

SAMSON VILORIA CALDERON, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND THE HONORABLE COURT OF APPEALS, RESPONDENTS.

G.R. No. L-6189. November 29, 1954

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

Accused of homicide, defendant Samson Viloría Calderon was, after due trial, convicted, by the Court of First Instance of Manila, of homicide thru reckless negligence and sentenced to an indeterminate penalty ranging from 6 months of arresto mayor to 1 year and 6 months of prision correccional, to indemnify the heirs of Eustacio Rodil, deceased, in the sum of P3,000.00, with subsidiary imprisonment in case of insolvency, and to pay the costs. On appeal taken by said defendant, the Court of Appeals found him guilty of homicide and imposed upon him an indeterminate penalty of not less than 6 years and 1 day of prision mayor nor more than 14 years, 8 months and 1 day of reclusion temporal and, in all other respects, affirmed the decision of the court of first instance, with costs against the defendant. The latter has brought the case; to us for review by writ of certiorari.

The pertinent facts are set forth in the decision of the Court of Appeals, from which we quote:

"En la noche del día primero de abril de 1951, el teniente del ejército, Leopoldo Regis, al mando de un pelotón de soldados, desplegó doce de los mismos, entre ellos Samson Viloría Calderon, en el lado izquierdo del área Tejeron-Harran, Santa Ana, Manila, que se puso bajo cordón, por sospecharse que dentro de ella estaban tres jefes de los Huks. Samson formaba la línea del cordón paralela al cerco de 'square type wire fence' (t.n.t. p. 3) del solar de unos dos mil metros cuadrados de la casa No. 227 de la calle Tejeron, Santa Ana, donde vivían Eustacio Rodil, su esposa y sus hijos. El cerco de alambre estaba reforzado con plantas de goma de trece pies de ancho. En el solar había alguno que otro grupo de plátanos y una zahurda detrás de la casa. Entre 11:00 y 12:00 de esa noche, Benjamin Rodil, uno de los hijos de Eustacio, se despertó por los ladridos de los perros y el ruido que luego observó producía el paso de un hombre. Abrió la ventana y se puso a observar, y al oírse que había una persona fuera del cerco, despertó a sus hermanas, Elisea y Virginia, y a su sobrino, Bernardo, informoles que alguien estaba fuera del cerco y ordenó a Elisea que abriera las dos bombillas eléctricas de cien bujías cada una, puestas detrás de la casa para alumbrar la zahurda, pues que dos como habo tentativa de hurto de sus cerdos en anteriores ocasiones, creía que otro se intentaba llevar a cabo. Encendidas las luces, Benjamin y su sobrino Bernardo bajaron al solar, recogieron piedras y tiraronlas hacia el lugar donde se oían los pasos, haciendo al mismo tiempo ruido para ahuyentar. Así estuvieron por unos quince minutos en que, a veces, no oían los pasos del individuo que estaba fuera del cerco, hasta que Eustacio Rodil bajó y preguntó que era lo que había. Le contestaron que se oían pasos fuera del cerco, y Eustacio se dirigió hacia allí, llevando en la mano derecha un bolo que llaman army bolo, que solía usar para cortar la hierba del solar. Apenas se había alejado unos quince pies de Benjamin, se oyó un tiro y Eustacio volvió diciendo que le habían tocado palpando al efecto la parte anterior de su hombro izquierdo, de la que manaba sangre. Se desmayó al llegar a su casa y le tuvieron que alzar y colocarle en su cama. Mientras le quitaban la ropa para descubrir sus heridas. Llegaron dos soldados del ejército, Samson Viloría y Ernest Lemos, y después el teniente Leopoldo Regis, que sugirió el traslado de Eustacio al Hospital General, sugestión a la que se

conformo el Dr. Deogracias Rodil, uno de los hijos de Eustacio qua avisado del suceso llevo poco antes que Regis, porque no tenia a mano medios para contener la hemorragia que manaba de las heridas de su padre. Embarcaron a iustacio en un jeepney, y el Dr. Deogracias y los dos soldados le llevaron al Hospital General. Segun el Dr. Deogracias, el pregunto por el que disparo a su padre y ninguno de los dos soldados le eontesto, pero, segun Samson, el le contesto que habia sido el. En el Hospital Eustacio fallecio al dia siguiente, 2 de abril, y el resiltado de la autopsia de su cadaver, practicada por el Dr. Mariano B. Lara, Chief Medical Examiner, MPD, consta en el Exh. B, * * *

* * * *

Segun Benjamin, no oyo mas que el eatampido de un tiro, y de acuerdo con el soldado Lemos, que estaba a tres metros de distancia de Viloría, no vio a este disparar sino una sola vez. El cadaver de Eustacio, sin embargo, presentaba tres heridas de entrada, en la parte anterior del hombroi izquierdo, y una de salida en la espalda, en la region escapular izquierda, heridas que tales comiestan marcadas en los disenos del Exh. B-1, la Uniea de salida aparece mas baja que las de entrada.

Viloria admite que fue el quien disparo el tiro, que hirio y mato a Eustacio en la ocasion de iutos, y explicando el suceso, dijo:

A

I believe that time that he was a Huk to kill me, so I shot him.

Q

What made you believe that he was a Huk?

A

Because there was information to the effect that there were many huks in this area.

* * * *

Q

Do you know the place where the civilian came from?

A

I know sir.

Q

From where?

A

From my front. He came from the direction opposite the place where I was at that time. (t.s.n. p. 35).

Q

Was there any conversation between you and the civilian before you shot him?

A

The civilian and I had a conversation.

Q

What was that conversation about?

A

I told him three times to halt and he said, if we did not clear out of the area he would kill us.

Q

Who would kill you?

A

The man.

Q

When you said to the civilian to halt did you identify yourself?

A

Yes, sir.

* * * *

Q

In what way did you identify yourself?

A

I told him I am a soldier.

Q

What did the man say if there is any?

A

I identified myself to him that I was a soldier, and that I told him not to move, but he said, that if we did not clear out the area he would kill, and he swung his bolo to me and I retreated.

Q

What more did he do?

A

He nevertheless continued advancing forward and he made movement as if to put one of his legs over the fence, (t.s.n, p 36)

Q

At the time that the civilian was going toward you, could you see him?

A

I could see him only when he was two meters distance from me.

Q

In that distance of two meters that was you could see him already, do you remember if that civilian carried with him something?

A

He has. He had an army bolo in his hand.

Q

In what hand was he carrying the bolo?

A

On the right hand.

Q

When he was at a distance of two meters, that was when he was going toward you, what did he do?

A

He was about to hack me with his bolo.

Q

Did he hack you?

A

Yes, sir.

Q

How many times did he hack you? What did he do?

A

Three times.

Q

At the time when the civilian was hacking you, could you demonstrate the position of the body and the weapon in his hand?

A

(Witness demonstrate by placing the witness chair in front of him and letting it be supposed as the fence in front of the witness and bends forward over the top of the fence so that the upper part of his body is bent and over the top of the fence with his right hand raised as if to strike, the left leg being placed on the witness chair, supposed to be the fence.)

Q

What was the distance of the civilian when he was hacking you?

A

One meter.

Q

After hacking you three; times, what did you do?

A

I shot him.

Q

Would you demonstrate before this Hon. Court your position at the time when you shot the civilian?

A

(Witness demonstrated in a squatting position with his left foot forward, his left elbow on his left knee and with left hand a little bit raised and his right hand drawn back as if holding the trigger part of a rifle.)

Q

At the time when you were about to shoot him, what did you feel in your person?

* * * *

A

I thought he was trying to kill me.

Q

What made you believe that he was trying to kill you?

