

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. VIRGILIO URIBE, DEFENDANT-APPELLANT.

G.R. Nos. 76493-94. February 26, 1990

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

These cases were originally before us on automatic review arising from the imposition of the death penalty by the trial court. However, subsequent to the commutation of death as a penalty to reclusion perpetua pursuant to the 1987 Constitution, the accused manifested his desire to continue the cases as appealed cases.

Accused-appellant Virgilio Uribe was charged with the crimes of murder and illegal possession of firearm in two separate informations filed with the then Court of First Instance of Leyte. For the crime of murder, the information reads:

"That on or about the 31st day of March, 1982, in the Municipality of Palo, Province of Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused armed with a .45 Caliber Colt pistol which he had provided himself for the purpose, with deliberate intent to kill and with evident premeditation, treachery and superior strength did, then and there wilfully, unlawfully and feloniously shoot one T2C GASPAR TIBAY, a PC Trainee thereby inflicting upon the latter the following injuries:

"Gunshot wound, point of entry, antere lateral portion of the upper third of the left arm, measuring 1 x 1 x 16 cms AML directed medialwards and inferiorly fracturing, the humeros, left, coursing further down wards penetrating the 5th ICS, left, lacerating the upper lobe of the left lung, apex portion of the heart, further lacerating the left dome of the diaphragm, right lobe of the liver, puncturing the stomach with spillage of food contents, trajecting downwards lacerating the small intestines with spillage of the fecal contents, lodging itself at the level of the right lumbar region.

"Slug recovered on the above area.

"Gunshot wound, point of entry right iliac region measuring 1 x 1 x 10 cms CML with the slug lodged at the bone substance of the right pelvic bone.

"Slug recovered on the above area.

"There were approximately 2,000 c.c. of blood and blood clots found at the thoracic cavity.

"There were approximately 500 c.c. of blood admixed with food and fecal contents in the abdominal cavity.

"Cause of death is cardiac respiratory arrest due to shock and hemorrhage due to gunshot wounds of the left arm, trajecting medialwards with lacerating of the lung, heart, diaphragm, liver, small intestines and gunshot wound of the right pelvic."

which vital wounds caused the death of said T2C Gaspar Tibay immediately thereafter." (Rollo, pp. 9-10)

while the information for the crime of illegal possession of firearm reads:

"That on or about the 31st day of March, 1982, in the Municipality of Palo, Province of Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above named accused, did then and there wilfully, unlawfully and feloniously possess and have in his custody and control and which was used in the killing of T2C GASPAR TIBAY, one .45 Caliber Colt pistol bearing Serial No. 2N — 180716, without first obtaining the corresponding and necessary license or permit from the government." (Rollo, pp. 26-27)

Upon arraignment, the appellant pleaded "NOT GUILTY."

The parties presented conflicting facts regarding the incident which resulted in the death of Trainee Second Class Gaspar Tibay inside the Philippine Constabulary Headquarters, Camp September 21st Movement located at Palo, Leyte.

The prosecution's version of the incident is summarized in the People's brief as follows:

"On March 31, 1982, at about 4:00 o'clock in the afternoon, appellant Virgilio Uribe, Sgt. Vicente Cabanacan, Sgt. Tobias Lubitos and an unidentified person entered the July 22nd Canteen at Camp Petik, RECOM 8, Palo, Leyte, (p. 4, tsn, April 11, 1984) where they drank a pocket size bottle of Fundador (p. 5, tsn, Feb. 19, 1985).

"Shortly, Sgt. Lubitos and the unidentified person left the July 22nd Canteen (p. 7, tsn, April 11, 1984). After the two (2) had left, the victim, Gaspar Tibay entered the canteen to borrow a ballpen from the cashier of the canteen. Sgt. Cabanacan called Tibay and told the latter to have a seat and offered Tibay a drink (p. 8, tsn, *ibid*).

