

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GORGONIO BUNTAN, SR. Y GERVAICIO AND JOHN DOE @ BAMMY, ACCUSED, GORGONIO BUNTAN, SR. Y GERVAICIO, ACCUSED-APPELLANT.**

*G.R. No. 90736. April 12, 1993*

Ponente: DAVIDE, JR., J.

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**DAVIDE, JR., J.:**

This is an appeal from the 29 August 1989 Decision of Branch 169 of the Regional Trial Court (RTC) of Malabon, Metro Manila, in Criminal Case No. 3918-MN, finding the appellant Gorgonio Buntan, Sr. guilty beyond reasonable doubt of the crime of Murder, imposing upon him the penalty of RECLUSION PERPETUA and ordering him to jointly and severally pay the heirs of the victim the sum of P30,000.00.[1]

The information was filed with the court a quo on 13 February 1986. It charges the appellant and one John Doe, @ "Bammy," with the crime of Murder allegedly committed as follows:

"That on or about the 2nd day of February 1986, in the Municipality of Navotas, Metro Manila, Philippines and within the Jurisdiction of this Honorable Court, the above-named accused with intention to kill one Crisguno Lusico Y Baquitis, with treachery and evident premeditation and by the use of superior strength, conspiring, confederating and mutually helping one another did then and there wilfully, unlawfully and feloniously attack, assault and shot [sic] one Crisguno Lusico Y Baquitis with a revolver several times, thereby inflicting upon the latter gunshot wounds which directly caused his death."[2]

Appellant's alleged companion, John Doe @ "Bammy," remains at large.

At his arraignment on 24 August 1986, the appellant pleaded not guilty. Thereafter, trial proceeded.

The prosecution presented five (5) witnesses, namely Joselita Lusico, Eulalia Lusico, Eddie Amante, Lt. Col. Desiderio Moraleda and Pat. Emerito Isidro. The defense, on the other hand, presented as its witnesses Atty. Misael Villanueva and appellant Gorgonio Buntan.

The evidence for the prosecution is summarized in the Appellee's Brief as follows:

"On February 2, 1986, between the hours of 1 and 2 in the afternoon, Eddie Amante was watching TV and drinking 'White Castle' whisky with Crisguno Lusico at the latter's residence located at 963 S. Policarpio St., Navotas, Metro Manila (pp. 3-4, TSN, July 7, 1986).

At that time, Lusico's sister, 14-year old Joselita, was in front of said house selling junk food or 'sitseria' as she called it (pp. 2-3, TSN, April 16, 1986).

Appellant's co-accused, identified only by his alias Bammy, was walking along Policarpio St. and passed by Joselita who was tending her goods. He stopped in front of Lusico's house, peeped through the window and left (p. 5, TSN, April 16, 1986).

A few moments later, Bammy returned together with appellant. Bammy again peeped through the screened window, nodded his head, pulled out a gun and without any hesitation, fired of Lusico four (4) times. Appellant was standing behind Bammy, looking out for people who might pass by (pp. 5-8, supra; pp. 4-6, TSN, July 7, 1986).

Eulalia Lusico, sister-in-law of Lusico, who was then at the second floor of the house, looked through the window upon hearing the gun reports. She saw a man tucking a gun in his waist. This man was accompanied by an old man who had white hair, a stooped posture and who walked quite slowly (pp. 8-9, TSN, May 24, 1986).

After the shooting incident, Bammy and appellant left and walked casually along Policarpio street, a small alley (p. 20, *ibid*; p. 20, TSN, April 16, 1986).

During that incident, Joselita who was merely an [sic] (1) arm-length away from Bammy and three (3) arms-length from appellant, was stuned [sic] by the occurence [sic]. She ran inside their house only when the duo left (pp. 7-9, TSN, April 16, 1986). Together with her sister-in-law Ela (Eulalia Lusico), brother Romy and Eddie Amante, she approached her fallen brother, who was then bleeding as a result of the gun shot wounds inflicted by Bammy (p. 17, *ibid*). The victim, though fallen by gun shot wounds, told his sister Joselita that it was Bammy shot [sic] him and that he was accompanied by appellant (pp. 17--18, *ibid*). Eulalia also heard what the victim said because she and her sister-in-law Joselita were then embracing the fallen victim (pp. 20-21, TSN, May 24, 1986).

