

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
BELARMINO DIVINA ALIAS "BEJAR"; AND MECRITO
BAGA Y HIYOG, ACCUSED-APPELLANTS.**

G.R. Nos. 93808-09. April 07, 1993

Ponente: CAMPOS, JR., J.

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CAMPOS, JR., J.:

In G.R. Nos. 93808-09, accused BELARMINO DIVINA alias "Bejar" and MECRITO BAGA y HIYOG appealed from the judgment* rendered by the Regional Trial Court, 7th Judicial Region, Branch 35 of Dumaguete City convicting both accused for murder and frustrated murder for the death of Concepcion Baillo and the gunshot wounds sustained by Jaime Baillo.

In G.R. Nos. 94073-74, accused BELARMINO DIVINA alias "Bejar" filed a petition for certiorari alleging that the trial court committed grave abuse of discretion amounting to lack or in excess of jurisdiction for disapproving his property bond because it consists of unregistered or untitled land.

On July 30, 1990, this Court resolved to consolidate the two abovementioned cases.

In G.R. Nos. 93808-09, the accused BELARMINO DIVINA alias "Bejar" and MECRITO SAGA y HIYOG were charged with murder and frustrated murder in the two informations as follows.

The Information for Murder in Criminal Case No. 8342 dated August 30, 1988, alleged:

"That on or about the 17th day of June, 1988, at Barangay Malungcay Daku, Municipality of Dauin, Province of Negros Oriental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating together and mutually helping one another, with intent to kill, evident premeditation and treachery, did then and there willfully, unlawfully and feloniously attack, assault and shoot Concepcion Baillo with the use of a firearm which said accused were then armed and provided, thereby inflicting upon the body of Concepcion Baillo a gunshot wound at her back which directly caused her death immediately thereafter.

Contrary to Article 248 of the Revised Penal Code."[1]

The Information for Frustrated Murder in Criminal Case No. 8362 dated September 9, 1988, alleged:

"That in the evening of June 17, 1988, at Barangay Malungcay Daku, municipality of Dauin, Province of Negros Oriental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with evident premeditation and treachery, and with intent to kill, conspiring and confederating together and acting under the same accord and purpose, did then and there willfully, unlawfully and feloniously, with the use of a gun, shoot one JAIME BAILLO inflicting upon the latter the following injuries, to wit:

1. Gunshot wound of entrance 0.5-1 cm. long posterior chest wall lower left penetrating abdominal cavity with injury to the liver left lobe thru & thru.

2. Hemoperitoneum approximately 250 cc. with metallic foreign body at submuscular area, epigastrium.
3. Retro peritoneal hematoma.
4. Gunshot wound of entrance 0.5 cm. left buttock upper portion.
5. Gunshot wound of exit left inguinal area.
6. Pneumonia both lower lung fields.

thus the offenders performing all the acts of execution which would have produced the crime of MURDER, as a consequence but which, nevertheless, did not produce it by reason of causes independent of the will of the perpetrators, that is, by the timely medical assistance rendered to the victim that prevented his death.

Contrary to Article 248 in relation to Article 6 of the Revised Penal Code."[2]

On May 18, 1990, the court a quo rendered its decision convicting both accused for murder and frustrated murder, the dispositive portion of which reads:

"WHEREFORE, accused BELARMINO DIVINA alias "Bejar" and MECRITO BAGA Y HIYOG are hereby found guilty beyond reasonable doubt of the crimes of Murder, qualified by treachery, in Criminal Case No. 8342 for the killing of Concepcion Baillo; and for Frustrated Murder, also qualified by treachery, in Criminal Case No. 8362, for the deadly wounds inflicted on Jaime Baillo, and the Court hereby imposes the following penalties to wit:

1. For the Murder of Concepcion Baillo in Criminal Case No. 8342, accused Belarmino Divina and co-accused Mecrito Baga are hereby sentenced to suffer the imprisonment of RECLUSION PERPETUA. Accused shall also jointly and solidarily indemnify the heirs of the deceased victim the sum of THIRTY THOUSAND PESOS (P30,000.00), and to pay the costs;
2. For the Frustrated Murder of Jaime Baillo in Criminal Case No. 8362, accused Belarmino Divina and co-accused Mecrito Baga are hereby sentenced, after applying the Indeterminate Sentence Law, as amended, to suffer an imprisonment ranging from EIGHT (8) YEARS AND ONE (1) DAY of Prison Mayor as minimum to SEVENTEEN (17) YEARS AND FOUR (4) MONTHS of Reclusion Temporal as maximum, and to pay the costs.

