

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
BUENAVENTURA TIMBANG (ALIAS BEN TIMBANG), MARCELINO
MALLARI (ALIAS STAR TINANG), CORNELIO ESTACIO (ALIAS DELIO),
AND M...**

G.R. No. 48326. August 06, 1943

Ponente: MORAN, J.

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MORAN, J.:

In the afternoon of July 31, 1940, certain socialists of Pampanga, in a meeting held in the house of one Francisco Miranda in sitio Malatumbaga, barrio San Agustin, Magalang, Pampanga, conspired and agreed to kill the deceased Jose Dizon. The criminal roposal was suggested by appellant Maximo Roque, a socialist leader of that barrio, to which all those present, and among them were the other appellants, Buenaventura Timbang (alias Ben Timbang), Marcelino Mallari (alias Star Tinang), and Cornelio Estacio (alias Delio), signified their assent, except Severino Borja, Juan Parungao and Francisco Miranda. The conspiracy was motivated by a three-fold purpose: to inspire terror in the wealthy class of Pampanga, the chosen victim being himself a person of some competence and standing in his community; to take possession of Dizon's gun which he usually carried with him, and make use of it in the elections which were then coming near; and to avenge the wrong which the deceased had supposedly been doing others by killing their carabaos, as in fact on one occasion he had shot the carabao of one Jose Santos. These facts appear from the testimony of Francisco Miranda.

And so it happened that in the same afternoon, Jose Dizon, as if to keep an appointment with Fate, left for his farm in sitio Malutu of the same barrio and, as was his custom, he rested for the night in the house of one Cayetana Galang. But even before his arrival, Maximo Roque had already gone there to inquire from her if Dizon had arrived and departed. Early in the morning of the next day Dizon, in the company of Cayetana Galang and her two daughters Susana Dimla and Petronila Dimla who were going the same way to Balitucan to have their palay threshed, proceeded to his farm. He rode on his carabao and the three women were ahead on foot. On their way they were joined by Dionisio Castro, a lunatic, who was riding on a carabao. Dizon was then wearing his gold wrist watch and had with him his nickel-plated, .38 caliber revolver in a holster. The party followed a trail about three meters wide, flanked on both sides by thick cogon grass and bushes, and as they were passing in front of an alibang-bang tree, a shot was heard and smoke came from the bushes on the left side of the trail about three or four meters away from Dizon. Shortly thereafter, another shot was heard from the same direction, but, this time, about two meters farther from the place where the first shot was heard, and almost simultaneously Dizon fell from the carabao on which he was riding. The three women took coyer behind the bushes on the left side of the trail and there they saw appellants Cornelio Estacio and Buenaventura Timbang with firearms, emerging from their place of ambush and looking from one direction to another. Estacio fired at the three women but failed to hit his mark. Immediately thereafter, he with Timbang approached the fallen body of Dizon, and the women, taking advantage of the opportunity, surreptitiously ran away from their hiding place and, crying for help, repaired to the house of one Albino Gozon. Upon their return to the scene of the crime they found Dizon dead and his gun

missing. These are substantially the facts testified to by the three women, Cayetana Galang, Susana Dimla, and Petronila Dimla.

Juan Paruñgao testified that in the same fatal morning he went to the store of Maximo Roque to buy some cigarettes and on his way home and at a distance of about thirty meters from Roque's store, he saw the three appellants Estacio, Mallari and Timbang standing by a guava tree; that upon his inquiry as to what they were doing, they told him that they were fixing their guns; that aware of their conspiracy to kill Dizon, he advised them to desist from the plan, but the three appellants, said that they were in great need of Dizon's firearm; that he proceeded to the woods to observe them, and when the three appellants arrived at the place of the crime, he saw Timbang fire at the direction where Dizon and his company were passing; that Mallari fired next and he (the declarant) saw Dizon fall dead from the carabao he was riding on; and that, terror-stricken, he ran away.

Fernando Hizon declared that he was in a forest called Sabatan in the same morning in search of lumber, and that while he was there he heard three shots followed by screams of women crying for help; that shortly thereafter he saw appellants Estacio, Mallari and Timbang walking fast as if they were afraid of something; that Timbang was then carrying a sack stained with blood and containing a gun; that Estacio approached him and told him that one Faustino was firing at them; that he was warned by them not to reveal what he had seen; and that not long before Estacio told him in confidence that they had a plan to kill Jose Dizon, and shortly thereafter Dizon was killed.

