

THE PEOPLE OF THE PHILIPPINES, APPELLEE, VS. BERNABE MONTEMAYOR ALIAS "BABY," APPELLANT.

G.R. No. 125305. June 18, 2003

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

This is an automatic review of the decision[1] of the Regional Trial Court of Dagupan City, Branch 41, convicting appellant Bernabe Montemayor alias "Baby" of murder, sentencing him to death by electrocution and ordering him to pay the heirs of the victim Leo Pontawe in the amount of P100,000 as civil indemnity; P200,000 as moral damages; P10,000 as exemplary damages; and P10,000 as consequential damages.

The Charge

On November 15, 1995, an Information[2] for murder was filed against the appellant which reads:

That on or about October 5, 1995 in the evening at [B]arangay Primicias, [M]unicipality of Sta. Barbara, [P]rovince of Pangasinan, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, armed with a gun with intent to kill, treachery and evident premeditation, did then and there wilfully, unlawfully and feloniously shoot Leo Pontawe y Salon inflicting upon him a gunshot wound, head which caused his instantaneous death to the damage and prejudice of his heirs.

Contrary to Art. 248, Revised Penal Code, as amended by R.A. 7659.[3]

On January 24, 1996, the appellant was arraigned with the assistance of his counsel, Atty. Miguel Caguioa and pleaded not guilty to the crime charged.[4]

The Case for the Prosecution[5]

Late in the afternoon of October 5, 1995, Beverly Limos, a balikbayan, invited neighbors for some drinking of beer and merrymaking in her house at Brgy. Primicias, Sta. Barbara, Pangasinan. In attendance were Leo Pontawe and his wife Gracia,[6] a public school teacher; Leo's brother Nestor Pontawe; one Rudy Ferrer; Bernabe "Baby" Montemayor, a master sergeant of the Philippine Army and Gracia's second cousin; and Barangay Kagawads Antonio Pablo and Armando Santiago. Bernabe was in yellow uniform with the name "Zaplan" printed thereon. Some guests sang with the accompaniment of a videoke. Between 8:00 to 9:00 p.m., Beverly requested Leo to sing, also with the accompaniment of the videoke. He obliged. He and his wife Gracia sang together. After their duet, the couple decided to go home. Leo handed the microphone to Bernabe, remarking, "Bayaw, its your turn because we are going home with my wife." [7] Bernabe took the microphone and began to sing. However, he was enraged when the videoke suddenly stopped. Bernabe shouted. "Vulva of your mother, who is tough here, you are folling [sic] me." [8] Simultaneously, Bernabe pulled a table and turned it upside down. He grabbed an empty bottle of beer grande and smashed it. He then shouted invectives at the Pontawe and Mihing families: "Vulva of your mother, you Pontawe family, you Mihing family." [9] Leo confronted Bernabe and demanded to know why Bernabe was so mad at his family (Mihing was the nickname of Leo's father). To prevent the already tense situation from further escalating, Gracia prodded Leo for them to leave. As Leo was retrieving his slippers,

Bernabe tried to hit him with the broken bottle. Leo parried the thrust and boxed Bernabe on the nose. They grappled for the possession of the broken bottle.[10] Petrified, Gracia pleaded to the neighbors to pacify and separate Leo and Bernabe. Randy Rosario, Nestor Pontawe, Dante Rivera and Rudy Ferrer responded and managed to separate the protagonists. Disgruntled, Bernabe turned to Leo's brother Nestor. Bernabe collared him and attempted to hit him with the broken bottle, but the latter was able to hold the hand of Bernabe. Nestor then twisted Bernabe's hand and succeeded in wresting possession of the broken bottle.[11] Uncowed, Bernabe ran after Leo and Gracia as they descended the stairs. When Leo looked back, he saw the approaching Bernabe and boxed him on the nose and mouth. Bernabe was thrown off, but was able to lean on the wall. He stood up and fought with Leo. They were separated anew, this time by Barangay Kagawads Antonio Pablo and Armando Santiago, who brought Bernabe to his tricycle. On his way to the tricycle, Bernabe warned Leo: "Wait for me and I will come back." [12] Nonong, Bernabe's son, drove the tricycle and brought the latter home.

