

## PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. FRANCISCO LOZANO, ACCUSED-APPELLANT.

*G.R. No. 90801. February 13, 1992*

Ponente: PARAS, J.

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### PARAS, J.:

This is an appeal from the August 18, 1989 decision of the Regional Trial Court, First Judicial Region, Branch 24, Cabugao, Ilocos Sur, in Criminal Case No. 993-K, finding the accused Francisco Lozano and Ernesto Morales guilty beyond reasonable doubt as co-principals in the commission of the crime of murder, qualified by treachery and aggravated by nighttime which is not offset by any mitigating circumstance, each is hereby sentenced to suffer the penalty of reclusion perpetua, with all the accessory penalties provided for by law, to indemnify, jointly and severally, the legal heirs of the late Ernesto Gazmen, Sr., in the amount of P100,000.00 without subsidiary imprisonment in case of insolvency, and to pay proportionate costs (Rollo, Decision, pp. 46-47).

The appellant was charged in an information filed by Actg. 2nd Asst. Provincial Fiscal Ulpiano I. Campos of Vigan, Ilocos Sur on August 21, 1985, which reads:

"The undersigned Acting 2nd Assistant Provincial Fiscal accuses Francisco Lozano, Ernesto Morales and Vivencio Somera of the crime of Murder with multiple frustrated murder, committed as follows:

That on or about the 11th day of March, 1984, in the municipality of Cabugao, province of Ilocos Sur, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating together and mutually helping one another, with treachery and evident premeditation, and with intent to kill, did then and there willfully, unlawfully and feloniously assault, attack and shoot with a gun Ernesto Gazmen, Sr., Dr. Loreto Damian, Luis Sumibcay and Marcos Segui, thereby inflicting upon Ernesto Gazmen, Sr., mortal gunshot wounds which necessarily produced his instantaneous death, and simultaneously inflicting upon Dr. Loreto Damian, Luis Sumibcay and Marcos Segui gunshot wounds on their bodies, thus performing all the acts of execution which would have produced the crime of multiple murder as a consequence thereof, but nevertheless did not produce it by reason of causes independent of the will of the accused, that is, because of the timely and able medical attendance rendered to said Dr. Loreto Damian, Luis Sumibcay and Marcos Segui, which prevented their death.

"CONTRARY TO LAW" (Rollo, p. 10, Original Record, p. 1).

Upon arraignment, the accused Ernesto Morales, Vivencio Somera and Francisco Lozano entered a plea of not guilty to the crime charged (Original Record, pp. 49; 70).

The trial of the case ensued.

The prosecution presented the following witnesses: Ernesto Gazmen, Jr., Joseph Soller, Floro Soller, Dr. Jaime Gorospe, Nestor Sabio and Alfredo Johnny Siruno.

Ernesto Gazmen, Jr., the eyewitness of the prosecution and the son of the deceased Ernesto Gazmen, Sr. narrated

that on March 11, 1984 at 9:00 o'clock in the evening, he was at a cockpit to watch and bet on the cock. He was at the west side on a higher level and saw his father at the south of the ringside of the arena. His distance from his father was more or less five (5) meters away. While the cockfighting was going on at past 8:00 o'clock in the evening, his father, Ernesto Gazmen, Sr., was shot to death by Francisco Lozano. He claimed that he actually saw Lozano shoot his father and the shots were successive. He also saw that Francisco Lozano had companions at that time, they were Ernesto Morales and Vivencio Somera. The two were behind Lozano. Lozano was a meter away from his father when he poked his gun at the latter (Victim's back was towards Lozano) while his companions Morales and Somera were also holding their guns aiming their guns at his late father. He admitted that he did not notice if the two accused, Morales and Somera, fired their guns at his father, who was standing when he was successively fired upon by Lozano and who slumped when he was hit. When he saw Lozano fire his gun at his father, he shouted and shouted that Francisco Lozano shot his father but he was not able to do anything because he was afraid, as the killers were armed and he was unarmed. After his father slumped, the people, including the three killers, ran away. When he went to see his father, he just peered at him and saw that he was already dead. After seeing the condition of his father, he called for a policeman and the one who came to assist him was Angelino Savella. The body of his father was brought to the emergency hospital by his father's workers. As he was advised not to accompany the body, he went home. He saw the cadaver of his father once when he went to the emergency hospital and the following morning when the body was brought home.

In addition, he also testified that he knew very well the three persons who shot his father: Francisco Lozano who was a P.C. Sergeant, married to a native of Cabugao; and Ernesto Morales and Vivencio Somera, who were both policemen. He identified them in court by pointing to them.

