# PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.TIRSO ARCAY @ “TISOY” AND TEODORO CLEMEN @ “BOY,” ACCUSED.TIRSO ARCAY @“TISOY,” ACCUSED-APPELLANT.

*G.R. No. 132373. October 23, 2001*

Ponente: QUISUMBING, J.

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**QUISUMBING, J.:**

On appeal is the decision of the Regional Trial Court of Tagbilaran City, Branch 2, in consolidated Criminal Cases Nos. 8079 and 8080. Appellant Tirso Arcay was found in Crim. Case No. 8079, guilty of attempted murder and sentenced to suffer an indeterminate penalty of four (4) years, two (2) months, and one (1) day of prision correcional as minimum to eight (8) years of prision mayor as maximum. In Crim. Case No. 8080, for murder, he was sentenced to reclusion perpetua with all the accessory penalties provided by law. However, his co-accused in both cases, Teodoro Clemen, alias "Boy," was acquitted.

The Information against appellant Arcay and co-accused Clemen in Criminal Case No. 8079 for Frustrated Murder reads:

> That on or about the 16[th] day of August 1992, in the municipality of Panglao, province of Bohol, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another, with intent to kill and without any justifiable motive, with evident premeditation and abuse of superior strength, the accused then being armed with a sliced (piece of) coco lumber, and by treachery (sic), by suddenly attacking the victim without giving her the opportunity to defend herself, did then and there, willfully, unlawfully, and feloniously attack, assault and strike Lucenda Micutuan with the piece of coco lumber, thereby inflicting upon the victim serious physical injuries which required a healing period of 9-14 days barring complication(s) and incapacitated her in the performance of her customary labor for the same period of time; the accused having performed all the acts of execution which would produce the crime of Murder, but did not, by reason of a cause independent of their will, to wit: the timely and effective medical treatment and attendance given to the victim which prevented her death; to the damage and prejudice of the victim in the amount to be proved during the trial of the case.
>
> Acts committed contrary to the provisions of Article 248 of the Revised Penal Code in relation to Articles 6 and 50 of the same Code with the aggravating circumstance of (1) nighttime being purposely sought for or taken advantage of by the accused to facilitate the commission of the crime; and (2) with insult or in disregard of the respect due the offended party by reason of her sex and her age, the victim being a woman of the tender age of 17 years.[1]

In Criminal Case No. 8080, the Information against them states:

> That on or about the 16[th] day of August 1992, in the municipality of Panglao, province of Bohol, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another, with intent to kill and without any justifiable motive, with evident premeditation and abuse of superior strength, the accused being then armed with a sliced (piece of) coco lumber, and (with)

> treachery, by suddenly attacking the victim without giving him the opportunity to defend himself, did then and there willfully, unlawfully and feloniously attack, assault, hit and strike the use of the said (piece of) coco lumber one Leonito Doliente, hitting the latter on the vital parts of his body (head) resulting to his death, to the damage and prejudice of the heirs of the victim.
>
> Acts committed contrary to the provisions of Article 248 of the Revised Penal Code with the aggravating circumstance of nighttime being purposely sought for or taken advantage of by the accused to facilitate the commission of the crime.[2]

When arraigned, both Arcay and Clemen pleaded not guilty to the charges. Trial on the merits ensued.

As the charges were founded on a common set of facts, which formed a series of offenses and involved the use of common evidence, the cases were consolidated. At first they were tried jointly before Branch 4 of the RTC of Tagbilaran City. On December 26, 1994, however, they were re-raffled to Branch 2 of said court. The new judge heard only the testimonies of the last two defense witnesses and then the rebuttal witnesses.

The trial court summed up its factual findings as follows:

> Positive eyewitness' account of victim Lucenda Micutuan, disclosed that on or about 10:30 in the evening of August 16, 1992, while she and her sweetheart Leonito Doliente were seated on the sand by the beach at Lagitan, Doljo, Panglao, Bohol, with their shoulders touching each other, she saw accused Tirso Arcay coming from behind, armed with a piece of coconut lumber (Exh "A", measuring 2" x 3" x 44"), suddenly struck her and her sweetheart Leonito Doliente, hitting the back of their heads. As a result of the attack Leonito Doliente died, while Lucenda Micutuan was injured and hospitalized.
>
> The accused denied the charges against them, claiming that on August 16, 1992, they were at Alona Kew, Tawala, Panglao, Bohol, six (6) kilometers away from the place where the crime was committed from 8:30 in the evening, passing the night there and leaving the place early the following morning, August 17, 1992. Accused further alleged that they had a drinking spree with the group of Roberto Doliente, whose brother, Kenneth Doliente and nephew, Clifford Tan, were having a party tendered by Alejandro Cimatti, an Italian national, who was going back to Italy the day after.[3]

