

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
RAFAEL DURLAO, ALIAS "BOY" DURLAO,
ACCUSED-APPELLANT.**

G.R. No. 62032. November 25, 1983

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

In Criminal Case No. L-2568 of the defunct Court of First Instance of Pangasinan, Branch I, presided by Judge Willelmo C. Fortun, RAFAEL DURLAO was accused of murder said to have been committed in the words of the information as follows:

"That on or about the 25th day of July, 1981, at barangay Portic, municipality of Bugallon, province of Pangasinan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a bolo, with intent to kill and with evident premeditation and with abuse of superior strength, did, then and there, wilfully, unlawfully, and feloniously attack, assault, and hack Alfredo "Boy" Fernandez, thereby inflicting upon the latter mortal wounds which caused his death." (Expediente, p. 29.)

In his decision Judge Fortun said:

"The wounds inflicted on the victim (13 incised wounds, on the lips, jaw, carotid artery, cheek, shoulder, etc.) shows a determined intention to kill. The killing is murder as the victim, Alfredo Fernandez, was hacked from behind, in a sudden, unexpected, and, therefore, treacherous manner. The aggravating circumstances of evident premeditation and abuse of superior strength were not proved by the prosecution. The aggravating circumstance of night time is absorbed by treachery and cannot, therefore, be considered as attendant. No mitigating circumstance was proved by the defense." (Expediente, pp. 63-64.)

Conformably to his finding, Judge Fortun sentenced Durlao as follows:

"WHEREFORE, the Court finds the accused, RAFAEL DURLAO, alias "Raft Durlao" GUILTY beyond reasonable doubt of the crime of murder, and, pursuant to law, hereby sentences him to suffer the medium penalty of reclusion perpetua (life imprisonment), to indemnify the heirs of the victim, Alfredo "Boy" Fernandez, in the amount of P12,000.00, with-out subsidiary imprisonment in case of insolvency, and to pay the costs, less the preventive period of his imprisonment." (Expediente, p. 64.)

Durlao appealed and now claims that the trial court committed the following errors:

I. THE TRIAL COURT ERRED IN NOT CONSIDERING THE SIGNIFICANCE AND IMPORT OF THE AUTOPSY REPORT AND TESTIMONY OF DR. ARMANDO V. CANTO THE RURAL HEALTH PHYSICIAN OF BUGALLON, PANGASINAN.

II. THE TRIAL COURT ERRED IN NOT CONSIDERING THERE WAS NO POSITIVE IDENTIFICATION OF THE ACCUSED RAFAEL DURLAO WHO ALLEGEDLY HACKED THE VICTIM ALFREDO "BOY" FERNANDEZ.

III. THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED RAFAEL DURLAO BASED ON THE UNCORROBORATED WEAK AND INSUFFICIENT TESTIMONY OF PRUDENCIO AYAP; WHEREAS, THE EVIDENCE OF ACCUSED-APPELLANT IS CLEAR AND CONVINCING AS TO PRECLUDE HIS PRESENCE AT THE TIME OF THE ALLEGED HACKING INCIDENT.

IV. THE TRIAL COURT ERRED IN OVER LOOKING TO CONSIDER THE ABUNDANT EVIDENCE ON RECORD THAT WILL UNMASK THE REAL PERPETRATORS OF THE CRIME AGAINST THE VICTIM." (Brief, pp. a-b.)

The People's version of the facts is as follows:

"Alfredo 'Boy' Fernandez was on his way home at around 7:00 o'clock in the evening of July 25, 1981 after paying a visit to the spouses Prudencio Ayap and his wife, Angelina de Vera. A few minutes after he left, Prudencio went to the kitchen to close the window shutters. While doing so, he saw Alfredo walking towards the bridge fronting his house which was only 30 meters away; he was obviously unaware that someone who was holding a bolo, followed closely behind him. Prudencio immediately recognized him to be Rafael 'Rafy' Dumlao. He and his family had known him since he was a small boy and since his house was situated about 80 meters away from Prudencio's house at Barangay Portic, Bugallon, Pangasinan and some-times they even saw each other twice a week because of the proximity of their houses (Tsn, May 11, 1982, pp. 35- 36; Tsn, May 26, 1982, p. 6). All of a sudden as Alfredo was nearing the foot of the bridge, Prudencio saw accused hack him at the back (Tsn, May 12, 1982, p. 15) with his 16 inch-bolo (Tsn, May 11, 1982, p. 43). Prudencio saw accused hack him twice with his bolo although he did not know how many times thereafter he might have hacked him (Tsn, May 11, 1982, p. 40) because he had by then rushed downstairs to call for his son who was under the house (Tsn, May 26, 1982, p. 10). Realizing that Alfredo's life might be in danger, they hurried towards the bridge; it did not take them three minutes to reach a distance of from 12 to 15 meters from the bridge. Rafael was by then on the other side of the creek but Alfredo 'Boy' was nowhere in sight (Tsn, p. 10, id). Brandishing his bolo, Rafael threatened them thus: 'If you will reveal what happened to any-one, I will kill both of you.' (Tsn, May 11, 1982, p. 41; Tsn, May 12, 1982, p. 5). Fearing for their lives, they ran towards their house. They remained there only for the night because the next day, without reporting the matter to the police because of the acts of the accused, they went up to the mountains to get rattan. It was only three days later that they came down; they found out that Alfredo 'Boy' was dead (Tsn, May 12, 1982, p. 9). A total of 13 wounds were found on his body (Tsn, May 11, 1982, p. 6).

