

SECOND DIVISION

[G.R. No. 121377, August 15, 1997]

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSEPH GELERA @ "SAKI" AND ROGELIO FERNANDEZ @ "TIMBOY", ACCUSED-APPELLANTS.

D E C I S I O N

PUNO, J.:

This is an appeal from the Decision^[1] of the Regional Trial Court of Dumaguete City, Branch 44, dated August 12, 1994, in Criminal Case No. 10126, convicting Joseph Gelera @ "Saki" and Rogelio Fernandez @ "Timboy" of Murder and sentencing them to suffer the penalty of reclusion perpetua in its medium period and to indemnify jointly and severally the heirs of the victim, Daniel Udto, the sum of fifty thousand pesos (P50,000.00) without subsidiary imprisonment in case of insolvency.

The two were charged in an Information which reads as follows:

That on December 4, 1991, at more or less 11 o'clock in the evening, in Sitio Malampa, Barangay Pangatban, Bayawan, Negros Oriental, and within the jurisdiction of this Honorable Court, the above named accused, conspiring and confederating and mutually helping each other, with intent to kill and with evident premeditation and treachery, did then and there willfully, unlawfully and feloniously attack, box and strike one DANIEL UDTO with the use of a stone with which they were then armed, thereby hitting and inflicting upon said Daniel Udto physical injuries which caused cerebral hemorrhage causing his death soon thereafter.

"Contrary to Article 248 of the Revised Penal Code."

The facts are as follows:

On December 4, 1991, at about 7 p.m., 14-year old Amid Jamandron, Joseph Gelera alias "Saki" and Aron Vergara went to Sitio Malampa, Barangay Pangatban, Bayawan, Negros Oriental, to watch a dance. At the dance hall, Amid saw his uncle, Daniel Udto, Rogelio Fernandez alias "Timboy", Ruty Gelera and one Pabling.^[2] At about 11 p.m., Eduardo Aniñon, a neighbor of Daniel and one of the organizers of the dance, noticed that Daniel was already drunk and could hardly walk straight. He advised Daniel to stop drinking and sleep in his grandfather's house. Fernandez, claiming to be Daniel's nephew, volunteered and insisted on bringing him home. Daniel's grandmother, Marta, warned him that he would be responsible if something happened to Daniel. Fernandez left the dance hall with Daniel, Gelera, Amid Jamandron and Aron Vergara.^[3]

After about half kilometer, Daniel, Fernandez and Gelera walked with their arms over

each other's shoulders along a narrow footpath. Following them some ten (10) meters away were Amid and Aron. The place was illumined by two (2) electric lamps. Amid testified that Fernandez punched Daniel causing the latter to fall down. Aron rushed back to the dance hall when the violence started. While Daniel was down on the ground, Gelera struck him with a stone five times (5x) on the neck. Thereafter, Fernandez and Gelera dumped Daniel face down in a nearby canal filled with knee-deep water. They then stepped on his body. Amid saw that Daniel was dead. The three left and went to the beach where they separated. Amid went home to sleep.^[4]

At about 7 a.m. of the following day, Fernandez and Gelera went to Amid's house and told him to stow away with them. Amid refused and the two did not persist with their suggestion. Thereafter, Amid informed his father about the killing of Daniel.^[5]

A certain Rustico Zamora reported the killing to the police at about 11 a.m. At the crime scene, the policemen found a dead body, face down lying flat on the canal. The body bore contusions on the left forehead, left side below the ear, left chin and left side below the throat. The dead person was identified by his relatives as Daniel Udto alias "Dadi". The policemen found out that the night before, Daniel left the dance hall with Fernandez, Gelera and Amid Jamandron. They investigated Amid and he revealed to them that Fernandez and Gelera were the perpetrators of the crime.^[6]

