

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. PO3 FERDINAND FALLORINA Y FERNANDO, APPELLANT.

G.R. No. 137347. March 04, 2004

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

For automatic review is the Decision[1] of the Regional Trial Court of Quezon City, Branch 95, convicting appellant PO3 Ferdinand Fallorina y Fernando of murder for the killing of eleven-year-old Vincent Jorojoro, Jr. while the latter was flying his kite on top of a roof. The court a quo sentenced the appellant to suffer the death penalty.

The accusatory portion of the Information charging the appellant with murder reads:

That on or about the 26th day of September 1998, in Quezon City, Philippines, the said accused, with intent to kill, by means of treachery and taking advantage of superior strength, did then and there, wilfully, unlawfully and feloniously attack, assault and employ personal violence upon the person of VINCENT JOROJORO, JR. y MORADAS, a minor, eleven (11) years of age, by then and there, shooting him with a gun, hitting him on the head, thereby inflicting upon him serious and mortal wound which was the direct and immediate cause of his death, to the damage and prejudice of the heirs of the said offended party.

CONTRARY TO LAW.[2]

Upon arraignment on October 20, 1998, the appellant, with the assistance of counsel, pleaded not guilty. Thereafter, trial ensued.

Case for the Prosecution[3]

Eleven-year-old Vincent Jorojoro, Jr. was the third child of Vicente and Felicisima Jorojoro. The family lived at Sitio Militar, Barangay Bahay Toro, Project 8, Quezon City. Vincent, nicknamed “Hataw,” was a grade three pupil whose education was sponsored by the Spouses Petinato, an American couple, through an educational foundation.[4]

The appellant was an officer of the Philippine National Police detailed in the Traffic Management Group (TMG) based in Camp Crame, Quezon City, but was on detached service with the Motorcycle Unit of the Metropolitan Manila Development Authority (MMDA).

At about 2:30 p.m. of September 26, 1998, Vincent asked permission from his mother Felicisima if he could play outside. She agreed.[5] Together with his playmate Whilcon “Buddha” Rodriguez, Vincent played with his kite on top of the roof of an abandoned carinderia beside the road in Sitio Militar, Barangay Bahay Toro. Beside this carinderia was a basketball court, where fourteen-year-old Ricardo Salvo and his three friends, nicknamed L.A., Nono and Puti, were playing backan, a game of basketball.

Ricardo heard the familiar sound of a motorcycle coming from the main road across the basketball court. He was

nonplussed when he looked at the person driving the motorcycle and recognized the appellant. Ricardo knew that the appellant abhorred children playing on the roof of the carinderia and berated them for it. His friend Ong-ong had previously been scolded by the appellant for playing on the roof.

Ricardo called on Vincent and Whilcon to come down from the roof. When the appellant saw Vincent and Whilcon, the former stopped his motorcycle and shouted at them, “Putang inang mga batang ito, hindi kayo magsibaba d’yan!” After hearing the shouts of the appellant, Whilcon immediately jumped down from the roof.[6] Vincent, meanwhile, was lying on his stomach on the roof flying his kite. When he heard the appellant’s shouts, Vincent stood up and looked at the latter. Vincent turned his back, ready to get down from the roof. Suddenly, the appellant pointed his .45 caliber pistol[7] towards the direction of Vincent and fired a shot. Vincent was hit on the left parietal area. He fell from the roof, lying prostrate near the canal beside the abandoned carinderia and the basketball court.[8]

Whilcon rushed to help Vincent up but was shocked when he saw blood on the latter’s head. Whilcon retreated and left his friend.[9] The appellant approached Vincent and carried the latter’s hapless body in a waiting tricycle and brought him to the Quezon City General Hospital. Vincent was pronounced dead on arrival.

Meantime, word reached Vincent’s parents that their son was shot and brought to the hospital. They rushed to the hospital, only to see their son’s already lifeless body. The appellant was nowhere to be found.

Dr. Ravell Ronald R. Baluyot of the Medico-Legal Division of the National Bureau of Investigation (NBI) conducted an autopsy where he made the following findings:

Cyanosis, lips and nailbeds.

Abrasion, 7.0 x 2.0 cms., right arm, middle third, postero-lateral aspect.

Contused-abrasion, 14.5 x 2.5 cms., postero-lateral chest wall, right side.

