

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. REYNALDO PAULE Y DONATO, ACCUSED-APPELLANT.

G.R. Nos. 118168-70. September 11, 1996

Ponente: PUNO, J.

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PUNO, J.:

Appellant REYNALDO PAULE y DONATO was convicted of the crime of MURDER[1] by the Regional Trial Court of Olongapo City (Branch 74), for the death of one Carlos Tubongbanua.[2]

The Information[3] against appellant, a certain alias "Glenn", and Conrado Matawaran, Jr., alias "Jun Matawaran", reads:

"That on or about the eighteenth (18th) day of October, 1990, in the City of Olongapo, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating together and mutually helping one another, armed with a gun, with intent to kill and with the qualifying circumstance of treachery and the aggravating circumstance of evident premeditation and that the crime was committed in consideration of a price, reward, or promise, did then and there, wilfully, unlawfully, and feloniously assault, attack and shot therewith one Carlos Tubongbanua, and as a result thereof, said Carlos Tubongbanua suffered Cardio Respiratory Arrest, Cerebral Concussion and Hemorrhage due to Multiple Gunshot Wounds which caused the death of said Carlos Tubongbanua, shortly thereafter, to the damage and prejudice of the heirs of the latter.

"CONTRARY TO LAW."

Upon his arraignment on May 14, 1990, appellant pleaded 'not guilty'[4] and underwent trial. His co-accused have remained at large.

The prosecution evidence reveals that at about 10 a.m. of October 18, 1990, Amos Manalo was with a lady friend in the vicinity of the public market along Brill Street, Bajac-Bajac, Olongapo City. Carlos Tubongbanua passed by and Manalo made a sales pitch to him saying: "Mamimili ka na naman." Tubongbanua did not respond and walked by. Manalo noticed three (3) men following Tubongbanua, one of whom was accused Reynaldo Paule. The three (3) men exchanged signals with each other. They separately positioned themselves a few meters away from Tubongbanua after the latter stopped in front of a store. One of them nodded at Paule who was about three (3) or four (4) meters behind Tubongbanua. Paule then drew a .38 caliber revolver and fired at Tubongbanua. The bullet hit the back of Tubongbanua's head. As Tubongbanua turned holding his nape, Paule shot him a second time near the right temple of his head. Tubongbanua slumped on the ground. Paule approached him, held his wrist and took his gold necklace. The dastardly deed done, Paule ran towards the nearby tricycle parking lot while his companions fled towards the 23rd Street.[5]

The Olongapo City police, led by Lieutenant Leonardo Esteban, repaired to the locus criminis a few minutes after the shooting. They found the victim sprawled on the ground, blood oozing from his left eye.[6] They gathered that the assailant wore a black gray checkered polo shirt and headed towards the station of buses bound for Bataan.

The group of Lt. Miguel Corpuz immediately established a check point at the Los Viajeros Canteen, located along the national highway, to watch vehicles leaving the Olongapo city proper. Another team of policemen checked on the Bataan-bound buses at the Victory Liner and Saulog Transit terminals in Olongapo.

Between 11:00 a.m. and 11:30 a.m., of the same day, the police spotted a passenger jeepney at the check point near the Los Viajeros Canteen. Among the three (3) male passengers in the jeepney was Paule who was wearing a light cream yellow T-shirt. A witness^[7] identified Paule as the assailant of Tubongbanua.^[8] Lt. Corpuz frisked Paule and found a fragmentation hand grenade in his possession. Paule was arrested and brought to Olongapo City Police Station A for investigation.

Paule was again bodily searched at the police station. The police recovered a gold necklace with rectangular pendant hidden in the folded lower portion of Paule's maong pants.^[9] Paule broke down and admitted his complicity in the crime. He disclosed that he hid his black gray checkered polo shirt and the murder weapon in a house rented by his uncle at No. 63-A Elicano Street, East Bajac-Bajac. The police fetched Paule's uncle from the market and they proceeded to his residence. They found there a .38 caliber revolver, with serial number 1096046, two (2) empty shells of the .38 caliber revolver, nine (9) live ammunitions, and Paule's black gray checkered polo shirt.^[10] The items were hidden between the beddings and the mat of a wooden bed ("papag").

