

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. LUIS B. TORING, DIOSDADO BERDON AND CARMELO B. BERDIN, ACCUSED-APPELLANTS.

G.R. No. 56358. October 26, 1990

Ponente: FERNAN, C.J.

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FERNAN, C.J.:

The appellants herein seek the reversal of the October 28, 1980 decision of the Circuit Criminal Court in Cebu City in Criminal Case No. CCC-XIV-2170 the dispositive portion of which reads:

"WHEREFORE, the Court finds the accused Luis B. Toring guilty beyond reasonable doubt of the crime of MURDER by direct participation as principal; Diosdado Berdon as accomplice thereto; and Carmelo Berdin as accessory after the fact.

Appreciating in favor of the accused Luis B. Toring the mitigating circumstance of voluntary surrender, the said circumstance having been offset by the aggravating circumstance of nighttime, the accused Luis Toring should be, as he is, hereby sentenced to the penalty of RECLUSION PERPETUA, with the accessory penalties of law.

There being neither mitigating nor aggravating circumstances on the part of the accused Diosdado Berdon, the said accused should be as he is hereby sentenced to the indeterminate penalty of from SIX (6) YEARS of Prison Correccional, as minimum, to TWELVE (12) YEARS and ONE (1) DAY of Reclusion Temporal, as maximum, with the accessory penalties of the law.

Appreciating in favor of the accused Carmelo Berdin, the privileged mitigating circumstance of minority, the said accused being only 17 years of age, the accused Carmelo Berdin should be, as he is, sentenced to the penalty of SIX (6) MONTHS and ONE (1) DAY of Prison Correccional, with the accessory penalties of the law.

The defendants shall jointly and solidarily indemnify the heirs of the deceased Samuel Augusto for actual and compensatory damages in the sum of P15,000.00 and for moral damages in the sum of P50,000.00, without subsidiary imprisonment in case of insolvency.

The instrument of the crime, the knife, Exhibit "B", is confiscated in favor of the government.

Proportionate costs."

SO ORDERED."^[1]

According to the prosecution, the antecedent facts are as follows:

In the evening of May 25, 1980, a benefit dance was held at sitio Naga, Babag II, Lapu-lapu City for the last canvassing of votes for the candidates for princesses who would reign at the sitio fiesta. As one of the candidates was the daughter of Samuel Augusto, he and the members of his family attended the affair.

Also present were members of the Kwaknit gang, a group which was noted for their bird-like way of dancing and their propensity for drunkenness and provoking trouble. Its president, called the "alas" king, was Luis Toring. The group was then outside the dancing area which was ringed by benches.

At around 10:45 p.m., Samuel's daughter was proclaimed the winner in the contest. Beer and softdrinks having been served the parents of the candidates by the officers of the Naga Chapel Association which took charge of the affair, Samuel was tipsy when, after his daughter's proclamation, he stepped out of the dancing area to answer the call of nature.

At that moment, barangay tanod Felix Berdin saw Luis Toring, Carmelo Berdin and Diosdado Berdon proceed to a dark area while whispering to each other. Diosdado Berdon handed a knife to Luis Toring,[2] who then approached Samuel from behind, held Samuel's left hand with his left hand, and with his right hand, stabbed with the knife the right side of Samuel's abdomen.[3] Upon seeing Felix running towards them, Luis Toring pulled out the knife and, together with Carmelo Berdin and Diosdado Berdon, ran towards the dark. Felix tried to chase the three but he was not able to catch them. He returned to where Samuel had slumped and helped others in taking Samuel to the hospital.

According to Maria Catalina Sorono, who was six (6) meters away from Samuel and Luis when the assault occurred, Diosdado Berdon and Carmelo Berdin were poised to deliver fist blows on Samuel just before Luis Toring stabbed him. Diosdado gave the knife to Luis Toring.[4]

As soon as she saw the stabbing of Samuel, Maria Catalina shouted for help. The three assailants ran towards the direction of the fields. Jacinto Lobas and Mario Andog responded to her shouts and brought Samuel to the Opon Emergency Hospital where he died on arrival. According to the necropsy report,[5] Samuel, who was thirty years old, died due to massive hemorrhage secondary to the stab wound on the abdomen. Said wound is described in the report as follows:

"Stab wound, with herniation of omental tissues; elliptical, 3.5 cms. long, running vertically downward, edges clean-cut, superior extremity rounded, inferior extremity sharp, located at the abdominal region, right anterior aspect, 7.5 cms. to the right of anterior median line and 107.0 cms. above right heel, directed backward, upward and medially, involving skin and the underlying soft tissues, penetrating right peritoneal cavity, incising inferior vena cava, attaining an approximate depth of 15.0 cms."

