

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
DOMINGO VISAGAR, DEFENDANT AND APPELLANT.***G. R. No. L-5384. June 12, 1953*

Ponente: BAUTISTA ANGELO, J.

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This is an appeal from a decision of the Court of First Instance of Leyte finding the accused guilty of murder and sentencing him to suffer the penalty of death, with the accessory penalties of the law, to indemnify the heirs of the deceased in the sum of P4,000, without subsidiary imprisonment in case of insolvency, and to pay the costs.

Domingo Visagar and Pedro Basilio had been neighbors for sometime, their houses being situated a few meters apart at the corner of Veteranos Street and Rizal Avenue in Tacloban, Leyte. Prior to the incident in question, the relationship between their families was quite cordial until the later part of July, 1951 when a dispute arose between them over a passageway from the house of Basilio leading to Veteranos Street.

Pedro Basilio was leasing a house and lot belonging to Angel Tomanda at Veteranos Street where he lived with his family. Fronting that street were two vacant lots belonging to Tomanda and Leonardo Enage which were also leased to Pedro Basilio. On the vacant lot of Tomanda there was a strip connecting the main street with the houses situated in the interior lot one of which belonged to Domingo Visagar. It appears that, a few days before the incident, Pedro Basilio started fencing the vacant lot thereby closing the passageway leading to the main street. The closing of that way greatly inconvenienced Visagar who had a jeep which used to pass through that passageway in going to and from his house.

At around 10 o'clock in the morning of July 10, 1951, Pedro Basilio and the wife of Visagar met in the office of Mayor Epifanio Aguirre where a heated argument took place between them regarding the affair. Mrs. Visagar pleaded to the Mayor that he make use of his influence so that Basilio may grant them the way they need for their jeep. Despite the intervention of the Mayor, who tried to bring about an amicable settlement, nothing was done because Basilio refused to compromise. Angel Tomanda, owner of the lot in dispute, was also asked to intervene, but he declined alleging that the lot was leased to Pedro Basilio. As Mrs. Visagar and Basilio could not reach an understanding, before departing, the former addressing the latter said, "If that is what you wish, something may happen." A few minutes later, Mrs. Visagar returned to the Mayor's office with her husband to request the Mayor once again to prevail upon Pedro Basilio not to close the passageway. The Mayor then called Angel Tomanda to his office and requested him to settle the dispute being the owner of the vacant lot being fenced by Basilio. This time Tomanda promised that he would look for a back alley which would allow the Visagars to bring their jeep to the main street, but Mrs. Visagar turned down the offer insisting that they had every right to use the old passageway, and in the presence of the Mayor said, "Mang Angel, please help settle this matter because something will happen." Mr. Visagar, who was nearby, also made this remark, "My wife told me that she is being downtrodden, abused * * * I better go to jail, there is no more use, if I cannot let my jeep enter my house and it is prohibited to park the jeep in the street I better go to jail."

After the conference in the office of the Mayor, Angel Tomanda and the spouses Visagar proceeded to the vacant lot being fenced by Pedro Basilio to view it and attempt another settlement. During the ocular inspection, Domingo Visagar suddenly rushed to Basilio with the evident intention of attacking him, but Tomanda stopped him and momentarily he was pacified. As Basilio remained adamant in his attitude in closing the passageway, Domingo Visagar faced him saying, "You Indong, you are always like that, do you want a fight with guns?" And in a split second ran towards his house, got his .45 caliber automatic pistol, and went to look for Basilio who at that time was leaning against the kitchen door of his house with his hands akimbo. At a distance of about three meters, and without mediating any word, Visagar fired two shots which hit Basilio on the chest causing two mortal wounds. Already wounded, Basilio entered the kitchen, followed by Visagar, who fired several shots in succession at Basilio after closing the door behind him. The wounded man staggered inside the kitchen where he dropped dead.

Dr. Isidoro Madlangbayan, resident physician of the Leyte Provincial Hospital, performed the autopsy and found six serious wounds in the different parts of the body of the deceased. The cause of death were the perforations of the heart, lungs and blood vessels which produced severe internal hemorrhage.

