

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. BENNY DY, ACCUSED-APPELLANT.*G.R. No. 74517. February 23, 1988*

Ponente: MELENCIO-HERRERA, J.

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At around midnight of 7 May 1984, death cast its shadow over Boracay Island, an internationally known tourist spot famous for its powdery white sand beach. The Island is accessible by land from Kalibo, Aklan, after a one-and-a-half hour trip. It can also be reached in twenty (20) minutes by pumpboat from Barangay Caticlan, the loading point for tourists going to the Island. Caticlan has a small airfield which can service small planes. Felled by a gunshot wound on the neck, which caused his death approximately six (6) hours later, was Christian Langel y Philippe, a Swiss tourist who was vacationing on the Island together with his sister and some friends.

The following day, 8 May 1984, the following police report was entered as Entry No. 3904 in the Police Blotter of the Malay Police Sub-station, Malay, Aklan:

"That on or about 0700H 8 May 1984, Pat. Padilla RR reported (to) this sub-station with the living body of one Beny Dy, with caliber .38 Danao made, as suspect to the shooting incident at Sitio Angol, Manoc-Manoc, Malay, Aklan, which cause(d) the untimely death of one Christian Langel Philippe, tourist, 24 years old and a Swiss nationale. Pat. Salibio rushed to the hospital at Caticlan to obtain ante-mortem but the victim died at about 0600H in the morning. Suspect Beny Dy voluntarily surrendered to the sub-station commander with his caliber 38 with serial number 33169 Smith and Wesson (US) [Exhibit 'G']."

Acting on the report, Chief of Police Tambong, also on 8 May 1984, prepared a Complaint (Exhibits "H" and "H-1") charging the Accused, Benny Dy, the owner of "Benny's Bar", situated on the Island, with the crime of "Murder With the Use of Unlicensed Firearms" (ibid., p. 2, Original Record). The Complaint was subscribed and sworn to before Judge Jaime R. Tonel of the 5th Municipal Circuit Trial Court of Buruanga, Aklan, on 17 May 1984 (Exhibit "H-2") and docketed as Criminal Case No. 1776 of that Court on the same day (Exhibit "H-3", Order, p. 4, Original Record).

The witnesses listed in that Complaint, namely, Bernadette Langel of Chatelaine Geneve, Switzerland, who is the victim's sister, and Ian Mulvey, of Essex, England, executed separate Sworn Statements giving their respective versions of the incident (Exhibits "H-4" and "H-7"). They did not take the stand, however, "for fear of reprisal" so that said Statements were correctly considered by the Trial Court as hearsay.

On 17 May 1984, Judge Tonel issued the following

"ORDER

"Having conducted the preliminary examination of this case, this Court finds probable cause that the crime as charged has been committed and that the accused may be responsible thereof.

"WHEREFORE, let the records of this case be registered in the docket. No warrant of arrest is issued for the

apprehension of the accused for the reason that he is already under police custody before the filing of the complaint. For the provisional liberty of the accused, bail is hereby fixed in the amount of Thirty Thousand Pesos (P30,000.00)." (p. 4, Original Record)

The Accused posted the required bail on 13 June 1984, which was approved by Judge Tonel on the same day. On 12 July 1984 the records of the case were forwarded to the Office of the Provincial Fiscal, Kalibo, Aklan, "for further proceedings" (Order, P. 10, Original Record)

On 27 July 1984 the Provincial Fiscal filed the Information before the Regional Trial Court of Kalibo, Aklan, charging the Accused with Murder. The case was docketed as Criminal Case No. 2001 in that Court.

After trial, the lower Court rendered judgment* on 9 December 1985 with the following decretal portion:

"WHEREFORE, judgment is hereby rendered finding the accused BENY DY y LIM guilty beyond reasonable doubt of the crime of MURDER and sentencing him to suffer the penalty of RECLUSION PERPETUA and to indemnify the heirs, for the death of the victim, in the sum of P30,000.00; actual damages of P33,243.10; moral damages of P30,000.00; exemplary damages of P30,000.00; and to pay the costs."

Hence, this appeal. The last Brief before this Court was filed on 26 February 1987 and the case was deliberated upon on 25 January 1988.