Eulalia Lusico and Romy Lusico then brought the victim to the Tondo General Hospital (p. 21, *ibid*; p. 11, TSN, April 16, 1986). Joselita went to Balintawak, Quezon City to inform Leticia L. Dellusa, her sister bout the shooting incident (p. 11, TSN, April 16, 1986). The victim died before any medical attention could be given at the hospital (p. 21, TSN, May 24, 1986).

As testified to by the PC Crime Laboratory medico-legal officer, Col. Desiderio Moraleda, the victim sustained four (4) gun shot wounds, two (2) on the right side of the chest, one (1) on the left buttocks [sic] and another on the right palm. No exit wounds were observed. Four (4) caliber .38 slugs were recovered on the cadaver of the victim. The medico-legal officer observed that the two (2) gun shot wounds on the chest were fatal, could result to instantaneous death, about five (5) to ten (10) minutes thereafter and were inflicted from a distance of about 24 inches. Cause of death was hemorrhage as a result of gun shot wounds (pp. 20-19, TSN, October 27, 1986).

It was only the day following the incident, or on February 3, 1986 that appellant was apprehended by police operatives. Appellant was then playing mahjong at the house of a certain Mang Elang when three (3) policemen arrived at about 1 to 1:30 in the afternoon and informed him that the Chief was inviting him for questioning (pp. 4-5, TSN, April 18, 1988). At the police station, appellant was confronted and identified by Joselita and Eulalia Lusico as the person who accompanied Bammy when the latter shot the victim on February 2, 1986 (p. 21, TSN, April 16, 1986)."[3]

We find this summary to be fully supported by the transcripts of the stenographic notes of the prosecution witnesses' testimonies.

For his part, appellant testified that on 2 February 1986, between the hours of 1:00 and 2:00 o'clock in the afternoon, he was at the house of Atty. Misael Villanueva at No. 158 Tangos, Navotas eating, drinking and discussing the approaching "snap" elections. Appellant was a leader of the Kilusang Bagong Lipunan (KBL). He claimed that he arrived at the Villanueva residence at around 11:30 o'clock in the morning and left only at 4:30 o'clock later that afternoon. The following day, 3 February 1986, while he was playing "mahjong" at the "Mahjongan of Mang Eleng" at Tangos, Navotas, three (3) policemen, including a certain Pat. Isidro, arrived and

invited him to go with them to the police station for questioning. The said invitation was supposedly extended by their chief. Appellant was then brought to the Navotas police station and was there informed about his supposed involvement in the earlier shooting incident. He was presented with a copy of the sworn statement of Joselita Lusico which was prepared the evening of the incident.[4]

Appellant's witness, Atty. Misael Villanueva, formerly an executive assistant in the Reparations Commission and presently in semi-retirement as a personnel officer of the Municipality of Navotas, testified that the appellant was in his residence in Navotas on 2 February 1986 from 11:00 o'clock in the morning until 4:30 o'clock in the afternoon.[5]

After trial, the court a quo promulgated its decision dated 16 August 1989 on the 29th of said month. The dispositive portion thereof reads:

"WHEREFORE, the Court finds the accused GORGONIO BUNTAN, SR. guilty beyond reasonable doubt of the crime of Murder punishable under Article 248 of the Revised Penal Code, and is hereby sentenced to suffer the penalty of RECLUSION PERPETUA, with all the accessory penalties provided for by law and to pay the costs.

The accused GORGONIO BUNTAN, SR. is hereby ordered to severally and jointly pay the heirs of the victim in the sum of P30,000.00.

#### **SO ORDERED."**[6]

In holding him liable for the death of Crisguno Lusico, the trial court gave credence to the evidence presented by the prosecution, and concluded that:

"x x x There is moral certainty that the accused Gorgonio Buntan, Sr. was with the trigger man in conspiring, confederating and mutually helping one another in the shooting of the victim Crisguno Lusico and considering the suddenness [sic] of the act leaving the victim unprepared, there was treachery and evident premeditation in the consummation of the act. x x x"[7]

It rejected the defense of alibi because the appellant was positively identified by the witnesses.

