

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. LEONARDO HENRY GARCIA Y ALVAREZ, ACCUSED-APPELLANT.

Ponente: CRUZ, R.A., J.

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CRUZ, R.A., J.:

THE CASE

This is an appeal interposed by Leonardo Garcia from the Decision dated July 9, 2010 by the Regional Trial Court (“RTC”) of Manila, Branch 20 in Criminal Case No. 98-169236, the dispositive portion of which reads, as follows:

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“Premises considered, the Court finds the accused Henry Garcia y Alvarez GUILTY beyond reasonable doubt of the offense of homicide and is hereby imposed an indeterminate penalty of six (6) years and one (1) day of prision mayor as minimum to fourteen (14) years and one (1) day of reclusion temporal as maximum.

He is likewise ordered to pay the heirs of the victim Wilfredo Ortillano, Jr. P132,500.00 as actual damages, P50,000.00 for moral damages and P50,000.00 as civil indemnity.

SO ORDERED.”

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THE ANTECEDENTS

Leonardo Garcia was charged before the RTC with the crime of homicide defined and penalized under Article 249[1] of the Revised Penal Code under the following information:

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“That on or about the 2nd day of December 1998, in the City of Manila, Philippines, the said accused, conspiring and confederating with another whose true name, identity and present whereabouts are still unknown and helping each other did then and there, willfully, unlawfully and feloniously with intent to kill, attack, assault and use personal violence upon one WILFREDO ORTILLANO, JR. Y MANUCAY by then and there shooting him on the head and on the different parts of his body with a gun, thereby inflicting upon the latter mortal wounds which were the direct and immediate cause of his/her death thereafter. Contrary to law.”[2]

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When arraigned on August 25, 1999, in Criminal Case No. 98- 169236, the accused pleaded "not guilty" to the crime charged.[3] Thereafter, pre-trial was held and consequently terminated[4], and trial of the case ensued.

From the evidence adduced by the prosecution, it appears that on December 2, 1998, at about 12 a.m., Wilfredo

Ortillano, Jr. and Leonardo Garcia were seen outside of Cowboy Grill Club having an altercation. Immediately after that, Wilfredo Ortillano, Jr. ran away from Cowboy Grill Club and headed towards Arquiza St. Leonardo Garcia chased him and shot him. Wilfredo Ortillano, Jr. fell to the ground and Leonardo Garcia shot him again and hit his head with the gun. Thereafter, Avel Sualibio approached the victim, kicked and punched him. When the police arrived, Leonardo Garcia and Avel Sualibio were boarded to the police car. Wilfredo Ortillano, Jr. was brought to the hospital but was pronounced dead on arrival.

On June 7, 2000, while on the witness stand, Remar Sandoval, a pedicab driver and parking boy, testified that the victim had a .45 caliber gun on his waist. Leonardo Garcia grabbed the gun from the victim and the latter ran away. The former chased the victim and shot him. After the victim fell with his face on the ground, Leonardo Garcia shot him again.

Remar Sandoval's uncle, Alfonso Guanzon, who was also a parking boy, testified that he saw Wilfredo Ortillano, Jr. and Leonardo Garcia arguing outside of Cowboy Grill Club. He said that the shorter man (Wilfredo Ortillano, Jr.) ran towards Arquiza St., and was chased by the taller man (Leonardo Garcia). He heard two gunshots and when he approached the crime scene, he saw Wilfredo Ortillano, Jr. sprawled on the ground. He saw Leonardo Garcia and Avel Sualibio beat and kick the victim.

Police Inspector Jose Bagkus, identified the Referral Letter[5], Arrest Report[6] and Booking Sheet[7] in relation to the incident.

Dr. Emmanuel Aranas, a medico-legal officer of the Philippine National Police Crime Laboratory, Camp Crame, Quezon City, also took the witness stand and testified that: (1) he conducted the autopsy of the cadaver of Wilfredo Ortillano, Jr.; (2) he prepared the Autopsy Report; (3) the victim sustained injuries consisting of lacerated wounds, abrasion, hematoma and gunshot wounds; (4) wounds marked as 6,8,9 of the Autopsy Report are gunshot wounds; (5) fatal wound marked 6 is a gunshot wound on the left side of the chest piercing thru the upper portion of the left lung, left side of the heart and middle portion of the right lung; a deformed slug exited and was recovered at the back; (6) wound marked 8 is a gunshot wound at the distal portion of the left arm causing laceration in the underlying soft tissues with an exit also at the same area of the arm; (7) wound marked 9 is a gunshot wound found at the proximas portion of the left forearm which fractured the bone of the left forearm specifically the left ulna and then made an exit; (8) the gun shot wounds were not self-inflicted.

