

## THIRD DIVISION

[ G.R. No. 110872, April 18, 1997 ]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ALEX  
GARMA, ACCUSED-APPELLANT.  
D E C I S I O N**

**FRANCISCO, J.:**

At around 8:00 o'clock in the evening of December 2, 1987, while Herminigildo Isidro was gathering hay just a few meters away from their house in Sitio Alinaay, Bagingao, Cabugao, Ilocos Sur, he heard two shots fired in succession.<sup>[1]</sup> Seconds later, he then heard his uncle Sixto Selma cry: "Remy [referring to Herminigildo] arayatennakman" or Remy, will you come to my rescue."<sup>[2]</sup> Believing that Sixto has been shot and that the assailants were still in the vicinity, Herminigildo immediately ran toward their house to inform his relatives of what he heard.<sup>[3]</sup>

Maria Isidro, Sixto's sister, also heard the gunshots and Sixto's subsequent call for assistance.<sup>[4]</sup> She forthwith awakened Gil Morales,<sup>[5]</sup> her son-in-law, who, with Perlita Gazmen-Selma, thereafter sought assistance from Councilor Jose Ardesani.<sup>[6]</sup> The latter, however, refused to extend assistance as he was himself "afraid" of the assailants.<sup>[7]</sup> Thus, left with no further alternatives, Gil, Perlita, Herminigildo and Maria, mustered all their courage together and proceeded to the place from where they heard Sixto moaning. They found the area deserted with Sixto lying on the ground — wounded.<sup>[8]</sup> Upon seeing them, Sixto promptly complained: "I am hit"; and when asked by Herminigildo about the identity of the assailant, Sixto replied: "They were three (3) but I recognize[d] only Alex Garma." <sup>[9]</sup>

Sixto was rushed to the nearby Pura Clinic, but was transferred to Gabriela Silang General Hospital in Tanog, Vigan, Ilocos Sur where he expired at around 12:00 o'clock in the same evening.<sup>[10]</sup> The cause of his death: "Cardio respiratory arrest x x x [due] to hypovolemic shock x x x to massive hemorrhage x x x to multiple gunshot wound."<sup>[11]</sup>

On the basis of the separate sworn statements executed by Herminigildo and Gil, appellant and an unidentified accused, were thereafter charged with Murder in an Information that reads:

"That on or about the 2nd day of December, 1987, in the [M]unicipality of Cabugao, [P]rovince of Ilocos Sur, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating together and helping one another, with treachery and evident premeditation, and with intent to kill, did then and there wilfully (sic), unlawfully and feloniously assault, attack and shoot with the use of illegally possessed firearm one Sixto Selma, thereby inflicting upon the

latter mortal wound on his body, which wound necessarily produced the death of said Sixto Selma, few hours later."<sup>[12]</sup>

Appellant pleaded not guilty when arraigned. Trial ensued. On December 4, 1989, the trial court handed down a verdict of conviction sentencing the appellant to suffer ten (10) years and one (1) day of prison mayor, as minimum, to eighteen (18) years, eight (8) months and one (1) day of reclusion temporal, as maximum. The trial court likewise directed the appellant to indemnify Sixto's heirs in the amount of P30,000.00.<sup>[13]</sup> On appeal, the Court of Appeals affirmed the findings of the trial court, except for the penalty imposed and the amount of civil indemnity awarded which the Court of Appeals increased to reclusion perpetua and P50,000.00, respectively.<sup>[14]</sup>

The case is now certified to us by the Court of Appeals in accordance with Rule 124, Section 13 of the Rules of Court,<sup>[15]</sup> in relation to Article VIII, Section 5, paragraph (2), subparagraph (d) of the 1987 Constitution.<sup>[16]</sup>

It is evident that appellant's conviction was predicated principally on the statement uttered by Sixto hours before his death, identifying appellant as one of the assailants. Said statement was testified to by four (4) prosecution witnesses, namely: (1) Herminigildo Aquino; (2) Gil Morales; (3) Maria Isidro; and (4) Perlita Gazmen-Selma, who all claimed to have heard Sixto's revelation when they found him lying on the ground-wounded. The trial court admitted such statement as part of *res gestae*, while the Court of Appeals considered the same as both part of *res gestae* and dying declaration.

