

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. RUBEN CABARRUBIAS @ AMBEN AND ZOSIMO ANTIPORDA @ SAMONG, DEFENDANTS-APPELLANTS.

G.R. Nos. 94709-10. June 15, 1993

Ponente: QUIASON, J.

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QUIASON, J.:

This is an appeal from the joint decision of the Regional Trial Court, Branch 2, Bangued, Abra, in Criminal Cases Nos. 442 and 443, convicting Ruben Cabarrubias alias "Amben" and Zosimo Antiporda alias "Samong" of murder (Art. 248, Revised Penal Code). The dispositive portion of the assailed decision reads as follows:

"WHEREFORE, the Court finds both accused in Criminal Cases Nos. 442 and 443 guilty beyond reasonable doubt of the crime of murder as defined and penalized in Art. 248 of the Revised Penal Code, the killing of Jonalyn Espiritu in Criminal Case No. 442 being qualified by treachery and taking advantage of superior strength with the aggravating circumstance of nighttime; while the killing of Pedro Espiritu in Criminal Case No. 443 is qualified by treachery with the aggravating circumstance of nighttime, with no mitigating circumstances proven in both cases, and sentences them to suffer the penalty of reclusion perpetua and to indemnify the families of their victims the amount of P100,000.00 each, and to pay the costs of these proceedings" (Rollo, p. 25).

The information filed in Criminal Case No. 442 against the accused Ruben Cabarrubias reads as follows:

"That on or about July 13, 1986, at about 7:00 o'clock at night, at Barangay Patoc, in the municipality of Bucay, Province of Abra, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, with treachery and evident premeditation and while armed with a sharp-pointed bolo, did then and there, wilfully, unlawfully and feloniously assault, attack and stab one Jonalyn Espiritu, an 8 year-old child, hitting her on her abdominal cavity and on other parts of her body, which multiple stab wounds caused her death shortly thereafter" (Rollo, p. 18).

The information filed in Criminal Case No. 443 against the accused Zosimo Antiporda reads as follows:

"That on or about July 13, 1986, at about 7:00 o'clock at night, at Barangay Patoc, in the municipality of Bucay, Province of Abra, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, with treachery and evident premeditation and while armed with a sharp-pointed bolo, did then and there, wilfully, unlawfully and feloniously assault, attack and stab one Pedro Espiritu, hitting him on his neck, which stab wound caused his death shortly thereafter" (Rollo, pp. 18-19).

At his arraignment, appellant Cabarrubias manifested his willingness to plead guilty to the lesser offense of homicide in Criminal Case No. 442, and to assume responsibility to the charge in Criminal Case No. 443, but these manifestations were not accepted by the trial court (Order, March 5, 1988; TSN, August 18, 1987, p. 2).

The arraignments proceeded with both appellants pleading not guilty. The two cases were tried jointly "because of their proximity of time and place of occurrence" (Decision, p. 2; Rollo, p. 19).

The records in the two cases show that at about 7:00 P.M. of July 13, 1986, Talledo Espiritu was at his house waiting for his 17-year old son, Pedro, to come home from the fields. Pedro suddenly appeared at the door, with a gaping wound on his neck and blood stains all over his clothes. Embracing his father, Pedro told him that he was stabbed by "Samong", referring to Antiporda. After identifying his assailant, Pedro collapsed and he died a few moments later. Talledo then shouted for help.

At about the same time, the screams of a child were heard. Domingo Espiritu, a next-door neighbor of Talledo, ran outside his house to where the screams were coming from. He saw his eight-year old granddaughter, Jonalyn Espiritu, squatting on the ground about three meters from Talledo's house. Domingo saw appellants running away from the scene, with Antiporda heading towards the direction of the house of Saturnina Belaras. Jonalyn told Domingo that she was stabbed by "Nong Amben", referring to Cabarrubias.

Estefana Tubana, the adoptive mother of Jonalyn and who rushed to her succor, was told by Jonalyn that she saw Antiporda stab Pedro and that appellants chased her upon noticing her presence.

