FOURTH DIVISION

[CA-G.R. CR.-H.C. NO. 06279, March 04, 2015]

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ROLAND "TEREK" DIESTRO, JOSE "JOE" AGUIRRE AND ROLAND "TANGKAD" VILLARUEL, ACCUSED,

ROLAND "TEREK" DIESTRO, ACCUSED-APPELLAN.

D E C I S I O N

BALTAZAR-PADILLA, J.:

Brought before this Court is an appeal[1] from the Decision[2] dated May 23, 2013 rendered by the Regional Trial Court of Quezon City, Branch 219 finding accused-appellant guilty as charged in Criminal Case No. Q-02-106906 for Murder, the decretal portion of which reads:

> *"WHEREFORE, judgment is hereby rendered finding the accused Roland "Terek" Diestro GUILTY beyond reasonable doubt of the crime of Murder and he is hereby sentenced to suffer the penalty of reclusion perpetua for the death of Senen Q. Mendoza.*
>
> *Accused Roland "Terek" Diestro is further adjudged to pay the heirs of Senen Q. Mendoza, represented by his widow, Concepcion M. Mendoza, the following amounts:*
>
> *1) Php75,000.00 as civil indemnity ex delicto;*
> *2) Php50,000.00 as moral damages;*
> *3) Php30,000.00 as exemplary damages; and*
> *4) Php57,000.00 as actual damages, plus costs of suit.*
>
> *SO ORDERED."*

Feeling aggrieved, accused-appellant comes to US challenging the said Decision and assigning the following errors as allegedly committed by the court *a quo*, to wit:

> *"I*
>
> *THE COURT A QUO GRAVELY ERRED IN FINDING ACCUSED-APPELLANT GUILTY BEYOND REASONABLE DOUBT OF THE CRIME CHARGED.*
>
> *II*
>
> *THE COURT A QUO GRAVELY ERRED IN APPRECIATING THE QUALIFYING CIRCUMSTANCE OF TREACHERY.*
>
> *III*

THE COURT A QUO GRAVELY ERRED IN APPRECIATING THE QUALIFYING CIRCUMSTANCE OF ABUSE OF SUPERIOR STRENGTH."[3]

The record shows that on September 23, 2002, accused-appellant and his co-accused Jose "Joe" Aguirre were arraigned and pleaded "*not guilty*"[4] under an Information for Murder, the accusatory portion whereof reads, viz –

> *"That on or about the 24th day of May, 2001, in Quezon City, Philippines, the said accused, conspiring together, confederating with and mutually helping one another, with intent to kill, qualified by evident premeditation, treachery and taking advantage of superior strength, did then and there willfully, unlawfully and feloniously attack, assault and employ personal violence upon the person of SENEN MENDOZA by then and there shooting him with the use of firearms, thereby inflicting upon him serious and mortal wound which were the direct and immediate cause of his untimely death, to the damage and prejudice of the heirs of the said SENEN MENDOZA.*
>
> *CONTRARY TO LAW."*

Accused Roland "Tangkad" Villaruel was not arraigned and has remained at large.

The prosecution presented two (2) witnesses, namely: Concepcion M. Mendoza (victim's wife) and Ma. Luz Nisperos. The defense, on the other hand, presented accused-appellant as its lone witness.

The facts as culled from the record of the case are as follows:

On May 24, 2001 at around 8:00 to 8:30 o'clock in the evening, the three accused namely, Roland "Terek" Diestro, Jose "Joe" Aguirre and Roland "Tangkad" Villaruel fired at Senen Mendoza's house at Iris Street, Fairview, Quezon City.

Senen and his family were then preparing to retire when they heard the shots prompting Senen to check on the commotion. Sensing danger for his family, Senen went outside their house and boarded their Tamaraw FX. He lit the headlights of the vehicle directing it towards the accused and drove it away from his house. However, the three accused ran along side the Tamaraw FX and continued to fire on the front side of the vehicle hitting Senen on different parts of his body, forcing the vehicle to stop. Thereafter, the three accused ran away. The victim was brought to the FEU Hospital and was declared "dead on arrival". He sustained multiple gunshot wounds on the forehead, eyebrow, right arm and shoulder. A case for murder was filed against the accused at the Regional Trial Court of Quezon City.

