

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE SILVESTRE Y CRUZ, ACCUSED-APPELLANT.

G.R. No. 127573. May 12, 1999

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

This is an appeal from the decision[1] of the Regional Trial Court (RTC) of Malabon, Branch 72, dated August 7, 1996, finding the accused-appellant Jose Silvestre y Cruz alias Jojo Bungo guilty beyond reasonable doubt of the crime of murder in Criminal Case No. 16579-MN.

The accused, Jose Silvestre y Cruz alias Jojo Bungo, was charged with the crime of murder in an information[2] that reads:

"That on or about the 18th day of January, 1996, in the Municipality of Malabon, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, and with treachery and evident premeditation while armed with a gun, did then and there, willfully, unlawfully and feloniously shoot one LUISITO PALENCIA y TOBIAS hitting him four (4) times on the different parts of his body, as a consequence said LUISITO PALENCIA y TOBIAS, sustained injuries which directly caused his death."

On April 24, 1996, accused-appellant was arraigned whereupon he entered a plea of not guilty to the crime charged.[3]

The prosecution presented three witnesses: the victim's widow, Marina Palencia; an eyewitness to the shooting, Felicitas Torres; and the arresting officer, SPO2 Benjamin Querubin.

Marina Palencia testified that she was the widow of the victim, Luisito Palencia; that they have three children: Harry, 18; Regine, 16; and Carmille, 11; and that when he was alive, he was employed as an installer and repairman of P.L.D.T. earning P14,877.00 a month. As a consequence of the death of her husband, she had incurred actual expenses in the amount of P66,500.00.[4]

Felicitas Torres testified that on 11:45 a.m. of January 18, 1996, she bought bread from the Concepcion Bakery in Malabon, Metro Manila. While waiting for a ride in front of the said bakery, she observed a man and a woman talking with each other. She then heard two shots fired. When she turned her head, she saw a man on the ground face down and beside him, a man holding a gun. She sought cover "for a short while", then saw the man with a gun fire two more times at the fallen man. She boarded a jeep after the last two shots were fired. While boarding, she heard someone say "binaril na ni Jojo si Palencia".

On February 5, 1996, she went to the branch office of P.L.D.T. in Malabon to pay for the telephone bill of her employer. While there, she overheard that no one was willing to testify about the shooting. She informed one of the employees that she was a witness to the incident, and was brought to the manager who asked her to testify as one of the witnesses in the case. On the same day, she was accompanied by a certain Jun, an employee of the

P.L.D.T., to the police station to give her statement.

At the police station, she identified the only person presented to her for purposes of identification as the assailant. She was later informed that this person was Jojo Bungo. In court, Torres also identified the accused Jojo Bungo, whose real name is Jose Silvestre, as the assailant.[5]

The parties dispensed with the presentation of Dr. Alberto Bondoc by making admissions concerning the manner and nature of his testimony, to wit:

- "1. that he is duly qualified and competent as a physician and medico-legal officer who had conducted an autopsy examination;
2. that he conducted the actual autopsy on the cadaver of the victim in this case by the name of Luisito Palencia to be marked as Exhibit B;
3. that in the course of the autopsy examination the witness prepared a sketch of the human body showing the locations and number of gunshot wounds sustained by the victim marked as Exhibit C;
4. that in the course of its examination he extracted a slug embedded on the said victim which cannot be traced to any gun because there was no ballistic examination; and,
5. that the final report containing the findings and conclusions particularly with respect to the fact and cause of death was prepared, thereby dispensing with the actual presentation of Dr. Bondoc as a prosecution witness."[6]

The prosecution's last witness was SPO2 Benjamin Querubin who testified that on February 5, 1996, Jojo Bungo was arrested outside his residence at Bagong Bantay, Quezon City after a six-hour stakeout. At the time of arrest, a .38 snub nose "paltik" revolver was recovered from Silvestre after he was frisked. He also identified Jojo Bungo in court.

On cross-examination, Querubin testified that there was a witness who gave her statement regarding the crime committed on January 18, 1996 but that she did not cooperate and even failed to subscribe to her statement.[7]

The defense presented SPO2 Angelito Balacaña, the investigating officer, who testified[8] that he was the officer who took the statement of Felicitas Torres. On cross-examination, he stated that there was no line-up made when Torres identified the accused because when Torres' statement was taken, she readily mentioned the name of the suspect. When he presented the suspect to Felicitas, the latter identified him as the one who shot Luisito Palencia.