Beverly Limos, Nestor Pontawe, Randy Rosario and some other visitors decided to go to the police station to report the incident. Beverly requested Gracia to stay behind and look after her house. Gracia agreed. Gracia, Leo, Rowel Pontawe and Samuel Pontawe (another neighbor of Beverly), waited near the gate fronting Beverly's residence.[13] Berlin (Boyet) Bornillo, a contemporary of Bernabe in the Philippine Army and Nestor Pontawe's brother-in-law, joined them. Gracia stood in front of Leo, who was seated near the flower box.[14] Berlin was seated at Leo's right, while William Pontawe was seated next to Berlin. The place was lit by electric bulbs and spotlights placed on the gate and the perimeter fence of the house. As Leo and Gracia conversed with their companions, he showed the wounds he had sustained earlier during his scuffle with Bernabe.

After about thirty to forty minutes, Bernabe returned to Beverly's house, armed with a short gun. He positioned himself in a dark place near the perimeter fence which was about seven meters away from and on the right side of Gracia. Suddenly, Gracia and Berlin heard a gunshot. They turned their heads towards the direction where the gunshot emanated from and saw Bernabe pointing his gun at them and their companions.[15] It turned out that Berlin had been hit on the left side of the neck, dove to the ground and lost consciousness. Gracia frantically warned the others that Bernabe had a gun.[16] Immediately thereafter, Gracia heard another gunshot.[17] Leo was hit on the left temple and fell to the ground, mortally wounded. Unaware that Leo had been shot, Gracia told him to take cover. Bernabe menacingly moved closer to Gracia and fired his gun two more times. He challenged the Pontawe and the Mihing families to come out: "Paway diay siga pamilya Pontawe, pamilya Mihing." [18] Gracia retreated towards the road and tried to get hold of Leo's hand but when she looked at her husband, she was aghast to see blood oozing from his head, prompting her to shout: "He was hit, he was hit!" [19]

Berlin and Leo were brought by neighbors to the Villaflor Hospital in Dagupan City in a Mazda mini bus. Gracia, accompanied by William, rushed to the police station to report the incident. She saw Barangay Captain Adoracion Montemayor, the wife of Bernabe, and spontaneously told the latter that her husband Bernabe had just shot Leo.[20] In the meantime, Beverly's report was placed in the police blotter.[21] Despite immediate medical attention, Leo died at the hospital on October 6, 1995.[22]

On the same day, Dr. Alfredo Layno Sy performed an autopsy on the victim and submitted his findings, thus:

AUTOPSY: 4 inches circular blood clot on temporal area[e], oval shape, $\frac{3}{4}$ x $\frac{1}{4}$ inches

*skull

*meninges covered with blood clot

*slug found in the right, posterior occipital area

PERIORBITAL HEMATOMA

2 inches above the ear

2 inches anterior to the L ear

0.25 cm. around, inverted age

thumb incised wound 0.5 cm

first finger

knuckle [sic] areae [sic] 0.5 cm.

between 1-2 joint - .5cm incised wound

Rigor Mortis, lividity at back, cyanosis of nailbed

Death due to Cardiorespiratory arrest 2' to Intracranial injury 2' to Gunshot Wound[23]

The doctor turned over the slug he had recovered from the right posterior occipital area of the victim to SPO2 Bernardo Balberan. Meanwhile, the chief of police and policemen rushed to the scene of the crime and conducted an on-the-spot investigation. They were told that Leo was shot by Bernabe. However, the latter was nowhere to be found. Senior Police Inspector 1 (SPO1) Eduardo B. Soriano prepared the police report on the said investigation.[24] On October 7, 1995, Gracia gave a sworn statement to SPO4 Dominador Cacho in which she stated that Bernabe was wearing an aqua green t-shirt with the name "Lito Zaplan" printed on it. A criminal complaint[25] was filed with the Municipal Trial Court of Sta. Barbara, Pangasinan in Criminal Case No. 3405 against Bernabe on October 10, 1995 charging him with murder for the death of Leo. Gracia affixed her signature on the said complaint as a witness.[26] Gracia filed a motion for the issuance of a warrant for the arrest of Bernabe, and testified in support of her motion. On October 12, 1995, the trial court granted the motion and issued the warrant. Gracia later learned that Bernabe was arrested on October 21, 1995 by the Provost Marshall of the Philippine Army.