The accused admitted having shot to death the deceased Pedro Basilio, but he alleged self-defense. He gave the following version: After coming from the Mayor's office where a conference was held to reach an amicable settlement, he, together with his wife and Tomanda, went to the vacant lot being fenced by the deceased where he met the latter. During the ocular inspection, when the deceased and Tomanda were showing to the accused the proposed passageway, the deceased asked the latter, "What will pass here, a jeep?" After the accused answered affirmatively, the deceased replied, "If a jeep is going to pass here, let the jeep fly." The accused retorted saying, "there is no jeep that can fly" and that "I will have my jeep pass through regardless of what will be destroyed upon my passing through." Sensing danger, Tomanda started to run, and forthwith, resentful of these remarks, the deceased drew his .38 caliber pistol and tried to shoot the accused. The latter grabbed the pistol with his right hand and both grappled for its possession at which instance the pistol fired. The deceased then held the accused tightly by the breast with his left hand and that, while struggling at close range, the accused was able to draw from the left pocket of his pants his .45 caliber pistol and with it shot the deceased several times.

There is no doubt in the mind of the court that the accused is guilty of having killed the deceased considering the manner and circumstances under which the wounds were inflicted on the latter which caused his instant death. That the accused started the aggression by firing his .45 caliber pistol at the deceased when he became incensed at the adamant attitude of the latter in connection with his plea that he give him a lane for the passage of his jeep from his house to the main street, is clearly proven not only by the eye-witnesses but by the nature and number of the wounds found in the body of the deceased in the autopsy performed by Dr. Isidoro Madlangbayan. According to eye-witnesses Trinidad Apura and Bibiana Labajo, the deceased was suddenly shot by the accused while leaning against the kitchen door of his house with his hands akimbo without mediating any struggle or exchange of words between the two immediately before the shooting. Trinidad, a laundrywoman of the Basilio family, was then standing in the kitchen while taking rest from her work when suddenly the accused came up and immediately fired shots at the deceased. Bibiana, on her part, was in her house about 10 meters distant from the kitchen of the deceased and while she was splitting firewood, she saw the accused pass by with a pistol in his hand and upon approaching the deceased he fired at him. Then, she said, the accused entered the kitchen and thereafter she heard several more shots. When he came out of the house, he was already carrying two pistols in his hands and went directly to her house inquiring for her brother-in-law and not finding him there he went home and then, according to Bibiana, she heard another shot. When policeman Baltazar Cormero arrested the accused in his house he found in his possession not only his own pistol, caliber .45 but also the nickel-plated pistol of the deceased caliber .38. And when these pistols were examined, it was found that all the bullets in the .45 caliber pistol had been fired

whereas in the .38 caliber pistol only one bullet was missing. This finding is significant for it corroborates the statement of the prosecution witnesses Apura and Labajo that the accused fired upon the deceased a rain of shots in rapid succession when he was assaulted in the kitchen of his own house and that when the accused went home carrying the two pistols, he again fired another shot. Evidently, the accused fired the lone shot from the pistol of the deceased to pave the way and give a semblance of truth to his plea of self-defense. The version of the two witnesses is confirmed by the findings of Doctor Madlangbayan who declared that, judging by the nature of the wounds found in the victim's body, the first two shots were fired by appellant at a distance of about three meters and that there was no struggle between the two immediately before the shooting. The multiple wounds found in the different parts of the victim's body also corroborate the multiple shots fired at him by the accused.

The claim of self-defense of the accused is hard to believe considering the circumstances which, according to him, preceded the shooting. He said that during the ocular inspection, the deceased sarcastically told him, "if a jeep is going to pass here, let your jeep fly", to which he replied saying, "there is no jeep that can fly" and that "I will have my jeep pass through regardless of what will be destroyed upon my passing through." The accused says that, because of this retort, the deceased became enraged and drew his .38 caliber pistol and tried to shoot him. Then he grabbed the pistol of the deceased with his right hand and while grappling for its possession, it fired once, and while struggling at close range he (accused) was able to draw his .45 caliber pistol from his left pocket and with it shot the deceased several times. If the accused merely remarked that there is no jeep that can fly and that at any rate he should have his jeep pass through regardless of the consequence, we cannot perceive how this remark could have enraged the deceased to the extent of shooting him with his pistol. That remark was at most a mere threat, and unless carried out, no harm could be done. It could not have provoked the deceased to the extent of drawing his pistol knowing that the accused was equally armed with a deadly weapon. On the other hand, it was the accused who had every reason to be resentful and to be enraged considering the stubborn refusal of the deceased to heed the accused's plea that he be given a way for the passage of his jeep to the main street. And then there was the threat made by the accused few hours before the fatal occurrence when he said that if he could not have his jeep enter his house because of the prohibition of the deceased he would prefer to go to jail. These circumstances lead to but one conclusion: That it was the accused who initiated the aggression which ended in the instant death of the deceased.

