

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GERARDO “NONOY” COGONON, ACCUSED-APPELLANT.*G.R. No. 94548. October 04, 1996*

Ponente: PANGANIBAN, J.

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In affirming appellant’s conviction for murder, frustrated murder and in addition, finding him guilty of attempted murder, this Court reiterates some familiar doctrines in demolishing the defenses of alibi and denial and in upholding the trial court’s assessment of issues of facts, particularly those relating to the credibility of witnesses. We also rule that the death penalty cannot be imposed via this Decision even if RA 7659 came into effect while this appeal was pending, inasmuch as said penalty was still constitutionally proscribed when the appealed decision was promulgated by the trial court.

The Facts

For the deaths of T/Sgt. Ermelino Tucaling, Pat. Leo Oebanda and Pat. Richard Sumili and the injuries sustained by P/Sgt. Epifanio Mercado, Pfc. Rogelio Aburido, Pat. Nestor Era and Cpl. Camelo Algaba, herein appellant Gerardo Cogonon (together with Andres Delima, Jr., Rodrigo Romeo and nine others) was charged with multiple murder and multiple frustrated murder before the Regional Trial Court, Branch 58,[1] San Carlos City, Negros Occidental in an Information dated November 3, 1986 and docketed as Criminal Case No. RTC-344. It reads as follows:

"That on or about the 14th day of October, 1985, in the Municipality of Calatrava, Province of Negros Occidental, Philippines, and within the jurisdiction of this Honorable Court, the first four (4) above-named accused, who are still at-large, in company of their co-accused whose truenames (sic) are still unknown and designated only as alias Junior Delima, alias Nonoy Cogonon, alias Bobby Lumanog, alias Goliath, John Doe, Peter Doe, Paul Doe and James Doe, who are likewise still at-large, armed with assorted firearms, conspiring, confederating and mutually helping one another, with intent to kill, with evident premeditation and treachery, did then and there, wilfully, unlawfully and feloniously ambush, attack and fire at the police patrol service car, thereby causing the instantaneous death of NCOIC/TSG ERMILINO TUCALING, Pat. LEO OEBANDA and Pat. RICHARD SUMILI and inflicting injuries upon the bodies of Pfc. CAMELO ALGABA, Pfc. ROGELIO ABURIDO, Sgt. EPIFANIO MERCADO and Pat. NESTOR ERA which would have caused their deaths; thus, with respect to the latter-mentioned injured victims, the accused had performed all the acts of execution which would have produced the crime also of murder as a consequence, but which nevertheless, did not produce it by reason of some causes independent of the will of the accused, that it is due to the timely and able medical assistance rendered to said Pfc. Camelo Algaba, Pfc. Rogelio Aburido, Sgt. Epifanio Mercado and Pat. Nestor Era, which prevented their death.

CONTRARY TO LAW."

Since none of the accused had as yet been arrested, the case was ordered archived by the trial court on November 25, 1986. Nonetheless, it directed the issuance of the corresponding warrants of arrest.[2] The case was reinstated on March 2, 1987 with the arrest of herein appellant[3] who, on March 31, 1987, entered a plea of not guilty to the

crimes charged.

On April 27, 1987, the trial court was informed that Andres Delima, Jr. was arrested and detained at the Calatrava INP jail.[4] At his arraignment on June 3, 1987, Delima entered a plea of not guilty.[5] Since the Information named Delima and the appellant only as "alias Junior Delima" and "alias Nonoy Cogonon", respectively, the trial court on September 30, 1987, ordered the provincial fiscal to amend the information to reflect their true correct names.[6]

The prosecution presented the following as witnesses: Pfc. Camilo Algaba, Dr. Ramon Nemenzo, P/Lt. Epifanio Mercado, Jocelyn Chan, Michael Valencia and Dr. Tranquilino Carmona while the defense relied on the testimonies of Lemy Cahayagan and the accused Gerardo Cogonon. The prosecutors offered Exhs. A to D-2, while the defense did not present any documentary evidence.

