

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ELESEO CHENG, ALEJANDRO MALUBAY, AND SALVADOR SIOCO, ACCUSED. ELESEO CHENG, ACCUSED-APPELLANT.

G.R. Nos. 120158-59. September 15, 1997

Ponente: MELO, J.

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MELO, J.:

Convicted on two counts of murder are appellant Eleseo Cheng and co-accused Salvador Sioco (who later escaped from detention) in a judgment, the dispositive portion of which reads:

WHEREFORE, in the light of the foregoing considerations, the Court finds^¾

1. In Criminal Case No. 89-73804 ^¾ the accused, ELESEO CHENG and SALVADOR SIOCO, guilty beyond reasonable doubt of the crime of MURDER, as defined and penalized under Article 248, Paragraph 1, Revised Penal Code, and as charged in the aforequoted information and, accordingly, hereby sentences each of them to suffer the penalty of reclusion perpetua with the accessory penalties provided by law, both to pay, subsidiarily and jointly; to the heirs of Esperanza Viterbo represented by her mother, Esperanza Viterbo, Sr., the amount of FIFTY THOUSAND PESOS (P50,000.00) as civil indemnification and the additional amount of TEN THOUSAND PESOS (P10,000.00) as moral damages, without subsidiary imprisonment in case of insolvency; and each to pay one-third (1/3) of the costs.

2. In Criminal Case No. 89-73805 ^¾ the accused, ELESEO CHENG and SALVADOR SIOCO, guilty beyond reasonable doubt of the crime of MURDER, as defined and penalized under Article 248, Paragraph 1, Revised Penal Code, and as charged in the aforequoted information and, accordingly, hereby sentences each of them to suffer the penalty of reclusion perpetua with the accessory penalties provided by law and each to pay one-third (1/3) of the costs.

Because no heir/relative of the deceased, Yehia Aburawash Mohammed was presented to testify on the civil aspect of the case, the Court reserves to his heirs the right to file suit for civil indemnification and/or damages.

Finally, in the service of their sentences, the two accused aforementioned shall be credited with the full time during which they underwent preventive imprisonment provided they voluntarily agreed in writing to abide by the same disciplinary rules imposed upon convicted prisoners; otherwise, they shall be credited to only four-fifths (4/5) thereof (Article 29, Revised Penal Code, as amended by Republic Act No. 6127).

3. In both Criminal Cases Nos. 89-73804 & 89-73805 ^¾ the Court finds the accused, ALEJANDRO MALUBAY, NOT GUILTY of the crime of MURDER, as defined and penalized under Article 248, Paragraph 1, Revised Penal Code, and as charged in the aforequoted two informations and, accordingly, hereby ACQUITS him thereof for insufficiency of evidence, with one-third (1/3) costs de oficio in these two cases.

The Prison Officer, City Jail of Manila is ordered immediately upon receipt of a copy of this Decision, to release from his custody the person of accused Alejandro Malubay unless there is other legal ground or cause for his

further detention.

SO ORDERED.

(pp. 68-68a, Rollo.)

The herein criminal cases were commenced with the filing of two Informations for the crime of murder against herein accused-appellant Eleseo Cheng, Alejandro Malubay, and Salvador Sioco, pertinently reading as follows:

Criminal Case No. 89-73804

That on or about February 21, 1989, in the City of Manila, Philippines, the said accused conspiring and confederating together and helping one another did then and there willfully, unlawfully and feloniously with intent to kill and with treachery and evident premeditation, and with the use of superior strength on the victim who was alone and unarmed, attack, assault and use personal violence upon one Esperanza Viterbo, by then and there shooting her three (3) times with an unknown caliber thereby inflicting upon her mortal and fatal gunshots wounds, which were the direct and immediate cause of her death thereafter.

Contrary to law.

(p. 2, Rollo.)

Criminal Case No. 89-73805

That on or about February 21, 1989, in the City of Manila, Philippines, the said accused conspiring and confederating together and helping one another did then and there willfully, unlawfully and feloniously with intent to kill and with treachery and evident premeditation, and with the use of superior strength on the victim who was alone and unarmed, attack, assault and use personal violence upon one Yehia Abu Rawack Mohamad an Egyptian national, by then and there shooting the latter three (3) times, hitting him in the head with an unknown caliber thereby inflicting upon him mortal and fatal gunshots wounds, which were the direct and immediate cause of his death thereafter.

Contrary to law.

(p. 3, Rollo.)