On the other hand, the defense presented Michael Lirio, the accused and Avel Sualibio as witnesses who had a different version of events which transpired on December 2, 1998.

Michael Lirio is a valet parking attendant of Hotel La Corona located at the corner of M.H. Del Pilar and Arquiza Streets. He testified that on December 2, 1998, at about past midnight, he saw Wilfredo Ortillano, Jr. restraining Leonardo Garcia by placing his arm around his neck[8] and pointing a gun at him at the corner of M.H. Del Pilar and Arquiza Streets. He observed that Leonardo Garcia had blood on his face. Leonardo Garcia struggled to free himself and ran away but Wilfredo Ortillano Jr. shot him. However, the gun did not fire. Leonardo Garcia turned his back and while Wilfredo Ortillano Jr. was in the act of cocking the gun, he jumped towards him. They scuffled for the possession of the gun and he heard gun shots. Both men fell to the ground and later on, Leonardo Garcia stood up and introduced himself as a policeman.

Accused Leonardo Garcia and Avel Sualibio both testified that they went to Cowboy Grill Club to celebrate. When they were about to leave, Avel Sualibio tried to retrieve his gun from the counter. Wilfredo Ortillano Jr. attempted to get Avel Sualibio's gun but the guard at the counter refused. They had a disagreement and when Leonardo Garcia intervened and introduced himself as a policeman, Wilfredo Ortillano Jr.'s ire turned to him. Wilfredo Ortillano Jr. restrained Leonardo Garcia by placing his arm around his neck[9] and brought him outside

Cowboy Grill Club. Thereafter, Wilfredo Ortillano Jr. hit his head with a gun. He fell on his knee and when he tried to stand up, Wilfredo Ortillano, Jr. pointed the gun at him. He ran towards Arquiza St. and stopped when he noticed blood flowing from his head. Wilfredo Ortillano Jr. caught up with him, pointed a gun at him and dragged him to Arquiza St. cor. M.H. Del Pilar St. Wilfredo Ortillano Jr. aimed the gun at him and pulled the trigger but it did not fire. He immediately jumped towards him and they scuffled for the possession of the gun. The gun fired and they both fell to the ground. Thereafter, he introduced himself as a policeman.

After the trial, the RTC rendered the assailed decision. In his appeal before us, he poses the following:

THE ASSIGNED ERRORS

I.

WHETHER OR NOT THE ACCUSED WAS DENIED DUE PROCESS WHEN THE COURT A QUO GRANTED THE FORMAL OFFER OF EVIDENCE OF PLAINTIFFAPPELLEE WITHOUT CONCURRENCE FROM THE PUBLIC PROSECUTOR;

II.

WHETHER OR NOT THE ACCUSED WAS DENIED DUE PROCESS WHEN THE COURT A QUO DENIED HIS DEMURRER TO EVIDENCE AND MOTION FOR RECONSIDERATION THERETO DESPITE FAILURE OF THE PROSECUTION TO PROVE THE GUILT OF THE ACCUSED BEYOND REASONABLE DOUBT;

III.

WHETHER OR NOT THE COURT A QUO ERRED IN CONVICTING THE ACCUSED FOR HOMICIDE DESPITE THE PIECES OF EVIDENCE SHOWING HIS INNOCENCE AND THAT HE ACTED IN SELFDEFENSE.

The accused, now the appellant before us, argues that he was denied due process when the court a quo acted on the formal offer of evidence and the demurrer to evidence at the same time. At the time the demurrer to evidence was submitted for the resolution of the court, the prosecution had already rested its case and no documentary evidence was ever admitted by the court. In denying the demurrer to evidence, the court did not specify how the prosecution had sufficiently proven its case. The demurrer to evidence should have been granted because the prosecution failed to prove his guilt beyond reasonable doubt.

He insists that the court a quo placed him in a situation which he never admitted. Accused only admitted the scuffling but not the killing of the victim. The court violated his right to be presumed innocent until proven guilty. The accused avers that it is not his fault that he did not submit himself for medical examination. He asseverates that he received medical treatment for his head injuries but the investigator did not submit the medico-legal certification in connection with this.

