

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JESUS G. RUIZ, DEFENDANT-APPELLANT.*G.R. No. L-33609. December 14, 1981*

Ponente: DE CASTRO, J.

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Automatic review of the decision of the Court of First Instance of Agusan imposing the death penalty on the appellant, Jesus G. Ruiz, for murder, aggravated by abuse of confidence, and sentencing him also to pay the heirs of the deceased, Atty. Jose Ong Oh, Jr. P12,000.00 as indemnity, P176,000.00 representing lost earnings of the deceased, P50,000.00 as moral damages, P25,000.00 as exemplary damages, and P10,000.00 as expenses of litigation, plus costs.

The gun used in the killing, an unlicensed revolver (Exhibit "F"), was ordered confiscated in favor of the Government.

As to how the crime was committed, and the events immediately preceding and following the commission thereof, the prosecution's version is presented in the People's Brief as follows:

"At about 6:30 P.M. of May 30, 1968, while accused was downstairs, in the mezzanine of the store situated at the first floor of his house along Mabini Street, at Nasipit, Agusan del Norte, Raymundo Discipulo arrived thereat and after quite sometime asked the accused whether it was true that the loading of copra on the M/V Sweet Hope that day was given to Goring Gavero. Expressing his surprise as he could not believe then that it could happen because of his contract and good relation with the deceased, the accused was only able to answer: 'Ha?' to Raymundo Discipulo's query (pp. 8-10, tsn, Aug. 26, 1969).

"At about 7 o'clock that same evening, the accused left the said store, took a tricycle and went to the office of the Oceanic Enterprises and inquired for the deceased (pp. 287-288, tsn, April 15, 1969). Upon being informed by Leoncio Njai Acido, a copra sample man of the said Oceanic Enterprises, that the deceased was at the wharf, accused left and rode on the waiting tricycle bound for the town (pp. 287, 289, tsn, Id.).

"At about 8:30 o'clock that same evening of May 30, 1968, while Carmelito Omboy was in his house fronting the plaza of the poblacion of Nasipit, Agusan del Norte, Dodong Ratilla, a nephew of the accused, arrived and told him (Carmelito Omboy) that the accused was requesting him to go to the latter's house (pp. 81, 82, tsn, Feb. 24, 1969). Soon thereafter, Carmelito Omboy went with Dodong Ratilla and proceeded to the accused's house located at a distance of only about .20 meters away and upon arrival thereat, accused who was then sitting by the door way beside a store (p. tsn, Id.) stood up and commanded him (Carmelito Omboy) to go to the wharf and to tell Joker (Atty. Jose Ong Oh, Jr., the deceased) to come to his (accused's) house because the latter wanted to talk to the former (pp. 83, 84, 86, tsn, Id.). Forthwith, Carmelito Omboy along with Dodong Ratilla took a tricycle and went to the wharf, a kilometer away, to look and fetch for the deceased (p. 87, tsn, Id.). Sometime after their arrival at the wharf, Carmelito Omboy was able to contact and convey the accused's message to the deceased who affirmatively said 'Yes, I will be going there' and a little later rode in his jeep bound for the town followed by Carmelito Omboy in a tricycle (pp. 87-89, tsn, Id.).

"Meanwhile, and that was between 8:30 and 9:00 o'clock that same evening of May 30, 1968, a wharf-bound cargo truck loaded with copra of the deceased and driven by Jose Mendrez developed engine trouble at the corner of Roxas and Mabini Streets in the poblacion of Nasipit, Agusan del Norte (pp. 233, 234, tsn, April 14, 1969) and stopped along Roxas Street at a point more or less seven (7) meters from the place where accused was sitting (p. 242, tsn, Id.). A short while after the said cargo truck stopped, and while its driver Jose Mendrez was still behind its wheel, the latter was approached by one named Charlito Cañon who said to him 'Nong, you are called by Jesus Ruiz', referring to the accused. Jose Mendrez went down the cargo truck and proceeded to where accused was sitting outside his store (p. 235, tsn, Id.). Accused gave Mendrez a glass containing Tanduay wine, a little of which the latter drank (p. 236, tsn, Id.). Accused inquired from Mendrez as to the whereabouts then of the deceased. Mendrez answered that he does not know because when he left the bodega, the deceased was not there (p. 237, tsn, Id.).

