

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ESMER MONTENEGRO; FREDDIE MACA (AT LARGE); KIKING SALAHAY (AT LARGE); BADIL SALAHAY (AT LARGE); MAMA MONTENEGRO (AT LARGE); AN...

G.R. No. 157933. August 10, 2004

Ponente: AZCUNA, J.

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AZCUNA, J.:

Appellant Esmer Montenegro was charged together with Freddie Maca, Kiking Salahay, Badil Salahay, Mama Montenegro and Florie Medrano before the Regional Trial Court of Tandag, Surigao del Sur, Branch 27, for Kidnapping and Serious Illegal Detention on October 22, 2001. Inasmuch as all the other accused were at large, the trial proceeded only with respect to herein appellant Esmer Montenegro who had surrendered and who has been detained by the authorities. After trial, he was found guilty by the lower court and sentenced to death.

The case is before us on automatic review.

The Information

Appellant and his co-accused were charged under an information that reads, as follows:

The undersigned prosecutor hereby accuses KIKING SALAHAY, alias ENRIQUE MENDOZA, FREDDIE MACA, BADIL SALAHAY, ESMER MONTENEGRO, MAMA MONTENEGRO, and FLORIE MEDRANO, with the crime of KIDNAPPING AND SERIOUS ILLEGAL DETENTION, committed as follows:

That on the 23[rd] day of August 2001, about 7:30 in the morning, more or less, at Umalag, San Miguel, Surigao del Sur, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another, did, then and there, willfully, unlawfully and feloniously kidnap and forcibly bring one Gerardo Mag-isa, 42 years old, to an undisclosed place for the purpose of extorting ransom, wherein the latter was detained and deprived of his liberty for a period of seven (7) days, to the damage and prejudice of said victim.

CONTRARY TO LAW. (In violation of Article 267 as amended by R.A. 7659).[1]

Upon arraignment, appellant pleaded not guilty.[2]

Pre-Trial

On July 5, 2002 a pre-trial hearing was conducted and terminated on the same day, where the following admissions were made by appellant and recorded in a Pre-Trial Order:[3]

- His identity as Esmer Montenegro;

- the date and place of the incident, namely, August 23, 2001 at about 7:30 in the morning at Umalag, San Miguel, Surigao del Sur;
- that with him were his co-accused Kiking Salahay, alias Enrique Mendoza, Freddie Maca, Badil Salahay, Mama Montenegro and Florie Montenegro;
- the existence of the four-page letter of the victim addressed to his wife Rose;
- that the victim Gerry Mag-isa was kidnapped and detained for seven days; appellant however alleged that he acted under the compulsion of an irresistible force;
- the one-page letter also dated August 23, 2001 by the victim addressed to Rose.

Appellant, however, proposed for admission by the prosecution the defense of having acted under the compulsion of an irresistible force. The prosecution rejected the proposal.

The Prosecution's Evidence

The prosecution offered the following as its exhibits:

Exhibit "A" - 4-page letter dated August 23, 2001 signed by Gerry Mag-isa and addressed to his wife Rose;

Exhibit "B" - 1-page letter signed by Gerry and addressed to his wife Rose.

The prosecution did not present any witness nor any other evidence and relied mainly on the admissions made by appellant during the pre-trial hearing and on Exhibits "A" and "B" which it formally offered in evidence.

On July 5, 2002, the trial court issued the following Order:[4]

After the pre-trial and considering the admission of the defense in so far as the accused Esmer Montenegro is concerned, Assistant Provincial Prosecutor Elpidio I. Digaum moved to be allowed to formally offer his evidence and rest his case. Granted. Formally offered in evidence are the following exhibits namely: the 4-page letter dated August 23, 2001 signed by Gerry the victim in this case addressed to his wife Rose marked as Exhibit "A" and the 1-page letter also dated August 23, 2001 signed by the same victim Gerry addressed to his wife Rose. The alleged purpose is to prove demand for money by the alleged kidnappers. The defense admitted the existence of Exhibits "A" and "B" and denied the purposes for which the same are offered.

