

GERONIMO DADO, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 131421. November 18, 2002

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

Before us is a petition for review under Rule 45 of the Rules of Court assailing the June 26, 1997 decision of the Court of Appeals[1] in CA-G.R. CR No. 16886, which affirmed the decision[2] dated April 22, 1994, of the Regional Trial Court of Sultan Kudarat, Branch 19, in Criminal Case No. 2056, finding petitioner Geronimo Dado and his co-accused Francisco Eraso guilty of the crime of homicide.

In an Information dated August 24, 1993, petitioner Geronimo Dado and accused Francisco Eraso were charged with murder allegedly committed as follows:

That in the evening of May 25, 1992, at Sitio Paitan, Barangay Sagasa, Municipality of Esperanza, Province of Sultan Kudarat, Philippines, and within the jurisdiction of this Honorable Court, the said accused, armed with firearms, with intent to kill, with evident premeditation and treachery, did then and there, willfully, unlawfully and feloniously, attack, assault and shot one SILVESTRE BALINAS with the use of the afore-mentioned weapons, thereby inflicting gunshot wounds upon the latter which caused his instantaneous death.

CONTRARY TO LAW, particularly Article 248 of the Revised Penal Code of the Philippines, with the aggravating circumstance of taking advantage of superior strength.[3]

Upon arraignment on September 22, 1992, petitioner and his co-accused pleaded not guilty.[4] Trial thereafter followed.

The antecedent facts as narrated by prosecution witnesses Alfredo Balinas[5] and Rufo Alga[6] are as follows: On the night of May 25, 1992, the Esperanza, Sultan Kudarat Police Station formed three teams to intercept cattle rustlers from Barangay Laguinding, Sultan Kudarat. The team, composed of petitioner SPO4 Geromino Dado and CAFGU members Francisco Eraso, Alfredo Balinas, and Rufo Alga, waited behind a large dike at Sitio Paitan, Sultan Kudarat. Alfredo Balinas and Rufo Alga, who were both armed with M14 armalite rifles, positioned themselves between petitioner, who was armed with a caliber .45 pistol, and accused Francisco Eraso, who was carrying an M16 armalite rifle. They were all facing southwards in a half-kneeling position and were about 2 arms length away from each other. At around 11:00 of the same evening, the team saw somebody approaching at a distance of 50 meters. Though it was a moonless night, they noticed that he was half-naked. When he was about 5 meters away from the team, Alfredo Balinas noticed that Francisco Eraso, who was on his right side, was making some movements. Balinas told Eraso to wait, but before Balinas could beam his flash light, Eraso fired his M16 armalite rifle at the approaching man. Immediately thereafter, petitioner, who was on the left side of Rufo Alga, fired a single shot from his .45 caliber pistol. The victim shouted, “Tay Dolfo, ako ini,” (“Tay Dolfo, [this is] me”)[7] as he fell on the ground. The victim turned out to be Silvestre “Butsoy” Balinas, the nephew of Alfredo Balinas and not the cattle rustler the team were ordered to intercept. Repentant of what he did, accused Eraso

embraced Alfredo Balinas saying, “Pare, this was not intentionally done and this was merely an accident.”[8]

Silvestre Balinas died as a result of the gunshot wounds he sustained. The post-mortem examination conducted on his cadaver by Dr. Rhodora T. Antenor, yielded the following results:

Gunshot wounds located at:

1. (Point of Entry) - at right outer lateral arm with a diameter of 0.25 cm coursing tangentially and exiting at the right inner arm, about 4 cm below the elbow, 2.5 cm by 3cm in diameter (Point of Exit).

No powder burns noted.

2. (Point of Entry) – 2.5 by 9.5 cm in diameter at upper mid-inner thigh, about 5 cm from the ischial spine. Exposed were the damaged muscles, blood vessels and the surrounding tissues along the femoral triangle. The wound coursed upwards toward the pelvic area through the inguinal canal with blast injuries noted [at] the urinary bladder prostate gland, urethra, part of the ureter, the mid-pelvic bone (symphysis pubis), and the surrounding vessels and tissues of the pelvis. Marked bleeding was noted along the injured pelvic area. Three (3) pieces of irregularly shaped metallic slugs were recovered from the body; one, silvery colored, along the iliac spine almost glued to the bone; two, copper colored, embedded in the urinary bladder substance; three, copper colored, embedded in blasted substance almost on the pelvic floor. Hematoma noted along the penile area.

