

## SECOND DIVISION

[ G.R. No. 139456, July 07, 2004 ]

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. ADONES ABATAYO,  
APPELLANT.**

### D E C I S I O N

**CALLEJO, SR., J.:**

On appeal is the Decision<sup>[1]</sup> of the Regional Trial Court of Mandaue City, Branch 56, in Criminal Case No. DU-4381 finding appellant Adones Abatayo guilty beyond reasonable doubt of two counts of murder and sentencing him to suffer *reclusion perpetua* for each count.

The appellant was charged with the crime of double murder in an Information dated January 31, 1994. The indictment reads:

That on or about the 10<sup>th</sup> day of September 1993, in the City of Mandaue, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with deliberate intent to kill and with treachery and evident premeditation, did then and there wil[l]fully, unlawfully and feloniously attack, assault and strike Dominador Basalan and Teofredo Basalan with the use of a GI pipe, thereby inflicting upon them mortal wounds in (*sic*) their head[s] which caused their instantaneous death.

CONTRARY TO LAW.<sup>[2]</sup>

Upon arraignment, the appellant, assisted by counsel, pleaded not guilty.<sup>[3]</sup>

The first witness for the prosecution was Juanito Gutang, whose direct examination was terminated during the trial of November 22, 1994. The appellant's counsel commenced with his cross-examination of the witness, but later prayed for a resetting as he still had many questions for the said witness. The court granted the motion. However, during the continuation of the trial on January 23, 1995, Juanito failed to appear due to fever. The public prosecutor then asked the court to defer the further cross-examination of Juanito until he recovered from his illness, and that he be allowed to present his second witness, Apolonio Quilag. The appellant did not object. The court granted the motion, but warned the public prosecutor that if Juanito would not appear to continue with his testimony by the next trial date, his testimony would be stricken off the record.<sup>[4]</sup> However, such warning was not contained in the order issued by the court on even date.

During the trial on March 2, 1995, the public prosecutor presented PO2 Alfredo Andales, and thereafter, the victims' mother, Silvina Basalan. Both testimonies were completed. The hearing of April 17, 1995 was cancelled, after the parties admitted the authenticity of Dr. Ladislao Diola, Jr.'s necropsy report and agreed to dispense

with his testimony thereon. The public prosecutor announced that he would rest his case on May 22, 1995.<sup>[5]</sup>

During the trial on May 22, 1995, the public prosecutor manifested that he was ready to offer his documentary evidence and rest his case thereafter. He offered in evidence the affidavit of Juanito as part of his documentary evidence. The appellant objected to the admission of the affidavit for the purpose for which it was offered. The court nevertheless admitted the affidavit and the public prosecutor rested his case. On motion of the appellant, trial was set at 8:30 a.m. of June 26, 1995 for the presentation of the witnesses for the defense.

### **The Case for the Prosecution<sup>[6]</sup>**

Teofredo Basalan and his brother Dominador Basalan, aged 24 and 26, respectively, lived with their mother Silvina Basalan in Colon, Naga, Cebu City.<sup>[7]</sup> They were stay-in construction workers at the construction site of the Gaisano FCDC at Ibabao, Mandaue City.<sup>[8]</sup>

At around 7:00 p.m. of September 9, 1993, after a hard day's work at the construction site, laborers Juanito Gutang, Apolonio Quilag and Pedro Esconia, as well as an unidentified co-worker, retired early in their quarters.<sup>[9]</sup>

At around 3:00 a.m. the following day,<sup>[10]</sup> Juanito was awakened by an unusual thud, similar to that produced by someone "striking somebody."<sup>[11]</sup> He got up and saw the appellant, from a distance of about three (3) meters,<sup>[12]</sup> hitting Teofredo and Dominador with a lead pipe.<sup>[13]</sup> Juanito woke up his co-workers and told them what he had just witnessed.<sup>[14]</sup> Apolonio saw the victims, already lying in a pool of blood.<sup>[15]</sup> Juanito and his co-workers immediately reported the incident to the security guards on duty who, in turn, called up the Mandaue City police station.<sup>[16]</sup>

Meanwhile, the appellant hurriedly left the job site, bringing with him his personal belongings.<sup>[17]</sup>

PO2 Alfredo Andales, who was assigned to the case, forthwith conducted an on-the-spot investigation. At the crime scene, he found the victims' bloodied corpses, with their respective heads smashed. He also found a galvanized iron (G.I.) pipe, the weapon used to kill the victims.<sup>[18]</sup> His investigation revealed that the night before the victims were killed, they had an acrimonious quarrel with the appellant over some misplaced construction tools which were later recovered.<sup>[19]</sup> The policemen had the incident recorded in the police blotter<sup>[20]</sup> with the appellant as the prime suspect.