The defense next called SPO1 Crizaldo Castillo who did not appear despite his being subpoenaed. Castillo was supposed to testify on a statement made by a certain Bernadette Matias, a witness to the shooting, who was not presented at the trial. His testimony was dispensed with when the prosecution admitted the existence and the contents of her written statement after the Court persuaded both parties to stipulate on his testimony.[9]

The defense rested its case and made its offer of evidence as follows:

"I will no longer present the accused. I am offering Exh. 1, 1-A and 1-A-1 a statement taken by SPO1 Castillo immediately after the incident took the statement of witness Bernadette Matias on 18 of January, 1996 at 1:00 o'clock in the afternoon and in that affidavit statement the witness stated that the suspect that she does know the name of the suspect and he is 5'5 between 120 to 130 ang bigat and kulot ang mabuhok, maiksi ang buhok, brushed up, likewise Exh. 1-A-1 the word 'kayumanggi' on Question No. 7 answer of the witness is to prove the person whom the eyewitness saw who shot the victim was a 'kayumanggi' likewise offering this affidavit as part of his testimony of the witness."[10]

The prosecution objected to the purpose for which the exhibit was offered since the affidavit was not presented for

identification; and the Court admitted it only as proof of its existence and contents.

On August 7, 1996, the Regional Trial Court rendered its decision finding the accused guilty beyond reasonable doubt of the crime of murder. The dispositive portion of the decision reads:

"WHEREFORE, premises considered, judgment is hereby rendered finding accused Jose Silvestre y Cruz @ Jojo Bungo GUILTY beyond reasonable doubt of the crime of murder and he is hereby accordingly sentenced to the prison term of reclusion perpetua.

Accused Silvestre is also ordered to pay Mrs. Marina Palencia, the following amounts: (1) P66,500.00 for the actual expenses spent in connection with the death and burial of Luisito; (2) P50,000.00 for the loss of Luisito's life; (3) P100,000.00 by way of moral damages for the pain and anguish suffered by the victim's family due to the untimely death of Luisito and an additional amount equivalent to three (3) years salary computed at the rate of P14,877.00 a month corresponding to Luisito's monthly salary by way of lost income.

Costs against accused Silvestre.

SO ORDERED.

Malabon, Metro Manila, August 7, 1996."[11]

Hence, this appeal where accused assigns the following errors:

I. THE GUILT OF THE ACCUSED WAS NOT ESTABLISHED BY PROOF BEYOND REASONABLE DOUBT OR PROSECUTION EVIDENCE HAS NOT OVER-COME ACCUSED CONSTITUTIONAL PRESUMPTION OF INNOCENCE.

II. THE COURT A QUO ERRED WHEN IT CONVICTED THE ACCUSED SOLELY BASED ON THE LONE TESTIMONY OF PROSECUTION'S PRINCIPAL WITNESS WHO IS NOT CREDIBLE AND POSITIVE.

III. THE COURT A QUO GRAVELY ERRED IN TREATING JUDICIAL ADMISSION OF THE PARTIES AS HEARSAY IN CHARACTER.

IV. THE COURT A QUO ERRED IN APPRECIATING EVIDENT PREMEDITATION AND TREACHERY FOR WANT OF EVIDENCE.

THE COURT A QUO ERRED IN SENTENCING ACCUSED OF A PRISON TERM OF RECLUSION PERPETUA.

VI. THE COURT A QUO ERRED IN ORDERING PAYMENT OF ACTUAL, MORAL DAMAGES, LOST OF INCOME ABSENCE OF PROOF IN SUPPORT THEREOF OR FORMALLY OFFERED IN EVIDENCE."[12]

The accused-appellant argues that the lower court erred in finding the accused guilty beyond reasonable doubt on the basis of the lone testimony of Felicitas Torres. According to the accused-appellant, Torres testified that she did not actually witness the accused shooting the victim because she merely heard two shots fired and sought cover for a short while, and hence it was doubtful whether she saw the man with a gun shooting at the fallen man two more times. As it was a startling or frightful experience for a woman, it was not probable that she was brave enough to witness the shooting which was merely five arm's length away from her; and that the prosecution witness merely speculated on the identity of the perpetrator from what she heard i.e., "binaril na ni Jojo si Palencia."[13]