Gelera claimed self-defense. He testified that he saw Daniel Udto drinking at the dance hall on the night of December 4, 1991. Without any provocation, Daniel punched him. Instead of retaliating, he just walked away from Daniel as the latter was drunk. He remained in the dance hall drinking wine. He left for home at about 11 p.m. with Amid Jamandron. Along a narrow footpath, he heard somebody say "You are here, I will finish you." He identified the voice as that of Daniel. Daniel boxed him at the upper left portion of his chest and he fell to the ground. As Daniel might strike him again, he grabbed a stone and threw it at Daniel. The stone hit Daniel at the left portion below the base of the neck causing him to fall. Daniel got up and attempted to attack him again. He then struck Daniel on the neck with a stone and he fell to the ground once more. He left Daniel for fear that he might get up and strike back.^[7]

Gelera alleged that he has no misunderstanding with Daniel. He explained that he used a stone to repulse Daniel's attack because he was smaller than Daniel.^[8]

Rogelio Fernandez's defense was alibi. He testified that on December 2, 1991, he left Barangay Cansilong, Bayawan, Negros Oriental, at about 8 p.m. with Boboy Puyat, Tinoy Atay, a certain Bebot and an unnamed boatman to fish in the deep sea of Mindanao. They stayed in the sea for three days and two nights. They returned to Bayawan on December 5, 1991 at about 11 a.m. When he arrived at his house at about 12 noon, he found Gelera who told him about his encounter with Daniel on the night of December 4, 1991. He declared that he and Gelera were arrested at his house by Victor, a CVO member, and brought to the house of the barangay captain who was not around at that time. They proceeded to the police station in Bayawan where he was forced to admit the killing of Daniel. Allegedly, his head was bumped against the cement wall by one of the policemen.^[9]

The trial court convicted Gelera and Fernandez of "the crime of murder committed by means of superior strength, evident premeditation, grave abuse of confidence, qualified with (sic) treachery".^[10] Both appealed. Accused-appellant Gelera contends in his Brief:

I. The trial court erred in holding that the killing of the victim, Daniel Udto, was attended with the qualifying circumstances of superior strength, evident premeditation, grave abuse of confidence and treachery.

"II. The trial court erred in not finding that accused-appellant acted in legitimate self-defense."

As for accused Fernandez, the records show that he escaped from the Negros Oriental Rehabilitation and Detention Center, Dumaguete City, on April 6, 1995.^[11] Pursuant to section 8 of Rule 124, the appeal of Fernandez is dismissed.

The appeal of Gelera is partly meritorious.

I

In the first assignment of error, appellant Gelera claims that the trial court erred in holding that the qualifying circumstances of abuse of confidence and abuse of superior strength attended the killing of Daniel although they were not alleged in the Information. A reading of the dispositive portion of the assailed Decision, however, clearly shows that the aggravating circumstances of abuse of superior strength and grave abuse of confidence were not used by the trial court to qualify the crime committed by the accused-appellant to murder. Its dispositive portion states:

"WHEREFORE, finding the evidence for the prosecution convincing and credible, this Court hereby declares both accused Joseph Gelera alias "Saki" and Rogelio Fernandez alias "Timboy" guilty beyond reasonable doubt of the crime of Murder committed by means of superior strength, evident premeditation, grave abuse of confidence, qualified with (sic) treachery."

Plainly, treachery was the only qualifying circumstance used by the trial court in convicting appellant of murder. It is not disputed that treachery as a qualifying circumstance was alleged in the Information. Abuse of superior strength, abuse of confidence and evident premeditation were appreciated by the trial court as mere generic aggravating circumstances. Generic aggravating circumstances may be proven even if not alleged in the information.^[12]

II

We now pass upon the propriety of the trial court's appreciation of the qualifying circumstance of treachery and the aggravating circumstances of abuse of confidence, superior strength and evident premeditation.

For treachery to be appreciated, the prosecution must prove: (1) that at the time of the attack, the victim was not in a position to defend himself, and (2) that the offender consciously adopted the particular means, method or form of attack