Gunshot Wound, Entrance, 3.0 x 0.8 cms., roughly ovaloid, with irregular edges, abrasion collar widest postero-inferiorly, located at the head, left parietal area, 9.0 cms. above and 8.0 cms. behind the left external auditory meatus, directed forward upward and from left to right, involving the scalp, fracturing the left parietal bone (punched-in), lacerating the left and right cerebral hemispheres of the brain, fracturing the right parietal bone (punched-out), lacerating the scalp, making an Exit wound, 3.3 x 1.0 cms., stellate with everted and irregular edges, 12.0 cms. above and 2.0 cms. in front of the right external auditory meatus.

Intracranial hemorrhage, subdural and subarachnoid, extensive, bilateral.

Scalp hematoma, fronto-parietal areas, bilateral.

Visceral organs, congested.

Stomach, one-fourth (1/4) filled with partially digested food particles.

CAUSE OF DEATH: GUNSHOT WOUND, HEAD.[10]

Dr. Baluyot testified that the victim died from a single gunshot wound in the head. The bullet entered the left upper back portion of the head (above the level of the left ear)[11] and exited to the right side.[12] Dr. Baluyot signed Vincent’s certificate of death.[13]

At about 3:00 p.m., SPO2 Felix Pajarillo and Police Inspector Abelardo P. Aquino proceeded to the scene of the shooting but failed to find the victim and the appellant. They proceeded to the Quezon City General Hospital where they heard that the victim had died. They returned to the crime scene and recovered an empty shell from a .45 caliber gun.[14]

On September 28, 1998, Major Isidro Suyo, the Chief of the MMDA Motorcycle Unit to which the appellant was assigned on detached service, reported to the Sangandaan Police Station that the appellant had not reported for duty.[15] At 2:10 p.m. of September 29, 1998, Police Senior Superintendent Alfonso Nalangan, the Regional Director of the PNP-TMG, NCR, surrendered the appellant to the Sangandaan Police Station together with his .45 caliber pistol bearing Serial No. AOC-38701.[16]

Meantime, upon the urging of Vicente Jorojoro, Ricardo was brought to the Department of Justice where he was enrolled under its Witness Protection Program. He gave his sworn statement to NBI Special Agent Roberto Divinagracia on September 29, 1998.[17] On the same date, P/Insp. Abelardo Aquino wrote the Chief of the PNP Crime Laboratory Examination Unit requesting for the ballistic examination of the .45 caliber pistol with Serial No. AOC-38701 and the empty shell of a .45 caliber gun found at the scene of the shooting.[18] Before noon on September 30, 1998, Divinagracia arrived at the station and turned over two witnesses, Raymond Castro and Ricardo Salvo. He also turned over the witnesses' sworn statements.[19] On October 2, 1998, on orders of the police station commander,[20] Pajarillo took pictures of the crime scene, including the carinderia and the roof with a bullet hole as part of the office filing.[21] He did not inform the prosecution that he took such pictures, nor did he furnish it with copies thereof. However, the appellant's counsel learned of the existence of the said pictures.

On October 5, 1998, P/Insp. Mario Prado signed Firearms Identification Report No. FAIB-124-98 stating that:

FINDINGS:

Microscopic examination and comparison of the specimen marked "FAP" revealed the same individual characteristics with cartridge cases fired from the above-mentioned firearm.

CONCLUSION:

The specimen marked "FAP" was fired from the above-mentioned caliber .45 Thompson Auto Ordnance pistol with serial number AOC-38701.[22]

Vincent's family suffered mental anguish as a result of his death. As evidenced by receipts, they spent P49,174 for the funeral.[23]

Case for the Appellant

The appellant denied shooting Vincent. He testified that at about 1:30 p.m. of September 26, 1998, Macario Ortiz, a resident of Sitio San Jose, Quezon City, asked for police assistance; Macario's brother-in-law was drunk and armed with a knife, and was creating trouble in their house. The appellant's house was located along a narrow alley (eskinita) perpendicular to the main road. It was 200 meters away from Macario's house.[24] Responding to the call, the appellant took his .45 service revolver, cocked it, put the safety lock in place and tucked the gun at his right waistline. He brought out his motorcycle from the garage and slowly negotiated the bumpy alley leading to the main road. Macario, who was waiting for him at the main road, called his attention to his revolver which was about to fall off from his waist. The appellant got distracted and brought his motorcycle to the right side of the road, near the abandoned carinderia where he stopped. As he stepped his right foot on the ground to keep himself from falling, the appellant lost his balance and slipped to the right. At this point, the revolver fell to the ground near his foot and suddenly went off. Bystanders shouted, "Ano yon, ano yon, mukhang may tinamaan." He picked up his gun and examined it. He put the safety latch back on and tucked it at his right waistline. He then told Macario to wait for a while to check if somebody was really hit. He went near the abandoned carinderia and saw Vincent sprawled to the ground. He picked up the bloodied child, boarded him on a tricycle on queue and instructed its driver, Boy Candaje, to bring the boy to the hospital.[25] On board the tricycle were Jeffrey

Dalansay and Milbert Doring.

