

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. SPO1 ROMULO GUTIERREZ, JR., ACCUSED-APPELLANT.

G.R. No. 116281. February 08, 1999

Ponente: MENDOZA, J.

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MENDOZA, J.:

This is an appeal from the decision,[1]dated February 15, 1994, of Branch 42 of the Regional Trial Court of Pinamalayan, Oriental Mindoro, the dispositive portion of which reads:

WHEREFORE, premises considered, this Court finds accused SPO1 ROMULO GUTIERREZ, JR. guilty beyond reasonable doubt of the crime of MURDER defined and punished under Article 248 paragraph 5 of the Revised Penal Code as charged with aggravating circumstances of abuse of superior strength, that advantage was taken by the accused of his public position, and that the crime was committed in contempt of or with insult to public authority, one of which is offset by the mitigating circumstance of voluntary surrender, the imposable penalty should have been death, but said penalty was abolished under the 1987 constitution by reason thereof, this Court sentences him to suffer the penalty of RECLUSION PERPETUA, and he is hereby ordered to pay to the heirs of Antonio Mercene, Jr. the following:

1) P50,000.00 as indemnity for the death of Antonio Mercene, Jr.;

2)

P224,000.00 as compensation for the victim's loss of earning as a duly elected Municipal Councilor of Pola, Oriental Mindoro during the May 11, 1992 Local Elections;

3)

P90,000.00 as reimbursement of the expenses incurred for the wake, burial and funeral services for the deceased Antonio Mercene, Jr.;

4)

P150,000.00 as support in the form of expenses for education of the two (2) minor children of the deceased;

5)

P100,000.00 as moral damages for the mental anguish suffered by the heirs of said deceased; and

6)

to pay the costs.

SPO1 Romulo Gutierrez, Jr., having been convicted of the crime of murder, the property bond posted by bondsmen Constancio Gutierrez, Virgilio Diona, and Feneta Lavalos-Diona for his provisional liberty is hereby cancelled and released, and authority is hereby given to the Acting Branch Clerk of Court of this Court to detach from the records the certificates of titles, and return them to the bondsmen, duly receipted.

SO ORDERED.

The information[2] in this case charged $\frac{3}{4}$

That on or about the 17th day of October, 1992 at 2:30 o'clock in the afternoon, more or less, in barangay Batuhan, municipality of Pola, province of Oriental Mindoro, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, a Police Officer, while armed with a revolver and with a decided purpose to kill, did then and there, wilfully, unlawfully and feloniously attack, assault and shoot therewith ANTONIO MERCENE JR. a duly elected municipal councilor, inflicting upon the latter a gunshot wound and multiple abrasions and laceration in different parts of the body which caused his untimely and instantaneous death.

That in the commission of the crime, the qualifying circumstances of treachery and evident premeditation and the aggravating circumstances of abuse of superior strength, that advantage was taken by the accused of his public position, that the crime was committed in contempt of or with insult to public authorities, are attendant.

Accused-appellant at first pleaded "not guilty,"[3] but later, through a new counsel, withdrew his plea and moved for modification of the order of trial pursuant to Rule 119, §3(e) of the Rules on Criminal Procedure invoking his plea of self-defense. The trial court ruled that accused-appellant was actually entering a conditional plea of guilty and thus entered a plea of not guilty for him. At the same time, it denied accused-appellant's motion for a modification of the order of trial.[4]

The prosecution's first witness was Dr. Alita H. Fetizanan, Municipal Health Officer of Pola, Oriental Mindoro. She testified that on October 17, 1992 at 6 p.m. she performed an autopsy on Mercene, Jr. She submitted an autopsy report (Exh. A) which contains the following findings:

FINDINGS

- Abrasion, 5 cms. in length, 1 cm. in width, above the right eyebrow, temporal side
- Abrasion, 1.5 cms. in length, 1 cm. in width, beside the right eyebrow, temporal side
- Abrasion, 1 cm. in length, 0.5 cm. in width, 1 cm. below the second lesion
- Linear laceration, 0.9 cm. in length, 0.2 cm. in depth lower right lip
- Elliptical abrasion, 4 cms. in length, 1.5 cms. in width, region of the left scapula.
- Gunshot wound, 0.4 cm. in diameter, oval in shape, edges inverted, with blackening around the gunshot wound and contusion collar, 5.5 cms. in diameter, behind the left ear. This wound is the entrance wound, penetrating the left anterolateral neck muscles, transecting the left carotid vessels, with formation of hematoma at the left lateral neck, hitting the apex of the left lung, perforating the ascending aorta and fracturing the 2nd and 3rd rib, about 3.5 cms. from the midsternal region.
- Hemothorax, with evacuation of about 1.5 liters in the chest cavity.