The death weapon, a kitchen knife made of stainless steel and with a red-colored handle, was recovered from the house of Luis Toring. According to Patrolman Pantaleon P. Amodia, the police found out during the investigation that Luis Toring had left the weapon with "Camilo" Berdin. When the police confronted Berdin, the latter led them to the house of Toring which Berdin entered. When he emerged from the house, Berdin handed the weapon to the police.[6]

An information for murder was filed against Toring. Subsequently, however, the information was amended to include Diosdado Berdon and Carmelo Berdin as defendants. The three were charged therein with conspiracy in killing Samuel Augusto in a treacherous manner. Berdon, it was alleged, "conveniently supplied the death weapon" which Toring used in stabbing Samuel while Berdin allegedly concealed the weapon to prevent its discovery by the police.[7] The crime was purportedly committed with the attendance of the generic aggravating circumstances of evident premeditation and nighttime.

All three accused pleaded not guilty to the offense charged. At the trial, Luis Toring, alias "Lowe," testified that he was not the president of the Kwaknit gang. He went to the benefit dance in the company of Venir Ybanez, Joel Escobia, Ely Amion, Abel Pongase, Abe Berdon, Genio Berdin and Alex Augusto. Toring and his group were standing outside the dancing area when, at around eleven o'clock in the evening, Samuel, a known tough guy

("maldito"), approached them and held Venir Ybanez by his collar. Then Samuel thrust the butt of his shotgun on the chin of Joel Escobia,[8] proceeded to another group who were also gangmates of Toring, and again, with the barrel of his shotgun, hit Eli Amion's chest several times.[9]

Reacting to what he saw, Toring got his kitchen knife which was tucked in his waist, approached Samuel from the latter's right side and stabbed him once as he did not intend to kill Samuel. Toring then ran towards the dark portion of the area and went home. There, he left the knife and proceeded to the hut by the fishpond of one Roman.[10]

Toring was sleeping in the hut with his older brother, Arsenio, when, at around 4:00 o'clock in the morning of May 26, 1980, Edgar Augusto, the younger brother of Samuel, shot them. Arsenio was hit on the left leg and he stayed two months in the hospital for the treatment of his wound.[11]

At 2:00 o'clock in the afternoon of May 26, 1980, Toring surrendered to two Philippine Constabulary soldiers.[12] They brought him to the police of Lapu-lapu City on May 28, 1980.[13] When the police asked him about the knife he used in stabbing Samuel, Toring told them to go to Carmelo Berdin because he was the only person who knew where Toring hid it.[14] Asserting that he was the one who returned the knife to his own house, Toring testified that Carmelo Berdin used to see him hide his weapons upstairs because Berdin was a frequent visitor of his.[15]

For his part, Carmelo, a 5-feet tall, asthmatic 17-year-old whom the court described as "lilliputian," admitted that he witnessed the stabbing incident but he ran away with his group immediately after because he was afraid he might be shot by Samuel. He was with Toring when the latter hid the still bloodied knife under a trunk in Toring's house. He was familiar with the hiding place of the knife because Toring showed it to him and there were times when he would get the knife there upon Toring's request. Carmelo corroborated Toring's testimony that on that fateful night, Toring carried the knife tucked at the back of his waistline.[16]

In court, Toring testified that he never saw Diosdado at the dance.[17] However, in his sworn statement dated May 28, 1980 and marked as Exhibit D, Toring stated that he took the knife from Diosdado to stab Samuel. Confronted with said statement, Diosda-do said that when he asked Toring why he implicated him, Toring allegedly replied that he "included" Diosdado because of the case the barangay brigade had filed against Toring.[18]