"After Tibay had consumed what had been offered to him, Uribe asked Tibay whether he (Tibay) knows Sgt. Cabanacan. Tibay answered in the affirmative saying that he had known the sergeant for quite sometime (p. 8, tsn, April 11, 1985).

"Somehow, the conversation took a sudden turn and there was an argument between Uribe and Tibay concerning guard duties. Uribe boxed Tibay, Tibay went out of the canteen but Uribe followed him outside and boxed Tibay once more. Tibay ran towards the guardhouse. Uribe went back to the canteen and put his shirt on and followed Tibay to the guardhouse (pp. 8-9, & 14, tsn, April 11, 1984).

"Sgt. Cabanacan followed suit but before he could reach the guardhouse he saw Uribe with a drawn .45 cal. pistol. He shouted at Uribe to stop but it was too late. Uribe fired two (2) shots at Tibay who fell dead. Uribe surrendered his .45 cal. pistol to Sgt. Cabanacan (pp. 8-10, tsn, Feb. 19, 1985)." (Rollo, pp. 160-162)

The appellant admitted the killing of Tibay. He, however, claimed self-defense. His version of the incident is summarized in the Appellant's Brief as follows:

"At around 4:00 o'clock in the afternoon on March 31, 1982, Constable First Class Virgilio Uribe, the appellant herein, went to the Philippine Constabulary Headquarters, located at Camp September 21st Movement, Palo, Leyte, to verify the details of his tour of duty that day to commence at 5:00 o'clock on the same afternoon (tsn pp. 3 to 4. Hearing of October 7, 1985). Thereafter, he went to the July 22nd Canteen situated inside the Camp to have a snack. After having a snack, he paid for it and while waiting for the change, Staff Sergeant Vicente Cabanacan, Jr., arrived. Staff Sergeant Cabanacan inquired from him as to whether appellant was the Incoming Sergeant of the Guard for which he answered in the affirmative (tsn p. 4, *Ibid*).

"Appellant, Staff Sergeant Cabanacan, Sgt. Lubitos and another comrade of theirs who later arrived, then had a drink of a pocket size Fundador. While they were drinking, Trainee Second Class, Gaspar Tibay, the victim herein, arrived. He was invited by Sgt. Cabanacan to join them; then requested to sit down; and offered a drink but he declined (tsn pp. 5 to 6, Hearing of Oct. 7, 1985; tsn p. 667, Hearing of April 11, 1984; and tsn p. 6, Hearing of Feb. 10, 1985). Sgt. Lubitos and his companion then left.

"Gaspar Tibay and the appellant had an argument about guard duties. For the appellant who was the Incoming

Sergeant of the Guard noted that Gaspar Tibay who was on duty was not in uniform and appellant admonished him to be in uniform whenever he is on duty (tsn p. 13, Hearing of April 11, 1984; pp. 6 to 7, Hearing of Oct. 7, 1985).

"Gaspar Tibay resented the above admonition made by appellant, saying 'You have nothing to do with me. You are not my Commanding Officer, you son of a bitch.' Appellant replied to that by saying 'Your reply is not good. I am only advising you to be in uniform. Instead of answering appellant, Gaspar Tibay raised his T-shirt from his hip' to make it known that he had a firearm and 'moved to draw said firearm from his hip' (tsn p. 7, Hearing of Oct. 7, 1985). Because of that, appellant approached him and they boxed each other. The deceased fell down to the chair and grappled with appellant until they reached in front of the July 22nd Canteen where Tibay was pushed by appellant and was outbalanced (tsn p. 7, Ibid; tsn p. 8, Hearing of April 11, 1984; and tsn pp. 5 to 6, Hearing of Dec. 5, 1983). Sgt. Cabanacan told them to stop it and they did. Gaspar Tibay went hurriedly 'to the Duty Guard House' trying to get something from his waist; while appellant Uribe returned to his seat inside the July 22nd Canteen (tsn p. 6 Hearing of Dec. 15, 1983 and tsn p. 7, Hearing of Feb. 10, 1985).