CONCLUSION:

That the cause of death was due to acute hemorrhagic shock secondary to gunshot wound, transecting the left carotid vessels and perforating the ascending aorta.[5]

She likewise issued a death certificate (Exh. B)[6] which states the following:

CAUSE OF DEATH:

I. Immediate cause: a. Acute Hemorrhagic

Shock

Antecedent cause: b. Gunshot wound, left post

auricular

The prosecution's next witness was Arnel Marasigan Aranas, a fellow member of the deceased Antonio Mercene, Jr. in the Sangguniang Bayan of Pola. Aranas knew both Mercene, Jr. and accused-appellant. He testified[7] that Mercene, Jr. was a member of the Task Force Dagat of the Sangguniang Bayan. According to him, Mercene, Jr. wrote to SPO4 Romeo V. Delmo, accused-appellant's superior, charging accused-appellant with grave misconduct (Exh. C).[8] Mercene, Jr.'s complaint was based on an incident which happened on August 25, 1992. Aranas said that he and Rosie Rivas accompanied the deceased on an inspection trip along the Casiligan river in Pola because of Rivas' complaint that accused-appellant had been poaching in the area in which she had been granted the exclusive right to catch lapu-lapu. Rivas had asked Mercene, Jr. for assistance. Aranas said that they saw accused-appellant with companions at the riverbank, and that Rosie Rivas alighted from the banca they were riding on to talk to accused-appellant. Aranas said he heard accused-appellant telling Rivas, "Bakit may kasama ka pang Konsehal fry at CAFGU fry" ("Why do you have to be accompanied by a councilor and CAFGU fry")? Later, according to Aranas, they again met accused-appellant's group in the middle of the river. Accused-appellant shouted invectives at them, "Putang ina ninyo, mga Konsehal fry at CAFGU fry, masisira ang aming lambat" ("You s.o.b. Councilor and CAFGU fry. Our fishing nets are going to be destroyed").

Because of that incident, Mercene, Jr. also wrote a letter (Exh. D)[9] on September 14, 1992 to the People's Law Enforcement Board (PLEB), complaining against accused-appellant for blocking their way with fishing nets and shouting expletives at them. Aranas said accused-appellant was at that time under the influence of liquor.

Continuing, Aranas testified that the deceased also filed a complaint against accused-appellant with the Philippine National Police (PNP) Provincial Command. PNP Chief Inspector Edwin I. Corvera sent for both accused-appellant and Rosie Rivas, as a result of which they signed an agreement (Exh. F),[10] dated October 16, 1992, whereby accused-appellant agreed not to catch fish within the area of Rosie Rivas' concession. In exchange, Rosie Rivas agreed not to press charges of illegal fishing against accused-appellant. But a day later, Aranas said, he learned from Rosie Rivas that accused-appellant had killed Mercene, Jr.

The prosecution presented two other witnesses to the shooting: Dante Pajaron, a supplier of gravel and sand, and his helper Jose Advincula.

Jose Advincula was first to testify.[11] He told the court that in the afternoon of October 17, 1992, at around 2:30 p.m., he went with Dante Pajaron to deliver gravel and sand to a certain Evelyn in Barangay Batuhan, Pola, Oriental Mindoro. While their truck was parked and he was on top of the sand loaded on it, he heard a commotion. Looking to his right, he saw two persons, one had a gun (whom he identified as accused-appellant), while the other (whom he identified as Mercene, Jr.) had none. Advincula said that while Mercene, Jr. was lighting a cigarette, accused-appellant kicked him, causing him to fall to the ground with both hands touching the

ground. As Mercene, Jr. tried to stand up, accused-appellant boxed him, causing him to fall again to the ground. Again Mercene, Jr. tried to get up, but accused-appellant hit him on the shoulder, causing Mercene, Jr. to fall with his hands and knees to the ground. Accused-appellant then aimed his gun (about two inches away) towards the back of Mercene, Jr.'s left ear and fired. Mercene, Jr. fell face downwards. In fright, according to Advincula, Dante Pajaron backed out the truck around 12 meters and then they unloaded their cargo of gravel and sand as fast as they could.

Testifying in his turn, Dante Pajaron corroborated the testimony of his helper. He said[12] that while they were delivering gravel and sand, he saw two persons at his right side, around 7-8 meters away, having an argument. One of them had a gun. He recognized the person with a gun as "Mulong" (accused-appellant's nickname). Fearing for his safety, Pajaron said he got off the truck and sought cover. Less than a minute later, he heard a gunshot. He peeped through his hiding place and saw the person with whom "Mulong" was having an argument drop to the ground. "Mulong" then went inside his house still holding the gun. Pajaron said he and his helpers then unloaded the sand from their truck and then left as quickly as they could.

SPO1 Froilan Rivera of the PNP at Pola was one of the investigators. He and SPO2 Ferdinand Abog and a photographer went to the scene of the crime. He said[13] that they found the deceased sprawled on the ground ("nakabulagta"). They took pictures of Mercene, Jr. (Exhs. H-H-4).[14] Together with Abog, Rivera made a sketch of the scene of the crime (Exh. J).[15] Rivera testified that they found no gun or deadly weapon on Mercene, Jr.'s person.

