

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. CRISOGONO BOTONA, APPELLANT.

G.R. No. 161291. September 27, 2004

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

Before us for review is the appeal of Crisogono Botona to the Court of Appeals (CA) of the Decision[1] of the Regional Trial Court (RTC) of Surigao City, Branch 29, in *People v. Botona*, Criminal Case No. 3007, for murder. The appeal was certified to this Court, in view of the penalty of reclusion perpetua imposed by the CA.

On January 31, 1990, an Information was filed against the appellant, charging him with murder, the accusatory portion of which reads:

That on or about the 13th day of April 1989, at 7 o'clock in the evening, more or less, in the City of Surigao, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with treachery, evident premeditation, and with the intent to kill, did then and there, willfully, unlawfully, and feloniously shoot twice, with a pistol, one Pepito Sulapas, thus, hitting the latter twice at the left side of his head which injuries caused the instantaneous death of the said Pepito Sulapas, to the damage and prejudice of his heirs in such amount as may be allowed by law.

Contrary to Article 248 of the Revised Penal Code with the qualifying circumstance of treachery and the aggravating circumstance of nighttime which was specially sought for by the accused to better accomplish the crime.[2]

The appellant, assisted by counsel, pleaded not guilty to the charge during his arraignment.

The Case for the Appellee

As culled by the Office of the Solicitor General (OSG) from the evidence on record, the case for the prosecution, the appellee herein, is as follows:

On April 13, 1989 at 7:00 in the evening, Valerio Tesado was at Pantalan Dos on Borromeo Street, Surigao City, waiting for the victim Pepito Sulapas to arrive. The victim was known to him since they had previous transactions regarding the buy-and-sell of fish. (TSN, November 5, 1991, pp. 9-10) While thus waiting, appellant arrived and asked Tesado when Sulapas would arrive; appellant left shortly thereafter. (Ibid., pp. 13 and 14)

When Sulapas arrived at Pantalan Dos, Tesado bought some selected fish from him. But before the transaction could be finished, it rained and they decided to take shelter at a nearby pigpen. After about ten (10) minutes, appellant came near them and shot Sulapas twice at the side of the head with a handgun, killing him. Out of fear, Tesado ran away and returned after ten (10) minutes. Thereafter, he and Sulapas' companions from the pumpboat brought Sulapas' body to Funeraria Leva (Ibid., pp. 10-13).

On April 14, 1989, Dr. Emmanuel Plandano, a physician at the Surigao Provincial Hospital, conducted an

autopsy on Sulapas' body at the funeral parlor upon the request of Police Captain Prudencio L. Rodriguez. His report showed that Sulapas suffered two (2) gunshot wounds at the left side of his head, both of which were fatal. (Ibid., pp. 5-6)

Upon a complaint lodged with the Surigao City Prosecutor's Office, the corresponding Information was filed with the Regional Trial Court. (Records, pp. 1-2)[3]

The Case for the Appellant

The appellant summarized his evidence in the trial court, thus:

Danilo Banderas declared that on April 13, 1989 between the hours of 6:30 to 7:00 in the evening, he, together with Rodulfo (sic) Russel and Felix Tecmon, unloaded twelve (12) boxes of fish from the pumpboat Romaliz (sic). After unloading the boxes of fish, there was a downpour so they took shelter at a pigpen near the pumpboat. At the pigpen, he was about one (1) meter from Pepito Sulapas. Then, a certain Julieta Baguilo shot the head of Pepito Sulapas twice with a revolver at close range. On that particular night, he did not see Valerio Tesado nor Crisogono Botona at Pantalan Dos or at the pigpen. On cross-examination, he claimed that he did not state in his affidavit that Julieta Baguilo was the one who killed Pepito Sulapas because he was afraid of the former who was still at Barangay Caub, Del Carmen, Surigao del Norte at that time. (TSN, pp. 3-12, March 10, 1993)

Rodolfo Russel declared that, on April 13, 1989 at around 6:30 in the evening, he was at Pantalan II, Surigao City, waiting for Pepito Sulapas to arrive. Together with Danilo Banderas and Felix Tecmon, they unloaded twelve (12) boxes of fish towards the pigpen. It rained, so they joined Pepito Sulapas who took shelter under the roof of the pigpen. At the pigpen, he saw a man shot the head of Pepito Sulapan (sic) twice. He did not see Crisogono Botona at the crime scene on that particular night. (TSN, pp. 4-11, September 14, 1993)