He also clarified that the gun poked at the head of his father was a .45 caliber. He knew it because he used to see such kind of gun and its slug. All along, Morales and Somera had already drawn their guns but he could not determine what kind of guns the other two accused had.

He further testified that at the time he saw Lozano, he was wearing a blue denim jacket, but he could not remember the attire of Morales and Somera. He was able to identify the three accused because the place was properly lighted and the lights were fluorescent lamps, placed at the sides of the cockpit.

In viewing the on going cockfighting, his companion was "Popoy" whose real name is Joseph Soller. He also saw Nestor Sabio in the company of his elder brother Danny. So was Floro Soller who was inside the cockpit, releasing the cock, and Johnny Siruno who was above his father.

He mentioned that aside from his father there were also others who were hit by a stray bullet, they were: Marcos Segui, Luis Sumibcay and Dr. Loreto Damian (Hearing of January 29, 1986, TSN, pp. 2-20).

Despite gruelling cross examination, witness consistently maintained his testimony and clarified his statements (Hearing of April 28, 1986, TSN, pp. 34-53). But more importantly, his testimony was corroborated by the following witnesses: (a) Joseph Soller, his companion at the cockpit when the incident happened (Hearing of July 28, 1986, TSN, pp. 81-86); (b) Floro Soller, the handler of one of the fighting cocks who despite his preoccupation with the fighting cocks, managed to monitor the movements of Francisco Lozano and Ernesto Morales who approached the deceased before he heard the gun reports that killed Gazmen, Sr. He explained that his attention was arrested by the unusual movement of the two accused and of the prevailing tense atmosphere in the cockpit (Hearing of October 8, 1986, TSN, pp. 117-126); (c) Nestor Sabio, an auto mechanic who happened to be at the cockpit at the time of the incident to eat "sinanglan" and later he joined his companions to watch the cockfight when he heard gunfire and saw Francisco Lozano firing a gun at Gazmen, Sr. He also identified the gun used, a pistol caliber .45. At the specific, time, he was at the gallery with Danilo Gazmen. He did not testify

immediately because he was afraid. He testified because the military went to his house (Hearing of November 18, 1986, TSN, pp. 152-160); (d) Alfredo Johnny Siruno, another resident of Barangay Baclig, Cabugao, Ilocos Sur, who went to the cockpit to place a bet and who also witnessed the incident as described by Gazmen, Jr. (Hearing of January 6, 1987, TSN, pp. 184--188); and finally (e) Dr. Jaime Gorospe, the municipal health officer of Cabugao, Ilocos Sur, who performed the autopsy on the cadaver. He testified that the cause of death was internal hemorrhage caused by gun shot wounds and that all the entrance wounds were inflicted at the back of the deceased, thereby confirming the testimonies of the eyewitnesses that the firing came from behind the victim (Hearing of November 17, 1986, TSN, pp. 140-145).

Significantly, all the witnesses of the prosecution except Ernesto Gazmen, Jr. did not see Vivencio Somera at the scene of the crime at or about the time the late Ernesto Gazmen, Sr. was shot. Hence, after the prosecution had rested its case, accused Vivencio Somera filed a motion to dismiss by way of a demurer to the evidence (Original Record, pp. 215-217) which was granted by the Court on September 23, 1987 for lack of a prima facie case against the accused (Original Record, p. 219).

Accused Ernesto Morales was deemed to have waived his right to present evidence for and in his defense by evading the processes of the court since August 10, 1988 up to the present, when he was required to put up another bail bond but went into hiding instead. Then, on February 5, 1989, Morales was the victim in a shooting incident that happened in the town proper of Cabugao and was hospitalized at the Gabriela Silang Hospital, Tamag, Vigan, Ilocos Sur, but escaped while being transferred to the Provincial Jail at the capital town of Vigan. Since then up to the present, accused Ernesto Morales has remained at-large, leaving the Citizens Legal Assistance Office, helpless in plotting his defense. Nevertheless, trial in absentia ensued with respect to accused Morales, as authorized by the 1973 and 1987 Constitutions (Rollo, Judgment, pp. 40-41).