Moreover, accused-appellant claims that there was an inconsistency between the sworn statement of Torres and her testimony in Court. In her sworn statement, she had stated that "xxx nakita ko ang isang lalaki na natumba at

isa pang lalaki na nakatayo sa harapan noong natumba xxx"[14] while in her direct testimony, she testified that: "xxx I saw a man slumped head face down xxx besides that man slumped on the ground a man with a gun".[15] He also avers that the identification made by Torres was not positive and was a "suggested identification" since no police line-up was conducted when she identified him at the police station.[16]

In addition, appellant argues that the lower court erred in treating the statement of Bernadette Matias as hearsay despite the fact that the prosecution admitted the existence and contents of her statement. He claims that he vigorously tried to secure subpoenas ad testificandum for the witnesses, Bernadette Matias and SPO1 Crizaldo Castillo but the trial court opted instead to have the parties stipulate on their testimonies. It is alleged that the trial court's insistence that the parties stipulate on Matias' declaration led him to believe that it was not necessary to present her to testify under oath as the contents thereof were already admitted.

Lastly, the accused-appellant contends that the lower court erred in appreciating the qualifying circumstances of treachery and evident premeditation, and in the absence of these circumstances, the crime is not murder but simple homicide. He finally argues that the lower court erred in awarding actual and moral damages despite the absence of proof of the factual basis therefor, and despite the absence of a formal offer of evidence.

The appellee, on the other hand, posits that the guilt of the accused has been proven beyond reasonable doubt.

First, Felicitas Torres positively identified the accused as the man who shot Luisito Palencia as she had witnessed the shooting in broad daylight, while she was merely five (5) arm's length away from the accused.

Second, Felicitas' testimony is consistent with the findings of the autopsy report which shows that the victim sustained four (4) gunshot wounds.

Third, the defense did not show any improper motive on the part of Torres to falsely impute the murder against the appellant. It was not shown that she knew the victim's family nor the accused prior to the incident.

Fourth, as regards the alleged contradictory statements of Felicitas, the prosecution argues that from the viewpoint of a "stunned" witness, the appellant could well be standing beside or in front of the victim. Assuming her statements were in fact inconsistent, such inconsistency pertains to a trivial matter as there was no inconsistency with respect to the fact of the shooting.

The appellee also argues that there is no law requiring a police line-up as a requisite for proper identification. Moreover, accused was not entitled to have counsel present at the time he was identified since he was not subjected to any investigation or interrogation.[17]

As regards the affidavit of Bernadette Matias, the same is hearsay as she was not presented as witness. Finally, the appellee contends that the presence of treachery as shown by the sudden and unexpected assault upon the defenseless victim qualified the crime to murder.

The first issue to be resolved is whether Felicitas Torres, the lone witness to the killing was a credible witness. We have carefully gone over the records and find nothing in her account of the events that shows that her testimony suffers from incredibility. Felicitas Torres testified as follows:

"DIRECT EXAMINATION BY FISCAL ACUÑA:

Q. Now, at 11:45 in the morning of January 18, 1996, do you remember where you were?

A. I was then near Concepcion Bakery.

Q. Will you please tell us in what municipality is this Concepcion Bakery located?

A. Malabon, Metro Manila.

Q. Now, what were you doing at that time?

A.

Buying bread, sir.

Q. Were you able to buy bread?

A. Yes, sir.

Q. After buying bread what did you do, if any?

A. I waited for a tricycle to go home.

Q. And you said you were waiting for a tricycle in going home when you said going home you are referring to Hulo, Malabon?

A. Yes, sir.

Q.

While you were waiting what happened while you were waiting for a ride?

A. I noticed something, sir.

Q. What was that you noticed?

A. I noticed a man and a woman talking with each other.

Q. How far were you more or less from this man and woman who was conversing with each other?

A. More or less five arms length.

Q. Now, what happened after that, if any?

A. I heard two shots then I turned my head.

Q. Now, when you turned your head after hearing two shots, what did you see if any?

A.

And then I saw a man slumped head face down.

Q. What else did you see?

A. Then I saw besides that man slumped on the ground a man with a gun.

Q.

What then did you do if any after that?

A. I sought cover for a short while.

Q. What happened after seeking cover?

A. Then I saw that man with a gun shot the man two times more.

Q. Now who was this man whom you saw fired twice more the man who was slumped face down.

A. I do not know him personally but I recognized him.

Q. Now, if you see this man were you be able to identify him?

A. Yes, sir.

Q. Now, look around and point him to us if he is inside the Court room?

A. Witness pointing to the person, step down and approached the person whom she pointed to and when asked to stand and asked his name, he answered Jose Silvestre.