Oscar Coballes is a crime investigator of the Criminal Investigation Service Command (CIS) stationed at Calapan, Oriental Mindoro. He testified[16] that upon the request of Mercene, Jr.'s widow, he conducted an investigation of the killing. The gun (Exh. O) which accused-appellant had surrendered was given to him. It had four bullets and one empty shell (Exh. P). Coballes prepared a report (Exh. Q)[17] which became the basis of the criminal complaint filed in the Office of the Provincial Prosecutor of Calapan, Oriental Mindoro against accused-appellant (Exh. R).[18]

The widow of the deceased, Alita Patulot Mercene, testified[19] that they have two children, aged 9 and 5; that her husband was a B.S.E. and B.S.E.Ed graduate, a former teacher, and, at the time of his death, a municipal councilor receiving P6,000.00/month; that she spent P40,000.00 for the six-day wake for her husband and P50,000.00 for his coffin and funeral services; that for this case she hired the services of the private prosecutor who charged P20,000.00 for his acceptance fee and P2,000.00 for his appearance fee; that her children faced an uncertain future because of the loss of their father; and that after her husband's death, she had trouble sleeping "because it is really difficult to be alone."

Accused-appellant testified in his behalf.[20] He said that at 2 p.m. on October 17, 1992, he met Mercene, Jr., "who was a little bit drunk," as he was about to leave for work. He claimed that Mercene, Jr. threatened to kill him, saying "Putang Ina mo Patrolman, papatayin kita ngayon" ("You s.o.b. Patrolman, I'll kill you now"). Accused-appellant said he raised his hands and begged the deceased for mercy, saying "Huwag po konsehal, maawa ka sa aking mga anak, at maliliit pa ang mga anak ko" ("Don't kill me Councilor. Have pity on my children, they are still so young"). He said he then turned to open the door to his house with his left hand, his right hand still raised. However, the deceased threw a box of matches at him and tried to grab his service pistol which was tucked at his waist. Accused-appellant said he held the cylinder of his revolver with his right hand. As accused-appellant and the deceased grappled for possession of the gun, they fell to the ground. According to accused-appellant, the deceased tried to put his finger on the trigger but he was not able to do so because accused-appellant had a finger inside the trigger guard. He claimed that as they were lying, his right hand was holding the barrel of the gun while his left hand was holding the right hand of the deceased. Mercene Jr.'s left

hand was allegedly holding accused-appellant's right waist. Accused-appellant said he tried to point the barrel of the gun upwards, even as Mercene, Jr. tried to point it towards accused-appellant. At that point, the gun went off, hitting Mercene, Jr. on the left nape below the ear. According to accused-appellant, at that time, the deceased's finger was on the trigger. Accused-appellant said he then picked up the gun and tucked it at his waist, and stepped out towards the road.

Accused-appellant saw SPO4 Meynard Ramos and asked him to help him bring Mercene, Jr. to the hospital. But Ramos told him to report instead to the police station and he would take care of Mercene, Jr.

Accused-appellant reported the matter to his station commander, SPO3 Rafael Tagulalap, saying that Mercene, Jr. had accidentally shot himself, and surrendered the fatal gun. Accused-appellant claimed that although he was placed inside the jail, it was more to protect him from relatives of the deceased rather than to prevent him from escaping because they believed he committed a crime.

Accused-appellant denied blocking Mercene, Jr.'s passage through the river on August 25, 1992. He claimed he placed the nets to catch fish. Accused-appellant complained that the spot report of the incident transmitted by his station to the PNP Provincial Commander in Calapan was different from the version he gave to his station commander because in the spot report it was stated that he drew his revolver and shot Mercene, Jr. as the latter was about to attack him (accused-appellant). The spot report (Exh. U) reads:

FROM: OIC POLA PNP

TO: PD MDO OR PNP

TEXT:

PPSE 1017-13 PD SPOT REPT RE SHOOTING INCIDENT PD THAT ON OR ABT 171430h OCT 1992 CMM A SHOOTING INCIDENT TRANSPIRED IN BGY BATUHAN CMM THIS MPLTY RESULTING TO THE DEATH OF ONE ANTONIO MERCENE CMM AN ELECTED MUNICIPAL COUNCILOR OF THIS TOWN CMM MARRIED CMM AND RES OF BGY BAYANAN POLA THIS PROVINCE PD INITIAL INVESTIGATION CONDUCTED BY THE ELEMENTS OF THIS STN REVEALED THAT ON SAID TIME AND DATE VICTIM WHO APPARENTLY DRUNK WITH INTOXICATION LIQUOR ALIGHTED FROM A PEDICAB JUST IN FRONT OF THE HOUSE OF ONE SPO1 ROMULO L. GUTIERREZ JR PNP IN BGY BATUHAN CMM AND WITHOUT THE KNOWLEDGE OF SID POLICEMAN ENTERED THE PREMISES OF SAID HOUSE PD AT THIS JUNCTURE CMM SUBJECT POLICEMAN WHO IS SITTING INSIDE THEIR SALA/GUESTROOM NOTICE THE PRESENCE OF THE VICTIM DOES HE CONFRONTED THE SAID VICTIM AND A HEATED ARGUMENT AROUSE BETWEEN THE TWO PD AT THIS JUNCTURE VICTIM ACTED AS IF HE WILL ASSAULT THE SUSPECT DOES SAID POLICEMAN DRAW HIS SERVICE REVOLVER CMM A .38 CALIBER WITH SERIAL NUMBER 924532 AND MADE SB CMM FROM HIS WAISTLINE AND FIRED IT AT CLOSED RANGE TO THE VICTIM CMM HITTING SAID VICTIM ON HIS HEAD NEAR THE LEFT EAR RESULTING TO THE ENSTANEIOUS [sic] DEATH OF SAID VICTIM . . .

(SIGNED)

OFFL: TAGULALAP, R E JR, SPO111, PNP, OIC[21]

He claimed that it was actually Mercene, Jr. who pulled the trigger thus accidentally shooting himself.

Bonifacio Nagulom, a copramaker, corroborated accused-appellant's account. He testified[22] that he witnessed the incident as he was on his way to the public market.

The testimony of Menardo Ramos was dispensed with as the prosecution agreed that if he testified this witness

would say he was the one who took Mercene, Jr. to the hospital.[23]

Romelyn Merjan also testified.[24] He said that while on his way to the bus terminal, he noticed somebody cursing "Putang Ina mo, Mulong mag-away tayo" ("You s.o.b. Mulong, let's fight") even as accused-appellant, with his hands raised, pleaded, "Huwag ho konsehal maawa ka sa mga anak ko, kaliliitan pa" ("Don't councilor, have pity on my young children"). Merjan said he noticed a gun tucked at accused-appellant's waist as he raised his hands. As accused-appellant turned away to go inside his house, Mercene, Jr. threw something at him and then tried to seize accused-appellant's gun. Both of them fell as they grappled for possession of the gun. A moment later, Merjan heard a gunshot. He noticed Mercene, Jr. trying to stand up only to fall down again.

Enrique Dajoyag, a member of the Philippine National Police of Pola, testified[25] that he was the one who took down the report of the incident in the police blotter because the investigator, Alvin de Ramos, who interviewed accused-appellant, had poor eyesight. Pages of the blotter containing the report were later found missing and the Station Commander, Romeo Delmo, in a memorandum (Exh. T),[26] stated his belief that the loss of the missing pages was not accidental.

However, testifying in his turn,[27] Alvin de Ramos could not recall whether he had asked Dajoyag to write the investigation report in the police blotter for him. Nor could he explain the fact that the pages of the police blotter containing his alleged report were missing. He remembered that what accused-appellant said was that Mercene, Jr. went to his house and that they had an argument and grappled for the possession of accused-appellant's firearm.

On rebuttal, the prosecution presented Mercene, Jr.'s widow Alita and SPO3 Rafael Tagulalap. Alita testified[28] that the Municipality of Pola is a sixth class municipality and that the salary of councilors is P7,095.00 a month. Tagulalap for his part identified the spot report (Exh. U) referred to in accused-appellant's testimony as the one sent by him to the PNP Provincial Director and said that it was in fact prepared by SPO2 Alvin de Ramos.[29]

The trial court found accused-appellant guilty. It noted that the witnesses for the prosecution were frank and straightforward and credible. Hence, this appeal.

Accused-appellant contends that the trial court erred

- In not allowing the accused in presenting his defense in an inverted order of trial upon his counsel's motion as he invoked self-defense;
- In failing to appreciate the fact that the elements required to invoke self-defense are present in this instant case;
- In being biased in the appreciation of the testimonies of the two eyewitnesses who could have not been present at the scene of the incident.

Order of Trial

Rule 119, §3 of the Rules of Criminal Procedure provides:

The trial shall proceed in the following order:

(a)

The prosecution shall present evidence to prove the charge and, in the proper case, the civil case liability.

(b)

The accused may present evidence to prove his defense, and damages, if any, arising from the issuance of any provisional remedy in the case.

(c)

The parties may then respectively present rebutting evidence only, unless the court, in furtherance of justice, permits them to present additional evidence bearing upon the main issue.

(d)

Upon admission of the evidence, the case shall be deemed submitted for decision unless the court directs the parties to argue orally or to submit memoranda.

(e)

However, when the accused admits the act or omission charged in the complaint or information but interposes a lawful defense, the order of trial may be modified accordingly.

Accused-appellant invokes this provision and contends that the trial court should have modified the order of the trial.