No other injuries noted.[9]

Dr. Rhodora T. Antenor testified that the fatal wound that caused the death of the victim was the one inflicted on the mid-inner thigh. The bullet pierced through and injured the organs in the pelvic region where she found three irregularly shaped metallic fragments. Dr. Antenor added that the position of the victim at that time of the shooting was higher than the assailant considering that the trajectory of the bullets was upwards. She added that the wound on the victim’s right outer lateral arm alone, would not bring about death, unless not immediately treated.[10]

Upon examination by NBI Ballistician Elmer Nelson D. Piedad, the three metallic fragments recovered from the fatal wound of the victim turned out to be fragments of a 5.56 mm jacketed bullet, thus:

FINDINGS AND CONCLUSION:

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1. Evidence marked “SB-1” is a part of a copper jacket of a caliber 5.56mm jacketed bullet and was fired through the barrel of a caliber 5.56mm firearms.

2. Evidence marked “SB-2” and “SB-3” could be parts of the lead core of evidence copper jacketed marked “SB-1”.

x x x x x x x x.[11]

On cross-examination, he declared that he is not sure whether the 2 other metallic fragments (marked as exhibit “SB-2” and “SB-3”) recovered from the fatal wound of the victim are indeed parts of “SB-1” which is a part of a copper jacket of a caliber 5.56 mm. jacketed bullet.[12]

For his part, petitioner testified that on the night of the incident, he was armed with a .45 caliber pistol. He claimed that while waiting for the cattle rustlers, he and his team positioned themselves beneath a big hole from which a big tree had been uprooted. He was facing eastward while his companions, CAFGU members, Francisco Eraso, Alfredo Balinas, and Rufo Alga, were facing southwards. When he heard rapid gun bursts, he thought they

were being fired upon by their enemies, thus, he immediately fired a single shot eastward. It was only when accused Eraso embraced and asked forgiveness from Alfredo Balinas, that he realized somebody was shot.[13]

On cross-examination however, he admitted that he knew the rapid gun burst which he thought to be from their enemies came from 2 meters behind him. He explained that his arm was then broken making it difficult for him to move. Thus, when he heard the gun burst, he did not turn to face the source thereof and instead fired his .45 caliber pistol in front of him. He declared that his purpose in firing his .45 caliber pistol opposite the source of the rapid gun burst was to demoralize their enemy.[14]

On April 22, 1994, the trial court convicted petitioner and accused Eraso of the crime of homicide. The dispositive portion thereof reads:

WHEREFORE, upon all the foregoing considerations, the Court finds the accused, SPO4 Geronimo Dado and Francisco Eraso, guilty beyond reasonable doubt of the crime of HOMICIDE.

ACCORDINGLY, applying the Indeterminate Sentence Law, the Court hereby sentences the accused, SPO4 Geronimo Dado and Francisco Eraso, to suffer the indeterminate penalty of imprisonment, ranging from EIGHT (8) YEARS and ONE (1) DAY of prision mayor, as minimum, to FOURTEEN (14) YEARS, EIGHT (8) MONTHS and ONE (1) DAY of reclusion temporal, as maximum; to indemnify jointly and severally the heirs of the late Silvestre Balinas, Jr.:

- a) the amount of P3,000.00 as actual damages which was duly established in relation to the expenses incurred for the complete funeral services given to the deceased victim;
- b) the amount of P15,000.00, as moral damages;
- c) the amount of P10,000.00, as exemplary damages;
- d) the amount of P50,000.00, as indemnity for death; and to pay the costs.

IT IS SO ORDERED.[15]

The aforesaid judgment of conviction was affirmed by the Court of Appeals on June 26, 1997.[16]

A petition for review[17] was filed by accused Francisco Eraso but the same was denied in a Resolution dated February 11, 1998,[18] which became final and executory on March 30, 1998.[19] Hence, as regards Francisco Eraso, the decision of the Court of Appeals finding him guilty of homicide has become final.