In the afternoon of that same day, the bodies of the victims were brought to the Cosmopolitan Funeral Homes where Dr. Ladislao V. Diola, Jr., conducted a *post mortem* examination. He signed a necropsy report stating that the victims died due to "cardio respiratory arrest due to shock and hemorrhage secondary to injuries to the head."<sup>[21]</sup> By agreement of the parties, the testimony of Dr. Diola was dispensed with after the defense admitted the findings contained in the doctor's *post mortem*

report.<sup>[22]</sup> On September 16, 1993, Juanito and Apolonio subscribed and swore to the truth of their respective affidavits before the public prosecutor.<sup>[23]</sup>

Silvina testified that she fainted when she learned of the death of her two sons. She spent around P50,000.00 for the wake and funeral. She also testified that the death of her two sons caused her emotional pain, but when asked to translate her pain into monetary terms, she left it for the court to determine.<sup>[24]</sup>

### **The Evidence of the Appellant<sup>[25]</sup>**

The appellant testified that he started working for Super Metro Gaisano as a construction worker sometime in mid-August 1993. On September 9, 1993, after rendering overtime work for two hours, he decided to go home. He left the job site at around 7:00 p.m., and hitched a ride home in the company's vehicle driven by Charmel Ralago, who happened to be his neighbor. He finally arrived home at about 9:00 p.m. The following morning, his uncle dropped by his place and asked to be accompanied to Carcar, Cebu, as it was the town's *fiesta*. The appellant readily acquiesced. Consequently, he absented himself from work, and requested a co-worker to get his salary. After the *fiesta*, he went back home but no longer reported for work. Instead, he went to Bohol. He returned home in December 1993 in time for the holiday season. He was surprised when he was arrested in August 1994 for the killings of the Basalan brothers.<sup>[26]</sup>

Bernabe Hinario, 23 years old, erstwhile *taho* peddler and next-door neighbor of the appellant, corroborated the latter's alibi. He testified that at about 9:00 p.m. on September 9, 1993, as he was whiling away the time in the neighborhood, he saw the appellant arrive from work as usual. The appellant greeted him and invited him to attend the *fiesta* in Carcar, Cebu, the next day. He declined because of his work. Thereafter, they parted ways, as the appellant proceeded to his house.<sup>[27]</sup>

Leonora Abatayo, the appellant's mother, testified that she was in their house when the appellant arrived home at about 9:00 p.m. on September 9, 1993. After taking his dinner, the appellant slept. The following morning, after breakfast, the appellant left with his uncle, Fransico Malubay, to attend the *fiesta* in Carcar, Cebu.<sup>[28]</sup>

After trial, the court rendered a decision, the dispositive portion of which reads:

Foregoing considered and in the light of Prosecution witness Juanito Gutang's positive identification and eyewitness account of the killing, the Court is constrained and so finds the Accused GUILTY of the crime of two counts of Murder. Accordingly, Accused is sentenced to suffer the penalty of *Reclusion Perpetua* for each count of Murder. Accused is, likewise, ordered to:

1. Reimburse the victim's kin for actual expenses in the sum of Seventeen Thousand Pesos (P17,000.00);
2. Pay damages in the total sum of Two Hundred Thousand Pesos (P200,000.00) plus costs.

SO ORDERED.<sup>[29]</sup>

In convicting the appellant, the trial court relied on the testimony of Apolonio and eyewitness Juanito Gutang, which were corroborated by the medical findings showing the nature and the location of the wounds inflicted on the victims. The court brushed aside as dubious and weak the denial and alibi interposed by the appellant. According to the court, such defenses could not prevail over the positive identification made by Juanito of the appellant as the perpetrator of the crime.<sup>[30]</sup>

The appellant now assails his conviction, asserting that:

### I

THE TRIAL COURT ERRED IN NOT ORDERING THE STRIKING OUT OF THE ENTIRE TESTIMONY OF THE PROSECUTION[‘S] ALLEGED EYEWITNESS JUANITO GUTANG ANENT THE CRIME CHARGED IN VIEW OF HIS UNJUSTIFIED FAILURE TO ALLOW HIMSELF TO BE FURTHER CROSS-EXAMINED PURSUANT TO ITS ORDER DATED JANUARY 23, 1995.

