

SECOND DIVISION

[G.R. No. 181085, October 23, 2009]

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. NEMESIO
ABURQUE, APPELLANT.**

D E C I S I O N

QUISUMBING, J.:

On appeal is the Decision^[1] dated November 15, 2006 of the Court of Appeals in CA-G.R. CR HC No. 00112. The Court of Appeals had affirmed *in toto* the Decision^[2] dated October 17, 2001 of the Regional Trial Court (RTC) of Negros Oriental, Branch 34, in Criminal Case No. 13714, finding appellant Nemesio Aburque guilty of murder, beyond reasonable doubt.

In an Information^[3] dated October 19, 1998, appellant was charged of murder committed as follows:

That on or about October 5, 1998, at about 11:00 o'clock in the evening, at Sitio Jagnaya, Barangay Tubigon, Sibulan, Negros Oriental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill, and attended with the qualifying circumstances of treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and stab one MIGUEL ABLAY, with the use of a long bolo, locally known as "pinuti", with which the said accused was then armed and provided, thereby inflicting upon the victim "a stab wound, epigastric area, 5 cm. with evisceration of incised intestines," which injury caused the death of the victim shortly thereafter.

That the circumstance of dwelling aggravates the offense as the offense was committed in the dwelling of the victim who did not give any provocation.

Contrary to Article 248 of the Revised Penal Code.

At the arraignment, appellant admitted killing the victim, but he interposed the justifying circumstance of self-defense. A reverse trial was thereafter conducted.

The facts, as found by the appellate court, are as follows:

For his defense, accused Nemesio Aburque testified that upon invitation of Miguel Ablay, he went to the latter's house on 5 October 1998 at around five o'clock in the afternoon after he was done with his day's work

at the farm. A ritual for unknown spirits was going to be held at the residence of the Ablays. Other guests were in attendance which included Baldo Aklan and Primo Banaybanay.

According to the accused Aburque, they began drinking tuba upon getting to the house of Ablay. He was able to witness the ritual and when it was done, dinner was served. Thereafter, they continued drinking tuba and partaking the *pulutan* served on them. The guests started leaving at around 10:30 in the evening. Miguel Ablay closed the door when the visitors left. Only the accused, Baldo Aklan, Primo Banaybanay and Miguel Ablay were left. They sat on the floor and continued with their drinking and eating.

While they were having their drinks, accused noticed that Ablay took out something which was wrapped in a cloth. Ablay unwrapped it and it yielded a knife or a bolo without a handle and a scabbard. He then started swinging it around. This was witnessed by Aburque, Aklan and Banaybanay. Accused advised Ablay to keep the weapon away to which the latter acceded. The group continued drinking until Ablay took out two (2) arnis sticks and again, in front of his guests, started swinging it around. Accused had to advise Ablay again to sit down, stop playing with the arnis and keep them away. Ablay stopped but gave one of the arnis sticks to Aklan, and told the latter to stand up as they would practice arnis. Aklan remained seated and held on to the arnis stick. Ablay remained standing and kept on twirling the arnis stick.

At this point, while he was facing down and eating, accused Aburque felt that something hit his forehead which made him dizzy and caused him to fall. As it was painful, he reached out for his bolo, held it close to his chest and slung it over his shoulder. According to Aburque, while he was slowly opening the door, Ablay kicked him and pinned him to the door with Ablay's feet. He then heard Ablay say, "Why don't I just finish you of (*sic*) or, what if I finish you of (*sic*)?"

As accused was lying on the floor wounded, he saw Ablay reached (*sic*) for the handle of his bolo. Fearing that he would be hacked, Aburque took out his bolo and stabbed Ablay in the stomach. The accused exhibited before the trial court the scars he sustained from that wound.

Upon seeing that Ablay has been stabbed, Aklan and Banaybanay started hitting Aburque. He passed out and only regained consciousness when he hit the ground after Aklan and Banaybanay threw him out.

Thereafter, as narrated by the accused, he was dragged towards an open area. He saw Aklan picked (*sic*) up a big stone to be smashed on his face but he was able to get away when he rolled over. It hit his shoulder and in open court [he] showed the slight scars on his right breast. Aklan and Banaybanay continued beating him up. And since the house of Ablay is located on a hilly area, Aburque rolled down the slope, until he saw Aklan and Banaybanay leave.

Accused testified that he slowly dragged himself, crawled beneath the

bushes to rest and spent the night in a grassy area because he was so tired. At sunrise, he started to crawl towards his house but did not pass through the road for fear that he would get killed. He reached his Tiya Idad's house before six o'clock in the morning. Thereat, he admitted that he was able to stab Miguel Ablay. He was told by his uncle to surrender but accused was so tired to go to the municipal hall. He also feared that Ablay's relatives might kill him. He asked his uncle to call the policemen as he was going to surrender.

