

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ROY ALZAGA, ACCUSED-APPELLANT.

G.R. No. 83695. September 15, 1989

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

This is an appeal from the decision of the Regional Trial Court of Legazpi City, Branch III finding the accused Roy Alzaga y Arnedo guilty beyond reasonable doubt of the crime of murder.

The dispositive portion of the decision reads:

"IN VIEW OF ALL THE FOREGOING CONSIDERATIONS, this Court finds the accused Roy Alzagay Arnedo, guilty beyond reasonable doubt of the crime of murder qualified with treachery and with the presence of the aggravating circumstance of use of an unlicensed, firearm which is offset by the mitigating circumstance of having surrendered himself to the authorities;

"ACCORDINGLY, the accused is hereby sentenced:

1. To suffer the penalty of reclusion perpetua;
2. To pay the heirs of the deceased Alfredo Adique the sum of P257,400.00 for loss of earning capacity of the deceased Alfredo Adique;
3. To pay the heirs of the deceased Alfredo Adique a straight death indemnity of P30,000.00; and
4. To pay attorney's fees of P6,000.00 and to pay the costs of suit. (pp. 189-190, Rollo)

The information filed against the accused alleged:

"That on or about the 9th day of January, 1984, in the City of Legazpi, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, beings then armed with a gun and with intent to kill, did then and there wilfully, unlawfully and feloniously attack, assault and shoot with said gun one ALFREDO ADIOUE Y TOCA, thereby inflicting injuries upon the latter which directly caused his untimely death.

"That there is, in the commission of the offense, the attendance of the aggravating qualifying circumstance of treachery.

"CONTRARY TO LAW." (p. 12, Rollo)

The prosecution evidence upon which the trial court based its finding of guilt beyond reasonable doubt is summarized as follows:

"The evidence for the prosecution shows that on that faithful (sic) night of January 9, 1984, at around 11:00 o'clock, Engr. Alfredo Adique, his brother, Vicente Adique, Jr. and Ernesto Toledo were on their way to the Sawali Restaurant at Rizal Street, Legazpi City. When they reached the parking space of said restaurant, a man, later on identified as the accused Roy Alzaga, called Engr. Adique, who responded by going near the

accused who was then in the parking lot outside of the Sawali Restaurant. The two (2) conversed for about thirty (30) minutes in a low voice and in a somewhat friendly manner while Vicente Adique, Jr. and Ernesto Toledo stood at a distance of about three (3) meters away from them waiting for Alfredo Adique. When Engr. Adique was about to leave towards his companions, he was drawn back by the accused letting him face the accused. It was then while facing each other, that Engr. Adique was shot with a short gun, a 38 caliber revolver, by the accused hitting the former on his face which caused his death about three (3) hours later at the Albay Provincials Hospital.

"Two (2) eyewitnesses, namely, Vicente Adique, Jr. and Ernesto Toledo testified that they were present at the time Alfredo Adique was shot and that it was the accused Roy Alzaga who shot Alfredo Adique with a short gun.

"Vicente Adique, testified, as follows:

"ATTY. FLORES:

"Q. Now, will you, using the interpreter as the medium and taking him to be Engineer Adique, will you illustrate to us how Roy Alzaga or demonstrate to us how Roy Alzaga drew back Engineer Alfredo Adique in order to make him return to where they were conversing?

"COURT: (to the stenographic reporter)

Also the answer, as interpreted.

"STENOGRAPHIC REPORTER:

"A Engineer Adique was about to leave and has already turned his back to Roy Alzaga when he was drawn back by the left arm of Roy Alzaga forcing him to step his night foot or forcing him to execute an about face and thereby that they were now facing each other.

"ATTY. FLORES:

It should be the left arm of Engineer Adique which was held by the accused by putting his right arm thereby making him turned towards him as to make the two (2) of them face each other.

"ATTY. ALEGRE:

May I suggest my interpretation to the answer: The accused drew Engineer Adique by holding him by the shoulder causing the latter to face him or the accused, Roy. Alzaga.

"ATTY. FLORES:

Arm not shoulder.

"ATTY. ALEGRE:

I stand corrected, not shoulder but arm.

"ATTY. FLORES:

"Q Now, after Alfredo Adique was already facing Roy Alzaga, what happened next?

"VICENTE ADIOUE:

"A. My brother was shot.

"Q. By whom?

"A. The person in front of him.

"Q. Who is this?

"A. Roy Alzaga." (TSN, pp. 19-21, September 5, 1984)

Ernesto Toledo also testified, as follows:

"FISCAL MORES:

"Q. Now, Mr. Toledo, do you remember where were you on January 9, 1984 at about 11:20 in the evening?

"ERNESTO TOLEDO:

"A. Yes.

Q. Where were you?

"A. At the Sawali.

"Q. Why were you there?

"A. I was invited by Engineer Alfredo Adique.

"Q. When you said you were invited, from what place have you come from before going to Sawali?

"A. In the house of Vicente Adique, Jr.

"Q. Where is that house of Vicente Adique, Jr. located?

"A. Banadero, Legazpi City.

"Q. Now, other than Engineer Adique, do you have other companion?

"A. Yes.

"Q. Who?

"A. Vicente Adique, Jr.

"Q. Were you able to reach Sawali Restaurant on that evening?

"A. Yes.

"Q. When you arrived at Sawali Restaurant, did you remember of any incident that happened?