On February 28, 1997, the trial court rendered its decision in the two cases, disposing as follows:

> WHEREFORE, in Criminal Case No. 8079, the Court finds the accused Tirso Arcay alias Tisoy, guilty beyond reasonable doubt of the crime of Attempted Murder, defined and penalized under Article 248 of the Revised Penal Code, in relation to Article 6, par. 3 thereof, as embraced in the aforequoted information, with the aggravating circumstance of disregard of sex. There being no mitigating circumstance to offset the same, said accused Tirso Arcay @ Tisoy is hereby sentenced to the indeterminate penalty of imprisonment of from FOUR (4) YEARS, TWO (2) MONTHS and ONE (1) DAY of Prision Correcional, as minimum, to EIGHT (8) YEARS of Prision Mayor, as maximum, with the accessory penalties of the law, to indemnify the offended party Lucenda Micutuan the sum of P2,500.00 as medical expenses, P5,000.00 damages, P5,000.00 attorney's fees, and to pay the costs.
>
> In Crim. Case No. 8080, the Court finds the accused Tirso Arcay @ Tisoy guilty beyond reasonable doubt of the crime of Murder, defined and penalized under Article 248 of the Revised Penal Code, as embraced in the aforequoted information. There being no mitigating nor aggravating circumstance adduced and proven during the trial, and applying the doctrine laid down by the Supreme Court in the case of People v. Muñoz, 170 SCRA 107, the Court hereby sentences the accused to suffer the penalty of RECLUSION PERPETUA, with the accessory penalties of the law; to pay the heirs of Leonito Doliente funeral expenses in the sum of P25,000.00; death indemnity in the sum of P50,000.00 (People v. Tazarra, G.R. No. 85531, Dec. 12, 1990), without subsidiary imprisonment in case of insolvency, and to pay the costs.


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> The charge(s) in both cases, as against accused Teodoro Clemen, for lack of evidence, is hereby dismissed. His immediate release is hereby ordered unless he is detained legally in another commitment.
>
> Accused Tirso Arcay, who has been detained is credited in full period of his preventive imprisonment, pursuant to Article 29 of the Revised Penal Code, as amended.
>
> SO ORDERED.[4]

Hence, this appeal assigning the following errors:

> FIRST ASSIGNMENT OF ERROR
>
> THAT THE TRIAL COURT ERRED IN NOT DECLARING THAT THE GUILT OF THE DEFENDANT-APPELLANT OF THE CRIME CHARGED WAS NOT ESTABLISHED BEYOND REASONABLE DOUBT.
>
> SECOND ASSIGNMENT OF ERROR
>
> THAT THE TRIAL COURT ERRED IN NOT DECLARING THAT THE PROSECUTION FAILED TO OVERCOME BY THEIR EVIDENCE THE CONSTITUTIONAL PRESUMPTION OF THE DEFENDANT-APPELLANT'S INNOCENCE.

Only one issue is before us: Did the prosecution prove appellant's guilt beyond reasonable doubt?

Appellant contends that the prosecution theory that he bore a grudge against a certain Miguel Clemen who had publicly whipped him with a belt, and that appellant killed Leonito Doliente after mistaking him for Miguel Clemen, is without basis. Appellant also avers that it was impossible for him to have mistaken Doliente for Clemen because the alleged incident happened at a place which was brightly lighted. He points out that Clemen is much older and taller than Doliente. Clemen sported a mustache, wore a red sweater and not a maroon jacket as the witness claimed. Moreover, Clemen had no girlfriend. He submits that the prosecution's witnesses erred in pointing to him as the culprit. He added he had no reason to kill the victim.

Appellant also assails eyewitness Lucenda Micutuan's credibility. He points out that Lucenda regained consciousness only on the following day, August 17, 1992. However, it was only on September 6, 1992 that she mentioned Tirso Arcay as the perpetrator on September 6, 1992. Appellant claims that Lucenda saw him with his mother and a companion during one of the fiesta festivities on August 26, 1992, but she showed no reaction whatsoever of his presence. Appellant insists that Lucenda's identification of him 17 days after her discharge from the hospital, makes her identification of him dubious.

