

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLANT, VS.
VICTORIANO CANOY, ET AL., DEFENDANTS. SERGIO GABUCAN,
DEFENDANT AND APPELLANT.**

G.R. Nos. L-4653-54. January 30, 1953

Ponente: PADILLA, J.

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PADILLA, J.:

Sergio Gabucan, Julian Kho, Victoriano Canoy and Pedro Flores were charged with illegal possession of firearms (case No. V-1527) and attempted robbery in band with homicide (case No. V-1975) in the Court of First Instance of Cebu. While awaiting trial the last three defendants escaped from jail. Julian Kho was rearrested. A joint trial of the two cases was held for the two defendants Sergio Gabucan and Julian Kho. After trial, both were found guilty of the crimes charged and sentenced for illegal possession of firearms, under Rep. Act No. 4, to suffer from 5 years and 1 day of prision correccional as minimum to 7 years and 1 day of prision mayor as maximum and for attempted robbery in band with homicide from 17 years, 4 months and 1 day as minimum to 20 years of reclusion temporal as maximum, the trial court compensating the aggravating circumstance of nocturnity with the mitigating circumstance of not having intended to commit so serious a crime, to indemnify the heirs of the deceased in the sum of P2,000 and to pay the costs. Only Sergio Gabucan has appealed.

It appears that on 13 March 1948, between 2:30 and 3:00 o'clock a.m., two prowlers, one armed with a pistol and the other with a flashlight and a knife, succeeded in opening the door of a room enclosed by wooden and bamboo sidings in the groundfloor of the house of Gregorio Sevilla situated at No. 269-C Mango Avenue, city of Cebu, where Abundio Carungay was sleeping, by raising the lock lever, entered the room, woke him up and told him not to shout. By the beams of the flashlight Carungay was able to recognize Julian Kho who held the flashlight and Pedro Flores, shorter in height, who carried a pistol which he tried to cock. When Carungay went to bed that night he left the light on but when he was awakened by the two intruders the light was out. Carungay could not help but shout "Robbers, robbers, Mr. Sevilla." These shouts woke up Gregorio Sevilla and his wife Ruth Sevilla who were sleeping in the second floor of the house and Carungay and the two intruders ran away. After being awakened by the shouts of Carungay, Ruth Sevilla jumped out of her bed, ran to the kitchen and opened the door. At that moment she saw standing on the yard behing the house a man who looked at her. A little while, when her husband joined her and was about to raise his gun to fire, she heard five or six gun shots coming from a corner of the yard behind the kitchen and left side of the house and saw her husband fall. She shouted for help and the neighbors came to the house and later went to the P.C. After that she was told that her husband was dead. After the firing of the gunshot Carungay went up to the house and found Gregorio Sevilla dead in the room adjoining the kitchen.

According to the doctor who made the necropsy of the deceased Gregorio Sevilla, the gunshots hit the deceased in the chest and the point of entry of the wound was at the eight interspace mid-axiliary line, left side, and the point of exit at the third rib, mammary line, right side, passing through the left ventricle, left auricle and right auricle of the heart; the gun must be a .30 caliber; and the cause of his instantaneous death was a sever hemorrhage (Exhibit

J).

