

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE LOMBOY @ “JOSE”, ACCUSED-APPELLANT.

G.R. No. 129691. June 29, 1999

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

Acquittal is inevitable if inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with the innocence of the accused and the other consistent with his guilt. Conviction must rest on the moral certainty of appellant's guilt brought about by the totality of the prosecution's evidence.

The Case

Jose Lomboy appeals the February 14, 1997 Decision[1] of the Regional Trial Court (RTC) of San Carlos City, Pangasinan (Branch 57), finding him guilty of (A) frustrated murder, sentencing him to seven (7) years of prison mayor to thirteen (13) years and four (4) months of reclusion temporal in Criminal Case No. SCC-2014; and (B) illegal possession of explosive (hand grenade), imposing upon him "eighteen (18) years and eight (8) months of reclusion temporal to reclusion perpetua."

Two separate Informations both dated March 26, 1993, were filed against appellant by the Office of the Provincial Prosecutor. The first,[2] for frustrated murder, reads:

"That on or about December 25, 1992, at Barangay Angatel, [M]unicipality of Urbiztondo, [P]rovince of Pangasinan, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, with treachery and evident premeditation, did, then and there, wi[l]lfully, unlawfully and feloniously throw a [hand grenade] thereby hitting Barangay Captain Benjamin Pidlaoan, inflicting upon him the following injuries:

- Acute subaural hematoma, brain laceration shrapnel injury

the accused having thus performed all the acts of execution which would have produced the crime of [m]urder as a consequence but, which nevertheless, did not produce it by reason of causes independent of the will of the accused and is due to the timely and able medical assistance afforded to Barangay Captain Benjamin Pidlaoan which prevented his death, to his damage and prejudice.

Contrary to Article 248 in relation to Art. 6 of the Revised Penal Code."[3]

The second Information[4] charged appellant with illegal possession of explosive (hand grenade), allegedly committed as follows:

"That on or about December 25, 1992, at Barangay Angatel, [M]unicipality of Urbiztondo, [P]rovince of Pangasinan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, did, then and there, wi[l]lfully, unlawfully and feloniously have in his possession, custody and control[,] [a hand grenade], without first securing the necessary permit and license to possess the same[,] which he used in the commission of the crime of [f]rustrated [m]urder.

Contrary to P.D. 1866."[5]

The appellant was arraigned on May 26, 1993,[6] and he pleaded[7] not guilty to both charges. Thereafter, the two cases were heard jointly.[8] After trial, the lower court promulgated the assailed Decision,[9] the dispositive portion of which states:

"WHEREFORE, the accused, JOSE LOMBOY, alias `Jose,' is hereby found:

Under Criminal Case No. SCC-2014: GUILTY beyond reasonable doubt of the crime of FRUSTRATED MURDER herein charged, defined and penalized under Article 248 in relation to Art. 6 of the Revised Penal Code, and he is hereby sentenced, under the Indeterminate Sentence Law, to suffer the penalty of imprisonment of from [s]even (7) [y]ears of prision mayor to [t]hirteen (13) [y]ears and [f]our (4) [m]onths of reclusion temporal, and to indemnify Brgy. Cap't. Benjamin Pidlaoan in the amount of P300,000.00.

Under Criminal Case No. SCC-2015: GUILTY beyond reasonable doubt of the crime of [i]llegal [p]ossession of [e]xplosive ([h]andgrenade) defined and penalized under Presidential Decree No. 1866, as herein charged, and he is hereby sentenced to suffer the penalty of imprisonment, under the Indeterminate Sentence Law, of [e]ighteen (18) [y]ears and [e]ight (8) [m]onths of reclusion temporal to reclusion perpetua."[10] (Emphasis in the original)

In view of the penalty imposed, the appeal was filed directly with this Court.[11]

The Facts

Version of the Prosecution

In its Brief,[12] the Office of the Solicitor General presents the facts in this wise:

"On December 25, 1992, about 1:00 o'clock a.m., private complainant Barangay Captain Benjamin Pidlaoan, together with Barangay Kagawad Marcelino C. Tapiador and Mardonio Tampico, were on their way home from a Christmas dance party of Barangay Angatel, Ubiztondo, Pangasinan. While walking along the barangay road and about 8 meters from the house of Rodolfo Marcelo, they saw a man lying face down by the roadside. When they were about 5 or 6 meters away, the man by the roadside directed a flashlight at them. Pidlaoan, in turn, flashed his flashlight at the man who was wearing a maong jacket. They recognized the man to be appellant, a 27-year-old barangay mate of theirs.