Crisogono (sic) Botona declared that, on April 13, 1989, he was still employed as driver at the Department of Public Works and Highways at Patinay, Agusan del Sur. He arrived at Surigao City at 8:30 in the evening of April 13, 1989 as he was directed to meet District Engineer Vicente Casuela who would arrive from Manila. He had supper at the residence of Engr. Casuela on that particular night. At 9 o'clock in the evening of the same day, he went to Pier Uno to find out if there was a launch going to Del Carmen. Thereat, he was called by security guard Ely Gologo who informed him that his cousin Pepito Sulapas was shot. So he proceeded to Leva Funeral Parlor to verify the information given to him, and thereat, he met Spouses Rodolfo Russel and Rosemarie Russel. Moments later, policemen arrived and viewed the dead body of Pepito Sulapas. Then, ex-mayor Virginia Monzon, the owner of pumpboat Romaliza, instructed him to transfer the said pumpboat to Pier Uno. Together with Spouses Rodulfo (sic) and Rosemarie Russel, they transferred the aforesaid pumpboat to Pier Uno. On cross-examination, he claimed that he left Patinay, Agusan del Sur at past 5 o'clock in the afternoon of April 13, 1989 and arrived at Surigao City at past 8 o'clock in the evening of the same day. He denied having met Valerio Tesado because he does not know the latter. (TSN, pp. 3-13, December 14, 1993)[4]

On May 2, 1995, the trial court rendered judgment finding the appellant guilty as charged, but sentenced him to suffer an indeterminate penalty of imprisonment, as follows:

WHEREFORE, in view of the foregoing, the accused, Crisogono S. Botona is hereby found guilty beyond reasonable doubt of the crime of murder and, accordingly, sentences him to suffer the penalty of eighteen (18) years, eight (8) months and one (1) day to twenty (20) years of reclusion temporal in its medium period, and for the death of the victim Pepito Sulapas, the accused is ordered to indemnify the heirs of the said victim, the sum of FIFTY THOUSAND (P50,000.00) PESOS, Philippine Currency, as well as for the actual damages in the sum of EIGHT THOUSAND (P8,000.00) PESOS and to pay the costs.

SO ORDERED.[5]

The trial court gave credence and full probative weight to the principal witness of the prosecution, Valerio Tesado, and disbelieved the alibi of the appellant. The latter appealed the decision to the CA which affirmed with modification the appealed decision.

The Present Appeal

In his manifestation before the Court, the appellant avers that the prosecution failed to prove that he shot the victim with treachery. On the other hand, in his brief in the CA, he asserted the following:

Assuming *arguendo* that accused-appellant was really the one who shot the victim, the trial court gravely erred in convicting him of the crime of murder instead of homicide. The trial court ruled that the qualifying circumstance of treachery was established to show that the accused committed the crime of murder.

We beg to disagree. There is treachery when the offender adopts means, methods or forms in the execution of the felony to ensure its commission without risk to himself arising from the defense which the offended party might make. (*People vs. Cuyo*, 196 SCRA 447). In the case at bar, although prosecution witness Valerio Tesado claimed that he allegedly saw accused-appellant suddenly shot the head of the victim once, it does not follow that if the attack was sudden and unexpected, it should be deemed attended with treachery. (*People vs. Ramirez*, 203 SCRA 24).

It is submitted that the prosecution miserably failed to prove beyond reasonable doubt that the crime committed was murder as no substantial, concrete and convincing evidence established the fact that the killing was attended by treachery. As earlier discussed, the testimony of prosecution witness Valerio Tesado is tainted with glaring inconsistencies. Furthermore, Tesado's testimony regarding the means allegedly employed by the accused-appellant in the commission of the crime (sic) was not corroborated by any other witness. Treachery must be based on some positive, conclusive proof not only upon hypothetical facts or on mere supposition or presumption (*People vs. Morin*, 241 SCRA 709), for settled is the rule that the circumstance which would qualify the killing to murder must be proved as indubitably as the crime itself. (*People vs. Raquipo*, 188 SCRA 571)[6]

For its part, the OSG avers that the prosecution adduced proof beyond reasonable doubt that the appellant killed the victim with treachery:

Appellant assails the trial court's finding that the qualifying circumstance of treachery attended the killing of the victim (Appellant's Brief, pp. 9-10).