The findings of Doctor Madlangbayan as regards the number and nature of the wounds as found in the body of the victim also belie the claim of self-defense of the accused. If it is true that the shooting was preceded by a personal grappling or handling between the assailant and the victim where both were armed with pistols, it does not stand to reason why the accused did not receive any wound whereas the deceased received many serious wounds which caused death immediately. Moreover, if we were to believe the accused's version of the shooting, he must have been at a very close range when he fired the fatal shots. According to him, he fired the shots while locked in struggle with the deceased for the possession of the latter's gun. Doctor Madlangbayan belied this story when he explained that no powder burns were found on the victim's body.

The defense presented three character witnesses to prove that the deceased was a man of violent temper and of quarrelsome disposition. They testified that the deceased was of aggressive character and had a bad reputation because he used to ill-treat his employees. But these witnesses proved to be biased because during their testimony they showed that they bore deep resentment against the deceased. They also testified that the act and behavior on which they base this character of the deceased took place more than ten years ago or long before the last war and considering the period that has elapsed since then, the character of the deceased may have undergone such change as befits his education and social standing in the community. On the other hand, this attempt to besmirch the character of the deceased appears sufficiently rebutted by two prominent and respectable residents of the place, Gerardo Villasin, Chairman of the local Board of Directors of the Philippine National Red Cross, Vice-President

of the Boy Scouts, Grand Knight of Columbus and member of the Rotary Club, and Dr. Virginio Fuentes, Chief of the City Hospital and President of the Tacloban Lions Club. These witnesses assured the court that the deceased was a man of good reputation and standing in the community.

According to the Solicitor General, the crime committed is merely homicide and not murder as found by the trial court. And this is so because, according to him, it was the accused who challenged the deceased to a gunfight before the shooting, which shows that the attack was not treacherous because it gave the deceased a chance to prepare for the impending attack. And considering the brief period that had elapsed from the time the challenge was hurled to the actual shooting, it cannot be said that appellant had premeditated the commission of the crime. To this we agree. In the commission of the crime, the aggravating circumstance of dwelling is present which is offset by the mitigating circumstance of passion, and obfuscation. The penalty prescribed by law should therefore be imposed in the medium period.

Wherefore, with the modification that the accused be sentenced to an indeterminate penalty of not less than 12 years of prision mayor and not more than 17 years and 4 months of reclusion temporal, the judgment appealed from should be affirmed, with costs against appellant.

Paras, C. J., Bengzon, Reyes, Jugo and Labrador, JJ., concur.

CONCURRING AND DISSENTING

MONTEMAYOR, J.,

In so far as appellant is found criminally responsible for the killing of the deceased Pedro Basilio, I concur. From the majority's finding that the crime committed was homicide instead of murder as found by the trial court, and from its consideration of the mitigating circumstance of passion and obfuscation in appellant's favor, I dissent.

In considering the killing as mere homicide, the majority merely relies on the view advanced by the Solicitor General. Says this Court—

"According to the Solicitor General, the crime committed is merely homicide and not murder as found by the trial court. And this is so because, according to him, it was the accused who challenged the deceased to a gun fight before the shooting, which shows that the attack was not treacherous because it gave the deceased a chance to prepare for the impending attack." (Majority Opinion, p. 9 last paragraph.)

Since the Court fails to base its conclusion on its own finding of fact and on its own reasoning, but relies implicitly on the Solicitor General's statement of fact and conclusion on this point, and makes them its own, it is but proper to consider and analyze that official's view.

I quote from the Solicitor General's brief.

"* * *. Appellant ran instantly towards his house, got his .45 caliber automatic pistol, Exhibit J, and sought the deceased who by then was standing and leaning against the kitchen door of his house with his hands akimbo (pp. 31, 52, 76, 81, 83, 86, t. s. n.). At a distance of about three meters, appellant forthwith fired two shots hitting the deceased on the chest causing two mortal wounds (pp. 77, 83, 86, 95, 98, 103, t. s. n.).