According to Diosdado, he did not attend the May 25 dance because of the trouble which erupted during the dance the night before. He did not have anything to do with the stabbing of Samuel. He admitted, however, that a week after the incident, his family went to barrio Andaliw, Ronda, Cebu, for their yearly visit to his father-in-law. He stayed there for fifteen days and would have stayed longer had not his mother informed him of the subpoena addressed to him.[19]

On October 28, 1980, a day after the last date of hearing, the lower court[20] rendered a decision discrediting Toring's claim that the killing of Samuel was justified because it was done in defense of a stranger pursuant to Article 11 (3) of the Revised Penal Code. The lower court found that Toring was the "aggressor acting in retaliation or revenge by reason of a running feud or long-standing grudge" between the Kwaknit gang and the group of Samuel, who, being the son of the barangay captain, was a "power to be reckoned with." It mentioned the fact that a year before the incident in question, Toring was shot by Edgar Augusto (Samuel's brother) and hence, in his desire to avenge himself, Toring "needed but a little excuse to do away with the object of his hatred." [21]

The lower court could not believe that Samuel brought along his shotgun to the dance because he was "not

reputed to be a public official or functionary entitled to possess a firearm." Otherwise, the police and the barangay tanod would have arrested him. The court surmised that if Samuel really carried a shotgun, he certainly must have had a permit or license to possess the same.

It noted that while Toring testified that Samuel was aiming his shotgun at the chest of Ely Amyon (Amion), prosecution witness Joel Escobia claimed that he was at the receiving end of Samuel's thrusts with the butt of his shotgun. To the court, such discrepancy is fatal to the defense because in appreciating the justifying circumstance of defense of a stranger, the court must know "with definiteness the identity of the stranger defended by the accused." [22]

The lower court, however, ruled out the existence of conspiracy among the three accused on the ground that there was no proof on what they were whispering about when Felix saw them. Accordingly, it held that the accused have individual or separate liabilities for the killing of Samuel: Toring, as a principal, Diosdado Berdon as an accomplice by his act of giving Toring the knife, and Carmelo Berdin as an accessory for concealing the weapon. It considered treachery as the qualifying circumstance to the killing, found no proof as to the allegation of evident premeditation but appreciated nighttime as an aggravating circumstance. It meted the accused the penalties mentioned above.

All three accused appealed.

Toring seeks his exoneration by contending that his assault on Samuel was justified because he acted in defense of his first cousin, Joel Escobia. Article 11 (3) of the Revised Penal Code provides that no criminal liability is incurred by anyone "who acts in defense of x x x his relatives x x x by consanguinity within the fourth civil degree, provided that the first and second requisites prescribed in the next preceding circumstance are present, and the further requisite, in case the provocation was given by the person attacked, that the one making defense had no part therein." The first and second requisites referred to are enumerated in paragraph (1) in the same article on self-defense as: (a) unlawful aggression, and (b) lack of sufficient provocation on the part of the person defending himself.

Joel Escobia, whose chin was hit with the butt of Samuel's shotgun, is the first cousin of Toring their fathers being brothers [23] although no explanation appears on record why they have different surnames. At any rate, this allegation on relationship was not rebutted by the prosecution.

The appreciation of the justifying circumstance of defense of a relative, however, hinges in this case on the presence of unlawful aggression on the part of the victim. Corollarily, the claim of Toring that Samuel was, at the time of the assault, carrying a shotgun to intimidate Toring's group must be proven.

Understandably, no prosecution witness attested that they saw Samuel with a firearm. The prosecution even recalled to the witness stand Samuel's widow who asserted that her husband did not own any firearm. [24] Going along with the prosecution's evidence, the lower court arrived at the rather gratuitous conjecture that Samuel could not have had a shotgun with him because no one without a permit would carry a firearm without risking arrest by the police or the barangay tanod. At the same time, however, the lower court described Samuel as the son of the barangay captain who "had the run of the place and had his compelling presence felt by all and sundry." [25]

While matters dealing with the credibility of witnesses and appreciation of evidence are primarily the lower court's province, this Court has the power to determine whether in the performance of its functions, the lower court overlooked certain matters which may have a substantial effect in the resolution of a case. [26] Defense witness Joel Escobia was, besides Toring, the only witness whose sworn statement was taken by the police on May 26, 1980, the day after the fatal assault on Samuel.