Testifying for the prosecution in the Court below, one Wilson TUMAOb, a resident in the area, and a fisherman by occupation, gave his account of the incident as follows:

"At around 12:00 midnight while inside the bar, he saw the accused Beny Dy shoot a white person, (meaning a European) who was hit on the right side of the neck (Tsn. Nov. 12, 1984, pp. 78, 80). He recognized the accused as the one who shot the white person because of the light coming from the petromax lamp which was in front of him and he was just one-and-one-half meters from the accused and about the same distance from the victim (Tsn. Nov. 12, 1984, p. 81). When he saw the accused shoot the victim, he did not hear any conversation between them (Tsn. Nov. 14, 1984, pp. 81, 82). At that precise time, there were many people of different nationalities coming in and out of the bar. He did not know anyone of them except the accused Beny Dy (Tsn. Nov. 14, 1984, p. 108). Neither did he know the helpers in the bar, nor see anyone of these customers to be residents of, or friends of his from, barrio Balusbos, Malay, where he resides.

"In the courtroom during the trial, the witness Wilson Tumaob demonstrated how the accused shot the victim.

Q. When you said you saw Benny Dy shoot the victim, can you demonstrate to the Court how he did it?

A. (As demonstrated, the victim and the accused were sitting and facing then immediately the accused stood up and shot the victim. (Tsn. Nov. 14, 1984, pp. 117, 118).

Wilson Tumaob testified that the accused was about one meter from the victim when the accused shot the latter. The table where he was sitting was parallel to the table where the victim was sitting. He was looking at the accused and the victim when he saw the accused shoot the victim, and the chair occupied by him and the chair occupied by the victim were at the same side. (Tsn. Nov. 14, 1984, pp. 119-120). After shooting the victim, the accused remained at the place where the accused was standing (Tsn. Nov. 14, 1984, p. 118).

"The victim was carried by the victim's companions to the shore and they loaded him on a pumpboat which was anchored about fifty meters from the bar. Wilson Tumaob helped in carrying the victim to the pumpboat to be brought to the hospital in Caticlan (Tsn. Nov. 12, 1984, pp. 82, 83). After the incident the eye-witness (Wilson Tumaob) went home and slept at around 1:30 in the morning of May 8, 1984. (pp. 4-5, Annex '1', Appellant's Brief)."

Additional prosecution evidence is to the effect that in the early morning after the incident, the Accused confessed orally to Pat. Rodolfo Padilla, the operator of the radio station on the Island, and voluntarily surrendered the gun he had used in shooting the victim. Pat. Padilla's testimony reads in part:

"ATTY. RESURRECCION:

Q Sometime on May 8, 1984, can you tell the Honorable Court if you have met the accused Benny Dy?

A At home after coming from the radio station, Benny Dy came to me and inquired if the Office of the Chief of Police was opened?

Q And what did you answer him when the accused asked you that?

A I answered him that the Office of the Chief of Police is opened for twenty four hours.

Q Did you ask Benny Dy why he asked you if the Office of the Chief of Police was opened?

A I inquired him why, then he answered me that he had shot a tourist." (p. 6, t.s.n., October 17, 1984.

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"ATTY. RESURRECCION:

Q When Benny Dy answered you that he shot a tourist, what did you do?

A I inquired him further if the tourist was dead but he answered me that the victim was brought to the hospital.

Q What did you do as police officer when Benny Dy told you that he shot a tourist?

A

He asked me to accompany him to the Office of the Chief of Police and I further asked him the gun he used in shooting the victim and he answered that it was still in his house.

Q When Benny Dy told you that the gun he used in shooting the tourist was in his house, what did you do?

A I advised him to get that gun and give it to me to be deposited in the Office of the Chief of Police.

Q Were you able to get that gun from the house of Benny Dy?

A Yes, sir.

Q Were you alone when you went to the house of Benny Dy to get that gun?

A I called one of the policemen to accompany me.

Q What is the name of the policeman who accompanied you?

A Pat. Manuel Casimiro.

Q Were you able to get the gun from the house of Benny Dy together with your companion Pat. Manuel Casimiro?

A Benny Dy voluntarily gave the gun to us.

