

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. NESTOR CASCALLA Y GUDOY, DEFENDANT-APPELLANT.

G.R. No. 96652. January 25, 1995

Ponente: QUIASON, J.

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QUIASON, J.:

This is an appeal from the decision of the Regional Trial Court, Branch 40, Calapan, Oriental Mindoro, in Criminal Case No. 2475, finding appellant guilty beyond reasonable doubt of the crime of murder with the use of an unlicensed firearm.

I

In an information dated January 6, 1987, Nestor Cascalla y Gudoy was charged with murder with the use of an unlicensed firearm committed as follows:

"That on or about the 10th day of December, 1986, at 10:00 o'clock (sic) in the evening, more or less, in the Barangay of Batino, Municipality of Calapan, Province of Oriental Mindoro, Philippines and within the jurisdiction of this Honorable Court, the above-named accused 'Nestor Cascalla, with intent to kill and with treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and shoot several times with the use of an unlicensed firearm, a .22 Caliber revolver with S.N. 59296, one Mario Cleofe while the latter was unaware, unarmed and defenseless, thereby inflicting upon the latter gunshot wounds causing his instantaneous death.

That in the commission of the crime of murder with the use of unlicensed firearm the qualifying circumstances of evident premeditation and treachery and the aggravating circumstance of nighttime were present.

Contrary to Section 1, Presidential Decree No. 1866 in relation to Article 248 of the Revised Penal Code" (Rollo , p. 8).

Upon arraignment, appellant interposed a plea of not guilty. After trial, the court rendered a decision, the dispositive portion of which reads as follows:

"WHEREFORE, PREMISES CONSIDERED, the Court finds the accused NESTOR CASCALLA guilty beyond reasonable doubt of the crime of murder with the use of an unlicensed firearm, and he is hereby sentenced to suffer life imprisonment, to pay the heirs of the victim the sum of P30,000.00 and to pay the costs (Rollo , p. 21).

II

The findings of fact of the trial court are as follows:

On December 10, 1986, at about 9:30 P.M., Igmedio Magtibay was tending his store at Batino, Calapan, Oriental Mindoro, when Mario Cleofe came for a chat. Shortly thereafter, Wilfredo Duenas joined them. Mario and

Duenas were old enemies. Mario asked Duenas, "Sino ka ga?" Duenas retorted, "Huag mo akong sisinu-sinuhin at isang bala ka lang." Duenas then drew his gun and aimed it at Mario. Magtibay pacified the two by saying, "Huwag naman, wala namang kabagay-bagay." Duenas heeded Magtibay and left.

Magtibay assisted Mario, who was tipsy, in getting to the road. Upon reaching the road, they met Sofronio Aranas, Mario's neighbor, who offered to accompany him home. Along the way, Aranas and Mario met appellant and Duenas. Appellant suddenly fired two shots in the air and said that he was a member of the Civilian Home Defense Force (CHDF). Duenas, who was two-arms length away from appellant, uttered, "Sige, Tiyo, akin ang pangatlong putok." Cowed, Aranas pleaded to appellant not to shoot them as they had not done anything to him. Appellant retorted: "Sige, lampas na." Aranas and Mario resumed walking toward the latter's house while appellant and Duenas went the other way. Later, Mario stopped to rest and sat on one side of the road; while Aranas sat at the opposite side. Suddenly, appellant and Duenas returned.

Appellant repeated to Mario that he was a member of the CHDF and ordered him to stand up. When Mario did not obey the order, appellant fired two shots directed at him. In spite of his bullet wounds, Mario was able to grapple with appellant for the possession of the gun, until he (Mario) collapsed to the ground. Upon seeing that Mario was shot, Aranas grabbed a piece of wood and hit appellant several times. At this point, Duenas ran away. Appellant, who was parrying the blows of Aranas, dropped his gun and also ran away. Aranas got the gun left by appellant and later turned it over to the barangay captain. Several persons arrived in response to Aranas' call for help and assisted in bringing Mario to his brother's house. From there, Mario was brought to the hospital by his wife, but he died along the way.

The next morning, appellant was detained by the police. He admitted that he owned the unlicensed gun retrieved by Aranas. He also admitted that it was the same gun he used in shooting Mario twice. However, the police failed to get a sworn statement from appellant for he was not assisted by counsel.

On December 15, 1986, a paraffin test on the hands of appellant was conducted by a forensic chemist at the National Bureau of Investigation. The test revealed several blue specks (Exhs. "G" and "H").

The body of Mario was autopsied by Dr. Carlos Adeva, who found two bullet wounds thereon: one was located two-inches above the umbilicus and the other was an inch below it. The necropsy report gave "shock due to internal hemorrhage due to bullet wounds penetrating the abdominal organs" as the cause of death (Exh. "A-1").

Appellant denied shooting Mario and gave the following version of the incident:

He was a resident of Lagadlarin, Lobo, Batangas. In December 1986, he went to Batijio, Calapan, Oriental Mindoro to work as a thresher-operator of Eduardo Capió in the riceland of Ernesto Magboo. While in Batino, he stayed with Magboo whose wife was related to him.

On December 10, 1986, at around 9:00 P.M., appellant met Duenas, who told him about the incident in the store of Magtibay. Appellant advised him to go home. As Duenas was also going to Gulod, they both proceeded to that place. Along the way, the two met Rodelito Cerezo and Loreto Cleofe, the brother of Mario. After a while, Loreto Cleofe left them.