"At this juncture then; and upon accused's instructions, Charlito Cañon, Nonoy Palabrica and another person unloaded from the stalled cargo truck three (3) sacks of copra which were then dropped along Roxas street at the side of the said truck (p. 238, tsn, Id.). Thereafter, Charlito Cañon stood at a corner fronting Roxas street, while Nonoy Palabrica and the other person went behind the house of the accused (p.239, tsn, Id.). Mendrez excused himself and went to the truck but upon reaching the same, Charlito Cañon told him that accused was calling for him again (p. 239, tsn, Id.). So, he (Mendrez) went back to the accused who, while holding a glass of Tanduay on his left hand and with something protruding from his waist, told him not to go away, otherwise, he (accused) would shoot him (p. 240, tsn, Id.).

"While Mendrez was thus being threatened by the accused, the deceased arrived in the vicinity riding in his jeep, but before the latter could alight therefrom, he was approached by Charlito Cañon, and soon thereafter, the deceased got down from his jeep and went towards the parked cargo truck and looked over at the sacks of copra lying on the street. Then he proceeded to the place where accused was (p. 241, tsn, April 14, 1969; p. 94, tsn, Feb. 24, 1969). Taking advantage of this opportunity, Mendrez left and went towards his parked cargo truck.

"According to Carmelito Omboy who arrived at the vicinity almost at the same time that the deceased reached the place as the latter was followed by the former from the wharf, the deceased greeted the accused 'Jesse, Jesse' extending his arms to the accused who, however, slapped them and kicked the rattan stool and said, 'Sit down' to the deceased in a commanding manner (pp. 94, 95, tsn, Feb. 24, 1969); that the deceased picked up the rattan stool and placed it in front of the accused and sat on it (pp. 96, 97, tsn, Id.); that accused demanded, 'Why did you load without asking permission?' (pp. 99, 100, tsn, Feb. 25, 1969); that the deceased answered 'Jesse, easy, easy' (Id.); that accused then splashed a glass of wine on the face of the deceased and throw the glass to the concrete pavement (Id.); that the deceased stood up, wiped his face, removed his eyeglasses and wiped it with his T-shirt, wore his eyeglasses again and sat down anew, but accused with his right hand slapped him on the left cheek (pp. 99, 100, tsn, Feb. 25, 1969); that the deceased's face was turned to the right due to the impact of the slapping, only to be met by the shot from accused's black revolver (Exh. "F", p. 110, tsn, Id.) when the deceased turned his face to the front; that the accused got the revolver from his right waist and that only one shot was fired (pp. 101, 102, t.s.n., Id.); that the deceased jerked a little and fell to his left side, meanwhile the accused stood up still holding his revolver, raised it, turned its drum and tucked it on his right waist (p. 102, tsn, Id.); that thereafter, the accused turned to his right, and went upstairs of his house (p. 110, tsn, Id.) and threw his firearm (p. 45, tsn, Aug. 27, 1969); that after a while, ac-cused came down from his house, passed by the body of the deceased, walked along Roxas Street and proceeded to the Municipal Building (pp. 111, 112, tsn, Feb. 25, 1969; p. 45, tsn, Aug. 27, 1969).

"Sometime, thereafter, that same evening, the Chief of Police of Nasipit, Agusan del Norte, Teodoro Luneta, arrived at the scene of the shooting incident to investigate at the instance of Mrs. Lourdes Ruiz, wife of the accused (pp. 22, 24, tsn, Aug. 27, 1968). Chief Luneta saw near the house of the accused the body of the deceased (p. 28, tsn, Id.) whom he had known for a good number of years (p. 24, tsn, Id.). He did not see any

firearms with or within the immediate vicinity of the victim (p. 58, tsn, Feb. 24, 1969). He left the place for a while to call some of his policemen to assist him, but upon his arrival at the municipal building, he saw the accused already there, so he ordered the station guard to keep watch on the person of the accused. As most of his policemen turned out to be on patrol, he went back to the scene of the crime, supervised the taking of the picture of the deceased on the spot, as well as the scene of the crime by photographer David, and the drawing of a sketch of the place (Exh. "B") by Corporal Jalop (p. 31, tsn, Aug. 27, 1968).

