

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
CALIXTO TUMALE Y TANGUIN, MAXIMO ATIENZA Y AMBAL,
ROLANDO TITOY Y BANTASAN, DEFENDANTS-APPELLANTS.**

G.R. No. 89116. August 22, 1990

Ponente: GANCAYCO, J.

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GANCAYCO, J.:

This is a prosecution for robbery with homicide resulting in the senseless maltreatment of an old woman that caused her life.

At about 5:00 o'clock in the morning of September 5, 1987, Susan Aguilar, alias Susan Titoy, together with Sammy Cardenas opened the sari-sari store of their employer's mother-in-law, Lola Gorgonia Danque Vda. de Limcangco, at No. 4 Glenn Street, U.P. Professors Village, Barrio Culiati, Diliman, Quezon City. Thereafter, Susan went inside the house adjoining the store to cook and clean the house while Sammy cleaned the car.

Two men then arrived at the store to buy cigarettes. They looked around to see if other people would come. Suddenly their three companions arrived and all the five of them entered the store. Two of them grabbed Lola Gorgonia by the hand and covered her mouth with a handkerchief to prevent her from shouting. They dragged her towards the house adjoining the store. When they saw Sammy cleaning the car, they held him by the neck as they entered the house. In time, they tied up Lola Gorgonia, Susan and Sammy with plastic straws. The women were shoved inside the bathroom, while Sammy was left outside. While inside the bathroom, Lola Gorgonia felt dizzy and her perspiration and breath were cold.

The five men ransacked the house and the store and were able to take away cash, a pair of diamond earrings, a ring, a transistor radio, a table watch, a stethoscope and a blood pressure instrument, all valued at P8,000.00 to P9,000.00.

Upon noticing that the men were gone, Sammy opened the bathroom and saw Lola Gorgonia sitting on the floor, while Susan was holding her head asking if she was still alive. Lola Gorgonia appeared to be glaring at Susan as if the latter had a part in the crime.

Sammy then opened the gate where he met his employer, Ric Aquino, son-in-law of Lola Gorgonia, who inquired about what happened. Aquino then rushed his mother-in-law to the Philippine Heart Center where she was pronounced dead. Post mortem examination showed that the cause of her death was "cardiac failure, secondary to myocardial infraction, resulting from coronary insufficiency."

On the same day the incident was reported to the police. The sketch of the face of one of the suspects was made based on the description of eyewitnesses. This led to the apprehension of Calixto Tumale whose face had a strong resemblance to the said sketch. He was investigated by Pfc. Rodrigo R. Fortaleza of the Quezon City Police Station on September 19, 1987. His statement was taken in writing and was sworn to before the fiscal on the same day.[1] In the said statement it appears that he admitted his complicity in the commission of the offense and he

identified his companions to be Rene Roma, Maximo Atienza, Rolando Tito and one Dado. Thus, Maximo Atienza and Rolando Tito were apprehended. In due course an amended information was filed against all of them in the Regional Trial Court of Quezon City charging them with the offense of robbery with homicide.

Upon arraignment all the accused entered a plea of not guilty. After the trial on the merits a decision was rendered by the trial court on March 8, 1989 finding the three accused guilty beyond reasonable doubt as principals of the crime of robbery with homicide and sentencing each one of them to suffer the penalty of reclusion perpetua and to indemnify the heirs of the victim, Gorgonia Danque Vda. de Limcangco, in the amount of P30,000.00 without subsidiary imprisonment in case of insolvency, and to pay the costs.

Not satisfied therewith said accused appealed to this Court.

In his appeal, appellant Maximo Atienza raises the following errors allegedly committed by the trial court:

"I

THE TRIAL COURT ERRED WHEN IT DISREGARDED THE REPUDIATION BY APPELLANT CALIXTO TUMALE OF HIS STATEMENT WHICH HE GAVE TO THE POLICE.

II

THE TRIAL COURT ERRED WHEN IT DISREGARDED THE FACT THAT EYEWITNESS SUSAN AGUILAR/SUSAN TITOY WAS NOT ABLE TO IDENTIFY THE APPELLANTS IN OPEN COURT.

III

THE TRIAL COURT ERRED WHEN IT RULED THAT APPELLANT MAXIMO ATIENZA WAS A PRINCIPAL IN THE OFFENSE CHARGED.

IV

THE TRIAL COURT ERRED WHEN IT RULED THAT THERE WAS CONSPIRACY AMONG THE APPELLANTS.

V

THE TRIAL COURT ERRED WHEN IT DISREGARDED THE FACT THAT APPELLANT MAXIMO ATIENZA WAS NOT ASSISTED BY COUNSEL WHEN HE WAS BROUGHT TO THE POLICE STATION.

