

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
SALVADOR SADIA, JR., JOSE ALLORDE Y PENOBLAR, AND MARIO
OPEÑA ALIAS "KA ELMO," ACCUSED, SALVADOR SADIA,
JR., ACCUSED-APPEL...**

G.R. No. 92633. October 17, 1991

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

The accused, Salvador Sadia, Jr., Jose Allorde y Penoblar and Mario Opeña alias "Ka Elmo," were charged with the crime of murder in Criminal Case No. 2591 before the Regional Trial Court, 5th Judicial Region, Branch 12, Ligao, Albay. The information filed in said case reads (p. 10, Rollo):

"That at or about 11:30 A.M. of the 18th day of November, 1986, at Barangay Herrera, Municipality of Ligao, Province of Albay, Philippines, and within the jurisdiction of this Honorable Court (sic), the above-named accused, together with two (2) other unidentified (sic) persons, all of them armed with guns and with intent to kill, did then and there, conspiring and confederating with each other with treachery, taking advantage of superior strength and with the aid of armed men, wilfully, unlawfully and feloniously attack, assault and shot one JOSE C. LOPEZ inflicting fatal wounds which caused his death (sic) to the damage and prejudice of his legal heirs.

"That the offense was committed by a band.

"ACTS CONTRARY TO LAW,"

Only Salvador Sadia, Jr. and Mario Opeña alias "Ka Elmo" were apprehended whereas Jose Allorde y Penoblar remains at large. Thereafter, trial on the merits proceeded against Sadia, Jr. and Opeña. On January 31, 1990, the trial court rendered its decision, the dispositive portion of which, reads (pp. 27-27-A, Rollo):

"PREMISES CONSIDERED, the court finds the two accused herein MARIO OPEÑA, alias "KA ELMO" and SALVADOR SADIA, JR., alias "KA JUN", GUILTY, as principal in the killing of JOSE LOPEZ y CLAVERIA, attended by the qualifying circumstances (sic) of superior (sic) strength (sic), with the generic aggravating circumstance of having (been) committed by a band. As such the accused are hereby sentenced to suffer the penalty of RECLUSION PERPETUA, and to suffer the accessory penalties provided for by law. They are ordered solidarily to indemnify the heirs of the victim the amount of P30,000.00 for the fact of death of Jose Lopez; P50,000.00 as moral damages; and P21,500.00, actual damages, as evidenced by receipts marked as Exhibits D, D-1 and D-2.

"SO ORDERED."

Hence, the present appeal by Salvador Sadia, Jr.

The antecedent facts, as stated in the plaintiff--appellee's brief are, as follows (pp. 88-93, Rollo):

"At around 11:30 a.m. on November 18, 1986, Danilo Chavez, a farmer, was working on the farm of Jose

Lopez at Barangay Herera (sic), Ligao, Albay (p. 7, tsn, Oct. 26, 1989). Chavez arrived at the landholding of Jose Lopez at about 6:00 o'clock in the morning of November 18, 1986. He came along with Lopez himself and they rode (on) the motorcycle of Lopez. Nobody was still (sic) around at that time. Then they proceeded to the farm. At about 8:30 a.m., people began to arrive (pp. 8-9, tsn, Id.).

"Among those who arrived at the farm were appellant, Jose Allorde and Mario Opeña @ Ka Elmo (pp. 9-10, tsn, Id.). At the time these persons arrived, Lopez was in his fishpond with Chavez cleaning it. The three persons, appellant, Allorde and Opeña, were to clean the fishpond of Allorde (pp. 10-11, tsn, Id.). The fishpond of Lopez and Allorde were about 20 meters apart (p. 12, tsn, Id.).

"After Lopez had brought Chavez to the fishpond, he told Chavez that he would go back to Guinobatan (p. 12, tsn, Id.). However, at around 11:30 of the day, Lopez came back to the fishpond while Chavez was cooking his lunch at the side of the fishpond (p. 13, tsn, Id.).