The police authorities of the city started to work on the case. They posted several operatives in the neighborhood where the house of the deceased was located. The owner of a store in the neighborhood informed the sleuths that the night previous to the killings of Sevilla, Julian Kho, Victor Canoy, Pedro Flores and another, whose name he did not know, came to his store and drank coca-cola and "tuba" and chewed gum but did not pay for them. In the afternoon of that day three of them returned to the store and were arrested on suspicion that they had something to do with the killing of Sevilla, taken to the police station and investigated. They confessed they were the authors of the killing of Gregorio Sevilla whose house they had intended to rob. Victorinao Canoy indicated the place where they hid the arms they used that night which was near the house of Sergio Gabucan. Victoriano Canoy was brought to the place and he pointed to a foxhole dug out by the Americans and covered by dried leaves, where they hid the arms they used that night. In the foxhole 20 or 30 meters from the house of Sergio Gabucan, they found an Ediston rifle caliber .30, U. S. model, serial No. 991345 (Exhibit L); a Japanese rifle caliber .25, serial No. 9211 (Exhibit M); a carbine caliber .30 with its serial number tampered (Exhibit N); a hand grenade (Exhibit O); a hunting knife (Exhibit P); a wire cutter (Exhibit Q); and an invasion pistol caliber .45 (Exhibit R). A revolver caliber .45 (Exhibit T) was found in the yard of the house of Gregorio Sevilla in the morning of 13 March which, according to Pedro Flores, Victoriano Canoy and Julian Kho, Sergio Gabucan carried and fired and, according to Victoriano Canoy and Julina Kho, Gabucan dropped when they ran away after the firing of the shots. In the afternoon of 13 March Sergio Gabucan left for Cagayan, Oriental Misamis, was arrested there and brought back to Cebu on 29 October 1948. He was asked about the weapon he used on the night of 13 March and he said he had placed it somewhere near his house. They repaired to that place but they did not find it because the field was cleared of the grass. On their way back to jail he pointed to the foxhole where they hid the arms. These were taken by them from the office of the deputy clerk of court where they were kept, being the exhibits presented at the trials of criminal cases. According to Victoriano Canoy, on the night of 13 March he carried a rifle caliber .30 serial No. 5846032 (Exhibit S) and 15 rounds of ammunition (Exhibit S-1) which he hid in a bamboo grove. A small piece of blue denim cloth was found hooked to the wire fence of the deceased's house which was the cloth of the trousers worn by Sergio Gabucan that night. Four bullet holes were found in the kitchen and in the ceiling of the house of the deceased.

On 23 January 1948, Sergio Gabucan, Julian Kho, Victoriano Canoy and Pedro Flores, who were prisoners then, were brought to the office of the deputy clerk of court to remove cabinets and safes. The cabinets, some of them containing arms and ammunition, were opened and emptied of their contents by the prisoners. After emptying them the prisoners moved the cabinets to another room in the building and put back their contents. In the morning of 13 March the deputy clerk of court, Vicente E. Zosa, found the cabinets forced open and the firearms and ammunition kept therein missing.

All the defendants made statements sworn to before the municipal judge of the city, Filomeno B. Ibañez, admitting participation in the taking of the arms from the office of the deputy clerk of court on the night of 12 March and in the attempt to rob the house of Gregorio Sevilla which resulted in the latter's death early in the morning of 13 March.

After testifying that ill-treatment and threat of further bodily injury forced him to sign the affidavit before the municipal judge, Sergio Gabucan swears that on the night of 12 March 1948 he was in his house from 7:00 p.m. until the following day; and that he left at 6:00 o'clock in the afternoon of 13 March for Mindanao to visit his brother, although he admits that at 10:00 o'clock in the morning of 12 March he met Julian Kho, Victoriano Canoy and Pedro Flores, who were his companions in the provincial jail, in a restaurant near the capitol, and all of them brought cigarettes to their friend and companion Lucio Caballes who was still in jail that day. He was

released from prison on 2 March and his three co-defendants on 11 March (Exhibit W).

The testimony of Julian Kho is substantially a reiteration of the evidence for the prosecution and of his statement sworn to before Judge Ibañez, on how they planned to commit robbery, how they took the firearms from the office of the deputy clerk of court and brought them to a banana grove near the house of Sergio Gabucan and how they entered the room in the groundfloor of the house of Gregorio Sevilla except as to the one who fired the shots that killed Sevilla. He says it was Victoriano Canoy. Further recounting what took place that night he says that while they were walking, Canoy and Flores armed with carbines and he with a revolver, a hunting knife and a flashlight, decided to rob any one they would meet on the way and went to Mango Avenue to watch for passers-by; that near a bridge they met a car the light of which blinded them and caused them to jump to a ditch; and that they continued their way passing through a corn field until they reached the house of Sevilla. Victoriano Canoy then proposed to rob the house of Sevilla. They all agreed. Victoriano Canoy stood in the yard of the house near the fence and Pedro Flores climbed the house and tried to open the window but failed. Flores came down and both he and Flores went to the groundfloor, put out the light and entered the room of a boy who shouted for help. When the boy shouted they ran away. A short while after they heard gun shots. The one who fired was Victoriano Canoy who was stationed outside of the room as guard. The revolver found near the house was the one Canoy dropped when he ran away.