The wounded man staggered inside the kitchen of his house where he soon fell (Exhibits B, C, D, folio of exhibits; p. 86, t. s. n.). Appellant followed up by firing four more shots at his fallen victim hitting him on different parts of the body (pp. 86, 95, 97, 108, 170, 119 t. s. n.). [Solicitor General's Brief p. 4]

"From all indications, the deceased did not expect appellant to take things seriously when he (appellant) said,

'Do you want a fight with guns' before running to his house to get the firearm, Exhibit J. Otherwise the deceased would not have been caught off-guard without being able to defend himself with the firearm, Exhibit I, which he probably had with him at the time. Pedro Basilio, Jr. who was present when his father was challenged by appellant to a gun fight a few moments before the shooting confirmed this fact when he said that 'his father was happy that day, he was laughing, smiling' when appellant uttered the challenge (p. 75, t. s. n.)." (Italics supplied—Ibid., pp. 7-8).

"* * *. It cannot be said, therefore, that the shooting "was treacherous simply because the deceased did not take appellant's challenge seriously as to cause hfon to be prepared, for the impending attack. That appellant challenged the deceased to a gun fight and immediately thereafter ran to his house to get a gun should have served as sufficient warning to the deceased of what was to come." (Italics supplied—Ibid., p. 11).

I accept Government counsel's statement of fact in the same manner that it was accepted by the majority, but I disagree as to the conclusion drawn therefrom by him and by the court. This was the situation. The appellant challenged the deceased to a duel, but the latter possibly knowing his neighbors' (appellant) passing fits of temper did not take the challenge seriously. Deceased was in good humor, smiled and even laughed, and calmly and leisurely went to his house and perhaps forgot all about the incident. He stood at his kitchen door, leaned against it, placed an arm akimbo and presumably thought of other things. He did not even bother to look in the direction of the entrance or stairs of his house to see if anyone came up. That was the way he treated the whole affair. In other words, he did not expect, much less prepare for the attack. In this state of mind and attitude he was found and set upon by appellant who must have entered the house stealthily and unnoticed so as to forestall any effective defense or even aggression. The Solicitor General himself says that the deceased was "caught off-guard without being able to defend himself," and that, not having taken the challenge seriously, he was unprepared for the attack. It was, therefore, a clear case of treachery, the attack being sudden and with a firearm, on a victim not prepared for it, and unable to defend himself or to run away to evade it. Point blank, appellant fired two shots inflicting two mortal wounds on the chest. Surprised and dazed, even paralyzed by the sudden, unexpected aggression, the victim could not even face his assailant but he staggered into his kitchen where appellant followed and finished him with four more shots.

Article 14, paragraph 16, of the Revised Penal Code defines treachery thus—

"There is treachery when the offender commits any of the crimes against the 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."

Appellant's sudden attack with a gun, were means employed which tended to insure execution of the killing, and there was certainly no risk to himself. I, therefore, believe that there was treachery in the attack.

Now, with respect to the mitigating circumstance of passion and obfuscation, this court and the Solicitor General merely say that in the commission of the crime, the aggravating circumstance of dwelling is off-set by the mitigating circumstance of passion and obfuscation. Neither considerations are made nor reasons given, and it seems that they just took it for granted. I am afraid that they over-looked the long line of decisions of this tribunal laying down the rule in consonance with decisions of the Supreme Court of Spain, when this mitigating circumstance may be considered in favor of an accused, and when it may not be accorded to him. In the case of *People vs. Silang Cruz* (53 Phil. 635, 638), this court said:

"As was held in the cases of *United States vs. Herrera* (13 Phil., 583), and *United States vs. Fitzgerald* (2 Phil., 419), the accused must have been actuated by such causes, both strong and powerful, as naturally produced passion and obfuscation, and those causes which merely give rise to the excitement inherent in combatants are not sufficient. Furthermore, the obfuscation must originate from lawful feelings (*U.S. vs. Flores*, 28 Phil., 29)."

In the case of *U. S. vs. Fitzgerald* above referred to, the defendant after a heated discussion and quarrel with the deceased, was punched and knocked down by the latter. Defendant went to his home, got his revolver and coming back, shot the deceased. That was a stronger case than the present; Fitzgerald as already stated, was even knocked down as a result of which he must have been obfuscated and infuriated, and yet this court held that he was not entitled to this mitigating circumstance. In the present case, nothing of the sort was done by the deceased Pedro Basilio to the herein appellant. All that he did was to refuse to grant the request for a right of way. This mere denial should not be regarded as sufficient to call for lawful resentment for the reason that Basilio was not legally bound to grant the request unless duly compensated therefor.