A

I thought he was a Huk.

Q

After having shot the civilian, what did you do?

A

I told my companion, Ernesto, to report the matter to Lt. Regis," (t.s.A. p 37)

Appellant maintains that:

"I. The Court of Appeals erred in holding that late Eustacio Rodil did not commit acts of unlawful aggression against the petitioner-appellant;

II. The Court of Appeals erred in not holding that petitioner-appellant fired the shot under the impulse of an uncontrollable fear of an equal or greater injury;

III. The Court of Appeals erred in holding that the shot fired by the petitioner-appellant did not proceed from an innocent mistake of fact;

IV. The Court of Appeals erred in holding that the ruling held by this Honorable Court in *People vs. Oanis et al.* (7k-Phil. 259), is applicable in the instant case.

In support of the first, second and third assignments error, it is urged that Eustacio Rodil gave appellant three bolo slashes, which missed him; that he believed a Huk; and that appellant fired at Rodil in self-defense and acting under the impulse of an uncontrollable fear of an equal or greater injury. In this connection the Court of Appeals said:

"Eustacio venia de su casa, se dirigia al cerco de su solar, tendido fuera del cordón, y no estaba por lo tanto, dentro del área sospechosa, acorralada en esa ocasión por la fuerza armada a que pertenecía Vitoria. El solar detrás de la casa de Eustacio, a cuyo cerco este se dirigia, estaba alumbrado por dos bombillas eléctricas de cien bujías cada una. Mas aun, antes de que Eustacio bajara de su casa y fuera al cerco, al otro lado del cual se encontraban Vitoria, a este estuvieron Benjamin y Bernardo tirándole piedras y ahuyentándole con la voz, dadas estas circunstancias no daban lugar a suponer que había Hukos en el solar de la casa de Eustacio, porque ningún Huk atacaría encendiendo primeramente las luces eléctricas, para exponerse asimismo a los que estaban en la sombra, y menos aun tiraría piedras y huyentaría haciendo ruido con la voz. No se concibe, pues, como Vitoria, que debe estar entrenado contra las emboscadas de los Hukos, podía creer que Eustacio era un disidente; sobre todo porque, según el mismo, fue advertido que despejara aquel sitio o de otro modo sería muerto. Esta advertencia no puede proceder de un Huk, y es toda la advertencia de un hombre que vive dentro de la ley, y dentro de la ley quiere proteger sus intereses. Pero esta conversación, que según Vitoria tuvo con Eustacio, no fue oída por Benjamin, ni la confirma Lemos, quien ni siquiera corrobora a Vitoria en su afirmación de que fue atacado tres veces por Eustacio con un arma bolo, y eso que, según Lemos, él le vio a Vitoria en el acto de disparar a Eustacio, lo que indica que él estaba también en condiciones de haber podido ver si Eustacio hubiera atacado a Vitoria. Por el hecho de que entre Vitoria y Eustacio había de por medio el cerco de square type wire fence, no era de creer que aunque este pudiera saltarlo, causa difícil a su edad de 68 años y su avitaminosis que, según el Dr. Deogracias, lo impedía mover libremente las extremidades inferiores,

lo intentaria, sabiendo que con ello se exponia a un ataque, sin defensa de su parte. Ademas, estando Viloria fuera del 34 cerco, Eustacio no era sino un espantajo dentro del cerco, que si levantaba su bolo, lo haeia para espantar, sin colocar de ninguna manera a aquel en sitiacion peligrosa. Y debe ser asi, porque de acuerdo con las heridas que el Dr. Lara localice en q! cadaver de Eustacio, la unica de salida en la espalda, en la region clavicular, aparece mas baji que las de entrada, en la cara anterior del hombro izquierdo, y su dlireccion, como se van en laigura B-1, es de un angulo de unos 60 grados, lo que denota que el acusado etaando dispare su armi estaba a un nivel mas alto que Eustacio, y no como trato de demostrarlo, agacbandose eon la pierna izquierda hacia delante y apoyando su codo izqikierdo en su rodilla izquierda.

No siendo exculpatoria la explieacion dada por Villoria, y admitido por el que fue quien disparo el tiro que hirio y mato a Eustacio, el debe responder por esta agresion criminal, sin que pueda a su favor invocar que en esa noche estaba en su puesto de soldado, por exigencias del deber y el servicio, publico, porque estos, en un gobierno derden y de ley, no inmunizan al abuso, el exceso y el crimen. El resultado de sus actos, ni siquiera puede considerarse justificado por una falsa o erronea identificacion de su victima, porque esta se hallaba dentro de su solar, fuera del cordon, caminaba a la luz electrica de doscientas bujias, le advertia, segun el, que despejara el sitio, todo lo cual revela claramente que no era disidente, ni queria danarle, y el no estaba de ningun modo en peligro para optar por una determinacion extrema, porque se interponia entre el de alambre, que este no trato agredirle, maliciosa y 7 Eustacio el cerco lie saltarlo para resueltamente.

It is apparent from the foregoing that the Court of Appeals found the theory of the defense unworthy of credence. Not being subject to our review, this finding is conclusive in the determination of the assignments of error under consideration, which thus turn out to be based upon false predicates and are, accordingly, untenable. At any rate, if, when the fatal shot was fired by appellant, as testified to by him, Rodil had just raised his left foot and placed it or was about to raise his left foot and place it on the lower portion of the wire fence, which was slightly over one yard in height, for the purpose of climbing it, he could not have given, at the same time, a bolo slash, for appellant was on the other side of the fence, squatting about a yard away therefrom, and hence, beyond his reach. Besides, Rodil - who was weak, for, apart from: being over 68 years of age, he had avitaminosis, which impaired the freedom of movement of his legs could not have gone over the fence without holding it with both hands and would have lost his balance had he swang his bolo while he was in the position described by appellant. Even ore unbelievable is the latter's testimony to the effect that, when Rodil was still about a yard from the fence, and, hence, two (2) yards away from appellant, the former had already tried to hack him twice with his (Rodil's) bolo, which, in view of the distance and the fence separating them, had no possibility of landing on appellant. It is, likewise, interesting to note that, according to the evidence for the defense, appellant was, at the time of the occurrence, squatting upon a ditch, whereas Rodil was, not only standing, but, also, trying to climb the fence, and, consequently, at a higher level than appellant. Yet, the former's injury had a downward direction, although it would have gone upward, if appellant's testimony were true. It is thus apparent, from the record, that appellant was neither candid nor truthful in the narration of facts; that the Court of Appeals was fully justified in giving no credence to his testimony and in accepting the version of the prosecution; and that the first three assignments of error cannot be sustained.

It is contended, under the last assignment of error, that, having acted under a mistake of fact, appellant is exempt from criminal liability and that, at most, he is merely guilty of homicide thru negligence. In support of this pretence, it is urged that, in deciding the case, we should consider the condition of emotional stress under which appellant must have been when he fired the fatal shot, not the objective facts, as the same appeared after the event, and that, being a peace officer, he was entitled to act in conformity with his honest belief at the time of the occurrence. Although generally material, the belief and intent of the accused are not necessarily decisive in the disposition of the case. The judgment and discretion of public officers, in the performance of their duties, must be exercised neither capriciously nor oppressively, but within reasonable limits. In the absence of a clear legal

provision to the contrary, they must act in conformity with the dictates of a sound discretion, and with the spirit and purpose of the law. This is specially true in the case of members of the armed forces, whose main duty is to defend the state, and, consequently, the people who, in a democratic society like ours, are the repository of sovereignty. Such duty would be a myth if a law abiding tax payer could be slain in his own home with impunity.