An autopsy conducted by Dr. Armando Canto, the rural health physician of Bugallon, Pangasinan on July 26, 1981 revealed the following findings (Exh. A):

‘AUTOPSY REPORT

Cadaver of ALFREDO FERNANDEZ, 26 years old, male, married, from Umanday, Bugallon, Pangasinan.

Findings:

1. Incise wd. nose to upper lip, 3 inches long
2. Incise wd. 2-1/2 inches long lower jaw, left
3. Incise wd. 2-1/2 inches lower jaw 1/2 inch from wd. No. 2, left
4. Incise wd. 6 inches long neck left cutting the carotid artery and the jugular vein
5. Incise wd. 2-1/2 inches long upper lip, left
6. Incise wd. 2 inches long, cheek left
7. Incise wd. 3-1/2 inches long, left cheek to ear

8. Incise wd. 2-1/2 inches long tem-poral, left
9. Incise wd. 1-1/2 inches long supra-orbital, left
10. Incise wd. 3 inches long frent--temporal, left
11. Incise wd. 1-1/2 inches long frontal
12. Incise wd. 1-1/2 inches long shoulder left
13. Incise wd. 4 inches long scapular, left (Decision, p. VI-VII)

According to him, the wounds could have only been inflicted by a sharp bladed weapon such as a bolo (Tsn, May 11, 1982, pp. 11-19).

Investigation would reveal that the accused nurtured a grudge against the victim for the latter's refusal to join his gangmates in stealing cows (Tsn, May 26, 1982, pp. 42-43). Earlier on June 26, 1981, while the victim, Jose Viliran and his com-panions were constructing a shade for his sister's wedding, accused sent his brother-in-law, Inciong, to call Alfredo because he wanted to tell him some-thing (Tsn, May 26, 1982, p. 32). When Alfredo ignored Dumlao's command, he sent another person to call him but the victim stood pat on his decision. Failing to get Alfredo to come to him, accused himself went up to their construction place and asked him to explain his refusal to heed him. Fired with anger, accused called him 'arrogant' (Tsn, p. 34, id) and made Alfredo understand that he can never forget the incident. Upon Viliran's intervention, a possible en-counter failed to materialize. Accused left the place but came back 15 minutes later. He followed the workers who were going up the house and brought along his bolo. He challenged Alfredo anew and when the latter refused, he took hold of his hair and knocked his head against the wall (Tsn, p. 35, id). When Alfredo would not budge and instead pleaded with him to stop hurting him, accused grabbed Alfredo's right hand and punched the latter's face with it (Tsn, id, p. 36). Failing to elicit a favorable response to his challenge, he shifted his concentration on Viliran and challenged him instead but the latter refused. Definitely enraged, he went down-stairs and said 'I will never forget this incident' (Tsn, May 26, 1982, p. 37). Alfredo might have had a pre-sentiment about what will later on befall him because when accused had left, he told Viliran that should he die other than by natural death, the accused will be the one responsible for it (Tsn, id).

It was only five months later, when Prudencio and Albino found out that Rafael had taken residence in another barrio, Barrio Cayanga, that they were able to summon enough courage to give their statements about the incident. On the 21st of December, 1981, Prudencio gave his statement (Exh. C) before PC Sgt. Graciano G. Aquino (Tsn, May 27, 1982, p. 24) and Albino Ayap gave a similar statement (Exh. D) on December 23, 1981. Immediately after, Prudencio likewise transferred his house to a land owned by his wife (Tsn, May 12, 1982, p. 15). In fact, when photo-graphs of the situs of the crime were taken on June 19, 1982, a year had passed since the incident took place and Prudencio's house no longer stood in the place." (Brief, pp. 3-7.)

