

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JULIO LUG-AW AND ROGELIO BANNAY ALIAS JUNIOR BANNAY, DEFENDANT-APPELLANTS.*G.R. No. 85735. January 18, 1994*

Ponente: ROMERO, J.

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This case demonstrates how passion can sway people who perceive that their right to till the soil is being violated - Carlos Pal-loy was shot to death as he was fencing the boundary limits of the land he was farming by persons identified with the owner of the land adjacent to his own and with whom Pal-loy had a boundary dispute.

Pal-loy was farming part of the communal forest land located in Sitio Kalipkip, Sto. Niño, Maddela, Quirino. Despite the boundary dispute between him and his neighbor, Conchita Tipon (Nipol or Ngipol), on December 12, 1985, Pal-loy straightened out the boundary line by putting up a fence allegedly upon the instruction of the public forester.[1]

As Pal-loy went about his task, his 13-year-old daughter, Sonia, and another daughter named Carina, followed him around, Pal-loy was proceeding towards the house when Sonia heard a gun report. Immediately, she went uphill and just as a second gun report resounded, she saw Rogelio Bannay and Julio Lug-aw from a distance of around four meters. She saw, too, that as her father was about to draw his bolo, Lug-aw shot him.

Approaching her father, she found him wounded on the right shoulder and the lower portion of the breast. Pal-loy asked her to call her mother. Sonia obeyed and together with her mother, they returned to him. He told them that his assailants were Lug-aw and Bannay. Her mother told her to seek help but no one responded. It was only when her mother herself called for help that Boy Culap, Gorio Gay-yaman and Patumbay Immul-yap came to their assistance. They brought Pal-loy to their house.

According to Sonia, Lug-aw was behind a tree stump when he shot her father. Bannay, who was with Lug-aw, was hiding and he did not do anything.[2] She was around ten meters from the two but she could not have seen them had she and her sister Carina not climbed a tree after the first shot. After shooting Pal-loy, Lug-aw ran towards the left side of Pal-loy with Bannay following him. Sonia saw the gun used in shooting her father but could not tell its caliber.[3]

Carmen, Pal-loy's wife, was at home at around 5:00 o'clock in the afternoon of December 12, 1985 when she heard a gun report which was followed by another shot three minutes later. She rushed to where she thought she heard the shots and found her daughters hiding behind the stump of a tree near their father. Her daughters informed her that their father's assailants were Julio Lug-aw and Junior Bannay, the nephew of Conchita Tipon. Her husband himself corroborated this and told her, "Awan sabali nga pimमतog, nangpatay kaniak no haan nga ni Julio Lug-aw kenni Rogelio Bannay" meaning, "nobody killed me except Lug-aw and Bannay." [4]

Instructing her daughters to look after their father, Carmen forthwith proceeded to the barangay captain and

councilmen of Sto. Niño to ask for help. Since no one came to help her, she sought the assistance of her neighbors. Her husband died at around 12 o'clock midnight and they buried him within the premises of their residence.[5]

Having heard of the "suspicious circumstances" surrounding the death of Pal-loy, the police station commander in Maddela requested the municipal health officer to conduct an autopsy after the body of Pal-loy shall have been exhumed.[6] For his part, the municipal health officer, Dr. Teodomiro R. Hufana, Jr., manifested before the municipal trial judge that after the burial of Pal-loy on December 15, 1985, the police acted on the case only upon the order of the commanding officer of the 166th PC company. Dr. Hufana also requested that the police bring down the body of Pal-loy from the mountain as he was incapable of negotiating the six-kilometer distance to the place where Pal-loy was buried.[7]

Upon exhuming the body on July 7, 1987, Dr. Hufana found it dressed in a white T-shirt and wrapped in a blanket. The bones were all in "chronological order" and there were four pellets in the lower quadrant of the abdomen and three pellets in the thoracic cage. There were two holes on the right side of the back of the T-shirt which were "probably the exit of the two pellets." According to Dr. Hufana, Pal-loy could have died of "severe hemorrhage secondary to gunshot wound." [8]