"Appellant, momentarily, got up from his seat and went out for the purpose of informing their Commanding Officer concerning the actuations of the deceased Gaspar Tibay, and his having a firearm (Paltic Cal. 22) although he was not authorized to carry such firearm (tsn p. 8, Hearing of Oct. 7, 1985). While he was already out of the canteen, he saw Gaspar Tibay still going toward the Guard House (tsn p. 8, Hearing of Dec. 15, 1983). On reaching the Guard House, Gaspar Tibay grabbed the armalite rifle from the Guard T2C Carcedo (tsn pp. 3 and 4, Hearing of Oct. 4, 1985), cocked it, positioned himself in the Guard House and aimed the rifle to appellant Virgilio Uribe who was then passing by the Guard House enroute to the Office of the Commanding Officer and when appellant saw the deceased already in position and about to shoot appellant at a distance of around eight meters he drew his .45 caliber service pistol from his waist, which was issued to him by their Supply Officer, Staff Sergeant Vicente Cabanacan, Jr., approved by their Commanding Officer (tsn p. 12 Hearing of Oct. 7, 1985; and tsn pp. 14 to 17, Hearing of Feb. 19, 1985), chamberload it and fired at the deceased twice, hitting him xxx". (Rollo, pp. 78-81)

With respect to the charge of illegal possession of firearm the prosecution presented a certification dated April 6, 1984 signed by Captain Prudencio Erfe, PC, Chief Records Branch Firearm and Explosives Unit, Camp Crame, Quezon City, to the effect that Pistol Colt Caliber .45 serial number 1807163 used by the appellant in shooting at Tibay was an "unlicensed and unregistered firearm per verification from available records to this Unit as of this date." The certification was obtained by Mrs. Purificacion E. Tibay, the mother of the deceased Tibay who testified on the matter.

On the other hand, the appellant who was connected with the PC for eight (8) years before the incident testified that the subject .45 caliber pistol was officially issued to him by his "x x x commanding officer and our staff sergeant Cabanacan who was the supply officer." (TSN, p. 194, October 7, 1985)

The trial court found the appellant guilty beyond reasonable doubt of both crimes. As regards the murder charge, the appellant was sentenced to "suffer the penalty of imprisonment from ten (10) years of prision mayor, as minimum to TWENTY (20) YEARS of reclusion temporal, as maximum; to indemnify the heirs of the deceased the sum of P20,000.00 but without subsidiary imprisonment in case of insolvency; and to pay the costs of this case." (Rollo, p. 37) As regards the illegal possession of firearm charge, the trial court after applying section 1 of Presidential Decree 1866 imposed "the supreme penalty of death subject to an automatic and final review of the same by our Supreme Court." (Rollo, p. 38)

The appellant now insists on his claim of self- defense.

Time and again we have stated the principles underlying self-defense as follows:

"Having admitted the killing, Ongonion must clearly establish that he acted in self-defense. The burden of proof is now shifted to him. He must, therefore, rely on the strength of his own evidence and not on the weakness of the prosecution (People v. Sadie, 149 SCRA 240; and People v. Regulacion, 121 SCRA 40) for even if the latter's evidence is weak, it could not be disbelieved after the appellant admitted the killing (People v. Llamera, 51 SCRA 48; People v. Bauden, 77 Phil. 105; and People v. Ansoyon, 75 Phil. 772).

xxx xxx xxx

"xxx For self-defense to prosper, the following elements should have been proved by appellant: (a) unlawful aggression; (b) reasonable necessity of the means employed to prevent or repel it; and (c) lack of sufficient provocation on the part of the person defending himself. (People v. Balmaceda, 148 SCRA 194 [1987]). (People v. Abacon, 161 SCRA 255 [1988])