He also argues that he never admitted the killing of the victim. The theory of self-defense only surfaced when the court denied the motion for reconsideration to his demurrer to evidence. The fact that he is taller than the victim does not mean that he is also of bigger built so as to arrive at the conclusion that he could have subdued the victim's aggression effortlessly. Contrary to the finding of the court a quo, he did not deviate from what he experienced. He was not able to pinpoint how many shots were fired because of the suddenness of the shooting. The court failed to consider that the laceration and the hematoma could have been caused by the victim's fall to the ground. His claim that there was scuffling and self defense is consistent with the tattooing present in the entry

wound of one of the gun shot wounds. That the gunshot wounds are all on the left side of the body proves that there was scuffling. Accused-appellant explains that he did not immediately bring the victim to the hospital because of temporary shock. While it is true that there was no proof as to who pulled the trigger, it was established that victim was the one holding the gun prior to the scuffling. It is not for the accused-appellant to ask that he be subjected to paraffin test but it is the investigator that should have subjected the parties thereto.

He contends that self-defense was sufficiently established. First, there was unlawful aggression on the part of the victim when he restrained him by putting his arm around his neck and pointing a gun at him. He even pulled the trigger but the gun did not fire. It is also worthy to note that the accused was unarmed at the time of the incident. Second, his act of jumping towards Wilfredo Ortillano, Jr. was a reasonable necessity to prevent or repel the unlawful aggression. Third, there was no provocation on his part as he does not even know Wilfredo Ortillano, Jr.

On the other hand, the Office of the Solicitor General (“OSG”) counters that accused-appellant was afforded due process during the trial. Prosecution of the criminal case against accused-appellant was conducted by the private prosecutor under the direct supervision of the public prosecutor. Absent any revocation or withdrawal of the authority given the private prosecutor, he can prosecute the case until the end. He was also represented by a counsel all throughout the proceedings. He was even given the chance to file a motion for reconsideration after his demurrer to evidence was denied.

OSG claims that accused-appellant makes inconsistent arguments. He admits to scuffling for the possession of the gun but denies killing the victim and then claims self-defense. To avail of the benefit of self-defense, accused-appellant has to prove: (1) unlawful aggression on the part of the victim; (2) reasonable necessity of the means employed; (3) lack of sufficient provocation on his part. There was no unlawful aggression as there was no proof of any assault against Leonardo Garcia by Wilfredo Ortillano, Jr. No medical report was presented to prove that he sustained injuries resulting from such assault. Multiple gunshots are by no means reasonable necessity to stave off the alleged assault. Moreso in this case since Leonardo Garcia is taller than Wilfredo Ortillano, Jr. The fact that the post-mortem record did not indicate gun powder burns on the victim and the claim of self-defense point out to the conclusion that it was accused-appellant who fired the gun. Even assuming that unlawful aggression came from Wilfredo Ortillano, Jr., this became immaterial when it stopped after the accused-appellant jumped towards him, scuffled for the possession of the gun and fired the same. After the first shot, unlawful aggression stopped. There is also no proof that he did not provoke the victim into assaulting him since he came from a celebration presumably where alcohol is served. OSG claims that the defense of self-defense is inherently weak because it can be easily fabricated and difficult to prove.

The OSG argues that the accused-appellant's guilt for the crime of homicide has been proven beyond reasonable doubt. The testimonies of the witnesses are credible and show no improper motive. The findings of facts of the trial court are accorded the highest respect, if not regarded as conclusive on appeal.

The OSG made the following recommendations: (1) Pursuant to the Indeterminate Sentence Law, the proper penalty should be six years and one day of prision mayor, as minimum to seventeen years four months of reclusion temporal in its medium period, as maximum; (2) Pursuant to prevailing jurisprudence, civil indemnity ex delicto should be P75,000.00.

OUR RULING

The appeal is not entirely without merit.