Paule was brought back to Police Station A. He was informed of his constitutional rights to remain silent and to be assisted by counsel. When he said he could not afford a lawyer, the investigator, Pfc. Leo Batinga, fetched Atty. Norberto Dela Cruz. Paule was assisted by Atty. Dela Cruz, when he executed an extrajudicial confession,^[11] dated October 18, 1990, admitting that he and a certain "Glenn" were hired by Conrado Matawaran, Jr. to kill Tubongbanua for a fee of P5,000.00 each. He pointed to "Glenn" as the triggerman. The confession was taken and signed in the presence of Lieutenant Leonardo Esteban, Chief of the Investigation Division of Olongapo City Police Station A and Atty. Norberto Dela Cruz.^[12] It was duly acknowledged by Assistant City Prosecutor Carmelita Gutierrez Fruelda.

Dr. Richard Patilano, Medico-Legal Officer of Olongapo City, conducted the postmortem examination of Tubongbanua. The result showed that the victim died due to "Cerebral Concussion and Hemorrhage due to multiple gunshot wounds."^[13] The point of entry of gunshot wound no. 1 was on the "right parietal area of the head." The point of entry of gunshot wound no. 2 was along the "right ear canal," and its point of exit was on the left eye.^[14] Dr. Patilano opined that the victim was shot at close range due to the presence of smudge around the points of entry of the gunshot wounds. Based on the locations of the gunshot wounds, he added that the assailant (assuming he is right handed) was standing behind or at the right side of the victim during the shooting incident.^[15]

Paule denied the charge. He revealed that he was a former commander of the New People's Army in Pampanga who quit in 1989 to start a new life.

He alleged that he visited his uncle, Marcos Paule, in Bajac-Bajac, Olongapo City, a week before the incident. His uncle sells cooked food at the public market in Bajac-Bajac. He stayed in his uncle's rented house along Elicano Street.

On October 18, 1990, at about 11:00 a.m., he was in a minibus on his way to his hometown in Dinalupihan, Bataan. Their vehicle was stopped and someone pointed to him. The police then arrested him and took him to the city hall where he was mauled. They asked for his residence in Olongapo and he led them to his uncle's house in Elicano Street. They ransacked the place but did not find anything. He was brought back to the police station.^[16]

Paule disowned his written extrajudicial confession. He averred that it was obtained under duress and without the

assistance of counsel. He denied ownership of the polo shirt, the .38 caliber gun and the hand grenade. He also submitted the paraffin test result showing that his left and right hands were negative for nitrates.[17]

Yolanda Ocampo, a sidewalk vendor in Bajac-Bajac public market, testified in favor of Paule. She declared that shortly after the incident, the authorities arrived at the scene of the crime and took the personal belongings of Tubongbanua, including the latter's gold necklace.

The trial court found Paule guilty beyond reasonable doubt of murder and sentenced him to suffer the penalty of reclusion perpetua and to pay the legal heirs of Carlos Tubongbanua the amount of P50,000.00 as indemnity for his death, twenty thousand pesos (P20,000.00) for moral damages, plus the costs of suit.[18]

Hence, the appeal.

Appellant contends that the trial court erred: (1) in admitting his extrajudicial confession which was taken without the assistance of counsel; (2) in giving credence to the testimony of eyewitness Amos Manalo; (3) in not considering the result of the paraffin test in his favor; and (4) in not taking into consideration the weakness of the prosecution evidence in view of the non-presentation of the alleged witness (Susi) who assisted the policemen in arresting him.

We affirm the judgment of conviction.

Section 12 (1), Article III of the Constitution provides:

"Any person under investigation for the commission of an offense shall have the right to be informed of his rights to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel."