The contention has no merit. To begin with, the Court understands accused-appellant's contention to be that he should have been heard first in his defense before the prosecution presented its evidence because of his plea of self-defense.

The present rule is a response to the early case of *Alejandro v. Pepito*[30] in which we ruled that even in situations where the plea of self-defense is raised, the constitutional provision that no person shall be held to answer for a criminal offense without due process still requires that in the presentation of evidence the prosecution must go forward and present all its proof in the first instance before the accused is required to substantiate his defense because the latter is presumed innocent until the contrary is proved. The change found in the present rule is based on the theory that by pleading self-defense, the accused admits the killing and, therefore, the burden of justification is now on him. Rule 119, §3(e), however, does not require such a change in the order of trial but only allows it in the discretion of the court. This can be seen in the use of the permissive "may."

At any rate, in the case at bar, although accused-appellant pleaded self-defense, he did not really admit the killing because his claim was that it was the deceased who accidentally shot himself. There is, therefore, no basis for reversing the order of trial. The burden was on the prosecution to prove that it was accused-appellant who really fired his gun at the deceased.

Credibility of Prosecution Witnesses

Accused-appellant assails the testimony of the principal prosecution eyewitness, Jose Advincula, claiming it to be riddled with inconsistencies showing that he did not actually witness the incident:

- According to accused-appellant, Advincula testified that he did not know the names of the two persons he saw, yet he identified accused-appellant Gutierrez, Jr. by name as the man he saw holding a gun. Advincula's testimony is as follows:

Q. Before this incident which you had witnessed, could you be able to tell this Honorable Court if you had seen

Romulo Gutierrez before?

A. Yes, sir.

Q. Why have you seen him?

A. I saw him that he is a policeman of Pola. I do not only know his name.

Q. What about this Antonio Mercene, have you seen this man before the incident in question?

A. Yes, sir. I know him long before. I have seen his face but I do not know his name.[31]

There is no inconsistency between Advincula's testimony that he did not know the names of the persons he saw in the afternoon of October 17, 1992 and the fact that he later identified accused-appellant as the assailant. Obviously, Advincula only came to know accused-appellant's name after witnessing the incident. Even if at the time of the killing he did not know accused-appellant's name, he was familiar with the latter, having seen accused-appellant before and in fact knew that accused-appellant was a policeman in Pola. More importantly, in the courtroom, Advincula positively identified accused-appellant as the person whom he saw shoot Mercene, Jr.[32]

- Accused-appellant claims that Advincula was inconsistent because at first he testified that he could not remember whether it was Mercene, Jr.'s left or right shoulder which accused-appellant hit with his gun but later this witness said it was the left shoulder which was hit.

This contention is also without merit. Advincula never said accused-appellant hit the deceased on the left shoulder. What he said was that the accused-appellant aimed his gun at the left shoulder of deceased. Here is what Advincula said:

A.

When Antonio Mercene was about to stand up, he was hit by the gun Romulo was holding, on the shoulder, I do not know only whether it was left or right shoulder.

. . . .

Q. What happened next?

A. Romulo Gutierrez shot Antonio Mercene, sir.

Q. How far was Romulo Gutierrez from Antonio Mercene when he fired his gun?

A. "Tutok po ang baril".

COURT:

Q. Where was it "nakatutok"?

A. On his left shoulder, your honor.[33]

- Another alleged inconsistency in Advincula's testimony is that he said he saw the deceased and accused-appellant talking "on the road outside the house" but later he said that the two were "at the side of the road." Advincula's testimony is as follows, and it belies accused-appellant's claim that it is inconsistent:

ATTY. JUNIO:

Q-

You said that when you were about 12 meters away from the place where the incident happened, did you notice that the two persons were just very close the door of the house?

A- They were talking on the road outside the house, sir.

Q- So, when Councilor Mercene was allegedly shot, he was shot on the road?

A- He was slumped on the road, sir.

ATTY. JUNIO:

The witness is not answering directly the question.

Q-

Prior to my last question, you said that the two, the deceased councilor Mercene and accused Romulo Gutierrez were on the road. So when councilor Mercene was shot, he was on the road?

A-

At the side of the road, sir.

Q- How far to the side of the road?

A- At the very side of the road, sir.[34]

What Advincula actually testified to was that he saw accused-appellant talking with Mercene, Jr. on the road but that the latter was shot at the very side of the road. Indeed, this testimony is consistent with the sketch (Exh. J)[35] of the crime scene, which shows the deceased's body on the shoulder of the road and his foot about 15 inches from the road indicating that if accused-appellant and the deceased did not have their initial confrontation on the road, it was at least quite near the same.