The presentation in open court of prosecution witnesses PO1 Joseph Dino[5] and Josephine Sapungan (Head of the Medical Records Division of FEU Hospital)[6] were dispensed with as the contexts of their testimonies were stipulated upon by the parties.

For its part, the defense asserted that after working as painter at Robinsons Mall in Sta. Lucia on May 24, 2001, accused-appellant Rolando "Terek" Diestro went home at No. 9 Iris Street, West Fairview, Quezon City. At the corner of Iris Street, he met

his friends and co-accused Roland Villaruel (a security guard) and Joel Aguirre. The two were having their snacks of chicharon and balut and they asked him to join them. When Villaruel brought down his hand and stooped, the sling of the shotgun he was carrying slipped from his shoulders and fell on a chair. The shotgun was discharged and fired at the direction of the street. For fear that the gun might fire again, accused-appellant took his balut and left his co-accused. When the shotgun accidentally fired, there were children and women around, but he did not notice if somebody was hit.

In August, 2001, police officers came over at accused-appellant's house and invited him to go to Camp Karingal to shed light on the incident that took place on May 24, 2001. He was surprised that upon reaching Camp Karingal, he was locked up in an unoccupied cell. He waited for the police officers to question him but they did not do so. In the evening, he was brought to a room with a table and was told to admit the crime so that he will not be hurt. When he denied any participation in the incident, he was subjected to physical abuse by the police officers. At a certain point, he even lost his consciousness. He was brought out of the said room around noontime. Bullets were placed between his fingers and they were pressed together until his fingers were swollen before he was told to sign a document which he was not able to read. Afterwards, he was brought before the public prosecutor for inquest. Out of fear, he admitted the offense being charged against him to the public prosecutor.

Days before the police invited him over to their station, the victim's wife and his neighbor Ma. Luz Nisperos went to his house asking him to testify against Roland Villaruel. He turned down their request because trouble might brew up between his relatives and the relatives of Villaruel who are living in the same province if he will be testifying against Villaruel.

Pending litigation, accused Aguirre died of cardio pulmonary failure secondary to pulmonary tuberculosis[7]. Thus, the case as against him was dismissed.[8]

After trial on the merits, the court *a quo* decided against accused-appellant finding him guilty as charged.

Dissatisfied, accused-appellant filed this appeal.

In seeking his acquittal, accused-appellant assails the credibility of the prosecution's witnesses. He claims that Concepcion Mendoza's testimony is weak and deserves no merit for being contrary to human experience. She gave her statement to the police almost two weeks after the incident happened and she could not even identify the assailants of her husband. She merely relied on her neighbors' "say-so". On the other hand, the account of Ma. Luz Nisperos of the situation surrounding the incident being complained of is inconsistent with the crime of murder. In fact, her testimony that his group first fired at the L300 van before firing at the victim's FX reveals the lack of intent to kill on their part for it shows that the original target is the occupant of the L300 van and not the deceased.

Accused-appellant claims that the presumption of innocence in his favor is strengthened by the fact that he did not flee and remained in the same house and community after the shooting incident took place which resulted in Senen Mendoza's death. There is no reason for him to flee because only a guilty man will do so.

Accused-appellant further insists that the trial court erred in appreciating the qualifying circumstances of treachery and abuse of superior strength against him. The prosecution failed to establish all the elements of treachery with clear and convincing evidence as the killing itself. The situation described by the victim's wife showed that Senen had all the opportunity to defend himself. After hearing the shots and learning that one of the bullets hit his roof, the deceased should have been placed on guard of the danger to his life and to that of his family. Yet, he went out of his house; drove his FX van outside and maneuvered it back to their house. Accused-appellant maintains that there is no treachery to speak of because prior to the attack the victim was already forewarned.