The accused-appellant was not denied due process. A perusal of the records reveal that the proceedings in Criminal Case No. 98- 169236 has always been under the direction and control of the public prosecutor consistent

with the provision of Section 5, Rule 110 of the Revised Rules of Criminal Procedure as amended by A.M. No. 02-2- 07 dated April 10, 2002[10]. To trace, the prosecution of the criminal action for homicide had always been under the direction and control of the public prosecutor namely, Assistant City Prosecutor Roslyn Rabara-Tria[11], Julita Danting[12], Armando Velasco[13], Leo Lee[14], Ferrer Co[15] and John Erick Flordeliza[16]. In the transcript of stenographic notes dated September 12, 2000, the public prosecutor categorically authorized the private prosecutor to prosecute the case under her direction and control. This authority was neither revoked not withdrawn, thus the private prosecutor continued to prosecute the case under the direction and control of the public prosecutor up to end of the trial. Hence, at the time the private prosecutor moved for time to file a written offer of exhibits and he was under the direction and control of the public prosecutor.

Neither was the accused-appellant denied due process when the lower court denied his demurrer to evidence. A demurrer to evidence is an objection by one of the parties in an action, to the effect that the evidence which his adversary produced is insufficient in point of law, whether true or not, to make out a case or sustain the issue.[17] The party demurring challenges the sufficiency of the whole evidence to sustain a verdict. The court, in passing upon the sufficiency of the evidence raised in a demurrer, is merely required to ascertain whether there is competent or sufficient evidence to sustain the indictment or to support a verdict of guilt.

Petitioner implores us to review the evaluation made by the lower court on the sufficiency of the evidence against him. Such a review cannot be secured in a Petition for Certiorari and Prohibition which is not available to correct mistakes in the judge's findings and conclusions or to cure erroneous conclusions of law and fact. It should be noted that an order denying a demurrer to evidence is interlocutory and, thus, not appealable. When such an adverse interlocutory order is rendered, the remedy is not to resort to certiorari or prohibition but to continue with the case in due course and when an unfavorable verdict is handed down, to take an appeal in the manner authorized by law.

The determination of the sufficiency or insufficiency of the evidence presented by the prosecution as to establish a prima case against an accused is left to the exercise of sound judicial discretion. Unless there is a clear showing of a grave abuse of discretion amounting to lack or excess of jurisdiction, the trial court's denial of a demurrer to evidence may not be disturbed. As we have culled from the records, it is not true that at the time the trial court resolved the demurrer to evidence, there was no evidence for the prosecution resulting from its failure to file formal offer of exhibits. In the Order dated October 26, 2005, the trial court granted the Motion for Reconsideration and to Admit Formal Offer of Exhibits filed by the prosecution. Consequently, the Formal Offer of Exhibits was admitted. It was only in the Order dated March 24, 2006, that the demurrer to evidence was denied. Hence, at the time the lower court resolved the demurrer to evidence, all the exhibits for the prosecution have been admitted by the court. The lower court, after hearing the evidence presented by the prosecution, was convinced that said evidence was sufficient to warrant a finding of guilt on the part of the accused-appellant. In its Order dated May 11, 2007, denying accused-appellant's motion for reconsideration of the denial of the demurrer to evidence, the trial court explained that:

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“the prosecution has established the following facts: A man named Wilfredo Ortillano, Jr. was killed with the use of a gun. The perpetrator was identified as Leonardo Garcia, herein accused. Evidence showed that a fatal gun shot on the chest was the ultimate cause of death”... “the accused was present in the very scene of the crime and was seen to be the one who shot the victim that caused the latter's death.”

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Given the sufficiency of the testimonial and documentary evidence against the accused-appellant, it cannot be said at that stage of the proceedings that the prosecution's evidence failed to establish the accused-appellant's guilt. As there was competent and sufficient evidence to sustain the indictment for the crime charged, it behooves accused-appellant to adduce evidence on his behalf to controvert the asseverations of the prosecution. Withal, the lower court did not commit any error when it found that there was a prima facie case against the accused-appellant warranting his having to go forward with his defensive evidence.

The RTC correctly rejected accused-appellant's claim of self-defense because he did not substantiate it with clear and convincing proof.

Accused-appellant claims that he only admitted to the scuffling for possession of the gun but not the killing of the victim. If this was true, then he should not be allowed to invoke the defense of self-defense at all. As ruled in *People of the Philippines vs. Melanio Nugas*[18], "By pleading self-defense, an accused admits the killing, and thereby assumes the burden to establish his plea of self-defense by credible, clear and convincing evidence; otherwise, his conviction will follow from his admission of killing the victim." (Emphasis supplied) Similarly, *People of the Philippines vs. Jose Mediado*[19], stated that, "An accused who asserts self-defense admits his infliction of the fatal blows and bears the burden of satisfactorily establishing all the elements of self-defense. Otherwise, his conviction for the felony of murder or homicide will be affirmed." (Emphasis supplied).