In his sworn statement,[27] Escobia attested that as he was about to dance with a girl, Samuel stopped him, pointed his shotgun at him, took a bullet from his jacket pocket, showed it to Escobia and asked him, "Do you like this, Dong?" to which Escobia replied, "No, Noy, I do not like that." Samuel then placed the bullet in the shotgun and was thus pointing it at Escobia when Toring came from behind Samuel and stabbed the latter. Even on cross-examination at the trial, Escobia did not depart from his statement. In fact he added that Samuel pointed the shotgun at his chin and told him to eat the bullet.[28]

There is no reason to doubt Joel Escobia's assertion of Samuel's unlawful aggression inasmuch as his sworn statement[29] and testimony in court had not been successfully discredited by the prosecution which also failed to prove that Joel had reason to prevaricate to favor Toring.

The presence of unlawful aggression on the part of the victim and the lack of proof of provocation on the part of Toring notwithstanding, full credence cannot be given to Toring's claim of defense of a relative. Toring himself admitted in court[30] as well as in his sworn statement[31] that in 1979, he was shot with a .22 caliber revolver by Edgar Augusto, Samuel's brother. It cannot be said, therefore, that in attacking Samuel, Toring was impelled by pure compassion or beneficence or the lawful desire to avenge the immediate wrong inflicted on his cousin. Rather, he was motivated by revenge, resentment or evil motive[32] because of a "running feud" between the Augusto and the Toring brothers. As the defense itself claims, after the incident subject of the instance case occurred, Toring's brother, Arsenio, was shot on the leg by Edgar Augusto. Indeed, vendetta appears to have driven both camps to commit unlawful acts against each other. Hence, under the circumstances, to justify Toring's act of assaulting Samuel Augusto would give free rein to lawlessness.

The lower court correctly considered the killing as murder in view of the presence of the qualifying circumstance of treachery. The suddenness of the assault rendered Samuel helpless even to use his shotgun. We also agree with the lower court that conspiracy and evident premeditation were not proven beyond reasonable doubt. Moreover, nighttime cannot be considered as an aggravating circumstance. There is no proof that it was purposely sought to insure the commission of the crime or prevent its discovery.[33] However, Toring should be credited with the privileged mitigating circumstance of incomplete defense of relative and the generic mitigating circumstance of voluntary surrender.

The penalty for murder under Article 248 of the Revised Penal Code being reclusion temporal maximum to death, the imposable penalty is prision mayor maximum to reclusion temporal medium in view of the presence of the mitigating circumstances of incomplete defense of relative and voluntary surrender (Art. 64 [5]). Applying the Indeterminate Sentence Law, the proper penalty to be meted on Toring is prision correccional maximum as minimum to prision mayor maximum as maximum penalty.

On the culpability of Diosdado Berdon, the Court holds that his defense of alibi cannot be sustained in the absence of proof that it was physically impossible for him to be at the scene of the crime when it was committed.[34] His house was only a kilometer away from the place where he supplied the knife to Toring.[35] That distance does not preclude the possibility that Diosdado aided Toring in the perpetration of the crime as it could be negotiated in just a few minutes by merely walking.[36] Moreover, his alibi was uncorroborated as it was founded only on his own testimony and what appears as a self-exonerating affidavit.[37]

But what pins culpability on Diosdado were the testimonies of at least two prosecution witnesses who positively identified him as the one who gave Toring the knife. Motive, therefore, has become immaterial in the face of such positive identification[38] and hence, even if it were true that he was not a member of the Kwaknit gang, his participation in the killing has been proven beyond reasonable doubt. Add to this is the fact that Toring himself in his sworn statement before the police pointed to him as the source of the knife.[39] Verily, Toring could not have

implicated him because of the incomprehensible reason that a case had been filed against Toring before the barangay brigade.

Pursuant to Article 52 of the Revised Penal Code, as an accomplice by his previous act of supplying Toring the death weapon, Diosdado Berdon should be meted the penalty of prision mayor maximum to reclusion temporal medium which is the penalty next lower in degree to reclusion temporal maximum to death, the penalty prescribed for murder by Article 248 (Article 6 [3]). There being no mitigating or aggravating circumstances, the penalty should be in its medium period or reclusion temporal minimum (Article 64 [1]). Applying the Indeterminate Sentence Law, the minimum penalty should be taken from prision mayor minimum while the maximum penalty should be within the period of reclusion temporal minimum.