"A. Yes, there, was.

"Q. Please tell the Honorable Court what that incident that happened?

"A. Engr. Alfredo Adique was shot.

"Q. By whom?

"A. By Alzaga.

"Q. If that Alzaga is in Court, can you still recognize him?

"A. Yes.

"Q. Please look around the courtroom and please point to the person whom you said shot Engr. Alfredo Adique?

"A. Yes, he is around.

"Q. Please point to him

"A. (Witness points to a man who when asked his name answered by the name of Roy Alzaga).

"FISCAL MORES.

"Q. Now, you said the person whom you identified a while ago shot Engr. Alfredo Adique, what happened to Engr. Adique when he was shot by that person?

"A. He is dead." (TSN, pp. 3-6, October 5, 1984)

"The third prosecution witness, Dr. Joselito Rustic, a resident physician of the Albay Provincial Hospital, testified that he attended to a patient by the name of Alfredo Adique on January 9, 1984; that by reason of his medical assistance to said patient, he issued a Medical Certificate, Exhibit 'C', which showed that the patient sustained a 'gunshot' wound, 3 cms. anterior to the ear canal. Cardio-respiratory arrest sec. to cerebral hemorrhage sec. to gunshot wound. Died-January 10, 1984 at 3:00 A.M." A death certificate was issued by him and marked in evidence as Exhibit 'F'; that an autopsy has been made on the body of Alfredo Adique for which an Autopsy Report was issued, Exhibit "D"; that during the autopsy; Dr. Rustia found a slug, Exhibit 'L', lodged in the skull on the parietal part above the left cerebral area of Alfredo Adique. That the bullet entered the left cheek, went upwards to the left and that the said slug was turned over to Benjamin Barrios, Exhibit 'E-1'.

"The fourth witness for the prosecution, Benjamin Barrios, a policeman, who conducted the investigation in connection with the death of Engr. Adique and also the one who took the Sworn Statement of Ernesto Toledo, Exhibit 'G', testified that he received the slug from Dr. Rustia, Exhibit 'E-1', which the latter found in the cadaver of Alfredo Adique during the autopsy and that he forwarded the said slug to the Philippine Constabulary Crime Laboratory (PCCL), Recom V, Camp Bagong Ibalon, Legazpi City, for ballistic examination to determine the kind of caliber and firearm used in the commission of the crime as shown in a letter dated January 11, 1984, marked in evidence as Exhibit 'H'.

"Prosecution witness, Vicente R. de Vera, a ballistic (sic) of the PCCL, testified that in connection with this case, he conducted an examination of the slug submitted to his Office by the Chief. PC-INP Laboratory, Region V, Camp Bagong Ibalon, Legazpi City, in an Indorsement dated January 19, 1984 to the PCCL, Camp Crame, Quezon City, EXhibit 'M'. His examination was reduced to writing and is found in ballistic Report. No. B-017-84, Exhibit 'K'. The report showed that the slug, Exhibit 'L', a badly deformed and mutilated fired bullet, is a 38 caliber and was fired from a 38 caliber revolver type firearm.'

"The accused is not a firearm licensee of, any kind and caliber as certified to by PC Captain Prudencio C. Erfe, Chief Records Branch, Firearms and Explosives Unit, Camp Crame, Ouezon City (Exhibit 'J')." (pp. 170- 172, Rollo).

On the other hand, the appellant summarize the facts for the defense as follows:

"4.1 In the afternoon of January 9, 1984 Charlie Neo, accompanied by Cesar Bulawan, went to the Norkis Motors at Legazpi City to have his motorcycle repaired by Pablo Perez. Later in the evening of said date after 7:00 o'clock, Charlie Neo went to the house of Pablo Perez to pay for the repairs of the motorcycle. Cesar Bulawan was also there. After paying for the repair, Neo invited Perez and Bulawan to go with him to the Sawali Restaurant at Sagpon, Legazpi City to drink beer. They arrived there at about 9:00 o'clock p.m. (TSN., 16 June 1986, Cesar Bulawan, pp. 1-9; TSN., 29 September. 1986, Pablo Perez, pp. 1-6)

"4.2 At 'the Sawali Restaurant, Neo, Bulawan and Perez drank beer. They decided to go home at about 10:00 p.m. When they were about to get their motorcycle, they saw the accused-appellant Roy Alzaga by the store

near the old YMCA building. Roy Alzaga invited them to drink some gin with him. (TSN., supra, Cesar Bulawan, pp. 9-10; TSN., supra, Pablo Perez, pp. 6-11.)

"4.3 After a while, a man who turned out to be Engineer Alfredo Adique came out of the Sawali Restaurant and tapped Ray Alzaga on the shoulder by way of greeting. Engineer Alfredo Adique was already drunk when he accepted the offer of Alzaga to drink gin (TSN., supra, Pablo Perez, pp.11-12; TSN., supra, Cesar Bulawan, pp. 11-13; TSN., 30 March 1987, Roy Alzaga, pp. 1-5.)

"4.4 Thereafter, Charlie Neo poured gin into a glass and offered it to Engineer Adique who refused because he said he was already drunk. Charlie Neo took offense and said that because Adique was already an engineer he no longer wanted to drink with Neo. A heated altercation ensued between Neo and Engineer Adique. Accused-appellant Roy Alzaga, intervened to pacify both. Engineer Adique then went on his way. (TSN, supra., Pablo Perez, pp. 12-14; TSN., supra, Cesar Bulawan, pp. 13-15; TSN supra, Roy Alzaga, pp. 5-8).