Q. Now, after firing two more shots at the man whom you saw "pasubsob", what then did the accused do if any?

A.

I do not know anymore because I boarded a jeep after he fired the last two shots.

Q. Now, while you were boarding that vehicle that you take home did you hear anything on that occasion?

A. There was a commotion and then I heard "binaril na ni Jojo si Palencia".

Q. When did you come to know the complete name of Palencia?

A. When I went to PLDT office.

Q. When was that?

A. February 5, 1996.

Q. Do you recall what happened when you went to the PLDT before that which place of PLDT did you go on February 5?

A. Malabon office, sir.

Q. Now, do you remember what happened when you went at PLDT branch in Malabon?

A. I heard that no one wanted to testify for Palencia.

Q. From whom did you hear this?

A. From the PLDT personnel.

Q. So, what then did you do, if any?

A. I approached one of them.

Q. For what purpose did you approach this PLDT employee?

A. I told him about the killing incident that I witnessed.

Q. What did this PLDT employee do, if any?

A. He brought me to the office of PLDT at the second floor.

Q. What happened at the second floor of PLDT office at Malabon?

A. I said I will testify.

Q. What then happened after that?

A. The complainant was called as she is a resident of Bulacan.

Q. Now, did the complainant arrive?

A. In the afternoon, sir.

Q. Now, after the arrival, by the way, who was that person who arrived?

A. Mrs. Palencia, sir.

Q. After Mrs. Palencia arrived what happened, if any?

A. The PLDT employee told her that I will be the one to testify in their favor.

Q. After that what happened?

A. Then after that we proceeded to the Malabon police station.

Q. What happened at the headquarters of Malabon?

A. My statement was taken down."[18]

Felicitas Torres categorically stated that she saw the accused Jose Silvestre whom she identified in Court, shoot at the fallen man two times after hearing two gunshots. While she did not see the accused-appellant actually fire the first two shots, she turned her head upon hearing the two gunshots and saw a man slumped on the ground and a man with a gun beside him. After seeking cover for a short while, she saw the man with the gun shoot the fallen man two more times moments after the first two shots were fired. This leads to no other logical conclusion than that the accused-appellant was the one who fired them.[19]

Her testimony is corroborated by the autopsy report[20] prepared by Dr. Alberto Bondoc, the findings of which are:

"FINDINGS:

1 Abrasions/Contusions: forehead, left.

2 Lacerated Wound: eyebrow, left, 22 mm.

3

Stabbed Wounds:

3.1 angle of mandible, left, 9 mm., directed superiorly, posteriorly and medially.

3.2 back, level of L2, PVL, left, 11 mm., directed anteriorly, superiorly and slightly laterally, non-penetrating.

4 Gunshot Wounds:

4.1

POE: back, level of L2, PVL, right, 8 x 10 mm., directed anteriorly, superiorly and medially, puncturing the right lobe of the liver from inferior to superior, puncturing the diaphragm, and lacerating the heart from the posterior wall of the right ventricle to the anterior wall of the left atrium, and puncturing the anterior chest

wall;

POX: none. A metallic slug, 9 x 18 mm. was recovered from the subcutaneous tissues of the anterior chest wall, along the 2nd ICS, MCL, left.

4.2 POE: nape, level of C5, right, 8 x 8 mm., directed anteriorly, inferiorly and slightly medially, fracturing T1;

POX: none. The slug embedded within the spinal canal.

4.3 POE: abdomen, AAL, just above the anterior iliac spine, right, 10 x 12 mm., directed posteriorly, inferiorly and medially;

POX: none. The slug was embedded deep within the muscle tissues of the right thigh

4.4 POE: abdomen, MAL, just above the iliac crest, left, 10 x 12 mm., directed posteriorly, inferiorly and medially;

POX: none. The slug was embedded deep within the muscle tissues of the left thigh.

5. Hemopericardium, massive.

6. Hemoperitoneum, moderate.

CAUSE OF DEATH: Cardiorespiratory Arrest due to Hemorrhagic Shock due to Multiple Gunshot Wounds, Back and Nape."