Q So do we understand from you that it was Benny Dy also together with your companion Manuel Casimiro who gave or surrendered the gun to you?

"ATTY. MARIN:

Benny Dy voluntarily gave the gun to him and Pat. Casimiro.

"COURT TO THE WITNESS:

Q Where did Benny Dy give to you and Pat. Manuel Casimiro the gun that is surrendered to you?

A In their house.

"COURT:

Proceed.

"ATTY. RESURRECCION:

Q Who were the persons present in the house of Benny Dy when the gun was given to you by him?

A His houseboy called 'Tan-tan'.

Q Was this Tan-tan already adult or teen-ager?

A Teen-ager.

Q What time of May 8, 1984, did Benny Dy give to you and Pat. Manuel Casimiro the gun he gave to you?

A About 6:00 in the morning." (pp. 7-9, id.)

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Q When Benny Dy told you that he shot a tourist in his establishment, known as Benny's Bar, what else did he tell you?

A He told me that after shooting the victim he requested somebody to rush the victim to the hospital.

Q Did you ask him why he shot the victim?

A I did not.

Q You stated that the accused Benny Dy surrendered to you a gun together with Pat. Manuel Casimiro, if that gun is shown to you, will you be able to identify the same?

A Yes, sir.

Q

I am showing to you a gun in a container revolver caliber .38 and one (1) bullet exhibit against Benny Dy, which we request that this container be marked as Exhibit 'A' for the prosecution, Your Honor.

“COURT:

Mark it.

“ATTY. RESURRECCION:

Q Is this the same gun you are referring to which was surrendered by Benny Dy?

A

Yes, sir, this is the one. (Witness identifying the gun.)" (pp. 11-12, id.)

The sequence of events presented by the prosecution then discloses that

"Together with Pat. Manuel Casimiro, Pat. Padilla accompanied Beny Dy to the police headquarters at the Poblacion of Malay. At the police headquarters, Pat. Padilla gave the gun surrendered by Beny Dy to Chief of Police Ariston Tambong who in turn handed it over to police supply officer Pat. Romulo Sijano for safekeeping (pp. 13-24, 27, id)". (pp. 7-9, Appellee's Brief).

The defense version, on the other hand, professes the innocence of the Accused, denies his presence inside the bar, during the shooting, and attributes the offense to an unrecognized person. Thus:

"On May 7, 1984, Benny Dy was inside his bar. However, he remained therein for a few hours as he had a headache. He left his bar at around 9:30 or 10:00 o'clock in the evening, and went to bed in a room at the annex building behind the bar. He left his friend, Francisco Ureta known as 'Tan-tan' and his new helper, Romy, to attend and take charge of the bar.

"In that evening of May 7, 1984, there were several customers inside the bar. Some people were dancing. At about midnight, a person entered Benny's Bar and in less than two (2) minutes, an explosion was heard inside the bar. The explosion caused the customers to scream; they rushed out of the bar including the person who entered immediately before the explosion.

"The loud explosion coupled with the screaming and rushing of customers, awakened Benny Dy. He was prompted to immediately come out of his room and directly proceeded to the bar. Inside the bar, Benny saw a man lying on the sand floor with blood on his shirt.

"Instinctively, Benny Dy carried this man to the beach, and woke up Charlie the owner of a pump boat which could take the wounded man to the hospital. While the wounded man was being loaded in a pumpboat, several persons arrived including Australian Nurses to render assistance. The wounded man was finally brought to

Aklan Baptist Hospital at Caticlan, Malay, Aklan for treatment. Unfortunately, the patient, whose real name is Christian Langel, died.

"The shooting in Benny's Bar 'may nabaril sa Benny's Bar', immediately spread like forest wild fire in the small Island of Boracay and rapidly transferred from one ear to another and in the course thereof, it became distorted from 'may nabaril sa Benny's Bar' to 'may nabaril sa Benny' and finally 'may nabaril si Benny'. Consequently, loose talks rapidly spread that somebody was shot by Benny ('may nabaril si Benny').