The appellant rode his motorcycle and proceeded to his mother's house in Caloocan City but did not inform her of the incident. He then called his superior officer, Major Isidro Suyo, at the Base 103, located at Roces Avenue, Quezon City. The appellant informed Major Suyo that he met an accident; that his gun fell and fired; and, that the bullet accidentally hit a child. He also told his superior that he might not be able to report for work that day and the following day. He assured his superior that he would surrender later. He then went to Valenzuela City to the house of his friend PO3 Angelito Lam, who was a motorcycle unit cop. The appellant stayed there for three days. He also visited friends during that time.

On September 29, 1998, he went to the office of Major Suyo and surrendered his .45 caliber pistol. Major Suyo accompanied and turned over the appellant to the commanding officer at Camp Crame, Quezon City. The appellant was subjected to a neuro and drug test. He stated that the results of the drug test were negative. The appellant was then referred to the Sangandaan Police Station for investigation.[26] The pictures[27] of the crime scene were given to him by Barangay Tanod Johnny Yaket, shown in one of the pictures pointing to a bullet hole. The appellant's testimony was corroborated in *pari materia* by Macario Ortiz.

Leonel Angelo Balaoro, Vincent's thirteen-year-old playmate, testified that at 1:30 p.m. of September 26, 1998, he was playing basketball at Barangay Bahay Toro, at the basketball court along the road beside the chapel. With him were Ricardo, Puti and Nono. Vincent was on the rooftop of the carinderia with Whilcon. While Puti was shooting the ball, an explosion ensued. He and Ricardo ran beside the chapel near the basketball court. He looked back towards the basketball court and saw the appellant, about 15 meters away from the canal, holding the prostrate and bloodied Vincent. He did not see the appellant shoot Vincent. He did not report what he saw to the police authorities. He was ordered by his father to testify for the appellant. He also testified that his mother was related to Daniel, the appellant's brother.

On January 19, 1999, the trial court rendered judgment convicting the appellant of murder, qualified by treachery and aggravated by abuse of public position. The trial court did not appreciate in favor of the appellant the mitigating circumstance of voluntary surrender. The decretal portion of the decision reads:

WHEREFORE, judgment is hereby rendered finding the accused PO3 Ferdinand Fallorina y Fernando GUILTY beyond reasonable doubt of the crime of Murder defined in and penalized by Article 248 of the Revised Penal Code, as amended by Republic Act No. 7659, and in view of the presence of the aggravating circumstance of taking advantage by the accused of his public position (par. 1, Art. 14, Revised Penal Code), is hereby sentenced to suffer the penalty of DEATH.

The accused is hereby ordered to indemnify the heirs of the late Vincent Jorojoro, Jr. the amounts of P49,174.00, as actual damages; P50,000.00, as moral damages; P25,000.00, as exemplary damages; and, P50,000.00, as death indemnity.

The accused is to pay the costs.

The .45 caliber pistol, service firearm (Exh. "R") of the accused, shall remain under the custody of the Court and shall be disposed of in accordance with the existing rules and regulations upon the finality of this decision.[28]

The appellant assigned the following errors for resolution:

- THE COURT A QUO SERIOUSLY ERRED IN NOT GIVING DUE CREDENCE TO RELEVANT PHYSICAL EVIDENCE, WHICH IF CONSIDERED COULD HAVE ALTERED THE CONCLUSIONS ARRIVED AT BY THE COURT AND THE OUTCOME OF THE CASE.

- THE COURT A QUO SERIOUSLY ERRED BY OVERSTEPPING THE LINE OF JUDGING AND ADVOCACY, AND GOING INTO THE REALM OF SPECULATION, PATENTLY DEMONSTRATING BIAS AND PARTIALITY.
- THE COURT A QUO ERRED IN GIVING UNDUE CREDENCE TO THE TESTIMONY OF RICARDO SALVO, ALLEGED PROSECUTION EYEWITNESS, WHOSE TESTIMONY IS WANTING IN PROBABILITY, AS IT IS CONTRARY TO THE COMMON EXPERIENCE OF MANKIND.
- THE COURT A QUO GRAVELY ERRED IN INEQUITABLY APPRECIATING EXCULPATORY AND INCULPATORY FACTS AND CIRCUMSTANCES WHICH SHOULD HAVE BEEN CONSIDERED IN FAVOR OF THE ACCUSED.
- THE COURT A QUO ERRED IN FAILING TO APPRECIATE THE MITIGATING CIRCUMSTANCE OF VOLUNTARY SURRENDER IN FAVOR OF THE ACCUSED.
- THE COURT A QUO GRAVELY ERRED IN APPRECIATING THE AGGRAVATING CIRCUMSTANCE OF TAKING ADVANTAGE OF HIS POSITION BY ACCUSED.[29]