The army bolo held by Rodil at the time of the occurrence does not suffice to justify his killing for, does the fundamental law not guarantee the inviolability of his domicile? Was it not, accordingly, the legal obligation of; appellant to respect and even protect the same? Was Rodil not entitled, therefore, to defend it as his own "castle" or citadel? Any other view would create the impression that peace officers are public masters, not public servants, thus alienating the faith and confidence of the people in the government, and undermining the foundation of all democratic institutions.

Furthermore, the Court of Appeals did not believe that appellant had acted under a mistake of fact. Indeed, he had no reason to assume, or even suspect, that Rodil was a Huk, the latter being inside his property, which was fenced, as well as outside the area then guarded by the army. Moreover, shortly before the shooting, members of the Rodil family had switched on two 100-watt electric bulbs, which illuminated their lot brightly. Then, they went to the yard and started throwing stones in the direction of the place where appellant and other soldiers were posted, believing them to be marauders with evil designs. In addition, the former made some noise in order to scare the latter away. This lasted for about 15 minutes, after which Eustacio Rodil appeared in the scene, holding an army bolo in his right hand, and proceeded to the spot where the supposed marauders were posted, at the same time bidding them to go away. As Rodil approached or reached the fence aforementioned, he was fatally shot by: appellant. Obviously, no individual, who is a Huk, bent on killing the appellant, would have lighted the place with said electric bulbs. Much less would said Huk have performed or caused to be performed the acts above referred to the effect of which upon appellant and his companions was to warn; them in advance before attacking him. In other words, appellant had absolutely no justification whatsoever to believe and could not have believed either that Rodil was a Huk or that he intended to kill said appellant.

In the light of these facts, and considering that Rodil was shot with the intent of killing him, it is clear that appellant does not deserve an acquittal. The cases of *People vs. Lara* (48 Phil. 153) *U. S. vs. Mojica* (42 Phil. 784), *U. S. vs. Ah Chong* (15 Phil. 239) and *People vs. Bayatnba* (52 Phil. 3111), cited by the defense, are not in point. In the first two cases, there was actually an unlawful aggression on the part of the deceased. In the last two cases, the defendant had reasonable grounds - which herein appellant did not have to believe that their lives were in imminent danger. We have, likewise, considered the applicability of the rule laid down in the base of *People vs. Mamasalaya*, (50 O.G.1004), involving, among others, an officer of the Philippine Constabulary, one Lt. Cabelin, in command of several members of said force, who, in compliance with his instructions, had fired at some houses in the barrio of Sapalan, Cotabato, Cotabato, thereby killing several innocent persons. In; acquitting him, this Court said:

"* * * There is no charge or claim that he acted deliberately and criminally in killing the four innocent civilians knowing that they were innocent. In good faith he believed that the three houses pointed out to him by Bulalakao were being occupied by bandits and lawless elements whom he was ordered to disperse. Capture or destroy. The question is whether he incurred in negligence or reckless imprudence in ordering his men to fire upon the houses. As previously stated, the witnesses for the defense including lit. Cabelin told the court under oath that the patrol was first fired upon from the three houses but in spite of this unprovoked fire he and his sergeant shouted and called out to the inmates of the houses not to fire because they (members of the patrol) were P.C. soldiers; and it was only when the firing; persisted that he ordered his men to return the fire. Of course, the prosecution denies this claim. But even assuming as claimed by the prosecution that the patrol had not been first fired upon, and that Cabelin and his sergeant had; not shouted or called out to the inmates of the

houses to identify himself and his men, under the circumstances, we believe that the shooting was justified for having been done and effected under an honest mistake." (Italics supplied)

We do not believe that appellant herein is substantially in the same predicament as Lt. Cabelin for: (1) the former had not been told by anybody that Eustacio Rodil was a Huk or an outlaw, unlike Cabelin who had been advised that the inhabitants of the houses in question were bandits and/or lawless elements, and was requested to proceed against them as such; (2) Cabelin was in Gotabato, in a region known to be infested by said elements, whereas Rodil was in Manila, outside the area cordoned by the peace officer; (3) the Mamasalaya case involved an appeal directly from a decision of the court of first instance, whose findings of fact are not binding upon the Supreme Court, which accepted and believed the version of Cabelin, or most of it, whereas the case at bar is before us upon a petition for review, by writ of certiorari, of a decision of the Court of Appeals, which found the theory of the defense to be unworthy of credence and this finding is conclusive upon us; and (4) a majority of the members of this Court with one member writing a strong dissenting opinion and 3 members not taking part in the decision found that Cabelin had acted under the "honest mistake" that the deceased were dissidents and/or outlaws, and that he was "justified" in ordering the shooting, unlike the case at bar in which the court of first instance, the Court of Appeals and the majority of this Court agree that appellant had no reason to "mistake" Rodil for a Huk and that the former was not justified, therefore, in shooting him.

Is appellant herein guilty of homicide or, merely, of homicide through either simple or reckless negligence? We have given considerable thought to this question and devoted a good deal of our time in the study of the authorities pertinent thereto, and the conclusion reached by the majority of the members of this Court is in favor of the first alternative, for the following reasons, namely

- In *People vs. Guillen* (47 O. G. 3433, 3440) it was held that "a deliberate intent to do an unlawful act is essentially inconsistent with the idea of reckless imprudence. (*People vs. Nanquil*, 43 Phil. 232). Where such an unlawful act is willfully done, a mistake in the identity of the intended victim cannot be considered as reckless imprudence. (*People vs. Gona*, 54 Phil. 605)." In *People vs. Castillo* (42 O. G. 1914, 1921), this Court declared that there can be no frustrated homicide through reckless negligence, for reckless negligence implies lack of intent to kill, without which the crime of frustrated homicide can not exist. In the case of *People vs. Dumon* (72 Phil. 41, 49), the court convicted of double homicide a person who killed a couple, allegedly in the act of copulation, in the erroneous belief that the woman was his wife committing adultery, the theory that the offense had been committed thru reckless negligence, having been rejected, for the reasons among others, that "the act of firing the fatal shots was intentional" on the part of the accused. Similarly a peace officer, who killed a person asleep, in the mistaken belief that he was a notorious criminal and escaped convict, whom the authorities wanted dead or alive, was found guilty of murder in *People vs. Oanis* (74 Phil. 256). In disposing of the case, this Court said:

"The crime committed by appellants is not merely criminal negligence, the killing being intentional and not accidental. In criminal negligence, the injury caused to another should be unintentional, it being simply the incident of another act performed without malice. (*People vs. Sara*, 55 Phil. 939). In the words of Viada, 'para que se calif pique un hecho de imprudenciSt es preciso que no haya mediado en el malicia ni intene alguna de dafiar; existiendo esa intencion, deberd calificarse el hecho del delito que ha produuido, por ma's que no haya sido la ijitencidn del agente el causar un mal de tanti gravedad csomo el que se pirodujo.' (Tomo 7, Viada Cddigo Penal Comentado1, 5. a ed. pag. 7). And, as once held by this Court, a deliberate intent to do an unlawful act is essentially inconsistent with the idea of reckless imprudence (*People vs. Nanquil*, 43 Phil., 232; *People vs. Bindor*, 56 Phil., 16), and where such unlawful act is willfully done, a mistake in the identity of the intended victim cannot be considered as reckless imprudence (*People vs. Gona*, 54 Phil., 605) to support a plea of mitigated liability."