"4.5 Neo, Bulawan and Perez continued conversing with Alzaga for about thirty (30) minutes. At this juncture, Engineer Adique, accompanied by two men, who turned out to be his brother, Vicente Adique, Jr., and Ernesto Toledo arrived. (TSN., supra, Pablo Perez, p. 14; TSN., supra, Cesar Bulawan, pp. 15-16; TSN., supra, Roy Alzaga, pp. 8-9.)

"4.6 In a belligerent manner Engineer Adipue approached the three men, Neo, Bulawan and Perez, pointing a finger at them Engineer Adique approached Bulawan, held him by the collar with the left hand and pointed a gun at said Bulawan with the right hand. (TSN., supra, Pablo Perez, pp. 15-19; TSN., supra, Cesar Bulawan, pp. 16-19; TSN., supra., Roy Alzaga, pp. 9-10.)

"4.7 The accused-appellant, Ray Alzaga, approached and held the right hand of Engineer Adique pulling it down and telling him; Do not do it. Engineer Adique then released the collar of Bulawan and held his right hand with the left apparently to remove it from the grasp of Alzaga. (TSN., supra, Pablo Perez, pp. 19-21; TSN., supra, Cesar Bulawan, pp. 19- 20; TSN. supra, Roy Alzaga, pp. 10-11.)

"4.8 A struggle for the gun followed. As demonstrated by defense eyewitnesses, the accused at first succeeded in bringing down the right hand of Engineer Adique to make the gun point downward but Engineer Adique was able to raise his right hand. Alzaga again pulled down the right hand of Adique. (TSN., supra, Pablo Perez, pp. 21-25; TSN., supra, Cesar Bulawan, pp. 20-21; TSN., supra, Roy Alzaga, p. 11).

"4.9 However, Adique was able to raise his right hand once more with the gun pointed upward almost touching his left cheek. While the finger of Engineer Adique was touching the trigger of the gun, the gun exploded hitting Engineer Adique on the left cheek. Adique fell down after the shot. (TSN., supra, Pablo Perez, pp. 26-28; TSN., supra, Cesar Bulawan, p. 22; TSN., supra, Roy Alzaga, p. 12)

"4.10 The accused, fearful that he would be attacked by Vicente Adique, Jr. and Ernesto Toledo who had knives, withdrew to the Sawali Restaurant. (TSN., supra, Roy Alzaga, p. 13)

"4.11 Ernesto Toledo then got the gun and ran away with it. Vicente Adique, Jr., picked up his brother Engineer Adique and brought him to the Albay Provincial Hospital where the victim died a few hours later. (TSN., supra, Pablo Perez, pp. 28-29; TSN., supra, Cesar Bulawan, p. 22-23; TSN., supra, Roy Alzaga, 12-13).

"4.12 The accused-appellant left for Manila early in the morning of January 10, 1984 because there were men threatening him. While in Manila, his wife suffered an induced abortion constraining accused-appellant to hospitalize her. (TSN., supra, Roy Alzaga, pp. 13-17)

"4.13 The accused-appellant, upon knowing that there was a warrant for his arrest, subsequently surrendered to the authorities. (TSN., supra, Roy Alzaga, pp. 17-21)" (At pp. 79-83)

Alzaga raises the following assignments of errors in this appeal, to wit:

A

"THE TRIAL COURT ERRED IN HOLDING THAT THE VICTIM WAS SHOT AT A DISTANCE OF ABOUT TWO (2) FEET.

- '1. The brother of the victim testified that the victim was shot at close range at a distance of two to three inches.
2. The trial court's reenactment photograph, Exhibits "A", "A-1", "B" & "B-1", confirm the foregoing.
3. The accused-appellant and his witnesses likewise confirm the foregoing.'

B

"THE TRIAL COURT ERRED IN HOLDING THAT THE MEDICAL EXPERT HAD OPINED THAT THE VICTIM WAS SHOT AT A DISTANCE OFF ABOUT TWENTY FOUR (24) INCHES SINCE THERE WAS NO TATOOING AT THE POINT OF ENTRY.

C

"THE TRIAL COURT ERRED IN HOLDING THAT THE BALLISTICS EXPERT HAD OPINED THAT THE GUN WAS FIRED AT A DISTANCE OF ABOUT TWO (2) FEET FROM THE POINT OF ENTRY.

D

"THE TRIAL COURT ERRED IN NOT DECLARING THE VERSION OF THE PROSECUTION UNWORTHY OF CREDIT.

E

"THE TRIAL COURT ERRED IN NOT ACQUITTING ACCUSED-APPELLANT ON THE GROUND THAT THE VICTIM ACCIDENTALLY SHOT HIMSELF.

F

"THE TRIAL COURT ERRED IN DISREGARDING THE FACT THAT THE VICTIM ACCIDENTALLY SHOT HIMSELF BASED ON A MATTER NOT BORNE BY THE EVIDENCE.

- '1. The petition for certiorari containing the accused's statement of facts is not part of the evidence, hence could not be considered by the trial court.
2. Neither can the trial court take judicial notice of such petition.
3. If at all, the petition is proper for impeachment purposes which, however, cannot now be made for failure to lay the predicate.