The Evidence of the Accused[27]

Bernabe denied killing Leo. He claimed that during the party, he and Leo had a quarrel about politics, during which Leo boxed him on his shoulder. He then left the place. He surmised that the only reason why the witnesses for the prosecution pointed to him as Leo's assailant was that prior to the shooting incident, he and Leo had a fight, but it was Leo who started it.

Jose Pontawe, the appellant's brother-in-law, testified that he witnessed the shooting of Leo. According to him, he saw a person, definitely not Bernabe, who ran towards the rear of his house. He could not, however, recognize the man because the place was dark at that time.

Bernabe adduced evidence that after drinking beer, he was so inebriated. He was brought home at about 10:00 p.m. on his tricycle driven by his son, who was in the company of Kagawads Antonio Pablo and Armando Santiago. It took the tricycle about fifteen to twenty minutes to reach his house, which was a kilometer away from Beverly's residence. He was so drunk and groggy that he fell asleep immediately upon arriving at his place. The two kagawads waited until Bernabe's wife arrived at about 10:00 to 10:30 p.m. and forthwith left.

Bernabe testified that at 4:00 a.m. the next day, October 6, 1995, he left his house and went to Camp Tito Abat in Manaoag, Pangasinan to follow-up his clearance for early retirement. He was thereafter confined at the V. Luna Hospital on October 14, 1995, as part of the continuing treatment of the wounds he sustained on September 16, 1981, while on active duty in the Philippine Army.[28] On October 16, 1995, after his discharge from the V. Luna Hospital, he then went to Tanza, Cavite to secure his papers from his command post.[29] On October 25, 1995, Bernabe was arrested by the Provost Marshall of the Philippine Army and detained at Fort Bonifacio.[30] He was discharged from the Philippine Army on November 16, 1995.[31] He adverted that before the incident at Beverly's residence on October 5, 1995, he and his second cousin Gracia were in good terms.

On February 27, 1996, the trial court rendered a decision finding Bernabe guilty beyond reasonable doubt of murder and sentenced him to the extreme penalty of death by electrocution:

WHEREFORE, this court finds accused guilty of the crime of murder as charged in the information in relation to RA 7659 and therefore hereby sentences him to death by electrocution and to indemnify the heirs of the deceased in the amount of P100,000.00 for the loss of life of the said victim; P200,000.00 as moral damages; P10,000.00 as exemplary damages and P10,000.00 as consequential damages.[32]

The trial court stated that Gracia and Berlin positively identified Bernabe as the assailant. The situs criminis was illuminated by electric bulbs on the hollow block fence of Beverly's residence. Moreover, Gracia and Berlin were both familiar with Bernabe's physical features that even if the crime was committed at nighttime, it was not difficult for them to recognize the appellant when he fired his gun four times, and shot the victims Berlin and Leo.

The trial court gave credence and full probative weight to the positive identification made by Gracia and Berlin, of Bernabe as the assailant of Leo, and rejected the appellant's bare denial of the crime charged as well as his defense of alibi.

Bernabe, now the appellant, assails the decision of the trial court contending:

- I. That the Lower Court gravely erred in finding that the identity of the Accused-appellant as the author of the crime charged has been established beyond reasonable doubt;
- II. That the Lower Court gravely erred in not considering the inconsistencies and incredibilities of the testimonies of the prosecution witnesses.
- III. That the Lower Court gravely erred in finding the crime committed was one of murder.
- IV. Lower Court gravely erred in not giving weight to the evidence of the defense.[33]