The purpose of providing counsel to a person under custodial investigation is to curb the uncivilized practice of extracting confession by coercion.[19] Any form of coercion, whether physical, mental or emotional, in extracting confession, stamps the confession with the taint of inadmissibility.[20] We have stressed that in giving a person under custodial investigation the right to counsel, the Constitution did not mean any kind of counsel but effective and vigilant counsel.[21] In the case of *People vs. Bacamante*,[22] we elucidated:

"The term 'effective and vigilant counsel' necessarily and logically requires that the lawyer be present and able to advise and assist his client from the time the confessant answers the first question asked by the investigating officer until the signing of the extrajudicial confession. Moreover, the lawyer should ascertain that the confession is made voluntarily and that the person under investigation fully understands the nature and consequence of his extrajudicial confession in relation to his constitutional rights. A contrary rule would undoubtedly be antagonistic to the constitutional rights to remain silent, to counsel and to be presumed innocent."

In this case, we have no doubt that Atty. Dela Cruz was called to assist the appellant during his custodial investigation. Lieutenant Leonardo Esteban, Chief of the Investigation Division of Olongapo City Police Station, testified that appellant was assisted by Atty. Dela Cruz. He identified the signature on the left bottom portion of appellant's extrajudicial confession as that of Atty. Dela Cruz.

The more important question, however, is whether Atty. Dela Cruz extended effective and vigilant counsel to the appellant before the latter signed his extrajudicial confession. On this factual issue, the only evidence given by the prosecutor is the testimony of Lt. Esteban who declared under cross-examination:[23]

"(ATTY. MENDOZA):

"Q:

I would show you Exhibits "G" to "G-6", is this the written admission of Paule having committed the charge of murder x x x?

"A:

Yes, sir.

"Q:

Were you present when this alleged admission was taken by a certain Pfc. Leo Batinga?

"A:

I was there, sir.

"x x x x x x x x

"Q:

And in all the investigation conducted resulting to the execution of this document Exhibit G, you were present?

"A:

Sometimes I am going out of my office for personal necessity.

"x x x x x x x x

"(COURT):

"Q:

Before Atty. Dela Cruz assisted the accused in the preparation of his statement, did they talk to one another?

"(LT. ESTEBAN):

"A:

Yes, your Honor.

"Q:

Did you hear the conversation?

"A:

Partly, some parts only of the conversation.

"Q:

As far as you can recall, what was the conversation between the two?

"A:

Atty. Dela Cruz informed him of his constitutional rights like saying, 'mabigat ang kasong ito, nais kitang paalalahanan: may karapatan kang manahimik at kumuha ng abogado.'

"Q:

And it was your impression that the accused was agreeable to have Atty. Dela Cruz as his lawyer.

"A:

Yes, sir."

It cannot be gainsaid that Lt. Esteban was not in a position to give relevant and reliable information on whether Atty. Dela Cruz provided appellant effective and vigilant counsel in the course of appellant's custodial investigation. He only overheard snatches of conversation between Atty. Dela Cruz and appellant. He admitted he was ". . . going out of my office for personal necessity" in the course of appellant's custodial interrogation. Thus, the records do not show whether Atty. Dela Cruz effectively counselled appellant during the crucial aspects of his custodial interrogation. During these times, Atty. Dela Cruz could have been out of sight and out of hearing distance. Given the circumstances of the case, Atty. Dela Cruz was the best witness to establish the critical fact that he gave effective and vigilant counsel to the appellant. Unfortunately, the prosecution did not present him for reasons difficult to divine. By this lapse, the prosecution failed to discharge the state's burden of proving with clear and convincing evidence that appellant enjoyed effective and vigilant counsel before he extrajudicially admitted his guilt to the police authorities. Consequently, the extrajudicial confession of appellant cannot be given any probative value.

Be that as it may, appellant cannot be acquitted in view of his positive identification as the gunman. Eyewitness Amos Manalo testified as follows:[24]

"x x x x x x x x

"Q: Will you please tell this Honorable Court how or what you saw at that time that Mr. Carlos Tubongbanua was shot?

x x x x x x x x

"A: On that date, October 18, 1990, that was Thursday, at 10:00 o'clock in the morning I saw Mr. Carlos Tubongbanua walking at Brill Street and I called or told him, he is again going to the public market and I noticed certain persons following him and I was or I kept on observing their movements and I saw the person behind him was pulling something from his waist.