G

"THE TRIAL COURT ERRED IN IMPUTING GUILT TO ACCUSED-APPELLANT BY HIS SILENCE.

'Accused's constitutional right to remain silent is guaranteed'.

H

"THE TRIAL COURT ERRED IN DECLARING ACCUSED-APPELLANT GUILTY OF FLIGHT.

I

"THE TRIAL COURT ERRED IN NOT DECLARING THAT THE GUILT OF ACCUSED-APPELLANT WAS NOT PROVED BEYOND REASONABLE DOUBT

J

"ASSUMING ARGUENDO THAT ACCUSED-APPELLANT MAY BE HELD RESPONSIBLE FOR THE DEATH OF THE VICTIM, THE TRIAL COURT, NONETHELESS, ERRED IN HOLDING THAT IT WAS ATTENDED WITH TREACHERY.

K

ASSUMING ARGUENDO THAT ACCUSED-APPELLANT MAY BE HELD RESPONSIBLE FOR THE DEATH OF THE VICTIM, THE TRIAL COURT ERRED IN HOLDING THAT THE CRIME WAS COMMITTED WITH THE USE OF AN UNLICENSED FIREARM.

L

"ASSUMING ARGUENDO THAT ACCUSED-APPELLANT MAY BE HELD RESPONSIBLE FOR THE DEATH OF THE VICTIM, THE TRIAL COURT ERRED IN NOT DECLARING THE MITIGATING CIRCUMSTANCE OF VOLUNTARY SURRENDER IN FAVOR OF ACCUSED-APPELLANT." (pp. 73-75, Rollo)

There are two diametrically opposed versions of the same incident in this case. The prosecution witnesses declared that Alfredo Adique who had been conversing in low tones for about half an hour with Roy Alzaga started to walk away when he was suddenly pulled by Alzaga into turning around and shot pointblank in the face.

The defense witnesses on the other hand state that it was Adique who pointed a gun at Cesar Bulawan. When Alzaga stepped in to prevent Bulawan from being shot, Adique and Alzaga grappled and struggled for the gun. It was at this juncture when the revolver fired, the bullet hitting Adique on the left cheek.

A careful reading of the testimonies of the eyewitnesses shows that the prosecution witnesses and defense witnesses were equally direct and positive in their narrations of what really happened.

Ordinarily, we should give full faith and credit to what the trial judge declares regarding the respective merits of the two versions of the same incident. As the Solicitor-General points out, the trial court's findings carry great weight far it had the privilege of examining the deportment and demeanor of witnesses and, therefore, could discern whether or not such witnesses are telling the truth. (People v. Ramilo 147 SCRA 102 [1987]) There are however, matters of weight and substance which the trial court overlooked and which, if taken into account, would result in findings different from the conclusions in the challenged decision.

The trial court discussed in detail the testimonies of the prosecution witnesses and those of the defense on the circumstances immediately surrounding the shooting itself. However, instead of reconciling in a more convincing manner the unexplained discrepancies in its conclusions which lead to reasonable doubts, the court appeared to have been more strongly influenced by incidents and matters which happened outside of the killing itself. Among them are the extrajudicial statements given to police investigators, the contents of a petition for certiorari questioning an order incident to the grant of bail, the absence of motive for the killing, and the alleged flight of

the accused. These latter matters are also important but they should not overshadow the killing itself. Considering that there are two conflicting versions which are both plausible and, if one is taken without the other, equally convincing.

One aspect of the case glossed over in the decision is that it was Alfredo Adique who had a motive to act as aggressor, who had reason to bring a firearm back to the restaurant, and who, therefore, pulled it out in drunken anger.

Engineer Adique was at the Sawali Restaurant earlier that evening. The testimony of Vicente Adique, Jr. inferentially corroborates the defense evidence on some points in this regard. In his initial testimony, Vicente, Jr. testified that he was with Alfredo from 8:00 P.M. up to the shooting incident about 11:00 o'clock that same evening. They allegedly played chess in Vicente's house, then proceeded to Sawali Restaurant. (T.S.N. September 5, 1984, pp. 34-35) In the later cross-examination, however, Vicente admitted that he first saw his brother that night at about 10:00 o'clock when Alfredo came to his house. Vicente, Jr. noticed that Alfredo was "a little tipsy". Asked how he arrived at this conclusion, he answered. "I smell something." (T.S.N. Oct. 1, 1984, pp. 8-9)

The testimony of the defense witnesses indicates that Alfredo Adique had been drinking at the Sawali Restaurant earlier that evening. He had a heated altercation with Charlie Neo over his refusal to drink gin with Neo after he had drunk gin with Alzaga. Alfredo went to fetch his brother Vicente, Jr., and an alleged toughie, Ernesto Toledo. With his two companions, Alfredo returned to the scene of the altercation. It was after confronting Alzaga and his two companions that the shooting happened.

According to the trial court, while no motive has been shown why Alzaga should shoot Alfredo Adique, "motive is important only when there is doubt as to the identity of the culprit."

In this case, there is doubt as to the ownership of the gun which caused the victim's death and the circumstances surrounding the fatal firing. Motive is important from the viewpoint of Alzaga who was charged with murder and of the late Alfredo Adique, who accidentally shot himself according to the defense.

The first three assignments of error center on the issue of how far was the distance between Roy Alzaga and Alfredo Adique when the latter was shot and how far from the gun barrel was the bullet's point of entry on the victim's face.

