

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. FLOREMAR RETUBADO, ACCUSED-APPELLANT.

G.R. No. 58585. June 20, 1988

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

The accused-appellant was charged with the crime of parricide in an information filed on July 1, 1981, with the Circuit Criminal Court,[1] XIV Judicial District, which reads:

"That on or about the 8th day of January, 1981, at 1:00 o'clock in the afternoon, more or less, at Barangay Sambag, Somosa, Municipality of Tabogon, Province of Cebu, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent to kill, did then and there wilfully, unlawfully and feloniously attack and assault with the use of fistic blows his five (5) month old child, named Raul R. Retubado, inflicting upon said child several injuries in different parts of his body which caused his instantaneous death.

"CONTRARY TO LAW." (Page 1, Original Record)

Upon being arraigned on July 9, 1981, accused entered a plea of not guilty. After trial on the merits, the court a quo rendered a decision on August 13, 1981, convicting the accused of the offense charged, the dispositive portion of which reads:

"WHEREFORE, the Court finds the accused Floremar Retubado guilty beyond reasonable doubt of the crime of PARRICIDE defined and penalized under Article 246 of the Revised Penal Code. The aggravating circumstances of treachery, abuse of superior strength, relationship and disregard of tender age having been proven, the said circumstances not having been offset by any mitigating circumstance, the accused should be, as he is hereby sentenced to suffer the extreme penalty of DEATH, with the accessory penalties of the law; to indemnify the heirs of the deceased baby, Raul Retubado, in the sum of P-12,000.00, and to pay the costs.

"SO ORDERED." (Page 48, Original Record) The case is now before Us on appeal. The following facts appear from the record:

The accused-appellant, Floremar Retubado, and his wife, Arcadia Retubado, were legally married and had two children. The younger child was Raul who was born on August 8, 1980. The couple resided in a small hut built on a farm land owned by Nicanora Codeniera and located at Sambag, Somosa, Municipality of Tabogon, Province of Cebu. Vicentica Robleca, mother of Arcadia, was the tenant of the farm land. Inside the hut was a hammock made of an empty fertilizer sack with both its ends tied with ropes. The hammock was made to hang a few feet above the floor of the hut.

On January 8, 1981, Vicentica and Nicanora harvested corn from the farm land. After the harvest was finished at around 1:00 o'clock in the afternoon of the same day, Vicentica called her son-in-law, the accused-appellant herein, who was then sleeping under the hammock and asked him to help bring Nicanora's share of the corn harvest to the road where public transportation was available. The accused refused unless he was paid P1.00 per

sack he would carry. Later, Vicentica sought the aid of her daughter, Arcadia, in placing on top of her head some bananas she wanted to bring to the road. Arcadia in turn told Vicentica to wait for a while as she would first finish breastfeeding her son, Raul.

Thereafter, Arcadia placed Raul inside the hammock preparatory to her leaving the hut in order to assist Vicentica. Raul began crying so that Arcadia tarried a bit to swing the hammock. She even asked the accused who was then squatting under the hammock, smoking and picking his teeth, to swing the hammock but the latter did not respond. Arcadia and Vicentica had barely gone out of the door of the hut when the accused immediately stood up and boxed Raul who was inside the hammock twice with his clenched fists. They immediately went to the rescue of Raul who stopped crying and became unconscious. Arcadia took Raul in her arms and asked the accused, "What did you do to the child, Bay?" to which the latter retorted, "That is the prize of a child who cries too much, (he) must be killed."¹ Afterwards, Arcadia handed Raul to Vicentica. Sensing that Raul did not regain consciousness, Vicentica asked the accused why he killed the child and the latter answered, "No one can command me, no. No one can rule me because this is my child. No one can rule me."

In the meantime, Nicanora, who was then attending to her share of the corn harvest a few meters away from the hut, rushed to the hut after hearing Arcadia's call for help and found Vicentica carrying Raul. Nicanora took Raul from her and massaged him thinking that he just fainted. After a while, Nicanora noticed that only she, the accused and the dead Raul were inside the hut as Arcadia and Vicentica left.