On the first two assignments of errors, the appellant avers that the prosecution's principal witnesses are the relatives of the victim: Gracia, the surviving spouse; Randy Rosario, the nephew; and Berlin, the brother-in-law. He argues that because of their relationship to the victim, the said witnesses are biased in favor of the prosecution. Furthermore, the testimony of Gracia is incredible. It is inconsistent with her Sworn Statement executed on October 7, 1995, as well as her testimony before the MTC, in support of her motion for the issuance of a warrant of arrest against the appellant. Gracia and Berlin could not have identified him as Leo's assailant because of the following: (a) Gracia testified before the MTC that when she heard the first gunshot, her back was towards the assailant, and she ran away immediately; (b) Gracia likewise testified before the MTC that the place where the appellant hid himself before the first gunshot was dark; (c) when Berlin was hit by the first gunshot, he fell to the ground unconscious; hence, he could not have seen the appellant shoot Leo; (d) Gracia also stated before the MTC that before the first gunshot rang out, she saw that portion of the appellant's body (from the waist up to the head) facing her and her companions. This is contrary to the physical evidence that Leo was hit on his left temple; (e) also contrary to Gracia's testimony, the assailant could not have been nearer than twenty to thirty meters from where Leo was shot, considering that Dr. Alfredo Sy who performed the autopsy on the body of the victim, did not notice any gunpowder burns on the entrance wound; and (f) although the appellant was charged for the injuries sustained by Berlin, the case was archived because Berlin refused to testify for the prosecution on account of his uncertainty of the identity of the person who shot him.

The contentions of the appellant do not persuade us. By controverting the credibility and probative weight of the collective testimonies of Gracia and Berlin identifying him as the assailant of the victim, the appellant thereby questions the findings of facts made by the trial court. But case law has it that the findings of the trial court, its calibration of the testimonies of witnesses and the probative weight thereof, as well as its conclusions anchored on the said findings, are accorded high respect by the appellate court, if not conclusive effect. The reason for this is that the trial court has the unique advantage of monitoring and observing the deportment, conduct and demeanor of the witnesses as they regale the trial court with their respective testimonies.[34]

The prosecution is burdened to prove beyond cavil that the appellant shot and killed the victim. Direct evidence is not the only matrix wherefrom a trial court may draw its conclusions and findings that the accused is the assailant. Even in the absence of direct evidence, conviction can be had if the established circumstantial evidence constitutes an unbroken chain, consistent with each other and to the hypothesis that the accused is guilty, to the exclusion of all other hypothesis that he is not.[35]

Admittedly, neither Gracia nor Berlin actually saw the appellant shoot and kill the victim. But the prosecution adduced conclusive proof, principally through the testimonies of Gracia and Randy, independent of that of Berlin, that no other than the appellant shot and killed the victim. The appellant was a master sergeant of the Philippine Army and had combat experience in Mindanao. He had a fight with Leo and Nestor, and he was at the losing end. Before he left the gathering at Beverly's residence, he avowed to avenge the assault on him by Leo when he shouted at the latter: "Wait for me and I will come back." True to his word, the appellant returned to the house after about thirty to forty minutes, armed with a high-powered handgun. The appellant positioned himself astride the perimeter fence, about seven meters away from Gracia. Gracia heard two successive gunshots; the first, hitting Berlin on the left side of his neck; and the second, hitting Leo on his left temple. Gracia turned her head towards her right and saw the appellant pointing a gun at her and her companions. After the second gunshot, the appellant emerged from where he was initially located, and menacingly moved closer to Gracia who retreated towards the road to avoid being the appellant's next victim. The gun was fired two more times even as the appellant challenged the Pontawe and Mihing families to come out and confront him, in full view of Gracia, Randy and Beverly's other guests. The only person in the vicinity who was armed with a gun was the appellant. The only reasonable conclusion thereon is that it was the appellant who shot Leo.[36]

Gracia rushed to the police station after the incident and spontaneously told Barangay Captain Adoracion Montemayor, the wife of the appellant, that the latter had just shot the victim. The spontaneous declaration of Gracia was part of the *res gestae*; hence, is entitled to full probative weight. The act of reporting the crime to the police authorities and describing the malefactor immediately after the shooting enhanced Gracia's credibility as a witness. After all, the natural reaction of one who witnesses the commission of a crime, especially if the victim is his close relative, is to report it and describe the malefactor to the police authorities at the earliest opportunity.[37] The appellant left the *situs criminis* after the shooting and could no longer be located until he was arrested on October 25, 1995 by the Provost Marshall of the Philippine Army. Flight from the *situs criminis* is an implied admission of guilt.[38] It is, therefore, pointless for the appellant to argue that the place where the appellant initially positioned himself before he first fired his gun was dark, or that he was not wearing an aqua green t-shirt.