"Suddenly, Chavez heard gunshots and when Chavez turned to look where the shots came from, he saw Ka Elmo, Allorde, appellant and two others (whom) he failed to identify. The group was about 20 meters away from Chavez (p. 13, tsn, Id.). Chavez saw the group fire at Lopez whose two arms were raised and he was asking the group to stop shooting and for them to talk over whatever wrong doings (sic) he may have committed. Lopez was about 15 meters away from where the group was shooting at him. Opeña used a long barrel gun and even fell into the fishpond while he was firing at Lopez (p. 14, tsn, Id.). Chavez could not tell what kind of gun the others were using. Chavez was not able to notice if appellant was holding a gun because what he saw was that the five of them were in a group (p. 15, tsn, Id.). Besides, while the group was firing at Lopez, he was looking at Lopez (p. 51, tsn, Id.). After the firing, Lopez ran towards the irrigation shouting at Chavez to take care of himself (p. 15, tsn, Id.). Lopez fell face down on the irrigation by the roadside and Ka Elmo and another in the group fired two more shots at him. Then they went near Lopez, kicked him and shot him at the right temple. At that time, Chavez was about 10 meters away and was running away to report the incident to the Barangay Captain of Herera (sic). Appellant and Allorde then rode (on) a tricycle and fled while Ka Elmo and the 2 others took the motorcycle of Lopez (pp. 16-17, tsn, Id.). After this incident, Chavez did not work anymore at the landholding of Lopez because he learned that he was being hunted by the group who shot Lopez to death (p. 19, tsn, Id.).

"The body of Lopez was autopsied in the evening of November 18, 1986 at Nuestra Sra. de Salvacion Funeral Parlor at Guinobatan, Albay by Dr. Domingo Vergara, Jr., Chief, Rapu-Rapu District Hospital (p. 10, tsn, Oct. 25, 1989). The following wounds were found on the body of Lopez:

- 1) Through and through gunshot wound, head area, entrance-right ear with pinna laceration: exit ear
 - this wound, if not medically attended, could cause immediate death
- 2) Gunshot wound, entrance at the right infra-scapular area (right side at the back, the bone area at the back of the body)
- 3) Gunshot wound, entrance at the right costo-vertebral angle (right side of the body near the angle of the rib case)
 - fatal area because the liver sustained lacerations that caused bleeding
- 4) Gunshot wound, entrance at the right buttocks, lateral side (right hip fleshly area)
 - fatal wound
- 5) Gunshot wound, entrance at the medial side of the thigh, proximal 3rd, posterior, right (inner side of the thigh)
 - fatal wound

6) Gunshot wound, exit at the parasternal area, left side, level of the first ICS)

7) Gunshot wound, exit at the medial side of the left thigh, middle 3rd (pp. 11-12, 17-21, tsn, Oct. 25, 1989)

"The cause of death was: hypovolemic shock secondary to multiple gunshot wounds, fatal (p. 21, tsn, Id.).

"In the early morning of the day when Lopez was shot, a conference was called by one Ka Daniel of the CPP-NPA Pasabilis Section at Sitio Baruc-barucan Barangay Herera (sic), Ligao, Albay. In that conference, a decision was reached that somebody was going to be killed. Among the 8 or 9 persons present at the said conference, were Mansueto Lucio, Benjamin Sta. Maria, Ka Elmo and appellant, alias Ka Jun Sadia. It was agreed that it was already time to 'deliver' Lopez. Assigned to kill Lopez were six members with appellant and Ka Elmo as triggermen. The reason given for killing Lopez was because he was against the CPP-NPA organization meaning that he did not give "taxes" to the NPA. Ka Elmo carried a carbine while Ka Jun had a .45 caliber. The group parted at around 7:00 a.m. At past 11:00 o'clock of the same day, Lopez was killed (pp. 4, 9-10, 12, 14, 16-21, tsn, Dec. 12, 1989; pp. 7-8, tsn, Dec. 13, 1989).

"At the time of his death, Lopez had a rice farm and fishpond. Every three months he harvested more than 1,000 tilapia from his fishpond (p. 21, tsn, Dec. 13, 1989). After his death, his family could not attend anymore to their fishpond at Herera (sic). Lopez was also engaged in buying and selling palay. He left three children with ages 10, 5 and 1. For funeral expenses, his wife spent P15,000.00 (p. 22, tsn, Id.)."