In this case, the appellant insists on his version of the incident as sustaining his claim of self-defense. He maintains: (1) that in the course of their argument regarding guard duties, Tibay raised his T-shirt from his hip to make it known that he had a gun and moved to draw the same; (2) that as Tibay was going out from the canteen he said "Follow me outside and we will shoot it out outside." (p. 190, Tsn, October 7, 1985) which amounts to an unlawful aggression on the part of Tibay; 3) that Tibay grabbed an armalite from a certain guard Corredo, chamberloaded it positioned himself in the Guard House and aimed the same at appellant prompting the appellant to defend himself by shooting at him first which shows that the appellant was forced to use his .45 caliber service pistol in repelling the aggression and that in defending his life there was a necessity and he employed reasonable means; and that 4) there was lack of sufficient provocation on the part of the appellant because as the incoming sergeant of the Guard that afternoon of the incident, he had the right to confront the deceased why he was not in uniform as required by military regulation.

To bolster further his claim of self-defense, the appellant points out the testimony of medico legal officer Capt. Angel Cordero while on cross-examination to the effect that "both wounds nos. 1 and 2 sustained by the deceased could have been sustained while in the act of aiming long firearm (tsn pp. 19 to 20, Hearing of July 21, 1983). (Rollo, p. 91)

The main issue boils down to the issue of credibility of witnesses. Do the records sustain the trial court's finding that the evidence for the prosecution was more credible?

Vicente Cabanacan, then staff sergeant of the PC and stationed at Regional Command No. 8 and who was with both Uribe and Tibay at the July 22nd canteen during the incident categorically stated that the appellant hit the victim first (Tsn p. 41, February 10, 1985). This testimony was corroborated by Genoveva Barredo, cashier of the July 22nd Canteen who was also present during the incident. (Tsn, p. 77, April 11, 1984). This evidence negates the appellant's contention that there was unlawful aggression on the part of Tibay. The appellant was the aggressor. The victim was running away from him, apparently looking for a safe sanctuary.

The appellant's contention that he was forced to shoot Tibay to defend himself because he saw the latter armed with an armalite aimed at him is not worthy of belief. On cross-examination, the appellant testified:

xxx xxx xxx

"Q. Tibay was not able to fire his firearm?

A. No, Sir.

Q. In fact, when you saw Tibay at a distance of 8 meters, when you shot him he was walking towards the guardhouse?

A. No, sir. When I saw him he was already in position.

Q. What do you mean 'in position'?

A. He was already ready to fire.

Q. While at that time he was already ready to fire where was your firearm

A. It was tucked to my waist.

Q. You had not even cocked the chamber of your firearm when it was placed at your waist?

A. No, sir, but it is very easy to cock a .45 caliber pistol in time of danger." (Tsn. October 7, 1985, pp. 196-197)

Indeed, the flow of events as testified by the appellant himself is incredulous. As the trial court aptly observed:

"[T]he accused would like this Court to believe that in spite of the victim having already aimed the armalite rifle at him, (accused) at a distance of only eight (8) meters, yet, he was able to fire first at the victim, in spite of the fact that his (accused's) own pistol was still uncocked and tucked inside his waist. This can probably happen only in the movies or in the comics." (Rollo, p. 35)

The medico-legal officer's testimony as regards the position of Tibay when he was shot based on the injuries he sustained does not in any way confirm that Tibay was shot while aiming an armalite rifle. The appellant is trying to read into the doctor's testimony a meaning which is not there. Captain Angel Cordero, the medico-legal officer testified on cross-examination as follows:

xxx xxx xxx

"Q.

As indicated by you, this wound No. 1, could this be possible that this wound was inflicted while the victim was in a squatting position facing his left side to the assailant?

A.

That is possible, sir, if he is squatting.

Q.

Like, for example, if he is aiming a long firearm?

FISCAL SANTO:

Already answered — possible.

ATTY. TEVES:

Q.

And this wound No. 2, doctor, could it be possible also that this was inflicted while the victim was also in kneeling or squatting position?

WITNESS:

Well, it is possible that wound No. 2 could be inflicted while the victim is in kneeling position, but not in squatting position." (Tsn, July 21, 1983, pp. 20-21)

As can be gleaned from his testimony, Captain Angel Cordero testified only as to the possibility that Tibay was shot while in a squatting position. He did not rule out any other position of Tibay when he was first shot by the appellant.