Considering the admission of the existence of Exhibits "A" and "B", the same are ordered admitted. The purpose of the offer and objection thereto will be evaluated in the appreciation of the evidence. The prosecution having rested its case, the reception of defense is set for August 13, 2002 at 8:30 in the morning. x x

Evidence For The Defense

Appellant, in his defense, testified that in the early morning of August 23, 2001, he was fetched from his house located at Barangay Caromata, San Miguel, Surigao del Sur, by his uncle Freddie Maca, who asked him to accompany him to collect money from a certain person and who told him that he will give him P500. They proceeded to Barangay Umalag and when they reached the place, he was made to wait at the waiting shed while his uncle went to the house of a certain councilor to fetch a relative by the name of Mama Montenegro. When Freddie Maca came back, he was accompanied by Mama Montenegro and Kiking Salahay and Badil Salahay whom he noticed to be all armed with .45 and .38 caliber guns. Then they all proceeded to the mountain of Umalag.

They proceeded to the mountain of Umalag because the person who was indebted to Freddie Maca was invited to that area. When they reached their destination, Kiking Salahay pointed his gun at a person who later turned out to be Gerry Mag-isa.

Appellant asked Freddie Maca for permission to go home because he was afraid of what the group did. Freddie Maca relayed his request to Kiking Salahay. Fearing that he would report the matter to the police, Kiking Salahay said that it would be better for all of them if they just killed appellant. Appellant then begged for his life and stayed with the group.

The group proceeded to Barangay Bitaugan and stayed there for one day and two nights. On the second night, however, at about 11:00 o'clock in the evening, they discovered that Gerry Mag-isa had escaped. Seizing the opportunity to leave the group, he asked permission to go home to which the group agreed.[5]

Upon reaching Barangay Caromata, he immediately reported the incident to Barangay Captain Felicula Gran who promised to assist him. She accompanied him in surrendering to Sgt. Nacional of the Philippine Army who picked him up and brought him to the Municipal Hall of San Miguel where he was detained until the case was filed.[6]

The Trial Court's Decision

After trial, the lower court, finding that the prosecution had established the crime charged, rendered its decision on November 20, 2002 convicting appellant of the crime of Kidnapping with Serious Illegal Detention and sentencing him to death.[7]

In its decision, the trial court presented the following facts:[8]

Evidence for the prosecution show[s] that on August 23, 2001, at about 7:30 in the morning, at Umalag, San Miguel, Surigao del Sur, the victim Gerry Mag-isa was at the mining site together with Arsenio L. Darasan, Ricardo P. Cabangbang, and Joseph C. Flores. At that moment, a man arrived who said that he was instructed by the Barangay Captain of Umalag, San Miguel, Surigao del Sur, by the name of Kapitan Piling, to invite Gerry Mag-isa and to bring him to her residence because it was the fiesta of her Barangay. Because they were so busy at that time, Gerry Mag-isa refused to go with him and instead handed him an amount of P200.00 when he left. Not long after fifteen minutes had passed, after said person left, three men arrived with the same intention of inviting him to the house of Kapitan Piling. However, when the three men were at the makeshift hut they suddenly pulled out their .45 and .38 caliber handguns and ordered Gerry Mag-isa, Arsenio L. Darasan, Ricardo P. Cabangbang and Joseph C. Flores to drop to the ground. That while still lying face on the ground, they saw Kiking Salahay, the leader of the group, hand over a piece of paper to Gerry Mag-isa and [Kiking Salahay] ordered him to write a note to his wife, telling her to give the amount of Two Million Pesos (P2,000,000.00) for the release of her husband. That soon after the note was written, they instructed Arsenio Darasan, Joseph C. Flores and Ricardo P. Cabangbang to bring said note to the wife of the victim. That after they left with Gerry Mag-isa, they immediately went to Tandag, Surigao del Sur (See Joint Affidavit of Arsenio L. Darasan, et al. in page 24 of the record).

