

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. AGAPITO MOLATO, ACCUSED-APPELLANT.

G.R. No. 66634. February 27, 1989

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

This is an appeal brought by the accused-appellant Agapito Molato who was originally charged with murder together with Tepdulo Balero in an information which reads:

"That on or about the 13[th] day of January, 1983, at around 11:30 o'clock in the evening at Bgy. Old Rizal, municipality of Catarman, province of Northern Samar, Philippines, and within the jurisdiction of this Honorable Court, the abovenamed accused armed with bolos, conspiring together, confederating with and mutually helping one another, with intent to kill, evident premeditation and treachery and with abuse of superior strength, did then and there wilfully, unlawfully and feloniously attack, assault and stab one Avelina Cabales with said weapons, which the herein accused had conveniently provided themselves for the purpose, thereby inflicting upon the letter mortal wounds on different parts of his body which directly caused his death.

CONTRARY TO LAW." (p. 4 Rollo)

Upon arraignment on April 22, 1983, both the accused pleaded not guilty. However, on May 12, 1983, Teodulo Balero withdrew his earlier plea of not guilty and substituted it with a plea of guilty to the lesser offense of homicide and was sentenced accordingly. The case against Agapito Molato was heard on the merits. The trial court rendered its decision, the dispositive portion of which reads:

"WHEREFORE, the Court finds the accused GUILTY beyond reasonable doubt of MURDER, appreciating the aggravating circumstance of Recidivism, the qualifying aggravating circumstance of evident premeditation and the generic aggravating circumstance of acting advantage of superior strength, without any mitigating circumstance, sentences accused Agapito Molato of the extreme penalty of Death and to pay the heirs of Avelino Cavales P6,000.00, 1/2 of P12,000.00 without subsidiary imprisonment in case of insolvency. The entire period of the preventive imprisonment suffered by the accused is credited in full, with costs against the accused." (p. 16, Rollo)

The evidence an record shows the following:

"Ursula Cabales, testified that on the evening of January 13, 1983 at about 9:00 o'clock she was in their house at Bgy. Old Rizal, Catarman, Northern Samar (p. 3, tsn, May 26, 1983). While her husband was on his way home just before he was able to go up their house he called her up but at the same somebody from outside also called for him. So she opened the door and saw her husband walking towards the street fronting their house. She found out that the person who called up her husband was Agapito Molato saying 'Pare Belen please come here.' She recognized Agapito Molato when he beamed his flashlight on her husband. Her husband likewise beamed his flashlight at Agapito Molato (pp. 4-5, tsn, id.). She also saw Teddy Balalero who stood close to Agapito Molato. When her husband approached the two, Agapito Molato slashed his immediately many times. Teddy Balero likewise slashed her husband many times (p. 5, tsn, id.). Teddy Balero hit the flashlight of her

husband, so she could not see anymore what was going on. The flashlight was marked as Exhibit "A". She brought the flashlight to the Municipal Building as an exhibit (p. 6, tsn, id.). At the time of the incident she was only about 4 meters away (p. 9, tsn, id.). After clashing her husband who fell to the ground dead, both accused ran away. She doesn't know of any grudges between her husband and both accused. After the two accused ran away, she asked for help from her neighbors one of them is Salustiana Tagros (pp. 8-9, tsn, id.).

"Salustiana Tagros testified that she lives in Brg. Old Rizal, near the house of two victim. While she was lying down at about 9:00 o'clock in the evening, she heard the barking of the dog so she opened her window to find out what it was all about. She heard Avelino Cabales calling for his wife (p. 10, tsn, id.). She likewise noticed that somebody beamed a flashlight on the victim and the latter also beamed his flashlight to the persons across the street who earlier beamed the light on him. She was therefore able to recognize the two across the street as Teddy Balero and Agapito Molato. Agapito Molato called Avelino Cabales and so he went across the street. Then she closed her window. Shortly, she heard the shout of Ursula Cabales, wife of Avelino, shouting for help (pp. 11-12, tsn, id.). She immediately opened the window and asked Ursula Cabales what it was all about, She informed her that her husband was slashed. Because it was dark, she let someone in her house light a petromax and she let her son bring the petromax to the place where Avelino Cabales lay dead (p. 12, tsn, id.).