It is to be noted that the two other witnesses presented by the appellant did not at all confirm his version of the incident. The trial court said:

"xxx The testimony of Sgt. Galicia gave the impression that he was the first one to take hold of the body of the victim and, when he did so, he found a 22 revolver tucked to the latter's waist. He did not, however, mention anything about an armalite rifle being in the hands of said victim. It should likewise be noticed at this point that no 22 revolver was ever presented by the defense to prove this particular point in the theory of the defense. It would seem therefore that the testimony of his witness did not add anything substantial to favor the cause of the defense.

"The testimony of M/Sgt. Malogapo is to the effect that immediately before the shooting he allegedly saw the victim successfully wrest the possession of an armalite rifle from the guard at the Camp gate but after he had cocked the same, a shot rang out and the (victim) fell to the ground. This witness was then among those who allegedly approached the victim, but he (this witness) never mentioned seeing T/Sgt. Galicia take a 22 revolver from the waist of the victim and give the same to a certain M/Sgt. Luquiatan.

"The oral testimony of Sgt. Malogapo is further found inconsistent with the oral testimony of the accused who categorically stated in open court that the victim was already aiming the armalite rifle at him when he was

passing the guardhouse at a distance of only eight (8) meters." (Rollo, p. 35)

It appears clear from the records that the appellant failed to prove his claim of self-defense. We see no reason to deviate from the well-entrenched principle that findings of fact of trial courts are entitled to the highest respect inasmuch as these courts have the privilege of examining the deportment and demeanor of witnesses and therefore can ascertain if such witnesses are telling the truth or not. (*People v. Abagon*, *supra*).

We, however, do not agree that there was treachery which qualifies the killing to murder. Section 16, Article 14 of the Revised Penal Code states that "There is treachery when the offender commits any of the crimes against the person employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make. Moreover, evidence must be shown that the mode of attack was consciously adopted by the appellant to make it impossible or hard for the person attacked to defend himself or retaliate. (*People v. Crisostomo*, 160 SCRA 47 [1988])

The evidence on record shows that the deceased Tibay was also armed with a .22 caliber gun when he was chased by the appellant. In fact, after the fist fight between the two protagonists, Tibay went out from the canteen ahead of the appellant. The appellant then followed him after which, at about four (4) meters distance between the two, while Tibay was trying to hide near a guard the appellant shot him in the arm. Under this scenario, there was the possibility that the appellant himself could have been hit by Tibay had the latter drawn his gun and used it before the appellant shot him. It is evident that in committing the crime, the appellant did not take any precautionary measures to insure no risk upon himself. Neither can it be said that the appellant consciously adopted a mode of attack to insure the impossibility of Tibay's retaliating. Both protagonists had firearms. It was in an open field where the incident happened. In the case of *People v. Villanueva* (161 SCRA 511 [1988]), we said:

"From the fact found by the trial court, it does not appear to us that Acosta and his companions were completely caught off-guard when the accused-appellant and his companions started chasing them. The attack against Acosta was not unexpected; in fact, he was running away from it; and in any case, there was sufficient warning when Villanueva's group confronted them in a menacing manner, and with weapons. Moreover, it has not been established that Villanueva consciously adopted such mode of attack to facilitate the commission of the offense without risk to himself. On the contrary, the Court believes that the shooting was done on impulse whetted by the excitement of chase and was not the result of earlier deliberation."

With these findings, we find the appellant guilty beyond reasonable doubt of the crime of HOMICIDE and not MURDER.

As regards the illegal possession of firearm charge, the Solicitor General recommends the acquittal of the appellant based on the testimony given by prosecution witness then Staff Sergeant Vicente Cabanacan of Regional Command 8. At the time of the incident, Cabanacan was the PC Supply Officer.

On direct testimony, Cabanacan testified that the .45 caliber pistol taken from Uribe at the scene of the crime was "a property of the service department." (Tsn. p. 144, February 19, 1985)

On cross-examination, Cabanacan declared:

Q.