"Appellant Benny Dy who carried the victim to the shore to be brought to the hospital to save the latter, and who facilitated the surrender to Pat. Rodolfo Padilla a gun which his helper found the following morning while cleaning the bar, eventually found himself the suspect in shooting of Langel." (pp. 1-3, Appellant's Brief)

All defense witnesses were one in testifying that the culprit was someone else other than the Accused. Thus, Rodrigo Lumogdang, a carpenter allegedly hired by a friend of the Accused to repair the kitchen of the bar, testified that around 11:30 P.M. of 7 May 1984, he saw a person go inside Benny's Bar but could not recognize him because the petromax lamp in the bar was not so bright as it was covered by colored red paper. In less than two minutes after said person entered, a shot exploded from the inside of the bar. Thereafter he saw the man who had just entered rush outside holding a gun tucked to his waist (tsn., June 25, 1985, pp. 7-8). He then ran a few meters away and when he came back he saw the Accused asking "Tantan" what had happened to which the latter replied that a white person had been shot. In particular, Lumogdang stated that he did not see the Accused at 6:30 P.M. when he took a stroll in the beach nor when he came back at around 11:30 P.M. Much less did he see TUMAOB inside the bar.

Another defense witness, Rogelio Lakandula, testified that he went to Benny's Bar at around 10:00 P.M. of 7 May 1984. While drinking beer thereat he saw a white person, who was three meters away from him, shot by a person he did not recognize but he saw him come from the door and enter Benny's Bar alone. Before and after the shooting incident, he did not see either the Accused or TUMAOB inside the bar.

Wolfer Tumaob, Jr., a nephew of the principal prosecution witness, TUMAOB, testified that on 7 May 1984 at 11:00 P.M., TUMAOB, Jover Casidsid, Welmer Taunan, Wolber Tumaob, Sr., and he, went out fishing at midsea staying thereat up to 6:00 A.M. of 8 May 1984 and that they did not pass Boracay Island at all on 7 May 1984 but went home on 8 May 1984.

The Accused stoutly denied having made any oral confession alleging that he went to Pat. Padilla not to report the incident but to state that a boy helper in the bar had found a gun on the sand floor while cleaning and that Pat. Padilla picked up the gun from the bar at his (Accused's) request (t.s.n., September 2, 1985, pp. 33-36). The Accused argues that even if he did make such a confession, the same would be inadmissible in evidence.

The Trial Court found the testimonies of defense witnesses enmeshed in contradictions on material points, rejected the disclaimers they had made, accorded more credence to the prosecution version, and as previously stated, rendered a judgment of conviction.

In this appeal, the Accused raises the following

Assignments of Error

I

The trial Court erred in holding that the Smith & Wesson revolver cal. .38 with Serial No. 33169 was the gun which caused the death of Christian Langel.

II

The trial Court erred in finding that Wilson Tumaob testified in court ahead of Dr. Caturan, so the former's testimony on the relative position of the accused and victim could not have been influenced or tailored to conform to Dr. Caturan's findings on the trajectory of the bullet slug found in the victim's body.

III

The trial Court erred in holding that Wilson Tumaob had no unfair motive to fabricate a story different from what he actually witnessed, and in giving weight to his testimony.

IV

The trial Court erred in holding that accused shot Langel.

V

The trial Court erred in holding that the conflicting testimonies of Pat. Padilla and Casimiro relate to minor matters which do not affect their credibility.

VI

The trial Court erred in holding that appellant made the oral confession, and in admitting the same as well as the entries in the police blotter.

VII

The trial Court erred in holding that compliance with the constitutional procedure on custodial interrogation is not applicable in the instant case.

VIII

The trial Court erred in holding that the uncorroborated testimony of Wilson Tumaob is sufficient to sustain appellant's conviction.

IX

The trial Court erred in holding that the evidence adduced by the prosecution is overwhelming and satisfied the test of proof beyond reasonable doubt in convicting appellant.

X

The trial Court erred in holding that appellant's defense of alibi is weak.

XI

The trial Court erred in convicting accused-appellant.

XII

The trial Court erred in denying accused-appellant's motion for new trial.

The basic issue is actually one of credibility, the crucial question being whether the Accused had orally admitted his authorship of the crime and surrendered the gun he had used in shooting the victim, as the prosecution claims, or, whether he had no involvement whatsoever, the gun surrendered having been found by a boy helper inside the bar while cleaning the place the morning after the incident, as the defense would have us believe.

