

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JESUS ACOSTA ALIAS “JERRY,” ACCUSED-APPELLANT.*G.R. No. 70133. July 02, 1990*

Ponente: CRUZ, J.

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On April 28, 1980, at about seven o'clock in the evening, Rafael Villavicencio, Jr. was shot to death at the Travel Lodge Restaurant in Lucena City by a person who managed to escape in the ensuing confusion. Two months later, Jesus Acosta was identified as the killer by three witnesses and charged with murder before the regional trial court of that city. Convicted after trial in a decision penned by Judge Manuel A. Patron,[1] the accused-appellant is now on appeal before this Court.

His appeal is based mainly on the insufficiency of the evidence of the prosecution identifying him as the person who shot Villavicencio. He also reiterates his defense of alibi which he claims was improperly rejected by the trial court.

The principal witness of the prosecution was Freddie Osmillo, a waiter of the said restaurant, who declared that he served the accused-appellant shortly before the killing. He testified that Acosta arrived at the restaurant at about five o'clock in the afternoon and asked for a beer, which he immediately brought him. Acosta was carrying a paper bag. At that time there was no other customer in the place, but when Acosta asked for a second bottle of beer, there were already around ten other customers. These left after a while. At about 6:40 p.m. Villavicencio arrived with Mayor Ramon Vera Cruz of Unisan, Quezon, and his secretary, Jose Tolentino, and they sat at a table about five meters from the accused-appellant. By this time Acosta had already ordered his third bottle of beer, also served by Osmillo. A brown-out then occurred and on Villavicencio's order (he was the manager of the restaurant), Osmillo lit a kerosene lamp and placed a lighted candle on each table. It was at this juncture that Acosta asked for his bill, paid for the beers, and left.[2]

Osmillo said that shortly thereafter, Acosta came back to the restaurant, entering through the back door, and ordered another bottle of beer from him. Osmillo went to the counter to get it but minutes later, when his back was turned, he heard a shot. He never saw Acosta again that night.[3]

Nida de Chavez-Ayado, the restaurant bookkeeper, corroborated Osmillo's testimony in practically every important detail.[4] She did not say, however, that she actually saw the accused-appellant shoot Villavicencio. For his part, Jose Tolentino said it was Acosta who approached their table during the brown-out when Villavicencio was shot from behind. Although he did not actually see the shooting, Tolentino declared he saw the accused-appellant lower the gun he was carrying and step backwards to flee through the back door.[5]

Two other witnesses for the prosecution testified on the possible motive for the killing.[6] They suggested that it might have been a dispute over a cockpit bet and rivalry in the jueteng business and that Acosta had acted as a hired gunman.

For his part, Acosta declared that he was at the time of the killing nowhere near the restaurant, being then in Atimonan, Quezon, an hour's ride away by public transportation.[7] He was supported by his friend, M/Sgt. Gabriel de Guzman, who testified that he met the accused-appellant in Atimonan at one o'clock in the afternoon of April 28, 1980, and the two of them had attended a court hearing in Macalelon, Quezon, the following day.[8]

The identification of the offender is crucial in every criminal prosecution where the defense pleads alibi. Unless the identity of the culprit is established beyond reasonable doubt, the charge against the accused must be dismissed on the ground that the constitutional presumption of innocence has not been overcome.

In its brief, the defense contends that the identification of the accused-appellant as Villavicencio's killer had not been sufficiently proved, being based merely on unlawful suggestions made by the investigating authorities. These suggestions unduly influenced the witnesses into pointing to the accused-appellant.

The only lead the investigators had of the killer was that he was about five feet tall and lean, as described by Osmillo. Proceeding on this information, they asked the three prosecution witnesses to take a look at Jesus Acosta, who was then being detained in Camp Nakar, and see if he was the person who had shot Villavicencio. At the time he was identified by Osmillo and Ayado, Acosta was alone in his detention cell.[9] There was no one else beside him with whom he might be compared by the two onlookers. The argument of the defense is that as there was no police line-up, Acosta's identification was a manipulated conclusion.

In the case of Tolentino, there was admittedly a police line-up when he was asked to identify the accused-appellant, but this reaction was practically suggested if not actually induced by the investigators. Earlier he had been shown a picture of Acosta which had not been mixed with other pictures so as to give him a choice.[10] At the police line-up, Acosta was wearing the same shirt he wore in the picture.[11] Moreover, he was the shortest person in the line-up, which should have been confined to persons of the same height and build as he, to prevent improper suggestiveness.[12] All this was deliberately designed to insure Acosta's identification as the killer.

It is clear that the manner in which all three witnesses were asked to identify the accused-appellant was less than objective. It impaired the trustworthiness of their identification insofar as it was elicited only by that questionable procedure.

In *U.S. v. Wade*, [13] the U.S. Supreme Court observed through Justice Brennan:

What facts have been disclosed in specific cases about the conduct of pre-trial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:

In a Canadian case ... the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over.

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.

In the case of *People v. Cruz*,^[14] a robbery with homicide was committed by a band of persons wearing masks (which allegedly fell off the face of the accused) in a house that was either completely dark or adequately lighted, depending on the conflicting versions of the two witnesses. These witnesses were later made to identify the accused-appellant in the following manner:

That very same afternoon, Angeles Cruz was picked up in front of a moviehouse and brought to the police station for questioning. He was made to walk and turn around in the presence of Zenaida and Emma. Cruz was not placed in a police lineup, contrary to standard stationhouse verification procedure, to test the accuracy of the witnesses' memory, and to afford a mere suspect a fair chance of early relief from the inconvenience inflicted on one who is mistakenly identified. Moreover, Zenaida and Emma testified that the several accused, including Cruz, were pointed out to them as the persons suspected by the police as the perpetrators of the robbery committed in Goso-on, and as notorious "tough guys" in Butuan City. The identification at the police station was attended, as the two girls themselves admitted, by a great deal of whispered conversations as well as by at least one unexplained conference elsewhere in the municipal building, at which they were present, immediately prior to their being confronted with the accused.