In the usual murder cases where there is a clear aggressor and an unwitting victim, the applicable rule is that "(it) matters not how far the assailant was at the time he shot the victim, the crucial factor being whether he did shoot the victim or not" (People v. Trinidad G.R. Nos. 79123-25, January 9, 1989). And even if there are variances as to measurements, conflicting testimonies on measurements of distances are ordinarily of minor consequence. (See People v. Ramilo 1146 SCRA 258 [1986]).

In this case, however, distance becomes important. The appellant contends that the trial court erred in holding that it was the examining physician Dr. Joselito Rustia who opined that the victim was shot at a distance of about 24 inches since there was no tattooing at the point of entry. The appellant points out that Exhibit C - Medical Certificate, Exhibit D - Autopsy Report, Exhibit E Resident Admitting History, and Exhibit F - Certificate of Death do not support this conclusion of the trial court. The decision relies on the medico-legal book of Dr. Pedro Solis that if a gun is fired six inches or less from the point of entry, there should be blackening or tattooing at that point. The absence of tattooing would show that it was fired from a greater distance. However, if the tattooing - its presence or absence - was not given any attention by the examining physician, any conclusion would be based on a non-existent premise.

The examining physician was aware of "the book of Dr. Solis of the NBI". While he answered "yes" to a question

that his autopsy report, medical certificate, and clinical report made no finding on any blackening and tattooing, he never positively stated that he looked for such tattooing and that there was no such tattooing. Dr. Rustia's testimony taken on October 5, 1984 shows that he could not determine whether there was a fracture at the point of entry as no X-ray was taken and he did not open up the face. He could not state whether the mandible was hit. He could not find any fragments of a bone that was hit. He did not measure the size of the wound at the point of entry. And because he did not measure the wound, he could not determine more or less the distance of the firearm at the time it was fired at the victim. (T.S.N. October 5, 1984 pp. 78-83). In fairness to Dr. Rustia, it should be mentioned that he was a 29 year old physician, three years a resident of the Albay Provincial Hospital and immediately before that, served a one year internship at the Philippine General Hospital. If the resident physician did not pay attention to so many details which an NBI medico-legal expert would have carefully noted, it would not be fair for the trial court to conclude that his failure to note any tattooing in his reports should be interpreted to mean that there was indeed no such tattooing at the point of entry.

The questioned decision also states:

"Ballistician Vicente R. De Vera, an expert prosecution witness, testified likewise that based on his physical and microscopic examination of the slug or bullet that was removed from the skull of the victim (Exhibit "L"), the bullet could have been fired at a distance of three (3) to two (2) feet and below. xxx." (At p. 49. Rollo)

The appellant cites the testimony of the ballistics expert to show that the gun was not fired at 2 feet but at two feet or below. Actually, the testimony of the expert is not precise and convincing. Vicente R. de Vera testified:

xxx xxx xxx

"Q. What is your basis for concluding that the gun from which the bullet was fired has a distance of three (3) ft.?

A. My basis is the same, because of the weight, sir.

Q Even the distance is merely deduced by you from the weight of the bullet, is that correct?

A. Not only that, sir, from the deformity suffered, I know for myself that based from the experience that I have observed with the autopsy conducted by the Medico-Legal officer, I know from the deformities of the bullet that it could have been fired at a distance or radius of two (2) feet or below because experience tells me that it is a bullet same as that bullet covered by the Medico-Legal Officer especially when it hits the human bone at a distance of two (2) feet or less.

Q. So, in other words, your conclusion of the distance is based on an autopsy report performed by somebody else, not by you?

A. When he performs that, I am present, sir.

Q. The autopsy? Were you present here in Albay where the autopsy was conducted?

A. Autopsies conducted in our laboratory, sir.

Q. But we are talking of the autopsy of the deceased?

A. As a matter of fact, 'I was not here.

Q. Then, why did you say that you were present in the autopsy?

A. The autopsy conducted here in Albay is different from the autopsy conducted at the Crime Laboratory.

Q. My question to you is did you base your conclusion on the distance of the gun merely on the autopsy report

conducted by another doctor here in Albay where you were not present?

A. I based all my findings based on the mutilation and deformity of the bullet, sir. So that, at least I can say with all sincerity and with all accuracy the distance of the muzzle of the firearm to the target." (T.S.N., August 5, 1985, pp. 36-38)

xxx xxx xxx

The distance from the firearm to the point of entry is important because the trial court's finding that the prosecution evidence is "conclusive and overwhelming, physical, direct, and positive" is based on the appellant's having shot Adique from two feet away. If that were so, then the killing would have been a cold-blooded one. It would destroy the defense theory that the appellant and the victim were grappling for the gun when it suddenly went off.

The eyewitnesses give a different version from that arrived at by the court. Cesar Bulawan testified that Alzaga was holding the hand of Alfredo Adique and that Adique was holding the gun which he had pulled from his waist. The hand holding the gun was pulled to the left, then to the right, and again to the left when it exploded. (T.S.N. June 16, 1986, pp. 19-22) Pablo Perez testified to the same fact:

xxx xxx xxx

"Q. What happened to the gun?

A. Adique was still holding the gun, the right hand of Adique was holding the gun and the left hand which collared Bulawan was removed and the left hand of Adique hold his right wrist and that was the time when Alzaga held both hands of Adique bringing the two (2) hands of Adique downward and after bringing the two (2) hands of Adique downward, it was again returned upward and still the two (2) hands of Adique holding the firearm.