The case history and the documentary evidence attest strongly to Appellant's oral confession and voluntary surrender. Thus, (1) Entry No. 3904 in the police blotter of the Malay Police Sub-station, dated 8 May 1984, *supra*, confirms three significant details: a) Pat. Padilla's testimony that he had accompanied the Accused to police headquarters in the early morning of 8 May 1984 after the latter admitted having "shot a tourist"; b) Appellant's voluntary surrender to the Chief of Police; and c) his surrender of his Smith & Wesson revolver, .cal 38, also to the Chief of Police.

It may be that Chief of Police Ariston T. Tambong, who had presumably made such entry, died on 15 August 1984 before the start of the trial of this case below and was not in a position to identify the same before the Court.

His successor (Lt. Audie Arroyo), however, was presented as a prosecution witness and identified said entry (t.s.n., October 17, 1984, pp. 29-33).

The revolver, marked as Exhibit "F", in turn, was identified by Pat. Padilla as the firearm surrendered by the Accused. When Pat. Padilla stated that he saw the fatal gun, its serial number and name for the first time (t.s.n., October 17, 1984, pp. 17-19) he was clearly referring to particulars which he did not concern himself with at the time of surrender.

Appellant's assertion that the gun he had surrendered was merely found by a boy helper while cleaning the bar deserves no credence for, if it were so, it would have been absurd for him to have placed himself under police custody in the early morning after the incident.

(2) The sworn Complaint for "Murder with Use of Unlicensed Firearm" signed by the Chief of Police (Exhibit "H"), dated 8 May 1984, also attests to Appellant's oral confession. Said officer could not have prepared the Complaint with such promptitude sans investigation at "0700H" the morning after the incident were it not for Appellant's outright admission. That Complaint forms part of the record of the proceedings before the Municipal Circuit Trial Court of Buruanga, Aklan, and is prima facie evidence of the facts therein stated (Section 38, Rule 130, Rules of Court). That said Complaint was sworn to before the Municipal Circuit Trial Court Judge and filed before his Court only on 17 May 1984 will not detract from the fact that the Chief of Police had taken official action promptly the very morning of Appellant's surrender by charging him with "Murder with the Use of Unlicensed Firearm" after having heard his admission.

(3) The fact of Appellant's surrender is further borne out by the Order of the Municipal Circuit Trial Court Judge, Judge Tonel, dated 17 May 1984, categorically reciting that "no warrant of arrest is issued for the apprehension of the accused for the reason that he is already under police custody before the filing of the complaint". It would have been at variance with ordinary human behavior for Appellant to have voluntarily placed himself under police custody absent any culpability for any offense.

Contrary to the defense contention, the oral confession made by the Accused to Pat. Padilla that "he had shot a tourist" and that the gun he had used in shooting the victim was in his bar which he wanted surrendered to the Chief of Police (t.s.n., October 17, 1984 pp. 6-9), is competent evidence against him. The declaration of an accused acknowledging his guilt of the offense charged may be given in evidence against him (Sec. 29, Rule 130, Rules of Court). It may in a sense be also regarded as part of the *res qestae*. The rule is that, any person, otherwise competent as a witness, who heard the confession, is competent to testify as to the substance of what he heard if he heard and understood all of it. An oral confession need not be repeated verbatim, but in such a case it must be given in substance (23 C.J.S. 196, cited in *People vs. Tawat*, G.R. No. 62871, May 25, 1985, 129 SCRA 431).

What was told by the Accused to Pat. Padilla was a spontaneous statement not elicited through questioning, but given in an ordinary manner. No written confession was sought to be presented in evidence as a result of formal custodial investigation. (*People vs. Taylaran*, G.R. No. 49149 October 31, 1981, 108 SCRA 373). The Trial Court, therefore, cannot be held to have erred in holding that compliance with the constitutional procedure on custodial interrogation is not applicable in the instant case, as the defense alleges in its Error VII.

With the indubitable official and documentary evidence on record, the identity of the Accused as the victim's assailant is indisputable. The denials by the defense immediately lose their credibility and the errors it has assigned are rendered without any merit whatsoever.

