

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ERUBIEN Z. NABAYRA, ACCUSED-APPELLANT.

G.R. Nos. 96368-69. October 17, 1991

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

In two (2) separate informations filed by the Provincial Prosecutor's Office of Aklan, appellant Erubien Z. Nabayra, was charged with the crimes of murder and illegal possession of firearm and ammunition in the Regional Trial Court of Kalibo, Aklan. The offenses were allegedly committed as follows:

a) For Murder

"That on or about the 14th day of December, 1989, in the morning, in Barangay Pinonoy, Municipality of Libacao, Province of Aklan, Republic of the Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a deadly weapon consisting of a fighting bolo, with evident premeditation and treachery, and with intent to kill, did then and there wilfully, unlawfully and feloniously attack, assault and wound REMY NABAYRA, thereby inflicting upon the latter physical injuries, to wit:

"1. Incised wounds - a) Forehead 3"L 0.5 Depth;

b) Left forearm-mid-lateral 2"L - 1" Depth;

c) Rt. forearm - anterior surface just above the wrist;

2. Stab wounds - a) Rt. iliac region 1.5"L - severing the descending colon;

b) Left hypochondriac region severing part of the liver and transverse colon.

3. Incised wounds - Occipital portion of head - 1.5"L 0.5" depth

- Back at level of the thoracic vertebrae (sic) a (sic) severing the vertebrae;

- Level of the right elbow - 1.5"L-1" Depth

- Rt. lumbar region - 2"L-1.5"Depth

- Left elbow - 1"L-0.5: Depth."

as per Medico-Legal Report on Physical Injuries issued by Dr. Chedy S. Bueno, Rural Health Physician, Libacao, Aklan, hereto attached and made an integral part of this information, which injuries caused the death of REMY NABAYRA." (Information, pp. 1-2)

b) For illegal possession of firearm and ammunition defined and penalized under Presidential Decree No. 1866:

"That on or about the 14th day of December, 1989, in the morning, in the Poblacion, Municipality of Libacao, Province of Aklan, Republic of the Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, did then and there wilfully, unlawfully and feloniously have in his possession and under

his custody and control one (1) handgun, locally known as "Paltik or Pugakang" and two (2) 12 gauge live ammunitions, without having obtained the proper license, permit or lawful authority to carry and/or possess the same.

CONTRARY TO LAW". (Joint Decision, p. 2)

The two cases arose from a continuing occasion on the same date, hence they were jointly tried by the trial court.

When arraigned, the appellant in both cases pleaded not guilty.

As regards the murder charge, the appellant admitted killing the victim, his uncle, Remy Nabayra. He, however, interposed self-defense. With this admission, the prosecution did not anymore present evidence to prove that the accused killed the victim. However, since the defense would not admit all the injuries enumerated in the information, the prosecution presented the government doctor to testify on the injuries suffered by the victim resulting in his death.

As regards the charge for illegal possession of firearm and ammunition, the prosecution presented the testimonies of two (2) police officers of the Libacao Police Force who apprehended the appellant and found in his possession a handbag (Exhibit "C") containing a handgun (Exhibit C-1); an ammunition which was red in color (Exhibit C-2); another ammunition (Exhibit C-3) and a sack.

The trial court narrates the prosecution's evidence as follows:

At about 11 o'clock in the morning of December 14, 1989 in the bank of the Aklan river in Barangay Pinonoy, Libacao, Aklan, where there was a ferry service from poblacion Libacao on the other side of the said river, the accused Erubien Z. Nabayra boloed and killed his uncle Remy Nabayra. The prosecution, as already stated above, had dispensed with the presentation of evidence to prove this fact as the accused had admitted that he was the one who inflicted the wounds on the said victim during the said incident which resulted in the latter's death. At about that time, Pfc. Alberto Villorente and Pat. Elmer de Jose were patrolling the vicinity of the ferry zone and saw a group of persons near the opposite bank of the Aklan river which is already within the territory of Barangay Pinonoy. The said barangay is separated by the Aklan river from poblacion Libacao. The said policemen met Ulysses Ortega, Jr., 12 years old and boatman of the ferry boat, who informed them that there was a hacking incident at the other side of the river. The policemen proceeded on their way to the scene of the incident and they met the accused Erubien Nabayra in the river bank, poblacion side, who was walking towards poblacion Libacao. They saw the clothes and bolo of Erubien Nabayra stained with fresh blood, so they told him to stop and put down his bag and bolo, which he heeded. The policemen noticed a gun inside the handbag as its barrel was protruding by one and one-half inches through the hole in the bag. They confiscated the handgun (Exhibit "C" for Crim. Case No. 2999), including the bag (Exhibit "B" for Crim. Case No. 2999); and also the bolo (Exhibit "C" for Crim. Case No. 2998) and its scabbard (Exhibit "C-1", Crim. Case No. 2998). When the policemen opened the handbag and took out the gun (a homemade handgun or "paltik"), they found out that it was loaded with one ammunition (Exhibit "C-1" for Crim. Case No. 2999), and another ammunition (Exhibit "C-2") was found in the sack (Exhibit "C-3"). When asked by the policemen at the time they met why his clothes were stained with blood, the accused answered that he hacked his uncle Remy Nabayra. Pat. Elmer de Jose went to the scene of the incident while Pfc. Alberto Villorente kept watch over the accused. Pat. de Jose found the victim about 50 meters from the river. The policemen caused the victim to be brought to the Libacao Medicare Hospital, then they proceeded to the police station with the accused where they opened the handbag containing the gun. When the policemen apprehended the accused in the river bank, the accused admitted ownership of the gun. He was not however able to present any license or permit to carry any firearm. When the policemen confronted the accused about his bloodstained clothes and bolo, the accused did not tell them that he was surrendering because he hacked his Uncle Remy Nabayra." (Joint Decision, pp. 3-5)

On the other hand, the appellant's version of the incident is summarized by the trial court as follows:

"After plowing his corn field in Barangay Pinonoy, Libacao, Aklan, at past 10 o'clock in the morning of December 14, 1989, the accused went to the Aklan River, about 30 meters from his farm, to wash. In the river bank, he met the victim Remy Nabayra, his uncle. The said victim got a bag from inside the sack he was carrying and after opening the bag, he took out a gun, a 'paltik' pistol, and aimed it at the accused, saying, 'I will shoot, I will kill you.' At this juncture, the accused drew his bolo from its scabbard tied to the left side of waist and hacked Remy Nabayra, hitting the latter on the left temple. Remy Nabayra turned around after being hit, and the accused hacked him again, hitting him at his back. Then the victim ran away and the accused chased him. The victim fell to the ground and the accused stabbed him again. The accused got the gun which the victim was holding with his right hand beneath his back. The victim was not able to fire his gun even once. The accused place the gun inside the bag which the victim was also holding and crossed the river by wading, with the intention of going to the municipal hall of Libacao in order to surrender the gun. On the way, the accused met Pfc. Alberto Villorente and Pat. Elmer de Jose who told him to put down the gun and bolo, which he did. The accused identified the bolo, Exhibit "C" (for Crim. Case No. 2998), and admitted it was the same bolo he used in hacking and stabbing Remy Nabayra (tsn., p. 9, April 20, 1990, M.V. Quimpo). He surrendered the gun and the bolo to the policemen. The accused was not in good terms with Remy Nabayra before December 14, 1989 because the latter was accusing him of having stolen the carabao of Anunciacion Orbista Nabayra, mother of Remy Nabayra and grandmother of the accused. On cross-examination, the accused said the police stopped him and arrested him; that he did not tell the policemen he was surrendering to them; that it was already while he was in the hands of the policemen and the gun was already in the possession of the policemen when he told them he was going to the municipal building (tsn., pp. 3-5, May 2, 1990, M.V. Quimppo). (Joint Decision, p. 5)

The appellant was found guilty in both cases, to wit:

"WHEREFORE, after a meticulous assessment of the evidence on record, this Court finds, and so holds, that the accused Erubien Z. Nabayra is guilty beyond reasonable doubt, as principal, of the crime of Murder in Criminal Case No. 2998, defined and penalized in Article 248 of the Revised Penal Code, and of Illegal Possession of Firearm and Ammunition in Criminal Case No. 2999, defined and penalized by Presidential Decree No. 1866, and hereby sentences him as follows:

For the crime of Murder, the penalty of Reclusion Perpetua, to indemnify the heirs of Remy Nabayra the sum of P50,000.00, as death indemnity.