Petitioner, on the other hand, filed the instant petition contending that the trial court and the Court of Appeals erred: (1) in ruling that he acted in conspiracy with accused Francisco Eraso; and (2) in finding him guilty of homicide on the basis of the evidence presented by the prosecution.

In convicting the petitioner, both the trial court and the Court of Appeals found that conspiracy attended the commission of the crime. The Court of Appeals ruled that petitioner and accused Eraso conspired in killing the deceased, thus, it is no longer necessary to establish who caused the fatal wound inasmuch as conspiracy makes the act of one conspirator the act of all.

A reading, however, of the information filed against petitioner will readily show that the prosecution failed to allege the circumstance of conspiracy. Pertinent portion of the information states: “ x x x the said accused, armed with firearms, with intent to kill, with evident premeditation and treachery, did then and there, willfully, unlawfully and feloniously, attack, assault and shot one SILVESTRE BALINAS with the use of the afore-mentioned weapons, thereby inflicting gunshot wounds upon the latter which caused his instantaneous death. x x x” Undoubtedly, the information does not satisfy the requirement that conspiracy must be conveyed in

“appropriate language.”[20] The words “conspired,” “confederated,” or the phrase “acting in concert” or “in conspiracy,” or their synonyms or derivatives do not appear in the indictment. The language used by the prosecution in charging the petitioner and his co-accused contains no reference to conspiracy which must be alleged, not merely inferred from the information. Absent particular statements in the accusatory portion of the charge sheet concerning any definitive act constituting conspiracy, the same cannot be considered against the petitioner who must perforce be held accountable only for his own acts or omissions.[21] In all criminal prosecutions, the accused shall first be informed of the nature and cause of the accusation against him. To ensure that the due process rights of an accused are observed, every indictment must embody the essential elements of the crime charged with reasonable particularity as to the name of the accused, the time and place of commission of the offense, and the circumstances thereof.[22]

Moreover, even if conspiracy was sufficiently alleged in the information, the same cannot be considered against the petitioner. Conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Although the agreement need not be directly proven, circumstantial evidence of such agreement must nonetheless be convincingly shown. Indeed, like the offense itself, conspiracy must be proved beyond reasonable doubt. Thus, it has been held that neither joint nor simultaneous action is per se sufficient proof of conspiracy.[23]

In the case at bar, petitioner and accused Eraso’s seemingly concerted and almost simultaneous acts were more of a spontaneous reaction rather than the result of a common plan to kill the victim. Simultaneity alone would not be enough to demonstrate the concurrence of will or the unity of action and purpose that could be the basis for collective responsibility of two or more individuals particularly if, as in the case at bar, the incident occurred at the spur of the moment. In conspiracy, there should be a conscious design to perpetrate the offense.[24]

Thus, petitioner can only be held responsible for the acts or omissions which can be proved to have been committed by him personally. In other words, his criminal accountability, if any, should be determined on an individual rather than on a collective basis. Petitioner could not be made to answer for the acts done by his co-accused, Franciso Eraso, unless it be shown that he participated directly and personally in the commission of those acts. It becomes important therefore to determine whether petitioner inflicted the fatal wound that directly caused the death of the victim.

The trial court found that a .45 caliber bullet will create a bigger entrance wound as compared to a 5.56 mm. bullet which is of a lower caliber. It concluded that the wound on the inner thigh of the victim must have been caused by a .45 caliber bullet because said wound had a bigger entrance than the wound sustained by the victim on the right outer lateral arm.[25] However, this conclusion is entirely devoid of basis because no evidence was presented to substantiate said conclusions. What is decisive is the result of the Ballistic Examination conducted by NBI Ballistician Elmer D. Piedad, on the 3 metallic fragments recovered from the fatal wound of the victim. Piedad found that one of said fragments, marked “SB-1,” “is a part of a copper jacket of a caliber 5.56 mm. jacketed bullet and was fired through the barrel of a caliber 5.56 mm. firearm,”[26] and not a part of a .45 caliber bullet.[27] Pertinent portion of his testimony, reads:

ATTY. MONTEFERIO:

Q: You have presented before this Honorable Court [a] piece of paper ... marked “A-1”. This refer to the very same Exhibit “A-1”?