Faustino Borja, Dizon's overseer, testified that while he was taking breakfast in the morning of August 1, 1940, he heard three shots, two in brief succession and after a short while, the third; that shortly thereafter Dionisio Castro came running to him saying that Dizon had been shot dead in front of the alibang-bang tree; that he took the revolver, caliber .45, which Jose Dizon had entrusted him and rushed to the place of the crime where he found Dizon dead; that while he was viewing Dizon's body, he heard a rustling of leaves, and upon turning his eyes to the bushes he saw appellants Estacio and Timbang and two others unknown to him; that he fired at them until his gun jammed; and thereafter he repaired to the house of one Patricio David from where he telephoned the chief of police of Magalang to inform him of the crime.

Francisco Miranda in turn testified that upon his arrival home from San Fernando in the late afternoon of August 1, 1940, appellants Timbang, Estacio and Mallari informed him that Dizon was killed; that according to them Timbang's and Estacio's shots did not hit their mark but Mallari's third shot did; and that Mallari showed him the wrist watch and revolver which he took from the deceased.

Dr. Miguel P. Morales testified that Jose Dizon died from his wounds caused by shotguns.

Appellants were, on the strength of the foregoing facts, found guilty by the trial court of the crime of murder qualified by premeditation with the aggravating circumstance of treachery compensated by the mitigating circumstance of lack of education and instruction, and were sentenced each to reclusion perpetua and to pay jointly and severally the heirs of the deceased an indemnity of P2,000. All of them interposed the instant appeal.

We are convinced, after a careful review of the evidence, that appellants were rightly convicted of the crime charged. The defense of alibi interposed by each and every appellant hardly merits any consideration at all. Considering that such defense is so easily manufactured; that here it was put forth not by appellants themselves but by witnesses bound to them by ties of consanguinity and affinity, as in the case of appellant Roque, and of friendship, as in the case of the others; that no convincing, corroborative evidence has been adduced; that, on the other hand, in some instances, it was rebutted by unimpeachable evidence as to the case of the alibi put forth by appellants Estacio and Mallari; we cannot, by any means, allow it to prevail over the clear and positive proof as to the identification of the accused and their participation in the commission of the offense. And, as the trial court has significantly observed: "Not a single witness of the defense had testified on the motive remote or proximate,

of the witnesses of the state in testifying against the accused and in implicating them in the perpetration of so serious a crime as that of murder."

Appellants sought to impugn the veracity of the accusation. It is claimed that as the complaint was filed on November 29, 1940, or about four months after the commission of the crime, the integrity of the charge becomes open to serious doubts. The delay which generally authorizes such an unfavorable inference is one which it, not otherwise satisfactorily explained. In the instant case, the assistant provincial fiscal of Pampanga declared that the first information was filed in the justice of the peace court on September 26, 1940, or twenty-six days after the commission of the offense, but as one only of the accused was then under arrest and the evidence in possession of the prosecution was not sufficient to warrant conviction, a temporary dismissal of the case was sought. From the date of the dismissal of the first information until the filing of the next, hardly a month had elapsed and, as again explained by the prosecution, such time was necessary to gather and coordinate its evidence. There was, therefore, no delay and if ever there was, it was necessarily incidental to the right, indeed the duty, of the prosecution to defer the commencement of the action until the evidence at its disposal would, in its opinion, insure conviction; not the kind of delay which exhibits circumstances of manufacture or fabrication of evidence.