VI

THE TRIAL COURT ERRED WHEN IT DISREGARDED THE CONSTITUTIONAL PRESUMPTION OF INNOCENCE OF APPELLANT MAXIMO ATIENZA."

In a separate appeal the other appellants enumerated the alleged errors of the trial court to be:

"I

THE COURT A QUO ERRED IN GIVING MUCH WEIGHT AND CREDENCE TO THE EVIDENCE FOR THE PROSECUTION WITHOUT CONSIDERING THAT OF THE DEFENSE.

II

THE COURT A QUO ERRED IN FINDING ACCUSED-APPELLANTS GUILTY BEYOND REASONABLE DOUBT OF THE CRIME OF ROBBERY WITH HOMICIDE."

The pivotal issue in this appeal is whether or not the appellants have been duly identified to be among the culprits by the witnesses for the prosecution. Insofar as appellant Tumale is concerned, the admissibility of his extrajudicial confession is also in issue.

An examination of the testimony of Susan Aguilar shows that the following answers were given by her to the questions propounded to her on direct examination:

"Q Who were these people you said hogtied you?

A Them, Sir, but I could only remember their face before when I was hogtied I was brought inside the bathroom.

Q Do you know the person by face, the one who hogtied you?

A I will be able to recognize him once I see him.

Q Will you please stand and look around this Court and tell us if he is here?

A They are not here, Sir. Nobody is here. They are not here.

ATTY. INTING

I manifest that the suspects Calixto Tumale and Titoy are present in Court, your Honor.

COURT

Alright, please take note.

ATTY. ROUS

Same manifestation for Maximo Atienza.

COURT

The manifestation of the counsel for accused that Tomale, Titoy and Atienza are all in court is NOTED."[2]

On further questions on the direct examination the same witness testified as follows:

"Q Coming back to you said the man held you, then what happened after that?

A I was hogtied and I look up and I saw an old man whom I recognize and I told him "kilala kita".

Q What is his name?

A Calixto.

Q You know his full name?

A I do not know, Sir.

Q Is he here in Court?

A Yes, Sir.

Q Will you please point him to us?

A There, Sir.

(Witness pointing to a person who is presently handcuffed and identified himself as Calixto Tumale.)

FISCAL ESCUETA

Why did you know him?

A Because he usually pass by our place at our store.

Q Then after being held by the man you pointed to as Calixto, what did he do to you if he did anything?

A I was tied and I was brought inside the bathroom.

Q Who tied you?

A The old man who was wearing yellow suit.

Q Is he here in Court the one who tied you?

A I do not recognize him here, Sir.

FISCAL ESCUETA

Do you know him by face?

WITNESS

Yes, by face because. He's round face.

Q Will you please look around for the second time if he is here?

A None, Sir.

Q After you were shoved inside a room, what happened next?

A No, Sir, it was in the bathroom."^[3]

From the testimony of this witness it is clear that while in the beginning she could not identify any of the culprits among any of the appellants who were then present in court, on further questions of the prosecution she positively identified the appellant Calixto Tumale as among the robbers. She nevertheless failed to identify the two other appellants. Her inability to identify appellant Tumale at the beginning may be attributed to her nervousness and it being her first experience in court.

Sammy Cardenas also testified in this manner as to the identity of the persons he saw:

Q Were you able to see the face and the appearance of these five people that entered the store of your Lola Gorgonia?

A Yes, Sir.

Q Would you be able to recognize them if you would see them?

A Yes, Sir.

Q Will you kindly stand up and look around inside the courtroom and try to identify the person you saw on that particular date and time by tapping them on the shoulder or point at their person.

WITNESS

The two of them, Sir.

COURT

Will you kindly stand up.

(Witness pointing to a person who identified themselves as Maximo Atienza and Calixto Tumale.)

ATTY. BERNALBO

You said that there were five people who entered the sari-sari store of your lola Gorgonia, how many of them you could actually recognize if you see them again?

A I can only identify four not five, Sir.

Q What is the reason why you could not identify the fifth one?

A Because he was wearing a mask, Sir.

ATTY. BERNALBO

What kind of mask was that particular person wearing, will you kindly describe the mask?

WITNESS

It was a black mask, Sir.

Q What part of the face of that masked man could be seen?

A Only his eyes, Sir.

Q You said a while ago that they tied,...

COURT

You said five men entered the store, you can identify only 4, the fifth man was masked but you identified in open Court only two, are there any other members of the group in Court aside from the two you identified?

A I do not see anyone aside from the two.

COURT

Will you check whether there are other accused here in Court?

ATTY. ANDRES (Branch Clerk of Court)

There are three (3) accused in Court.