Appellant filed his notice of appeal on 12 September 1989.[8] The People, through the Office of the Solicitor General, filed its brief on 16 November 1991.

In his Appellant's Brief filed on 12 September 1991,[9] appellant imputes upon the trial court the commission of the following errors:

#### **"I.**

X X X IN CONVICTING THE ACCUSED BASED ON AN ALLEGED CONSPIRACY NOTWITHSTANDING THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE TO THAT EFFECT.

#### **II.**

X X X IN GIVING CREDIT TO THE TESTIMONY OF JOSELITA LUSICO, EULALIA LUSICO AND EDDIE AMANTE BY SUSTAINING THEIR POSITION THAT THE ACCUSED-APPELLANT WAS POSITIVELY IDENTIFIED BY THEM, AS THE COMPANION OF THE TRIGGERMAN.

### III.

X X X IN NOT ACQUITTING THE ACCUSED?APPELLANT DESPITE SHOWING OF [sic] INFRINGEMENT OF THE LATTER'S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO REMAIN SILENT.

### IV.

#### **X X X IN DISREGARDING THE DEFENSE OF ALIBI.**

### V.

X X X IN NOT ACQUITTING THE ACCUSED?APPELLANT FOR INSUFFICIENCY OF EVIDENCE AND/OR ON GROUND OF REASONABLE DOUBT."[10]

In support of the first assigned error, appellant contends that the circumstances upon which the trial court based its finding of conspiracy and conclusion of his participation in the crime "do not partake the [sic] nature of clear, convincing evidence of conspiracy." [11] He alleges that there was no proof presented to show any common plan and purpose. Nor was any evidence submitted to indicate that he had performed any overt act to ensure the consummation of the crime. He states that no motive on his part was likewise shown. On the other hand, the Office of the Solicitor General maintains that it is not correct for the appellant to surmise that conspiracy can be proven only by direct evidence. Invoking *People vs. Alvarez*, [12] it asserts that conspiracy may be proven through a series of acts done in pursuance of a common unlawful purpose.

For his second assigned error, appellant impugns the credibility of the prosecution witnesses and their testimonies, and claims that the said witnesses' versions of the event are inherently improbable "when viewed in the light of human experience." [13]

Anent the third assigned error, appellant claims that his identification by the prosecution witnesses at the police station was done in an irregular manner; that there was no police line-up and that the witnesses knew beforehand that the person they were to identify was Buntan and not Bammy; and that the manner in which he was identified infringed on his right to counsel and to remain silent.

As to the fourth assigned error, appellant admits that alibi is the weakest of defenses but insists, nonetheless, that it should be given importance and credence in this case because the evidence for the prosecution is itself weak and unconvincing.

The last assigned error is merely a conclusion derived from the appellant's analysis that the evidence for the prosecution is insufficient and doubtful.

As We see it, the core issue in this case is whether or not conspiracy existed between the appellant and the triggerman -- "Bammy" -- who still remains at large. Without a finding of conspiracy, an acquittal would be inevitable considering that the appellant had no actual or direct participation in the shooting of the victim. He just happened to be the companion of "Bammy" when the latter returned to the victim's residence.

Conspiracy exists when two (2) or more persons come to an agreement concerning the commission of a felony and decide to commit it. [14] To establish conspiracy, it is not essential that there be proof of a previous agreement to commit a crime; it is sufficient that the malefactors shall have acted in concert pursuant to the same objective. [15] While proof of the agreement need not rest on direct evidence, the agreement itself may be inferred from the conduct of the parties, disclosing a common understanding among them with respect to the commission

of the offense,[16] or may be shown by acts and circumstances from which may logically be inferred the existence of a common design to commit the offense charged.[17]

