

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. OPENIANO PAJENADO @ PEMING, DEFENDANT-APPELLANT.

G.R. Nos. L-27680-81. February 27, 1970

Ponente: DIZON, J.

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DIZON, J.:

In the Court of First Instance of Samar appellant Openiano Pajenado was charged with murder (Criminal Case No. 3492, now G. R. No. L-27680) and with illegal possession of a firearm (Criminal Case No. 3558, now G. R. No. L-27681). Upon arraignment he pleaded not guilty in both cases, and after a joint trial thereof he was convicted and sentenced as follows:

"Wherefore, in view of the foregoing considerations, the Court finds the accused Openiano Pajenado alias Peming, guilty beyond reasonable doubt of the crime of murder and he is hereby condemned to suffer the penalty of Reclusion Perpetua, to indemnify the heirs of Carlos Tapong in the amount of P6,000.00 and to pay the cost of suit.

"The same accused Openiano Pajenado is likewise guilty beyond reasonable doubt of illegal possession of firearm and is hereby sentenced to suffer imprisonment of not less than One (1) year nor more than Five (5) years end to pay the cost of suit."

The facts established conclusively by the evidence are the following:

At about 12:00 o'clock noon on December 31, 1965 while prosecution witness Epifanio Cabe was walking along one of the streets of barrio Dapdap, municipality of Las Navas, North Samar, and arrived in front of the house of one Pablo Jazmines, he saw appellant holding the now deceased Carlos Tapong by the neck. As the two were apparently wrestling with each other, Carlito Pajenado, appellant's cousin, intervened and the two Pajenados were able to throw Tapong to the ground. Carlito Pajenado held Tapong by the shoulder and pinned him down to the ground, while appellant held him by one leg. As they thus held Carlos Tapong help-less, appellant drew his gun and fired at him. Thereupon, Carlito Pajenado stood up and run away, while appellant remained at the scene of the crime with his drawn gun until a policeman, another Pajenado (Ernesto), arrived and took the firearm from him. Carlos Tapong, mortally wounded, was thereafter carried home by his father and other relatives.

Another prosecution witness, Pelagia Tapong, testified that at noon on the day in question, while she was at the window of the house of her elder brother, Angel, along the street where the incident took place, she saw appellant standing on the street; that when Carlos Tapong appeared, appellant immediately met him and held him by the neck; that thereafter Carlito Pajenado intervened and with his help appellant was able to fell Carlos to the ground.

It is not denied that Carlos Tapong died as a result of the gun-shot wound inflicted upon him on that occasion. Testifying on the nature thereof, Dr. Angel Tan, municipal health officer of Las Navas, said that he conducted a post mortem examination of the cadaver on January 1, 1966 and found that the deceased sustained three gun-shot wounds which, in his opinion, were caused by a single shot from a .45 caliber pistol. The wounds are described by him in his autopsy report, Exhibits A, A-1 and A-2 as follows:

"Gun shot wound with entrance at the postero-medial portion of the distal third of the thigh making an exit at its upper proximal third in the antero-lateral margin, making another entrance at the right hypogastric region, penetrating the abdominal cavity. Perforating the intestines, penetrating the left dome of the diaphragm to enter the left thoracic cavity."

Dr. Tan also testified that considering the presence of powder burns in the body of the deceased, he must have been shot at a distance of less than one meter, and that the cause of his death was shock due to external and internal hemorrhage.

The issues raised in the assignments of error made in appellant's brief call for the resolution of: firstly, the question of whether appellant should be convicted only of homicide instead of murder, and whether, upon the evidence of record, he should also be found guilty of the crime of illegal possession of a firearm.

The Solicitor General agrees with appellant's view that the latter should be convicted merely of homicide committed with one aggravating circumstance not offset by any mitigating circumstance, because the qualifying circumstances of evident premeditation and treachery alleged in the information have not been proved.

We disagree.

The testimony of prosecution witness Pelagia Tapong clearly shows that, for sometime before the incident, appellant had been waiting for Carlos Tapong to appear, and that as soon as the latter showed up and arrived in front of the house of Pablo Jazmines, appellant met him and held him by the neck; that thereafter his cousin Carlito helped him throw their victim to the ground. This, We believe, is sufficient evidence of premeditation.