Appellants sought also to cast doubt on the credibility of the witnesses for the prosecution for their failure to reveal promptly to the authorities their knowledge of the crime. The reasons therefor are too evident to be ignored. Witnesses Miranda and Parungao were members of the socialist party to which all the accused were affiliated. Fear of vengeance, accentuated by the excitement occasioned by the tragedy, has powerfully weighed upon their minds. As a matter of fact, duress was brought to bear on Parungao by two socialist members to execute a second affidavit wherein he repudiated his first. And witness Fernando Hizon, another socialist, positively testified that he had been threatened with death by appellants Estacio and Mallari. Witness Faustino Borja likewise declared that he was afraid to reveal what he then knew to the authorities because "there were many socialistas, and I, being a member, was afraid to reveal anything." On the other hand, the Galangs, although nothing is shown as to their affiliation with the socialist party, must, by reason of their sex and spiritual relation with the deceased (who was compadre to Cayetana Galang), have been laboring under a like fear. They were fired at by appellant Estacio on the occasion of the tragedy. To weak hearts, no warning can be more impressive. In fact, the Galangs had to move from their home in sitio Balas to barrio Buensuceso on the night of the killing for fear that they too might be killed. Finally, aside from these considerations, it is of common knowledge that with the rank and file of our masses, specially among barrio people, civic courage in the way of prompt proffer of assistance in the disclosure of authors of killing is still wanting, their attitude being one of fear from adverse quarters. We have no doubt that this psychology has contributed to silence for some time the lips of these witnesses.

Appellants, relying on the provision of Rule 123, section 12, sought to assail the admissibility of the testimonies of Francisco Miranda and Juan Parungao to prove conspiracy. In *Gardiner vs. Magsalin* (40 Off. Gaz., 2471), we held that the provision of said rule constitutes one of the exceptions to the *res inter alios* rule. Explaining the provision, we said:

"* * * It refers to an extrajudicial declaration of a conspirator—not to his testimony by way of direct evidence. For illustration, let us suppose that after the formation but before the consummation of the alleged conspiracy between Catalino Fernandez and his five coaccused, the former borrowed a bolo from a friend, stating that he and his co-accused were going to kill Gaudencio Vitar. Such act and declaration of Fernandez could not be given in evidence against his coaccused unless the conspiracy be proven first. The testimony of Fernandez's friend to the effect that Fernandez borrowed his bolo and told him that he (Fernandez) and his coaccused were going to kill Gaudencio Vitar would be admissible against Fernandez, but not against his coaccused unless the conspiracy between them be proven first. It is admissible against Fernandez because the act, declaration, or omission of a party as to a relevant fact may be given in evidence against him (section 6, Rule 123). But,

without proof of conspiracy, it is not admissible against Fernandez's coaccused because the act and declaration of Fernandez are res inter alias as to his coaccused and, therefore, cannot affect them. But if there is conspiracy each conspirator is privy to the acts of the others; the act of one conspirator is the act of all coconspirators."

The testimony, therefore, of Francisco Miranda and Juan Paruñgao as to the conspiracy is admissible even if the fact of their being conspirators has not previously been shown.

There might, indeed, be contradictions between the testimony of some of the witnesses for the prosecution and their affidavits executed prior to the trial of this case, but such contradictions do not materially impair the intrinsic veracity said witnesses and have, besides, been satisfactorily explained. The infirmity of affidavits, as species of evidence, is also much a matter of judicial experience. As a prominent author said:

"We have too much experience of the great infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the court is not his; it is, and must be, the language of the person who prepares the affidavit; and it may be, and too often is, the expression of that persons erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies, into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the court as his." (2 Moore on Facts, sec. 952, P. 1105.)

There is no ground for appellant's contention that the prosecution failed to prove the motive for the crime. This we have elsewhere shown. On the other hand, even if it be conceded that no motive was proven, it is settled law that a judgment of conviction may be maintained, even in a capital case, where the commission by the accused of the crime is proved beyond reasonable doubt.

As to appellant Maximo Roque, proof of his being a conspirator (he was the mastermind of, the conspiracy) even without evidence of assistance in the material execution of the crime, places him on a like liability with its actual participants. The or each conspirator is the act of all. Judgment is affirmed, with costs against appellants.

Yulo, C. J., Ozaeta, Lopez Vito, and Imperial, JJ., concur.

DISSENTING

PARAS, J.,

I entertain doubt as to the guilt of the appellants.

