

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MARIO ALIVIADO Y CORDOVA, ACCUSED-APPELLANT.

G.R. Nos. 113782-84. August 14, 1995

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

Accused-appellant Mario Aliviado appeals from the decision of Branch 12 of the Regional Trial Court (RTC) of Manila convicting him of the crimes of murder in Criminal Case No. 88-66769 and frustrated murder in Criminal Case No. 88-66770 and sentencing him, in the first case, to a penalty of reclusion perpetua and to pay the heirs of Ramon Akil in the amounts of P50,000.00 as death indemnity and P20,000.00 as moral damages, and, in the second, to an indeterminate penalty ranging from six years of prision correccional maximum to twelve years and one day of reclusion temporal minimum.[1]

The accusatory portions of the informations in the said cases read as follows:

In Criminal Case No. 88-66769

That on or about October 17, 1986, in the City of Manila, Philippines, the said accused did then and there wilfully, unlawfully and feloniously, with intent to kill and with treachery and evident premeditation, attack, assault and use personal violence upon one RAMON AKIL y PLANAS by then and there firing at him his firearm successively a 45 caliber pistol, thereby inflicting upon the latter mortal wounds which were the direct and immediate cause of his death thereafter.[2]

In Criminal Case No. 88-66770

That on or about October 17, 1986, in the City of Manila, Philippines, the said accused with intent to kill and with treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and use personal violence upon the person of JAIME ABEJO y DONGHIT, by then and there shooting him several times with a 45 caliber pistol, thereby inflicting upon said Jaime Abejo y Donghit wounds which are necessarily fatal, thus performing all the acts of execution which would have produced the crime of murder as a consequence but nevertheless did not produce it by reason of causes independent of the will of the said accused, that is, by the timely and able medical attendance given to the said victim which saved his life.[3]

The appellant was also charged with frustrated murder in a third case, Criminal Case No. 88-66771,[4] which was subsequently dismissed for failure of the victim, Rizaldy Velasco, to appear despite subpoenas.[5]

These three cases were consolidated and jointly tried. The prosecution presented as its witnesses Jaime Abejo, Daniela Laciapag, Dr. Marcial Ceñido, Erwin Akil, and Dr. Arnold Timothy Yusuico. The defense relied on the sole testimony of the appellant, who interposed self-defense for his exculpation.

The evidence for the prosecution established the following facts.[6]

At around 12:30 a.m. of 17 October 1986, while Erwin Akil and his parents, Ramon and Agnes Akil, were outside

their apartment located at No. 2439 Pasig Line, Sta. Ana, Manila, the appellant arrived and inquired if they knew a certain Boy Tisoy. Thinking that the appellant was referring to Boy Bombay, who was living at the second floor of their apartment, the Akils asked someone to call for Boy Bombay. When the latter peeped through the window, the appellant remarked that Boy Bombay was not the one he was looking for.

The appellant then requested Ramon to accompany him to the "looban," an alley going to the interior portion of the area, to look for Boy Tisoy. Ramon obliged, and they walked toward the "looban ."

Erwin, who had decided to buy bread at a nearby bakery, followed and eventually overtook them at the entrance of the "looban." Afterwards, he heard a gunshot. When he turned his head and looked back, he saw the appellant shoot his father from behind with a gun. His father fell into the canal, while the appellant hurriedly fled to the alley beside their apartment. Erwin forthwith approached his father to render assistance to him.

Daniela Laciapag, a neighbor of the Akils who had earlier heard two gunshots, arrived and shouted for help.

Barangay Tanod Jaime Abejo, who had also heard the gun reports, came and helped Erwin carry Ramon. In the next instant, the appellant arrived on board a motorcycle and immediately shot Jaime Abejo, who was then carrying the wounded Ramon. Thereafter, the appellant sped away on his motorcycle.

