

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. VIRGILIO TUNHAWAN, DEFENDANT-APPELLANT.

G.R. No. 81470. October 27, 1988

Ponente: CORTES, J.

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CORTES, J.:

This appeal assails the verdict of conviction handed down by the Regional Trial Court, 10th Judicial Region, Branch 11, Manolo Fortich, Bukidnon against Virgilio Tunhawan in Criminal Case No. 287.

The accused was charged with the crime of murder in an information that reads as follows:

That on or about the 16th day of October, 1984, at about 9:00 o'clock in the morning, more or less, at barangay Dahilayan, municipality of Manolo Fortich, province of Bukidnon, Philippines, and within the jurisdiction of this Honorable Court, the abovenamed accused, with intent to kill by means of treachery and evident premeditation, armed with a garand rifle with which he was conveniently provided, did there and then wilfully, unlawfully and criminally shoot Virgilio Lugmay, inflicting on his back a mortal wound, which caused his death thereafter. [Rollo, p. 3.]

After his arrest, accused Tunhawan was provisionally released on bail. Upon arraignment on May 8, 1985, he entered a plea of not guilty. After trial, the lower court rendered the assailed Decision dated September 23, 1987, the dispositive portion of which reads:

WHEREFORE, premises considered, this Court finds the accused Virgilio Tunhawan, guilty beyond reasonable doubt of the crime of Murder defined and penalized under Article 248 of the Revised Penal Code qualified by treachery with aggravating circumstances of evident premeditation and use of a firearm to weaken the defense with no mitigating circumstance in favor of the accused. Accordingly, accused is sentenced to reclusion perpetua and to indemnify the heirs of Virgilio Lugmay the sum of P30,000.00, indemnity for the life of said victim.

SO ORDERED. [Rollo, p. 40.]

The accused-appellant interposed the present appeal, alleging that the lower court erred:

- IN ADMITTING THAT THE ACCUSED WAS TEN (10) METERS MORE OR LESS AWAY FROM THE VICTIM.
- IN GIVING CREDENCE TO THE PROSECUTION WITNESS ARTEMIO TANASIO RELATIVE TO WHAT HE SAW WHEN THE ACCUSED WAS ALLEGEDLY HOLDING THE FIREARM NOTWITHSTANDING HIS INCONSISTENCY AND FALSITY.
- IN ADMITTING THAT WITNESS DELFIN LEVANTA WAS AN EYEWITNESS.
- IN GIVING CREDENCE TO THE TESTIMONY OF ARTEMIO TANASIO DESPITE THE FACT THAT HE ONLY EXECUTED AN AFFIDAVIT AND TESTIFIED AFTER EIGHT (8) MONTHS.

- IN GIVING CREDENCE TO WITNESSES ARTEMIO TANASIO, DELFIN LEVANTA AND ROMERO GAWAHAN DESPITE THE FACT THAT THEY ARE COUSIN AND BROTHER-IN-LAWS (SIC) OF THE VICTIM VIRGILIO LUGMAY RESPECTIVELY.
- IN ADMITTING THAT ACCUSED VIRGILIO TUNHAWAN WAS STILL IN POSSESSION OF THE FIREARM WHEN IN TRUTH AND IN FACT IT WAS ALREADY DEPOSITED WITH THE STATION COMMANDER.
- IN NOT ACQUITTING THE ACCUSED- APPELLANT FOR FAILURE TO ESTABLISH HIS GUILT BEYOND REASONABLE DOUBT. [Rollo, pp. 52-53.]

The evidence for the prosecution is as follows: In the morning of October 16, 1984, the deceased Virgilio Lugmay and Artemio Tanasio went to Dahilayan, Municipality of Manolo Fortich, Bukidnon to collect debts from one Odong Ocmayon. They parked the motorcycle they were riding at the corner of the plaza. Lugmay, having seen Ocmayon, went after the latter while Tanasio was left behind at the plaza. When Lugmay came back, he said that he will wait for Ocmayon because the latter was still looking for money. While Lugmay and Tanasio were waiting, a bread vendor arrived, so they bought bread and were able to consume three packs of it. While Tanasio was in the act of receiving his change from the bread vendor, he heard a gunshot and saw that Lugmay was hit at the back. When Tanasio looked towards the direction of the shot, he saw the accused Virgilio Tunhawan still holding a Garand rifle at a firing position, some ten meters away from them [Rollo, p.18.]