A: Yes, sir.

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Q: ...Please tell us, how did you arrive in your findings that SB-1 is part of a copper jacket of a caliber 5.56 mm. jacketed bullet; how did you arrive?

A: In a copper jacket[ed] bullet, there is always [a] copper jacket, that is upper part of the bullet, sir.

Q: How did you arrive at the conclusion that this is part of a copper jacket of 5.56 mm.?

A: I carefully examined SB-1 in my report to a copper jacket[ed] bullet fired from [a] 5.56 mm., and I found out that the lands and grooves of the evidenced (sic) copper jacket marked SB-1 is riflings of the standard 5.56 mm., they have the same lands and grooves.

Q: Did you utilize instruments in order to determine?

A: A bullet comparison microscope.[28]

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ATTY. PASOK:

x x x x x x x x

Q: Mr. witness, being a ballistic expert, you know the composition of the bullet of [a] .45 caliber and that of [an] armalite?

A: Copper jacket.

Q: The composition on the content of the lead of .45 caliber and that of armalite?

A: We are not in the composition but we are on a caliber (sic).

Q: With that answer, it may be possible that this Exhibit "2", SB -1, SB-2 and SB-3, could be bullet from a caliber .45, M-14 or M-16?

A: It could not be possible. SB-1 is part of a copper jacket of 5.56 mm. and the lead core evidenced (sic) marked SB-2 and SB-3 could be parts of the copper jacket evidenced (sic) marked SB-1.[29]

x x x x x x x x

Q: Look at your Certification and in Exhibit "3-A", in page 2 under the column, "Findings and Conclusions" and I quote: "Evidenced (sic) marked SB-2 and 'SB-3' could be parts of the lead core of evidenced (sic) copper jacket marked [as] 'SB-1'. My question, you said could be part of copper jacket marked SB-1, are you telling the Court, you are sure that this Exhibits "SB-2" and "SB-3" [are] not ... part of a copper . . . jacket marked as SB-1?

A: It could be parts or it could not be parts.

Q: You are in doubt that this is really part of SB-1?

A: It could be part, I am doubting.

COURT:

Q: If it could not be parts of the lead core of the copper jacket of 5.56 mm. caliber ammunition, would you say that the same would be part of the lead core of the copper jacket of a different caliber or ammunition?

A: The copper jacket is parts (sic) of the caliber 5.56 and the lead core could be parts. We cannot evidently conclude. It could be parts of copper jacket evidenced marked SB-1.

There is no basis.

COURT:

Q: You are saying that practically, any ammunition has copper jacket?

A: The caliber 5.56 mm. there is copper jacket (sic) but something in caliber .38 copper jacket, rubber putted and lead (sic).

Q: How about .45 firearm?

A: The caliber .45, they are copper jacketed bullet or copper putted (sic) or lead.

Q: The same thing with 5.56 mm.?

A: Yes. All jacketed, 5.56 are all jacketed.

COURT:

Q: That is the reason why you said that your findings and conclusion that the evidenced (sic) marked as SB-2 and SB-3 could be possibly parts of the lead core or the evidenced (sic) copper jacket marked as SB-1?

A: Could be, Your Honor.

COURT:

Cross for the prosecution.

FISCAL DE PERALTA:

x x x x x x x x

Q: A caliber .45 bullet has copper jacket, is that correct?

A: Some caliber .45 has copper jacket, some copper putted (sic), some lead.

Q: If a caliber .45 bullet has copper jacket, then why is it that in your findings in Exhibit "2", particularly SB-1, you made it appear that this is part of a copper jacket of 5.56 mm. and not from a .45 caliber?

A: It is part of a copper jacket of 5.56 mm., sir.

Q: Why did you specifically state that SB-1 is part of a copper jacket of 5.56 mm?

A: Because it is only a part of a copper jacket of 5.56 mm... because it is only a part.