Also considering the fact that the two (2) accused are charged with a capital offense and taking into account their conviction today where it can no longer be said that the evidence against them is not strong, and considering that the possibility of their jumping bail and evading arrest is not now remote, the two accused are likewise hereby ordered to be detained at the Negros Oriental Detention and Rehabilitation Center without prejudice to their filing an appeal, if so, unless they could put up an additional bail bond in the amount of ONE HUNDRED THOUSAND PESOS (P100,000.00) each.

SO ORDERED."[3]

On July 16, 1990, the accused-appellants Belarmino Divina and Mecrito Baga filed an appeal with this Court which was docketed as G.R. Nos. 93808-09.

Pursuant to the trial court's decision, accused-appellant Belarmino Divina on June 29, 1990 filed an Urgent Exparte Motion For Approval Of Bail Bond before the trial court offering untitled properties as property bond. On the same date, the trial court in its Order dated June 29, 1990, directed the said accused-appellant to put up a titled property as property bond otherwise, he may put up a surety bond or a cash bond.[4]

Accused-appellant's motion for reconsideration of the aforesaid Order was denied.[5]

Hence, accused-appellant Belarmino Divina filed with this Court a petition for certiorari with urgent prayer for approval of bail bond, docketed as G.R. Nos. 94073-74.

In G.R. Nos. 93808-09, accused-appellants contend that the court a quo erred in finding that their guilt has been proven beyond reasonable doubt and in convicting them of the crime charged.[6]

The prosecution's version, as culled by the Solicitor General, is as follows:

"In the evening of June 17, 1988 at around 6:30 o'clock in the afternoon, Mr. Ambrocio Baillo, his thirteen (13) year old son Jaime Baillo and his wife Concepcion Baillo just came from the "tabuan" (flea market) at Barangay Anhawan, Dauin, Negros Oriental and were heading for home at Barangay Daku, Dauin, Negros Oriental (TSN, January 3, 1984, pp. 4-5; TSN, April 10, 1989, pp. 4-5). Just after crossing the Maayong-tubig river and while walking one behind the other (Ambrocio, Jaime then Concepcion) along the trail, suddenly and without any warning, they were shot from behind (Ibid.). Concepcion, being hit and mortally wounded, fell down and cried "agi!" (Ibid.). Jaime also fell down because he was hit at the back and at the left hip. Ambrocio was not hurt. Upon seeing his wife and son fall, he instructed his son Jaime to hide as he was going to get a vehicle (TSN, April 10, 1989, pp. 5-7). Immediately, Ambrocio ran away and proceeded directly to their house and told his other son Rogelio to go and see his mother and younger brother Jaime who were shot at Malungcay Daku (Ibid., p. 7). Then Ambrocio reported the incident to the police of Dauin and to the parish priest (Father Badoy) whose truck they used to return to the place of the incident (Ibid., p. 8). Policemen Ikoy Tubil and Dadoy Elumir rode on the truck while Ambrocio rode with June Alta Marino on the latter's motorcycle (Ibid., p. 9).

Meantime, at the scene of the incident, Jaime, upon being instructed by his father Ambrocio, was able to crawl and hide himself behind a hagonoy plant despite the wounds he sustained (TSN, January 3, 1989, p. 5). While hiding, two (2) men whom he recognized as their neighbors - Belarmino Divina and Mecrito Baga (accused-appellants) approached the lifeless body of his mother (Ibid.).

Then Belarmino Divina, with a gun, said in the dialect: "PUSIL RAY TAMBAL SA MGA TESTIGOS SA CONTRA SA MGA DIVINA" which means "ONLY THE GUN CAN SILENCE THOSE WITNESSES AGAINST THE DIVINAS" (Ibid., p. 6). (The records show that victim Concepcion Baillo was a witness against the Divinas in another pending case.)