At the arraignment on August 11, 1989, accused-appellant and his co-accused Salvador Sioco, then assisted by their counsel de parte, Atty. Arsenio de Leon, entered a plea of "not guilty" to the charges against them. Similarly, accused Alejandro Malubay, then assisted by counsel de parte, Atty. Augusto Jimenez, pleaded "not guilty".

Thereafter, trial on the merits ensued, following which, judgment was rendered convicting accused-appellant and Salvador Sioco, and acquitting co-accused Alejandro Malubay for insufficiency of evidence.

Accused-appellant and Salvador Sioco filed separate motions for reconsideration of said decision, with the former raising the following grounds: (1) that because he was a member of the Integrated National Police on his tour of duty on the date and time of the incident as charged, jurisdiction over the offense and authority to hear, try, and decide the case against him is conferred on a court martial, not a civil court, and (2) in the alternative, that assuming ex gratia that the court has jurisdiction, the prosecution evidence engendered reasonable doubt in many aspects, thus, his conviction is erroneous. The motion, as well as its supplement, were denied by the trial court in its order dated November 7, 1994.

On December 8, 1994, accused-appellant seasonably filed a notice of appeal. Much earlier, however, on January 1, 1993, convicted felon Salvador Sioco escaped from Camp General Ricardo G. Papa, Sr., Bicutan, Taguig, Metro Manila. For this reason, and also because his notice of appeal was filed four days late, the trial court denied

his appeal.

Now, to the background facts as supported by the record:

On February 20, 1989, jail guards Edwin Ramos and Redentor Lamiao were in the night shift at Gate 1 of the Manila City Jail, their tour of duty commencing at 7 P.M. and ending at 7 A.M. the following day. Early in the morning of February 21, 1989, Ramos allowed Yehia Aburawash, an Egyptian national who had been previously detained in the city jail, to enter the premises together with a female companion. Before 4 A.M., Aburawash and his companion went out of the jail and some time thereafter, or at about 4 A.M., accused-appellant who was then on duty on the night shift escorted out co-accused and then a detainee in the said city jail, Patrolman Alex Malubay, without any authorization from the desk officer or platoon commander on duty. Jail Guard Ramos asked accused-appellant to secure the approval of the desk officer but accused-appellant simply ignored Ramos and continued on his way out.

At about 4:30 o'clock that same morning, Emma Ruth Ilocso and her companions Catalina Balboa, and Marivic Policarpio, having just come from a disco joint, were at the corner of Claro M. Recto Avenue and Quezon Boulevard, right outside the vicinity of Manila City Jail. Ilocso decided to pass by the city jail to see her brother who was detained thereat. She, however, stopped at a nearby Burger Machine stand to have the P100.00 she intended to give her brother broken to smaller denominations.

It was while she was at the burger stand that Ilocso witnessed the commission of the crime. Ilocso saw the Egyptian national, Yehia Aburawash, at the center island of Quezon Boulevard. She recognized him because she had previously seen him while the latter was detained at the same city jail for swindling. She also saw Aburawash's female companion who was later identified to be Esperanza Viterbo. Ilocso observed that Aburawash and Viterbo were then engaged in an argument with accused-appellant, Sioco, and a third man. Thereupon, she heard the first gunfire from accused-appellant which caused Aburawash to fall to the ground. Two shots then quickly followed, one from Sioco, and another from accused-appellant. Afterwards, accused-appellant and Sioco went after Viterbo who ran towards the burger stand. Accused-appellant and Sioco told Viterbo that she would be brought to a waiting cab. However, when the two were already beside her, they both shot her, after which the two ran towards the direction of the Central Market.

At about 5:20 that morning, Patrolman Nelson Sarsonas, an investigator of the Homicide Section of the Western Police District, received a report from PC/Sgt. Alejandro Lopez of the Criminal Investigation Service that there were two dead bodies found near Quezon Boulevard and Claro M. Recto Avenue. After notifying several other concerned agencies, Pat. Sarsonas proceeded to the scene of the crime to investigate.

The two dead bodies were brought to the National Bureau of Investigation for autopsy. Dr. Maximo Reyes, who performed the examination, testified during the trial that the three gunshot wounds on Aburawash were all fatal as they involved the brain. He likewise testified that the gunshot wounds of Viterbo at the neck, face, and head were all fatal because they involved vital organs. He also observed that the sizes of the wounds concerned were different, prompting him to opine that at least two firearms were used, and that it was possible that more than one assailant was involved.