The relationship of Gracia and Randy to the victim does not militate against their credibility. Relationship by itself does not give rise to any presumption of bias or ulterior motive, nor does it impair the credibility of witnesses or tarnish their testimonies.[39] The relationship of a witness to the victim would even make his testimony more credible, as it would be unnatural for a relative who is interested in vindicating the crime to charge and prosecute another person other than the real culprit. Relatives of victims of crimes have a natural knack for remembering the faces of the attacker and they, more than anybody else, would be concerned with obtaining justice for the victim by having the felon brought to justice and meted the proper penalty therefor.[40] Where there is no showing of an improper motive on the part of the prosecution's witnesses for testifying against the appellant, their relationship to the victim does not render their testimony less credible.[41] In this case, the appellant failed to show any ill or devious motive on the part of Gracia and Randy to testify against him.

Gracia testified that after hearing the first gunfire, she looked at the direction where it emanated from and saw the appellant armed with a gun, and shortly thereafter, she heard another gunfire.[42] But when asked what she did after hearing the burst of a gun, she replied that she ran immediately.[43] This inconsistency, however, does not

affect the credibility of Gracia and the probative value of her testimony. It bears stressing that the testimony of a witness must be considered in its entirety instead of portions thereof. The technique in deciphering testimony is not to focus on isolated parts.[44] In ascertaining the facts established by a witness, everything stated by him on direct examination as well as on cross-examination must be considered and calibrated. Facts imperfectly or erroneously stated in answer to one question may be supplied or explained by his answers to other questions.[45] The principle "Falsus in uno falsus in omnibus," is not strictly applied in the Philippines.[46]

In this case, Gracia erroneously testified on direct examination that she ran immediately after the first gunshot. She intractably maintained on further direct examination as well as on cross-examination that after hearing the first gunshot, she remained where she was, turned her gaze towards the direction where the gunshot came from and saw the appellant who was armed with a handgun. She even warned her husband and the others that the appellant had a gun. Indeed, on cross-examination, Gracia testified that after hearing the second gunshot, she remained at the same place where she was.[47] Moreover, counsel of the appellant failed to confront Gracia on cross-examination with the apparently inconsistent statements. Gracia was not accorded a chance to explain her two conflicting testimonies. Hence, granting *arguendo* that Gracia had made two conflicting statements, the same cannot serve as basis for impeaching her credibility and the verisimilitude of her entire testimony.[48]

That Gracia did not flee to and hide inside the house of Beverly when she saw that the appellant was armed with a handgun, and opted to remain at the scene of the crime, is not unnatural. It has been repeatedly ruled by the Court that people react differently under emotional stress. There is no standard form of behavior when one is confronted by a shocking and nerve-wracking incident.[49] Some may shout, some may faint, some may be so shocked to immobility or insensibility.[50] A witness' inability to move, help or even to run away when the incident occurs is not a ground to label her testimony as doubtful and unworthy of belief.[51] In this case, Gracia was so shocked at hearing a gunshot, even more so at seeing her husband shot in her presence. She opted to remain beside her husband. Gracia was more concerned with the well-being and survival of her husband who was mortally wounded, than her personal safety. It was only after Leo was boarded in a mini bus and brought to the hospital that Gracia left the scene.

The inconsistencies ascribed by the appellant between the testimony of Gracia before the trial court, her affidavit to the police authorities, and her testimony before the municipal trial court during the hearing of her motion for the issuance of a warrant of arrest against the appellant, do not impair her credibility as a witness. It is of judicial knowledge that affidavits being taken *ex parte* are almost always incomplete and often inaccurate and are generally inferior to the testimony of a witness in open court.[52] Her testimony before the MTC was summary and brief. Besides, her affidavit to the police officers and her testimony before the MTC had not been offered and admitted in evidence, and Section 34, Rule 132 of the Revised Rules of Evidence provides that the Court shall not consider evidence which has not been formally offered. Furthermore, Gracia had not been confronted with her testimony before the MTC and accorded an opportunity to explain the inconsistencies.[53]