ATTY. BERNALBO

You said a while ago that they tied up your Lola Gorgonia and covered her mouth, after that what did they do with your Lola Gorgonia?"[4]

This witness positively identified appellants Maximo Atienza and Calixto Tumale as among the persons who participated in the commission of the offense in his presence. He was not able to identify the rest of the five persons, including the one who was allegedly wearing a mask, from among the appellants present in court.

Susan Titoy, the mother of appellant Rolando Titoy, took the witness stand anew and was presented by the prosecution. She testified as follows:

"Madame witness, what is your relation with the accused Rolando Titoy?

A He is my son.

Q If he is in Court madame witness, will you be able to point at Rolando Titoy?

A Yes, madam.

Q Will you please look around and point to Titoy if he is in Court?

(Witness pointing to a person who identified himself as Rolando Titoy.)

Q Madame witness, were you living together before or immediately before the incident?

A He is not there. He is not living with me.

Q Since when have you been separated with your son Rolando Titoy?

A Long time ago because I have been living with my employer long.

Q Although you have not been living together with your son, when this incident happened and immediately before, would you be able to recognize your son if and when he is near you?

A Of course, madame, because he is my son.

Q You will recall that you testified that one of the persons who entered the residence of Aquino was wearing a mask, do you remember that you testified on that?

Q Yes, madam, I remember.

Q Were you able to recognize the person who was wearing a mask?

A No I was not able to recognize him, madam.

Q Was that person the one wearing mask, one of those who entered the comfort room?

A The one that brought me to the comfort room was not wearing a mask.

Q Where did you see this person who was wearing a mask in relation to the whole house of Aquino?

A Outside, madam. At the garage.

Q Was he near you then when you saw this man wearing a mask?

A No, madam.

Q But you saw him very well, is it not?

A No madame because I was immediately brought inside the comfort room.

Q. But you saw this man wearing a mask?

A Yes, madame. I saw him but it was not clear.

Q When you saw him, was he facing you or was his back toward against you?

A He was not facing me. His back was towards me.

Q That is all for the witness."[5]

Susan was positive in her identification in the courtroom of Rolando Titoy being her son. She asserted that she

could easily identify him anytime because he is her son. Nevertheless, she could not say whether the person wearing a mask was her son.

From the foregoing set of evidence of the prosecution there can be no question that the appellants Calixto Tumale and Maximo Atienza have been duly identified as among the culprits by eyewitnesses but none of them identified appellant Rolando Titoy.

The positive identification of the perpetrators of an offense is required if their complicity is to be established beyond reasonable doubt. The failure to identify any of the accused would be fatal to the case of the prosecution as to said accused.

As to the extrajudicial confession of appellant Calixto Tumale,[6] the Court finds and so holds that the same is not admissible in evidence against him much less against his co-appellants. A reading of the same as well as that of the testimony of investigator Fortaleza shows that he was not assisted by counsel during said investigation and that his alleged waiver of the right to counsel was not made with the assistance of a counsel. This is a constitutional requirement, failing in which, the said extrajudicial confession is not admissible in evidence.

The Court is not persuaded by the observation of the lower court that because appellant Tumale admitted that he knew his co-appellants, there is conspiracy. The mere fact that certain persons know each other do not necessarily prove conspiracy. Other acts than this must be established. While conspiracy need not be supported by documentary evidence, it may be deduced from the mode and manner in which the offense was committed.[7]

However, We find and so hold that there is conspiracy in this case among the five men including appellants Tumale and Atienza who were positively identified. By their joint and simultaneous acts they showed oneness of purpose to commit the robbery by disabling the household members present resulting in the death of Lola Gorgonia and carting away the personal property of Ric Aquino.

The Court also finds that Rolando Titoy had not been satisfactorily identified as a co-conspirator.

WHEREFORE, the judgment appealed from is AFFIRMED as to appellants Calixto Tumale and Maximo Atienza but it is hereby REVERSED AND SET ASIDE as to Rolando Titoy and another judgment is hereby rendered ACQUITTING Rolando Titoy, with costs de oficio.

SO ORDERED.

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

[1] Exhibit C, pp. 109 to 110, Rollo.

[2] Tsn, October 20, 1987, page 4.

[3] Tsn, October 20, 1987, pages 6 to 7.

[4] Tsn, January 21, 1988, pages 43-44.

[5] Tsn, June 9, 1988, pages 64 to 65.

[6] Exhibit "C".

[7] People vs. Pudpud, 39 SCRA 618 (1971); People vs. Mejia, 55 SCRA 453 (1974); People vs. Genoguin, 56 SCRA 181 (1974).

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