- According to accused-appellant, Advincula's testimony that accused-appellant was situated obliquely on the left side of Mercene, Jr.'s head when he shot the latter was belied by the testimony of the medico-legal witness Dr. Fetizanan. This is not so. Dr. Alita Fetizanan's testimony in fact corroborates Advincula's testimony. She said:

It could be possible that the victim at the time he was shot was either stooping or sitting down and the assailant is positioned in such a way that he is higher than the victim. It is also possible that the assailant is located on the left posterior lateral position in relation to the victim, sir.[36]

- Finally, accused-appellant contends that Advincula lied when he testified that the distance between the deceased's body and the wall of accused-appellant's house was 5 meters since, according to SPO1 Froilan Rivera, the distance of the deceased's body from the wall of accused-appellant's house was only 5 feet or 1 1/2 meters.

Advincula's estimate regarding the distance between the place where the deceased was shot and the wall of appellant's house is from 4 to 5 meters. While this is belied by the sketch (Exh. J)[37] of SPO1 Rivera and the latter's testimony[38] to the effect that the distance between the head of the deceased and the main door of appellant's house was 59 inches, the erroneous estimate of Advincula may have been caused by fright. At all events, this is an error concerning a minor point. Far from detracting from the merit of his testimony, it in fact even bolsters its credibility for it indicates that his testimony was unrehearsed.[39]

Turning to Dante Pajaron's testimony, accused-appellant contends that it is of doubtful veracity because Pajaron testified that he had two companions at the time of the shooting, Jose Advincula and Ramil de los Reyes, but in his earlier affidavit (Exh. 1)[40] he stated that a certain Teddy Boy and John-John were also with him. We have observed many times before that affidavits taken ex parte are often incomplete and inaccurate, sometimes because of suggestion and at other times because of want of suggestion and inquiries. For this reason, they are generally considered inferior to testimony given in open court.[41] Moreover, Dante Pajaron clarified during his cross-examination that Teddy Boy and John-John were with them when they were gathering sand and that they were left behind in the quarry to pile the same while he, Jose Advincula, and Ramil de los Reyes proceeded to Pola.[42]

We find the findings of fact of the trial court to be in accordance with the evidence. With two credible eyewitnesses and the documentary evidence corroborating their testimonies, the prosecution has clearly discharged its burden of proving accused-appellant's guilt beyond reasonable doubt.[43] It should be added that the trial court had the opportunity to observe first-hand the demeanor and deportment of all the witnesses and its findings that the witnesses for the prosecution are to be believed over those of the defense are entitled to great weight.[44]

Improbability of Defense Version

Indeed, it is undisputed that accused-appellant was armed while the deceased was not. It would be foolhardy for

the deceased to challenge accused-appellant while in such a position of obvious weakness. Accused-appellant claimed that Mercene, Jr. was a "little bit drunk." This circumstance, assuming it to be true, is insufficient to make him throw caution to the winds and challenge an armed adversary. Equally improbable is accused-appellant's claim that the deceased threatened to kill him and he had to beg for the latter's mercy. Accused-appellant was armed while Mercene, Jr. was not. It is hard to believe that he could be intimidated by the deceased.

This is not the only improbability in accused-appellant's testimony. His narration of the alleged struggle for the possession of his gun is too detailed for a struggle that accused-appellant himself admits lasted for only a few seconds.[45] One wonders how he could remember what he was doing with his left and right hands and what Mercene was doing with his own hands. This total recall is highly improbable under the circumstances.[46]

There is also the matter of the spot report transmitted by the Pola Station to the PNP headquarters in Calapan which accused-appellant himself admits is at variance with his self-defense theory as the spot report states that accused-appellant shot Mercene, Jr. because the latter "acted as if he will assault" him. Accused-appellant says he cannot understand how the spot report could differ from the story he gave to his station commander which is also the same as his testimony in the trial court. He claims that he does not know who prepared the spot report.[47] But the source of the information used in the spot report could have only been accused-appellant himself considering that he was the one who in fact reported the shooting to his station and his admission that he was still in Pola when the report was transmitted to Calapan.

Finally, it is noteworthy that accused-appellant suffered no injury, not even a scratch, as a result of the incident, while the autopsy report reveals that the deceased suffered seven injuries. Yet he claims that he and the deceased fought for possession of the gun.

Defendant's Liability

We now come to the circumstances attending the commission of the crime. The information alleged two qualifying circumstances (evident premeditation and treachery) and three aggravating circumstances (abuse of superior strength, that advantage was taken by the accused of his public position, and that the crime was committed in contempt of or with insult to public authority).

For evident premeditation to exist, the following requisites must be established: (a) the time when the accused determined to commit the crime; (b) an act manifestly indicating that the accused had clung to his determination; and (c) sufficient lapse of time between such determination and execution to allow him to reflect upon the consequences of his act.[48]

The trial court found that there was evident premeditation based on the fact that, before the shooting, there was an incident between the parties at the Casiligan river, for which several complaints were filed by the deceased against accused-appellant. Assuming that these caused ill-feeling on the part of the latter, accused-appellant did not know that he would see the deceased on October 17, 1992 and, therefore, could not have planned to kill him then.