The appellant asserts that the trial court failed to appreciate in his favor the physical evidence, viz., the hole found on the rooftop of the carinderia where Vincent was when he was shot. The appellant contends that the picture[30] taken on October 2, 1998 by no less than SPO2 Felix Pajarillo, one of the principal witnesses of the prosecution, and the pictures[31] showing Barangay Tanod Yaket pointing to a hole on the roof buttress the defense of the appellant that the shooting was accidental. The appellant maintains that his service revolver fell to the ground, hit a hard object, and as the barrel of the gun was pointed to an oblique direction, it fired, hitting the victim who was on the rooftop. The bullet hit the back portion of the victim's head, before exiting and hitting the rooftop. The appellant posits that the pictures belie Ricardo's testimony that he deliberately shot the victim, and, instead, complements Dr. Baluyot's testimony that the gunshot wound came from somewhere behind the victim, somewhere lower than the point of entrance. The appellant invokes P/Insp. Mario Prado's testimony that if a gun hits the ground in an oblique position, the gun will fire and the bullet will exit in the same position as the gun, that is, also in an oblique position.

The Office of the Solicitor General, for its part, asserts that the contention of the appellant is based on speculations and surmises, the factual basis for his conclusion not having been proven by competent and credible evidence. There is no evidence on record that the hole shown in the pictures[32] was caused by a bullet from a .45 caliber pistol. The appellant did not present Barangay Tanod Johnny Yaket, who was shown in the pictures, to testify on the matter. The appellant failed to prove that any slug was found on the rooftop or under the roof which came from the appellant's .45 caliber pistol. According to the Solicitor General, the pictures relied upon by the appellant cannot overcome the positive and straightforward testimony of the young eyewitness Ricardo Salvo.

We agree with the Office of the Solicitor General. Whether or not the appellant is exempt from criminal liability is a factual issue. The appellant was burdened to prove, with clear and convincing evidence, his affirmative defense that the victim's death was caused by his gun accidentally going off, the bullet hitting the victim without his fault or intention of causing it; hence, is exempt from criminal liability under Article 12, paragraph 4 of the Revised Penal Code which reads –

The following are exempt from criminal liability:

...

- Any person who, while performing a lawful act with due care, causes an injury by mere accident without fault or intention of causing it.

The basis for the exemption is the complete absence of intent and negligence on the part of the accused. For the accused to be guilty of a felony, it must be committed either with criminal intent or with fault or negligence.[33]

The elements of this exempting circumstance are (1) a person is performing a lawful act; (2) with due care; (3) he causes an injury to another by mere accident; and (4) without any fault or intention of causing it.[34] An accident is an occurrence that “happens outside the sway of our will, and although it comes about through some act of our will, lies beyond the bounds of humanly foreseeable consequences.” If the consequences are plainly foreseeable, it will be a case of negligence.

In *Jarco Marketing Corporation v. Court of Appeals*,[35] this Court held that an accident is a fortuitive circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstance is unusual or unexpected by the person to whom it happens. Negligence, on the other hand, is the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand without which such other person suffers injury. Accident and negligence are intrinsically contradictory; one cannot exist with the other.[36] In criminal negligence, the injury caused to another should be unintentional, it being simply the incident of another act performed without malice.[37] The appellant must rely on the strength of his evidence and not on the weakness of that of the prosecution because by admitting having caused the death of the victim, he can no longer be acquitted.

In this case, the appellant failed to prove, with clear and convincing evidence, his defense.

First. The appellant appended to his counter-affidavit in the Office of the Quezon City Prosecutor the pictures showing the hole on the roof of the carinderia[38] to prove that he shot the victim accidentally. However, when the investigating prosecutor propounded clarificatory questions on the appellant relating to the pictures, the latter refused to answer. This can be gleaned from the resolution of the investigating prosecutor, thus:

Classificatory questions were propounded on the respondent but were refused to be answered. This certainly led the undersigned to cast doubt on respondent’s allegations. The defenses set forth by the respondent are evidentiary in character and best appreciated in a full-blown trial; and that the same is not sufficient to overcome probable cause.[39]

Second. The appellant did not see what part of the gun hit the victim.[40] There is no evidence showing that the gun hit a hard object when it fell to the ground, what part of the gun hit the ground and the position of the gun when it fell from the appellant’s waist.