The trio then met Mario and his two other brothers, Lope and Epa. As the Cleofe brothers were approaching, Duenas drew his gun and said, "Isang bala lang kayo ngayon." Appellant was then on the right side of Duenas. He held the hands of Duenas to prevent him from shooting Mario but as the gun was raised, it fired. Suddenly, appellant felt a blow on his back.

Reeling from the blow, appellant turned around but he was hit by Mario on the left side of the head, thereby

releasing his hold on the hand of Duenas. Mario continued hitting him and all he could do was to parry the blows with his hand. After appellant was hit on the left chin, he lost consciousness.

Appellant regained consciousness as Cerezo was lifting him up. He noticed that the Cleofe brothers and Duenas were no longer around. Cerezo, who helped him go home to Gulod, told appellant that Duenas had shot Mario. Upon reaching the house of Eduardo Capió, appellant requested that he be brought to the hospital for treatment. At the poblacion, however, they proceeded first, to the police station because the barangay captain of Gulod insisted that they should report the incident to the police.

Appellant and his companions stayed at the police station only for about two minutes. When he was asked who inflicted his injuries, he pointed to the Cleofe brothers. The police, however, did not ask him any more questions but instead told appellant's companions to bring him to the hospital for treatment.

Dr. Leo Geronimo, a resident physician of the Oriental Mindoro Provincial Hospital, attended to appellant. He found that appellant had a lacerated wound on the left parieto-occipital area and abrasions on the chest and at the back of the right scapular region. Appellant's left forearm was very tender and had limited movement. Dr. Geronimo opined that appellant's left forearm could have been hit by a blunt object.

III

Appellant was first represented by Alvin S. Dysangco of the Public Attorney's Office who, in the appeal brief, prayed that the decision of the trial court be modified by convicting him of the crime of homicide (Rollo , p. 48). Thereafter, appellant filed a motion for leave to file an amended brief stating that the Public Attorney's Office "omitted some important points" which he believed were vital to his defense (Rollo , p. 71). Thereafter, through Atty. Pedro T. Molo, appellant filed an amended appellant's brief praying for his acquittal (Rollo , pp. 78-122). Instead of filing an appellee's brief, the Solicitor General filed a manifestation that he agreed with Atty. Molo that appellant be acquitted of the crime charged (Rollo , pp. 159-177).

IV

Appellant questions the finding of the trial court that he was the one who shot Mario. He claims that the prosecution's version of the incident, pointing to him as the killer, was improbable because: (1) he had no motive to kill Mario, rather it was Duenas who had an enmity with Mario; (2) he did not own any firearm, rather it was Duenas who was seen to have carried a gun; (3) he was not a member of the CHDF while the one who shot Mario boasted to be a member of the CHDF; and (4) it was not natural for someone to kill another just for failure on his part to obey an order to stand up.

The issue of credibility is left to the discretion of the trial court, which has had the opportunity to observe the conduct and demeanor of the witnesses during the trial. Time and again, this court has held that it will not alter the findings of the trial court on the credibility of the witnesses, principally because they are in a better position to assess the same than the appellate court (*People v. Molleda*, 86 SCRA 667 [1978]).

It is not essential to prove motive in murder cases if the evidence is clear and overwhelming so as to leave no doubt of the guilt of the appellant (*People v. Tagaro*, 7 SCRA 187 [1963]).

We agree with the Public Attorney's Office that the trial court erred in applying evident premeditation and treachery as qualifying circumstances (Rollo , pp. 44-46). The prosecution evidence does not show when appellant meditated and reflected upon his decision to kill the victim. Neither is there any showing as to the time that had elapsed before his plan was carried out.

Likewise, treachery was not proven by the prosecution. As a matter of fact, the prosecution evidence shows that appellant even gave Mario a warning by firing two shots in the air. A few minutes before the fatal shooting, Mario had encounter with Duenas, the companion of appellant, at the store of Magtibay. Appellant made himself vulnerable to retaliation from the companions of Mario. In fact, Mario's companion, Sofronio Aranas, was able to deliver several blows on appellant, causing injuries to his person. Had appellant pre-planned the killing of Mario, he would definitely have done it in a way that would free him from any retaliation.

We also agree with the Public Attorney's Office that appellant cannot be convicted under Section 1, Paragraph 2 of P.D. No. 1866, which provides:

"If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed."

For conviction under this provision of the Decree, the prosecution has to prove that the accused used an unlicensed firearm to perpetrate the crime of homicide or murder. The prosecution presented Major Rizalino Leocadio, who testified that appellant admitted that the gun he used was not licensed. The admission was made during custodial investigation of the appellant without the assistance of counsel (TSN, June 23, 1987, p. 16). It is therefore inadmissible in evidence (People v. Jungco, 186 SCRA 714 [1990]).

The prosecution could have easily secured a certification from the Philippine Constabulary to the effect that no firearm license was issued to appellant to possess and carry the gun used in the killing.

Inasmuch as appellant is only guilty of the crime of homicide without any mitigating and aggravating circumstances, the maximum penalty that can be imposed on him is reclusion temporal in its medium period (Revised Penal Code, Art. 249).

WHEREFORE, the decision appealed from is **AFFIRMED** with the modification that appellant is found guilty only of Homicide. He is sentenced to an indeterminate penalty of eight (8) years and one (1) day of prision mayor as minimum to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal as maximum. He is also sentenced to indemnify the heirs of the victim the sum of P50,000.00 and to pay the costs.

SO ORDERED.

Padilla, (Chairman), Davide, Jr., Bellosillo and Kapunan, JJ., concur.

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