The theory of the defense consists of denial and alibi. It presented the following witnesses who testified as follows:

Francisco Lozano, one of the accused, testified that on March 11, 1984, he fetched Arthur Sonido from the latter's house. They then rode on a jeep of which he was the driver and proceeded to the cockpit. He and his companions, namely: Arthur Sonido, Eduardo Corpuz, Jun Flores and Vivencio Gazmen, then had a drinking spree outside the cockpit. They were later joined by Dodong, a former barangay captain of Tepping, Sinait, Ilocos Sur, now deceased. When they were already about to go home he heard gun reports coming from the southwest. He was at the time on the wheel of the jeep starting the engine, while Arthur Sonido was behind the jeep making signals for him to move the jeep backward. Inside the jeep were Arthur Sonido, Eduardo Corpuz, Vivencio Gazmen and Jun Flores. As they were informed by Teresita Sonido, wife of Arthur Sonido, that there were visitors waiting for Arthur, they proceeded home (Hearing of April 5, 1989, TSN, pp. 319-328).

His testimony was corroborated by the other witnesses who were supposed to be with him in the jeep, to wit: (a) Eduardo Corpuz, the embalmer (Hearing of March 14, 1988, TSN, pp. 215-223); (b) Floro Flores (Hearing of May 26, 1988, TSN, pp. 247-252); (c) Bonifacio Sonido (Hearing of May 27, 1988, TSN, pp. 262-266); (d) Arthur Sonido (Hearing of September 13, 1998, TSN, pp. 278-287); and (e) Vivencio Gazmen (Hearing of November 14, 1988, TSN, pp. 296-302) all of whom declared that they boarded a jeep driven by Francisco Lozano and denied having seen Ernesto Morales. They tried to establish that Francisco Lozano was not inside the cockpit where the incident happened, but outside, while Ernesto Morales, his co-accused, was not seen in the vicinity.

Constancia Franco Salonga, a supervising forensic chemist of the National Bureau of Investigation, testified that she conducted a paraffin examination on both Lozano and Morales. Her findings revealed that the left and right

hands of both accused showed negative results for the presence of nitrates. She, however, explained that the result of a paraffin test does not constitute conclusive evidence as to whether or not a person has fired a gun (Hearing of February 16, 1989, TSN, pp. 307-317).

On rebuttal the prosecution presented Mrs. Linda Somera Gazmen, who testified that she knew Francisco Lozano because he was residing in Barangay Quezon and married to a barangaymate of her. On March 11, 1984, that was Sunday, Lozano came to the house of her aunt, Mrs. Nona Artista, where they were playing cards and the time was about between 6:00 to 6:30 in the evening, he played or "nangbalasa" the cards of one of the players.

She also testified that accused Ernesto Morales was also in the house of her aunt. Morales went there after lunch alone and played cards up to before twilight. After they had played cards Morales, Lozano and others left the place and she could not tell where they had gone. (Hearing of June 20, 1989, TSN, pp. 354-357).

On sur - rebuttal, the defense recalled accused Lozano who denied the testimony put in by Linda Gazmen. He also said that Linda Gazmen merely wanted to put him down in this case, because of his closeness and friendship with Ernesto Morales (Hearing of July 24, 1989, TSN, p. 347).

On August 18, 1989, the trial court rendered judgment, the decretal portion of which reads as follows:

"WHEREFORE, finding both accused, Francisco Lozano and Ernesto Morales, GUILTY beyond reasonable doubt as co-principals in the commission of the crime of murder, qualified by treachery and aggravated by nighttime which is not offset by any mitigating circumstance, each is hereby sentenced to suffer the penalty of reclusion perpetua, with all the accessory penalties provided for by law, to indemnify, jointly and severally, the legal heirs of the late Ernesto Gazmen, Sr., in the amount of P100,000.00 without subsidiary imprisonment in case of insolvency, and to pay proportionate costs.

"The multiple frustrated murder component of the complex crime charged, is hereby DISMISSED, for lack of evidence.

"SO ORDERED." (Rollo, Judgment, pp. 46--47).

Hence, the instant appeal.

Appellant raised the following assignments of error:

## I

THE TRIAL COURT ERRED IN ACQUIRING JURISDICTION OF THE CASE AT BAR FOR MURDER AND FRUSTRATED MURDER ALLEGEDLY COMMITTED BY ACCUSED-APPELLANT FRANCISCO LOZANO WHILE HE WAS AN ACTIVE AND REGULAR MEMBER OF THE PHILIPPINE CONSTABULARY AND HIS CO-ACCUSED ERNESTO MORALES AND VIVENCIO SOMERA OF THE INTEGRATED NATIONAL POLICE.

## II

IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN FINDING ACCUSED-APPELLANT FRANCISCO LOZANO GUILTY BEYOND REASONABLE DOUBT OF MURDER, AS CHARGED.