Third. In answer to the clarificatory questions of the court, the appellant testified that the chamber of his pistol was loaded with bullets and was cocked when he placed it on his right waistline.[41] He also testified that the gun’s safety lock was on. He was asked if the gun would fire if the hammer is moved backward with the safety lock in place, and the appellant admitted that even if he pulled hard on the trigger, the gun would not fire:

Q:

Is this your service firearm?

A

Yes, Your Honor.

Q

So the chamber might have been loaded when you went out of the house?

A

Yes, Your Honor.

Q

What about the hammer, how was the hammer at that time when you tucked the gun in your waistline?

A

The hammer was cocked like this.

COURT:

Can you not stipulate that the hammer is moved backwards near the safety grip.

ATTY. AND PROS. SINTAY:

Admitted, Your Honor.

ATTY. PEREZ:

Yes, Your Honor.

COURT: (to the witness)

Q

You are a policeman, if there is a bullet inside the barrel of the gun and then the hammer is moved backwards and therefore it is open, that means that if you pull the trigger, the bullet will fire because the hammer will move forward and then hit the base of the bullet?

A

Yes, Your Honor.

Q

Therefore, the gun was cocked when you came out?

A

Yes, Your Honor.

Q

You did not place the safety lock before you went out of your house?

A

I safety (sic) it, sir.

Q

So when you boarded the motorcycle, the gun was on a safety lock?

A

Yes, Your Honor.

Q

Will you please place the safety lock of that gun, point it upwards.

(witness did as instructed)

It is now on a safety locked (sic)?

A

Yes, Your Honor.

Q

Pull the trigger if the hammer will move forward?

(witness did as instructed)

A

It will not, Your Honor.

COURT: (to the parties)

Q

Can you not admit that at this position, the accused pulled the trigger, the hammer did not move forward?

PROS. SINTAY AND ATTY. PRINCIPE:

Admitted, Your Honor.

COURT: (to the witness)

Q

And therefore at this position, even if I pull the trigger many times, a bullet will not come out from the muzzle of the gun because the hammer is on a safety locked (sic)?

A

Yes, Your Honor.

Q

Even if I pushed it very hard, it will not fire the gun?

A

Yes, Your Honor.

Q

Alright, I will ask you again a question. If the hammer of the gun is like this and therefore it is open but it is on a safety lock, there is space between the safety grip which is found below the hammer, there is a space, is it not?

A

Yes, Your Honor.

Q

That even if I pushed the safety grip forward, like this.
The Court gave the gun to the accused for him to demonstrate.
(to the witness)

You push it forward in order to push the hammer. Hard if you want but do not remove the safety lock.
(witness did as instructed)

The witness tried to push the safety grip and it does not touch the hammer even if the hammer is cocked.[42]

Fourth. The trial court was witness as the appellant's counsel himself proved that the defense proffered by the appellant was incredible. This can be gleaned from the decision of the trial court:

- More importantly, and which the Court considers it as providential, when the counsel of the accused was holding the gun in a cocked position and the safety lock put in place, the gun accidentally dropped on the cemented floor of the courtroom and the gun did not fire and neither was the safety lock moved to its unlock position to cause the hammer of the gun to move forward. The safety lock of the gun remained in the same position as it was when it dropped on the floor.[43]

Fifth. After the shooting, the appellant refused to surrender himself and his service firearm. He hid from the investigating police officers and concealed himself in the house of his friend SPO3 Angelito Lam in Valenzuela City, and transferred from one house to another for three days to prevent his arrest:

Q

So did you surrender that afternoon of September 26, 1998?

A

No, Your Honor.

Q

I thought you were surrendering to Major Suyo?

A

I was but I was not able to surrender to Major Suyo, Your Honor.

Q

Why, you were already able to talk to Major Suyo?

A

Because at that time I was already confused and did not know what to do, Your Honor.

ATTY. PRINCIPE: (to the witness)

Q

What is your relation with PO3 Angelito Lam of Valenzuela?

A

Just my co-motorcycle unit cop in the TMG, sir.

Q

Did I hear you right that you slept at the residence of PO3 Lam for three days?

A

Yes, sir.

Q

Why instead of going home to your residence at Bahay Toro?

A

Because I am worried, sir.

COURT: (to the witness)

Q

So what did you do for three days in the house of PO3 Lam?

A

During daytime, I go to my friends, other friends and in the evening, I go back to the house of PO3 Lam, Your Honor.

Q

So if you were able to visit your friends on September 27 or 28, 1998 and then returned to the house of PO3 Lam in the evening, why did you not go to Major Suyo or to your 103 Base?