Meanwhile, Rogelio Baillo, after being told by his father of the incident, immediately proceeded to Malungcay-Daku, the place of the incident (TSN, April 10, 1989, P. 33).

Upon arrival, he was told by his brother Jaime that Belarmino Divina and Mecrito Baga had approached the dead body of their mother Concepcion Baillo with Belarmino holding a gun (Ibid., p. 35). Rogelio saw wounds at the arms and at the back of his mother and he was not able to talk with her anymore (Ibid., 36). He also observed that Jaime sustained wounds at his left hip and at the back (Ibid.).

Thereafter, at about 10:00 o'clock that same evening, Ambrocio Baillo arrived with the truck of Fr. Badoy accompanied by policemen Ikoy Tubil and Dadoy Elumir and, Jun Alta Marino, a teacher in Malungcay Daku. Ambrocio noticed that his wife, Concepcion was already dead while his son Jaime was alive (Ibid., pp. 9-10). Ambrocio further observed that his wife Concepcion sustained six (6) wounds at the back and both her arms were lacerated (Ibid.). His son Jaime also sustained gunshot wounds at the back and at the left hip (Ibid.). They then loaded the dead body of Concepcion on the truck and brought her to their house while Jaime was brought to the provincial hospital for treatment (Ibid.). Jaime was operated twice. As testified to by the attending physician, Dr. Nerissa Calumpang, Jaime could have died were it not for the timely medical attention (TSN, April 11, 1989, pp. 2-18). Jaime was discharged only after two (2) weeks of confinement after which, he temporarily lived with their relatives at Valencia (a nearby municipality) because of fear that he might be killed by the Divinas (TSN, March 29, 1989, p. 18)."[7]

Accused-appellants, Belarmino Divina and Mecrito Baga interpose the defense of denial and alibi.

Accused Belarmino Divina's defense as contained in his Brief is as follows:

"Accused Belarmino Divina has been living in his parents-in-law's house at Anhawan, Dauin, Negros Oriental, since January, 1984. (TSN, January 31, 1990, p.2). He was the OIC Barangay Captain of Anhawan since 1986 up to May, 1988 (ibid., p. 3).

On June 17, 1988, from 7:00 a.m. to 11:00 a.m., he was plowing in his farm; after which he ate his lunch. At about 3:00 p.m. of the same day, he went to the "tabu-an", (a flea market) about 40 meters from his in-law's house where he met Sabino Sarense, Dedio Tubil, Porferio Tubil, Alberto Deloria and Nicolas Sarense. At about 3:30 p.m., the group, including accused Divina, played volley-ball. The group finished playing at about 4:00 p.m. after which they ate bread. At about 5:30 p.m. accused Divina invited the group to his in-law's house where he also lives with his family, to drink tuba. The group was joined by Tony Regalado and Lucero Regalado, accused Divina's brothers-in-law. They drank tuba until 7:00 p.m. that night after which accused Divina with his family, Dedio Tubil and Porferio Tubil stayed around to view the TV.

Sabino Sarense, after the group stopped drinking at 7:00 p.m., left together with his son Nicolas Sarense and Alberto Deloria. The rest of their group, Dedio Tubil, Porferio Tubil and accused Divina with his family were watching the TV. At about 8:00 p.m., Dedio and Porferio Tubil also left.

Accused Divina came to know of the killing of Concepcion Baillo the following day, June 18, 1988. Since that day accused Divina never heard of the identity of the suspect until he was arrested on July 26, 1988, as the suspect himself at about 4:00 p.m., at the Poblacion of Dauin while waiting for transportation going to Anhawan where he lives."[8]

On the other hand, Mecrito Baga's defense is as follows:

"Mecrito Baga and Douglas Divina were plowing the latter's field on June 17, 1988, starting from 7:00 o'clock in the morning until 11:00 o'clock that morning and from 2:00 o'clock in the afternoon to 5:00 o'clock in the afternoon that same day. They rested for a while in the house of Douglas Divina and at about 6:00 o'clock p.m. Mecrito Baga with his mother Nicolasa Baga joined the Divina family in praying the Holy Rosary which prayer had been going on for the last six months. After the prayer which ended at about 7:00 o'clock in the evening, accused Mecrito Baga and his mother joined the Divina family for supper. After supper, Mecrito Baga joined Guillermo Divina, Douglas Divina and Restituto Delvo in drinking tuba. At about 9:00 o'clock in the evening, Mecrito Baga and his mother left the residence of Douglas Divina.