This is unmeritorious. To constitute treachery, two conditions must be present, to wit: (a) the employment of means of execution that give the person attacked no opportunity to defend himself or to retaliate; and (b) the means of execution were deliberately or consciously adopted (*People v. Mabuhay*, 185 SCRA 675 [1990]).

In the case at bar, there is testimony to the effect that unknown to both the victim and Tesado, appellant went near the place where they had sought shelter from the rain and, thereafter, shot the victim without any warning whatsoever (TSN, November 15, 1995, pp. 11-12; Records, p. 15). As for the second requisite, the circumstance of appellant's asking Tesado what time the victim would arrive, half-hour before the shooting (*Ibid.*, p. 13) shows that appellant consciously adopted the mode of execution of attack.

A sudden and unexpected attack under circumstances which render the person attacked unable to defend himself by reason of its suddenness and severity constitutes *alevosia* (*People v. Sorio*, 190 SCRA 548 [1990]).[7]

The Ruling of the Court

The contention of the appellant has no merit.

Article 14, paragraph 16 of the Revised Penal Code provides that:

Art. 14. Aggravating circumstances. – The following are aggravating circumstances:

...

16. That the act be committed with treachery (alevosia).

There is treachery when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.

The essence of treachery is the sudden and unexpected attack by the aggressor on an unsuspecting victim, depriving the latter of any real chance to defend himself, thereby ensuring its commission without risk to the aggressor, and without the slightest provocation on the part of the victim.[8]

In this case, Tesado testified how the appellant shot the victim:

q

On April 13, 1989 at about 7 o'clock in the evening, where were you if you remember?

a

I was at Pantalan Dos.

q

Where is that Pantalan Dos located? In what town?

a

At Borromeo Street, Surigao City.

q

Why were you in Pantalan Dos or Wharf No. 2 in Surigao City, in the evening of April 13, 1989?

a

Because I was waiting for Pepito Sulapas as I wanted to buy his fish.

q

Why was Pepito Sulapas suppose to arrive that evening?

Atty. Pullos:

Leading, Your Honor.

Court:

Reform.

Atty. Villaluz:

q

Were you alone in waiting for Pepito Sulapas?

Atty. Pullos:

Leading, Your Honor.

Prosecutor Bonotan:

That was a follow-up question to the previous question.

Court:

May answer.

Witness:

q

I was alone.

Atty. Villaluz:

q

Did Pepito Sulapas arrive?

a

Yes, Sir.

q

Now, when Pepito Sulapas arrived, what did you do?

a

I went near him because I wanted to select his fish.

q

Were you the only one who selected fish?

a

The two of us, Pepito and I, selected fish.

q

Do you remember who were the persons in Pantalan Dos or in the pumpboat with Pepito Sulapas when you were selecting fish inside the pumpboat?

Atty. Pullos:

Leading, Your Honor.

Court:

Reform.

Atty. Villaluz:

q

Were there persons who, like you, wanted to buy fish at that time?

Atty. Pullos:

That is a question already thrown to the mouth of the witness, Your Honor.

Court:

Sustained.

q

When you were selecting fish, did something happen?

a

Yes, there was.

q

What happened when you were selecting fish?

a

Before Pepito Sulapas was shot, it rained and so we took shelter on (sic) a pigpen.

q

Upon the start of the rain, who sought shelter in that pigpen?

a

Pepito Sulapas and I.

q

While you were there, how long did you stay in that shelter?

a

More or less, five (5) minutes, Sir.

q

While you were in that shelter for that period, will you state to the court what happened?

a

Yes, Sir. While Pepito Sulapas and I took shelter in that pigpen, Crisigono (sic) Botona went near us.

q

How far were you when you saw Crisigono (sic) Botona?

a

One meter and a half (1½) meters (sic), more or less.

q

What did he do if he did anything?

a

He shot.

q

With what?

a

Pistol, Sir.

q

Whom did he shot?

a

Pepito Sulapas, Sir.

q

How many shots?

a

Of what I heard, there was only one shot that exploded because in the second shot that he made it did not explode.

q

How far were you when (sic) Pepito Sulapas when these shots were fired?

a

We were near each other about one-half meter only.

q

What happened to Pepito Sulapas?

a

He fell down when he was hit on the head.

q

Was Pepito Sulapas facing Crisigono (sic) Botona or not?

a

He was side view.

q

You said that you heard also a second shot – no, no, no – at the first shot, what happened to Pepito Sulapas?