A

Your Honor, during those days I am really calling Major Suyo.

Q

Why did you not go to your office at Camp Crame, Quezon City?

A

At that time, I did not have money, Your Honor.

Q

What is the connection of you having money to that of informing your officer that you will surrender?

A

What I know, Your Honor, is that if I do that I will already be detained and that I will have no money to spend.

ATTY. PRINCIPE: (to the witness)

Q

Mr. Witness, from the time of the incident up to Sept. 29, 1998, you did not even visit your family in Barangay Bahay Toro?

A

No, sir.

COURT: (to the witness)

Q

Did you send somebody to visit your family?

A

No, Your Honor.

ATTY. PRINCIPE: (to the witness)

Q

Did you cause to blotter the shooting incident of Vincent?

A

I was not able to do that, sir.

Q

You did not even talk to the Bgy. Officials in Bgy. Bahay Toro?

A

No sir, because I already brought the child to the hospital.[44]

The conduct of the appellant after the shooting belies his claim that the death of the victim was accidental and that he was not negligent.

We agree with the encompassing disquisitions of the trial court in its decision on this matter:

The coup de grace against the claim of the accused, a policeman, that the victim was accidentally shot was his failure to surrender himself and his gun immediately after the incident. As a police officer, it is hard to believe that he would choose to flee and keep himself out of sight for about three (3) days if he indeed was not at fault. It is beyond human comprehension that a policeman, who professes innocence would come out into the open only three (3) days from the incident and claim that the victim was accidentally shot. Human behavior dictates, especially when the accused is a policeman, that when one is innocent of some acts or when one is in the performance of a lawful act but causes injury to another without fault or negligence, he would, at the first moment, surrender to the authorities and give an account of the accident. His failure to do so would invite suspicion and whatever account or statement he would give later on becomes doubtful.

For the accused, therefore, to claim that Vincent was accidentally shot is odious, if not, an insult to human intelligence; it is incredible and unbelievable, and more of a fantasy than a reality. It was a deliberate and intentional act, contrary to accused's claim, that it happened outside the sway of his will.[45]

It is a well-entrenched rule that findings of facts of the trial court, its calibration of the testimonies of the witnesses, its assessment of the credibility of the said witnesses and the probative weight of their testimonies are accorded high respect, if not conclusive effect by the appellate court, as the trial judge was in a better position to observe the demeanor and conduct of the witnesses as they testified.[46] We have carefully reviewed the records of the case and found no reason to deviate from the findings of the trial court.

The testimony of prosecution witness Ricardo Salvo deserves credence. He testified in a positive and straightforward manner, which testimony had the earmarks of truth and sincerity. Even as he was subjected to a grueling cross-examination by the appellant's counsel, he never wavered in his testimony. He positively

identified the appellant as the assailant and narrated in detail how the latter deliberately aimed his gun and shot the victim. The relevant portions of his testimony are quoted:

Q: While playing basketball with Nono, LA and Puti, do you remember of any unusual incident which took place?

A: Yes, sir.

Q: What was that unusual incident?

A: When Vincent was shot, sir.

Q: Who shot Vincent?

A: Ferdinand Fallorina, sir.

...

Q: And in what place that Vincent was shot by Fallorina?

A: He was at the roof of the karinderia, sir.

Q: Was there any companion of Vincent?

A: Yes, sir.

Q: What was the position of Vincent at that time that you saw him and Fallorina shot him?

A: "Nakatalikod po siya."

...

Q: You included in this Exhibit O your drawing the figure of a certain Jeffrey and you and his tricycle? Why did you include this drawing?

A: Because it was in the tricycle where Vincent was boarded to and brought to the hospital.
(Witness referring to Exhibit O-11)

Q: And who was the driver of that tricycle?

A: It was Jeffrey who drove the tricycle, sir.

Q: You also drew here a motorcycle already marked as Exhibit O-7. Why did you include the motorcycle?

A: Because Fallorina was riding on that motorcycle at that time.

COURT: (to the witness)

Q: So when Ferdinand Fallorina shot the boy, the motorcycle was moving?

A: It was stationary, your Honor.

Q: Did you see where he came from, I am referring to Fallorina before you saw him shot the boy?

...

A: He came from their house, Your Honor.

Q: What was his attire, I am referring to Ferdinand Fallorina?

A: He was wearing white shirt and blue pants, Your Honor.

...

ATTY. PRINCIPE: (to the witness)

Q: At that time that Fallorina shot the victim, was Buddha still there?

A: He ran, sir. He jumped in this place, sir.

(Witness is pointing to a place near the canal already marked as Exhibit O-14).