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"On rebuttal, the prosecution presented Hospicio Avestruz, who testified that on the evening of the Incident he met Ursula Cabales, his comadre and came to know that Avelino Cabales was killed. So he went to the scene of the incident and new Avelino Cabales lying down dead. He found a flashlight and a thumbnail, the nail as Exhibit "B" (p. 25, tsn, July 13, 1983). The nail was found close to the body of the dead person. He gave the thumb nail to the police investigator Corporal Cesario Ada. The thumb nail belonged to Agapito Molato and he saw the latter, Agapito's thumb bandaged. He identified as Exhibit "C" a certification of the excerpts of the police blotter on January 14, 1983, 12:55 A.M. of the Catarman Police Station, Exhibit "C", No. 3, entry at 1:40 A.M. discloses that accused Agapito Molato complained in person to the police that he was struck by Avelino Cabales at the night thumb at Barangay Old Rizal. He was put in jail for safekeeping and as a suspect of the killer of Avelino Cabales (p. 20, tsn, id.)."

"Dr. Hernando Cometa, the Provincial Health Officer of Northern Samar, who conducted the autopsy on the cadaver of the deceased Avelino Cabales, testified that the victim suffered sixteen (16) wound (Exhibit "A") and that the second one was the most fatal; that it was possible that only one weapon was used in inflicting the 16 wounds; that it was also possible that there was only one assailant who inflicted the 16 wounds (pp. 6-7, tsn, June 21, 1983)." (pp. 88-90, Rollo)

The accused-appellant now raises the following assignment of errors:

I

"THAT THE TRIAL COURT GRAVELY ERRED IN GIVING FULL CREDENCE TO THE TESTIMONY OF THE PROSECUTION'S WITNESS URSULA CASALES WHICH IS HIGHLY INCREDIBLE, INCONSISTENT, DOUBTFUL, UNNATURAL AND UNRELIABLE.

II

THAT THE TRIAL COURT ERRED IN NOT GIVING CREDENCE TO THE DEFENSE INTERPOSED BY THE (ACCUSED-APPELLANT).

III

THAT THE TRIAL COURT GRAVELY ERRED IN APPRECIATING THE QUALIFYING CIRCUMSTANCE OF EVIDENT PREMEDITATION AND THE GENERIC AGGRAVATING CIRCUMSTANCE OF TAKING ADVANTAGE OF SUPERIOR STRENGTH.

IV

THAT THE TRIAL COURT GRAVELY ERRED IN APPRECIATING CIRCUMSTANCE OF RECIDIVISM AGAINST ACCUSED-APPELLANT." (p. 1, Accused-Appellant's Brief)

The accused, in his first assignment of error assails the testimony of Ursula Cabales as incredible, inconsistent, doubtful, unnatural and unreliable.

We find the appellant's claim without merit.

There is no reason to doubt the widow's testimony as she was able to positively identify the assailant as the accused through the flashlight that her husband beamed at the appellant even as the latter flashed his light at the victim. The place was illuminated by the flashlights of the two so that it is not impossible for the widow to recognize the appellant and his companion from a mere distance of four (4) meters nor for the, other witness to identify the two assailants. There is likewise no motive on her part to falsely testify against the accused, the latter being their. "compadre." This Court has consistently ruled that where the issue is credibility of witnesses, the appellate court will generally not disturb the findings of the trial court. (People v. Ramos, 94 SCRA 842, December 27, 1979). There is no reason shown in this, appeal as to why the factual findings of the trial court should be disregarded.

Alibi, the main defense of the appellant according to the trial court, is likewise untenable as there is no showing of physical impossibility for the appellant to be at the place of the crime.

Actually, the defense of Molato was not an alibi stating he was elsewhere but an admission of his presence and an explanation of what he was doing here. He claims to have been in his house near the scene of the crime. The accused was positively identified and the thumbnail found at the scene of the crime was established to have belonged to him. The appellant actually admitted that he was at the scene of the crime. He testified on his complaint to the police on January 14, 1983 at 12:55 a.m., that he was struck by the deceased on his right thumb and his nail was removed. The thumbnail was later discovered by prosecution witness Avestruz at the scene of the crime thus establishing his presence there.

The report given by the accused to the police regarding his having been struck by the victim thus causing the removal of his thumbnail is likewise directly contradictory to his testimony that the thumbnail was removed on the occasion of the struggle between him and Teodulo Balero when he was trying to prevent the latter from confronting Cabales while they were in his house. Moreover, the thumbnail was found near the body of the deceased together; with the latter's flashlight, not in the appellant's house.

The accused-appellant further argues that, the qualifying circumstances of evident, premeditation and taking advantage of superior strength should not be appreciated against him.