Having noticed the bluish discoloration on the left side of the head and behind the left ear of Raul, Nicanora asked the accused what he did to the child and the latter answered, "I boxed him inside the hammock."

Afraid that the accused might leave the hut, Nicanora told him to carry the dead child and said, "You hold him very close Mar, he might revive after feeling the heat of your chest. "Also, during the time when they were inside the hut with the dead child, Nicanora asked the accused why he killed the child and the latter retorted, "Why is it Tiya, will we be placed in jail if we (can) kill our own child?"

The accused was still holding the dead child Raul when Vicentica arrived with the chief of police of Tabogon and two policemen. Shortly thereafter, Arcadia also arrived with two PC soldiers. That same afternoon, the police officers brought the accused to the municipal building of Tabogon where he was detained. The following day, January 9, 1981, Raul was buried without first being medically examined. The police investigators took the sworn statements of Arcadia and Vicentica on January 10, 1981. The accused also gave his sworn statement to the police on January 12, 1981. The sworn statement of Nicanora was taken on January 14, 1981.

On June 22, 1981, Raul's body was exhumed and autopsied by Dr. Tomas Refe, NBICEVRO Senior Medico-Legal Officer, who issued a report stating his findings, as follows:

"POSTMORTEM FINDINGS

"Body, in advanced stage of postmortem decomposition.

Skin, and underlying soft tissues of the abdomen, both sides and anterior aspect, both thighs, mummified; all the rest of the tissues are almost gone,

Skeletal remains with bits of adherent markedly putrefied reddish soft tissue material.

Bone articulations are already separated by decomposition.

Fracture, parietal bone, skull, left side.

Heart, lungs, liver and other visceral organs, markedly autolyzed.

Brain, liquefied, reduced to grayish-white pultaceous mass, and admixed with clotted and liquid blood.

CAUSE OF DEATH: Skull fracture, traumatic."

The accused-appellant assigned three errors committed by the court a quo, as follows:

I

IN CONVICTING APPELLANT OF PARRICIDE WITHOUT TAKING DUE REGARD OF HIS TESTIMONY THAT HE WAS SLEEPING AT THE TIME OF THE ALLEGED COMMISSION OF THE CRIME, WITHOUT TAKING DUE REGARD OF THE FACT THAT THE MOST DAMAGING TESTIMONY AGAINST HIM WAS VAGUE, INCONSISTENT, AND OF THE FACT AS WELL THAT THE PROSECUTION WITNESSES WERE BIASED.

II

IN NOT TAKING DUE REGARD OF THE TEMPORARY INSANITY OR ABSENCE OF DISCERNMENT OF APPELLANT, ASSUMING HIS CLAIM TO BEING ASLEEP WAS WEAK.

III

STILL ASSUMING THAT HIS CLAIM TO BEING ASLEEP WAS WEAK, THE COURT STILL ERRED IN NOT APPRECIATING IN APPELLANT'S FAVOR THE MITIGATING CIRCUMSTANCES OF VOLUNTARY SURRENDER AND LACK OF INTENT TO COMMIT SO GRAVE AN OFFENSE, AS WELL AS IN NOT FINDING THAT NO AGGRAVATING CIRCUMSTANCE IN FACT WAS PROVEN, NOR DO THEY EXIST." (Page 35, Rollo)

Being closely interrelated, we shall discuss the first and second assignments of error together.

The accused's defense that he was asleep at the time of the death of the child is untenable. The prosecution witnesses, namely, Arcadia Retubado, Vicentica Robleca and Nicanora Codeniera, categorically and positively declared that they actually saw the accused deliver the fistic blows on the child who was inside the hammock and/or the resulting injuries inflicted on the latter. The severity of the blows delivered was confirmed by the findings of the NBI Medico-Legal expert, Dr. Tomas Refe, that the cause of the child's death was "skull fracture, traumatic" and who testified in open court that such injury could have been caused by "a fistic blow applied with tremendous force."