The police filed before the municipal trial court of Maddela a complaint for murder against Lug-aw and Bannay on October 29, 1986.[9] Bannay was arrested on November 18, 1986 while Lug-aw was apprehended the following day.[10] The court thereafter fixed their bailbond at P20,000.00 each[11] but it was later reduced to P12,000.00 each.[12] Lug-aw and Bannay were then ordered released from custody in an Order dated January 26, 1987 upon posting of the bailbond.[13] On May 19, 1987, the following information was filed against them:

"That on or about 5:00 o'clock in the afternoon of December 12, 1985 in barangay Sto. Nino, Municipality of Maddela, Province of Quirino, Philippines, the above-named accused, armed with firearms, with intent to kill, conspiring, confederating and mutually helping one another, attended with treachery and evident premeditation, did then and there, wilfully, unlawfully and feloniously, shot CARLOS PAL-LOY which caused the death of the latter.

That the crime was attended by the qualifying circumstances of treachery and evident premeditation.

CONTRARY TO LAW."

Testifying in his own defense, Julio Lug-aw, the son-in-law of Conchita Nipol, swore that he was plowing his farm in Nalungtutan, Nagtipunan, Quirino around 16 to 17 kilometers away from Sitio Kalipkip, Sto. Niño, Maddela, Quirino when the shooting occurred. Sitio Kalipkip can be reached on foot from Nalungtutan for five (5) hours as the road between them can be negotiated only by a 6 x 6 truck when the river is shallow. He denied farming his mother-in-law's agricultural land in Sitio Kalipkip as he had never set foot therein except when he got married. He expressed amazement at Sonia Pal-loy's testimony that he was the gunwielder, repeatedly denying any grudges between him and the victim's family.[14]

Rogelio Bannay whose house in Nalungtutan was around fifty meters away from that of Lug-aw, testified that when the crime occurred, he was at home "peeling peanuts" with his wife. He had gone to Sto. Niño in January 1984 to attend a wedding but he had not been to Sitio Kalipkip. He belonged to the same Ifugao tribe as Carlos and Carmen Pal-loy and the latter was his barriomate in Banawe. Like Lug-aw, he disclaimed bearing any grudge against Pal-loy and his family. Bannay Buanan and Conchita Nipol, his relatives in Sitio Kalipkip, indeed had a farm adjacent to the kaingin of Pal-loy but he learned from his relatives that they and Pal-loy enjoyed "good company" (timpuyog).[15]

Both alibis of Lug-aw and Bannay were supported by Jovito Pascual, the barangay captain of San Dionisio II, Nagtipunan, Quirino, who testified that when the crime transpired, he saw Lug-aw plowing his farm with four other persons. He also saw Bannay "peeling peanuts" at home.[16] In its effort to discredit the testimony of Sonia Pal-loy, the defense presented Moreno Lingay, a farmer and storekeeper in Dipintin, Sangbay East, Nagtipunan, Quirino, who testified that on December 13, 1985, two of Pal-loy's children came to his store to buy petroleum gas and gin and when he asked them who killed their father, both allegedly replied, "I don't know." Lingay asked the children's names but in their rush, they failed to answer him. Only later did he learn that their names were Sonia and Carmen.[17]

In its decision of September 8, 1988, the lower court[18] ruled that the alibi and denial interposed by the defense cannot overcome the positive identification of the accused by Sonia Pal-loy. Appreciating both treachery and evident premeditation against the accused, the lower court disposed of the case, as follows:

"IN VIEW OF ALL THE FOREGOING CONSIDERATIONS, the prosecution has proven the guilt of the accused Julio Lug-aw and Rogelio Bannay beyond reasonable doubt. Accordingly, the accused ROGELIO BANNAY and JULIO LUG-AW are hereby sentenced to reclusion perpetua or life imprisonment plus the accessory penalties provided by law and they are further ordered to indemnify the heirs of the victim Carlos Pal-loy in the amount of Thirty thousand (P30,000.00) Pesos. Cost against the accused.

SO ORDERED."