We agree with the appellant that evident premeditation should not be considered in the case at Bar as it was not clearly established. Teddy Balero stated that at 9:00 o'clock that same evening, Cabales struck him with a piece of wood. So he went home to get a bolo. The widow Cabales testified that her husband was killed at about 9:00 p.m. The interval of time from the determination to commit the crime up to the actual commission of the crime is so short that the assailants had no time to meditate and to reflect. The events happened spontaneously such that it cannot be said that the appellant was able to deliberate on the possible consequences of their action. He was only helping his brother-in-law avenge a wrong which was inflicted shortly before.

As held in People v. Fernandez (154 SCRA 30 [1987]) citing People v. Jardiniano (103 SCRA 530 [1981]) and People v. Guiapar (129 SCRA 539 [1984]) to properly appreciate evident premeditation, it is necessary to establish proof, as clear as the evidence of the crime itself, about -- (1) the time when the offender determined to

commit the crime; (2) an act manifestly indicating that the culprit had clung to his determination; and (3) a sufficient lapse of time between the determination and the execution to allow him to reflect. x x x. The element of sufficient lapse of time between the determination and the execution of the criminal act to afford the culprits full opportunity for calm reflection on the consequences of the crime was not established in this case.

We, however, agree with the Solicitor General that abuse of superior strength was present in the commission of the crime. However, it is deemed absorbed in the qualifying circumstance of treachery. Abuse of superior strength is not a separate and distinct aggravating circumstance of treachery (*People v. Tajon*, 128 SCRA 656 [1984]).

In the case before us, the victim was unarmed and completely unaware that death awaited him when called by the assailants. This element of surprise coupled with the excessive force used by the accused and his companion which was out of proportion to the means of the defense available to the deceased, proves the existence of treachery.

In a number of cases, it has been held that there is treachery in a sudden and unexpected attack which renders the victim unable to defend himself by reason of the suddenness and severity of the attack (*People v. Carzano*, 95 SCRA 146 C19803; *People v. Beltran*, 137 SCRA 508 [1985]; and *People v. Escoltero*, 139 SCRA 218 [1985] cited in *People v. Fernandez*, supra. Thus, there can be no doubt that treachery attended the crime.

On the other hand, we agree with the defense that recidivism cannot be appreciated against the accused. To appreciate recidivism, it is necessary to allege it in the information (*People v. Hermosilla*, 122 SCRA 905 [1983]). Absence of this allegation bars the trial court from allowing presentation of evidence regarding the matter (*People v. Tieng Pay*, 42 Phil. 212 [1922]).

All things considered, the, crime committed is murder, the killing being qualified by treachery.

The judgment of conviction imposed by the lower court is affirmed but the penalty will have to be modified in view of the abolition of the death penalty in the 1987 Constitution.

This Court has since February 2, 1987, complied with this constitutional change abolishing the death penalty. The penalty then for murder as held in the cases of *People v. Gavarra*, 155 SCRA 327 [1987]; *People v. Masangkay*, 155 SCRA 113. [1988]; *People v. Atencio*, 156 SCRA 242 [1987], *People v. Lopez*, 157 SCRA 304 [1988]; *People v. Melgar*, 157 SCRA 718 [1988]; and *People v. Inteno*, G.R. No. 69934, September 26, 1988 was reclusion temporal in its maximum period to reclusion perpetua. However, after reflecting on the question of penalties in the light of new prospectives, this Court, in the case of *People v. Munoz*, Millora, Tayaba and Mislang, G.R. Nos. L-38968-70, February 9, 1989 held:

"xxx we hereby reverse the current doctrine providing for three new periods for the penalty for murder as reduced by the Constitution. Instead, we return to our original interpretation and hold that Article III, Section 19(1) does not change the periods of the penalty prescribed by Article 248 of the Revised Penal Code except only insofar as it prohibits the imposition of the death penalty and reduce it to reclusion perpetua. The range of the medium and minimum penalties remains unchanged."

WHEREFORE, the judgment appealed from is hereby AFFIRMED except for a MODIFICATION of the PENALTY. The accused-appellant Agapito Molato is sentenced to suffer the penalty of reclusion perpetua; to pay indemnity to the heirs of AVELINO CABALES in the amount of THIRTY THOUSAND (P30,000.00) PESOS and to pay the costs.

SO ORDERED.

Fernan, C. J. (Chairman), Feliciano, Bidin, and Cortes, JJ., concur.

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