- The case of *People vs. Fernando* (49 Phil., 75), in which the defendant, was convicted of homicide through

reckless negligence, is substantially different from the case at bar. It was satisfactorily established in said case that the defendant therein was informed that the victim was an out-law, wanted by the authorities, and the surrounding circumstances were such that said defendant had some reason to believe the information to be true. In the, Fernando case, the language used was:

"The status of the accused on the night in question was that of an agent of the law, to whom notice had been given of the presence of suspicious looking persons who might be the Moro prisoners who had escaped from the Penal Colony of San Ramon. The appearance of a man, unknown to him, dressed in clothes similar in color to the prisoners' uniform, who was calling the owner of the house, and the silence of Paciencia Delgado, who did not at the time recognize the man, undoubtedly caused the accused to suspect that the unknown man was one of the three persons that the owner of the house said were prowling ground the place. The suspicion became a reality in his mind when he saw that the man continued ascending the stairs with a bolo in his hand, not heeding his question as to who he was. In the midst of these circumstances and believing undoubtedly that he was a wrongdoer he tried to perform his duty and first fired into the air and then at the alleged intruder. But it happened that what to him appeared to be a wrongdoer was the nephew of the owner of the house who was carrying three bolos tied together. At that psychological moment; when the forces of fear and the sense of duty were at odds, the accused was not able to take full account of the true situation and the bundle of bolos seemed to him to be only one bolo in the hands of a suspicious character who intended to enter the house. There is, however, a circumstance that should have made him suspect that the man was not only a friend but also a relative of the owner of the house from the fact that he called 'Nong Miong,' which indicated that the owner of the house might be an older relative of the one calling, or an intimate friend; and in not asking Paciencia Delgado who it was that was calling her father with such familiarity, he did not use the ordinary precaution that he should have used before taking such fatal action.

"Taking into consideration the state of mind of the accused at the time, and the meaning that he gave to the attitude of the unknown persons, in shooting the latter he felt that he was performing his duty by defending the owners of the house against an unexpected attack, and such act cannot constitute the crime of murder, but only that of simple homicide. He cannot be held guilty, however, as principal, with malicious intent, because he thought at the time that he was justified in acting as he did, and he is guilty only because he failed to exercise the ordinary diligence which, under the circumstances, he should have by investigating whether or not the unknown man was really what he thought him to be. In firing the shot, without first exercising Seasonable diligence, he acted with reckless negligence.

"The crime committed by the accused, therefore, Is homicide through reckless negligence * * *." (pp. 78-79)

Upon the other hand, appellant herein had never been informed that Rodil was a Huk. As already adverted to the conditions obtaining at the time of the occurrence were such as to leave no room for doubt that Rodil could not be Huk and did not intend to kill the herein appellant. Incidentally, the Fernando case is clear Authority against appellant's bid for acquittal,

- Appellant herein has much in common with the defendant in *People vs. Oanis* (74 Phil., 257). The latter was it1 peace officer who had been ordered to apprehend, "dead or alive" a notorious gangster and escaped convict known as Balagtas. Having been informed that the latter was living with a taxi dance girl, named Irene, the accused proceeded to the house in which she lived. As he opened the door of her room, defendant saw a man in her bed, whereupon he (defendant) shot and killed him. Although, acting under the erroneous belief that the victim was Balagtas, this Court convicted the accused, not merely of homicide, but of murder. Obviously, the main reason behind this conclusion was the fact that the accused had acted with such a disregard for the life of the victim without checking carefully the latter's identity as its place himself on the same legal plane as one who kills another willfully, unlawfully and feloniously. In shooting Rodil who, obviously, could neither be a Huk nor a killer appellant herein has acted under similar conditions.

- The view of the Supreme Court of Spain in its decision of April 26, 1883, is substantially the same.

In connection therewith, we quote from Viada:

"Si morador de un cortijo que oyendo ladrar los perros, y temeroso de que alguien se acercase a sustraer las caballerías, se asoma al balcon, dando el 'quien vive, y como nadie contestase, dispara la escopeta sobre un bulto, apareciendo al dia siguiente en dicho sitio el cadaver de un sujeto, Intimo amigo de aquel, cuya familia no supo explicarse el motivo que le condujera al lugar donde fue' encontrado muerto, sera responsable del delito de homicidio, o simplemente del de imprudencia temeraria? – El Tribunal Supremo ha declarado que la primera y mas grave calificación es la procedente: 'Considerando que en la sentencia recurrida se declara como hecho probado que Pedro Molina, despues de preguntar repetidamente aquiln vive?1 y como nadie le contestase, disparo su escopeta sobre un bulto que distinguio a distancia de seis varas, lo cual demuestra que ejecuto' este hecho voluntaria e intencionalmente sobre una persona, porque de una persona debiS creer que era el expresado bulto, cuando le pregunto 'quien vive?', y por lo tanto, que cometio el delito de homicidio por que ha sido penados Considerando que para que se entienda que un hecho se ha cometido por imprudencia temeraria y pueda tener aplicación el parrafo primero del art. 581 delCodigo penal, es requisito indispensable que en la ejecucion no haya mediado malicia, lo cual no ocurre en el caso del recurso porque con malicia, y voluntad obrd Pedro Molina disparando un arma de fuego sobre el bulto de una persona a la que causo la muerte, etc." (S. de 26 de abril de 1883, Gaceta de 5 de septiembre.) (Viada, Vol. 7 5th ed., p. 23.)

In view of the foregoing, we are of the opinion and so hold that the decision of the Court of Appeals should be as it is hereby affirmed. However, in view of the appellant's youth and considering that he had joined the Philippine Army a few months only, prior to the occurrence, the Clerk of Court is hereby directed to forward a copy of this decision to the President of the Philippines, through the Secretary of Justice, for consideration of the propriety of extending to appellant herein the benefits of executive clemency, after service of such period of the sentence imposed as maybe deemed sufficient to satisfy the demands of justice and public interest. With costs against the appellant.

IT IS SO ORDERED.

Pablo, Bangzon, Padilla, Montemayor, Reyes, A., Jugo, and Bautista Angelo, JJ. concur

Paras, C.J., in the result.

Mr. Justice J.B.L. Reyes, took no part.

DISSENTING

MONTEMAYOR, J.:

Appellant SAMSON VILORIA CALDERON, hereafter referred to as VILORIA, a member of the Armed Forces of the Philippines, was convicted by the Court of First Instance of Manila, of homicide thru reckless negligence and sentenced to an Indeterminate penalty ranging from four (4) months of arresto mayor to One (1) year and six (6) months of prision correccional, to Indemnify the heirs of Eustacio Rodll In the amount of P3,000, with subsidiary Imprisonment in ease of insolvency, and to pay the costs. On appeal to the Court of Appeals, said Tribunal found him guilty of homicide and sentenced him to an indeterminate penalty of not less than six (6) years and one (1) day of prision mayor nor more than fourteen (14) years, eight (8) months and one (1) day of reclusion temporal with the same Indemnity of P3,000 imposed by the trial court. The case is now with us on appeal.

In affirming the decision of the Court of Appeals the majority opinion accepts and makes its own the findings and conclusions made by the Court of Appeals, and in fact quotes with approval said findings and conclusions, saying that the same are not subject to review by the Supreme Court and are conclusive in the determination of the case. In this dissent venture to assert and to hold that while the findings of fact by the Court of Appeals in this case, as in other cases appealed to it, are conclusive and while I accept said findings of fact, the conclusions arrived at by the Court of Appeals on the basis of Huk Commanders, among them NICK PAMINTUAN, could be found in that area. The Army therefore decided to conduct as it did conduct on April 1, 1951, a raid through its Military Intelligence Service (MIS). To support this raid and to prevent the escape of the dissidents sought to be apprehended, a platoon of 36 soldiers under the command of Lt. Leopoldo Regis was dispatched to the area. He deployed his men in three squads of 12 men each, and Vitoria was assigned to the left flank of the cordon. This line of 12 men was parallel to the square-type wire fence which surrounded the yard or lot of the deceased Eustacio Rodil, and where his house stood. At about 11:30 that night appellant Vitoria took his position next to and outside the fence of Eustacio, squatting in a depression or canal. It seems that the movements and steps of the soldiers were noticed by a son of Eustacio named Benjamin who later woke the inmates of the house up and turned on the lights behind the house. A word about said lights.