Not to be disregarded were the admissions made by the accused immediately after the commission of the offense which all tend to show that he was wide awake and in full possession of his normal senses when he killed his child. First, immediately after Arcadia went to assist the child, she asked the accused why he boxed the latter. The accused replied angrily that death is the prize for a child who cried too much. Second, when his mother-in-law asked him the same question, the accused told her not to intervene and order him around because the child is his. And third, he admitted to Nicanora Codeniera that he boxed his child while inside the hammock. He even inquired from Nicanora whether a person may be imprisoned for killing his own child. Despite all these incriminating statements, the accused did not bother to refute them while testifying in his defense. The most he did was to make a bare denial of the testimony of Nicanora to the effect that he did not admit having boxed his child while inside the hammock.

The violent nature of the accused was also satisfactorily proven. Clear evidence was adduced to show that he also broke the arm of his other child, Floremar Retubado, Jr., when the latter would not stop crying. He even made this child drink vinegar and fed him with hot pepper.

Claiming that he was sleeping at the time his child, Raul, died, the accused surmises that the latter may have died due to colic, or by holding his breath. As aptly observed by the court a quo this is a mere conjecture. Besides, there is clear evidence showing that the child was healthy and never suffered from this disease before.

The accused assails the court a quo for giving the testimony of Arcadia greater weight than his denial. He points out that this witness could not have seen the actual delivery of the first blow because at that precise moment she was then on her way down the stairs with her back towards the hammock. However, this was satisfactorily explained by the witness who said that immediately prior to the delivery of the first blow, she looked back at the accused who told her to go ahead. Besides, it is also clear that the hut where the incident took place was small and its stairs had only two steps so that Arcadia could not have missed seeing what the accused actually did.

The accused also assails the prosecution witnesses for being biased and prejudiced against him. The only evidence adduced by him in support of this claim is his testimony that his mother-in-law was always against his marriage with her daughter and even wanted that they live separately. Assuming that this contention is true, there is nothing in the records showing that the mother-in-law is that wicked to impute to her son-in-law the killing of his own child for the sole purpose of seeing him ultimately separated from her daughter. Likewise, his allegation that his wife's testimony is biased has no factual basis. On the contrary, the accused testified that he did not know of any ulterior motive why his wife testified against him. as he had no quarrel or misunderstanding with his wife immediately preceding the incident. The same holds true with Nicanora Codeniera. No proof whatsoever was adduced to prove that this witness had some motive to falsely testify against the accused. Consequently, in the absence of credible evidence to support the charge of bias and prejudice, it is presumed that the prosecution witnesses would not have imputed to the appellant the crime of which he was charged unless he was guilty thereof (People vs. Ali, L-18512, October 30. 1969[^] 29 SCRA 756).

Lastly, the accused asserts that the court a quo erred in not giving him the benefit of the exempting circumstances of temporary insanity or total absence of discernment assuming, arguendo, that he was awake when he killed his child since no motive at all was shown on his part to commit the crime charged. This claim is also untenable. As correctly pointed out by the Solicitor General, the accused did not invoke said defense during the trial, much less present evidence in support thereof. His defense then was that he was asleep during the incident and surmised that the baby may have died of colic, or simply held his breath.

The third assignment of error is likewise devoid of merit. The fact alone that the accused did not escape after killing his child but remained inside the hut where the crime was committed cannot be considered voluntary surrender to the authorities. The police officers arrived at the scene of the crime not upon his behest but because they were called by his wife, Arcadia, and his mother-in-law, Vicentica. Moreover, when questioned by the police regarding the circumstances surrounding the death of his child, the accused replied that he did not know anything about it as he was then asleep. In People vs. Canoy, 90 Phil. 633, this Court said:

"The court, in our opinion, erred in applying the mitigating circumstance of surrender. Canoy did not surrender himself within the meaning of Article 13, paragraph 7, of the Revised Penal Code. The Chief of Police placed Canoy under arrest in his employer's home to which that officer was summoned and brought in Broce's jeep on Juvencio Broce's initiative or request. It does not appear that it was Canoy's idea to send for the police for the purpose of giving himself up."