"The body of the deceased was autopsied at the Raniel's Funeral Parlor at Butuan City by Dra. Lydia San Pedro, Municipal Health Officer of Nasipit, Agusan del Norte, at 2:00 o'clock in the morning of May 31, 1968 (pp. 140, 142-149, tsn, May 7, 1969), with the help of Dr. Teodoro Vesagas who did the actual incision (pp. 102, 149, tsn, May 7, 1969) and removed the slug which was lodged in the left medulla of the victim's brain (p. 116, tsn, Id.). The autopsy findings are reflected in the medical report (Exh. "T" and "T-3") submitted and testified to by Dra. Lydia San Pedro (p. 150, tsn, Id.) showing the following:

'Ext. finding: Transixed tongue medially; cominuted fracture left maxilla;

-- upper and lower incissor teeth left upper premolar detached from socket;

-- Hard and soft palate fractured on the left side with rugged edges.

'Internal Findings: Linear fracture from occiput extending to the base' of the skull; lacerated left and right lobe of the medulla; bullet slug lodge in the left medulla. Course of bullet wound of entrance-- left hard palate--left maxilla--base of the skull--left medulla.

'Description of wound entrance--Location--left angle of the mouth, has irregular surface with upward extension about 1-1/2 inches forming a triangle, two smaller linear wound triangular in size 1/2 inch in length on both sides of the first wound de-scribed above, burned and roughened area about the wound of entrance.

'CAUSE OF DEATH: Laceration with hemorrhage medulla due to gunshot wound.' (p.39, Rec.)

"In the early morning of May 31, 1968, the recovered slug (Exh. "C") was handed by Dra. Lydia San Pedro to Chief of Police Luneta (pp. 36-39, tsn, Aug. 27, 1968; p. 152, tsn, May 7, 1969) who in turn gave it to his deputy, Police Lt. Amado Felias, with instructions to have it ballistically examined (tsn, pp. 36, 37, Aug. 27, 1968; p. 237, May 9, 1969), and to escort the accused to Camp Crame for the purpose of paraffin test, which mission he undertook toge-ther with Lt. Jose C. Edera of the Agusan PC Command that same morning of May 31, 1968 (tsn, pp. 30-34, May 5, 1969; pp. 239 240, May 9, 1969).

"According to Capt. Constantino Y. Leva, Chief of the Ballistics Branch, PC Central Laboratory, Camp Crame, (pp. 148, 149, tsn, April 18, 1969) and who examined ballistically the recovered slug (Exh. "C"), the said slug was fired from a Cal. .357 Magnum firearm (pp. 150-155, tsn, Id.).

"The result of the paraffin test conducted on the accused also on May 31, 1968 by Lt. Col. Minardo B. Piñones, Chief of the Chemistry Branch, PC Central Laboratory, Camp Crame (pp. 326, 327, tsn, April 17, 1969), showed that the right hand of the accused was positive for the presence of nitrates, while his left hand was negative (Exh. "K"; pp. 336, 337, 388, 389, tsn, Id.).

"On the same date, May 31, 1968, at Camp Crame, Quezon City, the accused executed an affidavit (Exh. "Z") stating therein that while he and the deceased were grappling for the possession of the deceased's revolver, somebody whom he did not see fired at the deceased. This affidavit, however, was not believed by Lt. Col. Pelayo Perez, CIS Deputy Executive Officer, when the said affidavit was presented to the latter on June 1, 1968 on account that it does not identify who shot the deceased (pp. 174-175, tsn, May 8, 1969), so that Lt. Col. Perez was constrained to, and did, interview, the accused. (pp. 176, 179, tsn, Id.). After the interview, the accused, in the presence of Lt. Col. Perez, executed a second affidavit (Exh. "Z-1") giving a new version of the incident, in that it was the revolver of the deceased which killed the latter, and because of this new version, Lt.

Col. Perez further interviewed the accused who finally admitted that he knew where the firearm was, and promised to surrender the same in Agusan, if he (Perez) would go there. Forthwith, the accused was returned to Nasipit, Agusan, accompanied by Police Lt. Amado Felias and PC Lt. Edera (p. 240, tsn, May 9, 1969), while Lt. Col. Perez decided to follow them later together with CIS Agent Sofronio Sison (p. 182, tsn, May 8, 1969).