According to the prosecution the house of Eustacio had previously been the object of three robberies; in the first two, the robbers could enter the house and were able to carry away some things, but in the third, the robbers failed to enter the house because of the precautions taken by Eustacio's family. To discourage further attempts at robbery, two electric lights each with a 100-watt bulb were installed behind the house, not only to light up the outside of the house but also that of the pig pen behind the house where many pigs were kept. Whenever the inmates of the house felt that there were marauders prowling around, these two lights were turned on to discourage them.

For fifteen minutes Benjamin was at the window looking out and observing but he could not see anybody. In order to better observe, he and a nephew went down and posted themselves behind the house and because they continued hearing some noise in the direction of the pig pen although they could not see anyone, they emitted some sounds as if to challenge or scare away possible prowlers in that area, and they even threw stones in that direction. Explaining on direct examination why he could not see those who were making the noise near or outside the fence, Benjamin testified as follows:

"Fiscal:

Q

During the time that you were making hollering sounds could you see the person making sounds?

A

No, sir.

Q

Why could you not see?

A

Because in that place of the sounds where it is coming from, it is very dark while in our place, it is very lighted. That is why we cannot see." (t.s.n., p. 8)

Not long thereafter, the father Eustacio came down the house to make inquiries, carrying an Army bolo, which he was in the habit of using to cut grass in the yard, and upon being informed that there seemed to be people in the direction of the pig pen, he proceeded thereto with his bolo. After a short time a shot was heard and Eustacio was seen staggering towards the house fatally wounded in the shoulder and back. He was taken up the house and examined by the children and then a son who is a doctor was sent for. Not long thereafter, Lt. Regis, having been informed of the shooting, went up the house with two soldiers including Viloria, and at his suggestion and with the conformity of the son doctor who had already arrived, Eustacio was taken to the hospital accompanied by Viloria and the other soldier. Eustacio later died of his wound.

No witness for the prosecution testified as to the actual shooting which was owned and accepted by Viloria. Only Viloria gave testimony on this point although a fellow soldier named Limos said that he saw Viloria fire at Eustacio. Consequently, any finding as to the manner Sustacio was shot and the circumstances surrounding the shooting must be based solely on the testimony of Viloria if found reasonable and acceptable, or it may be based on mere inferences from the attending circumstances. Viloria told the court that as he was squatting near and outside the fence observing and awaiting developments as he was instructed to do as a member of the raiding party in that trouble area, presumably to prevent the escape of those sought to be apprehended, he suddenly saw a figure (Eustacio) brandishing a bolo and advancing toward the fence in his (Viloria's) direction ordering whoever was there to leave otherwise he would kill him.

Viloria said that he explained to the advancing figure that he was a soldier and three times ordered him to stop; but the man continued advancing not only brandishing the bolo in front of him in slashing fashion but when he reached the wire fence he raised his left leg and bent over forward as if to climb over and even lunged at him (Viloria) with his bolo, and it was at this moment or instant that Viloria fired his carbine, assuring the Court that he honestly believed that the man was a Huk determined to kill and so he shot him in self-defense. Without much if any explanation the Court of Appeals evidently discarded and rejected this testimony of Viloria about the warning and exchange of words between him and Eustacio merely saying that his fellow soldier Limos failed to corroborate him on this point, nor was the alleged conversation heard by Benjamin. Then, the Court of Appeals makes this rather ambiguous and startling statement and conclusion which to me is unfortunate as it is unfounded.

"No se concibe, pues, como Villoria, que debe estar entrenado contra las emboscadas de Ids Huks, podia creer que Eustacio era un disidente; sobre todo porque, segun el mismo, i'ue advertido qua despejara aquel sitio o de otro inodo seria muerto. Esta advertencia iid puede proceder de un Huk, y es toda la advertencia de tin hombre que vIve dentro de la ley, y dentro de la ley quiere proteger sus Intereses. Pero esta conversaclon, que segun Villoria tuvo eon Eustacio, no fue olda por Benjamin, ni la confirma Lamps, ***."

How shall we interpret the above statement of the Court of Appeals. Did the conversation between Eustacio and Viloria take place, namely that Eustacio warned and ordered anyone in the area to clear out and leave, otherwise he (Eustacio) would kill him, and the explanation of Viloria that he was a soldier and that he ordered Eustacio three times to halt, take place, or, did it not? Apparently, to the Court of Appeals, to show that Eustacio was a peaceful citizen within his own premises who merely asserted his rights, the conversation took place; but to support Viloria's claim that he halted him three times and even identified himself as a soldier, it did not take place. This ambiguity is rather disconcerting and was what probably prompted Viloria's counsel to say in his brief:

"It is clear that by this statement, the Court of Appeals dismisses the idea that the petitioner-appellant could not have mistaken the deceased as a Huk for the reason that no person not within the law will ever give the warning so given by Sustacio. But, the Court of Appeals in continuing stated, 'Pero esta conversacion, que segun Viloria tuvo con Eustacio, no fue olda por Benjamin, ni la confrmra Lemos * * *.' In effect, for the purpose of showing that no Huk could be in the yard and that Eustacio should not have been mistaken for a

Huk, the conversation took place; but for purposes of showing that the deceased did not halt as ordered and that Eustacio was menacing in attitude and determined to drive or kill the Intruder by the fence, the conversation was deemed not to have taken place."

Again, the Court of Appeals makes the following statement and conclusion:

"El solar detras de la casa de Sustacio, a cuyo cerco este se dlrlgla, estaba aluijbrado por dos bombillas electricas de a cien bujias eada una. has aun, antes de que Eustacio bajara de su casa y fuera al cerco, al otrD lado del eual se encDntraban Viloría, a este estuvieron Benjamin y Bernardo tirandole piedras y ahuyentaidole con la voz. Todas estas clrcunstancias no daban lugar a suponer que habia Huks en el solar de la casa de Eustacio, porque ningun Huk atacaria encendiendo primeramente las luces electricas, para exponerse asimismo a los que estaban eij la sombra, y menos aun tiraria piedras y ahuyentarla haciendo ruido con la voz."

And the majority approving the said statement and conclusion adds:

" * * *. Obviously, no individual, who is a Huk, bent on killing the appellant, would have lighted the place with said electric bulbs,. Much less would said Huk have performed or caused to be performed the acts above referred to the effect of which upon appellant and his companions was to warn them in advance before attacking him. In other words, appellant had absolutely no justification whatsoever to believe and could not have believed - either that Rodil was a Huk or that he intended to kill said appellant."