Thus, contrary to Error I, the gun which Appellant surrendered to Pat. Padilla and the Chief of Police, coupled with his voluntary surrender, cannot but be the weapon which caused the death of the victim. That is no inference;

it is clear and direct evidence. To further require a ballistic examination and a paraffin test would have been a superfluous exercise.

The issue raised in Error II as to who testified ahead, TUMAOB or the examining physician. Dr. Othello Caturan, also becomes irrelevant, TUMAOB's testimony being corroborated by the documentary evidence heretofore mentioned. Besides, even without TUMAOB's testimony the documentary evidence on record more than suffices to overcome the disclaimers by Appellant and on which his assigned Errors VIII & IX are predicated.

TUMAOB's motive in testifying the way he did, further assailed in Error III, is immaterial considering the corroboration his testimony received from Appellant's proven actuations after the incident. Efforts by the defense to discredit him as a "professional witness", who allegedly asked for a consideration from Appellant of P500.00 to swing the testimony in Appellant's favor, but which the latter rejected, with the insinuation that he could have been paid by Swiss authorities to testify the way he did in Court, is unavailing since conviction is not based on his testimony alone.

Whatever inconsistencies there may have been in the testimonies of Patrolmen Padilla and Casimiro, posited in Error V, are sufficiently overcome by the documentary evidence of record.

As to the testimonial evidence presented by the defense, which the Trial Court rejected, we find no reversible error in the meticulous assessment it had made thereof, ably pointing out the material contradictions in the testimonies and consequently their lack of credibility.

The entries in the police blotter were properly admitted by the Trial Court, contrary to the allegation in Error VI forming, as they do, part of official records.

The defense of alibi must likewise be rejected in the face of overwhelming evidence against the Accused. The Trial Court cannot be faulted, therefore, for denying Appellant's bid for acquittal contrary to the allegations in Errors IV, X and XI.

Lastly, neither was any error committed by the Trial Court in denying the defense Motion for New Trial (Error XII) based on the affidavit of recantation of witness TUMAOB that he was not at Benny's Bar when the victim was shot. Even assuming that it can be considered as newly discovered evidence it is insufficient to overturn the judgment already rendered, for, it bears emphasizing that conviction is not based on TUMAOB's testimony alone. Moreover,

"Affidavits of retraction executed by witnesses who had previously testified in court will not be countenanced for the purpose of securing a new trial. - It would be a dangerous rule for courts to reject testimonies solemnly taken before courts of justice simply because the witnesses who had given them later on change their mind for one reason or another, for such a rule would make solemn trials a mockery and place the investigation of truth at the mercy of unscrupulous witnesses. Affidavits of retraction can be easily secured from poor and ignorant witnesses usually for a monetary consideration. Recanted testimony is exceedingly unreliable. So courts are wary or reluctant to allow a new trial based on retracted testimony." (People vs. Saliling, et al, L-27974, February 27, 1976, 69 SCRA 427, cited in Ibabao vs. People, L-36957, September 28, 1984, 132 SCRA 216).

The penalty of reclusion perpetua imposed by the Trial Court, however, will have to be modified. With the abolition of the death penalty in the 1987 Constitution, the penalty for Murder is now reclusion temporal in its maximum period to reclusion perpetua. With the mitigating circumstance of voluntary surrender to which the Accused should be entitled, the penalty is imposable in its minimum period or from seventeen (17) years, four (4) months and one (1) day to eighteen (18) years and eight (8) months. For the application of the Indeterminate Sentence Law, the range of the penalty next lower is prision mayor in its maximum period to reclusion temporal in its medium period, or, from ten (10) years and one (1) day to seventeen (17) years and four (4) months.

WHEREFORE, the test of proof beyond reasonable doubt having been met, the judgment appealed from is hereby AFFIRMED but with the penalty MODIFIED to an indeterminate sentence of ten (10) years and one (1) day of prision mayor, as minimum, to seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum. Costs against the accused-appellant Benny Dy.

SO ORDERED.

Yap, (Chairman), Paras, Padilla, and Sarmiento, JJ., concur.

[*] Penned by Judge Jaime D. Discaya.

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