Mecrito Baga learned about the killing of Concepcion Baillo and the wounding of her son the following day, June 18, 1988, but he never heard of any suspect, not until July 25, 1988, when he was arrested by four policemen in his house."[9]

This appeal hinges on the credibility of the lone eyewitness and victim Jaime Baillo.

On the question of credibility, this Court will not as a general rule disturb the findings of the trial judge unless he has plainly overlooked certain facts of substance and value that, if considered, might affect the result of the case. The reason is the opportunity available to the trial court -- but not to the appellate court -- to observe the witnesses on the stand and to assess their credibility not only by the nature of their testimony but also by their demeanor under questioning.[10]

Accused-appellants allege that the testimony of the lone eyewitness, Jaime Baillo, is far from credible for being conflicting, uncorroborated, unreliable and inconclusive. In support of this contention, accused-appellants point out that Jaime Baillo upon admission in the hospital on the night of the incident allegedly told Dr. Calumpang that he (Jaime) was shot by an unknown assailant.[11]

Dr. Calumpang's testimony on cross examination is quoted as follows:

"ATTY. BARRAMEDA:

Q And did he tell you who shot him?

A No. By an unknown assailant.

Q That was what he said?

A Yes, Sir.

Q Unknown assailant?

A Yes, Sir.

Q That is very clear to you that he was shot an unknown assailant?

A Witness nodding her head.

Q Please vocalize your answer. Yes, he said that?

A Yes, your honor.

"x x x x x". "[12] (Underscore Ours.)

A reading of the above-quoted testimony shows that the response of the doctor to the question: "Did he tell you who shot him?" was "No". The phrase "by an unknown assailant" was merely volunteered by the doctor which can be taken to mean that the assailant was unknown to her but not necessarily unknown to the victim, Jaime Baillo. The succeeding question propounded by the defense counsel, to wit "That is very clear to you that he was shot by an unknown assailant?" calls for a statement of an opinion and not a statement of fact.

It is the duty of the defense counsel to propound questions that will not result in two or more interpretations as what happened in this case. The resulting inconsistencies were the product of the kind of questions propounded by defense counsel.

As to the alleged testimony of one Feliciano Parao given in another criminal case that the victim Jaime Baillo allegedly told him that it was Guillermo Divina and Douglas Divina, brothers of Belarmino Divina, who shot him and his mother, the said testimony cannot but be considered as hearsay for Feliciano Parao was not presented as witness during the trial of this case. His testimony has no probative value. The trial court was correct in rejecting said statements.

The defense makes a big issue of the fact that the prosecution witnesses Ambrocio Baillo, Jaime Baillo and Rogelio Baillo reported the identities of the accused only after one month and nine days have elapsed despite the fact that the accused's identities were already known to them on the very night of the incident.[13]

The rule is well-established that the failure to reveal or disclose at once the identity of the accused does not necessarily affect much less impair, the credibility of the witness.[14] The initial reluctance of witnesses to volunteer information about a criminal case and their unwillingness to be involved in criminal investigations due to fear of reprisal is common and has been judicially declared not to affect credibility.[15]

In the case at bar, it is fact that one of the accused, Belarmino Divina, has been the OIC Barangay Captain of Anhawan since 1986 up to May, 1988. It cannot be gainsaid that although the incident happened after his term having held said position, he has a strong influence in said place. It was natural for the victim to fear for his life as explained by him.

In addition thereto, the incident also resulted in the death of Concepcion Baillo, wife of Ambrocio Baillo and mother of Jaime and Rogelio Baillo. We have held that "(a)lthough there is a natural tendency to seek the ends of justice for the treacherous killing of a dearly departed, mourning and rites for the dead take priority as dictated by our culture.[16]

Moreover, the injuries sustained by the victim Jaime Baillo, both physical and emotional, and the necessary period of recuperation after his discharge from the hospital are enough reasons to understand the delay in the filing of the complaint.