"You said also a while ago that you were connected with the military since August, 1974, and that you were assigned to the supply headquarters, am I right?

A.

Yes, sir.

Q.

Do you remember having issued a memorandum receipt for a .45 caliber pistol for the use of Uribe on February 3, 1982?

A.

Yes, sir.

Q.

And you signed that memorandum receipt?

A.

Yes.

Q.

And you had it approved by Major Virgilio I. Bautista, your commanding officer?

A.

Yes. (Tsn, February 19, 1985, pp. 147-148).

During the re-direct examination of Cabanacan, the following transpired:

FISCAL TOGONON:

Q.

That .45 caliber pistol for which you issued a memorandum receipt to Virgilio Uribe, is that the same .45 caliber pistol which you mentioned in your affidavit under Question and Answer No. 13 which I read 'Q - In your capacity as the supply sergeant do you know the status of the firearm that CIC Uribe used in shooting T2C Tibay, whether issued by the Unit or not?

A.

That was a personally owned firearm of CIC Uribe which he asked me to make a memorandum receipt.'

A.

That firearm was surrendered by Uribe to the headquarters service detachment and it was re-issued to him with a memorandum receipt.

Q.

May we know under what authority as supply officer could you issue a memorandum receipt?

A.

We issue firearms with the approval of the commanding officer, your Honor. Once approved by the commanding officer, we issue the firearm.

COURT:

As far as the cross-examination was concerned, he was only issued a .45 caliber firearm. Why did you have it specified in the redirect? It strengthens the cross-examination. You pin-pointed that it was surrendered to the PC and re-issued to him. On the other hand, there is no memorandum receipt... so, that throws your case for illegal possession of firearm out of the window. No amount of witnesses can save your case now.

FISCAL TOGONON:

We have already a certification from Camp Crame, Quezon City, your Honor, that the firearm was unlicensed."

COURT:

The fact is that you brought out on redirect that the firearm was his, it was surrendered to the PC and re-issued to him with a memorandum receipt. Now, where is that illegal possession of firearm you are talking about?

FISCAL TOGONON:

That will be all, your Honor." (Tsn, February 19, 1985, pp. 149-151)

There may have been some irregularity in a surrendered firearm being re-issued to the former holder through a memorandum order. However, the irregularity cannot be the basis of the penalty of death.

Considering the evidence, we agree with the recommendation of the Solicitor General. In the case of *People v. Cuison*, (106 SCRA 98 [1981]), we ruled that "the prosecution is bound by the declarations of its own witness which tend to absolve the appellant of the crime charged." The prosecution's evidence confirms the testimony of the appellant that the subject .45 caliber pistol was issued to him through a memorandum receipt signed by the commanding officer. Furthermore, when queried as regards the certification issued by Captain Prudencio Erfe of Camp Crame that he is not a firearm licensee of the subject .45 caliber pistol, the appellant answered that "when the entire Philippine Constabulary Command was divided to regions, the Philippine Constabulary Command was authorized to issue firearms which was (sic) not reported to Camp Crame". (p. 196 Tsn, October 7, 1985) His testimony was not refuted.

WHEREFORE, the judgment appealed from is MODIFIED as follows: (1) appellant Virgilio Uribe is found guilty beyond reasonable doubt of the crime of HOMICIDE without any aggravating or mitigating circumstance. The prescribed penalty is reclusion temporal in its medium period but applying the Intermediate Sentence Law, the appellant is hereby SENTENCED to TEN (10) YEARS and ONE (1) DAY as MINIMUM and SEVENTEEN (17) YEARS and FOUR (4) MONTHS as MAXIMUM. The Court imposed indemnity is increased to P30,000.00; and (2) the appellant is ACQUITTED of the crime of illegal possession of firearm.

SO ORDERED.

Fernan, C.J., (Chairman), Feliciano, Bidin, and Cortes, JJ., concur.

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