"Q: Now, Mr. witness, how many persons did you see at that time, I mean, did you see at that time following Mr. Carlos Tubongbanua?

"A: Three (3) persons, Ma'am.

"Q: And will you please describe these persons that you saw following Mr. Carlos Tubongbanua?

"A: I just saw the one who shot or who killed him, Ma'am. (Witness at the same time pointing to the accused).

"Q: Now, you saw two (2) other persons following Mr. Tubongbanua if you have the chance to see these persons would you able to identify them?

"A: If I could see them again I could recognize and identify them.

"x x x x x x x x

"ATTY. DAQUIS

"Q: Now, Mr. Witness, how many times at that time or what was your distance from the accused at that time you saw him shot Mr. Carlos Tubongbanua?

"A: Four to five (4 to 5) arms length, Ma'am.

"Q: And how many shots were fired by the accused in this case, if you can recall?

"A: Two (2) Ma'am.

"Q: Will you please describe what you saw when he fired the first shot? Will you please describe?

"A: At the first shot, Mr. Tubongbanua was shot on his or was hit on his back of the head (witness is pointing at the back of the head) and then he turned around and shot again Mr. Tubongbanua hitting him on his temple (witness pointing to the right side of the head).

"ATTY. DAQUIS

"Q: Now, what was the distance of the accused with reference to Mr. Tubongbanua at the time he fired the first shot?

"A: About that distance, Ma'am (witness pointing a distance).

"COURT:

Can the parties agree on that distance pointed by the witness.

"A: Between three and four (3 and 4) meters.

"ATTY. DAQUIS

"Q: Now, Mr. Witness, you said there were three (3) of them at that time accused fired the first shot what happened to the other two (2)?

"A: One of the two gave a signal to the accused.

"COURT:

"Q: Name that accused you are referring?

"A: The accused Paule.

"ATTY. DAQUIS.

"Q: And what happened next?

"A: Then the other companion of accused Paule gave signal and then he turned around and Reynaldo Paule approached the victim and took something and even got hold of the wrist of the victim.

"Q: And what did you see the accused took from the victim at that time, Mr. Witness?

"A: The necklace, Ma'am.

"COURT:

"Q: Whose necklace?

"A: Necklace of Mr. Tubongbanua, sir.

"ATTY. DAQUIS

"Q: Now, what else, if any, did the other two companion of the accused do at that time after the signal was given to Paule?

"A: They just left.

"Q: And in what direction did Paule follow after the killing, Mr. Witness?

"A: On the road where people passes and tricycle passes and then he went towards the parking area of the tricycle.

"Q: How about the two (2) other companions, in what direction did they go?

"A: I did not see them anymore."

On cross-examination,[25] Manalo further testified:

"x x x x x x x x

"ATTY. MENDOZA

"Q: You made mention that these three (3) persons were trailing Mr. Tubongbanua but in this sketch you made, one (1) person appear to be ahead (of) the other one who is just across the street and Mr. Tubongbanua is behind, do you mean what the term trailing mean they are in that kind (sic) of position?

"ATTY. DAQUIS

The question is not clear. He mentioned about these two other companions of Paule who are across the street.

"COURT

"Q: You mentioned in the direct testimony that these three (3) persons were trailing or following the deceased whereas in this sketch three (3) persons were not actually trailing but situated separately, how could you explain that?

"A: Because in this sketch Mr. Tubongbanua stopped and the three (3) persons who were then trailing or following him separated each other and behind him was left Mr. Paule and he drew his hand.

"Q: The first time that you saw these three (3) persons what were their positions in relation to Mr. Tubongbanua? The first time you noticed them?

"A: Actually the two (2) other companions of Reynaldo Paule were standing at the corner of Brill Street while Reynaldo Paule was actually at the Brill Street and when they noticed Mr. Tubongbanua the two (2) companions of Reynaldo Paule walked side by side and touching their shoulder.

"Q: You made mention a while ago that you shouted at Mr. Tubongbanua and you made mention `mamimili ka na naman' correct?