On May 24, 1989, the INP station commander of Calatrava, Negros Occidental informed the said court, through a radio message to the station commander of San Carlos City,[7] that Rodrigo Romeo y Senefre "alias Goliath" had been arrested. Hence, on May 30, 1989, the trial court ordered the provincial fiscal to amend further the Information identifying "alias Goliath" as Rodrigo Romeo y Senefre.[8] Said accused likewise entered a plea of not guilty on August 3, 1989.[9]

However, considering that appellant and Delima had already rested their case when Romeo was arraigned, the prosecution manifested that the decision in regard to the two be promulgated ahead of that involving Romeo.[10] The defense did not object. Hence, the trial court granted the prosecution's prayer and eventually promulgated the assailed Decision.[11] Its decretal portion states:

"WHEREFORE, PREMISES CONSIDERED, the Court finds the accused Andres Delima, Jr. NOT GUILTY of the crime charged and hereby orders his immediate release from confinement.

The Court, however, finds the other accused Gerardo Cogonon GUILTY of the crime of Multiple Murder and Multiple Frustrated Murder punishable under Article 248 of the Revised Penal Code and hereby sentences him to RECLUSION PERPETUA, to indemnify the heirs of the three deceased in the sum of P30,000 each and the sum of P10,000 each for the four wounded policemen, and to pay the cost of suit.

SO ORDERED." [12]

The Prosecution's Version of the Facts as Adopted by the Trial Court

At about 8:30 in the evening of October 14, 1985, a certain Heminiano Clemen alias "Maning" went to the police station of Calatrava, Negros Occidental, to report the presence of armed men in the house of Tirso Claro, a barangay councilman of Barangay Lemery. Among the armed men was Nonoy Cogonon.

In response thereto, T/Sgt. Ermelino Tucaling, the station commander, organized a team to verify the report. Headed by Tucaling himself, the team was composed of P/Sgt. Epifanio Morales, Pfc. Rogelio Aburido, Pfc. Camelo Algaba, Pat. Nestor Era, Pat. Leo Oebanda and Pat. Richard Sumili. Riding in their patrol vehicle, a "back to back" Ford Fiera, the team proceeded to the house of Tirso Claro in Barangay Lemery. Failing to find the reported armed group there, they left for Sitio Daang Lungsod where the armed men were reportedly seen and where a benefit dance was being held.[13] However, according to Pfc. Camelo Algaba,[14] they still failed to find the armed group at the dance hall. So the team proceeded to Barangay Castellano, where they once more failed to encounter any armed group. Thus, they went back to Sitio Daang Lungsod.

By then, it was already 10:00 o'clock in the evening.[15] T/Sgt. Tucaling was driving the patrol vehicle with Pat. Oebanda beside him. Riding in the back, on the left side were Pfc. Aburido and Pat. Era with the former seated behind T/Sgt. Tucaling. At the right side of the vehicle were Pat. Sumili (who was seated behind Pat. Oebanda),

Pfc. Algaba and P/Sgt. Mercado. While negotiating a hilly curve in Sitio Daang Lungsod, their vehicle was suddenly hit just below the windshield by a rifle grenade. The explosion was swiftly followed by a volley of gunshots coming from both sides of the road. The policemen returned fire.

As the rifle grenade hit the vehicle and exploded, T/Sgt. Tucaling lost control of the same, causing it to swerve to the left side of the road, hitting an embankment. The vehicle stopped parallel to the road, its headlights pointed in the direction of the attackers. Despite the exchange of gunshots, the vehicle's headlights remained undamaged and illuminated the ambushers enabling the victims to identify them.

During the firefight, P/Sgt. Mercado recognized appellant Nonoy Cogonon, whom he had known prior to the incident as a member of the Civilian Home Defense Force (CHDF). He was on the left side of the road in fatigue uniform and armed with an M-16 rifle. Mercado likewise saw "alias Goliath" (Rodrigo Romeo), Guillermo Empenado and "alias Agui" (Violeto Tormis).[16] Mercado's identification of the assailant was corroborated by Pfc. Algaba.[17]

When the smoke of battle (which lasted 15 minutes) cleared, T/Sgt. Tucaling, Pat. Oebanda and Pat. Sumili were found dead on the spot,[18] while Pfc. Algaba, P/Sgt. Mercado, Pfc. Aburido and Pat. Era sustained various injuries.[19] The latter casualties were brought to the San Carlos Planters and Laborers Hospital for treatment.[20]