The qualifying circumstance of treachery, however, is present in the case as the two conditions for the same are present, i.e., (1) that at the time of the attack, the victim was not in a position to defend himself and (2) that the offender consciously adopted the particular means, method, or form of attack employed by him.[49] According to the eyewitness account of Jose Advincula, accused-appellant took Mercene, Jr. by surprise because the latter was lighting a cigarette when, without warning, accused-appellant kicked and boxed him, causing Mercene, Jr. to fall. As Mercene, Jr. was trying to get up from the ground, accused-appellant took aim at him and shot him near his left ear.

Treachery absorbs the aggravating circumstance of abuse of superior strength so the same need not be appreciated

separately.[50] Neither can the aggravating circumstance that the crime was committed with insult to public authority be appreciated as the crime was committed against the public authority himself.[51] The aggravating circumstance of taking advantage of one's public position, however, is present since the gun used by accused-appellant was the service revolver issued to him.[52]

The trial court likewise erred in appreciating the mitigating circumstance of voluntary surrender in this case as it appears that accused-appellant did not really go to his station to surrender and thus save the authorities the time and trouble of arresting him but rather to merely report the incident.[53]

The crime, therefore, is murder with the aggravating circumstance of taking advantage of accused-appellant's office. At the time when the crime was committed in 1992, the penalty for murder was reclusion temporal maximum to death. The presence of an aggravating circumstance would call for the imposition of the maximum penalty, i.e., death. However, in view of Art. III, §19(1) of the Constitution, the imposition of the death penalty then was prohibited. It was only on December 31, 1993 when, by virtue of R.A. No. 7659, the penalty of death was imposed for certain heinous offenses in view of the compelling necessity for imposing the supreme penalty. Accordingly, the penalty next lower to death, i.e., reclusion perpetua, should be imposed in this case.[54]

Award of Damages to the Heirs

Anent the award of actual damages, the Court must disallow the P90,000.00 as reimbursement for the expenses incurred for the wake, burial, and funeral services for Mercene, Jr.. Aside from the bare assertion of the widow, Alita Mercene, no evidence to prove the same was presented. The Court can only give credit for expenses supported by receipts. Here, since the actual amount of the funeral expenses was not substantiated, no award for the same can be granted.[55]

The award of P150,000.00 for support for the educational expenses of the two minor children of the deceased must also be disallowed, the recipients being Mercene, Jr.'s children who are his intestate heirs under Art. 980 of the Civil Code. Art. 2206(2) of the Civil Code provides that support for education may only be demanded from a person convicted of a crime if he is obliged to give support according to the provisions of Art. 291, "the recipient [not being] an heir called to the decedent's inheritance by the law of testate or intestate succession." (Emphasis added)

Although the prosecution did not present evidence to support the widow's claim for loss of earning capacity, such failure does not necessarily prevent recovery of the damages if the testimony of the surviving spouse is sufficient to establish a basis from which the court can make a fair and reasonable estimate of the damages for the loss of earning capacity of the victim.[56] In this case, Alita Mercene testified[57] that her husband was 34 years old at the time of his death and that he had B.S.E. and B.S.E.Ed degrees. Prior to his election as municipal councilor of Pola, he was a substitute teacher at Pahilahan and later a permanent teacher at Matulatula for two years. His monthly salary as councilor was P7,095.00.[58] While in her direct examination Alita Mercene testified that her husband's salary was P6,000.00, we think it proper to use the higher figure as it appears that she was recalled to the witness stand to correct her previous estimate and accused-appellant did not question the higher figure.

The deceased's loss of earning capacity would then be as follows:[59]

gross less

net earning capacity (x) = life expectancy x annual living

income expenses

(50% of gross annual income)

$$x = 2(80-34)$$

$$\frac{\quad}{3} \times [85,140 - 42,570.00]$$

3

$$= 30.67 \times 42,570.00$$

$$= P1,305,621.90$$

An award of P20,000.00 as exemplary damages is also justified under Art. 2230 of the Civil Code which provides:

ART. 2230. In criminal offenses, exemplary damages as a part of the civil liability may be imposed when the crime was committed with one or more aggravating circumstances. Such damages are separate and distinct from fines and shall be paid to the offended party.

The award of moral damages and attorney's fees[60] is also justified under Arts. 2219(1) and 2206(3), and 2208(1) and (11) of the Civil Code, respectively. However, the amount of P100,000.00 for moral damages, which the trial court ordered accused-appellant to pay, is excessive, in light of the purpose for making such award, which is to compensate the heirs for injuries to their feelings and not to enrich them. An award of P50,000.00 would be adequate for the purpose.[61]

WHEREFORE, the decision of the Regional Trial Court of Pinamalayan, Oriental Mindoro (Branch 42) is SET ASIDE and another one is RENDERED finding accused-appellant guilty of murder with the aggravating circumstance of abuse of public position and sentencing him to suffer the penalty of reclusion perpetua and to pay the heirs of Antonio Mercene, Jr., the amounts of P50,000.00 as indemnity for his death; P1,305,621.90 for loss of earnings; P20,000.00 as exemplary damages; P50,000.00 as moral damages; and P20,000.00 as attorney's fees; and the costs.