COURT:

Q: But you said it could be a part?

A: It is a part, Your Honor.

FISCAL DE PERALTA:

Q: What is the distinction of copper jacket of 5.56 mm. and copper jacket of .45 caliber?

A: They have the same (sic), but in my findings, I compared that to a caliber 5.56 mm. copper jacket fired from armalite under a microscope, the lands and grooves of the copper jacket and the standard bullet fired from 5.56., they are the same in width.

Q: Did you compare riflings of .45 caliber from the specimen marked SB-1?

A: No need to compare because the caliber .45 lands and grooves is too wide, the lands and grooves of .45

caliber is very wide. They are not the same.

Q: How about the lands and grooves of a caliber 5.56 mm. compared to a .45 caliber?

A: The caliber 5.56 mm. is smaller but on a caliber .45 are very wide.[30]

The doubt entertained by NBI Ballistician Elmer D. Piedad, as to whether the 2 other metallic fragments (marked as exhibit “SB-2” and “SB-3”) are indeed parts of the lead core of the “SB-1”, which is part of a copper jacket of a caliber 5.56 mm. jacketed bullet, must be resolved in favor of petitioner; that is, said metallic fragments cannot be presumed to be particles of a .45 caliber bullet fired from the .45 caliber pistol of petitioner. Under equipoise rule, where the evidence on an issue of fact is in equipoise or there is doubt on which side the evidence preponderates, the party having the burden of proof loses. The equipoise rule finds application if, as in the present case, the 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, for then the evidence does not fulfill the test of moral certainty, and does not suffice to produce a conviction. Briefly stated, the needed quantum of proof to convict the accused of the crime charged is found lacking.[31]

Evidently, the prosecution failed to prove that the metallic fragments found in the fatal wound of the victim are particles of a .45 caliber bullet that emanated from the .45 caliber pistol fired by petitioner. For this reason, the Court cannot in good conscience affirm his conviction for the crime of homicide.

In the same vein, petitioner cannot be held responsible for the wound inflicted on the victim’s right outer lateral arm for the same reason that there is no evidence proving beyond moral certainty that said wound was caused by the bullet fired from petitioner’s .45 caliber pistol.

Nevertheless, petitioner is not completely without liability. The Court sustains the finding of the trial court that petitioner fired his .45 caliber pistol towards the victim. From the attendant circumstances, it appears that there is no evidence tending to prove that petitioner had animus interficendi or intent to kill the victim. Note that the prosecution witnesses did not see whether petitioner aimed to kill the victim.[32] Intent to kill cannot be automatically drawn from the mere fact that the use of firearms is dangerous to life.[33] Animus interficendi must be established with the same degree of certainty as is required of the other elements of the crime. The inference of intent to kill should not be drawn in the absence of circumstances sufficient to prove such intent beyond reasonable doubt.[34]

Absent an intent to kill in firing the gun towards the victim, petitioner should be held liable for the crime of illegal discharge of firearm under Article 254 of the Revised Penal Code.[35] The elements of this crime are: (1) that the offender discharges a firearm against or at another person; and (2) that the offender has no intention to kill that person.[36] Though the information charged the petitioner with murder, he could be validly convicted of illegal discharge of firearm, an offense which is necessarily included in the crime of unlawful killing of a person. Under Rule 120, Section 4, of the Revised Rules on Criminal Procedure, when there is a variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or the offense charged which is included in the offense proved.

Pursuant to Article 254 of the Revised Penal Code, illegal discharge of firearm is punishable with prison correccional in its minimum and medium periods. There being no modifying circumstances and applying the Indeterminate Sentence Law, petitioner should be sentenced to suffer the penalty of six (6) months of arresto mayor, as minimum to two (2) years and eleven (11) months of prison correccional, as maximum.

WHEREFORE, in view of all the foregoing, the June 26, 1997 decision of the Court of Appeals in CA-G.R. CR

No. 16886, affirming the conviction of petitioner for the crime of homicide is SET ASIDE and petitioner is ACQUITTED of the crime charged on the ground of reasonable doubt.