The Version of the Defense

For his part, appellant, then 23 years old, interposed denial and alibi. According to him, he grew up in Barangay Laga-an, Calatrava, Negros Occidental. After two of his brothers were killed, he relocated to Barangay Cruz and became a CHDF member under the leadership of Marcial Mahilum. He knew other CHDF members like Junior Delima, Guillermo Empenado and Buenaventura Entienza. He was also familiar with members of the police force of Calatrava like T/Sgt. Tucaling and P/Sgt. Mercado because he used to hang out at the Municipal Hall. As a CHDF member, he was issued an M-16 Armalite which he claimed to have surrendered to Emiliano Anthony when he "rested" after the death of their leader Marcial Mahilum. He also claimed that inasmuch as he did not formally resign from the CHDF, he could obtain a firearm anytime.[21]

Appellant acquired a farm in Barangay Cruz which measured more than a hectare. It was cultivated by Lemy Cahayagan whose house was about two (2) kilometers from his own place. In the afternoon of that fateful day October 14, 1985, he was allegedly in Cahayagan's house attending a thanksgiving party. He arrived there at 5:00 o'clock in the afternoon and had dinner at 9:00 o'clock in the evening. From then on until 12:00 o'clock midnight, he drank tuba with Lemy and Camilo Cahayagan, Eusebio Caramihan, Carlos and Lito Lumanog. He did not leave the Cahayagan residence until 7:00 o'clock in the morning of the following day.[22]

Lemy Cahayagan corroborated appellant's testimony, adding that Barangay Cruz is about twenty (20) kilometers from Barangay Lemery and could not be reached via the national highway.[23]

The Issues

As stated above, the trial court convicted appellant of the crimes charged. Not satisfied with the Decision, Cogonon interposed the present appeal assigning a single error:

"The trial court erred in convicting accused-appellant Gerardo Cogonon of the crimes charged despite the failure of the prosecution to prove his guilt beyond reasonable doubt."

Appellant contends[24] that his conviction was based on the trial court's presumption that the crime was perpetrated by the CHDF of which he was a member, citing as basis for his contention the following portion of the questioned Decision:

"The Court perceives this [recall of firearms by the police] to be the seed of hatred which germinated in the minds

of the CHDF members whose guns Capt. Ponteras had ordered withdrawn, and culminated in the ambush slaying of the seven policemen. This, coming straight from the horse's mouth as testified to by Cogonon himself." [25]

The trial court in fact added that "the Ponteras order had generated an undercurrent of resentment on the part of the CHDFs which motivated them to perpetrate this dastardly slaughter." [26]

According to Cogonon, he never testified to that effect. He believes that the portion of his testimony which could have been made the basis for the trial court's conclusion is the following:

"Q. It appears from the record that...By the way, would you admit and agree with me that some members of the CHDF were disgusted or disheartened because of that order requiring them to surrender the firearms considering that they were deprived of their protection?

A. I do not know what they felt as I already returned mine." [27]

Thus, relying on Gaerlan vs. Court of Appeals, [28] appellant argues that his conviction cannot be predicated on a presumption or speculation, but on clear and positive evidence. Moreover, while his defense is alibi, it should not be totally disregarded. The possibility exists that, taken in the light of all the evidence on record, his alibi may suffice to acquit him since every circumstance must be considered in favor of the presumption of innocence. [29]

The Court's Ruling

While the quoted portion of the questioned Decision may appear to have been based on the trial judge's knowledge of certain facts not on record, a further reading of the Decision shows that appellant's conviction was based not on presumptions but principally on positive testimony, particularly on his identification as one of the ambushers of the patrol jeep.

The trial court correctly gave credence to the testimonies of P/Sgt. Mercado and Pfc. Algaba. Both positively testified that, after the ambush, they saw appellant at the side of the road, armed and fleeing from the scene of the crime. Both had known appellant even prior to the incident. [30] They had no ill motive to testify falsely against him. Moreover, because the headlights of the patrol vehicle were not damaged during the shootout, they provided sufficient illumination to enable the victims to identify their attackers.