They both assume and take for granted that Viloría saw and new that Eustacio came from t he house; that he was the owner of the same; that it was he who turned on the lights and that like was the same person who approached the fence outside of which Viloría was stationed. The Court of appeals overlooked the fact testified to by the very witness for the prosecution (Benjamin) and found by itself that the fence was nailed to and supported by gumamela shrubs and that near or around the pig pen there was a clump of banana trees and that it was very dark in that vicinity and so he (Benjamin) could not see what was behind those gumamela and banana trees. Let me again quote what he said, "Because in that place of the sounds where it is coming from, it is very dark while in our place, it is much lighted. That is why we cannot see." Besides, the yard is quite extensive, containing 2,000 sq. m. according to the very finding of the Court of Appeals, and if the house was constructed on one end as it probably was, because it fronted Tejeron Street (bearing street No. 227 Tejeron) according to the evidence, then the backyard must indeed be quite big so that the two lights installed behind the house despite their power, could not have illuminated all that area, especially that part of t he fence behind which Viloría was stationed, taking into account the gumamela and banana trees growing there and which according to Benjamin himself, Eustacio's son, was very dark. It was therefore possible, if not probable that Viloría who was squatting behind those banana trees and gumamela shrubs and even outside the fence, intent on observing what was happening in the direction of the house or houses being raided by the MIS, did not notice or could not even see what was happening in the yard of Eustacio, and that even if he noticed the light from the place where he was squatting, he could not have possibly seen who turned it on nor seen Eustacio as the latter walked towards the gumamela shrubs and banana trees. For all he knew, Eustacio may have been one of the Huks scared by the MIS raiders, who was trying to escape through the yard of Eustacio and who, when surprised by the turning on of the lights in the yard sought refuge and protection in the gumamela shrubs and banana trees and then tried to get away by going over the fence, when he was confronted by Viloría.

Again, the Court of Appeals says that Viloría being a trained soldier and alerted in the ambushes of Huks could not possibly believe that Eustacio was a dissident. It said "no se concibe, pues, corao Viloría, que debe estar entrenado contra las eciboscadas de los Huks, podia creer que Sustacio era una disidente; * * *." This statement about Viloría being trained on ambushes by Huks is not a finding but only a conclusion. Because Viloría was an Army soldier then, the Court of Appeals jumped to the conclusion that he must have been trained in dealing with

Huks, This unfortunate conclusion not only is not supported by the record but it is contrary to the evidence itself which is to the effect that Viloria was a raw recruit, having enlisted in the Army only on January 8, 1951, less than three months before the raid. In fact, the majority of this Court, disregarding the above conclusion of the Court of Appeals, takes notice of Viloria's being very new in the service and for this reason suggests that Viloria might merit Executive Clemency.

Both the majority of this Court and the Court of Appeals would not even grant that Viloria without any criminal Intent, acted recklessly in firing his gun, without taking the necessary precautions to ascertain the identity of Eustacio, and so is guilty only of homicide thru reckless imprudence as was found by the trial court, and in support of their stand, both courts cite the case of *People vs. Oanis*, 74 Phil. 262. It may be stated in this connection that said case was decided by a divided court, five for the majority, with Justices Paras and Hontiveros strongly dissenting, the first being presently our Honorable Chief Justice. The case of *Oanis* involved the shooting of an Innocent citizen (Serapio Tecson) sleeping In a room, with his back to the door where the appellants were, shot by the latter in. the honest belief that Tecson was the dangerous criminal they were after. Chief Justice Paras in his dissent said:

"In view of said order and the danger faced by the appellants In carrying it out, they cannot be said to have acted feloniously In shooting the person honestly believed by them fro be the wanted man. Conscious of the fact that Balagtas would rather kill than be captured; the appellants did not want to take chances and should not be penalized for such prudence. On the contrary, they should be commended for their bravery and courage bordering recklessness because, without knowing or ascertaining whether the wanted man was in fact asleep in his room, they proceeded thereto without hesitation and thereby exposed their lives to danger."

And in relation to this aspect of the case, as to whether or not Viloria, if guilty at all, is guilty only of homicide through, reckless imprudence, I am inclined to believe that the case of *People vs. Fernando*, k-9 Phil. 75 cited by the trial court in support of its decision is more applicable. In reversing the judgment of the trial court finding Fernando guilty of and murder, sentencing him to twenty years of *cadena temporal*, the Supreme Court in finding him guilty only of homicide thru reckless negligence said:

"Taking into consideration the state of mind of the accused at the time, and the meaning that he gave to the attitude of the unknown person, in shooting the latter he felt that he was performing his duty by defending the owners of the house against an unexpected attack, and such act cannot constitute the crime of murder, but only that of simple homicide. He can not be held guilty, however, as principal, with malicious intent, because he thought at the time that he was justified in acting as he did, and he is guilty only because he failed to exercise the ordinary diligence which,; under the circumstances, he should have by investigating whether or not the unknown man was really what he thought him to be. In firing the shot, without first exercising reasonable diligence, he acted with reckless negligence."

The case of *Fernando* above cited, to me, is really similar to the present case, assuming that Viloria is guilty at all.

We who are now in possession of all the facts disclosed by the evidence presented at the trial know that Eustacio was a peaceful citizen inside his own yard merely trying to drive or chase away the person or persons whom he believed to be potential robbers or thieves, and on the basis of said facts, one may say as do the Court of Appeals and the majority that Viloria's action in shooting him as wholly unwarranted and uncalled for, because there was absolutely no danger to him and besides, considering the age of Eustacio who was 68 years old, and that he suffering from avitaminosis, he could not anyway have gone per the fence to carry out his empty threats to kill. But how Viloria, at the time, to know all these facts? How was he to know that Eustacio was a peaceful citizen; that he was the per of the house and of the yard enclosed by the fence; that was 68 years old and suffering from avitaminosis and so could not possibly climb over the fence, and that he was merely trying to scare him (Viloria) and his companions?

It is a settled rule and principle of law that a person accused of and being held responsible for a criminal act must be judged, not by the facts as they turned out to be after investigation and trial but rather what he at the time honestly believed, them to be so, and that if the facts he then believed them to be, justified his act, then he must be held Innocent.

In the case of U.S. vs. Ah Cheng, 15 Phil. 488, this Court said:

"The question then squarely presents itself, whether in this jurisdiction one can be held criminally responsible who, by reason of a mistake as to the facts, does an act for which he would be exempt from criminal liability if the facts were as he supposed them to be, but which would constitute the crime of homicide or assassination if the actor had known the true State of the facts at the time when he committed the act. To this question we think there can be but one answer, and we hold that under such circumstances there is no criminal liability, provided always that the alleged ignorance or mistake of fact was not due to negligence or bad faith.

* * *

" * * * On the contrary, the maxim here is Ignorantia facti excusat ('Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse'), (Brown's Leg. Max., 2d ed., 190.)

"Since evil intent is in general an inseparable element in every crime, any such mistake of fact as shows the act committed to have proceeded from no sort of evil in the mind necessarily relieves the actor from criminal liability, provided always there is no fault or negligence on his part; and as-laid down by Baron Parke, 'The guilt of the accused must depend on the circumstances as they appear to him.' * * *.

"If, in language not uncommon in the cases, one has reasonable cause to believe the existence of facts which will justify a killing - or, in terms more nicely in accord with the principles on, which the rule is founded, if without fault or carelessness he does believe them he is legally guiltless of the homicide; though he mistook the facts, and so the life of an innocent person is unfortunately extinguished. In other words, and with reference to the right of self-defense and the not quite harmonious authorities, it is the doctrine of reason, and sufficiently sustained in adjudication, that notwithstanding some decisions apparently adverse, whenever a man undertakes self-defense, he is justified in acting on the facts as they appear to him. If, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he thus supposes the facts to be the law will not punish him though they are in truth otherwise, and he has really no occasion for the extreme measure.' (Bishop's New Criminal Law, sec. 305, and large array of cases there cited.)"