A new decision is entered finding petitioner Geronimo Dado guilty of the crime of illegal discharge of firearm and sentencing him to suffer the indeterminate penalty of six (6) months of arresto mayor, as minimum, to two (2) years and eleven (11) months of prision correccional, as maximum.

SO ORDERED.

Davide, Jr., C.J., Vitug, Carpio, and Azcuna, JJ., concur.

[1] Special Ninth Division composed of Associate Justices Ramon Mabutas, Jr. (Chairman and ponente); Portia Aliño Hormachuelos (member); and Bernardo LL. Salas (member).

[2] Judge German M. Malcampo.

[3] Records, p. 13.

[4] Records, p. 78.

[5] TSN, February 24, 1993, pp. 4-25.

[6] TSN, February 26, 1993, pp. 3-26.

[7] TSN, February 24, 1993, p. 21.

[8] TSN, February 26, 1993, p. 22.

[9] Records, p. 174.

[10] TSN, March 26, 1993, pp. 26-44.

[11] Records, p. 252.

[12] TSN, July 22, 1993, p. 37.

[13] TSN, March 31, 1993, pp. 11-25.

[14] TSN, April 1, 1993, pp. 15-20.

[15] Rollo, p. 94.

[16] The decretal portion thereof reads:

WHEREFORE, premises considered, the appealed decision (dated April 22, 1994) of the Regional Trial Court (Branch 19) in Isulan, Sultan Kudarat in Criminal Case No. 2056 is hereby AFFIRMED, with costs against the accused (appellants).

SO ORDERED. (Rollo, p. 58)

[17] Docketed as G.R. No. 131419.

[18] CA Rollo, p. 341.

[19] CA Rollo, p. 344.

[20] Garcia v. Court of Appeals, G.R. No. 124036, October 23, 2001, citing Agsill v. U.S., 60 F2d. 780 (1932);

People v. Quitlong, 292 SCRA 360 [1998].

[21] Garcia v. Court of Appeals, *supra*.

[22] Garcia v. Court of Appeals, *supra*.

[23] People v. Miana, Sr., G.R. No. 134565, August 9, 2001; citing The Revised Penal Code, Article 8; People v. Padrones, 189 SCRA 496 [1990]; People v. Saavedra, 149 SCRA 610 [1987]; People v. Tividad, 20 SCRA 549 [1967]; People v. Jorge, 231 SCRA 693 [1994]; People v. Dorico, 54 SCRA 172 [1973].

[24] People v. Albina, 298 SCRA 260, 276 [1998]; citing People v. Quitlong, 292 SCRA 360 [1998]; Sabiniano v. Court of Appeals, 319 Phil. 92 [1995].

[25] Rollo, p. 90.

[26] Records, p. 252.

[27] TSN, July 22, 1993, pp. 39-40.

[28] TSN, July 22, 1993, pp. 12-13.

[29] *Ibid.*, p. 28.

[30] *Id.*, pp. 37-40.

[31] Tin v. People, G.R. No. 126480, August 10, 2001, citing Rivera v. Court of Appeals, 284 SCRA 673 [1998]; People v. Cawaling 293 SCRA 267 [1998].

[32] TSN, February 24, 1993, p. 66.

[33] People v. Villanueva, 51 Phil. 488, 491 [1928].

[34] Mondragon v. People, 17 SCRA 476, 481 [1966]; citing People v. Villanueva, 51 Phil. 488 [1928]; U.S. v. Reyes and Palanca, 30 Phil. 551 [1915]; U.S. v. Mendoza, 38 Phil. 691 [1918]; People v. Montes, 53 Phil. 323 [1929]; People v. Pacusbas, 64 Phil. 614 [1937]; and People v. Penesa, 81 Phil. 398 [1948].

[35] Art. 254. Discharge of firearms. — Any person who shall shoot at another with any firearm shall suffer the penalty of prision correccional in its minimum and medium periods, unless the facts of the case are such that the act can be held to constitute frustrated or attempted parricide, murder, homicide or any other crime for which a higher penalty is prescribed by any of the articles of this Code.

[36] Reyes, The Revised Penal Code, vol. 2, 1998 ed., p. 492.

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