Even if we allow accused-appellant to claim self-defense as a justifying circumstance for the crime of homicide, the same was not established.

The Revised Penal Code delineates the standards for self-defense in Article 11(1)[20]. In order for self-defense to be appreciated, accused-appellant had to prove by clear and convincing evidence the following elements: (a) unlawful aggression on the part of the victim; (b) reasonable necessity of the means employed to prevent or repel it; and (c) lack of sufficient provocation on the part of the person defending himself.

Accused-appellant alleges that there was unlawful aggression on the part of the victim when the latter restrained him by putting his arm around his neck, dragged him outside Cowboy Grill Club, poked a gun at him, hit his head with the gun and shot him although the gun did not fire as intended.

The character of the element of unlawful aggression was aptly explained in *People of the Philippines vs. Alfonso Fontanilla*[21],

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"Unlawful aggression on the part of the victim is the primordial element of the justifying circumstance of self-defense. Without unlawful aggression, there can be no justified killing in defense of oneself. The test for the presence of unlawful aggression under the circumstances is whether the aggression from the victim put in real peril the life or personal safety of the person defending himself; the peril must not be an imagined or imaginary threat. Accordingly, the accused must establish the concurrence of three elements of unlawful aggression, namely: (a) there must be a physical or material attack or assault; (b) the attack or assault must be actual, or, at least, imminent; and (c) the attack or assault must be unlawful.

Unlawful aggression is of two kinds: (a) actual or material unlawful aggression; and (b) imminent unlawful aggression. Actual or material unlawful aggression means an attack with physical force or with a weapon, an offensive act that positively determines the intent of the aggressor to cause the injury. Imminent unlawful aggression means an attack that is impending or at the point of happening; it must not consist in a mere threatening attitude, nor must it be merely imaginary, but must be offensive and positively strong (like aiming a revolver at another with intent to shoot or opening a knife and making a motion as if to attack). Imminent unlawful aggression must not be a mere threatening attitude of the victim, such as pressing his right hand to his

hip where a revolver was holstered, accompanied by an angry countenance, or like aiming to throw a pot.”

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Assuming without admitting that Wilfredo Ortillano, Jr. restrained him by putting his arm around his neck and dragged him outside Cowboy Grill Club, such does not constitute unlawful aggression yet as defined by above because it does not put real peril to the life and personal safety of the person defending himself.

However, we find that Leonardo Garcia was hit on the head using a gun by Wilfredo Ortillano, Jr. and he sustained head injuries. The prosecution did not offer any testimony to that effect. It was rather silent as to whether or not Wilfredo Ortillano, Jr. hit Leonardo Garcia on his head using a gun. Nevertheless, the defense witnesses have sufficiently established that Leonardo Garcia sustained head injuries. The testimony of Michael Lirio to this effect was,

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“Q:

Where were you then?

A:

I was standing in front the door of Hotel La Corona.

Q:

What else did you see?

A:

I saw the taller one was bloodied on his face.

Q: Is that taller person the accused in this case Leonardo Henry Garcia?

A: Yes.”[22]

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Leonardo Garcia and Avel Sualibio were consistent in their testimony that the victim hit the head of the accused-appellant using a gun, to wit:

Testimony of Leonardo Garcia:

"Q: Then outside what happened?

A:

When I told him don't kill me because I'm also a police officer he got angry at me and he hit me on my head.

Q:

When you were hit what else happened?

A:

When he hit me on my head, fell on my knee.”[23]

Testimony of Avel Sualibio:

“Q:

What happened after you saw this Wilfredo Ortillano, Jr. collared [sic] Henry Garcia while holding his gun?

A:

When they were outside, I saw Wilfredo Ortillano hit Henry Garcia in the head with his gun and the gun fired.

Q:

Where was Henry Garcia hit?

A:

In the head, Sir.”[24]

In addition, this was corroborated by the documentary evidence of the prosecution. The Advance Information, marked as Exhibit “F”[25], stated that,

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“Noted present at the hospital were elements of WPD Mobile car 553 led by SPO1 Dominador Toco and SPO1 Nerio tabinas who claimed to have responded to the incident and the ones who brought the victim to the said hospital as well as the suspect, Leonardo Henry Garcia. SPO1 Toco pointed to Leonardo Henry Garcia inside the emergency ward being treated for head injuries by Dr. Rolando De Guzman.”