Ramon Akil died about an hour later at the Philippine General Hospital (PGH). In the afternoon of the same day Dr. Marcial Ceñido, Medico-Legal Officer of the Western Police District (WPD), conducted an autopsy on the body of Ramon Akil and found the fatal wound to have been caused by a bullet which hit the deceased's left buttock..[7] He recovered from the deceased's stomach partially digested rice without alcoholic odor.[8]

Dr. Arnold Timothy Yusuico, the surgeon on duty at the emergency room of the PGH in the early morning of 17 October 1986, attended to Jaime Abejo and found the latter to have sustained a gunshot wound at the upper part of the abdomen extending to the right portion of his back and injuries in the stomach, pancreas, left kidney and spinal column[9] which could have caused his death were it not for timely medical intervention.

On the other hand, the appellant had another version.[10]

In the evening of 17 October 1986, while he was on his way to the residence of his sister, Lilian Aliviado, in Parañaque Metro Manila, he decided to go to the residence of his estranged wife, Princess Ibay Castellvi, in Pasig Line, Sta. Ana, Manila. His wife had called him over the phone on three occasions requesting him to see her. To reach Pasig Line, he took a bus for Guadalupe, then a jeep for Mabuhay, and a tricycle.

The appellant arrived at Pasig Line at around 11:30 p.m.. On his way to his wife's residence, he passed by seven to eight men drinking in front of an apartment. They were then drunk and noisy. Three of them stood up and called out to him, "Hoy, saan ka pupunta?" He answered that he was going to the house of his wife, a sister of a certain Boy Mestizo. Suddenly, one of the men struck him on his left side under the armpit; the second, who was in front of him, pulled his gun and uttered, "Patayin na natin ito"; and the third was at his back. To protect himself, he grabbed and took the gun and, fearing that he might be killed, fired the gun at the three men and then ran towards Pasong Tamo Street. While running, he threw away the gun somewhere in an alley, and it dropped into a canal.

Afterwards, the appellant took a jeep bound for the highway and another towards his sister's residence in Paranaque. He stayed there and contemplated whether to surrender or not.

The following day, his wife came and told him that it would be better for him not to surrender because one of the men he had shot was related to a ranking officer of the WPD and the other, to someone working in the Department of National Defense, and that if he would surrender to the police, he would be killed. He believed his

wife because, being a resident in the place where the incident occurred, she probably knew those persons. Thus, he went into hiding in his brother's house in Munting Kalsada, Pasig, Metro Manila, and later, in his mother's residence in Enos Street, Talon, Las Pinas, where he was subsequently apprehended by a certain Sgt. Salvacion.

The trial court did not give credence to the appellant's claim of self-defense. It stated thus:

Having admitted that he shot three persons in alleged self-defense after he grabbed from one of these persons the fatal firearm, why did he not immediately surrender to the police authorities. Instead, he went to hiding from different places first at his brother's residence at Pasig and finally at his mother's place at Enos St., Talon, Las Pinas, Metro Manila where he was finally arrested by P/Sgt. Daniel Salvacion. He reasoned out that it was due to his estranged wife's precaution that he might be killed. But being a resident of Paranaque, there are other peace officers where he could surrender and ask for protection. If it is true as he claimed that he divested the weapon he used from one of those who accosted him, why did he throw it allegedly rather than keep and preserve it as evidence.

Assuming that -he had no weapon that night much less the firearm involved, the Court cannot believe him when he asserted that when accosted by three of some 7 to 8 persons allegedly drinking that night on his way to his ex-wife's place, one of them pulled a gun but he was able to grab and wrestled, took possession of the same then shot the three in succession. His admission that the one who supposedly pointed the gun at him was in front, the second stood at his left while the third was at his back, the Court cannot believe that he was that strong and fast to succeed in wrestling away the gun from one of the alleged tormentors and then begin firing back at them, Considering, farther, that he never knew nor experienced handling firearm and had no military or police training or service whatsoever. In fine, he could not have been that agile and fast on the draw so to say.

While he asserted that the 7 to 8 persons were drinking and already noisy and whom he considered to be drunk, the physician testified that Akil was found to be negative of alcohol odor.

Accused was likewise inconsistent in his declaration on how he went to Pasig Line. At first he maintained to have rode a bus from Paranaque to Guadalupe, later he said he took jeepney rides from Paranaque to Hi-way then another jeepney ride to Guadalupe. With these different versions the Court is more convinced that he was riding on a motorcycle when he went to the place of the incident.