Accused's uncle met the policemen on his way down the house and informed them that Aburque was there. He admitted to the policemen that he was able to kill. Afterwards, Aburque was brought to the Sibulan Police Station.

On cross examination, Aburque testified that right before he stabbed Ablay, the latter was seated facing him with [the latter's] back against the wall. Accused further testified that he was unsure if Ablay intentionally hit him in the forehead with the arnis stick or the latter was merely showing his arnis skills. After he was hit on his forehead, he took his bolo, plunged it over his shoulder and asked permission from the group that he would be leaving and intended to have his forehead treated the following morning. It was at this point that Ablay stepped on him and pinned him to the floor, uttering that he would finish him off. As Aklan and Banaybanay were not able to control Ablay, accused was forced to get his bolo and stabbed Ablay. He stated that ... he was not able to pull the bolo out of the stomach of his victim. As the door of the house was closed, he could not run away. Aklan and Banaybanay started beating him with firewoods.

Dr. Merlina B. Papas, Health Officer of the Municipality of Sibulan (*sic*) testified that on 6 October 1998, she attended to the wounds suffered by the accused. The testimony of the accused was further corroborated by the testimonies given by Canuto Sarne, who testified that Aburque sent him to call the policemen for his surrender; SPO2 Felonilo Fortuito, the police officer who testified that since Aburque did not resist arrest, there is voluntary surrender to him and the other policemen in the early morning of 6 October 1998; and Jesusa Aburque, the mother of the accused, who testified that she knew that policemen came over to fetch her son, and gave the conclusion that had he not been hit, Aburque would not have stabbed somebody.

The prosecution on the other hand presented Primo Banaybanay, Dr. Clemente S. Hipe IV, Carmen Ablay, and SPO2 Felonilo Fortuito.

Primo Banaybanay testified that the accused Aburque arrived at the house of Ablay at around ten o'clock in the evening, whereupon he was asked by Ablay to partake of the food and drinks prepared for the ritual for the spirits. Aburque joined Banaybanay and the other guests. After eating and drinking tuba, Aburque announced that he was leaving as his purpose for coming over was not there. He then pulled out his "pinuti" (bolo) and stabbed Ablay hitting him in the stomach and it pierced through his back, at which point, Banaybanay and Aklan started striking

Aburque with firewoods so he would let go of his bolo. He, together with Aklan and Carmen Ablay helped in bringing the victim to the hospital. Banaybanay was likewise among the persons who reported the stabbing incident to the Sibulan Police Station in the early morning of 6 October 1998.

Dr. Clemente S. Hipe IV of the Provincial Hospital testified as to the medical attendance given by him to one Miguel Ablay in the early morning of 6 October 1998; that Ablay died after about six (6) minutes into the hospital due to hypovolomic shock or loss of blood, brought about by a five-centimeter incise wound in his epigastric area.

Ablay's widow, Carmen Ablay testified as to the suddenness of the stabbing of her husband; that she witnessed Aburque stabbed (*sic*) her husband with a bolo in the evening of 5 October 1998, in the occasion of a ritual for the spirits held in their home in Jagnaya, Tubigon, Sibulan, Negros Oriental; that prior to the stabbing, the accused would not let go of his bolo as he laughed and drank tuba with the other guests; she corroborated Banaybanay's testimony that the accused uttered his intention to go home before he stood up and suddenly stabbed Ablay who was seated in front of him; that after stabbing Ablay, the accused pulled the bolo out of Ablay's body, upon which Banaybanay and Aklan started to hit the hands and the head of the accused. The accused fell down the stairs and was followed by Banaybanay and Aklan, who smashed the accused with a big stone. The accused rolled towards the bamboo grove and upon hearing Ablay crying out for help, the two went back to the house to bring Ablay to the hospital. Carmen Ablay also went with them to the hospital. However, the victim did not survive the stabbing and died shortly after arriving at the hospital.

SPO2 Felonilo Fortuito testified that he received the report on the stabbing incident in the early morning of 6 October 1998; that the bolo was surrendered to him after the arrest of the accused; that he recorded the incident in the police blotter; that the police blotter stated that accused Aburque voluntarily surrendered to him. When asked to explain the inconsistency between the voluntary surrender as reflected in the blotter and his testimony on direct examination that the accused was arrested, witness stated that an arrest was actually effected on the person of the accused.^[4]

After trial, the trial court rendered its Judgment dated October 17, 2001 finding the appellant guilty of murder as charged. The decretal portion of the decision reads:

WHEREFORE, accused NEMESIO ABURQUE y TOLONIA, is hereby found guilty beyond reasonable doubt of the crime of MURDER, and the Court hereby imposes upon him the penalty of RECLUSION PERPETUA.

Accused Nemesio Aburque is likewise adjudged to indemnify the heirs of deceased victim Miguel Ablay the sum of Fifty Thousand Pesos (P50,000.00) due to his untimely death.