The trial court's ruling was simply in accord with our pronouncement that "where the conditions of visibility are favorable and the witnesses do not appear to be biased, their assertion as to the identity of the malefactor should be normally accepted." [31] Aside from that, the prosecution witnesses had known appellant even before the ambush and therefore they could not have been mistaken as to his identity. Furthermore, it is a natural reaction of victims of criminal violence to strive to observe the appearance of their assailants (if not ascertain their identities) and the manner in which the crime is committed. [32] The policemen who witnessed the incident were themselves the victims of the deadly assault, and it is not unlikely that the faces of their attackers -- lighted up by the patrol car headlights -- were scorched into their memories.

The issue of appellant's identification boils down to the issue of credibility. Assessment of the credibility of witnesses and their testimonies is a matter best undertaken by the trial court because of its opportunity, not available to the appellate court, to observe the witnesses firsthand, and note their demeanor under questioning. These are the most significant factors in evaluating the sincerity of witnesses and ferreting out the truth, especially in the face of conflicting testimonies. Verily, findings of the trial court on such matters will not be disturbed on appeal unless some facts or circumstances of weight have been overlooked, misapprehended or misinterpreted which would otherwise materially affect the disposition of the case. In the present case, we do not see any reason to depart from this established rule. [33]

The defense of alibi interposed by appellant, an inherently weak defense which can be easily be fabricated, cannot

prevail as against positive identification of the appellant by the prosecution witnesses.[34] Moreover, it was not physically impossible for appellant to have been at the scene of the attack, given the relatively short distance between the crime scene and the place where the party was allegedly being held.

The trial court expressly ruled that the crimes committed were multiple murder and multiple frustrated murder. The killings were qualified by treachery, for, in the commission thereof, the perpetrators employed means and methods which tended directly and especially to ensure their execution without risk to themselves arising from the defense which the victims might make.[35] The essence of treachery is the sudden and unexpected attack without the slightest provocation on the part of the person attacked.[36] While the victims in this case were armed and were able to fire back at their attackers, nevertheless the established facts patently and ineludibly reveal a consciously adopted plan to completely surprise the victims and make it extremely difficult for them to defend themselves.

With respect to the injuries sustained by P/Sgt. Mercado, Pfc. Aburido, Pat. Era and Cpl. Algaba, it was duly established that P/Sgt. Mercado who sustained gunshot wounds on the shoulder, buttocks and thigh[37] would have died had medical attention not been given him shortly after the ambush.[38] It was also established that Cpl. Algaba had wounds on the left forearm, thigh and right ankle[39] while Pfc. Aburido and Pat. Era were likewise injured.[40] However, it was not conclusively proven that the latter three would have died had they not been treated immediately. Hence, as to them, appellant may be held liable only for attempted murder.[41]

Although it was not shown that the deaths of the three policemen was directly caused by bullets emanating from the firearm of appellant, he is liable for all the crimes resulting from the ambush on account of the duly proven conspiracy. It was indubitably demonstrated by the concerted action of the attackers in waiting for the patrol jeep to pass through the hilly curve of the road and shooting it and its unwary passengers. In conspiracy, all the accused are answerable as co-principals regardless of the degree of their participation.[42]

In view of the established fact that the killing of the three policemen on patrol was committed by several discharges of firearms, the resulting crimes may not be complexed.[43] Appellant should be held liable for the separate crimes[44] of three murders, one frustrated murder and three attempted murders.

Art. 248 of the Revised Penal Code penalizes the accused in a murder case with reclusion temporal in its maximum period to death. It was clearly proven that the crimes were perpetrated when the policemen, as public authorities, were engaged in the discharge of their duties.[45] In view of this aggravating circumstance and in the absence of any mitigating circumstance to offset it,[46] appellant should be imposed the death penalty for each of the murders committed considering that, at the time of the commission of the crimes on October 14, 1985, the death penalty was still sanctioned by law.[47] However, considering that the trial court promulgated its Decision on November 14, 1989 when the imposition of the death penalty was still proscribed by the Constitution, and R.A. 7659 re-imposing said penalty, took effect only on January 1, 1994, the trial court correctly applied the penalty of reclusion perpetua.[48]

Now, Art. 22 of the Revised Penal Code provides that "(p)enal laws shall have a retroactive effect insofar as they favor the person guilty of a felony x x x although at the time of publication of such laws a final sentence has been pronounced and the convict is serving the same."

