 30, Rollo.)

The facts of the case, as borne out by the evidence were correctly synthesized by the trial court, and are as follows:

SPO1 Jesus P. Opalla of the PNP, Buenavista, Bohol, witness for the prosecution, declared that on September 27, 1987, he was at Cagawal, Buenavista, Bohol. He was then slated to leave for Panglao together with several soldiers for he is connected with the Seaborne Patrol, Provincial Headquarters. He saw a group of people which he approached, and found out that a person was stabbed by the name of Ciriaco Diacor nicknamed Takan. He was weak and pale. He asked Takan as to who stabbed him who answered that it was the accused Eutiquio Apa-ap, Jr. from Cagawa. He knows the accused referred to by the victim Ciriaco Diacor for having been in prison many times. He took the Ante Mortem declaration of Ciriaco Diacor which was thumbmarked by his own blood.

Pablo Diacor, witness for the prosecution, declared that on September 29, 1987 at dawn, he was at his house at Cantuba, Buenavista, Bohol. Someone called him. It was the son of Barangay Captain informing him that his son Ciriaco Diacor was stabbed. He went to the scene of the stabbing incident and saw his son Ciriaco Diacor lying on the ground. He asked his son Ciriaco Diacor, the victim in the instant case, as to who stabbed him who answered that it was the accused Eutiquio Apa-ap, Jr. They brought his son who had difficulty in breathing, to the highway for they wanted to bring him to the hospital.

He saw and heard SPO1 Jesus Opalla who asked his son Ciriaco Diacor as to who stabbed him who answered that it was the accused Eutiquio Apa-ap, Jr., the accused in the instant case. SPO1 Jesus Opalla took the ante mortem declaration of his son Ciriaco Diacor, the victim in the instant case.

His son Ciriaco Diacor was brought in a jeep of the Mayor to the Dagohoy Hospital and finally to Tagbilaran who died on the way. They had to bring back his son home. His late son Ciriaco Diacor finished Grade III. He could write and read. He spent P5,000.00 for the burial of his son.

(p. 12, Rollo.)

Accused-appellant assails the admission of the dying declaration of the victim, Ciriaco Diacor, maintaining that the same does not conform with the requisites of a dying declaration.

Accused-appellant's contention is devoid of merit.

In order that a dying declaration may be admissible, the following requisites must concur:

- [1] The declaration must concern the cause and surrounding circumstances of the declarant's death;
- [2] The declarant, at the time the declaration was made, was under the consciousness of an impending death;
- [3] The declarant is competent as a witness; and
- [4] The declaration is offered in a criminal case wherein the declarant's death is the subject of inquiry (People vs. Clamor, 198 SCRA 642 [1991]).

There is no question in regard to the existence of the first requisite. The declaration (Exhibit A) relates to the stabbing of the victim, Ciriaco Diacor, and identifies accused-appellant as the person who stabbed the victim.

Likewise, the presence of second requisite cannot be gainsaid. The victim suffered fatal and serious wounds and he died shortly after making the declaration. It has been held that the degree and seriousness of the wound and the fact that death supervened shortly afterwards, maybe considered as substantial evidence that the declaration was made by the victim with full realization that he was in a dying condition (People vs. Obngayan, 55 SCRA 465 [1974]). In one case (People vs. Briosco, 375 SCRA 336 [1971]), it was held that judged by the nature and extent

of his wounds, the victim must have realized the seriousness of his condition, and that it can be safely inferred that he made the declaration under the consciousness of impending death considering that he died only one hour after being shot. Further, the herein victim's awareness of his impending death is vividly depicted by the fact that he thumbmarked his dying declaration (Exhibit A) with his own blood.

The third element is also present for there is nothing in the record to show that the declarant was incompetent as a witness. As a matter of fact, when SPO1 Jesus Ozalla, the policeman who took the dying declaration of the victim, was asked on the witness stand what was the mental condition of the victim before his death, the witness, a veteran police officer, stated that "when I interrogated him he answered well" (p. 6, tsn, November 20, 1992) and that the victim was not suffering from any mental disease (id.).