"Pidlaoan approached appellant and held the latter's left hand to help him get up. Appellant's right hand was noticeably on his stomach as if holding something. After helping him up, Pidlaoan asked him why he was lying down by the road to which he did not answer. When asked as to who his companion was, appellant replied that he was with Rodolfo Marcelo. Since the latter's house was just nearby, or only about 5 to 6 meters away, Pidlaoan stood by the left side of appellant and held him by the back collar of his jacket with his (Pidlaoan's) right hand, and pulled him towards the direction of Marcelo's house. While near the front gate of Marcelo's house and while calling for Marcelo to come out, Marcelo's young son who stood about 10 meters away from them, uttered `take care Barangay Captain because he has [a] grenade with him'.

"Suddenly, appellant managed to free himself from Pidlaoan's hold and moved about 3 meters backwards. He then got a grenade from inside his jacket and held it in one hand, with the other hand removing the pin thereof with a pulling movement. While shouting `vulva of your mother, we will all die', appellant threw the grenade in the direction of Pidlaoan and the same landed near him. Thereafter, there was an explosion and thick smoke.

"When Kagawad Tapiador, who was only about 5 meters from appellant, recognized that what appellant was holding was a hand grenade, he ducked with his face down.

"When Tapiador and Tampico saw that Pidlaoan was seriously wounded as he could not even stand, they brought him to the clinic of Dr. Serafino Padlan at Urbiztondo, Pangasinan. He was later transferred to the

Villaflor Doctors Hospital in Dagupan City.

"Upon receipt of a radio message about the explosion incident from Col. Ernesto Palisoc, SPO1 Tandoc and SPO2 Renato Solomon were dispatched at about 7:00 A.M. to investigate. Upon learning that Pidlaoan was brought to the Padlan clinic, they rushed thereto. They, however, were unable to speak with him as he was in critical condition having sustained a wound on his head. Thus, they instead proceeded to the scene of the incident at Barangay Angatel where they were able to recover five (5) empty bullet shells of M-14 and M-16 armalite rifles; one (1) hand grenade handle." [13]

Version of the Defense

For his part, appellant submits the following as the facts of the case: [14]

"LAMBERTO [15] LOMBOY, brother-in-law [16] of accused-appellant testified that on December 25, 1992 at around 8:00 o'clock in the evening while inside his house at Barangay Angatel, Urbiztondo, his brother Jose Lomboy and Boy Ferrera dropped at his house and invited him to attend a Christmas dance ball. He told them to go ahead and he will just follow them soon. He and Dominador Lomboy, another brother[,] left the house at past 8:00 o'clock in the evening and proceeded to the Christmas party. While he was watching the party, he saw Brgy. Capt. Pidlaoan [arrive] carrying a hand grenade hanging [from] the left pocket of his camouflage jacket[,] together with Mardonio Tampico[,] who was carrying an M-16 rifle[,] and Marcelino Tapiador carrying an M-14 rifle. (emphasis in the original, citations omitted)

"JOSE LOMBOY, accused-appellant testified that on December 25, 1992, at around 1:00 o'clock early dawn, he was [in front] of the house of his barkada, Rodolfo Marcelo conversing with him when he noticed some people walking along the road so he focused his flashlight at them. He saw Brgy Capt. Pidlaoan together with his aide, Mardonio Tampico and Barangay Kagawad Marcelino Tapiador. They were carrying two (2) long firearms and a [hand grenade] hanging [from] the pocket of Brgy. Capt. Pidlaoan who approached him, held his collar and struck him in the face, hitting his left cheekbone and on the head with the [use] of [the] hand grenade which was removed from his pocket. The trio mauled and gang[ed]-up on him, and when the Barangay Captain loosened his hold on him he was able to run [towards] the back of Rodolfo Marcelo's house planted with banana and coconut trees. They ran after him and kept on shooting but he was not hit because he ran in a zigzag manner. Brgy. Capt. Pidlaoan threw the [hand grenade] at him but when it exploded, the former was hit instead and got seriously injured. He went to his aunt's house for fear that Brgy. Capt. Pidlaoan will kill him and he stayed there for one (1) week until he was arrested by SPO1 Tandoc and SPO2 Solomon accompanied by Cesar Pidlaoan, son of the victim who squeezed his neck. He was incarcerated at Urbiztondo Municipal jail and on January 4, 1993, he was brought to Bolingit Hospital for medical treatment." [17] (emphasis in the original, citations omitted)

Ruling of the Trial Court

The trial court accepted the version of the prosecution as credible and rejected that of the defense, ruling thus:

"First, in view of the completely opposite claims of the prosecution and the defense as to who pulled the pin of, and threw, the [hand grenade], the matter of motive has assumed a special importance in [unraveling] the mystery; and, on this issue, the accused claimed that, just before the explosion of the [hand grenade], when he asked Brgy. Cap't. Pidlaoan why the latter was hitting him on the face and head with a [hand grenade], said barangay captain purportedly replied, 'Vulva of your mother, I'll surely kill you now because you are a family of thieves. xxx We were not able to kill you on the 3rd of January, I'll surely kill you now, you can't escape.'[,] said accused explaining that the barangay captain was referring to an alleged incident in the early dawn of January 3, 1992, when the house he, his mother and sister are living in was shot at, although he did not know then who did the [alleged] shooting. The Court finds this story of the accused, besides being uncorroborated, not to be worthy of belief for the following reasons:

(a) It is merely based on the accused's conjecture that Brgy. Cap't. Pidlaoan had anything to do with the alleged

shooting up of accused's house on January 3, 1992, assuming this without any basis, to have actually happened;

(b) The presumption that Brgy. Cap't. Pidlaoan is a reasonable and responsible public official of his barangay is not rebutted by the uncorroborated claim of the accused that by merely suspecting him and his family as 'a family of thieves', he would shoot up their house and would kill the accused right on the road in front of the house of the accused's barkada, Rodolfo Marcelo;

(c) It is unnatural and contrary to logic that the barangay captain would confess to the crime of shooting up the house of the accused months prior the present incident before carrying out his alleged intention to kill the accused;

(d) In view of all the foregoing, the Court traces the ill-motive to kill the barangay captain to the accused who was harboring the belief that it was the barangay captain who shot up the house where he (The accused) and his mother and sister were then sleeping and who was purportedly accusing them of being 'a family of thieves.'

"Second, it is established that two kinds of armalite rifles were fired [at] the scene of the crime, and it is claimed by the accused that he saw the barangay captain's two companions to be carrying these firearms as they approached him, if it is really true that it was the intention of said barangay captain to kill him, because he belonged to a family of thieves and he could not escape, the barangay captain and/or his companions should have shot him with the armalite rifles, not the [hand grenade] just to kill one person putting to risk not only the target but the persons nearby, including the thrower himself if thrown not far enough.

"Third, well-established is the rule on evidence that flight is an evidence of guilt; and in the instant case, as the [hand grenade] exploded, the accused ran away from the scene and proceeded to Malasiqui where he stayed in the house of his aunt, Leoning Gonzales, at Brgy. Lokeb Norte, for about one (1) week until he was arrested thereat by Urbiztondo policemen accompanied by Brgy. Cap't. Pidlaoan's son, Cesar. xxx.

"Fourth, the claim of the accused that he was being mauled by Brgy. Cap't. Pidlaoan and his companions when he was able to free himself from the hold of the barangay captain, is belied by the very Medico-Legal Certificate and the testimony of Dr. Conrado H. Cuison, M.D. who examined and treated him and who prepared said document, which the defense presented as evidence of his alleged injuries xxx"[18] (emphasis in the original)

The Issues

Appellant submits that the court a quo committed the following errors:

"I

THE TRIAL COURT GRAVELY ERRED IN CONVICTING ACCUSED-APPELLANT OF THE CRIME OF FRUSTRATED MURDER AS CHARGED IN CRIMINAL CASE NO. SCC-2014 DESPITE THE WEAKNESS AND INSUFFICIENCY OF PROSECUTION EVIDENCE.

II

THE TRIAL COURT GRAVELY ERRED IN CONVICTING ACCUSED-APPELLANT OF THE CRIME OF ILLEGAL POSSESSION OF EXPLOSIVES AS CHARGED IN CRIMINAL CASE NO. SCC-2015 DESPITE THE UNRELIABILITY OF THE EYEWITNESS TESTIMONY."[19]

The main issues to be resolved are the credibility of the prosecution's single eyewitness and the verity of his testimony.

The Court's Ruling

The appeal is meritorious.

Main Issue

Credibility of Prosecution's Lone Eyewitness

"As a general rule, the evaluation of the credibility of witnesses is a matter that particularly falls within the authority of the trial court, as it had the opportunity to observe the demeanor of the witnesses on the stand. For this reason, appellate courts accord its factual findings and assessments of witnesses with great weight and even finality, barring arbitrariness or oversight of some fact or circumstance of weight and substance." [20] We find, however, that the court a quo overlooked several circumstances of weight and substance, which create reasonable doubt on the appellant's culpability.

Testimony Is Dubious

The trial court relied mainly on the testimony of the lone prosecution eyewitness, [21] Barangay Kagawad Marcelino Tapiador. In light of the well-settled norm that the testimony of a witness must conform with knowledge, observation and common experience of mankind, [22] the Court meticulously reviewed Tapiador's testimony and concluded that his account was dubious.

First, Tapiador testified that about 1:00 a.m., while walking along the barangay road with Mariano Tampico and Barangay Captain Benjamin Pidlaoan, they saw the appellant lying face down on the road shoulder. Tapiador allegedly "sensed" that Jose Lomboy had "bad intentions," [23] but the former did not convey his feelings to his companions. Nonetheless, Pidlaoan collared the appellant as if he had just committed a crime. [24] Tapiador narrated the events in this wise:

"ATTY. SORIANO

Q At about 1:00 o'clock on that December 25, 1992 in the morning, do you remember where you were, Mr. Witness?