With these considerations, this Court entertain serious doubts on the truthfulness of the accused submission.[11]

Unsatisfied with the verdict, the appellant moved for a new trial[12] on the grounds of (1) negligence on the part of his counsel de oficio for allegedly failing to present his sister, Lilian Aliviado, as his witness; and (2) the discovery of new and material evidence consisting of the testimony of Luis Castellvi, Jr. who allegedly witnessed the incident, which the appellant could not have discovered and produced during the trial because the said witness was then detained for a criminal offense.

The trial court denied his motion for the following reasons: (a) the affidavit of Lilian Aliviado attached to the motion discloses that she was not able to come to the court on the day she was to testify because something had happened to her daughter, thus, negating the appellant's allegation that his counsel failed to exert effort to bring in material defense witnesses; besides, the other statements thereon, particularly paragraphs 5 and 6, are hearsay; and (b) the claim of newly discovered evidence is without merit because Luis Castellvi, a brother-in-law of the appellant and an inmate at the Manila City Jail where the appellant was detained, could have been produced at the trial without exerting too much effort.[13]

Having failed in his motion for new trial, the appellant seasonably filed a notice of appeal.[14]

In his brief[15] he submits that the trial court erred in denying his motion for new trial and in finding him guilty of murder and frustrated murder.

We disagree.

Under Section 2, Rule 121 of the Rules of Court, a new trial may be granted only on any of the following grounds:

(a)

That errors of law or irregularities have been committed during the trial prejudicial to the substantial rights of the accused;

(b)

That new and material evidence has been discovered which the accused could not with reasonable diligence have discovered and produced at the trial, and which if introduced and admitted, would probably change the judgment.

The appellant's motion based on the alleged negligence of the counsel de officio and on newly discovered evidence must indeed fail.

As correctly found by the trial court, the appellant's counsel de officio did exert efforts to present Lilian, and a date was in fact set for the reception of her testimony, yet, she failed to come to court. Moreover, her testimony was insignificant because the statements in paragraphs 5 and 6 of her affidavit are not based on personal knowledge but on information from other persons.

Also, the evidence sought to be established by the testimony of Luis Castellvi, Jr. fails to satisfy all the requisites for the aforementioned second ground for a new trial, which are, to wit: (a) the evidence was discovered after the trial; (b) such evidence could not have been discovered and produced at the trial even with the exercise of reasonable diligence; and (c) such evidence is material, not merely cumulative, corroborative, or impeaching, and is of such weight that, if admitted, would probably change the judgment.[16] Luis Castellvi, Jr. is the appellant's brother-in-law, who was also detained, together with the appellant, at the City Jail of Manila. Thus, he could have been easily produced and presented in court as defense witness. And even if Luis were allowed to testify in court, his testimony would, at most, only corroborate that of the appellant; hence, it would- not alter the judgment which is based on the appellant's failure to prove his claim of self-defense. If an accused fails by his own testimony to prove self-defense, no cumulative or corroborative evidence can improve his position.

The second assigned error is without merit. Having admitted the shooting of the victims in these two cases, the appellant had the burden to prove by clear and convincing evidence that his acts were justified and that he incurred no liability therefor. He must rely on the strength of his own evidence and not on the weakness of that of the prosecution, for even if the latter were weak, it could not be disbelieved after he admitted the shooting, which had resulted in the death of Ramon Akil and injuries to Jaime Abejo.[17] It was incumbent upon him to prove the following essential requisites of self-defense: (a) unlawful aggression; (b) reasonable necessity of the means employed to repel it; and (c) lack of sufficient provocation on the part of the person defending himself.[18]

The appellant claims that unlawful aggression was clearly shown when one of the three men pulled out a gun and uttered, "Patayin na natin ito," while another attacked him at his left side and hit him once. To bolster such claim, he declared that his attackers were drunk.

We are not persuaded. The appellant never testified that two of his alleged assailants were the deceased Ramon Akil and Jaime Abejo. Besides, Ramon Akil was not drunk; there was no trace of alcohol from the contents

recovered from his stomach. Jaime Abejo testified that he was not drunk either.