There is no question too as to the existence of the fourth requisite for said dying declaration was offered in the instant action, a criminal case where the declarant's death is the very subject of inquiry.

We have to reject the defense of alibi set up by accused-appellant. Alibi is a weak defense for it is easy of fabrication (People vs. Ragas, 44 SCRA 152 [1972]). To establish alibi, it must be shown that it was physically impossible for the accused to be present at the place where the crime was committed at the time of commission (People vs. Cruz, 208 SCRA 326 [1992]). Accused-appellant avers that on the day the crime was committed, he was working and staying at the house of Engr. Hermilando Torregosa at Tubigon, Bohol. Accused-appellant's alibi does not fulfill the requirements of a valid alibi for there is no showing that it was physically impossible for him to have been at Barangay Balwarte when the crime was committed even as he may have indeed worked at Tubigon. We can take judicial notice of the distance between Tubigon, Bohol, and Buenavista, Bohol, which is approximately 30 kilometers. At such a distance it would not have been physically impossible for accused-appellant to be present at the scene of the crime at the time it was committed. In People vs. Adriano, (95 SCRA 107 [1980]), we rejected the defense of alibi, where the accused claimed that he was in Sta. Rosa, Nueva Ecija and the crime was committed in Manila. Likewise, in People vs. Jimenez, (105 SCRA 721 [1981]), we rejected the defense of alibi where the accused asserted that they were at Navotas, Rizal, at the time when the crime was committed in General Trias, Cavite. With the availability of motorized transport, a distance of 30 kilometers can easily be negotiated in less than an hour.

Then too, it is a doctrine embedded in our jurisprudence that alibi cannot prevail over the positive and clear identification of the accused as the perpetrator of the crime (People vs. Catubig, 205 SCRA 643 [1992]; People vs. Rendoque, 205 SCRA 783 [1992]). Accused-appellant in the case at bench, was positively identified by the victim himself who was at the point of death when every motive for falsehood is silenced and the mind is induced by the most powerful consideration to speak only the truth. Moreover, the defense of alibi is an issue of fact that hinges on credibility and the relative weight which the trial court assigns to the testimony of witnesses. Such assessment, unless patently and clearly inconsistent, must be accepted (People vs. Artieda, 90 SCRA 144 [1979]), for verily a careful evaluation of the record does not reveal that the trial court's rejection of accused-appellant's defense of alibi is inconsistent with the evidence on record.

The Solicitor General recommends that the qualifying circumstance of treachery should not be appreciated. We agree.

Treachery cannot be appreciated in the absence of evidence of the mode of attack; it cannot be presumed but must be proven positively (People vs. Quilaton, 205 SCRA 279 [1992]). Where no particulars are known as to the manner in which the aggression was made or how the act which resulted in the death of the victim began and developed, it can in no way be established from mere supposition that the killing was perpetrated by treachery (People vs. Devaras, 205 SCRA 676 [1992]). There is an absolute paucity of evidence to establish the mode of

attack, or the inception thereof, adopted by accused-appellant in killing the victim. The qualifying circumstance of treachery should, therefore, not be appreciated. In fine, the crime committed by accused-appellant is homicide, not murder.

Under the Revised Penal Code, the penalty prescribed for homicide is reclusion temporal (Article 249, Revised Penal Code). In the case at bench, there is no mitigating nor aggravating circumstance. Applying the Indeterminate Sentence Law, the proper sentence is an indeterminate penalty ranging from six (6) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months, and 1 day of reclusion temporal, as maximum.

WHEREFORE, the decision appealed from is hereby AFFIRMED, with the modification that accused-appellant is found guilty of homicide only and is consequently sentenced to an indeterminate imprisonment term of six (6) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months, and one (1) day of reclusion temporal, as maximum.

The civil indemnity imposed by the trial court stands.

SO ORDERED.

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

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