In the appeal now before us, accused-appellant raises as his first issue the question of jurisdiction. He contends that by virtue of Section 1 of Presidential Decree No. 1850, the trial court had no jurisdiction to hear, try, and decide the cases against him. He argues that on the date of the commission of the crimes on February 21, 1989, he was still an active member of the Integrated National Police and assigned as jail guard at the Manila City Jail. He assails the trial court's finding that he was already dismissed from service when the two Informations against him were filed in court on June 6, 1989, claiming that he received the copy of the special order on his dismissal only

on June 7, 1989. Besides, he claims that this order of dismissal is still pending appeal before the Office of the Judge Advocate. For want of jurisdiction, he implores that this Court dismiss the cases and declare the judgment of the court a quo to be null and void.

We find the argument devoid of merit.

While it is true that jurisdiction over the subject matter of a case cannot be waived and may be assailed at any stage in the proceedings, even for the first time on appeal, this ruling presupposes that the factual basis for determining such want of jurisdiction is extant in the record of the case and is borne by the evidence.

Should there be nothing on record which may indicate lack of jurisdiction, this Court will sustain the existence thereof.

Accused-appellant invokes Section 1, of Presidential Decree No. 1850, as amended, which provides:

Section 1. Court-Martial Jurisdiction over Integrated National Police and Members of the Armed Forces. ^{3/4} Any provision of law to the contrary notwithstanding - (a) uniformed members of Integrated National Police who commit any crime or offense cognizable by the civil courts shall henceforth be exclusively tried by courts-martial pursuant to and in accordance with Commonwealth Act No. 408, as amended, otherwise known as the Articles of War; (b) all persons subject to military law under Article 2 of the aforesaid Articles of War who commit any crime or offense shall be exclusively tried by courts-martial or their case disposed under the said Articles of War. Provided, that, in either of the aforementioned situations, the case shall be disposed of or tried by the proper civil or judicial authorities when court martial jurisdiction over the offense has prescribed under Article 38 of Commonwealth Act Numbered 48, as amended, or court-martial jurisdiction over the person of the accused military or Integrated National Police personnel can no longer be exercised by virtue of their separation from the active service without jurisdiction having duly attached beforehand unless otherwise provided by law. Provided, further, that the president may in the interest of justice, order or direct, at any time before arraignment, that a particular case be tried by the appropriate civil court.

The record reveals that on February 21, 1989, when the crimes charged were committed, accused-appellant was undoubtedly in active service. Under Paragraph (a) of the above-quoted provision, exclusive jurisdiction over accused-appellant and the offense should have pertained to the courts martial save only in the following exceptions, namely: (1) when court martial jurisdiction over the offense has prescribed under Article 38 of Commonwealth Act No. 48, as amended, or (2) court-martial jurisdiction over the person of the accused military or Integrated National Police personnel can no longer be exercised by virtue of his separation from active service without jurisdiction having duly attached beforehand unless otherwise provided by law; or (3) the president, in the interest of justice, orders or directs at any time before arraignment, that the particular case be tried by the appropriate civil court.

The evidence on record shows that the cases at bench fall under the second exception. During the hearing conducted on February 15, 1990 when accused-appellant was presented as defense witness, he stated his personal circumstances as follows:

Pat. Eleseo Cheng y Bello, 36 years old, married, as of now jobless but before I was with the Western Police District, residing at 870-C Norte Street, Sta. Cruz, Manila.

(p. 8, tsn, Feb. 15, 1990)

And when the direct examination by his counsel de parte, Atty. Arsenio de Leon, proceeded, the following questions and answers were taken:

Q: Mr. Eleseo Cruz. I heard you said that you are now in jobless?

A: Yes, sir.

Q: Since when?

A: May 20, 1989, sir.

(Ibid.)

There is here an express judicial admission by accused-appellant that as of May 20, 1989, he was already separated from active service in the INP. When accused-appellant raised the issue of jurisdiction for the first time in his motion for reconsideration of the judgment of conviction, he presented no further evidence. In fact, it was the prosecution, during the hearing conducted on June 7, 1991 of said motion for reconsideration, which presented a copy of Special Order No. 65-P to prove that accused-appellant was dismissed from the police service with prejudice to future re-entry into the INP effective as of May 18, 1989 (See: Exh. "A-Opposition", p. 417, Record). It was only then that accused-appellant began claiming that he received a copy of the special order only on June 7, 1989, or a day after the filing of the Informations in the instant cases. Verily, we find such posture by accused-appellant, who at that stage had already replaced Atty. de Leon with Atty. Renato T. Paguio, as a mere after-thought, to which the trial court correctly accorded no weight.