The accused cannot be credited with the mitigating circumstance of lack of intent to commit so grave a wrong. He ought to have known that boxing a 5-month old child twice with the full force of his clenched fists would necessarily result in great physical harm to the child or even his death. Clearly, brute force was employed by the accused. In People vs. Ku, L-13780, January 28. 1961. 1 SCRA 199. this Court said:

"x x x Since intention partakes of the nature of a mental process, an internal act, it can, as a general rule, be gathered from and determined only by the conduct and external acts of the offender, and the results of the acts themselves. It is easy enough for the accused to say that he had no intention to do great harm. But he knew the girl was very tender in age (6 years old), weak in body, helpless and defenseless. He did not only cover her mouth to silence her, but choked her. He knew or ought to have known the natural and inevitable result of the act of strangulation, committed by men of superior strength, specially on an occasion when she was resisting the onslaught upon her honor. The brute force employed by the appellant, completely contradicts his claim that he had no intention to kill the victim. (People v. Orongon, 58 Phil. 421; People v. Flores, 50 Phil. 549; People v. Reyes, 61 Phil. 341)."

The court a quo considered four aggravating circumstances as having attended the commission of the offense, namely: 1) treachery; 2) use of superior strength; 3) relationship; and 4) disregard of tender age.

Treachery attended the killing of the 5-month old Raul. In *People vs. Valerio, Jr.*, L-4116, February 25, 1982, 112SCRA 231, this Court en banc, speaking through Mme. Justice Ameurfina Melencio-Herrera, said:

"Treachery, as alleged in the Information, must be considered qualifying and must be appreciated against the accused. The killing of a child is murder even if the manner of attack was not shown. The qualifying circumstances of treachery or 'alevosia' exists in the commission of the crime of murder when an adult person illegally attacks a child of tender years and causes his death."

Clearly, there was abuse of superior strength by the accused over the defenseless child, but the same cannot be appreciated as an additional aggravating circumstance, it being absorbed in treachery. (*People vs. Layson*, L-25177, October 31, 1969, 30 SCRA 92).

The circumstance of relationship cannot be considered as it is inherent in the crime of parricide.

The circumstance of disregard of age cannot also be considered because it has neither been proved nor admitted by the accused that in committing the crime he had intended to offend or insult the age of the victim. (*People vs. Mangsant*, 65 Phil. 548). Besides, this circumstance is included in that of treachery. (*People vs. Limaro*, 88 Phil. 35, 42).

Under Article 246 of the Revised Penal Code, one guilty of parricide shall be punished by the penalty ranging from reclusion perpetua to death. In view, however, of the abolition of the death penalty in the 1987 Constitution, the proper penalty for the offense now is only reclusion perpetua.

In the instant case, the crime was committed with the attendance of one aggravating circumstance and no mitigating circumstance. Conformably with the provisions of Article 63, paragraph 1, of the Revised Penal Code, the proper penalty to be imposed on the accused is reclusion perpetua. The indemnity in the amount of Twelve Thousand Pesos (P12,000.00) ordered by the court a quo to be paid by the accused to the heirs of the deceased, Raul Retubado, is increased to Thirty Thousand Pesos (P30,000.00).

ACCORDINGLY, with the modifications above indicated, the judgment appealed from is affirmed in all respects, with costs.

Narvasa (Chairman), Cruz, Gancayco, and Griño-Aquino, JJ., concur.

[1] Presided over by the [hen Judge Regino Hermosisima, Jr.. now Associate Justice of the Sandiganbayan.

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