The allegation of the victim Gerry Mag-isa (See Affidavit on page 23 of the record) shows that he was forcibly abducted and kidnapped about 7:00 in the morning of August 23, 2001, at Barangay Umalag, San Miguel, Surigao del Sur. He stated, that he was treated well by the kidnappers, except that when he answered to the call of nature, he was watched closely and they were asking money from his family. The kidnappers also took from him the amount of P320.00 which was spent for their food in the mountains and his chainsaw amounting to P18,000.00. After spending 7 days at the hands of the captors, specifically on August 30, 2001, at about 1:00 o'clock in the morning, while they were asleep, he was able to escape and reached Barangay Bagyang, San Miguel. He was able to know the leader of the kidnappers by the name of Kiking Salahay, alias Enrique Mendoza because they called him "kumander". They were armed with a .45 caliber, two .38 caliber handguns

and sharp bladed military knives.

Appellant in his brief assigns a single error, to wit;

THE TRIAL COURT GRAVELY ERRED IN CONVICTING THE ACCUSED–APPELLANT OF THE CRIME CHARGED.

In support of his sole assignment of error, appellant seeks exemption from criminal liability under Article 12, Paragraph 5 of the Revised Penal Code which provides that “any person who acts under the compulsion of an irresistible force” is exempt from criminal liability. He cites the following circumstances which would place him under the umbrella of this exemption:

- He was forced to join the kidnappers because he was threatened with bodily harm and death.
- He did not attempt to escape because the leader Kiking Salahay and his companions carried with them .45 and .38 caliber firearms.
- He was not allowed to leave the group because Salahay feared that the accused would report the matter to the police.[9]

The specific act which allegedly constitutes this irresistible force is the statement of Kiking Salahay that it would be better for the group if they just killed appellant in response to his request to be allowed to go home. Appellant thus begged for his life and was left with no choice but to stay with the group.[10]

As a result, appellant argues that he was reduced to a mere instrument. He did not act of his own volition and the fear of being killed and the fact that his uncle Freddie Maca had moral ascendancy over him forced him to stay with the group. These circumstances, therefore, he contends, exempt him from criminal liability. In support, appellant cites the ruling in *People v. Del Rosario*. [11]

The Solicitor General’s Recommendation

The Solicitor General filed a Manifestation and Motion (In Lieu of Brief), [12] recommending the acquittal of appellant on the ground that the exacting proof of guilt beyond reasonable doubt was not met, thus:

x x x

- The appeal is meritorious
- Under the criminal justice system, the burden of proof lies with the prosecution. (Rule 115, Section 1, Revised Rules of Criminal Procedure). That burden must be discharged on the strength of the prosecution’s own evidence, without relying on the weakness of the defense. Proof beyond reasonable doubt, or that quantum of proof sufficient to produce a moral certainty that would convince and satisfy the conscience of those who are to act in judgment, is indispensable to overcome the constitutional presumption of innocence (*People v. Batocoy*, G.R. Nos. 137458-59, prom. April 24, 2003).
- Such proof is lacking in this case.
- The prosecution merely offered in evidence the following documents:
 - A 4-page letter dated August 23, 2001 signed by Gerry Mag-isa, addressed to his wife. The letter contained a demand of P150,000.00 ransom instead of P2M;
 - A 1-page letter dated August 23, 2001 signed by Gerry Mag-isa, This letter was addressed to Rose informing her that he was a hostage and that the kidnappers were demanding a P2M ransom.

- Sadly, the prosecution did not present testimonial evidence to prove the guilt of appellant of the crime charged. The evidence of the prosecution does not measure up to the requisite moral certainty, notwithstanding the admission by the defense of the existence of the four-page letter of the victim Gerry Mag-isa addressed to his wife (Exh. "A"). Furthermore, the admissions of appellant were not reduced into writing and signed by him and his counsel in violation of Section 2, Rule 118 of the Revised Rules of Criminal Procedure. This means that the admissions, assuming that these are incriminating, cannot be used against appellant.

- Even as appellant testified that he was with the other accused, there is no evidence that he conspired with them to kidnap the victim, detain him for more than three (3) days, and demand for ransom in exchange for his release.