Q. Towards what direction was the firearm pointing when both hands of Adique raised the gun?

A. (Witness demonstrating with his two (2) hands from downward up with left hand holding the right wrist of the witness, the distance pointing the left face of the witness).

ATTY. FERNANDEZ:

Your Honor, may we if there is a gun available, we would like to have a demonstration and have it taken by a photographer. I think, the Fiscal has a gun, your Honor.

FISCAL MORES:

No, that gun was used in the other case, your Honor.

COURT:

Clerk-in-charge handing a gun to the interpreter and the witness is requested to go down the witness stand to demonstrate

ATTY. FERNANDEZ

We would like to make it of record that there is a man here, the photographer before, to take pictures at different angles of the demonstration.

ATTY. FLORES:

May we just make it of record that the photographer in the courtroom asked by counsel for the accused is Francisco Benita who obviously came without subpoena in court; And as admitted by counsel for defense,

Francisco Benitag was asked to come today." (T.S.N., September 29, 1986 pp. 20-22)

xxx xxx xxx

"COURT

Proceed.

ATTY. FERNANDEZ:

Alright, with the interpreter as Adique, will you please put his hand together and make him hold the gun as he was holding it that night?

COURT:

At this juncture, the right hand of Adique, represented by the interpreter, is holding the firearm with the left hand holding the right hand of Adique and the witness representing Alzaga, the right hand of the witness is holding the right wrist and the left hand of the witness is holding the left hand of Adique and the gun is pointing upward.

ATTY. FLORES:

At the same time Roy Aizaga, as demonstrated by the witness is on the left side of Adique facing the same direction.

ATTY. FERNANDEZ:

Alright what happened when the gun is Already in that position?

WITNESS:

(Demonstrating.)

COURT INTERPRETER:

Roy Alzaga bringing both hands of Adique down to the left side of Alzaga and the gun pointing to the level of Alzaga's waist at the same position.

ATTY. FERNANDEZ:

Then what happened to that position did it remain like that?

WITNESS:

(Demonstrating.).

COURT INTERPRETER:

Adique pulled the gun upwards and both hands of Adique holding the gun. At this juncture the gun was pointing to the left side of the face of Adique.

ATTY. FERNANDEZ:

Q. In that position what happened?

ATTY. FLORES:

Alright, may we have a shot on this angle where. Do not move!

ATTY. FERNANDEZ:

Do not move? The witness and the interpreter have already moved.

ATTY. FLORES:

Do not move? The witness and the interpreter have already moved.

ATTY. FLORES:

No, your Honor. We told him 'Do not move' because we knew that the angle was changed after we have instructed the. May we request now the.

ATTY. FERNANDEZ:

No, the gun was moved already. Put it back to the position.

ATTY. FLORES:

No, no your Honor please, the reason why we are prompted to instruct the witness not to move back was because after we have given instruction or we manifested that there should be a shot at a different angle, the gun was moved.

ATTY. FERNANDEZ:

No, no, you have to move the gun. We have to do that to put it back.

COURT:

No, it was the interpreter who moved his head after you have manifested the shot at a different angle.

ATTY. FERNANDEZ:

Q. Alright, while that gun was in that position, what happened?

WITNESS:

Demonstrating.

COURT INTERPRETER:

Again both hands of Adique was moved down the level waist of Alzaga and the gun pointing to the ground.

ATTY. FERNANDEZ:

Q. And then what happened? WITNESS:

A. (Demonstrating)

COURT INTERPRETER:

Again it pulled back upwards, the gun pointing again to the left face of Adique and the gun fired.

ATTY. FERNANDEZ:

Q. What happened to Adique when the gun exploded?

WITNESS:

A. Adique fell down the road.

Q. What happened to the gun?

A. After the gun fell down, we ran away on different directions but I was just near, when I looked back I saw somebody picked the gun, one of the companion of Adique, the shorter one." (TSN, September 29, 1986, pp. 24-28)

Most revealing, however, is the testimony of prosecution witness, Vicente Adique, Jr., brother of the victim and his companion on that ill-fated night. Vicente testified:

xxx xxx xxx

COURT INTERPRETER:

The witness referring that Engr. Adique and Roy Alzaga is conversing facing each other at a distance of more or less 1/2 foot.

ATTY. FERNANDEZ:

How did he turned back?

COURT INTERPRETER:

The witness demonstrating that Engr. Adique turned left.

ATTY. FERNANDEZ:

In that position, how did accused hold him back the right hip?

COURT INTERPRETER:

Witness demonstrating that the left hand of Roy Alzaga holding him on the right hip and pulling him back.

ATTY. FERNANDEZ:

Q. Alright, now when they are in that position again facing each other, what happened?

WITNESS:

A. He was shot.

Q. With what arm did Roy Alzaga shot Engr. Adique?

A. With right arm.

ATTY. FERNANDEZ:

Q. With right arm, how will you demonstrate that?

COURT INTERPRETER:

Witness raising his right arm and putting it on the left cheek of the official interpreter who is acting as Engr. Adique.

ATTY. FERNANDEZ:

Q. Do you mean to say that the gun is touching the left cheek?

WITNESS:

A. No, sir.

Q. Well, you please demonstrate the exact position and distance?

A. Because my brother was taller than the suspect so the position of the gun was upwards.

Q. What do you mean by upwards; how far is the gun from his face?

COURT INTERPRETER:

The distance between the cheek and the end of the ballpen representing the gun being about two (2) inches away from the cheek, of the interpreter.