In rejecting the identification made by the two witnesses, Justice Fred Ruiz Castro said for the Court:

The manner by which Emma and Zenaida were made to identify the accused at the police station was pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted their reliability as eyewitnesses. This unusual, coarse and highly singular method of identification, which revolts against the accepted principles of scientific crime detection, alienates the esteem of every just man, and commands neither our respect nor acceptance.

Apart from the above considerations, we agree that the testimony of Tolentino suffers from the added defect that by his own admission he saw Acosta only for a few seconds and in fact did not pay much attention to him before the shooting.^[15] It is no less significant that after the shooting, not only was it dark because of the brown-out but there was already a great deal of alarm and confusion that could easily have beclouded his remembrance of the incident and its principal protagonists. As for Ayado, it is not really believable that she could have followed Osmillo's every movement during the period covered by his own testimony, as she would also have been attending to her own duties at that time as bookkeeper of the restaurant. The Court discerns in her declaration a palpable effort to corroborate every detail of Osmillo's testimony that renders her own testimony suspect.

But the testimony of Osmillo is another matter.

We do not think it is flawed by the irregular manner in which he and Ayado were made to identify Acosta at Camp Nakar, as such identification was not really necessary in his case. We agree that in the case of Ayado and Tolentino, there was improper suggestiveness exerted on them to induce them to believe that Acosta was the same person they had seen two months earlier when Villavicencio was killed. In our view, however, that suggestiveness did not induce or impair Osmillo's own identification, which was made on a different basis.

Osmillo's identification was not based on his own observation of Acosta in his detention cell at Camp Nakar, but on his previous experience with the accused-appellant on the day of the killing. The incident at Camp Nakar only seconded his earlier identification of Acosta on April 28, 1980, before Villavicencio was shot in the neck by the lone gunman.

Osmillo testified that Acosta arrived at the restaurant at five o'clock in the afternoon and left at about twenty to seven. He was the waiter who served Acosta three bottles of beer during that period of more than one-and-a-half hours and it was he who met Acosta again when, after paying his bill and leaving through the main door, he re-entered through the back door of the restaurant and ordered another bottle of beer from Osmillo. He did not see Acosta for only a few seconds, as Tolentino did, or from a distance, like Ayado. They talked to each other for at

least five times, the first three when Acosta placed his successive orders of beer, the fourth when he asked for his chit and paid it, and the fifth when he returned and ordered another beer. During that period, he saw Acosta long enough to retain recollection of him after the incident even without the necessity of his going to Camp Nakar to take a look at the accused-appellant.

That identification at Camp Nakar merely affirmed his earlier impressions of Acosta that he had acquired during the time he served him at the Travel Lodge Restaurant. In other words, when Osmillo went to Camp Nakar, he was not identifying Acosta for the first time at the prodding of the authorities. Osmillo merely recognized Acosta then.

On the basis of this conclusion, we find that there is sufficient evidence to establish the identity of the accused-appellant as the person who killed Villavicencio. The identification made by Ayado and Tolentino must be, as it is hereby, rejected. Even so, the testimony alone of Osmillo, who had a long enough time to retain his recollections of that tragic afternoon, including the physical description of Acosta, who was his customer, justifies the accused-appellant's conviction.

The defense of alibi is less than persuasive and must also be dismissed. The testimony of de Guzman is hardly believable and does not deserve much comment. Even the distance between Atimonan and Lucena City is against the accused-appellant, who could easily have come from Atimonan, assuming he was really there on that date, committed the crime in Lucena City, and thereafter gone back to join his friend in Atimonan that same night or the following morning. Moreover, we have held in a long line of decisions that alibi is unavailing against the positive identification of the culprit,^[16] which has been clearly and unmistakably established in the case at bar.

The killing was qualified by alevosia, the murderer having shot the victim from behind without warning. Evident premeditation not having been proved and there being no mitigating circumstances, the penalty of reclusion perpetua was correctly imposed, together with the civil indemnity of P30,000.00 payable to the victim's heirs, and the costs of the suit.

WHEREFORE, the challenged judgment is **AFFIRMED** and the appeal is **DISMISSED**, with costs against the accused-appellant. It is so ordered.

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

[1] Rollo, pp. 14-22.

[2] TSN, July 29, 1981, pp. 88-117.

[3] Ibid., pp. 118-125.

[4] Id., March 10, 1982, pp. 67-81.

[5] Id., February 2, 1982; pp. 37-41.

[6] Id., July 9, 1982, pp. 7-29; September 13, 1982, pp. 9-26.

[7] Id., July 17, 1984, pp. 16-24; March 5, 1984, p. 25.

[8] Id., March 5, 1984, pp. 14-22.

[9] Id., July 29, 1981, pp. 143-146.

[10] Id., February 2, 1982, pp. 118; 189; March 10, 1982, pp. 34-40.

[11] Exhibits J; F; F-2.

[12] Exhibits F; F-2.

[13] 388 U.S. 218.

[14] 32 SCRA 181.

[15] TSN, February 2, 1989, pp. 81-89, 113.

[16] *People v. Salcedo*, 122 SCRA 54; *People v. Plandez*, 132 SCRA 69; *People v. Arbois*, 138 SCRA 24; *People v. Sinaw-ay*, 138 SCRA 221; *People v. Egaras*, 163 SCRA 692.

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