The accused then filed a motion for "new trial and/or consideration" based on the "inefficient legal service" rendered by the CLAO (Citizens Legal Assistance Office) which allegedly denied the accused due process and prevented them from properly ventilating their cause.[19] Attached to the motion were the affidavits of: (1) Bannay attesting to the fact that before the promulgation of the decision, Carmen Pal-loy, the victim's widow, twice approached him begging for forgiveness; telling him that she was just induced to frame up the accused and expressing her willingness to testify to prove that both accused were innocent; (2) Fernando Lablabong, stating that he was with Lug-aw plowing the field on December 12, 1985; that he was in the house of Bannay when Carmen Pal-loy confessed that she and her daughters were induced to point to the accused as the killers, and that he confirmed the fact that it was physically impossible for the accused to have been at the scene of the crime, and (3) Gregorio Gayyaman, swearing that he was one of those who helped Carmen bring her dead husband home; that being a relative of Pal-loy, he asked Carmen the name of the killer of her husband but she replied that she did not know; that while he and others made Pal-loy's coffin, no mention was made of the names of the accused as the killers; that it was only after Carmen had lived with one Carlos Capinpin that the accused became the suspects in the killing and that he was surprised that after the victim's family had informed him that there was no evidence as to who killed Pal-loy, the names of the accused suddenly cropped up.

After the prosecution had filed its comment on the motion, the lower court denied the same in an Order dated September 8, 1988 explaining that the testimonies of Lablabong and Gayyaman could not be considered newly discovered evidence because the defense had all the opportunity to present them as witnesses at the trial. The court also turned down the claim of the defense regarding the incompetence of counsel stating that, if upheld, there would be no end to a suit as long as a new counsel could be employed by the accused.[20]

The defense filed a motion for the reconsideration of said Order quoting the "treatise" of then Secretary of Justice Sedfrey A. Ordoñez on "forgotten evidence" under Rule 37 of the Rules of Court and ineffective counsel.[21] Attached to the motion were the affidavits of: (1) Rosalina Bookan stating that Carmen Pal-loy, her townmate, admitted to her that the accused were not the real culprits and that Carmen was advised against recanting her testimony which might subject her to persecution, and (2) Carmen Pal-loy swearing that her husband "did not state categorically and clearly that it was the accused Julio Lug-aw and Rogelio Bannay who shot him" and that

she did tell Bookan and the spouses Rogelio and Julie Bannay that her husband did not say that the accused perpetrated the crime.

In its Order of October 7, 1988, the lower court denied the motion and held that it was Sonia Pal-loy and not her mother, Carmen, who is the principal witness to the killing and that the alleged ineffective legal assistance is not a ground for new trial.[22] Hence, the instant appeal.

The appellants contend that the lower court erred in finding that they were positively identified as the culprits and that the victim's wife and daughter Sonia were present when the crime was perpetrated. They also assail the lower court's finding that there was conspiracy between them in killing Pal-loy.

As in most criminal cases, the linchpin in the resolution of this case is the credibility of the witnesses. Times without number, this Court has declared that the findings of the trial court on this matter should not be disturbed on appeal unless some facts or circumstances of substance and value have been overlooked which, if considered, might well affect the result of the case. This doctrine is premised on the undisputed fact that, since the trial court has the best opportunity of observing the demeanor of the witnesses while on the stand, it can discern whether the witnesses are telling the truth or not.[23] We find no cogent reason to depart from this doctrine.

As expected, the appellants zeroed in on the testimony of Sonia Pal-loy, the only eyewitness presented by the prosecution. They contend that Sonia did not actually witness how her father was shot. In support of this contention, appellants cite discrepancies between her sworn statement and her testimony in open court. They assert that her failure to specifically name the two persons running away from the scene of the crime cast a doubt on her testimony that she saw Lug-aw shooting her father.[24]

The Court has always discouraged reliance on affidavits as a basis for resolving a criminal case. In *People v. Caranzo*[25] the Court said that "affidavits being taken ex parte usually are incomplete and often inaccurate, caused sometimes from partial suggestions, sometimes for want of suggestions and inquiries, without the aid of which the witness may be unable to recall the connected collateral circumstances necessary for the correction of the first suggestion of his memory and for his accurate recollection of all that belongs to the subject." As correctly pointed out by the Solicitor General, Sonia's failure to name the appellants in her sworn statement could be attributed to her tender years and the trauma and shock she had experienced after having witnessed the horrifying killing of her father.