Atty. Pullos:

Already answered, he fell down.

Atty. Villaluz:

Alright, that's the answer.

q

After he fell down, you said that you heard the second shot. Is that correct?

a

Yes, Sir.

q

Now, at the second shot, what was the position of Pepito Sulapas?

Atty. Pullos:

Objection, Your Honor, because it was previously answered by the witness that there was no more shot that exploded.

Court:

Reform. The witness testified that after the first shot, the deceased Pepito Sulapas fell down.

Atty. Villaluz:

q

What was the position of Pepito Sulapas at the second shot, because you said there was a second shot?

Atty. Pullos:

Objection, Your Honor. In the first place, it was already answered although there was another shot but there was no explosion.

Court:

May answer.

Witness:

a

He fell down.

Atty. Villaluz:

q

What did you do then?

a

Because of my fear, I ran.

q

Were you able to go back to Pantalan Dos to find out what happened?

a

Yes, Sir.

q

Where was Pepito Sulapas when you returned?

a

He was still there at the place where he fell down.

q

How about the accused Crisigono (sic) Botona?

a

He left.[9]

The attack was sudden. The victim had no inkling that the appellant would arrive and shoot him pointblank on his left temple. The victim had no opportunity to defend himself and fend off the attack. Indubitably, the crime was attended by treachery:

We have no doubt that the act of the accused-appellant in shooting the victim qualifies the crime with alevosia. Oscar Manjares was peeling garlic when he was shot. He had no suspicion that he was to be assaulted, and the sudden, swift attack gave him no opportunity to defend himself. Hence, we agree with the trial court that the crime committed was murder.[10]

We note that the trial court did not award moral and exemplary damages in favor of the heirs of the victim. Conformably to current jurisprudence, the heirs are entitled to P50,000 as moral damages and P25,000 as exemplary damages.[11]

We also note that the trial court sentenced the appellant to an indeterminate penalty for murder. The penalty imposed by the trial court is not correct. When the crime was committed in 1989, the penalty for murder under Article 248 of the Revised Penal Code was reclusion temporal in its maximum period to death. Since the felony was not attended by any modifying circumstance except the qualifying circumstance of treachery, the appellant must be sentenced to reclusion perpetua, conformably to Article 64, paragraph 1 of the Revised Penal Code. Reclusion perpetua is an indivisible penalty and must be imposed by the trial court as provided in Article 63 of the Revised Penal Code. Even under Republic Act No. 7659, reclusion perpetua remains an indivisible penalty despite the amendment of Article 27 of the Code. It bears stressing that Article 76 thereof enumerates the divisible penalties. Republic Act No. 7659 did not amend the said article, or reclassified reclusion perpetua as one of the divisible penalties.

IN LIGHT OF ALL THE FOREGOING, the Decision of the Regional Trial Court of Surigao City, Branch 29, convicting the appellant of murder is **AFFIRMED WITH MODIFICATIONS**. The appellant is sentenced to suffer the penalty of reclusion perpetua. He is ordered to pay to the heirs of the victim Pepito Sulapas P50,000 as moral damages and P25,000 as exemplary damages. No costs.

SO ORDERED.

Puno, (Chairman), Austria-Martinez, and Tinga, JJ., concur. Chico-Nazario, J., on leave.

[1] Penned by Judge Andres P. Enriquez.

[2] CA Rollo, p. 24.

[3] Id. at 56-57.

[4] Id. at 26-27.

[5] Id. at 43.

[6] Id. at 32.

[7] Id. at 65-66.

[8] *People v. Lovedorial*, 349 SCRA 402 (2001).

[9] TSN, 5 November 1991, pp. 9-12.

[10] *People v. Lovedorial*, *supra*, p. 416.

[11] *People v. Delim*, 396 SCRA 386 (2003).

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