## III

THE TRIAL COURT ERRED IN FINDING THE KILLING OF THE DECEASED WAS QUALIFIED BY TREACHERY.

#### IV

THE LOWER COURT ERRED IN CONSIDERING NIGHTTIME AN AGGRAVATING CIRCUMSTANCE.

The appeal has no merit.

#### I

Accused-appellant Lozano's allegation in his first assigned error that the trial court did not acquire jurisdiction in trying his case and that the decision rendered by him should be declared null and void does not merit any consideration.

The record shows that the issue of jurisdiction in the trial court was not raised by the accused-appellant Lozano, so much so that if the issue be raised at this point in time it would be useless and futile because the question of jurisdiction over the person which was not raised in the trial court cannot be raised on appeal (*Vda. de Alberto v. Court of Appeals*, 173 SCRA 436 [1989]).

Besides, a party is estopped from assailing the jurisdiction of a court after voluntarily submitting himself to its jurisdiction (*Tejones v. Gironella*, 159 SCRA 100 [1988]). Accused-appellant Lozano's appearance in the arraignment and pleading not guilty to the crime charged, is a sign that he voluntarily submitted himself to the jurisdiction of the court, so that jurisdiction has been acquired by the court over his person and continues until the termination of his case.

It is also the contention of the accused-appellant Lozano that as a military man (member of the Philippine Constabulary) he should be tried by the military court and not by the civil court.

Under General Order No. 59 Military Tribunals created under General Order No. 8 exercise exclusive jurisdiction over all offenses committed by military personnel of the Armed Forces of the Philippines while in the performance of their official duties. The only requisite, however, for offenses committed by military personnel to be covered by and fall under the ambit of the aforesaid Order No. 59 is that the "act or omission is committed in the actual performance of official duties" (*Dela Cruz v. Moya*, 160 SCRA 838 [1988]) (underscoring supplied).

In the case at bar, there is no evidence whatsoever, that the appellant committed the offense in the performance of his official duties.

It is significant to note that appellant was immediately discharged from the military service after he committed the crime, which resulted in the case being filed in the civil court. As correctly observed by the trial court in its decision, this case was initially filed with the military authorities at Camp Dangwa, La Trinidad, Benguet, Lozano being then a P.C. sergeant and Morales and Somera, members of the Integrated National Police, but the case was transferred to the civil court for trial and disposition, following the discharge of the accused from the military and police service (Rollo, p. 46).

#### II

The last three assigned errors boil down to the issue of credibility of witnesses.

The prosecution witnesses positively identified accused-appellant Lozano as one of the assailants of the late Ernesto Gazmen, Sr.. There was no mistake in identifying the accused-appellant Lozano because the place where the incident happened was very well lighted/illuminated by fluorescent bulbs.

On these testimonies of the witnesses, their positive identification and categorical declarations that

accused-appellant Lozano was one of the assailants, the prosecution was able to prove the guilt of the accused. There being no evidence to show that the witnesses for the prosecution were actuated by improper motive, their identification of the accused as the assailant should be given full faith and credit. (People v. Somera, 173 SCRA 684 [1989]).

On the other hand, appellant Lozano merely relies on his defense of alibi which he was not able to substantiate by more convincing and credible evidence. Alibi is a weak defense which cannot prevail over the positive identification of the accused by the prosecution eye-witnesses (People v. Almenario, 172 SCRA 268 [1989]). For alibi to prosper, the requisites of time and place must be strictly met (People v. Abaya, 170 SCRA 691 [1989]), it must be shown that it was physically impossible for the accused to have been at the scene of the crime at the time it was committed (People v. Salcedo, 172 SCRA 78 [1989]; People v. Catubig, 195 SCRA 505 [1991]) or it must be established by clear and convincing evidence that the accused was at some other place and for such a period of time as to negate his presence at the time when and where the crime was committed (People v. Solis, 195 SCRA 404 [1991]). Even under the theory of the defense appellant was just outside the cockpit at the time the incident happened. Hence, there appears to be no cogent reason to disturb the findings of fact and the conclusions of the trial court.

PREMISES CONSIDERED, the appealed decision of the trial court dated August 11, 1989 is hereby AFFIRMED, with the modification that the indemnity to the heir/heirs of the victim is reduced to P50,000.00 in line with existing jurisprudence (People v. Alitao, 194 SCRA 120 [1991]; People v. Gamboa, 194 SCRA 372 [1991]).

**SO ORDERED.**

Melencio-Herrera, (Chairman), Padilla, Regalado, and Nocon, JJ., concur.

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