

## EN BANC

[ G.R. No. 136267, July 10, 2001 ]

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.  
FIDEL ABRENICA CUBCUBIN, JR., ACCUSED-APPELLANT.**

### DECISION

**MENDOZA, J.:**

This case is here on automatic review of the decision,<sup>[1]</sup> dated October 5, 1998, of the Regional Trial Court, Branch 88, Cavite City, finding accused-appellant Fidel Abrenica Cubcubin, Jr. guilty of murder and sentencing him to suffer the penalty of death.

The information against accused-appellant alleged:

That on or about August 26, 1997, in the City of Cavite, Republic of the Philippines and within the jurisdiction of this Honorable Court, the abovenamed accused, armed with an unlicensed homemade (paltik) Smith and Wesson caliber .38 revolver, with no serial number, with intent to kill, acting with treachery and evident premeditation and taking advantage of the darkness of [the] night, did, then and there, willfully, unlawfully, and feloniously, assault, attack and shoot with the aforesaid unlicensed firearm a certain HENRY PECHO PIAMONTE, hitting and inflicting upon the latter gunshot wounds in the head which caused the latter's instantaneous death.

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

Accused-appellant pleaded not guilty to the charge, whereupon trial on the merits ensued.

Eight witnesses were presented by the prosecution: police officers Florentino M. Malinao, Jr., Enrico A. Rosal, Raymundo D. Estoy, Jr., and Virgilio L. Pilapil, all of whom belong to the Cavite City Police Department; National Bureau of Investigation ballisticsman Isabelo D. Silvestre, Jr.; NBI Forensic Chemist II Juliet Gelacio-Mahilum; Dr. Regalado D. Sosa, City Health Officer II and City Medico-Legal Officer of the Department of Health (DOH) in Cavite City; and Danet D. Garcellano, a food server at the Sting Cafe in San Antonio, Cavite City. The testimony of Police Chief Inspector Edwin G. Nemenzo, Chief of the Records, Firearms and Explosives Division of the Philippine National Police (PNP) in Camp Crame, Quezon City, was dispensed with in view of his certification, dated October 7, 1997 (Exh. N),<sup>[3]</sup> that accused-appellant is not a licensed/registered holder of firearm of any kind and caliber.

The prosecution evidence is to the following effect:

At about 3:30 in the morning of August 26, 1997, Sgt. Rogel, desk officer of the Cavite City police station, received a telephone call that a person had been shot near the cemetery along Julian Felipe Boulevard in San Antonio, Cavite City. For this reason, a police team, composed of SPO1 Malinao, Jr., PO3 Rosal, PO3 Estoy, Jr., PO3 Manicio, and SPO3 Manalo, responded to the call and found Henry P. Piamonte slumped dead on his tricycle which was then parked on the road. Police photographer Fred Agana took pictures of the crime scene (Exhs. A, A-1, A-2, and A-3)<sup>[4]</sup> showing the victim slumped on the handle of the tricycle.<sup>[5]</sup> PO3 Rosal testified that a tricycle driver, who refused to divulge his name, told him that accused-appellant and the victim were last seen together coming out of the Sting Cafe, located in San Antonio near the gate of Sangley Point, Cavite City, about a kilometer and a half away from the crime scene. Forthwith, PO3 Rosal and SPO1 Malinao, Jr. went to the cafe and talked to Danet Garcellano, a food server/waitress in Sting Cafe.<sup>[6]</sup> The other policemen at the police station called up City Prosecutor Agapito Lu who also proceeded to Sting Cafe. Garcellano told the police investigators that she had seen accused-appellant arrive at Sting Cafe at about 12:00 midnight and drink beer; that at about 2:30 a.m., the victim arrived and joined accused-appellant; that the two stayed in the cafe until 3:30 a.m.; and that she did not know if they left together as she was serving other customers. Garcellano described accused-appellant as a lean, dark-complexioned, and mustachioed man who had on a white t-shirt and brown short pants.<sup>[7]</sup>

Armando Plata, another tricycle driver, told PO3 Rosal and SPO1 Malinao, Jr. that Garcellano's description fitted a person known as alias "Jun Dulce." Armando Plata, who knew where accused-appellant lived, led PO3 Rosal, SPO1 Malinao, Jr., and Prosecutor Lu to accused-appellant's house in Garcia Extension, Cavite City. The policemen knocked on the door for about three minutes before it was opened by a man who answered the description given by Danet Garcellano and who turned out to be accused-appellant. The police operatives identified themselves and informed him that he was being sought in connection with the shooting near the cemetery. Accused-appellant denied involvement in the incident. PO3 Rosal and SPO1 Malinao, Jr. then asked permission to enter and look around the house.<sup>[8]</sup>