Q: Now from the witness stand that you are now seated. Can you tell the Court how far where (sic) you from Fallorina at that time of the shooting?

COURT:

Can the prosecution and the accused stipulate that the distance pointed to by the witness is more or less 7 meters.

...

ATTY. PRINCIPE: (to the witness)

Q: How about the distance of Fallorina from Vincent, can you tell that?

COURT: (to the witness)

Can you point a distance between Fallorina and the boy at that time the body (sic) was shot?

COURT:

10 meters more or less?

...

Q: How long have you known Ferdinand Fallorina before the incident?

A: More or less two years, sir.

Q: Why do you know him?

A: I usually see him in that place at Sitio Militar, especially on Sundays, sir.

...

Q: How many shots did you hear?

A: Only one, sir.

Q: Do you recognize the gun used by Fallorina?

A: Yes, sir.

Q: What was that gun?

A: .45 cal., sir.

Q: Are you familiar with .45 cal.?

A: No, sir.

Q: Why do you know that it was .45 cal.?

A: Because that kind of gun, I usually see that in the movies, sir.

Q: Ricardo, you said that you have known Fallorina for two (2) years and you saw him shot Vincent on September 26, 1998 at around 2:30 in the afternoon. Please look around the courtroom now and point at the person of PO3 Ferdinand Fallorina?

CT. INTERPRETER:

Witness is pointing to a male person the one seated at the back of the lady and wearing a yellow shirt and maong pants and when asked of his name, he stated his name as Ferdinand Fallorina.

ATTY. PRINCIPE: (to the witness)

Q: Can you tell to the Court whether you heard utterances at that time that he shot the victim?

...

A: Yes, sir.

Q: What was that?

A: "Putang inang mga batang ito, hindi kayo magsisibaba diyan!"

...

Q: After Fallorina shot Vincent Jorojoro, you saw Vincent Jorojoro falling from the roof, what about Fallorina, what did he do?

A: He was still on board his motorcycle and then he went at the back of the karinderia where Vincent fell, Your Honor.

Q: And after he went at the back of the karinderia and looked at Vincent Jorojoro, what did he do?

A: He carried Vincent, Your Honor.

Q: And after carrying Vincent, what did he do?

A: He boarded Vincent in the tricycle.

Q: What about the gun, what did he do with the gun?

A: I do not know anymore.[47]

The appellant even uttered invectives at the victim and Whilcon before he shot the victim. In fine, his act was deliberate and intentional.

It bears stressing that of the eyewitnesses listed in the Information as witnesses for the prosecution, only Ricardo Salvo remained steadfast after he was brought under the Witness Protection Program of the Department of Justice. He explained that the reason why he testified for the prosecution, despite the fact that the appellant was a policeman, was because he pitied the victim's mother who was always crying,[48] unable to obtain justice for her son. We find no ill motive why Ricardo would falsely testify against the appellant. It was only his purest intention of ferreting out the truth in this incident and that justice be done to the victim.[49] Hence, the testimony of Ricardo is entitled to full faith and credence.

The Crime Committed by the Appellant

We agree with the trial court that the appellant committed murder under Article 248 of the Revised Penal Code qualified by treachery. As the trial court correctly pointed out, Vincent was shot intentionally while his back was turned against the appellant. The little boy was merely flying his kite and was ready to get down from the roof when the appellant fired a shot directed at him. The essence of treachery is the sudden and unexpected attack on an unsuspecting victim without the slightest provocation on his part.[50] Nonetheless, Vincent was an eleven-year-old boy. He could not possibly put up a defense against the appellant, a police officer who was armed with a gun. It is not so much as to put emphasis on the age of the victim, rather it is more of a description of the young victim's state of helplessness.[51] Minor children, who by reason of their tender years, cannot be expected to put up a defense. When an adult person illegally attacks a child, treachery exists.[52] The abuse of superior strength as alleged in the Information is already absorbed by treachery and need not be considered as a separate aggravating circumstance.[53]

We, however, note that the trial court appreciated the aggravating circumstance of abuse of public position in this case. We reverse the trial court on this score.

There is no dispute that the appellant is a policeman and that he used his service firearm, the .45 caliber pistol, in shooting the victim. However, there is no evidence on record that the appellant took advantage of his position as a policeman when he shot the victim.[54] The shooting occurred only when the appellant saw the victim on the rooftop playing with his kite. The trial court erred in appreciating abuse of public position against the appellant.