According to the medico-legal officer who conducted the autopsy on the deceased. Lugmay died of cardio-respiratory arrest secondary to hemorrhage and shock from a gunshot wound [TSN, December 12, 1985, p. 8.]

The accused, setting up the defense of alibi, claimed that he did not know anything about the incident because he had been hiding in Malaybalay, Bukidnon since October 1, 1984 because he was afraid of being killed by Teodoro Lugmay, the father of Virgilio Lugmay [Rollo, p. 34.]

It appears that the family of the accused Tunhawan, who is a member of the Integrated Civilian Home Defense Force (ICHDF) of Dahilayan, had a long-standing feud with the Lugmay family which arose from the burning and strafing of the Tunhawan residence and the alleged shooting of Virgilio Tunhawan by Teodoro Lugmay, father of Virgilio Lugmay. Upon the suggestion of Col. Manaig, then Provincial Commander of Bukidnon, a conference between the two feuding families was held and an agreement was reached: (1) the Lugmay family was to transfer residence to Kalugmanan while the Tunhawan family agreed to stay behind in Dahilayan and (2) that if any member of the Lugmay family should set foot at Dahilayan, this will be considered an act of aggression against the Tunhawan family [Rollo, p. 25.]

The defense of alibi was correctly rejected by the court a quo as it was not established by clear and convincing evidence [People v. Cruz, G. R. No. 68805, July 9, 1986, 142 SCRA 576; People v. Marquez, G.R. No. L-48834, September 14, 1987 153 SCRA 700.] None of the defense witnesses testified that appellant had been staying in the barracks in Malaybalay, Bukidnon since October 1, 1984 up to the day the killing took place. Their testimonies that they did not recognize the man who they saw running when Lugmay was shot [TSN, February 19, 1986, pp. 5 and 13] and the appellant's denial of his presence at the scene of the crime cannot prevail over the positive testimonies of the prosecution witnesses attesting to the presence of the appellant [People v. Manalo, G.R. No. L-45088, February 28, 1985, 135 SCRA 84.] Between the positive declaration of the eyewitnesses to the incident and the uncorroborated testimony of appellant Tunhawan on his alibi, the former deserves more weight especially since the evidence for the defense is not conclusive as to the whereabouts of the accused at the time the crime was committed.

Thus, Artemio Tanasio testified that when he heard the gunshot that killed Lugmay, he looked towards the direction where the shot came from and it was the accused whom he saw at an elevated portion of the road holding a rifle in a firing position some ten meters away from Lugmay and Tanasio [TSN, June 20, 1985, p. 5.] Another witness, Delfin Levanta, testified that the person whom he saw when he tried to ascertain the source of the gunshot was the accused [TSN, November 5, 1985, p. 4] and that the accused was holding his gun in a firing position aimed at the victim. This was further confirmed by the testimony of Romero Gawahan, who at the time of the incident was in the vicinity watching a demolition taking place [TSN, November 5, 1985, p. 19.]

Furthermore, the defense of alibi requires physical impossibility for the accused to be at the scene of the crime at the time of its commission [People v. Pecato, supra.] In this case, no such physical impossibility exists as the court a quo noted that ". . . bus travel from Malaybalay to Manolo Fortich, Bukidnon would only last for one hour, at most, one and one half hours. And from Manolo Fortich to Dahilayan would only take almost one hour. These two places are not so distant enough that it is impossible for one to be in the said places in any given day." [Decision of the RTC, Rollo, p. 40.]