The autopsy report shows that the victim sustained four (4) gunshot wounds. This tallies with the testimony of Torres whose account of the events reveals that a total of four shots was fired.

This Court has ruled on countless occasions that the trial court is in the best position to determine facts and to assess the credibility of witnesses as it is in a unique position to observe the witnesses' deportment while testifying which opportunity the appellate court is denied on appeal; this Court will respect the findings and conclusions of the trial court provided that they are supported by substantial evidence on record.[21] We find no cogent reason to disturb the trial court's appreciation of the evidence and find no basis in the record to rule that Felicitas Torres' testimony was not credible.

With regard to appellant's argument that there was an inconsistency between Torres' sworn statement and her testimony in court, we agree with appellee that the alleged inconsistency pertains to a trivial matter. While she stated in her sworn statement that the accused was in front of ("sa harapan") the victim she thereafter testified that the gunman was "beside" the victim. This statement refers only to how the accused stood in relation to the victim and is not sufficient to weaken her positive assertion that she saw the accused shoot the victim two times after hearing two shots previously fired. This Court has repeatedly ruled that inconsistencies between the sworn statements and direct testimony given in open court do not necessarily discredit the witness since affidavits are oftentimes incomplete and are generally inferior to the testimony of the witness in open court.[22]

In addition, the appellant has failed to show any improper motive on the part of Torres to falsely impute such a terrible crime to him. Torres did not know either the appellant or the victim prior to the shooting on January 18,

1996.[23] The testimony of a single witness, when credible and trustworthy, is sufficient to convict[24] and must be given full faith and credence when no reason to falsely testify is shown.[25]

As regards the lack of a police line-up when Torres identified Jose Silvestre as the assailant, we agree with appellee that there is no law which requires a police line-up as essential to a proper identification provided that the identification was not suggested to the witness by the police.[26] In the present case, there is no showing that the identification made by Torres in the police station was suggested to her. In her sworn statement,[27] Torres stated that:

"Question # 22.

T:

Inihaharap ko ngayon sa iyo ang taong ito, ano ang masasabi mo sa kanya? (This investigator confronting affiant with the suspect who is presently under detention at the Malabon Municipal Jail.)

S:

Siya nga ho ang nakita kong bumaril kay Tito Palencia. (Affiant pointing to the suspect Jojo Bungo whose real identity is JOSE SILVESTRE Y CRUZ, 40 yrs. old, married, jobless, and res at 240 C. Arellano St., Baritan, Malabon, Metro-Manila.)"

While on cross-examination, Torres testified that:

"Q. Now when you were already at the police station of Malabon with the employee of PLDT in the name of Jun whom did you talk to?

A. Jun asked them who is the investigator because I was going to give a statement.

Q. Then where were you when Jun asked about the investigator?

A. I was at the lobby, sir.

Q. You were left by Jun at the lobby of the police station?

A. Yes, sir.

Q. And Jun went somewhere else inside the police station.

A. Yes, sir.

Q. So, at the time Jojo the alleged assailant was not still around?

A. Yes, sir.

Q. When Jun the police investigator came out they were already or Jun was already with them?

A. I gave the statement first.

Q. Now, while you are giving your statement to the police investigator who was with you?

A. No one because I was told to enter the room alone.

COURT:

Q.

Now Jojo Bungo was eventually presented to you, is that not correct?

A.

Yes, sir.

Q. Did you point him the assailant face to face?

A.

Yes, sir.

Q. And what was his reaction as being pointed to you as the assailant?

A Nothing.

Q. Did he not deny the accusation against him?

A. He did not, sir.

ATTY. SIRUELO:

Q. Now, when he was presented for your identification he was alone?

A. Yes, sir.

Q. And you were told that this was Jojo Bungo?

A. Yes, sir."[28]

There is nothing in the testimony of Torres nor in her sworn statement that would show that the police suggested

that the suspect to be presented to her was Jojo Bungo. The police merely asked what she could say about the person presented to her, and she spontaneously answered that he was the one who shot Luisito Palencia. She was only informed that the person presented was Jojo Bungo after she had already pointed him out. She could not have been mistaken in her identification of the gunman as she was only five arm's length away from them when the shooting occurred. During her cross-examination, she explained how she was able to see the face of the gunman as follows:

"Q.

xxx when you arrived there at the headquarters you were already confronted with the suspect Jojo?

A. Yes, sir.

Q. And that was only the first time that you saw his face?

FISCAL ACUÑA:

Misleading.