The gaps in Sonia's sworn statement were, however more than offset by her testimony during the preliminary investigation conducted by the municipal trial judge on November 12, 1986 wherein she testified, thus:

"Q - Who is your father?

A - Carlos Palloy, sir.

Q - Where is your father now?

A - He was killed, sir.

Q - Who killed him?

A - Julio Lug-aw and Junior Bannay, sir.

Q - Why do you know that your father was killed by Julio Lug-aw and Junior Bannay?

A - I saw them shoot my father, sir.

Q - Between the two, Julio Lug-aw and Junior Bannay, who shot your father?

A - Julio Lug-aw, sir.

Q - What kind of gun did you see they used to shoot your father?

A - Long, sir.

Q - How far were you when you saw Lug-aw shot your father?

A - About four meters, sir, from my father, sir.

Q - Where were Julio Lug-aw and Junior Bannay at the time when they shot your father?

A - They were hiding behind a trunk of a tree, sir.

Q - Did you tell to your mother that your father was shot?

A - Yes, sir.

Q - When you heard the gun report and your father was shot what did you do?

A - I called my mother, sir.

Q - (Did) you have a companion at the time when you heard a gun report?

A - Yes, sir my sister Carlina.

Q - How many gun report(s) did you hear (from) the direction of your father?

A - Two, sir.

Q - And the gun report(s) (were) all in the direction of your father?

A - Yes, sir.

Q - What was your father doing when he was shot?

A - He was driving a peg on the ground when he was shot and when he was shot he tried to draw his bolo but he was prevented when (sic) drawing his bolo because they hit him on his arm, sir.

Q - Before your father died did you talk to him?

A - Yes, sir.

Q - What did he tell you if any?

A - He said that "IF I DIE MY ASSAILANT(S) WHO KILL(ED) BY SHOOTING ARE JULIO LUG-AW AND JUNIOR BANNAY." (Underscoring supplied.)[26]

During the trial, Sonia clung tenaciously to her story and testified that it was during the second gun report that she saw Lug-aw shot her father. Sonia testified as follows:

"Q - You said while you were at the lower place where your father was you heard a gun report, what did you do when you heard that gun report?

A - We went uphill, sir.

Q - When you were going uphill, what transpired?

A - On the second time that he was shot we saw them, sir.

Q - And who were those whom you saw?

A - Rogelio and Julio, sir.

x x x x x x x x.

Q - You said you saw these persons who shot your father, who actually shot your father?

A - Julio Lug-aw, sir.

Q - What was your father doing at the time Julio Lug-aw shot your father?

A - He was about to draw his bolo in order to fight him but the bolo was thrown away, sir.

Q - And how far were you at that time when you saw Julio Lug-aw shot your father?

A - Four (4) meters, sir." (Underscoring supplied.)[27]

In their attempt to discredit Sonia, the appellants pointed out that the normal reaction of a person to such a traumatic happening would be to flee. However, no hard and fast rule can be laid down with respect to the reaction of persons to the same situation. Running to one's father who has been shot to give him succor is equally a normal reaction of any daughter.

The failure of the defense to attribute any ill motive on the part of Sonia in order to pin responsibility on the appellants adds more credence to her testimony. In fact, both appellants admitted before the court that there was no reason for Sonia to testify against them. Indeed, it is inconceivable for a 13-year-old who barely finished third grade to impute a very serious offense on anyone unless it were true. If she were merely fabricating her testimony, she would have broken down during the intensive cross-examination at the stand. Al contrario, as observed by the trial court, Sonia was "natural in her manners" and testified "straight forwardly."

Her positive identification of the accused as the perpetrators of the crime demolished their alibi and denial. Even standing alone, such positive sole testimony is enough basis for conviction.[28] Thus, even if we lend credence to defense's claim that the victim's widow, Carmen, prevaricated as shown by the fact that she allegedly tried to recant after the termination of the trial, Sonia's testimony suffices as a basis for a finding of guilt. Noteworthy is the fact that, unlike her daughters Sonia and Carina, Carmen was not an eyewitness.