The trial court did not, however, err in ruling that the appellant is not entitled to the mitigating circumstance of voluntary surrender. Surrender is said to be voluntary when it is done by the accused spontaneously and made in such a manner that it shows the intent of the accused to surrender unconditionally to the authorities, either because he acknowledges his guilt or he wishes to save them the trouble and expense necessarily incurred in his search

and capture.[55]

In this case, the appellant deliberately evaded arrest, hid in the house of PO3 Lam in Valenzuela City, and even moved from one house to another for three days. The appellant was a policeman who swore to obey the law. He made it difficult for his brother-officers to arrest him and terminate their investigation. It was only after the lapse of three days that the appellant gave himself up and surrendered his service firearm.

Under Article 248 of the Revised Penal Code, the penalty for murder is reclusion perpetua to death. Since there is no modifying circumstance in the commission of the crime, the appellant should be sentenced to suffer the penalty of reclusion perpetua, conformably to Article 63 of the Revised Penal Code.

IN LIGHT OF ALL THE FOREGOING, the Decision of the Regional Trial Court of Quezon City, Branch 95, is **AFFIRMED WITH MODIFICATION**. The appellant PO3 Ferdinand Fallorina y Fernando is found guilty beyond reasonable doubt of the crime of murder under Article 248 of the Revised Penal Code and, there being no modifying circumstances in the commission of the crime, is hereby sentenced to suffer the penalty of reclusion perpetua. He is also ordered to pay the heirs of the victim Vincent Jorojoro, Jr. the amount of P49,174 as actual damages; P50,000 as moral damages; P50,000 as civil indemnity; and P25,000 as exemplary damages.

SO ORDERED.

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

Puno, J., on leave.

Panganiban, J., on official leave.

[1] Penned by Judge Diosdado Madarang Peralta.

[2] Rollo, p. 6.

[3] The prosecution presented the following as its witnesses: Felicisima Jorojoro, Ricardo Salvo, Dr. Ravell Baluyot and P/Insp. Mario Prado.

[4] TSN, 13 November 1998, p. 18.

[5] Id. at 8.

[6] TSN, 20 November 1998, p. 23.

[7] Exhibit "R."

[8] TSN, 20 November 1998, p. 20.

[9] TSN, 4 December 1998, p. 10.

[10] Exhibit "I."

[11] TSN, 13 November 1998, p. 59.

[12] Id. at 40-41, 61.

[13] Exhibit "B."

[14] Exhibit "R-1."

- [15] Exhibit “M-1.”
- [16] Exhibit “R.”
- [17] Exhibits “P” and “Q.”
- [18] Exhibit “K.”
- [19] Exhibit “M-1” to “M-2.”
- [20] TSN, 18 November 1998, pp. 34-35.
- [21] Exhibit “U-1.”
- [22] Exhibit “S.”
- [23] Exhibits “C” to “C-4.”
- [24] TSN, 15 December 1998, p. 20.
- [25] TSN, 16 December 1998, pp. 6-16.
- [26] Id. at 16-21.
- [27] Exhibits “1” to “1-K.”
- [28] Rollo, p. 153.
- [29] Id. at 77-78.
- [30] Exhibit “U-1.”
- [31] Exhibits “1” to “1-K.”
- [32] Exhibits “U-1,” “1,” “1-A,” “1-B,” “1-C,” “1-G” and “1-J.”
- [33] Article 3 of the Revised Penal Code.
- [34] Reyes, The Revised Penal Code, Vol. 1, 18th ed., p. 225.
- [35] 321 SCRA 375 (1999).**
- [36] Ibid.
- [37] People v. Oasis, 74 Phil. 257 (1943).
- [38] Supra, note 31.
- [39] Records, p. 3.
- [40] TSN, 16 December 1998, p. 33.
- [41] Id. at 36.
- [42] Id. at 36-39.
- [43] Rollo, pp. 29-30.
- [44] TSN, 16 December 1998, pp. 45-47.

[45] Rollo, pp. 31-32.

[46] *People of the Philippines v. Jerryvie Gumayao y Dahao @ Bivie*, G.R. No. 138933, October 28, 2003.

[47] TSN, 20 November 1998, pp. 7-32.

[48] *Id.* at 40.

[49] *Id.* at 41.

[50] *People of the Philippines v. Allen Bustamante*, G.R. Nos. 140724-26, February 12, 2003; *People v. Magno*, 322 SCRA 494 (2000).

[51] *People v. Abuyen*, 213 SCRA 569 (1992).

[52] *People v. Sancholes*, 271 SCRA 527 (1997).

[53] *People v. Macahia*, 307 SCRA 404 (1999).

[54] *People v. Joyno*, 304 SCRA 655 (1999).

[55] *People v. Ramos*, 296 SCRA 559 (1998).

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