Gracia testified that the appellant was about seven meters away from where she and Leo were when he fired his gun for the first and second times. This account is not impaired by the testimony of Dr. Alfredo Sy that he found no gunpowder residue in the body of Leo when it was autopsied. According to Dr. Sy, it is possible that there could be no gunpowder residue in the body of a victim who is shot at a distance of seven meters:

q And in this particular case you will agree with me if it would [sic] really a gunshot wound the person who made the gunshot is far away from the deceased, it could be 20 to 30 meters away?

a Yes, sir, I could not estimate the distance.

q But for sure he is far?

a Yes, sir.

q Would you say that 10 meters is far away?

a Yes, sir.

q And it could also be 15 meters?

a Yes, sir.

q

This incise wound may have been caused by falling, Doctor?

a I don't think so, sir.

q It may have been also inflicted totally with a sharp instrument?

a Yes, sir.

q Immediately preceding the alleged shooting?[54]

...

q You also said that the assailant here would have been far, would (7) meters considered far to you?

a Yes, sir.

q Since this patient has no gun powder [sic] burst we could not determine how far the victim from the assailant?

a No, sir.[55]

Besides, the absence of gunpowder at or near the entrance of the wound will not preclude near fire because other factors might have intervened.[56]

On the fourth assignment of error, the trial court correctly rejected the appellant's denial of the crime charged and his alibi. It bears stressing that alibi is one of the weakest, if not the weakest of defenses in criminal prosecutions, because it is facile to fabricate and difficult to disprove. To merit approbation, the appellant is burdened to prove with clear and convincing evidence that at the time of the commission of the offense charged, he was in a place other than the situs criminis such that it was physically impossible for him to have been at the scene of the crime

at the time it was being committed. Denial by an accused of the crime charged is but a negative self-serving evidence. The mere denial by the appellant of the crime charged and his alibi cannot prevail over the clear and positive identification of the appellant by the prosecution witnesses as the assailant of the victim.[57]

In this case, Kagawad Armando Santiago, one of the appellant's witnesses, testified that it took him and Kagawad Antonio Pablo twenty to twenty-five minutes to reach the house of the appellant via a tricycle driven by the appellant's son:

q How long did you negotiate the way in front of the house of Beverly Limos to the house of Bernabe Montemayor?

a About 20 to 25 minutes, sir.[58]

Kagawad Antonio Pablo, on the other hand, testified that it took them around fifteen to twenty minutes to negotiate the distance from the house of Beverly to the house of the appellant:

q Now, how long did you negotiate the way from the house of Beverly Limos to the house of Bernabe Montemayor?

a Around 15 to 20 minutes, sir.

q Now, were you able to reach the house of Bernabe Montemayor?

a Yes, sir.[59]

The foregoing testimonies of Kagawads Santiago and Pablo coincide with and corroborate Gracia's testimony that after leaving Beverly's house, the appellant returned thirty to forty minutes later; this time, armed with a gun. Considering the short distance from Beverly's residence to the appellant's house, the appellant could have easily armed himself with a gun, returned to Beverly's residence, and shot Berlin and Leo successively. The appellant's insistence that he was so drunk, that upon reaching home, he slept immediately is belied by the fact that before the appellant left Beverly's house, he even had a fistfight not only with Leo but also with Nestor.

It bears stressing that the appellant filed with the trial court on December 8, 1995 a "Motion for a Reinvestigation and/or Re-Appraisal of Evidence." However, he failed to allege in his motion that at the time of the commission of the crime charged, he was in his house fast asleep. The appellant even failed to allege that he was so drunk that he fell asleep immediately when he arrived home. The Court believes that the appellant's defenses of denial and alibi are but afterthoughts in a last ditch effort to extricate himself from the crime charged.

Anent the third assignment of error, the trial court correctly convicted the appellant of murder with the qualifying circumstance of treachery. However, the trial court erred in appreciating against the appellant evident premeditation as an aggravating circumstance.