A Yes, sir.

Q Where were you then, Mr. Witness at that time?

A We were walking towards another occasion, sir.

x x x x x x x x

Q Do you remember of any unusual incident that took place on that precise time and on that place, Mr. Witness?

A Yes, sir.

Q What was that, Mr. Witness?

A While we were walking along the road, we saw a man lying with his face down along the shoulder of the road.

Q When you mentioned we were walking, to whom [we]re you referring to.

A

Brgy. Captain Benjamin Pidlaoan and Mardonio Tampico, sir.

x x x x x x x x

ATTY. SORIANO

Q On that precise moment that you have seen as you mentioned a person lying down, what happened next if there is any?

A

The man lying down flashed his flashlight towards us and xxx Brgy. Captain Benjamin Pidlaoan xxx flashed his flashlight towards him and then the Barangay Captain approached him.

Q You said you [saw] a person lying down, who is that person who is lying down?

A Jose Lomboy, sir.

Q

Are you referring to the accused whom you have pointed earlier, Mr. Witness?

A Yes, sir.

x x x x x x x x

ATTY. SORIANO

Q After Brgy. Captain Pidlaoan made Jose Lomboy stand, what transpired next if there is any, Mr. Witness?

A He was asked what he was doing there and who was his companion.

Q To whom [was] question directed to Mr. Witness?

A

Jose Lomboy, sir.

Q And what was the answer of Jose Lomboy if there is any, Mr. Witness?

A His companion was Rodolfo Marcelo, sir.

Q And what did the Brgy. Captain do if there is any, Mr. Witness after that?

A He collar[e]d Jose Lomboy and he accompanied him to the house of Rodolfo Marcelo.

x x x x x x x"[25] (emphasis ours)

The improbabilities in the foregoing narration are readily apparent. It is unnatural for one to lie down near a road at one o'clock in the morning during the cold season for no particular reason. Indeed, when asked on cross-examination whether the appellant appeared to be drunk or was doing anything illegal, the witness replied in the negative. Moreover, if it was true that appellant intended to commit a crime, his actuations as described by the eyewitness spoke otherwise. If appellant had evil designs that night, why did he point his flashlight towards his targets -- Pidlaoan and his companions - thereby attracting their attention? Why did he lie face down on the road in plain view of passersby? Instead, he should have positioned himself in an inconspicuous place and waited, unnoticed, for the right opportunity from a safe distance to throw the grenade at the group.

Second, Tapiador stated categorically that he did not see any firearms or hear any gunshots during the incident. The pertinent part of his testimony is as follows:

"ATTY. SAMSON

Q Is it not a fact that you and Brgy. Captain before the explosion were armed?

A None, sir.

COURT

Q You were not on patrol duty then?

A No, sir, but we attended the Christmas Party.

Q Did you not attend the Christmas Party as security to maintain peace and order?

A No, sir.

ATTY. SAMSON

Q You are a Brgy. Kagawad of Brgy. Angatel, Urbiztondo, Pangasinan?

A Yes, sir.

Q Just immediately after the explosion, did you not hear the firing of guns?

A None, sir.""[26] (Emphasis supplied.)

The physical evidence on record controverted the foregoing assertions. Reports of what happened were transmitted over the radio as a shooting incident and not merely as an explosion, as Tapiador would have us believe. The investigating officer, SPO1 Rodrigo Tandoc, testified:[27]

"Q. What was that radio message all about that was sent to your office by Col. Palisoc?

A. He informed our office that there was a shooting incident, sir."

Furthermore, Tandoc declared that he and his team recovered at the scene of the crime several bullet shells of M-16 and M-14 rifles, along with a grenade shrapnel.[28] In fact, the Appellee's Brief admits that the two companions of Pidlaoan were armed with armalite rifles.[29]

Third, Tapiador testified that the victim took the appellant to the front of Marcelo's house and that, by implication, the incident took place there. The witness said:

"ATTY. SORIANO

Q And what did the Brgy. Captain do if there is any, Mr. Witness after that?

A He collar[e]d Jose Lomboy and he accompanied him to the house of Rodolfo Marcelo.

Q What particular part of the house of Rodolfo Marcelo did Brgy. Captain take Jose Lomboy?

A Near the front of his house, sir."[30]

This would necessarily mean that the grenade exploded at or near the front of Marcelo's house. According to the Appellee's Brief, the barangay captain collared the accused and took him to that particular place; after the latter freed himself, he stepped backwards and "threw the grenade in the direction of Pidlaogan and the same landed near him." [31] The eyewitness was categorical when he testified that the entire incident took place at or near the front of Marcelo's house.

But according to SP01 Tandoc, the center of the explosion was located at the back portion of Marcelo's house where there were banana and coconut trees:

"ATTY. R. SAMSON

Q

You said that you have gathered evidence at the scene of the explosion. When you said you gathered, you and you companions were the [ones] who personally gathered these evidences like the empty shells of M-16 and M-14 and the handle of the grenade, is that not correct?