As previously held, motive is not an essential element of a crime,[5] particularly of murder.[6] It becomes relevant only where there is no positive evidence of an accused's direct participation in the commission of a crime and evidence is purely circumstantial.[7] In this case, the prosecution's evidence is not circumstantial. The offended party in Crim. Case No. 8079, Lucenda Micutuan, positively, consistently, and categorically identified appellant as the person who clubbed her and her boyfriend Leonito Doliente, resulting to his death.[8] Where the identity of the malefactor is established, proof of motive or the lack of it is not essential to sustain a conviction.[9]

The Office of the Solicitor General (OSG) states that Lucenda's failure to denounce appellant as the malefactor when she saw him on August 26, 1992, is neither strange nor puzzling. Lucenda suffered a severe head injury and it took time for her to recover from her mental shock. Moreover, it was not sufficiently established that she indeed saw appellant on said date. It does not affect her credibility.

Although the judge who penned the decision was not the same one who earlier heard the prosecution witnesses, after scrutinizing the records on Lucenda's testimony, we are in agreement with the findings of the trial court that

"Lucenda's firsthand account albeit standing alone, is straightforward and rings with the truth that can only proceed from a trustworthy witness."[10] Said finding shows no arbitrariness nor undue partiality. Nor did the trial court overlook some material fact or significant circumstance, which could materially affect her credibility.

Mere delay in reporting the crime or pinpointing the felons does not affect the credibility of the witnesses for as long as the delay is sufficiently explained.[11] Here, the prosecution established that Lucenda needed time to fully recover from her head injury.[12] Moreover, the police did not go to her and question her during her recovery period.[13] The police only took her sworn statement, on September 6, 1992, or two days before appellant was arrested.[14] Given this background, we find the explanation of her delay in reporting the offense or naming the offender satisfactory.

While appellant claims that Lucenda did not denounce him when she saw him during the "Teacher's Night" on August 26, 1992, the records reveal that, on rebuttal, Lucenda consistently denied seeing appellant during said affair.[15] At best, appellant's story that Lucenda saw him during the affair is self-serving. Moreover, the occasion of a teacher's celebration appears inauspicious for any denunciation regarding a crime.

Appellant claims an alibi, i.e., that he and his co-accused spent the whole evening of August 16, 1992 at the Alona Kew White Beach Resort, in Tawala, Panglao. Tawala is at the southeastern side of Panglao, some five (5) kilometers from the crime scene at Lag-itan. Further, defense witnesses Roberto Doliente and Celso Labastida testified that appellant never left Alona Kew from 8:30 P.M., August 16, 1992, until the morning of August 17, 1992.

Alibi is an inherently weak defense and it must be proved to the satisfaction of the court.[16] For alibi to be considered, the defense must show: (a) that the accused was not at the scene of the crime; and (b) that it was physically impossible for him to have been there when the crime was committed.[17] We agree with the trial court when it observed,

> The [two] accused asserted that they were about 5 to 6 kilometers from the scene of the crime. However, they also admitted that this distance can be negotiated by a motorcycle for 15 to 20 minutes, hence, with this admitted fact, the indispensable element of physical impossibility for them to be present at the scene of the crime at about the time when it was committed, is not satisfied (citation omitted).[18]

Nor will appellant's reliance on the corroborative testimonies of Roberto Doliente and Celso Labastida suffice to prove his alibi. Doliente testified that he, his brother Kenneth Doliente, nephew Clifford Tan, and their Italian guest, one Alejandro Cimatti, stayed at the Alona Kew Resort from August 6 to 18, 1992. On the night of August 16, 1992, appellant and his co-accused joined them at the said resort and they had a drinking spree from 8:30 P.M. until 1:00 A.M. the following day. Roberto Doliente averred that appellant and his co-accused never left the place and slept at Cottage No. 5 of the resort, and that he woke them up at 7:00 A.M. of August 17, 1992.[19] On his part, Celso Labastida testified that he and Kenneth Doliente left the others, including the two accused, still drinking in Cottage No. 6 and went to sleep in Cottage No. 5 at 11:00 P.M. of August 16, 1992. He, thus, could not know if anybody left the group after he and Kenneth retired for the night.[20]