Treachery is committed when two conditions concur, namely: (1) at the time of the attack, the victim was not in a position to defend himself; and (b) the assailant consciously and deliberately adopted the particular means, methods or forms of attack employed by him. The essence of treachery is the sudden and unexpected attack by the assailant on an unsuspecting victim, depriving the latter of any real chance to defend himself and thereby ensuring its omission without risk to himself.[60] There may still be treachery even if before the assault, the assailant and the victim had an altercation and a fisticuff where, after the lapse of some time from the said altercation, the assailant attacked the unsuspecting victim without affording him of any real chance to defend himself. In this case, the appellant, armed with a gun, shot the victim as the latter was conversing with his wife and Beverly's

other guests in front of the gate of the latter's house. The victim was unarmed. The attack of the appellant was sudden. The victim had no inkling that the appellant had returned, armed with a gun.

For evident premeditation to be appreciated, the prosecution is burdened to prove the confluence of the following elements: (1) the time when the offender determined to commit the crime; (b) an act manifestly indicating that he has clung to such determination; and (c) sufficient lapse of time between the determination and execution to allow the offender to reflect upon the consequence of his act.[61] The aggravating circumstance must be proved with equal certainty as the commission of the crime charged. The mere lapse of time does not prove evident premeditation.[62] There must be proof of overt acts of the appellant, showing when he conceived the plan to kill the deceased, and that in the interim, he clung to his determination to kill, and that sufficient time had elapsed between his determination and the execution of the crime to allow his conscience to overcome the resolution of his will. The mere fact that after his fight with the victim, the appellant came back with a gun and shot his adversary does not constitute proof of evident premeditation.[63] The evidence of the People shows that after the appellant left the gathering at Beverly's house, he returned armed with a gun after the lapse of thirty to forty minutes. Considering that it took the appellant twenty to thirty minutes to get to his house and a similar period of time to return to Beverly's residence, it cannot be gainsaid that the appellant had sufficient time to ponder upon the dire consequences of the crime he had decided to commit.

Under Republic Act No. 8294, the use of an unlicensed firearm in the commission of murder is a special aggravating circumstance. Moreover, the lack of a license to possess the firearm is an essential element of the said circumstance and must be properly alleged in the information and proven during trial. In this case, however, the use of an unlicensed firearm by the appellant cannot be considered as a special aggravating circumstance because: (a) it was not alleged in the information as mandated by Rule 110, Section 8 of Article 10 of the Revised Rules of Criminal Procedure and proved by the prosecution;[64] and (b) the crime was committed on October 5, 1995 before the effectivity of Rep. Act 8294 and case law is that the new rule shall be applied retroactively since the same is favorable to the accused.[65]

The penalty prescribed for murder under Article 248 of the Revised Penal Code is reclusion perpetua to death. Since no aggravating circumstance attended the commission of the crime, the appellant should only be sentenced to suffer the penalty of reclusion perpetua, conformably to Article 63 of the Revised Penal Code.

The trial court awarded to the heirs of the victim the amount of P100,000 as civil indemnity; P200,000 as moral damages; P10,000 as exemplary damages; and P10,000 as consequential damages. The trial court did not award temperate damages. The award of damages should thus be modified to conform to existing jurisprudence. Civil indemnity should be reduced to P50,000; and moral damages to P50,000.[66] The award for exemplary damages should be increased to P25,000. The heirs of the victim are also entitled to temperate damages in the amount P25,000. Although testimonial evidence was adduced to prove that the heirs of the victim spent the total amount of P65,000 for the wake and burial of the deceased, the prosecution failed to adduce documentary evidence to prove expenditures of said amount.[67]

IN LIGHT OF ALL THE FOREGOING, the Decision dated February 27, 1996 of the Regional Trial Court, Branch 41, of Dagupan City, in Criminal Case No. CR-95-01158-D, is AFFIRMED with MODIFICATIONS. Appellant Bernabe Montemayor alias Baby is found guilty beyond reasonable doubt of murder defined in Article 248 of the Revised Penal Code, as amended by Republic Act No. 7659, and there being no aggravating circumstance in the commission of the crime, is hereby sentenced to suffer the penalty of reclusion perpetua. He is ordered to pay to the heirs of the victim Leo Pontawe, the amounts of P50,000 as civil indemnity; P50,000 as moral damages; P25,000 as exemplary damages; and P25,000 as temperate damages.