ATTY. FERNANDEZ:

Q. Is that the exact position of the gun facing upwards?

ATTY. FLORES:

For a moment, may we just indicate that the direction of the ballpen is not really upright upwards but it has an angle.

ATTY. FERNANDEZ:

The witness is the one demonstrating not the lawyer. Everybody can see the position, why should you be 'explaining?

ATTY. FLORES:

Your Honor, Please.

ATTY. FERNANDEZ:

We are asking the witness to point exactly the gun so everybody can see not for anybody to explain.

ATTY. FLORES:

Precisely, your Honor please, we are trying to put on record how the ballpen was directed towards the cheek.

COURT:

You show to us.

ATTY. FERNANDEZ:

The witness can understand English.

ATTY. FERNANDEZ:

Q. Alright, like that. I wish we could have a picture taken whereas, your Honor, everybody could see the way the gun is placed, it could just graze the body. I want to make it of record that the way that the witness is pointing the gun it will not penetrate the skull but it would just graze part of the face of the skull.

ATTY. FLORES:

Your Honor please, I think that is the conclusion of the counsel for the defense but at the rate, we can see how that ballpen is aimed on the left cheek of the interpreter. It is clear that it has an angle where the end of the ballpen is aimed at the left cheek and therefore it would not just be a case of grazing.

ATTY. FERNANDEZ:

May we request that a photographer be brought here and that the witness would not change the position. This is very crucial, your Honor, very crucial. You can not just rely on the interpretation of the private prosecutor because everybody can see it. From the position that the gun is being pointed by the witness, it would just

graze the left cheek. May we ask for a suspension so we can call a photographer.

ATTY. FLORES:

We are not objecting to the calling of a photographer but we believe, your Honor please, that the honorable court has seen the angle the way the ballpen was pointed to the left cheek and it is better to leave the matter for judicial appreciation.

ATTY. FERNANDEZ:

Ah no, this case will reach the appellate court. The honorable court saw but how can the appellate court see, that is why we want a picture taken.

COURT:

We will have a picture taken." (TSN, November 27, 1985, pp. 31735)

xxx xxx xxx

"COURT:

At this juncture a photograph is being taken. Witness pointing the firearm at a distance less than two (2) inches from the left cheek of the interpreter who acts as the victim.

ATTY. FERNANDEZ:

I think it should be made to appear that the photographer should directly file six (6) copies of the picture and the negatives with the Clerk of Court." (TSN, November 27, 1985, p. 38)

It was not a mere slip of the tongue or a clever maneuver by the defense lawyer which led Vicente Adique, Jr. to testify in a manner, sustaining the testimony of Roy Alzaga and the two eye-witnesses who testified for the defense. The court had declared a recess. A photographer had to be fetched. There were legal skirmishes about a ballpen being used to represent a firearm and about the difference in height between the victim and the interpreter who stood as the victim during the court re-enactment. A 38 caliber revolver was produced. Only then were the relative positions frozen in a photograph. Yet when the picture was taken, Vicente had not corrected himself or changed his testimony. He placed the tip of the gun barrel two inches away from the cheek of his brother. (See photographs Exhibits A and A-1 for the trial court).

Reasonable doubts regarding the correctness of the finding of guilt have basis. The trial court not only ignored the testimony of the key prosecution witness but it based its conclusion on the findings of a resident physician and a ballistics experts who were not present at the shooting and whose conclusions are inconclusive and could be interpreted either way.

There are other findings challenged by the appellant.

The initial discussion of its conclusions by the court centers on the alleged flight of the appellant immediately after the shooting. In fact, the incident of flight appears to have greatly influenced the rest of the decision. According to the appellant, he was about to help the fallen victim but he was afraid that Vicente Adique, Jr. and Ernesto Toledo who had knives would attack him. He later fled to Manila, followed by his wife, because there were men threatening him. The court discounted the alleged threats saying that Alzaga's father is a barangay chairman and prominent in the place while his father-in-law, Judge Protacio Sto. Tomas is easily accessible in Legaspi City. The trial court also noted that Alzaga was earlier able to pacify Alfredo Adique twice without fear of the latter's companions. This may be so, if it is the prosecution's version which is given credence. However, if it is true that Alfredo Adique left. Sawali Restaurant in drunken anger, fetched his brother and another companion to

avenge a resented wrong, and was fatally shot while Roy Alzaga was grappling with him for possession of his gun or at least to turn it away, there was reason for Alzaga to fear for his life. Whether intentional or accidental, the death of Adique resulted from an incident where Alzaga was the only remaining participant.

The trial court gave credence to the prosecution evidence that Alfredo Adique and Roy Alzaga conversed in low voices and "in a somewhat friendly manner" for about 30 minutes before Alzaga suddenly pulled Adique around when he was leaving and then shot him. The shooting is inconsistent with the friendly conversation and the absence of any motive.