A Yes, sir.

Q And you personally gathered some of them?

A Yes, sir.

Q Did you try to determine the center of the explosion of the hand grenade as duty investigator?

A Yes, sir.

Q From the center of the explosion of the hand grenade, is it near the trees like banana tree?

A Yes, sir.

Q Is it not a fact also that a domesticated animal died because of that explosion of the hand grenade?

A I do not know if that animal died but it was hit, sir.

Q What domesticated animal was that?

A Carabao, sir.

Q And that domesticated animal was hit; that domesticated animal was found near the center of the explosion?

A Yes, sir.

Q Did you try also to find out the condition of the surroundings of the center of the explosion?

A

Yes, sir.

Q Is it not a fact that near the center of the explosion you can find several banana trees as well as coconut [groves]?

A There were, sir.

Q And the center of the explosion is likewise near the house of Rodolfo Marcelo?

A Yes, sir.

Q

And just at the back of the house of Rodolfo Marcelo there were coconut [groves] and banana plantations?

A Yes, sir.

x x x x x x x x

ATTY. R. SAMSON

Q

A while ago you have stated that the center of the explosion was near the banana trees, how far is the center of the explosion from the nearest banana tree? [I]s it less than a meter from the nearest banana tree, the center of explosion?

A More of or less 1 meter, sir."[32]

The investigating officer was clear and certain in stating that the center of the blast was about a meter away from the nearest tree at the back of the house. Clearly, the location of the grenade blast scuttles the theory of the prosecution, which is based entirely on the testimony of Tapiador. His story was that appellant was brought by the victim to the front of the house; that Marcelo's son who was outside the house warned them of the grenade in appellant's possession; and that appellant loosened the victim's grip on him, made three steps backward and threw the grenade at the victim. But the fact that the center of the explosion was at the back of the house shows that this story was untrue.

It should also be emphasized that the lone eyewitness was unsure of the events that transpired after a child had allegedly warned them. During cross-examination, said eyewitness faltered while answering several questions:

"ATTY. SAMSON

Q

After the boy uttered the words, he has a [hand grenade] and as you have demonstrated, Brgy. Captain pushed his right hand backward as if he is removing something, did I get you right that when he removed his right hand backward as if he is removing something, the right hand of Brgy. Captain Benjamin Pidlaoan was placed at the back collar of Jose Lomboy loosened or detached?

COURT

You reform so that witness will

ATTY. SAMSON

Q You said that Jose Lomboy [swung] his right arm towards his back. When he swung his arms towards at the back, what happened?

A

He moved backward by around 3 steps.

Q

And that was the very moment that he threw the hand grenade?

A He first talked, sir.

Q What did he say?

A "Vulva of your mother, we will all die."

Q And that was the distance of 3 steps backwards?

A Yes, sir.

Q And that was the very moment he threw the [hand grenade]?

A Yes, sir.

COURT

Q Did you notice where the grenade came from?

A Inside his jacket, sir.

Q Will you please assure the Court that it was the right hand of Brgy. Captain which was holding the back collar of Lomboy?

A Yes, sir.

Q And you are also sure that it was the right hand of Jose Lomboy which is swung backwards?

A Yes, sir.

Q Where was the Brgy. Captain in relation to Jose Lomboy, as he was holding the back collar of Lomboy?

A He was besides Jose Lomboy, sir.

Q The right side of Jose Lomboy?

A Left side, sir.

Q But you are pointing to your right side?

A He turned, sir.

Q So the Brgy. Captain was in the left side of Lomboy using his right hand, when he was holding the back collar of Lomboy?

A

Yes, sir.

Q And at that time they were both facing the same direction?

A

Yes, sir.

Q With that position, it was then that Lomboy swung his right hand?

A Witness demonstrating by swinging his right arm side[ways].

Q So, in other words, what he did was to hit the Brgy. Captain with his right elbow?

A I don't know anymore, sir.

Q

So he did not actually swing his right arm backwards as you claimed first because, what he did now is just to turn around and swing his right elbow as if to hit the Brgy. Captain?

A Yes, of course, because he was loosening the [grip] of the Brgy. Captain.

Q So he used his right hand now in order to grip or did he swing the right arm?

A

I could not tell anymore, sir, if he used his right hand in removing the grip of the brgy. Captain because of his position with his elbow turning around."[33]

The Grenade Story

Most important, the prosecution failed to provide a satisfactory answer to the very crucial question identified by the trial court itself: Who "pulled the pin of, and threw, the hand grenade that exploded?"[34] To this, the prosecution answered based on the testimony of Tapiador that (1) he saw appellant holding a grenade, and (2) a child warned them that appellant had a grenade. Such answer cannot be given credence for several reasons.