It must be stressed that the burden of proving lack of jurisdiction is upon him who claims such. The Court significantly notes that accused-appellant presented no competent and admissible evidence to show that as of June 6, 1989, the date of the filing of the Informations, he was still in active service with the INP. Accused-appellant's claim that he received his copy of Special Order No. 65-P relative to his summary dismissal only on June 7, 1989 simply remained an allegation. We have consistently ruled that mere allegation is not evidence (*Lagasca vs. De Vera*, 79 Phil. 376 [1947]), and such unproved allegation may not be given any favorable consideration whatsoever. On the contrary, we have reason to believe that accused-appellant received the copy of said Special Order No. 65-P on May 20, 1989 as he admitted in his direct testimony.

In a similar manner, accused-appellant's claim that he appealed the order of dismissal to the Judge Advocate General has remained unsupported by any proof. He claimed in his supplemental motion for reconsideration that he wrote the Judge Advocate General asking for certification as to the status of his appeal. No proof was ever presented to show that said letter, if any, was in fact sent to and received by the Judge Advocate General. More significantly, he claimed that the Judge Advocate General sent a reply-letter dated June 5, 1991 to his counsel, Atty. Paguio (See: p. 5 Supplemental Motion for Reconsideration; p. 430, Record) but the entire record is bereft of any copy of the said alleged reply-letter. This being so, accused-appellant's claim that his dismissal effective May 18, 1989 had not yet attained finality when the Informations were filed on June 6, 1989 deserves scant consideration. It appears to be another after-thought on the part of accused-appellant.

Thus, just like in the case of *People vs. Dulos* (237 SCRA 141 [1994]) this issue of jurisdiction may be disposed of by stating that while it is true that Section 1, Presidential Decree No. 1850, as amended, vests exclusive jurisdiction upon courts martial to try criminal offenses committed by members of the INP, whether or not done in the actual performance of their official duties, accused-appellant's case falls under the second exception contained in the proviso of the section which confers upon civil courts jurisdiction over the person of the accused where he was discharged from active service without military jurisdiction having duly attached over him before his separation. The court, a quo, therefore had jurisdiction over accused-appellant for the offenses charged.

Accused-appellant also assails the credibility of Emma Ruth Ilocso who rendered an eyewitness account of the killing of Esperanza Viterbo and Yehia Aburawash Mohammed. Accused-appellant claims that there appear in the record some facts or circumstances of weight and influence which were misappreciated by the trial court. One is the alleged loose morals of Emma Ruth Ilocso. Another such factor would refer to the supposed inconsistencies in

some of the details between her declarations during the administrative proceedings and the trial of the criminal case.

Accused-appellant's efforts to discredit Emma Ruth Ilocso are futile.

We stress that in this jurisdiction, loose morals per se is not a ground to discredit a witness. There must be clear indications militating against her credibility other than her being a person of ill repute. Otherwise stated, even a prostitute may be a competent witness to the extent that even with her sole testimony an accused may be duly convicted, provided that such witness is not coached and her testimony is not rehearsed and on all other counts worthy of credence beyond reasonable doubt.

The all too sweeping contention in accused-appellant's motion for reconsideration that it is improbable that Ilocso will tell the exact truth where there is the slightest motive for testifying falsely as she would probably be willing to bring her evidence to market as she was ready to offer her person for sale, presents a cynical and too dark an outlook of a human person for acceptance. In the first place, Ilocso has not been shown to be a person of ill repute. Then too, the reputation of this witness is not germane to the case.

To further discredit Emma Ruth Ilocso, accused-appellant capitalizes on the supposed discrepancies in her answers as to exactly where she and her companions came from before they came to the city jail, or who her companions were. He also points out her supposed lie concerning her personal circumstances such as her educational background. Ilocso was forthright enough to say that some of her statements in the administrative case are not correct and true. But she ascribes, which reason we believe, the same to her constant fear as she was threatened by accused-appellant, a policeman whom she knows could kill as he did kill the herein victims. In any event, the supposed untrue statements do not deal with Ilocso's positive identification of accused-appellant and his companion, Sioco, both of whom Ilocso had known 2 years previous to the incident.

Under the foregoing consideration, there is no cogent reason for the Court to depart from the well established doctrine that on questions of credibility of witnesses, this Court will hold with high respect the factual findings of the trial judge who actually observed the demeanor of the witnesses at the witness stand.