With regards to Carmelo Berdin, his culpability as an accessory to the murder has not been proven beyond reasonable doubt. The fact that he knew where Toring hid the knife does not imply that he concealed it to prevent its discovery (Article 19 [2]). There simply is no proof to that effect. On the contrary, Luis Toring in his sworn statement and testimony during the trial testified that after stabbing the victim, he ran away and went to his house to hide the murder weapon. Being a close friend of Toring and a frequent visitor to the latter's house, it is not impossible for Carmelo Berdin to know where Toring hid his knives. Significantly, Carmelo readily acceded to the request of police officers to lead them to the place where Toring kept the knife. He willingly retrieved it and surrendered it to the police, a behavior we find inconsistent with guilt.

WHEREFORE, the decision of the lower court is hereby affirmed insofar as it convicts Luis Toring as principal in the murder of Samuel Augusto and Diosdado Berdon as an accomplice thereto.

The lower court's decision is modified as follows:

- (a) Luis Toring shall be imposed the indeterminate penalty of six (6) years of prision correccional maximum as minimum to twelve (12) years of prision mayor maximum as maximum;
- (b) Diosdado Berdon shall suffer the indeterminate penalty of six (6) years and one (1) day of prision mayor minimum as minimum to twelve (12) years and one (1) day of reclusion temporal minimum as maximum;
- (c) Carmelo Berdin is acquitted as an accessory to the murder of Samuel Augusto, and
- (d) Luis Toring and Diosdado Berdon shall jointly and severally pay the heirs of Samuel Augusto an indemnity of thirty thousand pesos (P30,000.00). Costs against appellants Toring and Berdon.

SO ORDERED.

Gutierrez, Jr., and Bidin, JJ., concur.
Feliciano, J., on leave.

[1] Rollo, pp. 24-25.

[2] TSN, September 23, 1980, p. 30.

[3] TSN, supra, pp. 37-38.

[4] TSN, October 14, 1980, pp. 35-37.

[5] Exhibit E.

[6] TSN, October 15, 1980, pp. 23-24.

- [7] Rollo, pp. 8-9.
- [8] TSN, October 22, 1980, pp. 23-24.
- [9] TSN, supra, pp. 31-32.
- [10] TSN, supra, pp. 33-39.
- [11] TSN, supra, pp. 68-70.
- [12] TSN, supra, pp. 41-42.
- [13] TSN, October 13, 1980, p. 7.
- [14] TSN, October 22, 1980, pp. 42-43.
- [15] TSN, supra, pp. 79-81.
- [16] TSN, October 24, 1980, pp. 19-20; 24-25.
- [17] TSN, October 22, 1980, p. 93.
- [18] TSN, October 24, 1980, pp. 7-8.
- [19] TSN, October 24, 1980, pp. 5-6.
- [20] Presided by Judge Regino Hermosisima, Jr.
- [21] Decision, pp. 11-12.
- [22] Decision, p. 13.
- [23] TSN, October 23, 1980, p. 32.
- [24] TSN, October 27, 1980, p. 15.
- [25] Decision, p. 4.
- [26] People vs. Ligon, G.R. No. 74041, July 29, 1987, 152 SCRA 419, 426.
- [27] Exhibit G or Exhibit 2-Toring and Exhibit 3-Berdon and Berdin.
- [28] TSN, October 23, 1980, p. 35.
- [29] Exhibit G.
- [30] TSN, October 22, 1980, pp. 74-75.
- [31] Exhibit C.
- [32] See: People vs. Punzalan, G.R. No. 54562, August 6, 1987, 153 SCRA 1, 12.
- [33] People vs. Beltran, L-38049, July 15, 1985, 137 SCRA 508.
- [34] People vs. Renejane, G.R. Nos. 76954-55, February 26, 1988, 158 SCRA 258, 268.
- [35] TSN, October 24, 1980, p. 9.
- [36] People vs. Santillan, G.R. No. 68331, January 29, 1988, 157 SCRA 534, 539.
- [37] Exhibit 4.

[38] People vs. Anquillano, G.R. No. 72318, April 30, 1987, 149 SCRA 442.

[39] Exhibit D.

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