One, Tapiador provided conflicting testimony on whether he saw the appellant holding a grenade. In his direct testimony, he stated:

"ATTY. SORIANO

Q How about the accused Jose Lomboy, what was his reaction when there was a [caution] made by that alleged person?

A Jose Lomboy struggled and then he loosened himself [from] the Brgy. Captain and moved backward around 3 meters.

Q And on that, what happened next if any, Mr. Witness?

A He was already holding a grenade, the other hand with the grenade and the other hand with the pin with his two (2) hands meeting each other.

x x x x x x x x

ATTY. SORIANO

Q And how about you, what did you do when accused Jose Lomboy uttered those words `Baonina yon amin, onpatey tila dia'?

A When I saw that it was a grenade the[n] I lay with my face down, sir. [sic]

Q By the was Mr. Witness, when the accused threw the [hand grenade] to the place of the Brgy. Captain, what is your distance [from] the accused?

A

Around 6 meters away, sir.

Q How do you know that it was a grenade that the accused was holding, Mr. Witness?

x x x x x x x x

WITNESS

A Because we were illuminated by a light and I know that kind of grenade sir."[35]

On cross-examination, however, he said that he could not see what appellant was holding. He testified thus:

"ATTY. SAMSON

Q

You want to convey to this court that after that boy uttered that Jose Lomboy had a [hand grenade], Brgy. Captain [Pidlaoan] instead loosened his grip o[n] the xxx collar of Jose Lomboy?

ATTY. SORIANO

That was already answered several times in direct and cross, your Honor.

COURT

Witness may answer.

A No, sir, just after the boy uttered those words.

COURT

He [was not saying anything], he was just demonstrating. The witness demonstrated by raising his right arm and swinging it backwards as if removing something from behind him.

ATTY. SAMSON

Q And of course Jose Lomboy was at that time not yet holding anything?

ATTY. SORIANO

Your Honor, what particular moment.

ATTY. SORIANO [sic]

On that very moment, your Honor.

COURT

Witness may answer as the question is explained on that very moment.

WITNESS

A

I could not see what he was holding because, it was night time and although he was holding something since grenade is very small, so even though the witness [sic] is demonstrating as if he was removing something then I could not see anymore.

ATTY. SAMSON

Q You mean to say therefore that you were not illuminated by electric lights, because you said you can not recognize him?

A There was a light, sir."[36]

This conflict in the testimony of the eyewitness regarding an important factual detail belies the truthfulness of the prosecution account.

Two, Kagawad Tapiador testified that there was a child, who warned them of the fact that the appellant was armed with a hand grenade. On direct examination, Tapiador narrated:

"ATTY. SORIANO

Q At that precise time when they were in front or near the house of Rodolfo Marcelo, what transpired next if any, Mr. Witness?

A Upon reaching in front of the house of Rodolfo Marcela, there was a child who uttered "take care Brgy. Captain because he has a grenade with him".

Q And what is the distance of that person who mentioned the Barangay Captain, Mr. Witness?

A Around 10 meters away, sir."[37]

On cross-examination, Tapiador identified the child as Rodolfo Marcelo's son. However, notwithstanding his claim that the place was illuminated by an electric bulb, he was not able to describe the child on further questioning, viz.:

"ATTY. SAMSON

Q Do you know that boy who [uttered]?

A He is the child of Rodolfo Marcelo, sir.

Q You know him personally?

A Only that night, sir.

Q But you did not mention his name in your affidavit, is that correct?

A

I don't know his name.

Q But you know that he is the son of Rodolfo Marcelo?

A Yes, sir, that's what I [said].

Q You mean to say that when that boy [uttered] the words, he was inside the house of Rodolfo Marcelo?

A No sir.

Q Where was he?

A He was on the ground, sir.

Q Around how old is that boy, if you know?

A I don't know, sir.

Q Could you approximate the age of that boy by his look?

A No sir.

Q [How a]bout the height of that boy?

A Of course it is night time, sir, and something happened.

Q You mean to say because it's night time, you can not recognize him?

A No more, sir, because it was so sudden.

Q

So in other words, you [did] not [recognize] him, you don't know if he is a boy or an old man?

A I saw that it is a boy but I could not recognize [him]."[38]

Truth to tell, there was no child involved in the incident, because all the children of Rodolfo Marcelo were already asleep according to the testimony of SPO1 Rodrigo Tandoc.[39] We note that the child was not presented in court. We have said that the failure to present a witness to establish one's thesis may imply that the testimony would be adverse if presented.[40] It should be added here that Mardonio Tampico, the other companion who could have easily corroborated the account given by Tapiador, was not presented either.