He also claims that there is no showing that the means of execution were deliberately and consciously adopted. The facts as established by the prosecution's own witnesses proved that the deceased was not the target during that time. His death was not caused by a deliberate plan or community of effort to kill him but was merely a result of accidental firing. In fact, according to the victim's wife the first volley of gunfire was not directed at them but came from the outside although she harbors the suspicion that a bullet hit their roof. Even the victim was convinced that they were not targeted as he kept on wondering what the commotion outside was all about prompting him to go outside and investigate.

Accused-appellant further asserts that the aggravating circumstance of abuse of superior strength could not be treated as a separate qualifying circumstance. It is absorbed in treachery. While there are three alleged assailants in this case, superiority in number does not per se mean superiority in strength. The issue is not the number of assailants but whether the aggressors took advantage of their combined strength in order to consummate the offense. There is nothing in the prosecution's evidence that would show that they took advantage of their combined strength to kill Senen.

For its part, plaintiff-appellee maintains that the prosecution was able to prove accused-appellant's guilt beyond reasonable doubt.

In convincing this Court to overturn his conviction for murder, accused-appellant merely relied on denial and alibi. However, for the defense of alibi to prosper, the accused must prove that: (a) he was present at another place at the time of the perpetration of the crime, and (b) it was physically impossible for him to be at the scene of the crime during its commission. Physical impossibility refers to distance and the facility of access between the crime scene and the location of the accused when the crime was committed. He must demonstrate that he was so far away and could not have been physically present at the crime scene and its immediate vicinity when the crime was committed.[9]

In the extant case, accused-appellant failed to satisfy these requirements. He admitted in open court that he was present at the place, date and time of the commission of the crime although he denied any participation in the death of Senen Mendoza on the lame excuse that Villaruel's shotgun accidentally fell and misfired. After the accidental firing, he went home to sleep in his house located in the same street where the incident happened.

What strongly militates against accused-appellant's denial and alibi is his positive identification by eyewitness Ma. Luz Nisperos who testified categorically that he was

present at the scene of the crime and had participated in its commission. Her straightforward and categorical account of the incident as quoted by the trial court in its assailed decision clearly points to accused-appellant as one of the assailants brandishing a firearm; firing shots at Senen Mendoza's house; and, thereafter, running alongside the Tamaraw FX relentlessly firing at Senen. Time and again, the Highest Court has consistently ruled that positive identification prevails over alibi since the latter can easily be fabricated and is inherently unreliable.[10] Besides, positive identification where categorical and consistent and without any showing of ill motive on the part of the eyewitness testifying on the matter prevails over a denial which, if not substantiated by clear and convincing evidence, is negative and self-serving evidence undeserving of weight in law. They cannot be given greater evidentiary value over the testimonies of credible witnesses who testify on affirmative matters.[11]

The defense contends that treachery did not attend the commission of the crime considering that Senen was forewarned of the impending danger to his life and to that of his family.

WE agree.

There is treachery when the offender commits any of the crimes against person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[12] For treachery to be appreciated two elements must concur: 1) the employment of means of execution that would insure the safety of the accused from retaliatory acts of the intended victim and leaving the latter without an opportunity to defend himself and 2) the means employed were deliberately or consciously adopted by the offender.[13]

The trial court appreciated the qualifying circumstance of treachery on the ground that the accused suddenly attacked the victim. However, it does not always follow that because the attack is sudden and unexpected, it is tainted with treachery. In appreciating treachery, it must also be shown that the mode of attack was consciously adopted. This means that the accused must make some preparation to kill the deceased in such a manner as to insure the execution of the crime or to make it impossible or hard for the person attacked to defend himself or to retaliate. The mode of attack, therefore, must be planned by the offender, and must not spring from the unexpected turn of events.[14]

In *People vs. Alberto S. Antonio, et al.,*[15] the Supreme Court expounded that:

> *"It is not only the sudden attack that qualifies a killing into murder. There must be a conscious and deliberate adoption of the mode of attack for a specific purpose.*
>
> *All the evidence shows that the incident was an impulse killing. It was a spur of the moment crime.*
>
> *The precedents are many. They are consistent. Among them:*