In the present case, the trial court imposed reclusion perpetua obviously in deference to the 1987 constitution[49] and it did not consider whether or not mitigating or aggravating circumstances attended the commission of the crimes.

The imposition of the penalty of reclusion perpetua upon the appellant by the trial court and the retroactivity of

penal laws favorable to the accused are determinative factors in the imposition of the proper penalty in this case. When appellant interposed this appeal, it was for the apparent purpose of reversing his sentence or at least attaining mitigation of his culpability and its corresponding penalty. He should not be unduly prejudiced for availing of the privilege of appeal to a higher court. Cogonon's appeal was elevated to this Court and submitted for resolution prior to the effectivity of R.A. 7659. It is not his fault that this Decision is now being promulgated after said law reimposing the death penalty has taken effect. Hence, we hold that, in reviewing such penalty, this Court may not increase it to the maximum of death as that would collide with the established doctrine to resolve all doubts in favor of the accused.

WHEREFORE, the appeal is hereby DISMISSED. The questioned Decision is MODIFIED as follows: Appellant Gerardo Cogonon is hereby found GUILTY beyond reasonable doubt of the separate crimes of multiple murder, frustrated murder and multiple attempted murder, and accordingly, upon him is imposed the following penalties: (a) three penalties of reclusion perpetua for the three multiple murders, (b) the indeterminate penalty of twelve (12) years of prision mayor maximum to seventeen (17) years, four (4) months and one (1) day of reclusion temporal maximum for frustrated murder and (c) three indeterminate sentences of six (6) years of prision correctional maximum to ten (10) years and one (1) day of prision mayor maximum for the three attempted murders, which penalties shall be served successively and in accordance with law. Pursuant to current jurisprudence, appellant is ORDERED to indemnify the families of the deceased T/Sgt. Ermelino Tucaling, Pat. Leo Oebanda and Pat. Richard Sumili in the amount of P50,000 each. The indemnity of P10,000 payable to each of the four injured policemen imposed upon appellant by the trial court is hereby AFFIRMED.

SO ORDERED.

Narvasa, C.J. (Chairman), Davide, Jr., Melo, and Francisco, JJ., concur.

[1] Presided by Judge Mariano Y. Basa, Jr.

[2] Record, p. 104.

[3] Ibid., p. 107.

[4] Ibid., p. 117.

[5] Ibid., p. 124.

[6] Ibid., p. 146. No copy of the amended complaint is attached to the Record. Even the Decision of the trial court merely copied the wordings of the original Information naming appellant as alias Nonoy Cogonon.

[7] Ibid., p. 239.

[8] Ibid., p. 242.

[9] Ibid., p. 256.

[10] Ibid., p. 278.

[11] Ibid., p. 283.

[12] Ibid., p. 289.

[13] TSN, August 5, 1987, pp. 3-5; June 22, 1988, pp. 4-6.

[14] TSN, August 5, 1987, pp. 5-6.