"In the meantime, on June 2, 1968, P.C. Sgt. Manuel Leva, a paraffin technician, lifted paraffin casts on the left cheek and both hands of the deceased (pp. 303-307, tsn, April 16, 1969). On June 6, 1968, these paraffin casts were turned over by Sgt. Leva to Lt. Col. Minardo B. Piñones, the Chief Chemist, who examined the same and the result (Exh. "L", p. 349, tsn, April 17, 1969) showed that the paraffin cast lifted from the left cheek of the deceased was positive for the presence of nitrates (pp. 346, 347, tsn, Id.), while the paraffin casts lifted from both hands of the deceased were negative (p. 348, tsn, Id.).

"On June 4, 1968, Lt. Col. Perez arrived in Agusan and at the residence of the accused the latter surrendered to the former a Cal. .357 Magnum firearm with five live ammunitions and one spent shell (pp. 182-191, tsn, May 8, 1969; pp. 37-43, May 5, 1969), which firearm (Exh. "F") was found ballistically to be the firearm from which the recovered bullet or slug (Exh. "C") that killed Atty. Jose Ong Oh, Jr. (deceased) was fired (Exh. "P"; pp. 162-167, tsn, April 18, 1969).

"On June 5, 1968, the next day after the accused surrendered the aforesaid firearm (Exh. "F"), he executed a third affidavit (Exh. "Y") consisting of six (6) pages, at the Headquarters of the Agusan PC Provincial Command at Butuan City (pp. 193, 194, tsn, May 8, 1969), in which affidavit, accused, among others, admitted that the surrendered firearm (Exh. "F") is his own unlicensed revolver that killed the deceased, but that the killing was accidental as the forefinger of the deceased's left hand was inserted into the trigger guard of said revolver causing it to fire and hitting the deceased himself."

Upon the other hand, the version of self-defense as developed by appellant during the trial is as follows, quoting also from Appellant's Brief:

"On the same date, i.e., May 30, 1968, at 9:00 P. M. Ratilla who was sent to look for the deceased, Atty. Jose Ong Oh, Jr., arrived with one Carmelito Omboy. Ratilla told the herein accused-appellant that the deceased, Atty. Jose Ong Oh, Jr., was at that time at the Helen's Bakery, then said Ratilla after telling the herein accused-appellant the fact that Atty. Jose Ong Oh, Jr., was at the Helen's Bakery went upstairs their house and said accused-appellant keep on looking towards the direction of Helen's Bakery but could not see the deceased, so he went to the middle of Mabini Street where he saw the jeep of the deceased then parked. Then after seeing the parked jeep of the deceased the herein accused-appellant went back to his seat at the store in the first floor of their house. Then he saw that the deceased, Atty. Jose Ong Oh, Jr., was walking towards the cargo truck and look at its engine and upon seeing the three sacks of copra being unloaded from the truck he (the deceased) pulled his hair and saying: "This is a delay of the loading." Then he went around the said truck and the herein accused-appellant could see from the face of the deceased, Atty. Jose Ong Oh, Jr. that he was angry over the unloading of the three sacks of copra. That at the distance of about three to four meters the herein accused-appellant told the deceased, Atty. Jose Ong Oh, Jr.: "It is good that you are here," but the deceased did not answer, then he offered him a seat while he (the accused-appellant) was sitting on a rattan chair, telling the deceased to 'sit down first' and pointing to a chair in front where he was then sitting, but the deceased, Atty. Jose Ong Oh, Jr., answered: 'No. I am in a hurry' then the accused-appellant stood up, placed his hands on the shoulder of the deceased and requested him again to sit down; then the deceased, Atty. Jose Ong Oh, Jr., inquired and said: 'What shall we talk about, about the loading?', then the accused-appellant asked the deceased whether it was true that he gave the loading of his copra on M/V Sweet Hope to another labor union. Then the deceased, Atty. Jose Ong Oh, Jr., answered in a harsh voice and said: 'It is true; this is our copra; you cannot tell me to whom I will give the loading of the copra.' Then the herein accused-appellant in turn raised his voice and said: 'What do you mean? I cannot interfere? Have you forgotten our contract? And that the last shipment was not handled by us, so this shipment should be ours', then the deceased replied and said: 'It is none of your business. Litsi, it is none of your business; why do you interfere with our loading?' That because the herein

