

## SECOND DIVISION

[ G.R. No. 110899, March 07, 2000 ]

**ELIZARDO DITCHE Y DELA CERNA, PETITIONER, VS. COURT OF APPEALS (2ND DIVISION) AND NONITO TAM, RESPONDENTS.**

### D E C I S I O N

**DE LEON, JR., J.:**

Before us is a petition for review<sup>[1]</sup> of the Decision<sup>[2]</sup> dated January 14, 1993, as well as the Resolution<sup>[3]</sup> dated June 10, 1993 of the Court of Appeals which modified the judgment<sup>[4]</sup> of conviction rendered by the Regional Trial Court (RTC)<sup>[5]</sup> from frustrated to attempted murder.

On December 15, 1986, Asst. Provincial Fiscal Bernardo G. Delfin filed with the Regional Trial Court an Information<sup>[6]</sup> for Frustrated Murder against petitioner Elizardo Ditche and one Rene España. It reads:

"That on the 3rd day of April, 1983, at or about 6:00 o'clock in the afternoon, along the national highway in Barangay San Roque, Municipality of Asturias, Province of Cebu, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, together with two other persons whose identities are still unknown, the latter two to be prosecuted separately as soon as procedural requirements shall have been complied with upon their identification, conspiring, confederating and mutually helping each other, all armed with high-powered firearms, with evident premeditation and treachery and intent to kill, did then and there wilfully, unlawfully and feloniously ambush, shoot and fire their firearms at the direction of NONITO TAM, MRS. ANNABELLA TAM, CEDRIC TAM AND EMELITO TINGAL who were riding on a motorcycle on the way to Poblacion Asturias, Cebu from Tubigagmanok, Asturias, Cebu, hitting Nonito Tam and Emelito Tingal and the said victim suffered gunshot wounds, thus performing all the acts of execution which would have produced the crime of Murder as a consequence but nevertheless did not produce it by reason of causes independent of the will of the accused, that is, the frantic maneuver of the motorcycle to make it run in zigzag and the timely medical attendance extended to the victims at the Cebu (Velez) General Hospital.

"Contrary to law."

Duly arraigned on May 25, 1984, petitioner Elizardo Ditche and Rene España pleaded "Not Guilty" to the charge.<sup>[7]</sup> In the course of the trial, however, Rene España died on February 13, 1990.<sup>[8]</sup>

In due time, the trial court rendered its decision<sup>[9]</sup> convicting petitioner Ditché of Frustrated Murder, the dispositive portion of which reads:

"WHEREFORE, considering that the quantum of evidence in the case at bar has satisfied the moral certainty required in the criminal case, it is therefore the findings of this court to hold the accused GUILTY beyond reasonable doubt of frustrated murder in Article 248, in relation to Art. 50 of the Revised Penal Code. It is hereby sentenced <sup>[sic]</sup> of this court for the accused after applying the indeterminate sentence law to suffer the penalty of six (6) years, one (1) month and eleven (11) days to ten (10) years and to pay the amount of P1,500.00 as hospitalization expenses and Five Thousand Pesos (P5,000.00) as moral damages and to pay the cost.

"SO ORDERED."

Petitioner appealed from the decision to the Court of Appeals.

On January 14, 1993, the Court of Appeals promulgated its decision affirming the guilt of petitioner, but at the same time agreeing with the recommendation of the Solicitor General that since the wound inflicted on the complainant was not of such serious nature as would have produced death, petitioner should only be guilty of Attempted and not Frustrated Murder.<sup>[10]</sup>

On February 17, 1993, petitioner filed a Motion for Reconsideration<sup>[11]</sup> of the decision. He also filed a Motion for New Trial<sup>[12]</sup> on March 19, 1993, praying that the case be remanded to the lower court for the reception of the testimonies of new witnesses Marcelo Remis and Angela Nemenzo.

On June 10, 1993, the Court of Appeals denied both Motion for Reconsideration and Motion for New Trial on the grounds that first, the former is a mere reiteration or repetition of the arguments already ventilated in his brief and second, the latter was filed beyond the reglementary period.<sup>[13]</sup>

Hence, this petition for review of the decision of the Court of Appeals.