The only substantial difference then between his testimony on the stand and his affidavit Exhibits AA, A-1 and A-2 refers to the confederate who fired the gunshots which killed Sevilla. In the former he says it was Victoriano Canoy to free Sergio Gabucan; in the latter he says it was Sergio Gabucan.

The evidence is clear that the four defendants conspired to rob and to carry out their plan in the evening of 12 March they stole the arms and ammunition which they knew were kept in the office of the deputy clerk of court and before that in the afternoon of 12 March they drank and ate in a small restaurant located near the capitol building. Sergio Gabucan was released from jail on 2 March and his three companions nine days later, after serving a court sentence for theft (Exhibit W). Sergio Gabucan left Cebu in the afternoon of the day of the commission of the crime and went to Cagayan, Oriental Misamis. His departure reveals guilty conscience. The extrajudicial confession or admission by Sergio Gabucan that he took part in the commission of the crimes charged (Exhibit C) voluntarily made as testified to by the municipal judge, Filomeno B. Ibañez, before whom it was subscribed and sworn to, corroborated by the disappearance of arms and ammunition from the office of the deputy clerk of court on the night of 12 March; by the finding thereof in the foxhole indicated by his confederate Victoriano Canoy on 13 March and by him after his arrest and confinement on 29 October; by the admissions made by him to detective Hilarion Vestil; and by his flight from the scene of the crime late in the afternoon of the same day, 13 March, despite denial by him on the stand that it was voluntary, leads us, as it led the trial court, to conclude that Sergio Gabucan in conspiracy with his three co-defendants committed the crimes charged against him. Conspiracy having been established it is immaterial whether it was Victoriano Canoy and Sergio Gabucan who fired the fatal shot. All the defendants are guilty of the crimes charged.

The penalty imposed for illegal possession of firearms is within the range provided for in section 2692 of the Revised Administrative Code, as amended by Com. Act No. 56 and Rep. Act No. 4 but it is neither prison correccional for the minimum nor prison mayor for the maximum. It should be just from 5 years and 1 day of imprisonment as minimum to 7 years and 1 day of imprisonment as maximum.

The penalty for attempted robbery with homicide, pursuant to article 297 of the Revised Penal Code, is reclusion temporal in its maximum period to reclusion perpetua. Two aggravating circumstances concurred in the commission of the crime, to wit: that of more than three armed malefactors took part therein and that of nocturnity, which are not offset by any attenuating circumstance because that taken into account by the trial court

of not having an intent of committing so grave a wrong as that committed would not apply to robbery, and even if it deemed applicable to the incidental crime of homicide, there would still be one aggravating circumstance which is not offset. The penalty provided by law should be imposed in its maximum period which is reclusion perpetua. The Indeterminate Sentence Act does not apply to convicted persons of offenses punished with life imprisonment or reclusion perpetua (sec. 2, Act No. 4103, as amended by Act No. 4225).

We modify the judgment appealed from by striking out "prison correccional" and "prision mayor" from the penalty imposed for illegal possession of firearms and by writing the word "imprisonment" in lieu thereof; and by sentencing the appellant to suffer reclusion perpetua for attempted robbery with homicide, the accessories of the law, and affirm the rest of the judgment, with costs against the appellant.

Paras, C.J., Pablo, Bengzon, Tuason, Montemayor, Reyes and Jugo, JJ., concur.
Bautista Angelo and Labrador, JJ., no part.

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