accused-appellant was hurt said to the deceased: 'You are trampling on my right already. You are a traitor, you big Chinese communist, you rascal.' Then he stood up to avoid the deceased, but the deceased said: 'What do you mean by rascal? communist? traitor?' at the same time stepping forward towards him (accused-appellant) and pulling out his revolver from his (deceased) right hip pocket. However, before the deceased could put his finger on the trigger of his revolver, the accused-appellant splashed Tanduay wine contained in the glass he was holding on his right hand on the face of the deceased and with his left hand, he (the accused-appellant) gripped the drum of the deceased's revolver which the deceased held with his right hand. That the accused-appellant tightened his grip on the deceased's right hand so that he could wrestle the former's revolver. But the deceased placed his left hand over the accused-appellant's left hand trying to loosen his grip so that he (the deceased) could shoot him. The accused-appellant began to feel afraid that he will be shot by the deceased if his left hand could be wrestled from its hold on the drum of the deceased's revolver. Then he (accused-appellant) threw the glass that he was then holding with his right hand and with his right hand he pulled deceased's left hand which was on top of his left hand, but he noticed the growing strength of deceased's left hand, and he remembered that he had a firearm at his waist, so he pulled it and struck deceased's face hitting lightly the deceased near his jaw with the end of the barrel of the revolver because the deceased parried his blow. Then the deceased struggled to point his gun at him, so he (accused-appellant) pistol whipped the deceased again but he was surprised why he could not, (sic) however, he found out that deceased's left forefinger was then inserted into the trigger guard of his revolver and both of them were then pulling his (accused-appellant's) revolver, then he pushed forward with his revolver the deceased, however, the deceased met his forward push and his left finger still inserted into the trigger guard of his revolver, and after a while he heard a gunburst and it was his gun that fired and his left hand still holding the right hand of the deceased which was still holding his revolver. Then a little later, deceased's left hand and his forefinger inside the trigger guard of accused-appellant's revolver loosened its grip then he saw the deceased slump to the ground on his right side. That it was the left forefinger of the deceased which pushed the trigger of the accused-appellant's revolver that caused it to fire. That after the deceased slumped to the ground he (the accused-appellant) released his grip on de-ceased's revolver and deceased's revolver dropped to the ground by the side of the deceased. Then the herein accused-appellant after taking a look at the deceased left and proceeded upstairs of his house and threw his gun. Then he went down again from his house and proceeded towards the Municipal Building of Nasipit. That the accused-appellant had six more bullets in his revolver, and that he did not fire them at the deceased because he had no intention to shoot the deceased, he did not care to find out where the deceased was hit and what occurred to his mind was to notify the police so that the police could bring the de-ceased to the hospital and for him to surrender and report the incident. (Cf. decision Appendix "A", pp. 50 to 58.)"

The refusal of the trial court to give credence to appellant's version of self-defense is the basic and main assignment of error.

We agree with the court a quo in rejecting the plea of self-defense. It has found the prosecution witnesses more credible, and rightly so, because they all appear to be disinterested witnesses, specially the public officials among them, the Municipal Judge, the Chief of Police, and certain officers of the Philippine Constabulary, whose testimonies, touching on how the crime was committed, totally discredit the story of self-defense which fails to inspire belief. The finding of the trial court on the relative cre-dibility of the witnesses in this case deserves full respect.

To begin with, the initial unlawful aggression imputed to the deceased by the defense, in order to erect the main prop of the defense invoked by appellant, is belied by the more natural and credible testimony of the State witnesses. Thus, the supposed aggression committed by the deceased according to appellant and his witnesses was in whipping out his gun and pointing it at appellant after a heated exchange of angry words. It is entirely belied by the fact that no gun was found near the fallen body of the deceased or in the immediate vicinity thereof, and that the slug (Exhibit "C") that caused the death and extracted from the brain of the deceased was fired from

appellant's unlicensed gun (Exhibit "F"), as established by the ballistic examination conducted by an expert, Capt. Constantino Y. Leyva, Chief of the PC Central Laboratory, Camp Crame.