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While the Memorandum dated December 2, 1998[26] prepared by Police Chief Inspector Romulo Sapitula stated that,

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“Both arrested policemen [referring to Garcia and Sualibio] were taken at OSMA for medical examination, HENRY LEONARDO GARCIA was treated by Dr. Vivian Enriquez for head injuries...”

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The testimony of the prosecution and defense are conflicting as to who between the victim and the accused-appellant ran away and chased the other one. Prosecution claims that Leonardo Garcia chased Wilfredo Ortillano, Jr. while defense claims that it was Wilfredo Ortillano, Jr. who chased Leonardo Garcia. In which case, the more logical scenario would be the one where Wilfredo Ortillano, Jr. chased Leonardo Garcia because: (1) Leonardo Garcia already sustained head injuries and was unarmed; (2) Wilfredo Ortillano, Jr. was the one holding the gun.

Unlawful aggression on the part of Wilfredo Ortillano, Jr. started when he hit the head of Leonardo Garcia with a gun. It continued at the time of the chase, as he was seen pointing the gun at Leonardo Garcia and actually pulling the trigger. Would it not for the failure of the gun to fire, then he would have shot Leonardo Garcia. It was at the time that the victim was cocking the gun that Leonardo Garcia took his chance and jumped towards him.

As a general rule, there is a difference between the act of drawing one's gun and the act of pointing one's gun at a target. The former cannot be said to be unlawful aggression on the part of the victim. In *People of the Philippines vs. Virgilio Borreros*[27], it was held that,

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“no unlawful aggression could be gleaned. It bears stressing that for unlawful aggression to be attendant, there must be a real danger to life or personal safety. Unlawful aggression requires an actual, sudden and unexpected attack, or imminent danger thereof, and not merely a threatening or intimidating attitude. Here, the act of the deceased Federico Medina of allegedly drawing a gun from his waist cannot be categorized as unlawful aggression. Such act did not put in real peril the life or personal safety of appellant.” (Emphasis supplied)

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Recent caselaw however has differentiated the instance above from a circumstance where a police officer reached for his own firearm and pointed it at the accused. In justifying the presence of unlawful aggression, the court held in *SPO1 Lolito Nacnac vs. People of the Philippines*[28],

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“A police officer is trained to shoot quickly and accurately. A police officer cannot earn his badge unless he can prove to his trainors that he can shoot out of the holster quickly and accurately x x x. Given this factual backdrop, there is reasonable basis to presume that the appellant indeed felt his life was actually threatened. Facing an armed police officer like himself, who at that time, was standing a mere five meters from the appellant, the [latter] knew that he has to be quick on the draw. It is worth emphasizing that the victim, being a policeman himself, is presumed to be quick in firing.

Hence, it now becomes reasonably certain that in this specific case, it would have been fatal for the appellant to have waited for SPO1 Espejo to point his gun before the appellant fires back.”

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There is all the more reason to find the presence of unlawful aggression in this case considering the following: (1) Wilfredo Ortillano, Jr. is a police officer with higher position than Leonardo Garcia; (2) Leonardo Garcia is unarmed; (3) Wilfredo Ortillano, Jr. has previously pulled the trigger only that the gun did not fire.

Under the prevailing circumstances of the case, it would have been fatal for the accused-appellant to have waited

for Wilfredo Ortillano, Jr. to shoot him again.

However, we find that the second element of self-defense is lacking in this case.

There is no reasonable necessity of the means employed by Leonardo Garcia to prevent or repel the unlawful aggression of Wilfredo Ortillano, Jr.

It is settled that reasonable necessity of the means employed does not imply material commensurability between the means of attack and defense. What the law requires is rational equivalence, in the consideration of which will enter the principal factors the emergency, the imminent danger to which the person attacked is exposed, and the instinct, more than the reason, that moves or impels the defense, and the proportionateness thereof does not depend upon the harm done, but rests upon the imminent danger of such injury.[29]

The number and character of gun shot wounds sustained by the victim negate the assertion of reasonable necessity of the means employed to prevent or repel the unlawful aggression.