- [15] TSN, June 22, 1988, pp. 6-7.
- [16] Ibid., p. 8-15.
- [17] TSN, August 5, 1987, pp. 6-12.
- [18] Exhs. A, B and C; Record, pp. 26-28.
- [19] Record, pp. 29-34.
- [20] TSN, August 5, 1987, pp. 12-13; TSN, June 22, 1988, pp. 17-19.
- [21] TSN, August 3, 1989, pp. 15-25.
- [22] Ibid., pp. 7-14.
- [23] TSN, May 30, 1989, pp. 2-7.
- [24] Two briefs were filed for appellant: One, entitled "Memorandum," was filed by Attys. Estefanio S. Libutan, Jr. and Danilo T. Pabalinas of the Public Attorney's Office (PAO) in San Carlos City and the other by Attys. Bartolome P. Reus and Lilian Doris S. Alejo of the head office of the PAO at the Department of Justice, Padre Faura, Manila.
- [25] Decision, p. 5.
- [26] Ibid., p. 6.
- [27] TSN, August 3, 1989, pp. 26-27.
- [28] 179 SCRA 20, November 6, 1989.
- [29] Appellant's Brief filed by PAO-DOJ, pp. 8-9; rollo, pp..
- [30] The prosecution presented on the witness stand Michael Valencia, a security guard at the San Miguel Aquaculture Center in Hda. Refugio, Calatrava Negros Occidental, who testified that, at around 9:00 o'clock in the evening of August 26, 1986, while he was on duty, a red cargo truck arrived at the company compound. The service light at the gate of the compound was focused on the truck and when he approached it, the passengers told him that they were fry buyers. But then, two armed men jumped from the front seat of the truck while four other armed men alighted from its cargo section. One of the armed men was illuminated by the spotlight and he recognized him to be herein appellant. Appellant ordered one of his companions to seize his (Valencia's) .38 caliber service revolver. He was hit by the armed man on the stomach. Apart from his service firearm, the armed men seized a handset, a yellow flashlight, a personal hunting knife and 24 rounds of ammunition from the guardhouse. They then lifted the boom and entered the company premises but, upon seeing people working at the pond, they moved out. (TSN, April 28, 1988, pp. 3-9).
- [31] People vs. Bongadillo, 234 SCRA 233, July 20, 1994.
- [32] People vs. Canturia, 245 SCRA 275, June 22, 1995.
- [33] People vs. Viñas, Sr., 245 SCRA 448, June 29, 1995; People vs. Pija, 245, SCRA 80, June 16, 1995,.
- [34] People vs. Acob, 246 SCRA 715, July 20, 1995,.
- [35] People vs. Alban, 245 SCRA 549, July 3, 1995; People vs. Viñas, supra.
- [36] People vs. Abapo, 239 SCRA 469, December 28, 1994,.

[37] Exh. D.

[38] TSN, September 28, 1988, p. 6.

[39] TSN, August 5, 1987, p. 9.

[40] Ibid., p. 12.

[41] People vs. Maguikay, 237 SCRA 587, 605, October 14, 1994.

[42] People vs. Solon, 244 SCRA 554, May 31, 1995.

[43] People vs. Fabros, 214 SCRA 694, 700, October 19, 1992.

[44] People vs. Lago, 220 SCRA 578, March 30, 1993; citing People vs. Pascual, 81 SCRA 548, February 23, 1978.

[45] Art. 14 (5), Revised Penal Code.

[46] Art. 64(3), supra.

[47] In People v. Pandiano, 232 SCRA 619, May 30, 1994, the crime of murder was committed on September 1, 1985 or before the effectivity of the 1987 Constitution abolishing the imposition of the death penalty. The trial court convicted the accused on August 31, 1989, when the 1987 Constitution was already in full force, and imposed the penalty of reclusion perpetua. In the Decision of May 30, 1994, this Court found that while there was no mitigating circumstance, the aggravating circumstance of abuse of superiority attended the commission of the crime and therefore the death penalty should have been imposed. However, the Court, through associate Justice Josue Bellosillo, said: "But while death can now be imposed as a penalty with the passage of R.A. No. 7659, Art. 21 of the Revised Penal Code specifically prohibits the imposition of a penalty for a felony which was not so prescribed at the time of its commission. Since R.A. No. 7659 was signed into law on 13 December 1993 and took effect on 1 January 1994, fifteen (15) days after its publication in two (2) newspapers of general circulation, the imposition of the penalty of reclusion perpetua upon appellant x x x was proper." (Underscoring supplied.)

[48] In People v. Parica, 243 SCRA 557, April 21, 1995, the Court imposed the penalty of reclusion perpetua on the appellant notwithstanding that the crime was committed in 1985 because "at the time of the killing of Narciso Decena, the imposition of the death penalty was as yet prohibited by the 1987 Constitution." The same penalty was imposed by the Court on the appellant in People v. Panganiban, 241 SCRA 91, February 6, 1995, although the crime was committed in 1981.

[49] Art. III, Sec. 19 (1).

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