For the crime of Illegal Possession of Firearm and Ammunition, the penalty of imprisonment ranging from EIGHTEEN (18) YEARS, EIGHT (8) MONTHS AND ONE (1) DAY of Reclusion Temporal as minimum to TWENTY (20) YEARS of Reclusion Temporal as maximum, and to pay the costs.

The firearm and ammunition, Exhibits C, C-1 and C-2, are ordered forfeited in favor of the government to be disposed of according to law."

The appellant now contends:

- "1. THE LOWER COURT ERRED IN FINDING THAT THE ACCUSED IS THE AGGRESSOR.
2. THE LOWER COURT ERRED IN FINDING THAT THE GUN WHICH IS THE SUBJECT OF CRIMINAL CASE 2990 BELONGS TO THE ACCUSED." (P. 3, Brief for the Accused-Appellant).

The appellant insists that he killed his uncle Remy Nabayra in self-defense. In view of this admission it is incumbent upon him to proffer strong clear evidence to prove this justifying circumstance to be relieved of any criminal liability. (People v. Bayocot, 174 SCRA 285 [1989]; People v. Masangkay, 157 SCRA 320 [1988]; People v. Abagon, 161 SCRA 255 [1988]; People v. Tesorero, 71 SCRA 579 [1976]; People v. Llamera, 51

SCRA 48, [1973]; *People v. Bauden*, 77 Phil. 105 [1946]; *People v. Ansoyon*, 75 Phil. 772 [1946] cited in *People v. Bausing, et al.* G.R. No. 64965 July 18, 1991.

Legitimate self-defense is acceptable only when the following requisites are present: 1) unlawful aggression on the part of the victim; 2) reasonable necessity of the means employed to prevent or repel it; and 3) lack of sufficient provocation on the part of the person defending himself. (par. 1, Article 11, Revised Penal Code).

The appellant claims that the victim was the unlawful aggressor since the latter was the first to draw his gun and tried to shoot him. Unluckily for the victim, the gun did not fire prompting him to draw his bolo and hacked him in self-defense.

The circumstances as related by the appellant as regards the encounter between him and the victim and the physical evidence on record however, belie the above asseverations.

According to the appellant, he met the victim at the bank of the river who was carrying a sack. The victim then got a bag from the sack. The victim opened the bag and took out a gun which he aimed at him saying "I will, shoot you, I will kill you." At this precise time, the appellant drew his bolo from its scabbard and began hacking the victim.

The scenario depicted by the appellant is incredulous. Human instinct to preserve one's life demands that at the time the victim took out the gun from his bag, the appellant should have reacted to repel the imminent danger that he found himself in. The appellant would not have stood there watching and waiting for the victim to open a bag, take out a gun and aim at him. He would not have awaited the shout "I will kill you" before he started to repel the action of the victim. Such action of the victim against the appellant could have been foreseen by a rational man considering that according to the appellant, he and the victim were not on good terms as he was accused by the victim to have stolen the carabao of the mother of the victim. Well-settled is the rule that "evidence to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself such as the common experience and observation of mankind can approve as probable under the circumstances." (*People v. Flores*, 125 SCRA 244 [1983]; *People v. Torio*, 126 SCRA 265 [1983]; *Borromeo v. Court of Appeals*, 131 SCRA 318 [1984].