SPO1 Malinao, Jr. said that upon entering the house, he noticed a white t-shirt, bearing the brand name "Hanes" (Exh. H)<sup>[9]</sup> and the name "Dhenvher" written in the inner portion of the shirt's hemline, placed over a divider near the kitchen. Upon close examination, he said that he found it to be "bloodied." When he picked up the t-shirt, two spent .38 caliber shells fell from it. PO3 Rosal stayed with accused-appellant while he conducted a search. They then took the t-shirt and the two bullet shells. SPO1 Malinao, Jr. then asked accused-appellant to go with them to Sting Cafe for purposes of identification. There, accused-appellant was positively identified by Danet Garcellano as the victim's companion. The police investigators asked accused-appellant where the fatal gun was. SPO1 Malinao, Jr. said accused-appellant refused to tell him where he hid the gun so he sought his (accused-appellant's) permission to go back to his house to conduct a further search. Thereupon, SPO1 Malinao, Jr., accompanied by Prosecutor Lu, PO3 Estoy, Jr., PO3 Manicio, SPO3 Manalo, and PO3 Rosal, proceeded thereto.<sup>[10]</sup> Inside the house, they saw accused-appellant's 11-year old son Jhumar. PO3 Estoy, Jr. found on top of a plastic water container (*drum*) outside the bathroom a homemade Smith and Wesson caliber .38 revolver (six shooter), without a serial number (Exh. F). He found the gun loaded with five live bullets (Exhs. M, M-1, M-2, M-3, and M-4). PO3 Estoy, Jr. said that he inscribed his

initials "RDE" (for Raymundo D. Estoy) on the cylinder of the gun with the use of a sharp object. While PO3 Estoy, Jr. was conducting the search, SPO1 Malinao, Jr. and PO3 Rosal stayed with accused-appellant in the sala.<sup>[11]</sup> The .38 caliber gun (Exhs. B, B-1),<sup>[12]</sup> the white "Hanes" t-shirt (Exhs. B-2, B-2-A, B-2-B),<sup>[13]</sup> and the two spent .38 caliber shells (Exhs. B-2, B-2-B)<sup>[14]</sup> were all photographed. Accused-appellant was then taken to the police station, where he was photographed (Exh. B-3)<sup>[15]</sup> along with the things seized from him.

SPO4 Virgilio Pilapil, Chief Investigator of the Criminal Investigation Division, testified that on August 26, 1997, the case involving the killing of Henry Pecho Piamonte was forwarded to him by PO3 Rosal together with the evidence consisting of a bloodstained white "Hanes" t-shirt, a .38 revolver with five live ammunitions, and two deformed slugs. After an evaluation of the evidence, he formally filed a criminal complaint for murder against accused-appellant. He took blood samples of the victim and submitted the same to the NBI for laboratory examination.<sup>[16]</sup>

Dr. Regalado Sosa, City Health Officer II and City Medico-Legal Officer of the Department of Health in Cavite City, conducted a postmortem examination of the cadaver and prepared an autopsy report (Exh. O)<sup>[17]</sup> which showed the following findings:

#### AUTOPSY REPORT

##### EXTERNAL FINDINGS:

A medium built fair complexioned male adult human body in its cadaveric state with gunshot wounds . . . described as follows:

- = Gunshot wound, 1.5 cm. x 0.5 cm., oval in shape with powder burns more on top of the wound to 2.5 cms. elevation/height located at the angle of the right jaw and/or 5 cms. below the inferior level of the right ear. The wound has irregular and inverted borders. It is directed inwards fracturing the lower edge of the angle of the right mandible and the lead slug is embedded at the right lateral portion of the first (1st) cervical vertebrae hence extracted.
- = Gunshot wound, 1 cm. in d[iameter] with inverted irregular borders located at the left frontal region 5 cms. above the temporal end of the left eyebrow. It is directed inwards and downwards fracturing the bone (frontal) underneath into [the] intracranial cavity.

##### INTERNAL FINDINGS:

- = Presence of circular complete fracture, 0.8 cm. in d[iameter] at the left frontal region.
- = The left frontal lobe of the brain is perforated and the frontal lobe is enveloped with liquid and clotted blood.
- = The lead slug is found at the inner surface of the left frontal lobe.

- = The right mandibular region was incised near the gunshot wound and the area is severely hematomatous and explored until a lead slug [was] found at the 1st cervical vertebrae at the right side.
- = Stomach contains liquid and little rice and with alcoholic (beer) smell.
- = Other internal organs are significantly normal.

Slugs extracted:

1. 0.6 cm. in d[iameter] lead slug with one end is markedly deformed. The length of the slug is 1.6 cms.

Note: One diagonal incised line was marked on the slug.

2. A 0.7 cm. in d[iameter] lead slug . . . roundly/ovaly deformed [on] one end. The length of the slug is 1.8 cm.

Note: Two diagonal incised lines [were] marked on the said slug.