- In view of the abject failure of the prosecution to present witnesses to prove the guilt of appellant, his testimony, therefore, remains undisturbed.

x x x

- From [appellant's] declaration, it appears that appellant had no idea of the kidnapping scheme because he was just invited by his uncle to accompany him in collecting an obligation from a certain person. Likewise, significant are the acts of appellant in reporting the incident to the authorities and turning himself in. These were not disputed by the prosecution.

- Absent any overt act of appellant which would be construed as necessary or essential to the perpetration of the kidnapping for ransom and serious illegal detention, mere presence at the locus criminis cannot by itself be a valid basis for conviction. Mere knowledge, acquiescence to or agreement to cooperate, is not enough to constitute one as a party to a conspiracy, absent any active participation in the commission of the crime, with a view to the furtherance of the common design and purpose. Conspiracy transcends companionship (*People v. James Patano, et al.*, G.R. No. 129306, prom. March 14, 2003). Conspiracy must be proved as convincingly as the criminal act itself, which may be deducted from the acts of appellant pointing to a joint purpose, concerted action and community of interest (*People v. Guittap*, G.R. No. 144621, prom. May 9, 2003). It is hornbook doctrine that conspiracy must be proved by positive and convincing evidence (*People v. Patano*, G.R. No. 129306, prom. March 14, 2003), the same quantum of evidence as the crime itself, that is, by proof beyond reasonable doubt (*People v. Caballero*, G.R. Nos. 149028-30, prom. April 2, 2003; *People v. Gregorio*, G.R. No. 153781, prom. September 24, 2003).

- To be sure, the trial court could not rely on the affidavits not affirmed by the affiants' court testimony. The admission of hearsay evidence would be a violation of the constitutional provision that the accused shall enjoy the right to confront and cross-examine the witness testifying against him (*People v. Feliciano Ulit*, G.R. Nos. 131799-801, prom. February 23, 2004).

- Consequently, it was egregious error for the trial court to consider the joint affidavit of Arsenio Darasin, Ricardo Cabanbang and Joseph Flores, as well as the affidavit of the victim. Affidavits of persons who are not presented to testify on the truth of the contents thereof are hearsay evidence (*Vallarta v. Court of Appeals*, 163 SCRA 587 [1989]).

x x x.[13]

The Court's Decision

We have reviewed the entire records of this case and we fully agree with the position taken by the Solicitor General. As the Solicitor General recognizes, we operate under a system that unshakably puts the burden of proof on the prosecution.[14]

This burden has not been discharged, and was hardly even attempted to be discharged, by the prosecution in this case. It was content to rely on the admissions made at the pre-trial hearing and the introduction and offer in

evidence of the two letters allegedly written by the victim to his wife.

The admissions at the pre-trial hearing, however, showed only that:

- Gerry Mag-isa was kidnapped and detained for seven days;
- appellant Esmer Montenegro was among the group at the mountains of Umalag where the victim was brought, which consisted of Kiking Salahay, alias Enrique Mendoza, Freddie Maca, Badil Salahay, Mama Montenegro and Florie Montenegro;
- the letters informed the victim's wife of his kidnapping and detention and the amount demanded for his release;

The pre-trial admissions do not show that appellant participated in the kidnapping of Gerry Mag-isa.

The evidence on record of appellant's participation is his own narration of how he found himself with the group without knowing that a kidnapping had transpired and, in his defense, he insists that he stayed with the group because of the compulsion of an irresistible force exerted on him when Kiking Salahay stated in reply to his request to be allowed to go home, that it would be better for all of them if they just killed appellant.

If the prosecution had proved conspiracy as alleged in the information, these admissions would be relevant and material in determining the guilt of appellant. However, no proof to this effect was presented. Hence, it cannot be determined what the specific role of appellant was in the commission of the crime. No conspiracy having been proved, appellant cannot be convicted for a crime where his participation is not established. As noted by the Solicitor General in his brief, "absent any overt act of appellant which would be construed as necessary or essential to the perpetration of the kidnapping for ransom and serious illegal detention, mere presence at the locus criminis cannot by itself be a valid basis for conviction. Mere knowledge, acquiescence to or agreement to cooperate, is not enough to constitute one as a party to a conspiracy, absent any active participation in the commission of the crime." [15]

The trial court utilized the affidavit of the victim Gerry Mag-isa as well as the joint affidavit of Arsenio L. Darasin, Ricardo P. Cabangbang, Joseph C. Flores and Roy I. Tante to support its findings of appellant's participation and culpability.