"A: Yes, sir.

"Q: And this incident took place at 10:15 in the morning, how long have you talked to Mr. Tubongbanua before the incident took place at 10:15 in the morning?

"A: We did not talk with each other, actually Mr. Tubongbanua just passed by the place where I was standing and I did not notice him immediately and he did not notice me. I just noticed him when he was already four (4) arms length away from me and that was the time I talked or rather that was the time I called him but I am not sure whether he heard me or not.

"Q: In short Mr. Tubongbanua did not make any response?

"A: Yes, sir.

x x x x x x x x

The probability that Manalo misidentified appellant is remote. The crime was committed in broad daylight and Manalo was barely four (4) arms length away from appellant during the shooting incident. Manalo was able to narrate the minute details on how appellant and his companions trailed the victim and properly positioned themselves before gunning him down. The records show that no ill-motive could be attributed to Manalo for imputing such a grave offense against appellant. His identification of appellant should be given full faith and credit.[26]

Appellant discredits Manalo on account of his inconsistent declarations on the number of times he saw the gun. It is pointed out that Manalo testified in court that he saw the weapon twice " the first time, during the shooting incident and the second time, when he was asked to identify it during his testimony. He also averred that the gun was not shown to him during the investigation. In contrast, he stated in his sworn statement that, during the investigation, the gun was shown to him by the investigator for identification purposes.

These inconsistencies cannot destroy the totality of Manalo's testimony. A truth-telling witness is not always expected to give an error-free testimony, considering the lapse of time and the treachery of human memory. Thus, we have followed the rule in accord with human nature and experience that honest inconsistencies on minor and trivial matters serve to strengthen, rather than destroy, the credibility of a witness, especially of witnesses to crimes shocking to conscience and numbing to senses.[27]

More. Manalo's version of the incident is supported by the physical evidence of the case. His testimony that the victim was shot twice from behind by appellant was corroborated by Dr. Patilano who testified as follows:[28]

"(Court):

"Q: Just a moment doctor, on the basis of the location and the nature of the gunshot wound, what was the position of the assailant in relation to the deceased?

"A: x x x if the assailant was right handed, he must be standing at the right side of the victim or at the back of the victim.

xxx xxx xxx

"Q: How many gunshot wounds did you find?

"A: There were two points of entry, your Honor.

"Q: All in the head?

"A: All in the head, your Honor.

"Q: Both wounds fatal?

"A: Yes, Your Honor."

Appellant cannot unduly capitalize on the paraffin test showing that he was negative for nitrates. In the case of *People vs. Teehankee, Jr.*,^[29] we held:

"x x x Scientific experts concur in the view that the paraffin test has 'x x x proved extremely unreliable in use. The only thing that it can deliberately establish is the presence or absence of nitrates or nitrites on the hand. It cannot be established from this test alone that the source of the nitrates or nitrites was the discharge of a firearm. The person may have handled one or more of a number of substances which give the same positive reaction for nitrates or nitrites, such as explosives, fireworks, fertilizers, pharmaceuticals, and leguminous plants such as peas, beans and alfalfa. A person who uses tobacco may also have nitrate or nitrite deposit on his hands since these substances are present in the products of combustion of tobacco.' In numerous rulings, we have also recognized several factors which may bring about the absence of gunpowder nitrates on the hands of a gunman, viz: when the assailant washes his hands after firing the gun, wears gloves at the time of the shooting, or if the direction of a strong wind is against the gunman at the time of firing."

In *People vs. Realon*,^[30] we further held that lack of nitrates on a suspect's hands does not preclude a judgment of conviction where the overwhelming evidence proves his guilt.