In the case of *U. S. vs. Taylor* (6 Phil., 162, 163), this court in overruling the trial court and in refusing to consider the presence of the mitigating circumstance of passion and obfuscation said:

"The trial court was of opinion that in fixing the penalty the extenuating circumstance defined in paragraph 7 of article 9 should be taken into consideration, because the accused committed the offense in an uncontrollable burst of sudden passion (*arrebato y obcecacion*), but the supreme court of Spain has repeatedly held that the fact that the offense was committed under the stimulus of a sudden burst of passion should not be taken into consideration as an extenuating circumstance unless it appears that it was provoked by prior unjust or improper acts. (Decisions of the Supreme Court of Spain of October 11, 1887.)"

In the case of *U. S. vs. Hicks* (14 Phil., 217), the accused therein and a woman illicitly lived together. Afterwards, the woman separated from him and lived with another man. Defendant, enraged by her conduct killed her. This court held that no mitigating circumstance of passion and obfuscation was present, not even loss of reason and self-control produced by jealousy as alleged by the defense, inasmuch as the only causes which mitigate the criminal responsibility for the loss of self-control are such as originate from legitimate feelings, not those which arise from vicious, unworthy and immoral passions.

Finally, we have the case of *People vs. Nonay* (58 Phil., 393). Defendant Nonay's carabao was destroying the sugar cane planted by the deceased, and the latter told Nonay to tie his carabao and pay for the damage caused. Upon Nonay's refusal, the deceased said he would take the carabao to the lieutenant of the barrio and started to do so. Nonay grabbed his spear, pursued the deceased and stabbed him to death. He was found guilty of homicide by the trial court and was given the benefit of the mitigating circumstance of passion and obfuscation. On appeal, this tribunal refused to accord him said mitigating circumstance and said:

"* * *. The finding that the defendants acted upon an impulse so powerful as naturally to have produced passion or obfuscation was likewise not justified by the evidence of record. The deceased, as we have said, was clearly within his rights in what he did. The defendants, without any rational cause for provocation, pursued the deceased and deliberately killed him. In order to be entitled to this mitigating circumstance, it must appear that the obfuscation of the deceased arose from lawful sentiments. The fact that an offense was committed in an uncontrollable burst of passion (*con arrebato y obcecacion*) should not be taken into consideration as an extenuating circumstance unless it appears that it was provoked by prior unjust or improper acts.' (*U.S. vs. Taylor*, 6 Phil., 162.)"

Considering the rule laid down in the above-quoted authorities, may appellant Visagar properly claim this mitigating circumstance of passion and obfuscation? Unlike the defendants in the different cases cited where the deceased or offended party performed a positive act such as a mistress going to live with another man, or the deceased punching and knocking down the accused, or the deceased taking the animal of the defendant to the lieutenant of the barrio,—all positive acts likely to produce resentment, passion and obfuscation in the accused, here the deceased performed no positive act. His was only negative. He merely refused to grant a request of the defendant, a request which by the way was not legitimate or one to which he was entitled. Under the law (art. 564, old Civil Code and article 649, new Civil Code), one is entitled to demand a right of way through the neighboring

estates only after payment of the proper indemnity. Appellant Visagar never offered to pay for the right of way he asked for. On the contrary, according to his own testimony, and as quoted in the brief of the Solicitor General and in the majority opinion, he told the deceased that "I will have my jeep pass through regardless of what will be destroyed upon my passing through." No wonder that because of such attitude and because of the lack of offer to pay indemnity, the deceased refused as he had the right to refuse to grant the passage or right of way. He was perfectly within his right in doing so and the anger and resentment created in appellant was not based on a legitimate and lawful sentiment. Appellant is not, therefore, entitled to this mitigating circumstance of passion and obfuscation.

In conclusion, I hold that the crime committed is murder, and that there being no mitigating circumstance to compensate the aggravating circumstance of dwelling, the penalty should be imposed in its maximum degree. However, because of the absence of the necessary number of votes to impose said penalty, the same should be reclusion perpetua.

Pablo and Tuason, JJ., concur.

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