Moreover, the manner of infliction and the number of physical injuries sustained by the victim during the incident negate the self-defense posture of the appellant. As the lower court correctly stated:

"If the intention of the accused was only to defend himself, and he was already able to hack the victim on the left temple, which wound was fatal according to the doctor, he would not have inflicted further injuries on the victim who was his uncle. The accused continued to hack the victim on his back and even chased the victim when he ran away to escape from further torture. When the victim fell to the ground, the accused inflicted more injuries on him, as according to him, he wanted to kill the victim and get the gun from him (tsn., p. 7, April 20, 1990, M.V. Quimpo). The accused acted with murderous ferocity when he finished the victim off. The victim appeared helpless at the hands of the accused. He was at the complete mercy of the accused. Even Ludovico Asiong, a witness for the defense, confirmed the fact that the victim went to the public market of Libacao that fateful day of December 14, 1989 as it was the market day of the town and was carrying that sack on his way home." (Joint Decision, p. 7)

However, we agree with the Solicitor General that the crime committed by the appellant was homicide and not murder.

The information alleges the existence of treachery and evident premeditation qualifying the crime committed by the appellant to murder. However, the prosecution did not present any evidence to prove the presence of any of these qualifying circumstances. It did not present eyewitnesses to the incident. The doctor presented as witness

testified only on the number of physical injuries sustained by the victim as a result of the hacking incident. The two policemen presented as witnesses did not testify on the circumstances before or during the hacking incident.

In view of these circumstances the lower court erred in appreciating treachery or evident premeditation to qualify the crime to murder. The well-entrenched principle is that "treachery cannot be presumed. It must be proven as conclusively as the act of killing itself." (People v. Caldito, 182 SCRA 66 [1990] citing People v. Manalo 148 SCRA 98 [1987]). As regards the qualifying circumstance of evident premeditation, the following elements must be established: 1) the time when the offender determined to commit the crime; 2) an act manifestly indicating that he has clung to his determination; 3) sufficient lapse of time between determination and execution to allow himself to reflect upon the consequences of his act. (People v. Quintos, 186 SCRA 14 [1990] citing People v. Talla, 181 SCRA 133 [1990]).

Anent the charge of illegal possession of firearm and ammunition, the appellant reiterates his stance that the gun and the ammunition taken from him belonged to the victim. He testified that at the time the two policemen apprehended him, he was on his way to surrender himself, the bolo he used in hacking the victim, and the gun he took from the victim to the police authorities.

The appellant's claim was, however, denied by the two policemen who apprehended him. When confronted by Pfc. Villorente and Pat. de Jose, the appellant did not state that the gun was taken by him from Remy Nabayra and that he was surrendering the same to them. It was only after the two policemen apprehended the appellant that the latter told them that he was on his way to the municipal hall. In fact, according to Pfc. Villorente, the appellant admitted that he owned the unlicensed gun Villorente testified:

"xxx xxx xxx

Q. After finding out that he was carrying a handgun locally known as 'paltik', did you ask him if he has any license for the possession of the same?

A. I did not ask him, instead we just brought him to our station.

xxx xxx xxx

Q. Did he produce any license in your presence authorizing him to have that firearm?

A. There is none, sir.

Q. Even in the station he did not present any license to carry said firearm?

A. No, sir.

xxx xxx xxx

(TSN, February 26, 1990, pp. 7-8).

Q. Did the accused in this case have any companion during the time that you arrested him?

A. None.

Q. Did he accept ownership of this handbag as well as the handgun?

A. Yes, sir. He took hid (sic) by putting it down.

xxx xxx xxx

(TSN, February 27, 1990, p. 7; underscoring supplied).

As between these two conflicting testimonies, we rule in favor of the police officers. The appellant did not show evidence that the police officers were prejudiced against him. Between the biased testimony of the appellant and the unprejudiced testimony of the police officers, the latter's testimony should prevail. (*People v. Canizares*, 107 SCRA 296 [1981]).

WHEREFORE, the Court renders judgment as follows:

1. The decision in G.R. No. 96368 is MODIFIED by holding appellant Erubien Z. Nabayra guilty of HOMICIDE. There being neither generic mitigating nor an aggravating circumstance present, the appellant shall suffer the penalty of imprisonment for an indeterminate period ranging from TEN (10) YEARS of prison mayor as minimum to SEVENTEEN (17) YEARS and FOUR (4) MONTHS of reclusion temporal as maximum;

2. In G.R. No. 96369, the questioned decision is AFFIRMED; and

In all other respects, the questioned joint decision is AFFIRMED.

SO ORDERED.

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

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