We agree, however, that treachery was not proved. On the other hand, the aggravating circumstance of abuse of superior strength, admitted by appellant's counsel (p. 8, appellant's brief), must be considered in the imposition of the corresponding penalty.

Upon the question of whether or not appellant should also be convicted of the crime of illegal possession of a firearm, We agree with both appellant's counsel and the Solicitor General that the appealed decision should be reversed.

It is true that *People vs. Lubo*, 101 Phil. 179 and *People vs. Ramos*, 8 SCRA 758 could be invoked to support the view that it is incumbent upon a person charged with illegal possession of a firearm to prove the issuance to him of a license to possess the firearm, but We are of the considered opinion that under the provisions of Section 2, Rule 131 of the Rules of Court which provide that in criminal cases the burden of proof as to the offense charged lies on the prosecution and that a negative fact alleged by the prosecution must be proven if "it is an essential ingredient of the offense charged", the burden of proof was with the prosecution in this case to prove that the firearm used by appellant in committing the offense charged was not properly licensed.

It can not be denied that the lack or absence of a license is an essential ingredient of the offense of illegal possession of a firearm. The information filed against appellant in Criminal Case No. 3558 of the lower court (now G.R. No. 27681) specifically alleged that he had no "license or permit to possess" the .45 caliber pistol mentioned therein. Thus it seems clear that it was the prosecution's duty not merely to allege that negative fact but to prove it. This view is supported by similar adjudicated cases. In *U.S. vs. Tria*, 17 Phil. 303, the accused was charged with having criminally inscribed himself as a voter knowing that he had none of the qualifications required to be a voter. It was there held that the negative fact of lack of qualification to be a voter was an essential element of the crime charged and should be proved by the prosecution. In another case (*People vs. Quebral*, 68 Phil. 564) where the accused was charged with illegal practice of medicine because he had diagnosed, treated and prescribed for certain diseases suffered by certain patients from whom he received monetary compensation,

without having previously obtained the proper certificate of registration from the Board of Medical Examiners, as provided in Section 770 of the Administrative Code, this Court held that if the subject of the negative averment like, for instance, the act of voting without the qualifications provided by law is an essential ingredient of the offense charged, the pro-secution has the burden of proving the same, although in view of the difficulty of proving a negative allegation, the prosecution, under such circumstance, need only establish a prima facie case from the best evidence obtainable. In the case before Us, both appellant and the Solicitor General agree that there was not even a prima facie case upon which to hold appellant guilty of the illegal possession of a firearm. Former Chief Justice Moran upholds this view as follows:

"The mere fact that the adverse party has the control of the better means of proof of the fact alleged, should not relieve the party making the averment of the burden of proving it. This is so, because a party who alleges a fact must be assumed to have acquired some knowledge thereof, otherwise he could not have alleged it. A familiar instance of this is the case of a person prosecuted for doing an act or carrying on a business, such as, the sale of liquor without a license. How could the prosecution aver the want of a license if it had acquired no knowledge of that fact? Accordingly, although proof of the existence or non-existence of such license can, with more facility, be adduced by the defendant, it is, nevertheless, incumbent upon the party alleging the want of the license to prove the allegation. Naturally, as the subject matter of the averment is one which lies peculiarly within the control or knowledge of the accused prima facie evidence thereof on the part of the prosecution shall suffice to cast the onus upon him." (6 Moran, Comments on the Rules of Court, 1963 edition, p. 8.)

WHEREFORE, judgment is hereby rendered as follows:

- (1) Appellant is found guilty of murder, with the aggravating circumstance of use of superior strength, without any mitigating circumstance to offset the same, but for lack of the required number of votes to impose the corresponding penalty in its maximum degree, We only affirm the penalty of reclusion perpetua imposed upon him by the trial court. However, the indemnity appellant must pay the heirs of Carlos Tapong is increased to P12,000.00.
- (2) The appealed decision is reversed and set aside in so far as it finds appellant guilty of illegal possession of a firearm, with the result that he is hereby acquitted of said charge.

Modified as above indicated, the appealed decision is affirmed in all other respects, with costs.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Zaldivar, Ruiz Castro, Fernando, Teehankee, Barredo, and Villamor, JJ., concur.

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