COURT:

Witness may answer.

WITNESS:

A. No, because I saw him when he shot the victim.

ATTY. SIRUELO:

Q. You testified that during those dates that you saw the assailant at the actual place of incident thru his back only, is that not correct?

FISCAL ACUÑA:

That is misleading.

COURT:

Let us put this way.

Q.

On direct examination you said you saw a person who turned out to be Jojo Bungo shooting at the victim who was already lying on the ground face down. On direct examination you said that when you again saw the

assailant Jojo for the first time his back was turned to you. Now, the question is: how then did you see his face or recognize him as you claim?

A. Because he was turning his head from side to side."[29]

Appellant also argues that the court a quo erred in treating the judicial admission of the statement of Bernadette Matias made by the prosecution as hearsay. The records show that the prosecution only admitted the existence and contents of the supposed statement made by Bernadette Matias as shown by the following excerpt from the transcript:

"Atty. Siruelo:

My next witness is SPO1 Crizaldo Castillo he was subpoenaed, Your Honor.

Court:

Can we not have stipulation or admissions concerning the testimony of Castillo as corroborative only of that of Balacaña?

Atty.:

No, Your Honor, very material on our defense on the conflicting testimony of the witness.

Court:

Do you have a copy thereof?

Atty.:

I am referring to the witness, Bernadette Matias. I have a statement of the other witness.

Court:

Then show it to the Fiscal and probably the Fiscal can admit it.

Fiscal:

The reason why we did not present the witness because she was afraid in fact that was sworn to.

Court:

The existence and contents you can admit it Fiscal?

Fiscal:

Yes, Your Honor.

Court:

So we can dispense with the testimony of Castillo."[30]

The appellee's admission only referred to the fact that the statement was made by Matias. In *People vs. Gaddi*,^[31] it was ruled that when testimony is presented to establish not the truth but the tenor of the statement or the fact that the statement was made, it is not hearsay.^[32] The lower court was therefore correct in admitting only the existence and contents and not the truth or veracity of the unsworn statement of Matias as an "independently relevant statement"^[33] This statement cannot be used to establish the veracity of it; it would be hearsay as Matias was not presented in Court.

Appellant cannot fault the prosecution for the failure to present Bernadette Matias. The prosecution has discretion to decide on who to call as witness during trial and its failure to do so did not give rise to the presumption that "evidence willfully suppressed would be adverse if produced"^[34] since the evidence was at the disposal of both parties.^[35] If the defense believed that the testimony of Bernadette Matias was important to its case, it should have insisted on presenting her as a witness, or as the appellee points out, made a tender of excluded evidence of the witness in question under Section 40, Rule 132 of the Rules of Court. The same may be said of Joanna Santiago, another supposed witness to the shooting, who was also not presented during trial.

The next issue to settle is whether treachery and evident premeditation can be appreciated to qualify the crime into murder. In finding the presence of treachery and evident premeditation, the court a quo ruled that:

"A person being shot at while standing in a public place and talking to a woman must have been shot with evident premeditation and treachery because he was unaware of the impending attack which prevented him from putting up a defense that will repel the attack that will also place the attacker under some sort of risk by reason of said defense. After having fallen to the ground head first, said person's being shot two times more would have been indicative of the treacherous plan to kill him."^[36]

There is treachery when the offender commits any of the crimes against persons, employing means, methods, or forms in the execution thereof which tend directly and specifically to insure its execution without risk to himself arising from the defense which the offended party might make.^[37] For treachery to be appreciated as a qualifying circumstance, two elements must concur: (1) the employment of means of execution which gives the person attacked no opportunity to defend himself or retaliate; and (2) the means of execution is deliberately or consciously adopted.^[38]

We find the evidence of the prosecution insufficient to prove treachery as a qualifying circumstance. The fact that Torres saw the accused-appellant shoot the victim while he was already on the ground does not mean that that was the only assault made by the accused-appellant on the victim.^[39] When Torres saw the accused-appellant shoot the victim, she had already heard two shots fired. The autopsy report shows that the victim also sustained two unexplained stab wounds. Given these facts, Torres cannot be considered as having testified as to how the incident began since she saw the incident already in progress.^[40] Treachery cannot be considered when the witness did not see the commencement of the assault.^[41]