In the first place, I do not believe that of a meeting was ever held in the house of Francisco Miranda, at which, according to the decision, the plot to kill Jose Dizon was concocted. The evidence for the prosecution shows that at the alleged meeting Cornelio Estacio, Buenaventura Timbang, Maximo Roque, Marcelo Tuazon Faustino Aguilar, Paulino Gutierrez, Serafin Pangan, Severino Borja, Marcelino Mallari, and Juan Parungao were present; that it was presided over by Maximo Roque; that the proposition to kill Jose Dizon was strongly objected to by witness Juan Paruñgao, and that the meeting was held on the night of July 31, 1940. However, Paruñgao himself testified that it was in the afternoon when he went to the house of Francisco Miranda) and that before reaching it he was informed by some of those who attended that the meeting had already adjourned. In this connection, it should be remembered that, as testified to by defense witness Magno Hicban, corroborated by Alejandra Ramos, and admitted by Francisco Miranda (owner of the house), the latter had a case in the Court of First Instance of Pampanga which was to be tried at eight o'clock in the morning of the next day (August 1, 1940). Miranda's house

is in the barrio of Balud, about eleven kilometers from the poblacion of Magalang, Pampanga, from which Miranda had to take the bus in going to San Fernando, Pampanga. From Balud, it was necessary to walk at least three or four hours to reach the poblacion of Magalang. It must have been true, as stated by Hicban, that Francisco Miranda started from that barrio at about three o'clock in the afternoon of July 31 and took his dinner in a panciteria in the poblacion of Magalang at about seven o'clock in the evening. This arrangement gave Miranda sufficient time to rest and to reach San Fernando.

In the second place, although the evidence for the prosecution shows clearly, that upon the death of Jose Dizon the accused took from his person P300 in paper bills, a nickel-plated .38 cal. revolver, and a wrist watch, and this fact should have been known beforehand to the prosecution, no allegation to that effect was included in the information. In fact the lower court found that robbery was committed, but no conviction could be made therefor in view of such failure of the prosecution.

In the third place, it should be noted that, immediately after the occurrence, investigation was conducted not only by the municipal authorities but also by Major Gaspar Baylon, Provincial Inspector of Pampanga, and Lt. Estrara. Major Baylon testified that when he asked Faustino Borja, Cayetana Galang, and the latter's two daughters, all of whom are principal witnesses for the prosecution, if they knew the authors of the crime, they answered in the negative.

In the fourth place, a witness stated that the motive of the plot was to avenge the practice of the deceased of killing carabaos belonging to other persons, although he later testified that only one carabao had been killed by the deceased. According to another witness the purpose for getting rid of Jose Dizon, a rich man, was to terrorize the wealthy people. Still another witness testified that the object was to get the pistol of the deceased so as to be used during the then coming electoral campaign. By reason of this conflict as to the motive of the malefactors, I am constrained to doubt the veracity of the witnesses for the prosecution, I do not even believe that the deceased, in going to his farm, would carry along money amounting to P300. There is more probability in the theory of the defense that the real cause of the shooting of Jose Dizon was an incident that occurred the night before, namely, that while Dizon was in the house of his co-madre Cayetana Galang, who had two young daughters named Susana and Petronila Dimla,—it was his practice to pass the night in that house before proceeding to his farm,—a group of serenaders was driven away from the house at the instance of the deceased.

In the fifth place, the complaint against the appellants was filed on November 29, 1940. The crime was committed on August 1, 1940. The case was investigated on the same day and the people in the vicinity where the occurrence took place were investigated, including the women companions of the deceased on his way to the farm. On September 26, 1940, or a few weeks thereafter, a complaint for robbery with homicide was filed against some of the accused in the Court of First Instance of Pampanga, but the same was dismissed upon the fiscal's motion on the ground that there was no sufficient evidence for their conviction. It seems paradoxical that policeman Wenceslao Guzman of the municipality of Magalang, by merely paying visits to the principal witnesses for the prosecution in their respective houses and through friendly conversations with them, could have succeeded in making these people testify as they did in this case, after such dismissal and after all previous investigations.

Lastly, Juan Paruñgao, a star witness for the prosecution, is the same person who, in a sworn statement made before the clerk of court, voluntarily admitted that he was asked to sign an affidavit by certain agents of the authority and that the contents thereof were wholly untrue, because as a matter of fact he did not know a thing about the commission of the crime

In view of the foregoing reasons, I vote for the acquittal of the appellants.

BOCOBO, J.:

I concur in the above dissenting opinion.

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