### II

THE TRIAL COURT ERRED IN GIVING PROBATIVE VALUE TO THE UNFINISHED TESTIMONY OF THE PROSECUTION WITNESS JUANITO GUTANG DESPITE ITS INHERENT IMPLAUSIBILITY AND IN DISREGARDING THE EVIDENCE INTERPOSED BY [THE] ACCUSED-APPELLANT WHICH WAS AMPLY CORROBORATED ON MATERIAL POINTS.

### III

THE TRIAL COURT ERRED IN RENDERING A VERDICT OF CONVICTION NOTWITHSTANDING THE FACT THAT ACCUSED-APPELLANT’S GUILT WAS NOT PROVEN BEYOND REASONABLE DOUBT.<sup>[31]</sup>

### **The Ruling of the Court**

We affirm the findings of the trial court and sustain the conviction of the appellant with modifications.

#### ***The Incomplete Cross-Examination of Juanito Gutang***

The appellant insists that the trial court should not have given credence to the story of the lone eyewitness for the prosecution, Juanito Gutang, considering that his counsel was not able to continue cross-examining the witness. He strongly argues that his constitutional and procedural right to confront the witness against him was thereby impaired. Citing *Ortigas, Jr. v. Lufthansa German Airlines*<sup>[32]</sup> as the case in point, the appellant faults the trial court for relying on Juanito’s testimony despite the warning it made during the trial of January 23, 1995, that it would consider the entire testimony of Juanito stricken off the record for lack of proper cross-examination.<sup>[33]</sup>

The Office of the Solicitor General (OSG), for its part, asserts that while the appellant has the constitutional right to cross-examine the witnesses against him,

he waived such right when he failed to invoke the same after his initial cross-examination of Juanito.

We agree with the OSG.

Under Article III, Section 14(2) of the 1987 Constitution, the appellant has the right to meet the witnesses against him face to face. Under Rule 115, Section 1(f) of the Rules of Court, he has the right to confront and cross-examine the witnesses against him at the trial, a fundamental right which is part of due process. However, the right of confrontation and cross-examination is a personal one. It is not an absolute right which a party can claim at all times.<sup>[34]</sup>

In *Savory Luncheonette v. Lakas ng Manggagawang Pilipino*,<sup>[35]</sup> we ruled that the right to confront the witness may be waived by the accused, expressly or impliedly.

The right of a party to confront and cross-examine opposing witnesses in a judicial litigation, be it criminal or civil in nature, or in proceedings before administrative tribunals with quasi-judicial powers, is a fundamental right which is part of due process. However, the right is a personal one which may be waived, expressly or impliedly, by conduct amounting to a renunciation of the right of cross-examination. Thus, where a party has had the opportunity to cross-examine a witness but failed to avail himself of it, he necessarily forfeits the right to cross-examine and the testimony given on direct examination of the witness will be received or allowed to remain in the record.

The conduct of a party which may be construed as an implied waiver of the right to cross-examine may take various forms. But the common basic principle underlying the application of the rule on implied waiver is that the party was given the opportunity to confront and cross-examine an opposing witness but failed to take advantage of it for reasons attributable to himself alone.<sup>[36]</sup>

In the later case of *Fulgado v. Court of Appeals*,<sup>[37]</sup> we ruled that the task of recalling a witness for cross-examination is imposed on the party who wishes to exercise said right, and stressed that it should be the opposing counsel who should move to cross-examine the plaintiff's witness. Thus:

The task of recalling a witness for cross-examination is, in law, imposed on the party who wishes to exercise said right. This is so because the right, being personal and waivable, the intention to utilize it must be expressed. Silence or failure to assert it on time amounts to a renunciation thereof. Thus, it should be the counsel for the opposing party who should move to cross-examine plaintiff's witnesses. It is absurd for the plaintiff himself to ask the court to schedule the cross-examination of his own witnesses because it is not his obligation to ensure that his deponents are cross-examined. Having presented his witnesses, the burden shifts to his opponent who must now make the appropriate move. Indeed, the rule of placing the burden of the case on plaintiff's shoulders can be construed to extremes as what happened in the instant proceedings.<sup>[38]</sup>