Hence, it is principally from Sonia's testimony that we conclude that the crime committed was not murder but homicide. The qualifying circumstances of treachery and evident premeditation had not been proven beyond reasonable doubt. The trial court drew the conclusion of the presence of treachery because the attack was sudden as Pal-loy was simply going about his task of fencing his kaingin. We find however, that no one witnessed the initial attack. As Sonia herself testified, she heard the first shot, went up a hill, climbed a tree and from there, saw Lug-aw shooting her father with the shot reverberating as the second gun report. Nowhere do we find in the records any evidence that she witnessed the first shot nor how her father reacted to it. What she did see was her father trying to repel the assault with a bolo but he failed because a second shot hit him. As this Court held in *People v. Castor*,[29] where the lone eyewitness was not able to observe the commencement of the assault, he could not, therefore, testify on how it all began and developed. Citing *United States v. Perdon*[30] and *United States v. Pangilion*,[31] the Court held in the *Castor* case that absent any particulars as to the manner in which the aggression commenced or how the act which resulted in the death of the victim unfolded, treachery cannot be appreciated to qualify the killing to murder.

Similarly, the records are bereft of evidence that the crime was committed with evident premeditation. The three requisites of this aggravating circumstance, namely, the time when the offender determined to commit the crime, an act manifestly indicating that the culprit has clung to his determination and a sufficient lapse of time between the determination and execution to allow the accused opportunity to reflect upon the consequences of his act,[32]

are wanting in the case at bar. Evident premeditation was, therefore, incorrectly appreciated by the trial court.[33]

While the guilt of Lug-aw, the gunwielder, has been established beyond reasonable doubt, the complicity of his companion, Bannay, is open to question. As regards his participation in the crime, Sonia testified as follows:

"Q - At the time Julio Lug-aw shot your father, what was the other accused Rogelio Bannay also doing at that time?

A - He was hiding, sir.

Q - Did you notice if he has a firearm?

ATTY. FLORES -

Objection.

FISCAL FERNANDEZ -

Q - What did you notice to (sic) Rogelio Bannay when he was hiding?

A - None, sir.

Q - And what was the participation of Rogelio Bannay if any in connection with the shooting of your father?

A - None, sir.

COURT -

Q - (To the witness) But he was there near Julio Lug-aw?

A - Yes, Your Honor.[34]

Additionally, Sonia stated that after Lug-aw had shot her father, Bannay followed him in running away.[35] Bannay's presence at the scene of the crime was also proven by the victim's declaration that Bannay and Lug-aw were his assailants. While these circumstances and utterances may prove Bannay's presence at the scene of the crime, unless conspiracy is proven, these do not, by themselves, indicate criminal culpability. The quantum of evidence required for a finding that Bannay was in conspiracy with Lug-aw has not been met. Conspiracy, as with any other ingredient of the offense, must be proved as indubitably as the crime itself through clear and convincing evidence and not merely by conjecture. As such, proof beyond reasonable doubt is required.[36]

There is conspiracy when two (2) or more persons come to an agreement concerning the commission of a felony and decide to commit it.[37] Direct proof, however, is not essential to prove conspiracy. It may be shown by acts or circumstances from which may be logically inferred the existence of a common design among the accused to commit the offense charged; it may likewise be deduced from the mode and manner in which the offense was perpetrated.[38] To extricate himself from criminal liability, the conspirator must have performed an overt act to dissociate or detach himself from the unlawful plan to commit the felony.[39]

There is no evidence that Bannay shared Lug-aw's criminal intent. Thus, although he did not do anything in contravention of the supposed conspiracy, his mere passive presence at the scene of the crime did not make him liable therefor.[40] Moreover, the prosecution failed to show other facts and circumstances, aside from Bannay's presence near Lug-aw as the latter committed the dastardly act and following Lug-aw as he ran away, from which a community of interest and design between the two may be construed. The prosecution's weakness in this respect cannot be taken against Bannay. We should take into account the doctrine that, in case of doubt as to the culpability of an accused, it should be resolved in accordance with the presumption of innocence.