As stated earlier, the accused-appellant has ascribed to the trial court several errors. The Court, after considering the evidence, finds the assigned errors unmeritorious.

- The first assigned error relates to the finding that the accused was about ten (10) meters away from the victim, the appellant insisting that he was not present when the killing of Virgilio Lugmay took place. However, the contention that the accused was not at the scene of the crime was predicated merely upon the alleged inconsistency between the accounts of the eyewitnesses. The appellant contends that the inconsistency was irreconcilable considering that the incident occurred at the town plaza in broad daylight. The appellant emphasized that while Artemio Tanasio saw the accused BEFORE the shooting, Delfin Levanta and Romero Gawahan saw the accused AFTER the shooting.

The inconsistency cited though, relates merely to a collateral matter which cannot adversely affect the credibility of the eyewitnesses. It is of no moment that the testimonies differ as to insignificant details for it is enough that the testimonies concur on the material facts. Here, the vital fact of the presence of the accused at the scene of the crime at the time it was committed was established by the testimonies of the eyewitnesses. Indeed, where the inconsistencies and contradictions in the prosecution evidence relate to collateral matters, as in this case, the same do not detract from its substantial truthfulness and credibility [People v. Ancheta, G.R. No. 70222, February 27, 1987, 148 SCRA 178.] Moreover, appellants' statement that Tanasio saw him only before the shooting was misleading as Tanasio was able to establish clearly that he also saw appellant after Lugmay was shot. [TSN, June 20, 1985, p. 5.]

- The same principle can be cited to dispose of the second assigned error which dwells on the inconsistencies in the testimony of Artemio Tanasio. The appellant attempts to discredit Tanasio for stating during his direct-examination that he "saw Virgilio Tunhawan still holding his gun in a firing position" [TSN, June 20, 1985, p. 5], then stating in the cross-examination that he "saw that Virgilio Tunhawan was holding the gun" [TSN, June 20, 1985, p. 11] and finally, stating that he "saw Virgilio Tunhawan still loading the gun." [TSN, June 20, 1985, p. 14.] These minor inconsistencies, we reiterate, are insufficient to destroy the credibility of a witness [People v. Natipravat, G.R. No. 69876, November 13, 1986.]

- Anent the third assigned error, the appellant insists that Delfin Levanta was not an eyewitness to the crime as the other eyewitness. Artemio Tanasio, did not mention the presence of Levanta at the scene of the crime when he testified. Appellant argues that Levanta could not have been present at the scene because if he was then conversing with Lugmay and Tanasio, Tanasio would not have sought the help of other people when Lugmay was shot.

The trial court did not err in giving credence to Levanta's testimony. The testimony of Levanta clearly established that he was conversing with Tanasio and the deceased Lugmay and after less than an hour, he heard a shot. He then looked around to determine who fired the shot and saw that it was the accused Virgilio Tunhawan. He then immediately left the scene as he was "afraid because somebody (Lugmay) was hit." [TSN, November 5, 1985, p. 12.] His immediate departure from the place where the incident took place thus accounts for his failure to render assistance to the victim. Besides, Tanasio did not categorically deny the presence of Levanta during the incident as the questions propounded to Tanasio constituted a general inquiry on the persons present at the time the incident took place, which accordingly elicited a general response.

Even granting that the testimony of Delfin Levanta should be discredited, the same cannot alter the conclusion reached by the trial court as the testimony of Levanta was merely corroborative.

- Neither did the trial court err in giving credence to the testimony of Artemio Tanasio despite the fact that he only executed an affidavit some eight (8) months after the incident. The trial court aptly noted:

Accused attempted to destroy the credibility of the prosecution witness Artemio Tanasio who came out into the open and executed an affidavit only after about eight (8) months from the time the incident happened. Artemio Tanasio, however, explained that he went into hiding for fear of his life. He is sandwiched with fear. Accused Virgilio Tunhawan on one side and Teodoro Lugmay, the father of the victim on the other. The fact that earlier, after the incident, he said that he had not seen the shooting was made purposely to protect himself from Virgilio Tunhawan and he went into hiding for fear of Teodoro Lugmay who was looking for him. (Emphasis supplied) [Rollo, p. 35.]