Moreover, treachery cannot be appreciated when no particulars are known with respect to the manner by which the aggression was made or how the act began or developed^[42] or when the evidence lacks any details showing

the manner of attack, its suddenness or unexpectedness, the relative positions of the victim and his assailant, and the victim's defenselessness.[43]

Lastly, although the fatal wounds were found at the back of the victim, this does not, of itself, compel a finding of treachery.[44] We disagree with the Regional Trial Court's ratiocination that a person who, after falling to the ground head first, was shot two more times indicates the treacherous plan to kill him as it does not prove the suddenness of the attack which prevented the victim from defending himself or retaliating. The conclusion is speculative and based on a presumption not on the evidence. It is a basic precept that treachery must be proven as indubitably as the killing itself and it cannot be deduced from mere presumption or sheer speculation.[45]

The court a quo also appreciated evident premeditation as a qualifying circumstance. For evident premeditation to be appreciated, the following must be proved:

- 1.) the time when the accused determined to commit the crime;
- 2.) an act manifestly indicating that the accused has clung to his determination; and
- 3.) sufficient time between such determination and execution to allow him to reflect upon the consequences of his act.[46]

Neither are we convinced that evident premeditation was proven. The records are bereft of evidence of any of the above requisites of evident premeditation. There is absolutely no proof of the time the accused decided to commit the crime. There is no showing how the accused, Jose Silvestre, planned the killing of the victim, Luisito Palencia. Neither is there any showing of how much time elapsed before he executed his plan. Absent all these, evident premeditation cannot be appreciated.[47]

Since both treachery and evident premeditation cannot be appreciated to qualify the crime into murder, the accused-appellant can only be convicted of the crime of homicide.[48] Article 249 of the Revised Penal Code provides that the penalty for homicide is reclusion temporal. Since there are no mitigating nor aggravating circumstances in the present case, the penalty that should be imposed on the accused-appellant is reclusion temporal in its medium period. Applying the Indeterminate Sentence Law, the accused-appellant is sentenced to prision mayor, as the minimum, and reclusion temporal in its medium period, as the maximum.[49]

The last issue to be resolved is whether the heirs of Luisito Palencia are entitled to actual and moral damages and loss of income which would have been earned had it not been for the victim's untimely death.

We cannot sustain the award of P66,500.00 as actual damages in favor of the heirs of Luisito Palencia. The records show that the prosecution failed to substantiate the bare assertion of the widow, Marina Palencia, with other corroborative evidence. The Court can only grant such amount for expenses if they are supported by receipts.[50] In the absence thereof, no award for actual damages can be granted.

We affirm the award of P50,000.00 as indemnity for the loss of Luisito's life as this is in accord with prevailing jurisprudence.[51] However, the award of moral damages must be reduced from P100,000.00 to P50,000.00[52] as the purpose of this award is not to enrich the heirs of the victim but to compensate them for the injuries to their feelings.[53]

We must also modify the award for loss of earning capacity. The absence of documentary evidence to substantiate the widow's claim for the loss will not preclude recovery for said amount.[54] Marina Palencia testified that her deceased husband earned P14,877.00 per month as a P.L.D.T. repairman and installer.[55] It was also established that at the time of his death, the victim was forty-four (44) years old.[56] Loss of earning capacity is computed based on the following formula:[57]

Net Earning Capacity (x)

= life expectancy $[2/3(80\text{-age at death})]$

x Gross Annual Income (GAI)

- living expenses (50% of GAI)

x = $2(80-44) \div 3 \times 178,524.00 - 89,262.00$

x = $24 \times 89,262.00$

Net Earning Capacity = P 2,142,288.00

WHEREFORE, the appealed decision of the Regional Trial Court is hereby MODIFIED, and the accused-appellant is found GUILTY OF HOMICIDE and sentenced to an indeterminate penalty of ten (10) years and one (1) day of prison mayor, as minimum, to seventeen (17) years and four (4) months of reclusion temporal, as maximum.[58] Accused-appellant is further ordered to pay the heirs of the victim the following: (1). death indemnity P50,000.00, (2). moral damages P50,000.00, (3). loss of earning capacity P2,142,288.00.

SO ORDERED.

Romero (Chairman), Vitug, Panganiban, and Purisima, JJ., concur.

[1] Penned by Judge Benjamin M. Aquino, Jr., Rollo. pp. 12-17.

[2] Rollo. p. 6.

[3] Record, p. 33.