SO ORDERED.

Bellosillo, (Chairman), Puno, Quisumbing, and Buena, JJ., concur.

[1]Per Judge Manuel A. Roman, Rollo, pp. 24-42.

[2]Rollo, p. 11.

[3]Per Order dated January 14, 1993, Records, p. 29.

[4]TSN, pp. 8-9, 11, May 25, 1993.

[5]Records, p. 17.

[6]Id., p. 18.

[7]TSN, pp. 13-56, May 25, 1993.

[8]Records, p. 80.

[9]Id., p. 82.

[10]Records, p. 84.

[11]TSN, pp. 9-54, May 26, 1993.

[12]TSN, pp. 6-42, June 9, 1993.

[13]TSN, pp. 8-39, June 8, 1993.

[14] Records, pp. 85-86, 100-101.

[15]Id., p. 88.

[16]TSN, pp. 3-29, July 6, 1993.

[17] Records, pp. 89-90.

[18]Id., p. 91.

[19]TSN, pp. 39-56, July 6, 1993.

[20]TSN, pp. 9-111, Sept. 8, 1993.

[21]Records, p. 154.

[22]TSN, pp. 6-16, Nov. 23, 1993.

[23]TSN, p. 4, Nov. 24, 1993.

[24]Id., p. 14.

[25]TSN, pp. 2-14, Jan. 10, 1994.

[26] Records, p. 149.

[27]TSN, pp. 11-13, Jan. 11, 1994.

[28]Id., p. 35.

[29]TSN, pp. 39-43, Jan. 11, 1994.

[30]96 SCRA 322 (1980).

[31]TSN, p. 19, May 26, 1993 (emphasis added).

[32]Id., p. 14.

[33]TSN, pp. 16-17, May 26, 1993 (emphasis added).

[34] TSN, pp. 35-37, May 26, 1993.

[35]Records, p. 85.

[36]TSN, p. 18, March 3, 1993.

[37]Records, p. 88.

[38]TSN, pp. 3-18, June 8, 1993.

[39]See *People v. De Guia*, 280 SCRA 141 (1997); *People v. Bergonia*, 273 SCRA 79 (1997).

[40]Records, p. 13.

- [41]People v. Sumbillo, 271 SCRA 428 (1997); People v. Tampon, 255 SCRA 118 (1996).
- [42]TSN, p. 30, June 9, 1993.
- [43]People v. Gatchalian, G.R. No. 90301, Dec. 10, 1998.
- [44]E.g., People v. Reyes, 282 SCRA 105 (1997); Amper v. Sandiganbayan, 279 SCRA 762 (1997).
- [45]TSN, p. 105, Sept. 8, 1993.
- [46]See People v. Estrera, 285 SCRA 372 (1998).
- [47]TSN, pp. 84-85, Sept. 8, 1993.
- [48]E.g., People v. Queliza, 279 SCRA 145 (1997); People v. Magsombol, 252 SCRA 187 (1996).
- [49]People v. Magaro, G.R. No. 113021, July 2, 1998; People v. Magallanes, 275 SCRA 222 (1997).
- [50]People v. Caritativo, 256 SCRA 1 (1996).
- [51]People v. Rizal, 103 SCRA 282 (1981).
- [52]See People v. Gapasin, 231 SCRA 728 (1994); TSN, p. 16, Sept. 8, 1993.
- [53]See People v. Valles, 267 SCRA 103 (1997).
- [54]People v. Guillermo, G.R. No. 113787, January 28, 1999.
- [55]David v. Court of Appeals, G.R. Nos. 111168-69, June 17, 1998; Fuentes, Jr. v. Court of Appeals, 253 SCRA 430 (1996); People v. Rosario, 246 SCRA 658 (1995).
- [56]See Pantranco North Express, Inc. v. Baesa, 179 SCRA 384 (1989).
- [57]TSN, p. 38, July 6, 1993.
- [58]TSN, p. 35, Jan. 11, 1994.
- [59]Sanitary Steam Laundry, Inc. v. Court of Appeals, G.R. No. 119092, Dec. 10, 1998; Metro Manila Transit Corporation v. Court of Appeals, G.R. Nos. 116617 and 126395, Nov. 16, 1998; Negros Navigation Co., Inc. v. Court of Appeals, 281 SCRA 534 (1997); Villa-Rey Transit, Inc. v. Court of Appeals, 31 SCRA 511 (1970).
- [60]Baliwag Transit, Inc. v. Court of Appeals, 262 SCRA 230 (1996).
- [61]People v. Aringue, 283 SCRA 291 (1997).

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