Tanasio's fear of the deceased's father was explained by the fact that the father was rumored to be very angry with him for accompanying Virgilio to Dahilayan despite the danger facing them because of the feud with the Tunhawans [TSN, August 20, 1985, p. 4 & 15.] On the other hand, there was also the fear of reprisal from Virgilio Tunhawan himself, who was an ICHDF member. Indeed, Tanasio's initial fears of getting involved in the bitter feud between the Lugmay and Tunhawan families if he testified in the criminal case against Virgilio Tunhawan was understandable under the circumstances. The initial reluctance of witnesses to volunteer information about a criminal case and their unwillingness to be involved in or dragged into a criminal investigation is common in this country and does not affect their credibility [People v. Punzalan, G.R. No. 54562, August 6, 1987, 153 SCRA 1.] This Court has recognized fear of reprisal as a valid explanation for the failure of witnesses to immediately reveal the identity of the perpetrators of the crime, it being natural for witnesses to be afraid to tell the truth about what they knew until they felt that it was safe for them to do so [People v. Egual, G.R. No. L-13469, May 27, 1965, 14 SCRA 89, 99.] In this case, Tanasio gave an adequate explanation for his failure to name the accused when he reported the matter to the police, declaring: "That is what I have said before, that I only said that I have not seen it because I was afraid of the CHDF." [TSN, August 20, 1985, p. 9.]

- This Court's holding that the relationship of the key prosecution witness to the victim does not necessarily disqualify him as biased and interested [People v. Cabantug, 49 Phil. 482 (1926); People v. Villalba, G.R. No. L-17243, August 23, 1966, 17 SCRA 948; People v. Legaspi, G.R. No. 74953, June 30, 1987, 151 SCRA 670], disposes of the fifth assigned error which puts at issue the credibility of Artemio Tanasio and Romero Gawahan who are cousins of the victim and Delfin Levanta who is a brother-in-law of the victim. The controlling rule on this matter is that mere relationship of the prosecution witnesses to the victim does not make their testimony biased nor render such testimony unworthy of belief in the absence of an improper motive making the witnesses testify against the accused [People v. Cielo, G.R. No. 64923, October 31, 1984, 133 SCRA 117.] No improper motive on the part of the prosecution witnesses was established by the defense in this case.

- The penultimate error ascribed by the appellant relates to the trial court's ruling that Virgilio Tunhawan used

his service Garand rifle in killing the victim. The defense tried to establish that on October 16, 1984, Virgilio Tunhawan no longer had in his possession the rifle issued to him as a member of the ICHDF because on June 30, 1984, he was shot in the leg and consequently hospitalized and the rifle had been turned over to the custody of the detachment commander of Dahilayan, Pat. Rolando Lompon [TSN, October 23, 1986, p. 5.] Thus, the appellant in his brief argues that "it was therefore impossible for the accused to commit the crime of murder without the gun." [Rollo, p. 67.]

However, as correctly ruled by the trial court, the explanation of the whereabouts of the fatal weapon is not credible [Rollo, p. 38.] While P/Lt. Arthur Daniot, Station Commander of Manolo Fortich, Bukidnon testified that he gave verbal instructions to Pat. Rolando Lompon, detachment commander of Dahilayan to retrieve the firearm issued to Virgilio Tunhawan, he likewise admitted that he did not know whether that rifle was subsequently issued by Pat. Lompon to any other person [TSN, October 23, 1986, pp. 5-7.]

Moreover, the evidence for the defense itself points to the conclusion that the appellant had in his possession his service rifle on that fatal day. P/Lt. Daniot testified that the barangay captain who accompanied the appellant Tunhawan in surrendering to the police likewise surrendered the firearm issued by the ICHDF to Tunhawan [TSN, October 23, 1986, p. 9] This conclusion is further bolstered by the testimony of prosecution witness Romero Gawahan who categorically declared that he saw the appellant holding his issue garand rifle [TSN, November 5, 1985, p. 21.]