The appellant argues:

"Based on the foregoing, the first discernible question is why did accused-appellant shoot the victim after they had a quiet friendly conversation? Why did the accused-appellant shoot the victim on the left cheek with the gun pointed upwards? If the accused-appellant and the victim were facing each other, the most natural thing to do was for the accused-appellant to shoot the victim in the body or on the face with the gun pointed straight in a horizontal position, not pointing upwards, as demonstrated by the prosecution's two (2) eyewitnesses? If, indeed, the victim had already turned his back from the accused-appellant, why would accused-appellant still draw the victim to face him when accused-appellant could have easily shot the victim at the back of his head or the back of his body? If accused-appellant really killed the victim, why was there only one (1) gunshot fired? It is most unnatural for one who intends to kill somebody to still draw the Victim, whose back is already against the assailant, in order that he may face the assailant prior to the shooting, in the nature of things, an assailant would conveniently shoot the victim while his back is turned against him to facilitate the killing with ease." (Rollo, pp. 138-139)

In his sixth assignment of error the appellant questions the trial court's reliance on a Petition for certiorari dated April 16, 1984 which was filed with the Court of Appeals. The court noted discrepancies between the statement of facts in the 1984 petition and the statements given in court by Alzaga in 1987. The petition states there was a "rumble" while the court testimony states there was only an "altercation." Comparing the statement of facts in the petition with the facts given in Alzaga's testimony, the court stated:

"In his statement of facts, the accused stated that an hour later, the victim Alfredo Adique came back with his group and another trouble erupted. The petitioner came out to pacify. He talked with the deceased Alfredo Adique who was armed and drunk to stop the trouble. Whereas, in Court, the accused testified that he was already in the company of Neo, Bulawan and Perez near the YMCA Building outside the Sawali Restaurant when Engr. Adique approached and collared Bulawan and pointed a gun at him where a struggle for the gun ensued between him Adique." (Rollo, p. 46)

The discrepancies are not so material as to overcome the reasonable doubts mentioned earlier. A petition is prepared by a lawyer who frames the statement of facts for the petitioner. As between the version of a lawyer who was not present during the shooting incident and the declarations made during trial in open court, it should be the words coming from the mouth of the witness that should bind him.

The trial court found the appellant guilty of murder aggravated by the use of an unlicensed firearm. The evidence leading to this aggravating circumstance is a certification by PC Captain Prudencio G. Erfe of the Records Branch, Firearms and Explosives Unit, Camp Crame to the effect that Alzaga is not a firearm licensee of any kind and caliber. The finding based on the above-stated certification ignores the possibility that the firearm belonged to the victim and, therefore, could not have been licensed in the appellant's name. The gun which killed the victim was never recovered. According to the defense, the gun was picked up by the victim's companion, Ernesto Toledo, who ran away with it. The appellant summarizes in his 97 paged brief other flaws of the questioned decision as follows:

"The prosecution's evidence is incomplete. The medico-legal expert failed to report on the matter of tattooing on the point of entry which is crucial to the determination of the distance of the gun when it was fired and the point of entry on the victim's left cheek. Worse, there was no paraffin test conducted on the victim to find out whether or not the victim did or did not fire the gun. Absent the foregoing the version of the defense becomes credible to sustain reasonable doubt at the very least.

"The prosecution evidence is inconclusive. In fact, the two (2) eyewitnesses lend credence to the version of the defense that the victim accidentally shot himself while grappling, for the gun with accused-appellant when the gun was two (2) to three (3) inches away from the point of entry. (Please see TSN., Vicente Adique and Ernesto Toledo, supra; Exhibits "0" & "0-1" Prosecution; Exhibits "10", "10-A" up to "10-E" inclusive-Defense; Exhibits "A" & "A-1", "B" & "B-1"-Court.) Consistent with the accidental killing, it was therefore understandable why Vicente Adique, Jr., initially reported that the 'culprit was unknown'. (Please see Exhibits "6", "6-A", "7" & "7-A").

"The prosecution's two (2) eyewitnesses gave inconsistent testimonies. While Vicente Adique, Jr., claims that the victim was allegedly shot by accused-appellant at a distance of one half (1/2) foot, -.Ernesto Toledo, however, claims that the victim was shot at a distance of two (2) feet away from accused-appellant.

"The testimony of Vicente Adique, Jr., who has a stronger motive to ask for the conviction since the victim was his brother, on the distance of the victim from accused-appellant as well as the gun to the point of entry substantially supports the version of the defense.

"The trajectory of the bullet supports the theory of the defense.

"The opinion of the ballistics that the gun could have been fired at a distance of two (2) feet or below also supports the theory of the defense.

"It is unnatural for a person who intends to kill a man to still draw him face to face when such person had already turned his back against the assailant.

"The fact that only one (1) gunshot was fired also supports the version of the defense of the accident. (People v. Taylaran; 108 SCRA 373).

"As repeatedly held in *Duran v. Court of Appeals*, 71 SCRA 68, *People v. Santos*, 85 SCRA 630, and *People v. Compesario*, L-70998, (14 October 1986), where inculpatory facts are susceptible of two (2) interpretations one consistent and another inconsistent with the guilt of the accused, then the accused should be acquitted since the evidence fails to fulfill the test of moral certainty to support a conviction." (Rollo, pp. 160-163)

We agree with the appellant that where inculpatory facts are susceptible of two interpretations, then we have to sustain the interpretation which leads to acquittal. Proof of guilt must convince beyond reasonable doubt. We are not so convinced.

WHEREFORE the decision appealed from is hereby SET ASIDE. The accused-appellant is acquitted on grounds of reasonable doubt.

SO ORDERED.

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

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