Appellant also bewails the non-presentation of the witness^[31] who pointed to the appellant on board a Bataan bound vehicle. The omission did not, however, materially dent the strength of the prosecution's evidence. His testimony would only be corroborative of the testimony of the arresting officers. No prejudicial inference can arise against a party who fails to call a witness where the only object of presenting him would be to produce corroborative or cumulative evidence.^[32] Also, no unfavorable inference can accrue against the prosecution where the records show that it used the coercive process of subpoena to secure the presence of a witness at the trial, but said witness could not be found.^[33] In this case, prosecution witness Rodolfo Susi was ordered to appear in court but the subpoena was returned unsatisfied because he was no longer residing at his given address.^[34]

We now come to the correct categorization of the crime at bar. The prosecution successfully proved that the crime was committed with treachery. There is treachery when, at the time of the attack, the unsuspecting victim was not in a position to defend himself and the offenders consciously adopted the particular means, method and form of attack employed by them.^[35] In this case, the unarmed victim was suddenly shot from behind and on his head, thus, rendering him totally defenseless against his aggressors. Treachery qualified the crime to murder. Considering the presence of treachery, appellant's prison sentence is reclusion perpetua. We need not pass upon the question of whether the other aggravating circumstances of evident premeditation and commission of the crime in consideration of a price or reward were properly appreciated by the trial court as the same will not alter the prison sentence of appellant.

IN VIEW WHEREOF, the decision of the court a quo, finding appellant REYNALDO PAULE y DONATO guilty beyond reasonable doubt of MURDER is AFFIRMED. Costs against appellant.

SO ORDERED.

Regalado, (Chairman), Romero, Mendoza, and Torres, Jr., JJ., concur.

[1] Docketed as Criminal Case No. 131-91.

[2] Appellant was also charged with Illegal Possession of Firearm and Ammunitions, docketed as Criminal Case No. 132-91, and Illegal Possession of Explosive, docketed as Criminal Case No. 133-91. He was acquitted in both cases for insufficiency of evidence.

[3] Rollo, p. 4.

[4] Original Records, p. 18.

[5] TSN, April 24, 1992, pp. 7-12.

[6] TSN, October 15, 1991, p. 8.

[7] Rodolfo Susi.

[8] Exhibit "A", Original Records, p. 229; TSN, December 16, 1991, pp. 19, 34, 40, 42; TSN, October 15, 1991, p. 11.

[9] TSN, October 15, 1991, pp. 11 and 13; TSN, December 16, 1991, p. 43.

[10] Ibid., at p. 14; Ibid., at p. 29.

[11] Exhibit "G", Original Records, p. 232.

[12] TSN, December 16 1991, pp. 49-50.

[13] Autopsy Report, dated October 18, 1990, Original Records, p. 236.

[14] TSN, December 8, 1992, pp. 6-7.

[15] Ibid., pp. 12, 14.

[16] TSN, July 27, 1993, pp. 7-8, 18-19, 26.

[17] Exhibit "1", Original Records, p. 344.

[18] Decision, dated August 10, 1994, Rollo, pp. 23-80; Penned by Judge Amado M. Costales.

[19] People vs. Lucero, G.R. No. 97936, May 25, 1995, 244 SCRA 425.

[20] People vs. Montiero, G.R. No. 110106, July 31, 1995, 246 SCRA 786.

[21] People vs. Lucero, supra.

[22] G.R. No. 103627, 248 SCRA 47, 56; Penned by Associate Justice Teodoro R. Padilla.

[23] TSN, March 2, 1992, pp. 30-36.

[24] TSN, April 24, 1992, pp. 7-12.

[25] TSN, April 24, 1992, pp. 40-43.

[26] People vs. Bolado, G.R. No. 105375, September 28, 1993, 226 SCRA 800.

[27] People vs. Loto, G.R. Nos. 114523-24, September 5, 1995, 248 SCRA 59.

[28] TSN, December 8, 1992, pp. 14-15.

[29] G.R. Nos. 111206-08, October 6, 1995, 249 SCRA 103.

[30] No. L-30832, August 29, 1980, 99 SCRA 422.

[31] Rodolfo Susi.

[32] People vs. Andiza, Nos. L-71986-87, August 19, 1988, 164 SCRA 642.

[33] U.S. vs. Baybay, No. 8957, November 10, 1913, 26 Phil. 125.

[34] Original Records, p. 47.

[35] People vs. Maturgo, Sr., G.R. No. 111872, September 27, 1995, 248 SCRA 519.

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