Both accused interposed the defense of alibi and denial. It is Our view that the trial court was correct in convicting accused Belarmino Divina on the strength of the testimony of the lone eyewitness Jaime Baillo but in the case of the accused Mecrito Baga, We find the evidence of the prosecution not sufficient to establish his guilt beyond reasonable doubt.

On the issue of conspiracy, We hold that it was not established beyond reasonable doubt. Nowhere in the trial court's decision was there any mention of any act of the accused that may be construed as an overt act in the furtherance of conspiracy. Absent such an evidentiary basis, We cannot accept the finding of implied conspiracy.[17]

We have held that:

"x x x, albeit no formal agreement is necessary to prove conspiracy and the same may be inferred from the circumstances attending the commission of the crime, yet conspiracy must be established by the same quantum of evidence as any other ingredient of the offense. Such evidence must show intentional participation in the transaction with a view to the furtherance of the common design or purpose. The same degree of proof necessary to establish the crime is required to establish a finding of criminal conspiracy, that is, proof beyond reasonable doubt. It cannot be established by conjectures but by positive and conclusive evidence. Since conspiracy must be proved beyond peradventure of a doubt, it follows that it cannot be appreciated where the facts can be consistent with the non-participation of the accused in the fancied cabal."[18]

In the case at bar, no conspiracy may be deduced where there is no evidence to show the participation of accused Mecrito Baga in the shooting incident. The lone eyewitness Jaime Baillo testified that while he was hiding behind the hagonoy plants, he saw accused Belarmino Divina holding a gun and together with Mecrito Baga, approached the lifeless body of his mother. The mere presence of accused Mecrito Baga does not prove his participation in the killing. The mere fact of being with Divina does not of itself establish conspiracy.[19]

Having found that no conspiracy attended the commission of the crime and that the prosecution failed to establish the guilt of accused Mecrito Baga beyond reasonable doubt. We are constrained to acquit him of the crime charged.

With regards to accused Belarmino Divina, conviction must be sustained.

The well-settled rule is that alibi is one of the weakest defenses that can be resorted to by an accused, not only because it is inherently weak and unreliable but also because of its easy fabrication. We have repeatedly held that the defense of alibi cannot prevail over the positive identification of the accused by witnesses for the prosecution and that to establish it the accused must show that he was at some other place for such a period of time that it was impossible for him to have been at the place where the crime was committed at the time of its commission.[20]

Record shows that the victim Jaime Baillo while hiding behind the hagonoy plant saw accused Belarmino Divina approach the dead body of his mother Concepcion Baillo and uttered "PUSIL RAY TAMBAL SA MGA TESTIGOS SA CONTRA SA MGA DIVINA" which means "ONLY THE GUN CAN SILENCE THOSE

WITNESSES AGAINST THE DIVINAS".

In addition thereto, accused Belarmino Divina in his cross examination admitted that the house of his father-in-law where he was allegedly drinking tuba with his friends is only about two and a half (2 ½) kilometers from where the victims Concepcion Baillo and Jaime Baillo were shot at.[21] Hence, it was not physically impossible for accused Belarmino Divina to be at the place where the crime was committed.

Moreover, although motive is unnecessary when the assailant has been positively identified,[22] in this case, accused Belarmino Divina has the motive to commit the crime charged because the victim Concepcion Baillo was shown to be a witness against the former's brothers in another criminal case.

Accused Belarmino Divina argues that as stated in the police blotter, the shooting incident happened at around 7:40 o'clock in the evening of June 17, 1988 and not 6:30 o'clock as claimed by the prosecution witnesses. It was therefore, not possible for the victim Jaime Baillo to have seen the accused without the aid of a lighted torch.