In this appeal, the accused-appellant raises the following assignment of errors:

1. the trial court erred in finding him guilty of murder on the basis of the testimonies of alleged co-conspirators, prosecution witnesses Mansueto Lucio and Benjamin Sta. Maria; and
2. the trial court erred in appreciating band as an aggravating circumstance and in imposing the penalty of reclusion perpetua against him.

The accused-appellant asseverates that the trial court disregarded material inconsistencies in the testimonies of Lucio, Sta. Maria and Chavez. Lucio and Sta. Maria, in their respective testimonies at the hearing on December 12, 1989 and December 13, 1989, claimed that at a conference called by a certain Ka Daniel among the operatives of the New People's Army in the area, the accused-appellant and Opeña were given the assignment of liquidating Lopez. However, at the hearing held on October 26, 1989, Chavez testified that, of the five (5) men he saw in the vicinity during the shooting -- the accused-appellant, Opeña, Allorde and two (2) John Does, he saw only Opeña and the two (2) John Does shoot Lopez. In fact, Chavez did not even notice whether or not the accused-appellant and Allorde had a gun. Moreover, even Chavez' positive identification of the accused-appellant as among those he saw with the group who shot Lopez is rebutted by the testimony of Reynaldo Maristela, a barangay tanod, that after the shooting, when he asked Chavez who shot Lopez, Chavez replied that "he does not know."

The alleged inconsistencies do not exist. Although Chavez saw only Opeña and the two (2) John Does shoot Lopez and he failed to notice whether or not the accused-appellant, in particular, held a gun (p. 51, tsn, October 26, 1989), his (accused-appellant) presence at the scene of the crime during the time Lopez was killed was sufficiently proven. Chavez testified that (pp. 12-13, *ibid*):

"x x x.

"Q: Then, what transpired when (sic) Jose Lopez was working in his fishpond?

"A: At that time when Mr. Lopez brought me to the fishpond to work, Mr. Lopez told me that he will just take me to Herera (sic) and he will go back to Guinobatan, but at around 11:30 Mr. Lopez (sic) arrived and I was and even cooking already for the midday meal and then I heard the (sic) gunshot. These five people were there when Mr. Lopez was shot.

"x x x.

"Q: When you heard (a) gunshot, what did you do?

"A: After I heard the (sic) gunshot I turned my face and looked at these five, this Ka Elmo, Allorde, Sadia and the other two whom I was not able to identify.

"x x x."

Chavez could not have been mistaken in identifying the accused-appellant because he has known him even prior to the shooting incident (p. 11, *ibid*):

"x x x

"Q: How about this Salvador Sadia, Jr., do you know (sic) him before November 18, 1986?

"A: Yes, sir, because he has a sari-sari store in Herera (sic) and I used to buy cigarette and viand when(ever) I work there in Herera (sic).

"x x x."

It bears emphasis that the trial court found the accused-appellant guilty of the crime charged, on the basis of conspiracy (pp. 26-27, *Rollo*):

"In the case at bar, the court is of the honest opinion that conspiracy was duly established. There was direct proof of the existence of conspiracy. There was that conference at Buruchburucan in the mroning (sic) of November 18, 1986, between the hours of 6:00 and 7:00, where the killing of Jose Lopez was agreed upon. The accused Ka Elmo and Salvador Sadia, Jr. were present and were among those ordered to kill Lopez. When conspiracy is established, the act of one is the act of all. In order to hold an accused guilty as co-principal by reason of conspiracy, it must be established that he perform (sic) an overt act in furtherance of the conspiracy, either by actively participating in the actual commission of the crime or by biding (sic) moral assistance to his co-conspirators by being present at the scene of the crime (Pp. vs. Peralta, 25 SCRA 759). Accused Sadia may not have fired a shot as it was not shown that he was holding a gun. He was however present during the killing."