However, appellant's claim that he spent the entire night of August 16, 1992, at Alona Kew Resort was rebuffed by the testimony of Virgilio Calipusan, the security guard of the resort. Calipusan categorically declared that he saw both accused leave the resort at 10:00 P.M. Neither returned to Alona Kew.[21] Appellant, in his brief, did not state any reason why Calipusan's testimony should be disbelieved or discredited. More importantly, appellant failed to show the physical impossibility of his presence at the crime scene at the time it was allegedly committed. Thus, his self-serving defense of alibi cannot prevail over the positive testimonies of witnesses who place him at the crime scene and point to him as the perpetrator of the two offenses of murder and attempted murder.

Further, we agree with the trial court that treachery attended the commission of the offenses. The victim, Leonito Doliente, was sitting on the beach and conversing with his sweetheart, Lucenda Micutuan, when appellant suddenly appeared from behind and clubbed both of them with a piece of coconut lumber. This caused Leonito's death from an intracranial hemorrhage, secondary to head contusion on the occipital region.[22] Lucenda had to be hospitalized for the treatment of her injuries.[23] No prior conversation took place between the assailant and his victims. Unarmed and unaware of any impending danger, Leonito could not have defended himself against the attack from his back. The means employed by the appellant ensured the execution of his nefarious designs upon the victims without any risk to himself whatsoever from any defense which the victim might have made.[24] Treachery patently attended the commission of Doliente's killing and the attempt on Lucenda's life.

In Criminal Case No. 8079, the trial court also found that the "aggravating circumstance of sex has been established, the complainant being a woman, 17 years of age."[25] The attack made by appellant with a deadly weapon against an unarmed man and his date, however, does not appear in this case to indicate a disregard of respect owing to a victim because of her sex. The weapon used in this case was the same for both victims, and did not capitalize clearly on female weakness merely, even if the woman was unable to defend herself.[26]

In Criminal Case No. 8079, appellant was charged with Frustrated Murder. However, the trial court convicted him only of Attempted Murder on the basis that "Lucenda Micutuan was confined in the hospital only for five (5) days and her injury was recorded to have a healing period of only `9 to 14' days...hence, such injury cannot be categorized as fatal..."[27] On this score, we are in agreement with the trial court's conclusion.

In a criminal case, an appeal throws the whole case open to review and the appellate tribunal is empowered to correct errors in the appealed judgment, though unassigned.[28] Here, a review on the penalties imposed by the trial court is in order.

Under Article 51 of the Revised Penal Code, the penalty for attempted murder shall be a penalty lower by two degrees.[29] The penalty for murder under Article 248 of the Revised Penal Code, prior to its amendment by Republic Act No. 7659, is reclusion temporal in its maximum period to death. Two degrees lower should be prision correccional in its maximum period to prision mayor in its medium period or from four (4) years, two (2) months and one (1) day of prision correccional, as minimum, to ten (10) years of prision mayor, as maximum. The circumstances of treachery had already been taken into account in qualifying the offense. There being no other circumstances, whether aggravating or mitigating, the said penalty should be applied. Therefore, applying further the Indeterminate Sentence Law, the minimum of the penalty to be imposed in Criminal Case No. 8079 shall be within the range of the penalty next lower in degree, or from arresto mayor maximum to prision correccional medium, or from four (4) months and one (1) day to six (6) months, to two (2) years and 4 (four) months.

In Crim. Case No. 8080, the trial court correctly imposed the penalty of reclusion perpetua, taking into consideration the absence of any aggravating or mitigating circumstance.

With respect to damages in Criminal Case No. 8079, appellant was ordered to pay Lucenda Micutuan, P2,500 as medical expenses, P5,000 damages, P5,000 attorney's fees, and to pay the costs. The award of P2,500, as actual damages is proper, the same being supported by receipts. However, the award of P5,000 being unspecified damages should be deleted. There being treachery in the commission of the offense, P10,000 as exemplary damages is in order, together with P5,000 attorney's fees and the costs.