Costs de oficio.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Puno, Vitug, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio-Morales, and Azcuna, JJ., concur.

[1] Penned by Judge Victor T. Llamas, Jr.

[2] Docketed as Criminal Case No. CR-95-01158-D.

[3] Records, p. 1.

[4] Id., at 58.

[5] The prosecution presented Gracia Pontawe, Dr. Alfredo Layno Sy, Berlin Bornillo and Randy Rosario as witnesses.

[6] In its decision, the trial court identified Gracia as Grace.

[7] TSN, January 25, 1996, p. 4.

[8] Ibid.

[9] Id.

[10] TSN, February 1, 1996, p. 5.

[11] TSN, February 1, 1996, p. 6.

[12] Id., at 8.

[13] TSN, January 25, 1996. p. 5.

[14] Exhibit "A-1."

[15] Id., at 6-7.

[16] TSN, January 25, 1996, p. 8.

[17] Id., at 14.

[18] Id., at 8.

[19] Id.

[20] Supra.

[21] Exhibit "2."

[22] Records, p. 5.

[23] Exhibit "B."

[24] Exhibit "2-B."

[25] Exhibit "1," Records, p. 2.

[26] Exhibit "1" and "1-A," *id.*

[27] Bernabe testified in his behalf. He presented Jose Pontawe, Barangay Kagawad Antonio Pablo and Armando Santiago, Adoracion Montemayor and PSI Segundino Adalega.

[28] Exhibit "9."

[29] Exhibit "3."

[30] TSN, February 23, 1996, pp. 19-21.

[31] Exhibit "8."

[32] Records, p. 102.

[33] Rollo, p. 115.

[34] *People v. Ramos*, G.R. No. 142577, December 27, 2002.

[35] *People v. Raquino*, 315 SCRA 670 (1999).

[36] See *People v. Sesbreño*, 314 SCRA 87 (1999).

[37] *People v. Faustino*, 339 SCRA 718 (2000).

[38] *People v. Tidula*, 292 SCRA 596 (1998).

[39] *People v. Villanueva*, 302 SCRA 380 (1999).

[40] *People v. Listerio*, 335 SCRA 40 (2000)

[41] *People v. Gallo*, 318 SCRA 157 (1999).

[42] TSN, January 25, 1996, pp. 7-8.

[43] *Id.* at 7.

[44] *People v. Baldevieso*, 314 SCRA 803 (1999).

[45] FRANCISCO, THE REVISED RULES OF COURT OF THE PHILIPPINES, 1997 ed., Vol. VII, Part II, p. 1542.

[46] *People v. Costelo*, 316 SCRA 895 (1999).

[47] TSN, January 25, 1996, p. 13.

[48] *People v. De Guzman*, 288 SCRA 346 (1998).

[49] *People v. Galano*, 327 SCRA 462 (2000).

[50] *People v. Torejos*, 326 SCRA 75 (2000).

[51] *People v. Muyco*, 331 SCRA 192 (2000).

[52] *People v. Silvestre*, 307 SCRA 68 (1999).

[53] *People v. De Guzman*, *supra*.

[54] TSN, January 26, 1996, pp. 10-11.

- [55] *Id.*, at 12.
- [56] *People v. Garcia*, G.R. No. 145505, March 14, 2003.
- [57] *People v. Cañete*, 287 SCRA 490 (1998).
- [58] TSN, February 21, 1996, p. 11.
- [59] TSN, February 19, 1996, pp. 10-11.
- [60] *People v. Reyes*, 287 SCRA 229 (1998).
- [61] *People v. Tulop*, 289 SCRA 316 (1998).
- [62] *People v. Sol*, 272 SCRA 392 (1997), cited in *People v. Piamonte*, 303 SCRA 577 (1999).
- [63] *People v. Timblor*, 285 SCRA 64 (1998), also cited in *People v. Piamonte*, *supra*.
- [64] See note 50.
- [65] *People v. Tadeo*, G.R. Nos. 127660 & 144011-12, September 17, 2002.
- [66] *People v. Agunias*, 279 SCRA 52 (1997); *People v. Delim*, G.R. No. 142773, January 28, 2003.
- [67] See note 50.

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