I quote with approval the citation made by appellant's counsel on page 20 of his brief, to wit:

"A person need not be in actual imminent peril of his life or of great bodily harm before he may stop his assailant. It is sufficient if in good faith he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril; if he is threatened with death or some great bodily harm, and has reasonable ground to believe and does believe that his life is about to be taken or such great bodily injury to be inflicted, he may act safely upon appearances and kill his assailant, if that be necessary to avoid the apprehended danger, though it may afterwards turn out that there was in fact neither design to do him injury nor danger that it would be done." (Warren on Homicide, Vol. I, p. 716: citing Glass vs. State, 201 Ala. 411, 78 So. 819; Dleburn vs. State, 16 Ala. App. 371, 77 So. 983).

Viloria in his testimony said that he shot Eustacio believing him to be a Huk who was attacking him with a bolo. Was Viloria justified in thinking as he did? To answer this question we must try to analyze the state of mind of Viloria at the time. Before the raid, he and his companions had been briefed by their officer and told that there were dangerous Huks in that area, among them NICK PAMINTUAN, the overall Huk Commander of the Manila Area, a man who was fearless, and determined to shoot it out with the officers of the law. As a matter of fact, on September 22nd of the same year this same Huk Commander NICK PAMINTUAN was finally cornered by a

combined posse of Army officers and soldiers and Manila Policemen in Pandacan, Manila. Alone he battled them and although he was killed, he also was able to kill Capt. Juan Panoplo of the Armed Forces and wound an agent of the Military Intelligence Service (although according to paragraph 24 of the Third Amended Information against Luis M. Taruc, the casualties were the killing of Lt. Jose Reyes of the MPD and Lt. Juan Panoplo of the AFP, and the wounding of Sgt. Rafael Redultin of the AFP), this, according to the records of the Armed Forces and the Manila Police Department. (See page 13, Appellant's Brief). As a result of that raid on April 1, 1951, 21 Huk suspects were apprehended, thus showing that the information about the presence of Huks in the area raided was well founded. Ejar from being a veteran soldier in the Army, as erroneously concluded by the Court of Appeals, Vilerla was a raw recruit, and it was not his fault that he was pressed into this secret and dangerous mission of raiding or cordoning an area said to contain desperate dissidents and Huk Commanders; and it was not in broad daylight either, but at midnight. Then, suddenly from the darkness and the shadows of the gumamela shrubs and banana trees he saw a figure advancing toward him brandishing a bolo. What was he to think? Peaceful and law-abiding citizens do not usually go about at midnight, brandishing boloes and making threats. If such a person is met in any other place like a street or yard under ordinary circumstances, one might yet think that he is a mere prowler or burglar bent on stealing but not otherwise dangerous. But that night of the raid, the surrounding area was said to be infested with dangerous Huks and precisely Vilorio was sent there to apprehend them if they tried: to escape or even shoot them if they resorted to resistance or aggression. It is true that the yard of Custacio was just outside the area to be raided but one could not pin point and determine accurately by metes and bounds the exact place where the dissidents were supposed to be. It could be that their hideout was well inside the line or cordon of soldiers but that when the dissidents were surprised by the MIS agents said dissidents may have scattered and some tried to escape into the surrounding area including the yard of Eustacio, and that for all that Vilorio knew the figure he saw that night may have been one of them.

We should not judge Vilorio too strictly nor harshly. Divesting ourselves awhile of the serenity of mind and logical thinking and reasoning of a judicial official, with all the true facts before him, let us try to place ourselves in the situation and mental state of Vilorio at the time, reminding ourselves of his untutored and simple mind and his lack of training. As this Court well said in the case of *D. S. vs. Santos*, 36 Phil. 853, 855, in the course of its decision reversing a sentence of conviction of a policeman by the trial court:

"One should however not expect too much of an ordinary policeman. He is not presumed to exercise the subtle reasoning of a judicial officer. Often he has no opportunity to make proper investigation but must act in haste on his own belief to prevent the escape of the criminal. To err is human. Even the most conscientious officer must at times be misled. If, therefore, under trying circumstances and in a zealous effort to obey the orders of his superior officer "and to enforce the law, a peace officer makes a mere mistake in good faith, he should be exculpated. Otherwise, the courts will put a premium on crime and will terrorize peace officers through a fear of themselves violating the law."

From the point of view of Vilorio, was there aggression which he was justified in repelling? Both the Court of Appeals and the majority believe that there was no such aggression because Eustacio was a peaceful citizen within his yard merely trying to scare away potential robbers and marauders and that anyway he would not carry out his threat because due to his age and his physical affliction, he could not have possibly gone over the fence. I have already pointed out that Vilorio should be judged not by the facts as they turned out to be but by what he in good faith believed them to be. Besides, to repel an aggression, it is not necessary that the latter be consummated. In the case of *U. S. vs. Batungbacal*, 37 Phil. 382, this Court said:

"In order that the assault may be repelled, it is not necessary that it must have been perpetrated; it is sufficient that there be an attempted assault. The law protects with this exemption from liability not only the person who repels an aggression, but even the person which tries to prevent an aggression that is expected."

To constitute aggression it is not necessary that the attack or assault be carried out. It is sufficient that it be shown by the acts and by the attitude of the assailant that he will attack. The mere opening of a knife and making a motion as if to make an attack constitutes a real aggression; one who brandishes a knife and raises it during a dispute, commits aggression; and the act of a wounded man raising a club which he hold in his hands and advancing towards the accused with an attitude of hitting him, constitutes real unlawful aggression (Guevarra's Commentaries on the Revised Penal Code, p. 11, citing decisions of the Supreme Court of Spain. And in the opinion of Viada, even a mere threat of an attack such as brandishing a knife with which to stab one or pointing a gun to discharge against one, is aggression (I Viada, 5th Ed., p. 173).

Viloria did not have to wait until the menacing figure had done over the fence and within hitting distance struck at him or then self-defense may have been too late. Besides, Viloria was not there as a mere civilian permitted only to protect himself in case of aggression. He was there as a peace officer to apprehend dissidents and when in his opinion one of them attacked he could shoot him not only to defend himself but also to disable or if necessary to kill a public enemy.

Was Viloria required under the circumstances to retreat in order to avoid inflicting injury on his assailant? A civilian under the circumstances may have sought refuge in flight, but Viloria was not a civilian. He was a soldier of the Armed Forces of the Republic with traditions to uphold, and was expected to observe proper conduct in the presence of the enemy. Asked by the Fiscal why he did not retreat, like a true soldier he gave a most proper answer. He said: "I could not retreat from that place without an order from my officer", (t.s.n., p. 42) He was stationed in that place by his officer. He was as it were occupying a battle or skirmish position, and without an order from his officer he could leave that position only when driven by superior force. To retreat from his position would have been an act of cowardice and desertion of his post for which he could be court-martialed and discharged dishonorably and in disgrace, and so he held his ground and stuck to his post.

In the case of U.S. vs. Monica, *supra*, this Court said:

"A police officer, in the performance of his duty, must stand his ground and cannot, like a private individual, take refuge in flight; his duty requires him to overcome his opponent. The force which he may exert therefore differs somewhat from that which may ordinarily be offered in self-defense. Bearing this in mind, we do not think that the appellant in using his revolver against the deceased can be said to have employed unnecessary force. The deceased attacked him with a deadly weapon; he might, perhaps, have saved himself by running away, but this his duty forbade."