If the appellant fired his unlicensed gun with his right hand, as the presence of nitrates thereon would prove, and there being no nitrate found on his left hand, when he was subjected to paraffin test the day following the shooting incident (Exhibit "K") also in Camp Crame, the defense theory that the deceased pulled out a gun which appellant tried to wrest from the deceased with his left hand, and that in the course of the struggle for the possession of the gun, it went off with the deceased's finger also pressed against the trigger, would be pure concoction. Under such theory, the left hand of appellant would have been positive for nitrate, as well as the right hand at least, of the deceased that supposedly fired the gun. But paraffin test conducted on June 2, 1968 showed both hands of the deceased negative for nitrates (See Exhibit "L"). It was the left cheek of the deceased that was found positive for the presence of nitrates, which shows that the gun was close to the face when it was fired.

If there was a struggle for the possession of the gun of the deceased as claimed by appellant, there is the much greater likelihood of the gun being held down on the level of the body during the struggle, not the level of the head. That the gun was fired close to the face is more indicative of a deliberate aim with complete freedom from any force that could distort its accuracy, as would happen in a hand-to-hand struggle for the possession of the gun. The entry of the slug through the mouth, likewise, renders appellant's version of how the gun went off while he and the deceased who allegedly pulled out his gun very improbable, as was his first version, as given in his statement (Exhibit "Z-1"). All these improbabilities and plain untrustworthiness in the testimony of the appellant, and the physical findings of experts, would make the version of the prosecution that it was appellant who drew his own gun from his right waist and fired at the deceased directly on the face, at close range, easily the more natural and thus the more credible of the diametrically conflicting versions of the defense and the prosecution.

In the protective surrounding of appellant's residence where his confrontation with the deceased took place, and appellant having been quite justifiably angered by what he heard that the deceased had a rival union to load his copra, by which act he felt cheated and unjustly discriminated, together with the numerous members of his union, and his anger perhaps showing itself very visibly because he had been drinking in celebration of his son's birthday, the deceased could not have assumed the aggressive stance portrayed of him. It was appellant, therefore, who deliberately fired at the deceased, infuriated by how he felt seriously aggrieved by the deceased's act in violating an agreement on the loading of the latter's copra by the two rival unions under some kind of rotation scheme. The deceased himself must have been angered on seeing three sacks of his copra unloaded from the truck that stopped near appellant's house, and taking on an attitude that was more hostile than friendly, the deceased added fuel to appellant's fury, igniting in the latter a violent temper, as to mark him as the real aggressor, not the deceased.

The element of unlawful aggression not having been established, appellant's plea of self-defense, or even that of incomplete self-defense, must fail. The other requisite of self-defense which is that of the reasonable necessity of the means employed to prevent or repel the aggression must, likewise, have to be found wanting, once the basic requisite of unlawful aggression is shown to be non-existent. Neither could it be said, from how the evidence has been analyzed above, that the appellant gave no provocation, which is the third and last requisite of the justifying circumstance of self-defense.

With the constant shifting of appellant's version from that of absolute denial that he shot at the deceased, pointing to an unknown person as the assailant, to that of accidental shooting, and finally to that of legitimate self-defense, the utter incredibility of each of the changing theory he gave from the time he first gave statement in custodial interrogation, to the time he testified in court, becomes so manifest for him to be deserving of any bit of credence as a witness in his own behalf. This is true with his witnesses who merely tried to give corroboration to his

principal testimony.

Finding, therefore, that appellant shot and killed the deceased not in lawful self-defense, his liability for the killing, authorship of which he admitted, is beyond doubt. The only question now is whether the shooting was attended with treachery as to raise the slaying to the category of murder as charged, and as found by the trial court, said court holding that there was treachery, even if the attack was frontal, because it was sudden and unexpected.