Dr. Sosa testified that the victim sustained two gunshot wounds (Exh. R),<sup>[18]</sup> the first one located on the right jaw below the ear while the second wound located at the left temporal side above the left eyebrow. The slug from the first gunshot wound remained at the base of the neck, near the spinal column. There were powder burns, called "tatooing," surrounding the first wound which showed that the victim was shot point-blank. The second slug was also embedded at the front lobe of the brain.<sup>[19]</sup> Dr. Sosa indicated in the Certificate of Death (Exh. Q) that the victim died of "shock secondary to severe intracranial hemorrhage due to multiple gunshot wounds."<sup>[20]</sup>

Upon written request (Exh. C)<sup>[21]</sup> of Prosecutor Lu, the NBI conducted a ballistics examination to determine whether the two slugs taken from the body of the victim were fired from the firearm recovered from accused-appellant.

Isabelo D. Silvestre, Jr., an NBI ballistics, conducted on September 10, 1997 a comparative examination of the two "evidence bullets," marked as "HPP-1" (Exh. E) and "HPP-2" (Exh. E-1), which had been recovered from the victim's head and the three "test bullets" (Exhs. G, G-1, G-2) fired from the seized .38 caliber firearm. The tests showed that the "evidence bullets" were fired from the subject firearm.<sup>[22]</sup> The empty shells from the three "test bullets" fired were duly marked (Exhs. G-3, G-4, G-5). No photographs were taken. Silvestre's findings were confirmed by four other NBI ballisticians: Chief Ballistician Rogelio Munar, Supervising Ballistician Ernie Magtibay, Senior Ballistician Elmer Pieded, and, Flor Landicho, another ballistics. The two .38 caliber empty shells recovered from accused-appellant were no longer examined.<sup>[23]</sup>

Prosecutor Lu also made a written request (Exh. J)<sup>[24]</sup> for a laboratory examination of the bloodstains on the white "Hanes" t-shirt of accused-appellant to determine whether such were identical to the blood of the victim.

Juliet Gelacio-Mahilum, NBI Forensic Chemist II, testified that on September 26, 1997, she conducted three kinds of laboratory examinations, namely, (a) benzidine test, to determine the presence of blood; (b) precipitin test, to determine if the bloodstains came from human or animal blood; and (c) ABO grouping test, to determine the blood group. When tested and matched together, the bloodstained white "Hanes" t-shirt and the blood sample of the victim yielded positive results for human blood belonging to blood type "O" (Exh. K).<sup>[25]</sup>

For its part, the defense presented accused-appellant himself, his son Jhumar, and his sister Yolanda Cubcubin Padua.

Accused-appellant Fidel Abrenica Cubcubin, Jr. testified that he enlisted in the Philippine Constabulary as a soldier in 1974 but was discharged in 1977 for being AWOL. He said he left for Saudi Arabia where he worked as a driver and came back in 1979. He was later employed as a driver by a friend, who owned a junk shop in Cavite City. He admitted knowing the victim whom he addressed as "*Kuya*." Accused-appellant testified that from 10:00 in the evening to 12:00 midnight of August 25, 1997, he and some friends played a card game called "*tong-its*" on Molina Street, Cavite City. Afterwards, he proceeded to the Sting Cafe where he had some drinks while waiting for food to be served. Henry Piamonte, a tricycle driver, arrived and had drinks with him. After a while, the victim left as a passenger was waiting to be given a ride. The victim came back to the restaurant before 1:00 a.m. and had another bottle of beer with accused-appellant. At about 1:30 a.m., the victim again left to transport another passenger. After that, the victim did not come back anymore.<sup>[26]</sup>

Accused-appellant said he left Sting Cafe at about 2:00 a.m. and took a tricycle home to 1151 Garcia Extension, San Antonio, Cavite City. He was sleeping on the sofa in his bedroom when he was awakened by the arrival of three policemen, two of them he recognized as SPO1 Malinao, Jr. and PO3 Estoy, Jr., who pointed their guns at him and told him to lie face down. He said he was handcuffed while the policemen searched his room, turning the sala set upside down and opening the cabinets. His son, Jhumar, stood beside him. Before leaving, the policemen took from the clothes stand a white t-shirt belonging to his son Denver. Accused-appellant said that he did not ask them why they were searching the place as he was afraid they would maltreat him. He denied the claim of the policemen that the white t-shirt had blood stains. He claimed that the policemen did not have any search warrant nor a warrant of arrest when they took him into custody. Nor did they inform him of his constitutional right to remain silent and to be assisted by counsel. He also said that he was made to stay in a police patrol car for almost two hours before he was brought inside the police station. He denied owning the .38 caliber revolver presented to him by Prosecutor Lu and SPO4 Pilapil or that the same had been recovered from his house. He also denied the prosecution's claim that he was taken to the Sting Cafe where he was allegedly identified by Danet Garcellano as the person last seen with the victim before the latter was killed.<sup>[27]</sup>

Jhumar Cubcubin, son of accused-appellant, testified that at about 4:00 in the morning of August 26, 1997, he was sleeping on the second floor of the house when he was roused from his sleep by loud knocks on the door. When he opened the door, he saw three policemen who were looking for his father. He told them that his father