The Court Of Appeals and the majority lay stress on the fact that as shown by the wounds of entrance and exit, the latter was lower, and from this they draw the Inference that Viloria did not tell the truth when he said that he shot Eustacio from a squatting position, because otherwise the exit would have been higher than the entrance. Again, I am constrained to state that both the majority and the Court of Appeals apparently overlooked the fact as stated by Viloria without contradiction, he fired the shot at the moment when Eustacio's body was bent over the fence with his left leg lifted as if to scale the fence preparatory to going over it. In this position and forward inclination of the body, a shot fired by one even from a squatting position in front would naturally produce a wound where the exit would be lower from the point of entrance. In this connection, to show that Eustacio was shot right at the fence when he was bending over it, Lt. Regis testified without contradiction or refutation that the morning following the shooting, he inspected and went over the scene of the shooting and found blood spots or stains on the ground, from the fence to the house, evidently the blood from the wound of Eustacio as he walked back from the fence to the house after being shot, the nearest blood stains being on the dry leaves of a gumamela shrubs about a foot from the fence. And what was Eustacio doing just before and at the instant that he was shot? As asserted by Viloria, Eustacio was brandishing his bolo and making threats. This is the finding of the Court of Appeals itself,

accepted by the majority. I quote:

"Eustacio no era sino un espantajo dentro del cerco, que si levantaba su bolo, Id hacia para es- pantar, sin colocar de ninguna manera a aquel in situacion peligrosa".

Of course we now know that in brandishing his bolo, Eustacio was merely trying to scare and terrify, but this Vilorio did not know at the time, he said that he thought that Eustacio is a Huk bent and determined to kill him. In the important case of *People vs. Bayambao*, 52 Phil. 3095 these are the facts. One night, while defendant Bayambao was in his house, His wife told him that someone had thrown a stone at the house. So he took his revolver and went down to Investigate. We looked around under the house but saw no one. At that time there were outlaws in the vicinity and several days before, a soldier had killed two outlaws not far from the house. As Bayambao was walking back to the stairs, about to go up the house, He heard a noise and saw a black figure with hands uplifted rushing at him. Without giving any warning, he fired at the black figure thinking that he was an outlaw, but who later turned out to be his own brother-in-law. Charged with murder for the killing, he was found guilty by the trial court and sentenced to cadena temporal. On appeal this Tribunal acquitted him saying:

"The latter, on that occasion, acted from the impulse of an uncontrollable fear of an ill at least equal in gravity, in the belief that the deceased was a malefactor who attacked him with a kampilan or dagger in hand, and for this reason, he was guilty of no crime and is exempt from criminal liability (art. 8, No. 10, Penal Code.)

"Furthermore, his ignorance or error of fact was not due to negligence or bad faith, and this rebuts the presumption of malicious intent accompanying the act of killing. In an analogous case, this Court acquitted the accused (*U.S. vs. Ah Cheng*, 15 Phil. 488), and we deem the doctrine laid down in that case applicable to this one."

In the more recent case of *People vs. Mamasalaya, et al.*, 50 O.G. 1104, cited in the majority opinion, a Constabulary officer while out on patrol and on a mission to apprehend and if necessary kill outlaws, ordered his men to fire on several houses in the belief and assurance that the inmates thereof were bandits or outlaws. It turned out, however, that said inmates were innocent civilians. For the death of several of said civilians, the officer was charged with quadruple murder and after trial was found guilty of the charge and sentenced to 20 years of reclusion temporal. On appeal he was acquitted by this Tribunal on the ground that the shooting was justified for having been done and effected under an honest mistake. To me, the present case of Vilorio is stronger. In the *Mamasalaya* case, the inmates of the houses fired upon had done nothing or committed any act which might lead or cause the Constabulary officer to believe that they were other than law-abiding citizens. They were peacefully sleeping in their homes and gave no provocation whatsoever; and yet said Constabulary officer was exonerated just because he honestly believed, that the houses harbored outlaws. In the present case, Vilorio was engaged in a secret and hazardous mission, a raid not on a mere opium joint or gambling den where the inmates would not possibly offer any resistance, much less make aggression, but on a re-grouping center and hideout of desperate Huks and Huk Commanders who Vilorio was told were determined to fight and not to be taken alive, for which reason the Army sent one officer and 36 soldiers armed with rifles. And it was midnight. Vilorio did not fire on said hideout but was merely standing guard observing and awaiting developments. Then suddenly here comes this menacing figure of Eustacio in the darkness and shadows of gumamela shrubs and banana trees, advancing towards him and brandishing a bolo. Vilorio honestly thought and believed that Eustacio was a Huk advancing towards him to attack with a deadly weapon. So he shot him, not only to protect himself from what he believed was a real aggression and imminent peril, but also to carry out the purpose of his mission which was to catch Huks or kill them if resisted, in my opinion, he had a better reason and more valid ground to be exonerated than the Constabulary officer in case of *Mamasalaya*.

There is absolutely no reason to believe that Vilorio intentionally and deliberately shot Eustacio knowing him to

be an innocent citizen, just for the sake of killing or the sheer fun of it. He did not know Eustracio, never met him before nor ever heard of him. Vilorio is not a wanton killer. He had already grown the Impetuousity, rashness or irresponsibility of youth and teenage. He was already 26 at the time of the shooting. He is not a product of the slums and other breeding places of crime of a City. He was raised in a rural community and he was a farmer when he joined the Army, according to him, to serve his country and possibly make a career of it. Unfortunately for him, less than three months after his enlistment and before he could acquire the experience and training of a real soldier, he was pressed into this dangerous mission of raiding a Huk hideout.

I believe with the Court of Appeals and with the majority that peaceful and law-abiding citizens should be protected. At the same time, we should equally afford protection and give sympathetic consideration to our peace agents and soldiers when they make honest mistakes in the performance of their duties, specially when carrying out dangerous missions where their lives are jeopardized and imperiled. For there is nothing more demoralizing to said peace agents and officery, nothing more destructive of their morale, than the thought or realization on their part that their Government which sends them out on dangerous missions, is heartless and entirely lacking in sympathy, and is quick to punish them mercilessly for any mistake committed, however honest said mistake, and regardless of the difficult conditions and circumstances under which the mistake was committed. With that "Sword of Damocles" ever hanging over their heads, to protect themselves, they would always act halfheartedly, without any Initiative and play safe and they would never catch the criminals and dissidents whom they are supposed to protect society. As was said by this Court in the case of *People vs. Santos*, supra, if the courts did not excuse and exculpate peace agents for mistakes committed by them in good faith then "the courts will put a premium on crime and will terrorize peace officers through a fear of themselves violating the law." And, as we said in the case of *People vs. Mamasalaya*,

"All these considerations we have taken into account in rendering verdict on the innocence or guilt of appellant Cabelin. Because, If we make a mistake by holding criminally responsible and sentencing to life Imprisonment or death, a peace officer sent on a special or critical mission, who to accomplish his mission and at the same time protect and insure the lives of his men had to act and acted under facts which he honestly and in good faith believed to be true, and under extraordinary conditions obtaining at the time, just because later the facts turned out to be different, we might though without realizing, much less intending it, demoralize our Armed Forces specially their officers, to the extent that in the future, to avoid any possible criminal prosecution, they would be too slow, over-cautious, vacillating and irresolute to the point of utter inefficiency and impotence."

If I have dwelt rather at length on this case, it is because altho I have the greatest respect for the learned opinion of the majority, I am afraid it failed to give due and sufficient consideration to certain aspects of the case, besides accepting some, to me, erroneous and unwarranted conclusions of the Court of Appeals, and I cannot get myself to acquiesce in the conviction and punishment of a soldier of the Republic whose only fault, in my opinion was in acting quickly as he should and like a true soldier, on what he honestly believed the facts to be at the time, in order to carry out his mission and to defend himself, altho subsequent investigation showed the facts to be otherwise. If guilty at all, Vilorio should be held liable only for homicide thru reckless imprudence as was found by the trial court.

For the foregoing reasons, I believe that Vilorio should be exonerated and I agree with the majority that he is entitled to Executive Clemency, but immediately and not after service of a part of his sentence.

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