The appellant's claim of self-defense is further negated by his subsequent conduct, viz., (a) the throwing away of the firearm he used in shooting the victims and his failure to report the incident to the police authorities [19] and to lead them, after he was arrested, to the place where he threw the firearm; and (b) his flight, as shown by his transfer of residence from one place to another to avoid arrest.

Flight evidences guilt or betrays the existence of a guilty conscience.[20] It is a silent admission of guilt.[21] Truly, "the wicked man flees though no man pursueth, but the righteous are as bold as a lion." [22]

Treachery was correctly appreciated in the instant case. The appellant suddenly, unexpectedly, and without any warning shot Ramon Akil from behind[23] and Jaime Abejo while the latter was carrying the wounded Ramon Akil. He did so without any risk to himself, as the unsuspecting victims were not only without any weapon for their defense, but were in no position to repel or avoid the imminent danger to their lives and limbs.

The trial court then committed no error in finding the appellant guilty beyond reasonable doubt of the crimes of murder in Criminal Case No. 88-66769 and frustrated murder in Criminal Case No. 88-66770. It should have, however, awarded moral damages in favor of Jaime Abejo. Under the law, moral damages, which include, inter alia, physical suffering, mental anguish, fright, and serious anxiety,[24] may be recovered in criminal offenses resulting in physical injuries.[25] No proof of pecuniary loss is necessary in order that such damages may be adjudicated, and assessment thereof is left to the discretion of the court. [26] If the court a quo does not exercise such discretion, this Court may do so, since an appeal in a criminal case opens the whole case for review. Considering that the gunshot inflicted by the appellant on Jaime Abejo injured his stomach, pancreas, left kidney, and spinal column which could have caused his death were it not for the timely medical intervention, no further proof is needed to prove his physical and mental sufferings. We thus award him moral damages in the amount of P25,000.00.

WHEREFORE, the instant appeal is DISMISSED, and the challenged decision of Branch 12 of the Regional Trial Court of Manila in Criminal Cases Nos. 88-66769 and 88-66770 is hereby AFFIRMED, with the modification that the appellant is further ordered to pay Jaime Abejo moral damages in the amount of P25,000.00.

Costs against the appellant.

SO ORDERED.

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

[1] Original Records (OR) 209-231; Rollo, 12-34, 50-72. Per Judge Romuto A. Lopez, Assisting Judge.

[2] OR, 1.

[3] Id., 28.

[4] Id., 29.

[5] RTC decision, 2; Id., 210; Rollo, 51; TSN, 1 September 1989, 3.

[6] RTC decision, 7-8, 10-11, 13-14.

[7] Exhibits "G" and "H."

[8] Exhibit "G".

[9] Exhibit "C".

[10] TSN, 10 May 1989, 2-8.

[11] Rollo, 28-30.

[12] OR, 232-233.

[13] Id., 245-246.

[14] OR, 247.

[15] Rollo, 49 et seq.

[16] *People vs. dela Cruz*, 207 SCRA 632 [1992], citing *MORAN, M., Comments on the Rules of Court*, vol. 4 [1980], 340-341.

[17] *People vs. Ybeas*, 213 SCRA 793 [1992]; *People vs. Boniao*, 217 SCRA 653 [1993]; *People vs. Gomez*, 235 SCRA 444 [1994].

[18] Paragraph 1, Article 11, Revised Penal Code.

[19] *People vs. Jotoy*, 222 SCRA 801 [1993]

[20] *People vs. Garcia*, 209 SCRA 164 [1992]; *People vs. Martinado*, 214 SCRA 712 [1992].

[21] *People vs. Cruz*, 213 SCRA 611 [1992].

[22] Book of Proverbs, Old Testament, 28:1; *United States vs. Sarikala*, 37 Phil. 486 [1918]; *People vs. Garcia*, supra note 16.

[23] *People vs. Boniao*, supra note 17.

[24] Article 2217, Civil Code.

[25] Article 2219(1), Id.

[26] Article 2216, Id.

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