The positive identification of the accused-appellant by Chavez as among those who shot Lopez was not rebutted by the testimony of Maristela that when he asked Chavez who shot Lopez, Chavez replied that "he does not know." Chavez was then afraid to reveal the identity of the killers of Lopez. After the incident, he stopped working in the landholding of Lopez because he was being hunted by the persons who killed Lopez (p. 19, *tsn*, October 26, 1989). And, as stated by the trial court, the information was prepared only in 1988 and filed in January, 1989, because aside from the fact that the culprits were still at large, Chavez entertained fear that he might be liquidated by the killers of Lopez should he testify (p. 22, *Rollo*).

Additionally, the accused-appellant alleges that the trial court erred in considering the aggravating circumstance of band. As testified to by Chavez, only three (3) of Lopez' killers were armed. Under Article 14, No. 6, paragraph 2 of the Revised Penal Code, the indispensable elements of band are: 1) there must be at least four (4) malefactors; and 2) all of the four (4) malefactors must be armed. At any rate, even if it were proven that the accused-appellant is guilty of the crime charged, since the aggravating circumstance of band cannot be appreciated against the accused, the penalty imposable is only eighteen (18) years, eight (8) months and one (1) day to twenty (20) years of reclusion temporal, and not reclusion perpetua, as decreed by the trial court.

On the allegation that the trial court erred in appreciating the aggravating circumstance of band in this case, We agree with the accused-appellant. The evidence of the prosecution showed that among the five (5) members of the

group who killed Lopez, only three (3) were armed (pp. 31, 50, tsn, October 26, 1989). Article 14(6), paragraph 2 of the Revised Penal Code is explicit that "[w]henver more than three armed malefactors shall have acted together in the commission of an offense, it shall be deemed to have been committed by a band" (underscoring supplied). We regret, however, that while We sustain this allegation of the accused-appellant, it will not help in reducing the penalty to be imposed on him, as We shall discuss later.

We have thus limited Our disquisition on the aforementioned issues. The other issue in this appeal, namely, whether the prosecution established that the killing of Lopez was in furtherance of rebellion or murder, was never raised in the proceedings before the trial court and cannot, therefore, be considered and passed upon now (*People v. Albior, et al.*, G.R. No. 75034, June 30, 1988, 163 SCRA 332; *People v. Leoparte*, G.R. No. 85328, July 4, 1990, 187 SCRA 190).

Abuse of superior strength qualified the killing of Lopez to murder. This circumstance was proven by the testimony of Chavez (pp. 14-16, tsn, October 26, 1989);

"x x x.

"Q: What did you see after you heard the gun fired (sic)?

"A: I saw them shot (sic) at Mr. Jose Lopez (whose) both hands were raised and he was telling the group to stop. They will talk over what(ever) misdeeds he has done but they did not stop firing at him.

"x x x.

"Q: After the firing, what happened to Mr. Lopez?

"A: What Mr. Lopez did was to run towards the irrigation and he shouted at me that I just take care. What I did is (sic) to dive on the fishpond.

"Q: After Mr. Lopez ran, what happened to him?

"A: While Mr. Lopez was already lying face downward on the irrigation by the roadside they even (sic) still fired two shoots.

"x x x.

"Q: How far was Ka Elmo when he fired coup de grace?

"A: While Mr. Lopez was lying down after they kicked them (sic) they fired another shoot (sic) (witness indicating the right temple of Mr. Lopez).

"x x x."

Article 248 of the Revised Penal Code provides that the crime of murder is punishable by reclusion temporal in its maximum period to death. Inasmuch as there are neither aggravating nor mitigating circumstances that attended its commission in this case, the penalty that should be imposed on the accused-appellant is the medium period of the penalty prescribed by said article (Article 64 of the Revised Penal Code), or reclusion perpetua, conformably with the doctrine adopted in *People v. Muñoz, et al.*, G.R. Nos. L-38969-70, February 9, 1989, 170 SCRA 107. Notwithstanding Our previous finding that the aggravating circumstance of band is not present in this case, the proper penalty is still reclusion perpetua.

ACCORDINGLY, the decision appealed from is hereby AFFIRMED, subject to the MODIFICATION that the trial court's appreciation of the aggravating circumstance of band is deleted and the civil indemnity for the death of the victim is increased to P50,000.00.

SO ORDERED.

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

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