Accused-appellant's argument that conspiracy has not been established in the instant case with the same quantum of evidence required for conviction does not persuade us. The unity of purpose of accused-appellant and co-accused Sioco was clearly established by the plain and clear testimony of witness Ilocso. She saw the two co-accused engaged in an argument with Aburawash before both accused shot the latter. Immediately thereafter, both accused went after a defenseless woman, Viterbo, who ran towards the burger stand and there they shot her too. There is no indication whatsoever that either of them desisted from executing all the overt acts necessary to perpetrate the two crimes of murder. Clearly, there was conspiracy.

Finally, on the last issue involving the existence of the qualifying circumstances, we agree with the Solicitor General that treachery attended the commission of the crime, qualifying the crimes to murder.

As correctly pointed out by the Solicitor General:

. . . There is treachery when the offender commits any of the crimes against the person employing means, methods and forms in the execution thereof which tend directly and specially to insure its execution without the risk to himself arising from the defense which the offended party might make (Article 14, paragraph 16, Revised Penal Code). For the said circumstance to be present, two conditions must concur, to wit: (a) the employment of a manner of execution which would insure the offender's safety from any defensive or retaliatory act by the offended party such that no opportunity is given the latter to defend himself or retaliate and (b) such means of execution was deliberately or consciously adopted (People vs. Crisostomo, 222 SCRA 93).

Where the victim was without any opportunity to repel the aggression or to escape, treachery can be appreciated to qualify the killing to murder (People vs. Maestro, 222 SCRA 538). In treachery, what is decisive is that the attack was executed in such a manner as to make it impossible for the victim to retaliate (People vs. Buela, 227 SCRA 534).

(pp. 37-38, Appellee's Brief.)

However, the trial court was in error when it took into consideration evident premeditation and abuse of superior strength.

Evident premeditation was not proved by the evidence. The trial court erroneously surmised that when accused-appellant followed Aburawash and Viterbo coming from inside the premises of the city jail, co-accused Sioco was already outside waiting for them. From this the court a quo concluded that the act of shooting Aburawash in the head three times and forcibly bringing out Viterbo from the burger stand where she sought refuge, telling her that she will be brought to a waiting taxicab, but instead coldbloodedly shooting her to death, confirmed that their assassinations were well planned. Hence, the conclusion that there was evident premeditation (p. 34 Decision; p. 344, Record).

We do not agree. There was no evidence directly showing any preconceived plan to liquidate or kill the victims. What appears on record was that the accused-appellant and Aburawash engaged in a heated argument before the crime was committed. There is the possibility that the decision to shoot the victims was made only there and then. This consideration should at least cast reasonable doubt as to the existence of a plan to kill the victims. For evident premeditation to be appreciated against an accused, the prosecution must prove the following: (1) the time when the offender determined to commit the crime; (2) an act manifestly indicating that the culprit has clung to his determination, and (3) sufficient lapse of time between the determination and execution to allow him to reflect upon the consequences of his act (Par. 13, Art. 14, Revised Penal Code; People vs. Cordero, 217 SCRA 1[1993]). These elements have not been shown in the instant case.

The trial court likewise erred in separately appreciating abuse of superior strength which is already absorbed in the qualifying circumstance of alevosia or treachery (People vs. Villanueva, 225 SCRA 353 [1993]; People vs. Borja, 91 SCRA 340 [1979]; People vs. Pasilan, 14 SCRA 694 [1965]; People vs. Escalona, 1 SCRA 891 [1961]).

In sum, the killings in the instant case were qualified to murder by treachery. The penalty imposed under Article 248 of the Revised Penal Code is reclusion temporal in its maximum period to death. There being no aggravating circumstances present, the imposable penalty is the medium thereof which is reclusion perpetua.

The trial court awarded civil indemnity payable jointly and severally by accused-appellant and convicted felon Salvador Sioco to the heirs of Esperanza Viterbo in the amount of P50,000.00 for her death, and the additional amount of P10,000.00 as moral damages. The Court sustains the award of P50,000.00. However, finding no justification for the additional amount of P10,000.00 from the judgment under review, the Court is inclined to delete the same.

WHEREFORE, premises considered, the conviction of accused-appellant by the trial court and the corresponding penalties imposed are hereby **AFFIRMED** with the **MODIFICATION** that the award of moral damages is deleted, with no special pronouncement as to costs.

SO ORDERED.

Narvasa, C.J., (Chairman), Romero, Francisco and Panganiban, JJ., concur.

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