In Criminal Case No. 8080, the trial court ordered appellant to pay the heirs of Leonito Doliente P25,000 as funeral expenses and P50,000 as death indemnity. The award of P25,000 as actual damages, however, should be deleted, for lack of receipts as supporting evidence. To be entitled to actual damages, it is necessary to prove the


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actual amount of loss with competent proof.[30] However, as the heirs of the victim clearly incurred funeral expenses, P10,000 by way of nominal damages ought to be awarded.[31] In addition, the award of moral damages in the amount of P50,000 and P10,000 as exemplary damages should also be granted to the heirs of the victim,[32] together with attorney's fees of P10,000 and the costs.

WHEREFORE, the appealed judgment of the Regional Trial Court of Tagbilaran City, Branch 2 is AFFIRMED WITH MODIFICATION as follows:

(1)

In Criminal Case No. 8079, appellant Tirso Arcay @ "Tisoy" is found GUILTY of Attempted Murder. There being neither aggravating nor mitigating circumstance, appellant should thus be sentenced to a maximum of six (6) years and one (1) day to eight (8) years of prision mayor in its minimum period, and a minimum of six (6) months and one (1) day to two (2) years and four (4) months of prision correccional in its minimum period.

(2)

In Criminal Case No. 8080, appellant Tirso Arcay a.k.a. "Tisoy" is found GUILTY of Murder and is sentenced to suffer the penalty of reclusion perpetua. Appellant is likewise ordered to indemnify the heirs of Leonito Doliente the sum of P50,000 as indemnity ex delicto, P50,000 as moral damages, and P10,000 as nominal damages, P10,000 as attorney's fees and the costs.

**SO ORDERED.**

Bellosillo, (Chairman), Mendoza, Buena, and De Leon, Jr., JJ., concur.

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[1] Records, pp. 62-63.

[2] Id. at 1.

[3] Rollo p. 51.

[4] Supra note 2 at 240-241.

[5] People v.San Miguel, 235 SCRA 80, 86 (1994).

[6] People v. Andres, 296 SCRA 318, 338 (1998).

[7] People v. Lozada, G.R. No. 130589, June 29, 2000, p. 27, citing People v. Padlan, 290 SCRA 388 (1998).

[8] TSN, November 16, 1993, pp. 3-4, 7-11.

[9] People v.Laceste, 293 SCRA 397, 408 (1998).

[10] Records, Crim. Case No. 8080, p. 239.

[11] Peoplev.Lozada, G.R. No. 127841, June 16, 2000, p. 10, citing People v. Agsunod, Jr., 306 SCRA 612 (1999), People v. Reduca, 301 SCRA 516 (1999), People v. Banela, 301 SCRA 84 (1999).

[12] TSN, November 23, 1993, p. 11.

[13] Supra note 15 at 6.

[14] Records, Crim. Case No. 8079, pp. 19-20.

[15] TSN, October 2, 1996, pp. 5, 8-9.


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[16] People v. Caverte, et al., G.R. No. 123112, March 30, 2000, p. 21.

[17] People v. Milliam, G.R. No. 129071, January 31, 2000, p. 12.

[18] Records, Crim. Case No. 8080, p. 238.

[19] TSN, February 19, 1996, pp. 16-22; TSN, February 20, 1996, pp. 10, 23-24.

[20] TSN, July 26, 1994, p. 14.

[21] TSN, September 18, 1996, pp. 6-9.

[22] Exhibit "D," Folder of Exhibits, p. 4.

[23] Exhibit "E," Id. at 5.

[24] People v.Teston, G.R. No. 134938, June 8, 2000, p. 14, citing People v.Sumalpong, 284 SCRA 464 (1998).

[25] Records, Crim. Case No. 8079, p. 333.

[26] See Peoplev.Puno, 192 Phil. 430, 442 (1981) citing Peoplev.Guzman, 107 Phil. 1122 (1960).

[27] Records, Crim. Case No. 8079, p. 332.

[28] Peoplev.Llaguno, 285 SCRA 124, 147 (1998).

[29] Art. 51. Penalty to be imposed upon principals of attempted crime. - The penalty lower by two degrees than that prescribed by law for the consummated felony shall be imposed upon the principals in an attempt to commit a felony.

[30] People v. Samolde, G.R. No. 128551, July 31, 2000, p. 21, citing People v. Suelto, G.R. No. 126097, February 8, 2000.

[31] People v. Candare, et al., G.R. No. 129528, June 8, 2000, pp. 14-15, citing Sumalpong v. Court of Appeals, 268 SCRA 764 (1997).

[32] People v. Candare, supra at 15.


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