[4] T.S.N., May 13, 1996, pp. 5-10.

[5] T.S.N., May 20, 1996, pp. 6-35.

[6] Order of June 3, 1996; Record, pp. 48-49.

[7] T.S.N. June 10, 1996, pp. 3-16.

[8] T.S.N. July 1, 1996, pp. 3-12.

[9] T.S.N., July 1, 1996, pp. 12-16.

[10] T.S.N., July 1, 1996, pp. 15-16.

[11] Decision of the Regional Trial Court, p.6; Rollo. p. 38.

[12] Appellant's Brief, p. 2.

[13] Appellant's Brief, p. 16.

[14] Record, p. 54.

[15] T.S.N., May 20, 1996, p. 9.

[16] Appellant's Brief, p. 24.

[17] Appellee's Brief, pp. 7-11.

- [18] T.S.N., May 20, 1996, pp. 7-12.
- [19] *People vs. Salveron*, 228 SCRA 92 at p. 97 [1993]; *People vs. Agunias*, 279 SCRA 52 at pp. 62-66 [1997].
- [20] Record, pp. 45-46.
- [21] *People vs. Mahinay*, G.R. No. 122485, February 1, 1999 at p. 16; *People vs. Banela*, G.R. No. 124973, January 18, 1999 at p. 5.
- [22] *People vs. Banela*, *Supra*, at p. 7.
- [23] T.S.N., May 20, 1996, pp. 9-10.
- [24] *People vs. Bajar*, 281 SCRA 262 [1997].
- [25] *Ibid.*, see Note 25.
- [26] *People vs. Salguero*, 198 SCRA 357 at p. 362, [1991]; *People vs. Espiritu*, 191 SCRA 503 at pp. 505-506, [1990].
- [27] Exhibit A-1, Record, p. 55.
- [28] T.S.N., May 20, 1996, pp. 33-35.
- [29] T.S.N., May 20, 1996, pp. 30-32.
- [30] T.S.N., July 1, 1996, pp.12-13.

[31] 170 SCRA 649.

- [32] *Ibid.*, at 658; *People vs. Porras*, 255 SCRA 514 at p. 527 [1996].
- [33] Ricardo J. Franciso, *Evidence*, 3[rd] ed., 1996, p. 250-251.
- [34] Rule 131, Rules of Evidence, § 3(e).
- [35] *People vs. Andal*, 279 SCRA 474 at pp. 495-496 [1997].
- [36] Decision, p. 5; Rollo p. 16.
- [37] Revised Penal Code, Article 14 (16); *People vs. Tavas*, G.R. No. 123969, February 11, 1999 at p. 13.
- [38] *People vs. Tavas*, *Supra* at p. 12; *People vs. Dorado*, G.R. No. 122248, February 11, 1999, at p. 9.
- [39] *People vs. Oscimar*, 253 SCRA 689 at p. 698 [1996].
- [40] *People vs. Oscimar*, *Supra*.
- [41] *People vs. Garcia*, 258 SCRA 411 at p. 422, [1996]; *People vs. Tiozon*, *Supra*.
- [42] *People vs. Cruz*, 262 SCRA 237 at p. 243, [1996]; *People vs. Tiozon*, 198 SCRA 368 at p. 388, [1991].
- [43] *People vs. Zamora*, 278 SCRA 60 at p. 77 [1997].
- [44] *People vs. Maturgo, Sr.*, 248 SCRA 519 at p. 531 [1995].
- [45] *People vs. Tavas*, *Supra*, at pp. 10-11.
- [46] *People vs. Bahenting*, G.R. No. 127659, February 24, 1999, p. 8; *People vs. Realin*, G.R. No. 126051,

January 21, 1999, p. 14.

[47] People vs. Bahenting, Supra.

[48] Article 249, Revised Penal Code; People vs. Tavas, Supra.

[49] People vs. Tavas, Supra.

[50] People vs. Gutierrez, Jr., G.R. No. 116281, February 8, 1999 at p. 24.

[51] People vs. Verde, G.R. No. 119077, February 10, 1999 at p. 17.

[52] Ibid.

[53] Ibid.

[54] Ibid., at p. 18.

[55] T.S.N., May 13, 1996, p. 5.

[56] Record, p. 45.

[57] People vs. Verde, Supra; People vs. Gutierrez, Jr., Supra at p. 26.

[58][58] People vs. Tavas, Supra.⁵⁸

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