Saturnina Belaras, a neighbor of Talledo's, was washing dishes when someone tried to forcibly open the door of her house. When she opened the door, Antiporda entered and talked with Saturnina's son. Antiporda did not stay long and hurriedly left the house when shouts for help were heard.

Jonalyn died the following day, succumbing to five wounds.

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Cabarrubias admitted before the trial court to killing both Jonalyn Espiritu and Pedro Espiritu. He testified that he went to see Pedro to confront him about the latter's attempt to electrocute Cabarrubias' sister with an electric fishing device. Pedro reacted by unsheathing his bolo and attacking Cabarrubias, who was able to parry the attack and stab Pedro. He claimed that after the traumatic incident, he was possessed by a state of mind that bordered on insanity overpowered by a force beyond his control. This was his explanation of why he stabbed Jonalyn who happened to cross his path (Cabarrubias' Brief, pp. 4-5, 7-9; Rollo, pp. 82-83, 85-87).

In this appeal, Cabarrubias asserts that he should have been exempted from liability on the ground of insanity and of having acted under the compulsion of an irresistible force.

Insanity was not invoked as a defense by Cabarrubias in the trial court . and no evidence was presented to overcome the presumption of sanity. It is too late on appeal to raise the defense of insanity (People v. Yagong, 181 SCRA 479 [1990]).

The evidence on record does not show any outward act of Cabarrubias, indicating his "complete deprivation of intelligence" nor "total deprivation of freedom of the will." On the other hand, as pointed out by the Solicitor General, Cabarrubias was able to give a lucid account of the series of events, from the moment he crossed path with Jonalyn to the moment he stabbed her (Consolidated Brief for the Appellee, pp. 28-31; Rollo, pp. 164-167). He was able to describe the bolo he had used and to demonstrate how he used it (TSN, August* 25, 1988, pp. 23-24).

There is also no showing in the record which would lead this Court to a finding that Cabarrubias had acted under the compulsion of an irresistible force.

Cabarrubias further contends that he should have been convicted of homicide, not murder, and that the mitigating circumstance of lack of intention to commit so grave a wrong as that committed and the mitigating circumstance of passion or obfuscation, should have been appreciated in his favor.

He alleges that he stabbed Jonalyn without any intention of killing her but merely to stop her from screaming. He

points out that Jonalyn did not suffer any mortal wound as shown by the fact that after being stabbed, she was still strong enough to assume a squatting position and even answer questions asked her by Domingo Espiritu. He further claims that Jonalyn did not die as a result of the stabbing but of shock and internal hemorrhage secondary to her wounds (Cabarrubias' Brief, pp. 10-13, Rollo, pp. 88-91).

Contrary to the claim of Cabarrubias, the evidence shows that he intended to kill Jonalyn. He used a bolo to inflict five incisions and penetrating wounds on the head and torso of Jonalyn, a mere eight-year old child. The mitigating circumstance of lack of intent to commit so grave a wrong as that committed cannot be appreciated where the acts employed by the accused were reasonably sufficient to produce the result that they actually produced - the death of the victim (People v. Amit, 32 SCRA 95 [1970]).

Cabarrubias asserts that Pedro's alleged act of attempting to electrocute Cabarrubias' sister, Pedro's alleged unlawful aggression, and Jonalyn's screams produced the passion and obfuscation that deprived him of the time for reflection (Cabarrubias' Brief, pp. 13-15; Rollo, pp. 91-93).

The circumstance of passion and obfuscation is not mitigating when the accused acted in a spirit of lawlessness. Besides, the screams of an eight-year old child are not provocative enough to generate a sudden impulse of natural and uncontrolled fury (People v. Caliso, 58 Phil. 283 [1933]).

The trial court convicted Cabarrubias of murder qualified by treachery and taking advantage of superior strength and aggravated by nighttime.