To constitute treachery, the method, form or means adopted in killing the victim must be consciously and deliberately chosen to insure its execution without any risk to the offender arising from the defense which the victim might make.[1] In the case at bar, the resort of the appellant to the use of his firearm was, as he and his witnesses declared, the hostile and insulting manner the deceased responded to appellant's demand for explanation why, in violation of their existing agreement, deceased was loading his copra in the vessel with the employment of laborers, not of his union but of a rival labor union. There is no evidence that even before the arrival of the deceased at the residence of appellant when asked to see the latter, appellant had already formed an intent to kill the deceased. His business relationship with the victim was such that appellant would not gain from the death of the deceased who was giving livelihood to him and his union members, for appellant to desire to do away with the deceased. Appellant had sought the deceased at the Oceanic bodega of the latter upon hearing of the loading being done by rival union members. In doing so, he could not have had murder in his heart and commit it at the very stronghold of his intended victim. All appellant wanted was an explanation of, and rectification for, an act committed by the deceased considered by appellant as highly discriminatory and prejudicial to the interest of many laborers whose union he headed. If appellant his gun and fired at the deceased, it was clearly because of the unexpected turn of events that aroused the killer instinct in him, as shown by his having been previously indicted also for murder of a police sergeant, and convicted by the same trial court and sentenced to death (Decision, p. 100, p. 532, Rollo), which developed from the unfriendly, if not hostile and belligerent, manner with which the deceased dealt with appellant in their confrontation at the latter's place of residence. For in this respect, We are inclined to believe more the defense version that the killing was preceded by some discussion which grew heated, not as cold-blooded as the prosecution would want to prove it was.

In *U.S. vs. Namit*, 38 Phil. 926, it was held that the circumstance that the attack was sudden and unexpected to the person assaulted did not constitute treachery, where it did not appear that the aggressor had consciously and deliberately adopted a mode of attack intended to facilitate the perpetration of the killing without risk to himself. As already shown, appellant had not the time to reflect on the means or mode of attack for it to be said that he deliberately and consciously pulled out his gun and fired at the deceased to insure the commission of the crime without risk to himself. He fired only once. One shot would not be so certain to disable the deceased from making a defense. Before he was shot, the deceased was splashed on the face by appellant with liquor from a glass the latter was holding and then slapped on the left side of the face. The shooting was thus preceded not only by a heated discussion, but acts on the part of appellant that showed not mere hostility but such a heated temper that could break into a violent attack, to put the deceased on his guard. The circumstances just mentioned negate the presence of treachery, as held in the case of *People vs. Gonzales*, 76 Phil. 473. For there to be treachery by reason of the suddenness and unexpectedness of the attack, it has been generally held that there must have been no warning of any sort to the deceased or offended party.[2] His act of going to the Municipal Building right after he had shot at the victim but once, can hardly suggest a strong and prior homicidal intent, a circumstance also not quite compatible with a conscious and deliberate choosing of the mode, form or means of assault to insure the execution of the crime without risk to himself. Unconvinced nor persuaded that treachery was present in the killing, We cannot find appellant guilty of murder.

We neither could view the fact that both appellant and the deceased were friends as giving rise to the aggravating circumstance of abuse of confidence when appellant killed the deceased, as held by the trial court. We agree with the defense in invoking the ruling of *People vs. Luchico*, 49 Phil. 689, in that before the fatal shooting of the deceased, the latter, from the time he had hired other laborers for the loading of his copra, not the appellant's men, as he should have done under a supposed agreement with appellant, and even more after being sought for by appellant for the alleged breach of the agreement, and with the heated exchange of words between them when they finally came face to face, whatever feeling of confidence, deceased had of appellant had vanished. The sight of his truck parked near the residence of appellant, with three sacks of his copra unloaded therefrom, also helped to vanish whatever confidence he had in appellant, for that sight reflected the hostility of appellant towards him. The deceased himself naturally got mad at the appellant, a mood not quite compatible with the charitable feeling of confidence. The deceased then knew, beyond mere suspicion, that appellant was mad at him. It certainly cannot be said, therefore, that the commission of the crime was facilitated by the confidence deceased had in appellant, which alone would justify the appreciation of abuse of confidence as an aggravating circumstance.[3]