We agree with the Court of Appeals that the statement of Sixto uttered shortly after the assault and hours before his death identifying the appellant as one of the assailants, qualifies both as dying declaration and as part of *res gestae*. To elaborate, there are four (4) requisites which must concur in order that a dying declaration may be admissible in evidence, to wit: (a) it must concern the crime and the surrounding circumstances of the declarant's death; (b) at the time it was made, the declarant was under a consciousness of an impending death; (c) the declarant was competent as a witness; and (d) the declaration was offered in a criminal case for homicide, murder or parricide in which the decedent was the victim.<sup>[17]</sup>

In this case, the foregoing requirements are undoubtedly present. First, Sixto's statement that "they were three (3) but I recognize[d] only Alex Garma," is a statement of the surrounding circumstances of his death as the same refers to the identity of his assailants. Second, Sixto gave such declaration under the consciousness of an impending death as shown by the serious nature of his wounds,<sup>[18]</sup> which in fact resulted in his death several hours later.<sup>[19]</sup> Third, prior to his death, Sixto was competent to be a witness in court. And fourth, Sixto's dying declaration is offered in a criminal prosecution for murder where he was himself the victim.

On the other hand, there can be no plausible objection against its admissibility as part of *res gestae* even if said statement was uttered by Sixto in response to a question posed by Herminigildo about the identity of the assailants.<sup>[20]</sup> This is because, the record bespeaks that such statement was made right after the

shooting incident and before Sixto had the opportunity to contrive or devise a falsehood.<sup>[21]</sup>

Appellant interposes alibi as defense. According to him, from 7:00 to 10:00 o'clock in the evening of December 2, 1987, he watched television programs in the house of his grandfather Sotero Garma.<sup>[22]</sup> Corroborating appellant's testimony were those of Edilberto Califlores,<sup>[23]</sup> Simeon Sonido,<sup>[24]</sup> Maximo Pacis<sup>[25]</sup> and David Garma<sup>[26]</sup>- who all confirmed appellant's presence in Sotero's house during the night Sixto was gunned down. We are not persuaded. In the face of appellant's positive identification by the victim as one of the authors of the crime, his defense of alibi necessarily collapses. It is a settled rule that alibi can not prevail over a positive identification.<sup>[27]</sup>

Appellant also impugns the credibility of the prosecution witnesses contending that their testimonies are inconsistent with each other in that: (1) Herminigildo and Gil testified that moments before his death, Sixto uttered that "he cannot survive," while Maria and Perlita did not recount such a remark; and (2) Maria and Perlita affirmed that the killing was triggered by the previous altercation between Sixto and appellant about the hay which, however, was not disclosed by Herminigildo and Gil.<sup>[28]</sup>

To our mind, these alleged inconsistencies are not that material so as to cast serious doubts on the witnesses' credibility.<sup>[29]</sup> As correctly ruled by the Court of Appeals, these alleged inconsistencies are merely minor ones, attributable as they are, to the frailty of human memory at times. Neither can it be successfully argued that since the prosecution witnesses "could not give the definite words of Sixto,"<sup>[30]</sup> then their testimonies should have been taken with a grain of salt. A witness testifying on the dying declaration of the deceased need not reproduce exactly the words of the deceased as long as he is able to give its substance.<sup>[31]</sup> At any rate, the trial court which had the opportunity to observe the demeanor of herein prosecution witnesses found that their testimonies rang "with truth and sincerity."<sup>[32]</sup> We find no cogent reason to hold otherwise.

However, we agree with the appellant that both the trial court and the Court of Appeals erred in appreciating the qualifying circumstance of treachery against him. Our settled rule is that treachery cannot be presumed,<sup>[33]</sup> but must be proved by clear and convincing evidence, or as conclusively as the killing itself.<sup>[34]</sup> In this case, the trial court declared that the shooting of Sixto was "sudden and unexpected,"<sup>[35]</sup> which cavalier pronouncement finds no basis from the record as there was no one who testified to such manner of assault described by the trial court.

Neither may the presence of treachery be simply assumed, as what the Court of Appeals apparently did, from the mere fact that the fatal wounds were found at the back of Sixto. The location of the fatal wounds does not, by itself, compel a finding of treachery.<sup>[36]</sup> Such a finding must be based on some positive proof, and not be merely an inference drawn more or less logically from hypothetical facts.<sup>[37]</sup>

In fine, we hold that appellant is nonetheless guilty, albeit of the crime of homicide only. Appellant's guilt has been proven by the prosecution through the dying