The record is bereft of any evidence to show that these affidavits were ever presented or offered as evidence for the prosecution, nor were the persons who executed them ever presented to affirm what was in the affidavits nor to offer oral testimony on the circumstances of the alleged kidnapping. Hence, they are of no value in the determination of the guilt of appellant. As we said in *Osias v. Court of Appeals*, [16] "allegations in an affidavit not testified upon in the trial are mere hearsay evidence and have no substantial evidential value." In *People v. Santos*, [17] we ruled:

Indeed it appears that the only source of the above findings of fact of the trial court is "Exhibit C," the sworn statement of Romeo Fernandez. Since the affiant himself never took the stand during the trial, his sworn statement is absolutely inadmissible in evidence for being hearsay. The admission of such hearsay evidence and the conviction of the accused on the basis thereof gravely violated their constitutional right to meet their witnesses face to face and to subject them to the rigid test of cross-examination. As we said in an earlier case, "the constitutional right to confrontation precludes reliance on such affidavits. Such a constitutional safeguard cannot be satisfied unless the opportunity is given the accused to test the credibility of any person, who, by affidavit or deposition would impute the commission of an offense to him."

Furthermore, Section 34, Rule 132 of the Rules of Court specifically provides that "the court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."

Again, we find nothing in the record that would show that these affidavits were offered in evidence.

Lastly, without going into the validity of appellant's defense of having acted under the compulsion of an irresistible force, the fact established by his own testimony which was not rebutted by the prosecution, was that he had no idea that a kidnapping had been committed as he was just invited by his uncle to go with him to collect money from someone. When he tried to leave the group, he was threatened with death. Nowhere in all the evidence of the prosecution does it show that appellant performed any overt act that would implicate him as an accomplice or participant in the crime.

The trial court brushed away this defense as not sufficiently proved. It also refused to believe the testimonies of appellant and of the Barangay Captain of Caromate, Felicula Gran, that he reported the incident after he was released, as mere "afterthought." Yet what the trial court failed to perceive was that the evidence for the prosecution was weak, if not nil. Consequently, the trial court, in an untenable lapse of judgment, decided to consider only the alleged weaknesses of the defense to arrive at the conclusion that appellant is guilty and not the strength or weaknesses of the prosecution's case. From our review of the records, we find that the prosecution in this case has utterly failed in its duty to overcome by proof beyond reasonable doubt the presumption of innocence of appellant.

WHEREFORE, the decision of the Regional Trial Court of Tandag, Surigao del Sur, Branch 27, dated November 20, 2002, in Criminal Case No. 4306, is REVERSED and SET ASIDE and appellant Esmer Montenegro is hereby ACQUITTED.

The National Bureau of Investigation is DIRECTED to assist in the arrest of the other accused in this case who are at large, for them to undergo arraignment and trial. Let a copy of this Decision be furnished its Director.

No costs.

SO ORDERED.

Davide, Jr., C.J., Puno, Panganiban, Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio-Morales, Callejo, Sr., Tinga, and Chico-Nazario, JJ., concur.
Sandoval-Gutierrez, J., on leave.

[1] Records, p. 44.

[2] Records, pp. 68, 71, 72.

[3] Records, p. 143.

[4] Records, p. 140.

[5] TSN, September 5, 2002, pp. 4-28.

[6] TSN, October 8, 2002, pp. 3-7.

[7] Rollo, p. 17.

[8] Records, pp. 207-209.

[9] Rollo, p. 33.

[10] Rollo, p. 31.

[11] 305 SCRA 740 (1999).

[12] Rollo, pp. 55-75.

[13] Rollo, pp. 61-69.

[14] *People v. Eslaban*, 218 SCRA 534 (1993).

[15] Rollo, p. 67.

[16] 256 SCRA 101, 118 (1996).

[17] 139 SCRA 583, 586 (1985).

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