

THIRD DIVISION

[G. R. No. 136741, July 17, 2003]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
VICTOR AÑORA Y BACALLA, ACCUSED-APPELLANT.**

D E C I S I O N

CARPIO MORALES, J.:

On appeal is the August 31, 1998 Decision^[1] of the Regional Trial Court (RTC) of Cebu City, Branch 12, in Criminal Case No. CBU-20016 finding Victor Añora y Bacalla (appellant) guilty of murder for fatally shooting Fernando Lim (the victim).

On July 22, 1990, the victim was shot and died as a result of two gunshot wounds located at his chest and right arm.^[2]

Three days after the incident or on July 25, 1990, Pablo Rico, Jr. and Jonas Niala executed a joint affidavit^[3] recounting that at the time and date of the incident, they heard "a single burst of fire" and, on verification, they saw two persons one of whom "was about to stumble down to the ground" and the other person was "still standing and holding a firearm of an unknown caliber then a moments (sic) later he tucked his firearm to his [waist];" that the man who tucked a firearm to his waist walked hurriedly towards them (Rico and Niala) and they "positively identified himself (sic) and [they] **came to know his name** as Victor Añora;" and that the person lying down was Fernando Lim.

Also on July 25, 1990, the victim's father Atilano Lim, Jr. executed an affidavit^[4] stating that his son was shot to death "by his assailant whom **I know now** as Victor Añora."

A preliminary investigation of the case was conducted by the Cebu City Prosecutor's Office, but the subpoena addressed to the suspect Victor Añora of Magsaysay Street, Pasil, Cebu City, who was directed to file a counter-affidavit, was not served as he could not allegedly be located at his given address. Hence, in accordance with its Resolution^[5] of September 6, 1990, upon a finding of probable cause against Victor Añora, the Prosecutors Office filed an Information^[6] for Murder at the RTC of Cebu on October 30, 1990, allegedly committed as follows:

That on or about the 22nd day of July, 1990, at about 3:20 A.M., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, armed with a gun, with deliberate intent, with intent to kill and with treachery and evident premeditation, did then and there attack, assault and sho[o]t one Fernando Lim with the use of a gun hitting the latter upon vital parts of his body and inflicting upon him the following physical injuries:

"GUNSHOT WOUNDS OF THE CHEST (L) AND (R) ARM"

and as a consequence of said injuries Fernando Lim died a few minutes later.

Contrary to law.^[7]

A warrant^[8] was issued on November 8, 1990 for the arrest of Victor Añora of Magsaysay Street, Pasil, Cebu City which warrant of arrest could not be served, he having allegedly ceased to reside thereat.

More than nine months and three years after the shooting or on May 14, 1994,^[9] appellant was arrested and was identified by Rico at the police station as the man he saw tucking a gun into his waist.^[10]

On arraignment on June 22, 1994, appellant entered a plea of not guilty.^[11]

The prosecution presented Rico, Jr. who finished second year college as a criminology student, from whose testimony the following is gathered: On July 22, 1994, at 3:20 a.m., while he and his companion Niala were buying barbeque for snacks at the corner of Junquera and Sanciangco streets, Cebu City, some eight armslength from the Alliance chapel along Junquera street, they heard what sounded to be a "gunburst." After the lapse of about five minutes, he and Niala, on repairing to where they heard the "gunburst" came from, saw two persons in front of the chapel. He saw one of the persons fall down, whom he recognized as his neighbor, Fernando Lim, while the other one, whom he identified as the appellant, tucked a firearm into his waist, walked towards the direction of the south, the same direction where he (Rico) and Niala came from, and boarded a taxicab.^[12]

Rico added that prior to the incident, he **heard** that appellant and the victim who is a drug pusher had an argument because the latter was asked (by appellant) to buy shabu but he pocketed the money^[13] for the purpose.

Rico's co-affiant Niala who was subpoenaed as a witness, on motion of the prosecution, failed to show up. Despite the issuance of a bench warrant against Niala, the prosecution failed to get him to testify.

Denying the accusation and proffering alibi, appellant claimed that on July 22, 1990, at about 3:20 a. m., he was busy unloading fish at the Pasil Fish Market, Cebu City.^[14] He was corroborated by Roberto Tesoro, a neighbor and "head of the laborers of fish vendors in Pasil" who testified that appellant was one of the 14 men who worked under his supervision, and that on the day of the incident, appellant was helping unload fish at the Pasil Fish Market from 2:00 a.m. to 10:00 a.m. the next morning.^[15]

The defense suggested that the killing of the victim was committed by appellant's uncle and namesake, Victor Añora y Cempron, who has a string of criminal cases against him.

Finding that "the defense of alibi cannot prevail over the positive identification of the accused" as the person Rico saw in front of the Alliance Chapel tucking his firearm