Homicide under Art. 249 of the Revised Penal Code is punishable by reclusion temporal. In the absence of any aggravating or mitigating circumstances, the penalty imposable is the medium degree of reclusion temporal.[41] Applying the Indeterminate Sentence Law, the penalty that should be imposed on Lug-aw is ten (10) years and one (1) day of prision mayor maximum as minimum penalty to seventeen (17) years and four (4) months of reclusion temporal medium as maximum penalty. Pursuant to the latest jurisprudence, Lug-aw shall indemnify the heirs of Carlos Pal-loy in the amount of fifty thousand pesos (P50,000.00).

WHEREFORE, appellant Julio Lug-aw is hereby found guilty beyond reasonable doubt of homicide under Art. 249 of the Revised Penal Code for killing Carlos Pal-loy and he shall serve the indeterminate sentence of ten (10) years and one (1) day of prision mayor maximum as minimum penalty to seventeen (17) years and four (4) months of reclusion temporal medium as maximum penalty, and indemnify the heirs of Carlos Pal-loy in the amount of fifty thousand pesos (P50,000.00). Appellant Rogelio Bannay is hereby ACQUITTED of the crime charged and he shall be released from custody immediately. No costs.

SO ORDERED.

Feliciano, (Chairman), Bidin, Melo, and Vitug, JJ., concur.

[1] TSN, July 23, 1987, pp. 17-18.

[2] TSN, August 24, 1987, pp. 3-10.

[3] Ibid, pp. 12-15.

[4] TSN, July 23, 1987, pp. 12-22.

[5] Ibid, pp. 16-17 & 26.

[6] Record, p. 5.

[7] Ibid, p. 4.

[8] Exh. "A."

[9] Record, p. 1.

[10] Ibid, pp. 21 & 23.

[11] Ibid, pp. 34-35.

[12] Ibid, p. 37.

[13] Ibid, p. 100.

[14] TSN, July 12, 1988, pp. 2-8.

[15] TSN, July 6, 1988, pp. 2-12.

[16] TSN, April 7, 1988, pp. 2-6.

[17] TSN, May 12, 1988, pp. 3-5.

[18] Presided by Judge Carlos T. Aggabao, RTC Branch XXXII, Cabarroguis, Quirino.

[19] Record, p. 301.

- [20] Record, p. 312.
- [21] Ibid, p. 314.
- [22] Ibid, p. 320.
- [23] People v. Galendez, G.R. Nos. 56465-66, June 26, 1992, 210 SCRA 360
- [24] Appellants' Brief, pp. 6-8; Rollo, pp. 82-84.
- [25] G.R. No. 76743, May 22, 1992, 209 SCRA 232, 243-244.
- [26] Exh. "C;" Record, pp. 14-15.
- [27] TSN, August 24, 1987, pp. 4-5.
- [28] People v. Fagyan, G.R. No. 90197, May 22, 1992, 209 SCRA 275.
- [29] G.R. No. 93664, December 11, 1992, 216 SCRA 410, 422.
- [30] 4 Phil. 141 (1905).
- [31] 34 Phil. 786 (1916).
- [32] People v. Balatucan, G.R. Nos. 93805-06, February 7, 1992, 206 SCRA 81.
- [33] People v. Competente, G.R. No. 96697, March 26, 1992, 207 SCRA 591.
- [34] TSN, August 24, 1987, pp. 9-10.
- [35] Ibid, p. 15.
- [36] People v. Donato, G.R. No. 94530, March 6, 1992, 207 SCRA 125.
- [37] Art. 8, Revised Penal Code.
- [38] People v. Pama, G.R. No. 90297-98, December 11, 1992, 216 SCRA 385, 401.
- [39] People v. De los Reyes, L-44112, October 22, 1992, 215 SCRA 63.
- [40] People v. Garcia, G.R. No. 94187, November 4, 1992, 215 SCRA 349.
- [41] Art. 64 (1), Revised Penal Code.

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