In this case, no direct evidence to prove conspiracy was shown. Nor are We convinced, from a reading of the transcripts of stenographic notes, that the appellant's conduct during the shooting incident betrays confederacy and a common understanding between the two (2) accused in the commission of the offense. Although the testimonies of the prosecution witnesses sufficiently established that the appellant was with "Bammy" when the latter returned to the residence of the victim and shot him, there is a paucity of evidence to convince Us that the appellant shared a common intent with "Bammy" or that both had a common purpose or design. The prosecution's thesis that the appellant "posted himself a little distance away, about 2-3 arms-length from Bammy as a look-out for on-comers [sic],"[18] is implausible. It is to be observed that such a postulation is based on the testimony of Joselita Lusico, the victim's 14-year old sister, that the appellant was "observing who will be coming." [19] Firstly, there is no evidence of any prior meeting between the appellant and "Bammy," or of any conversation had between them before the shooting. Secondly, there is a dearth of evidence to show any specific act or conduct on the part of the appellant to suggest that he had indeed acted as a look-out. Finally, it must be stressed that "Bammy" had earlier proceeded by himself to the victim's residence and peeped through the window in an apparent move to find out if the victim was there. He then left -- to get his firearm -- and returned soon after to shoot the victim. A look-out was completely unnecessary under the circumstances.

The appellant's mere presence at the scene of the crime when the killing was perpetrated cannot therefore, by itself, be considered as an indication of the existence of a conspiracy.[20]

On this score alone, appellant's acquittal may forthwith be decreed. However, We find it necessary to discuss the other important assigned errors.

Appellant impugns the credibility of the prosecution witnesses and their testimonies by maintaining that the latter's versions of the events are inherently improbable "when viewed in the light of ordinary human experience." [21]

Contrary to the appellant's assertion, there is nothing improbable in the testimonies of the principal witnesses for the prosecution. Not only were they able to identify the appellant, they were also able to clearly describe the physical features of the triggerman and his acts preceding the shooting.

On the matter of the failure to conduct a police line-up for the appellant's identification, We hereby reiterate that there is no law requiring a police line-up as an essential requisite for a proper identification.[22] In this case, the identities of Buntan and "Bammy" were ascertained by the police authorities on the basis of the witnesses' accounts which specifically mentioned the names "Bammy" and "Gonying," the latter being the appellant's alias. In short, the appellant had already been identified even before he was invited.

Nor is there merit in the appellant's claim that his constitutional right to counsel and to remain silent while under police custody was infringed. A person's right to counsel while under custodial investigation cannot be invoked until such time that the police investigators start questioning, interrogating or exacting a confession from the person under investigation.[23] There is no showing that Buntan was ever investigated by the police. Also, no evidence, supposedly obtained from the appellant's custodial encounter with the police, was even presented during trial. As borne out by the records, Buntan was not interrogated at all and no statement or confession was extracted from him. All that the police investigators did was to show him Joselita's sworn statement identifying him as one of two (2) suspects in the killing of her brother. Buntan's own testimony during trial does not show that his right to counsel or to remain silent was ever violated.

WHEREFORE, the judgment appealed from is hereby REVERSED, and appellant GORGONIO BUNTAN, SR. Y GERVACIO is hereby ACQUITTED on the ground of reasonable doubt. His release from confinement is hereby ordered, unless he is being held for another legal cause. Costs de oficio.

**SO ORDERED.**

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

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[1] Original Records (OR), 189-189-e; Rollo, 57-62. Penned by Presiding Judge Eufrocinio S. Dela Merced.

**[2] OR, 1.**

[3] Brief for Appellee, 4-8 (unpaginated in rollo).

[4] TSN, 18 April 1988, 3-6.

[5] TSN, 4 January 1989, 6-8.

[6] OR, 189-e; Rollo, 62.

[7] OR, 189-d & e; Rollo, 61-62.

[8] Id., 198.

[9] Id., 34-55.

[10] Rollo, 37-38.

[11] Id., 44.

**[12] 169 SCRA 730 [1989].**

[13] Rollo, 45.

[14] Article 8, Revised Penal Code.

[15] People vs. San Luis, 86 Phil. 485 [1950].

[16] People vs. De la Cruz, 190 SCRA 328 [1990].

[17] People vs. Tingson, 47 SCRA 243 [1972].

[18] Brief for Appellee, 9 (unpaginated in rollo).

[19] TSN, 16 April 1986, 7.

[20] People vs. Pimentel, 147 SCRA 25 [1987]; Orodio vs. Court of Appeals, 165 SCRA 316 [1988].

[21] Supra.

[22] People vs. Espiritu, 191 SCRA 503 [1990].

[23] People vs. Loveria, 187 SCRA 47 [1990].

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