Sufficiency of Prosecution Evidence

The Court notes that the trial court gave misplaced and erroneous emphasis on the weakness of the evidence for the defense. In its assailed Decision, the lower court insisted that the ill motive imputed to Pidlaoan was "uncorroborated, not xxx worthy of belief." [41] Worse, it concluded in a rather cavalier manner that such imputation suggested bad faith on the part of appellant. This was speculative and immaterial. Likewise, the court a quo manifested a wrong perspective in erroneously focusing on the alleged failure of the appellant to prove that the victim and his companions mauled him.

After belaboring the perceived weakness in the assertions of the appellant, the trial court concluded that the prosecution's version was more credible. It held:

"In the light of all the foregoing findings, the Court holds that the aforestated version of the prosecution is far more credible than that of the accused, and that the prosecution's evidence is sufficient to establish beyond reasonable doubt that it was accused, Jose Lomboy, who pulled the pin off[f], and threw, the [hand grenade] xxx." [42] (emphasis ours)

Well-entrenched is the doctrine that a finding of guilt must rest on the prosecution evidence, not on the weakness or even absence of evidence for the defense.[43] The burden of proving appellant's guilt beyond reasonable doubt rests upon the prosecution.[44] The lower court erred in relying on the alleged weakness of the defense. To our mind, when the trial court said that the prosecution's version "was far more credible," what it actually meant was that the prosecution's version was more probable. Verily, guilt cannot be shown by mere speculations or even probabilities, whether the offense be *malum prohibitum* or *malum in se*. [45]

Appellant's Flight

The lower court held that appellant's flight may be an indication of his guilt, but it did not explain why.[46] Evidently, it was unsure of the import and significance of appellant's act. In *People v. Cario*, [47] we stressed that flight may indicate guilt in certain instances, but it cannot, by itself, prove guilt beyond reasonable doubt. In this case, appellant departed from the scene of the incident, because he was afraid that the victim would kill him.[48] Furthermore, the lower court should have considered the uncontroverted fact that the victim's son had choked the appellant while the latter was incarcerated,[49] a clear indication that the threat to appellant's life was real.

Verity of Defense's Allegations

It is noteworthy that the pieces of physical evidence, which contradict the prosecution's account, support the story of appellant. He said that he was talking with some friends at the house of Rodolfo Marcelo when some people approached them. He focused his flashlight and saw Barangay Captain Pidlaoan, Tapiador and Mardonio Tampico. The three were carrying two rifles, while a hand grenade was hanging from Pidlaoan's pocket. The three mauled appellant, who thereafter ran towards the back of Marcelo's house when he was able to free himself. The three fired their rifles at him; fortunately, he was not hit. It was then that Pidlaoan threw the grenade, which exploded at the back of the house and blasted him instead.

The bullet shells found in the crime scene, as well as the initial report that what happened was a shooting incident,

belie Tapiador's statement that he did not see any firearms or hear any gunshots. On the other hand, they confirm appellant's theory that the barangay captain and his companions fired at him.

Finally, the fact that the center of the explosion was at the back of Marcelo's house discredits the prosecution's claim that appellant threw the grenade at the victim who was standing in front of the house. At the same time, it supports the story of the appellant that the barangay captain threw the grenade at him while he was running towards the back of the house.

Indubitably, the pieces of physical evidence present a scenario that completely negates the prosecution's account. Indeed, these established and uncontroverted facts rebut the trial court's theory and affirm that of the appellant. Well-settled is the rule that where "inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with the innocence of the accused and the other consistent with his guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction."^[50] Perforce, acquittal is inevitable.^[51]

WHEREFORE, the appeal is hereby GRANTED. The assailed Decision is hereby REVERSED and VACATED. Appellant Jose Lomboy is hereby ACQUITTED for insufficiency of evidence. The director of the Bureau of Corrections is hereby directed to cause the release of appellant forthwith, unless the latter is being lawfully held for another cause; and to inform this Court of his release or the reasons for his continued confinement, within ten days from notice. No costs.

SO ORDERED.

Vitug, Purisima, and Gonzaga-Reyes, JJ., concur.
Romero, (Chairman), J., abroad on official business.

[1] Penned by Assisting Judge Nicodemo T. Ferrer, who was the acting presiding judge during the trial.

[2] Rollo, pp. 7-8.

[3] Rollo, p. 7.

[4] Ibid., p. 9.

[5] Ibid.

[6] Ibid., p. 11.

[7] Assisted by Atty. Rodolfo Samson.

[8] 2nd Assistant Provincial Prosecutor Federico G. Quinit handled the case for Illegal Possession of Explosive, while Private Prosecutor Conrado Soriano handled the case for Frustrated Murder under the supervision and control of Prosecutor Quinit.

[9] Rollo, pp. 22-29; records pp. 225-232.

[10] Decision, pp. 7-8; Rollo, pp. 28-29; records pp. 231-232.

[11] Notice of appeal was filed on March 7, 1997 (records, p. 234). This case was deemed submitted for resolution after the Court's receipt of the Brief for the Appellee on January 29, 1999. The filing of a reply brief was deemed waived, as none was submitted within the reglementary period.