Upon the other hand, appellant had been drinking while celebrating his son's birthday. He was told of the loading of the victim's copra by a rival union laborers, by which act of the deceased, he felt cheated and discriminated in alleged breach of a standing agreement. This fact aroused his passion, and caused obfuscation. However, after seeing the appellant fall from the single shot he fired, he went forthwith to the Municipal Building and placed himself at the disposal of the law and the authorities. We note from these facts the presence of the mitigating circumstances of (1) drunkenness which was not shown to be intentional nor habitual; (2) passion and obfuscation; and (3) voluntary surrender. With these three mitigating circumstances, and with no aggravating circumstance to offset them, the penalty to be imposed should be one degree lower than that for simple homicide or reclusion temporal, which is prison mayor, or from 6 years, 1 day to 12 years (Article 64(5), Revised Penal Code. Applying the indeterminate Sentence Law, the penalty should be from 6 years of prison correccional to 12 years of prison mayor.

As to the amount of indemnity and damages awarded, the amount of actual and compensatory damages, represented by the loss of expected earnings, finds support in the case of *Alcantara vs. Surro, et al.*, G. R. No. L-4555, July 23, 1953, 59 O.G. 2769. From the physical condition of the deceased, and his social standing when gunned down by appellant, his heirs are also entitled to moral damages as awarded by the court a quo, but the amount so awarded may be reasonably reduced from P50,000.00 to P20,000.00, there being no aggravating circumstance, but there are three mitigating ones. However, as held recently in the case of *Nora Aguilar Matura vs. Hon. Alfredo C. Laya and People of the Philippines*, G. R. Nos. L-44550-51 and L-44552-53, July 30, 1979 that there is no basis for awarding exemplary damages when not even one aggravating circumstance was established, no exemplary damages may be awarded. The amount of P10,000.00 for attorney's fees may likewise be reasonably reduced to P5,000.00, the private prosecutors that helped in the prosecution of the case being deemed to have rendered service for a fellow member of the bar more in the spirit of professional fraternity.

WHEREFORE, with the modification as to the penalty which is a prison term as above indicated, instead of death, and as to the amount of damages awarded, also as above indicated, the judgment of the trial court is affirmed in all other respects, with costs.

SO ORDERED.

Fernando, C.J., Concepcion, Jr., Fernandez, Guerrero, Abad Santos, and Melencio-Herrera, JJ., concur. Teehankee, J., voted for affirmance of the death penalty. The accused's claims should not be given any credence, since he gave three conflicting statements and the victim was shot in cold blood in the head. Barredo, J., voted with J. Aquino in his concurring opinion.

Makasiar, J., files a separate opinion.

Aquino, J., concurs in the opinion that the appellant committed homicide and not murder. He is entitled only to the mitigating circumstance of voluntary surrender to the authorities. The penalty imposable on him is twelve (12) years of prision mayor as minimum to fourteen years of reclusion temporal as maximum.

Makasiar, J., see separate opinion.

[1] People vs. Samonte, Jr., 64 SCRA 319; People vs. Boduso, 60 SCRA 60; People vs. Sudoy, 60 SCRA 174; People vs. Tizon, 66 SCRA 372; People vs. Velez, 58 SCRA 21.

[2] People vs. Ramiscal, 49 Phil. 103; People vs. Torejas, 43 SCRA 158; People vs. Cabiling, 74 SCRA 285.

[3] People vs. Hanasan, 29 SCRA 534; People vs. Villas, 27 SCRA 947; People vs. Caliso, 58 Phil. 283.

6 pt 6 pt 0 3

dissenting in part

MAKASIAR, J.:

Drunkenness could not mitigate the crime as there was no showing that the quantity of liquor that appellant imbibed shortly before the incident impaired his mental faculties and diminished his willpower. On the contrary, it can be reasonably expected that as a leader of a labor union of stevedores, appellant is not a stranger to hard liquor.

However, I agree with the main opinion that passion or obfuscation mitigates the guilt of the appellant who, as head of a labor union of stevedores, was obfuscated by the victim's violation of his contract with appellant's labor union for the loading of the victim's copra. The records showed that about 6:30 in the evening of May 30, 1968, the accused was informed that the victim authorized the loading of his copra by a rival labor union and the incident occurred between 8:30 and 9:00 that same evening, barely three hours thereafter, an insufficient period of time for him to cool off.

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