We do not agree. A police blotter is a book which records criminal incidents reported to the police. Entries in official records, as in this case of a police blotter, are only prima facie evidence of the facts therein stated. They are not conclusive.[23] It is undisputed that the alleged time of the commission of the crime, i.e., 7:40 in the evening of June 17, 1988, was supplied only by the parish priest Fr. Badoy who was neither present when the shooting incident happened nor presented as a witness during the trial. The information supplied is therefore hearsay and does not have any probative value.

With regards to G.R. Nos. 94073-74, We are constrained to deny accused Belarmino Divina's petition for certiorari in line with this Court's Administrative Circular No. 2-93 dated January 20, 1992 "Re: Cancellation of Bail Bond of Accused Convicted of Capital Offense in the Regional Trial Court" pertinent provisions of which are quoted hereunder:

"The basic governing principle on the right of the accused to bail is laid down in Section 3 of Rule 114 of the 1985 Rules on Criminal Procedure, as amended, which provides:

"Sec. 3. Bail, a matter of right; exception. -- All persons in custody shall before final conviction, be entitled to bail as a matter of right, except those charged with a capital offense or an offense which, under the law at the time of its commission and at the time of the application for bail, is punishable by reclusion perpetua, when the evidence of guilt is strong."

Pursuant to the aforecited provision, an accused who is charged with a capital offense or an offense punishable by reclusion perpetua, shall no longer be entitled to bail as a matter of right even if he appeals the case to this Court since his conviction clearly imports that the evidence of his guilt of the offense charged is strong." (Underscoring Supplied.)

Accused Belarmino Divina was convicted by the Regional Trial Court of the crime of murder which is an offense punishable by reclusion perpetua. Pursuant to SC Administrative Circular No. 2-92, he is no longer entitled to bail even if he appeals to Us since his conviction clearly imports that the evidence of his guilt is strong.

We therefore find no reason to dwell on the issue raised in said petition.

WHEREFORE, premises considered, judgment is hereby rendered ACQUITTING accused MECRITO BAGA of the crime of Murder in Criminal Case No. 8342 and of Frustrated Murder in Criminal Case No. 8362 for failure of the prosecution to prove his guilt beyond reasonable doubt. The convictions of accused BELARMINO DIVINA in Criminal Cases Nos. 8342 and 8362 are AFFIRMED with the modification that he be ordered to indemnify the heirs of the victim Concepcion Baillo in the amount of P50,000.00 in consonance with prevailing jurisprudence.

The petition for certiorari filed by accused BELARMINO DIVINA is DISMISSED for lack of merit.

SO ORDERED.

Narvasa, C.J., (Chairman), Padilla, Regalado, and Nocon, JJ., concur.

* Penned by Judge Rosendo B. Bandal, Jr.

[1] Rollo of G.R. Nos. 93808-09, p. 11.

[2] Ibid., pp. 22-23.

[3] Ibid., p. 41; Decision p. 21.

[4] Annex "D" of Urgent Petition: Rollo of G.R. Nos. 94073-74, p. 15.

[5] Annex "F" of Urgent Petition; Rollo of G.R. Nos. 94073-74, p. 22.

[6] Brief for Accused-Appellants, p. 1.

[7] Appellee's Brief. pp. 6-11: Rollo. pp. 71-76.

[8] Appellants' Brief, p. 3.

[9] Ibid., pp. 5-6.

[10] People v. Belibet, 199 SCRA 587 (1991).

[11] Appellants' Brief, p. 8.

[12] Ibid., p. 10.

[13] Appellants' Brief, p. 8.

[14] People v. Valdez, 159 SCRA 152 (1988).

[15] People v. Rosario, 134 SCRA 497 (1985).

[16] People v. Sabellano, 198 SCRA 196 (1991).

[17] People v. Saavedra, 149 SCRA 610 (1987).

[18] People v. Furugganan, 193 SCRA 471, 480-481 (1991); citing People v. Drilon, et al., 123 SCRA 72 (1983); People v. Martinez, 127 SCRA 260 (1984).

[19] People v. Sosing, 111 SCRA 368 (1982).

[20] People v. Devaras, 205 SCRA 676 (1992).

[21] TSN, January 31, 1990, p. 13.

[22] People v. Kyamko, 192 SCRA 374 (1990).

[23] People v. Santilo, Jr., 201 SCRA 87 (1991).

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