[12] Signed by Solicitor General Ricardo P. Galvez, Assistant Solicitor General Mariano M. Martinez and

Solicitor Fay L. Garcia.

[13] Appellee's Brief, pp. 6-9; Rollo, pp. 109-112.

[14] Appellant's Brief, pp. 8-9; Rollo, pp. 53-54. This was signed by Public Attorney IV Arceli A. Rubin, Public Attorney III Bartolome F. Reus and Public Attorney II Rogel F. Quijano of the Public Attorney's Office.

[15] Spelled "Alberto" in the TSN.

[16] "Brother" in the TSN.

[17] Appellant's Brief, pp. 7-8; Rollo, pp. 52-53.

[18] Decision, pp. 5-7; rollo, pp. 26-28.

[19] Appellant's Brief, p. 1; Rollo, p. 46.

[20] *People v. Perucho*, G.R. No. 128869, April 14, 1999, pp. 8-9 (citing several cases), per Panganiban J. See also *Cosep v. People*, 290 SCRA 378, May 21, 1998; *People v. Meneses*, 288 SCRA 95, March 26, 1998; *People v. Lagao*, 286 SCRA 610, February 27, 1998; *People v. Gil*, 284 SCRA 563, January 22, 1998.

[21] The other eyewitness, Mardonio Tampico, was not presented during the trial.

[22] See *People v. Diaz*, *supra*; *People v. Perucho*, *supra*; *People v. Venerable*, 290 SCRA 15, May 13, 1998; *People v. Niño*, 290 SCRA 155, May 19, 1998; *Cosep v. People*, 290 SCRA 378, May 21, 1998; *People v. Meneses*, 288 SCRA 95, March 26, 1998; *People v. Albao*, 287 SCRA 129, March 6, 1998.

[23] This also appears in his sworn statement.

[24] *Ibid.*, p. 8.

[25] TSN, September 20, 1993, pp. 5-8.

[26] TSN, September 20, 1993, pp. 28-29.

[27] TSN, October 15, 1993, p. 3.

[28] TSN, October 15, 1993, pp. 5-6.

[29] Appellee's Brief, p. 19; Rollo, p. 122.

[30] TSN, September 20, 1993, p. 8. (Emphasis ours.)

[31] Appellee's Brief, p. 8; Rollo, p. 111.

[32] TSN, October 15, 1993, pp. 15-17. (Emphasis ours.)

[33] *Ibid.*, pp. 23-27. (Emphasis ours.)

[34] Decision, p. 3; Rollo, p. 24.

[35] TSN, September 20, 1993, pp. 10-11. (Emphasis ours.)

[36] TSN, September 20, 1993, pp. 23-24. (Emphasis ours.)

[37] TSN, September 20, 1993, p. 9.

[38] TSN, September 20, 1993, pp. 19-20. (Emphasis ours.)

[39] TSN, October 15, 1993, pp. 14-15.

[40] See *People v. Solis*, 291 SCRA 529, June 29, 1998.

[41] Decision, p. 5; Rollo, p. 26.

[42] *Ibid.*, p. 7; Rollo, p. 28.

[43] *People v. Perucho*, GR No. 128869, April 14, 1999, p. 17, citing *People v. Llaguno*, 285 SCRA 124, January 28, 1998 and *People v. Paguntalan*, 242 SCRA 753, March 27, 1995. See also *Cosep v. People*, *supra*; *People v. Rugay*, 291 SCRA 692, July 2, 1998; *People v. Meneses*, *supra*; *People v. Manambit*, 271 SCRA 344, April 18, 1997.

[44] See *People v. Meneses*, *supra*.

[45] See *People v. Dela Rosa*, 284 SCRA 158, January 16, 1998; *People v. Albao*, 287 SCRA 129, March 6, 1998.

[46] The lower court ruled: "The accused claimed that he hid thereat because he was afraid of the barangay captain who allegedly wanted to kill him. This may be so, but it may be that his fear was based on the sense of guilt xxx" (emphasis ours)

[47] 288 SCRA 404, March 31, 1998 per Davide Jr., J (now CJ).

[48] See *People v. Furunggan*, 193 SCRA 471, January 28, 1991; *People v. Macatana*, 161 SCRA 235, May 9, 1988; *People v. Bulawin*, 29 SCRA 710, September 30, 1969.

[49] TSN, January 17, 1994, p. 13.

[50] *People v. Jubilag*, 263 SCRA 604, 616, October 28, 1996, per Francisco, J. See also *People v. Ferras*, 289 SCRA 94, April 15, 1998; *People v. Manambit*, 271 SCRA 344, April 18, 1997.

[51] *People v. Perucho*, *supra*, p. 18, per Panganiban, J. See also *Cosep v. People*, *supra*; *People v. Gil*, 284 SCRA 563, January 22, 1998.

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