The appeal raises two questions, namely: whether or not Dumlao killed Alfredo Fernandez and, if he did, should the crime be denomi-nated as murder or homicide only.

Anent the first question, Prudencio Ayap and his son, Albino, positively identified the appellant as the one who hacked Alfredo with a bolo. The trial court believed the testimony of the father and his son and We see no reason to disturb the finding for it was able to observe the demeanor of the witnesses. It is to be noted that the appellant was well-known to the witnesses. The appellant and the witnesses not only lived in the same barrio but they were also neighbors.

It is true that the Ayaps did not report the incident until late in December 1981 or only after the lapse of five months from July 25, 1981. The reason for the delay is well explained by the threat of the accused who said, "If you reveal what happened to anyone, I will kill both of you." (TSN, May 11, 1982, p. 41.) But when the Ayaps

made the report, the appellant had changed his residence to another barrio.

Dumlao interposed the defense of alibi. He said that on July 25, 1981, he resided in Bo. Portic, Bugallon, Pangasinan, but on that day he was in Bo. Cayanga, about 2 kilometers away, with Jorge Espiritu. He helped Espiritu to plant rice from 8:00 A.M. to 5:00 P.M. then ate his supper and slept at Espiritu's house until the next day when he went home.

Dumlao's claim that he was elsewhere when Fernandez was killed cannot be taken seriously for the following reasons:

1. He was positively identified by the Ayaps as the killer of Fernandez and he has not satisfactorily shown any reason why the Ayaps would perjure themselves.
2. The barrio where he was supposed to be is not so far that it was not physically impossible for him to have gone to the scene of the crime.

The remaining question is whether the appellant committed the crime of murder or homicide only.

The information alleges the qualifying circumstances of evident premeditation and superiority. We agree with the trial court that the record does not support these allegations. The trial court, however, still convicted Dumlao of murder because, to use its words, "the victim Alfredo Fernandez, was hacked from behind, in a sudden, unexpected, and, therefore, treacherous manner."

Assuming for the sake of argument that treachery was present when Dumlao killed Fernandez, it cannot qualify the crime as murder. For treachery is not alleged in the information as a qualifying circumstance and it is well-settled that, "A qualifying circumstance not alleged in the information or complaint, although proven, may only be considered as an aggravating circumstance, but not to qualify the offense charged." (People vs. Navarro, L-20860, Nov. 28, 1964, 12 SCRA 530, 537.)

Under the circumstances, Dumlao can be convicted of homicide only with treachery as a possible generic aggravating circumstance.

The first assignment of error attempts to negate the presence of treachery. Thus it is asserted:

"x x x that all the 13 wounds were inflicted on the left side of the body (tsn-pp. 20-21, May 11, 1982); that if the assailant is a right handed man, all of the wounds were inflicted in a frontal attack (tsn-p. 27, May 11, 1982); but if he is a left handed man, the wounds would be on the right side of the body (tsn-pp. 27-28, May 11, 1982; xxx." (Brief, p. 23.)

And it is further asserted:

"Evidently the foregoing declaration of Prudencio Ayap [that Alfredo Fernandez was hacked at the back] is false because Dr. Armando Canto testified that all the 13 wounds were inflicted on the left side of the body (tsn-pp. 20-21, May 11, 1982); that if the assailant is a right-handed man, all the wounds were inflicted in a frontal attack (tsn-p. 27, May 11, 1982); but if he is a left-handed man, the wounds would be on the right side of the body (tsn-pp. 27-28, May 11, 1982); Now, the conclusion is inescapable that the assailant must have been a right-handed man because all the 13 wounds were inflicted on the left side of the body; and that said wounds were inflicted in a frontal attack, according to Dr. Canto in his testimony." (Brief, pp. 25-26.)

The most that can be said of Dr. Canto's testimony is that it was based on mere supposition. It cannot prevail over the testimony of an eye-witness. And the possibility that Dumlao used his left hand in hacking Fernandez from behind cannot be discounted.

The crime committed by the appellant is homicide aggravated by treachery.

WHEREFORE, the judgment of the court a quo is hereby modified; the appellant is adjudged guilty of homicide and sentenced to an indeterminate penalty of six (6) years and one (1) day of prision mayor as minimum to eighteen (18) years of reclusion temporal as maximum, to indemnify the heirs of the deceased in the amount of P12,000.00, and to pay the costs.

SO ORDERED.

Concepcion, Jr., Guerrero, De Castro, and Escolin, JJ., concur.

Makasiar, J., (Chairman), joins J. Aquino's concurrence.

Aquino, J., concur but vote for ten years and one day of prision mayor as minimum penalty.

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