The pertinent facts are:

Sometime on March 30, 1983 at around 5:30 in the afternoon, Nonito Tam,<sup>[14]</sup> went to the house of Dr. Noel at Ginabasa, Tubigagmanok, Asturias, Cebu to inform Dr. Noel about the theft of coconuts in his plantation. A minute later, petitioner arrived.<sup>[15]</sup> In the course of their conversation, a verbal quarrel ensued between petitioner and Nonito Tam. Petitioner challenged the latter to a fist fight. But Dr. Noel intervened and pacified them. Having calmed down, both petitioner and Tam left for home.<sup>[16]</sup>

On April 3, 1983, at around 6:00 o'clock in the evening, Tam, his wife Annabella, son, Cedric and a farm helper, Emelito Tingal were on their way home from their farm at Barangay Tubigagmanok, Asturias, Cebu. While riding a motorcycle driven by Tam they were ambushed at Barangay San Roque.<sup>[17]</sup> Shortly before reaching the site of the ambush, Tam had already sighted two (2) men half-naked from the

waist, sitting on a sack of copra placed along the right side of the road going to Asturias, Cebu. When Tam and company were four (4) meters away from the said sack of copra, the two (2) men stood up and began firing at them using a revolver. Tam continued to negotiate the road amid the gunfire. Ten (10) meters away from the ambush site, Tam looked back and this time he saw four (4) men firing and chasing them. He positively identified two (2) of the four (4) men as petitioner Ditché and the now deceased Rene España.<sup>[18]</sup>

Upon reaching their house at Poblacion, Asturias, Cebu, Tam told his neighbor, Lucy Dumdum, to report the incident to the police authorities.<sup>[19]</sup> Lucy Dumdum was also the one who asked permission from the Mayor to lend them his car to transport the injured to the Cebu (Velez) General Hospital for medical treatment. The car was driven by one Carlo Magno Alao, brother of Lucy Dumdum.<sup>[20]</sup> Dr. Reynaldo Bacilig was the physician who treated the injured at the said hospital.<sup>[21]</sup>

During cross-examination, Tam admitted that he filed a case for Grave Threats against the late Rene España with the office of petitioner Ditché who was, at that time, the barangay captain. But petitioner Ditché did not entertain his complaint, so he filed a case with the Office of the Provincial Fiscal. For this reason, petitioner allegedly got irritated and plotted his revenge.<sup>[22]</sup>

On re-direct examination, Tam declared that he realized that he was hit only after driving one (1) kilometer away from the ambush site when he felt numbness on his right knee.<sup>[23]</sup> His helper, Emelito Tingal, was also hit on the back of his left knee.

Although the shooting incident was reported by Lucy Dumdum on April 3, 1983, police authorities did not make any record. According to them Dumdum's report was an informal report, hence, no investigation was ever conducted on that day.<sup>[24]</sup>

Once discharged from the hospital on April 7, 1983, Tam reported the incident to the police authorities and had the same entered in the police blotter. However, to his surprise, the certification of the police stated that the attackers were unidentified. Tam called the attention of Pat. Tomas Tundag, the policeman on duty, but the latter did not rectify the erroneous report. Pat. Tundag did not bother to change the certification.<sup>[25]</sup> Thus, Tam reported the incident to the National Bureau of Investigation (NBI) hoping that from the NBI he could obtain justice and protection.<sup>[26]</sup>

Annabella Rojo Tam, wife of Tam, gave corroborative testimony. She positively identified petitioner Ditché and the deceased España as two (2) of the four (4) men who fired at them at Barrio San Roque, on April 3, 1983 at around 6:00 o'clock in the evening.<sup>[27]</sup>

Leticia Quijano Noel, another prosecution witness, also corroborated the testimony of Tam. She declared that on March 30, 1983, Tam went to their house to report the theft that happened in their coconut plantation. She asked his son to invite and fetch petitioner Ditché, their Barangay Captain, to come over to their house. In the course of their conversation,<sup>[28]</sup> a heated argument ensued between petitioner and Tam. Petitioner challenged Tam to a fight. But Dr. Noel pacified both of them and when both calmed down, Dr. and Mrs. Noel invited the two (2) to join them for

dinner. Thereafter, both left for home.<sup>[29]</sup>

Petitioner's defense is basically alibi. His testimony was corroborated by defense witness Venpelubio Gilbuena, his Barangay Secretary. He claimed that on April 3, 1983 at around 4:00 o'clock in the afternoon, he was at his residence at Ginabasan, Tubigagmanok, together with Gilbuena. Witness Gilbuena helped him prepare the minutes of the meeting of the Association of Barangay Council of Asturias of which petitioner was the Secretary. Both left the petitioner's house at around 7:00 o'clock in the evening. Gilbuena returned to his own house while petitioner reported for work at the White Cement Factory.<sup>[30]</sup>

On cross-examination, witness Gilbuena admitted that petitioner Ditché requested him to testify on his behalf.<sup>[31]</sup>

Petitioner raises the following assignment of errors:

- "I. THE RESPONDENT COURT OF APPEALS ERRED IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL DESPITE ITS HAVING BEEN FILED SEASONABLY IN ACCORDANCE WITH SECTION 14, RULE 124 OF THE REVISED RULES ON CRIMINAL PROCEDURE.
- "II. THE RESPONDENT COURT OF APPEALS GRAVELY ABUSED ITS DISCRETION AND ERRED WHEN IT AFFIRMED THE CONVICTION OF THE PETITIONER ON THE BASIS OF AN ILLOGICAL AND IMPOSSIBLE CONCLUSION OF POSITIVE IDENTIFICATION OF PETITIONER AS THE ALLEGED ASSAILANT, IN UTTER DISREGARD OF NUMEROUS CIRCUMSTANCES AND/OR FACTS ESTABLISHED BY EVIDENCE EXTANT ON THE RECORDS WHICH NEGATE SUCH IDENTIFICATION AND GROSSLY IGNORING THE PRONOUNCEMENTS OF THE SUPREME COURT WHICH ARE CONSIDERED AS THE APPLICABLE LAW ON SUCH CIRCUMSTANCES.
- "III. THE RESPONDENT COURT OF APPEALS GRAVELY ERRED IN MAKING CONCLUSIONS IN ITS DECISION THAT ARE GROUNDED ENTIRELY ON SURMISES OR CONJECTURES AND IN MAKING INFERENCES WHICH ARE MANIFESTLY MISTAKEN AND WITHOUT ANY SPECIFIC EVIDENTIARY BASIS."<sup>[32]</sup>

The petition is devoid of merit.

Petitioner contends that respondent Court of Appeals erred in denying his motion for new trial on the ground that the same was filed beyond the period for perfecting an appeal. He maintained that he received the Court of Appeal's decision on January 22, 1993. On February 17, 1993, he filed his motion for reconsideration. Pending resolution of said motion, petitioner filed a motion for new trial on March 19, 1993 claiming newly discovered evidence which would result in the reversal of his conviction.

While it is true that petitioner's motion for new trial was seasonably filed, in order for the said motion to be granted, the same must be based on newly discovered evidence material to his defense.<sup>[33]</sup>

Petitioner's allegedly newly discovered evidence consists of the testimonies of Marcelo Remis and Angela Nemenzo to the effect that at the time relevant to this case, they were residing within the vicinity of the ambush site and that when the shooting incident took place, it was already dark as it was already, in their estimate, 7:00 o'clock and not 6:00 o'clock in the evening as declared by the prosecution witnesses.

However, not only is such allegedly newly discovered evidence necessarily predicated on the alleged incredulousness of the prosecution witness, whose credibility has in fact already been determined by the trial court, but more importantly, it merely attempts to corroborate the earlier defense of the petitioner on the alleged impossibility of positive identification. Hence, the additional evidence sought to be presented by the defense is not really a newly discovered evidence as contemplated by law and therefore will not change the result of the case.

The judge who penned the assailed decision was not the only one who heard and received the evidence presented by the parties. The case was heard by two (2) judges, namely, Judge Melchor C. Arboleda, in whose court the Information was filed and who heard the testimonies of three (3) out of the four (4) prosecution witnesses while Judge Jose P. Burgos heard the case from the cross-examination of the third prosecution witness onward. This fact, however, does not diminish the veracity and correctness of the factual findings of the trial court. In any event, we have gone over the records, including the transcript of stenographic notes, and we found no reason to disturb the factual findings and conclusion of the trial court.

The findings of the trial court on the credibility of witnesses deserve great weight, given the clear advantage of a trial judge over an appellate court in the appreciation of testimonial evidence. This is the rule. The trial court is in the best position to assess the credibility of witnesses and their testimonies because of its unique opportunity to observe the witnesses, their demeanor, conduct and attitude on the witness stand. These are the most significant factors in evaluating the sincerity of witnesses and in unearthing the truth.<sup>[34]</sup> Although the rule admits of certain exceptions, none obtains in this case.

Petitioner equates his alleged non-identification with the fact that the victims<sup>[35]</sup> of the ambush initially failed to mention the name of their assailants or attackers to the parents-in-law of Tam<sup>[36]</sup>, the Asturias Police<sup>[37]</sup>, Lucy Dumdum,<sup>[38]</sup> the Municipal Mayor<sup>[39]</sup> and Carlomagno Alao.<sup>[40]</sup> Petitioner likewise maintains that Tam's testimony as corroborated by his wife, smacks of fabrication considering that it took him nine (9) days to reveal the names of the assailants to the National Bureau of Investigation (NBI), where he sought assistance. Petitioner also insists that the crime scene was dark; thus, it was impossible for Tam and his wife to identify their attackers.

But as gleaned from the findings of both the trial court and the Court of Appeals, petitioner's identity as the culprit has been sufficiently established. Tam and his wife could not have been mistaken in pointing petitioner and the late España as their attackers considering that both were familiar to them; petitioner Ditché was their Barangay Chairman while España was earlier charged by Tam for grave threats.