- From the foregoing, the lack of merit of the last assigned error in this appeal becomes evident. The evidence presented by the prosecution proves the guilt of the accused beyond reasonable doubt. While none of the prosecution witnesses saw the appellant actually shoot the victim, three of them categorically declared that after the victim was shot, they saw appellant alone holding his rifle in a firing position, aimed at the victim. Artemio Tanasio, who was the companion of the victim at the time of the incident, even testified that he was afraid that he, too, might be shot at, as the barrel of the gun was pointed towards the victim and him and it was only when the victim fell down dead that appellant walked away [TSN, June 20, 1985, p. 16.] This act of the appellant, together with the fact that there were no other people in the elevated portion of the road where the shot came from except the appellant, sufficiently convinces the Court of the culpability of the accused. That the appellant bore a grudge against the victim [TSN, December 12, 1985, p. 14] as a result of the feud existing between their families further strengthens the case against the appellant. As the prosecution has successfully overcome the presumption of innocence in appellant's favor, it is incumbent upon the appellant to adduce exculpatory evidence to justify his acquittal. Appellant failed to discharge this burden since his defense of alibi – that he was in Malaybalay, Bukidnon -- which is an inherently weak defense, was not even corroborated by any of the defense witnesses. Certainly, his self-serving statements that he was in a place other than the scene of the crime cannot prevail over the positive testimony of the prosecution witnesses.

The element of treachery, which qualifies the killing of Virgilio Lugmay to murder, has been amply proven as the evidence shows that the victim was shot from behind suddenly and unexpectedly while sitting on a parked motorcycle eating, hence, unable to defend himself. This Court has declared 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. Fernandez, G.R. No. 69619, September 15, 1987, 154 SCRA 30.]

This Court however finds that the aggravating circumstances of evident premeditation and use of firearm to weaken the defense were erroneously appreciated by the trial court in the case at bar.

Firstly, the prosecution failed to show that the appellant had deliberated on killing the deceased. The killing appears to be a casual incident, a sudden reaction of the appellant upon seeing Virgilio Lugmay in Dahilayan in violation of the agreement between the two feuding families. Absent any showing that the execution of the criminal act was preceded by cool thought and reflection upon the resolution to carry out the criminal intent

during the space of time sufficient to arrive at a calm judgment [People v. Durante, 53 Phil. 363 (1929), this aggravating circumstance of evident premeditation cannot be said to have attended the commission of the crime [People v. Ochavido, G.R. No. 68858, May 30, 1986, 142 SCRA 193.]

Secondly, the Solicitor General himself concedes that the aggravating circumstance of employing means to weaken the defense of the victim was not present in the commission of the offense. Indeed, the mere fact that a Garand rifle was used in killing the victim does not necessarily aggravate the crime perpetrated by the appellant [Rollo, p. 148.] Even if held to be present in the instant case, the aggravating circumstance of employing means to weaken the defense would be deemed absorbed by treachery [People v. Siaotong, et al., 100 Phil. 1103 (1957).]

Since the crime has not been attended by any aggravating or mitigating circumstance, the penalty for murder, which in view of the abolition of the death penalty is now reclusion temporal in its maximum period to reclusion perpetua, shall be applied in its medium period which is 18 years, 8 months and 1 day to 20 years. Applying the Indeterminate Sentence Law, the Court, in its discretion fixes the minimum at 12 years and 6 months of reclusion temporal.

WHEREFORE, the guilt of the appellant having been established beyond reasonable doubt, the judgment of conviction is hereby affirmed with the modification that the appellant is sentenced to an indeterminate penalty of 12 years and 6 months of reclusion temporal as minimum to 20 years of reclusion temporal as maximum.

SO ORDERED.

Fernan, C.J., Gutierrez, Jr., Feliciano, and Bidin, JJ., concur.

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