The trial court is correct in finding Cabarrubias guilty of murder qualified by treachery. Killing a child is characterized by treachery even if the manner of the assault is not shown because the weakness of the victim due to her tender age results in the absence of any danger to the accused (People v. Ganohon, 196 SCRA 431 [1991]).

However, taking advantage of superior strength was not alleged as a qualifying circumstance in the information and, therefore, it cannot be properly appreciated as such. Neither can it be appreciated as a generic circumstance because it is absorbed in treachery.

Nighttime cannot be properly appreciated against Cabarrubias because there is no evidence to show that he purposely sought this circumstance to commit the crime or to facilitate the commission of the crime (People v. De Los Reyes, 203 SCRA 707 [1991]). Granting that nighttime attended the commission of the crime, this circumstance is also absorbed in treachery.

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To bolster his defense of alibi, Antiporda relies on Cabarrubias' testimony in open court admitting that he, not Antiporda, was the one who stabbed to death Pedro Espiritu. Antiporda points to this testimony of Cabarrubias, his lack of motive to kill Pedro and the dimly-lit place of the stabbing, which made identification difficult, as sufficient grounds to negate the weight of the dying declaration of Pedro (Antiporda's Brief, pp. 6-9; Rollo, pp. 40-43).

The trial court dismissed Cabarrubias' version of the killing of Pedro as a "shallow concoction and confabulation to save the neck of his cousin and constant companion, accused Zosimo Antiporda in Criminal Case No. 443" (Decision, p. 4; Rollo, p. 21).

The version of Cabarrubias is uncorroborated and is contradicted by the evidence of the prosecution, principally the dying declaration of Pedro that he was stabbed by Antiporda, not by Cabarrubias. The dying declaration of Jonalyn, as told to Estefana Tubana, also pointed to Antiporda as the assailant of Pedro.

The trial court found no reason to doubt the credibility of Pedro in making his ante mortem declaration and that of

Talledo Espiritu in conveying said declaration (Decision, p. 7; Rollo, p. 24). We find no reason to depart from the rule that the findings of the trial court on the credibility of witnesses are given the highest degree of respect by the appellate court (*People v. Saulo*, 211 SCRA 888 [1992]).

Anent the defense of alibi, this defense is unavailing where there is affirmative evidence of the presence of the accused at the scene of the crime at the time of its commission (*People v. Plaza*, 140 SCRA 277 [1985]; *People v. Pigon*, 173 SCRA 607 [1989]).

Lack of motive does not preclude conviction when the crime and the participation of the accused therein are definitely established (*People v. Caranzo*, 209 SCRA 232 [1992]).

We find, however, that the trial court erred in appreciating the circumstance of treachery, which it considered to qualify the crime to murder. Treachery cannot be appreciated in the absence of evidence of the mode of attack; it cannot be presumed, but must be proved positively (*People v. Quilaton*, 205 SCRA 279 [1992]).

Nighttime cannot be properly appreciated against Antiporda, there being no evidence that it was purposely sought by him to commit the offense (*People v. De Los Reyes*, 203 SCRA 707 [1991]).

Consequently, Antiporda can only be convicted of homicide, with no modifying circumstance.

WHEREFORE, in view of the foregoing, the decision of the trial court is **AFFIRMED** with the following modifications:

In Criminal Case No. 442, appellant Ruben Cabarrubias is found guilty of murder and sentenced to suffer the penalty of reclusion perpetua. He is ordered to pay the heirs of Jonalyn Espiritu the amount of FIFTY THOUSAND PESOS (P50,000.00) as indemnity.

In Criminal Case No. 443, appellant Zosimo Antiporda is found guilty of homicide, and sentenced to suffer the indeterminate penalty of ten (10) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal, as maximum. He is ordered to indemnify the heirs of Pedro Espiritu in the sum of FIFTY THOUSAND PESOS (P50,000.00).

SO ORDERED.

Cruz (Chairman), Griño-Aquino and Bellosillo, JJ., concur.

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