The Autopsy Report reveals that the victim suffered three (3) gun shot wounds. The number of times accused-appellant fired at the victim and the number of gunshot wounds sustained by the victim - were not reasonably necessary. On the contrary, we find that the number of gunshot wounds reveals a clear intent to kill, not merely to repel the attack of the victim. The totality of the circumstances shows that after the victim was taken down to the ground after the first gun shot, the accused-appellant ceased to be motivated with the lawful desire of defending himself. He was, by then, acting with intent to harm the victim whose aggression had already ceased. According to the testimony adduced by Remar Sandoval, after the accused-appellant shot the victim and the latter fell to the ground, the former fired a second shot[30]. This was corroborated by the testimony of Alfonso Guanzon that he heard two gun shots[31] after the chase. The same can be said as to the character of the gun shot wounds inflicted on the victim. While accused-appellant was quick in pointing out that these three (3) gun shot wounds are localized in the same area of the body (upper left portion) of the victim, we observed that the point of entry of the gun shot wounds (6,8,9) are not all located at the front. The points of entry of gun shot wound numbers 6 and 8 are located at the front portion of the body. On the other hand, the point of entry of gun shot wound number 9 is located at the back of the left arm. This important detail casts doubt on the claim of the accused-appellant that the gun only fired once. It is consistent with the testimony of the prosecution that the accused-appellant fired multiple shots: the first at the time the parties were scuffling for the possession of the gun and the second at the time when the victim was lying down facing the ground.

By the testimony adduced by prosecution, accused-appellant hit the victim's head with the gun even when the latter was already lying down facing the ground. Accused-appellant denied hitting the victim on the head and countered that the lacerations on the head of the victim may have been caused by his fall to the ground. As testified by the prosecution witnesses, the victim was lying down facing the ground[32]. Hence any injury resulting from the fall should have been sustained at the supraorbital (frontal) region of the head. Lacerated wound numbers 4 and 5 are located at the left parietal (back) region of the head and could not have been caused by the fall of the victim to the ground. The fact that the victim suffered injuries at the back and front portion of the head is consistent with the testimony that the accused-appellant hit the victim's head with the gun. It appears, therefore, that the means used by the accused-appellant, which were multiple gunshots and hitting the victim on the head while he was lying down facing the ground were adopted by him not only to repel the aggression of the victim but to ensure the latter's death. In sum, such act failed to pass the test of reasonableness of the means employed in preventing or repelling an unlawful aggression.

With respect to the third element, we find that there is lack of sufficient provocation on the part of the accused-appellant. The records bear that Leonardo Garcia only intervened to resolve the altercation between

Wilfredo Ortillano, Jr. and Avel Sualibio at the guard counter of Cowgoy Grill Club. Accused-appellant has not given cause for the aggression by any unjust conduct or by inciting or provoking the aggressor.

At the most, Leonardo Garcia could be credited with the privileged mitigating circumstance of incomplete self-defense. Under Article 69[33] of the Revised Penal Code, in order to avail of the privileged mitigating circumstance of incomplete self-defense which at the discretion of the court, reduces the penalty by one or two degrees, than that prescribed by law, accused-appellant must prove the existence of a majority of the requisites for self-defense. Here, a majority of the requisites of the justifying circumstance of self-defense, including the indispensable requisite of unlawful aggression on the part of the victim, has been established. Accused appellant, a police officer, was unsuspectingly pacifying an altercation between two other police officers, without the slightest inkling of an impending harm that would radically change the rest of his life. While it is true that he may have over-reacted to the assault, the fact remains that it was the unlawful aggression of the victim which set into motion the series of events which brought upon himself the injuries complained of. Under the circumstances, we deem it proper to modify the penalty imposed by the RTC by lowering it by two degrees than that prescribed by law.

Article 249[34] of the Revised Penal Code provides that the penalty for homicide is reclusion temporal. Because the requisites of unlawful aggression and lack of sufficient provocation on the part of accused-appellant are present in Criminal Case No. 98-169236, he is entitled to a penalty two degrees lower than reclusion temporal, that is, prision correccional.

From this penalty, the maximum of the indeterminate penalty is determined by taking into account the attendant modifying circumstances, applying Article 64 of the Revised Penal Code. Since no aggravating nor mitigating circumstance intervened, the maximum of the indeterminate penalty shall be prision correccional in its medium period whose range is from 2 years, 4 months and 1 day to 4 years and 2 months.

To determine the minimum of the indeterminate penalty, prision correccional has to be reduced by one degree without taking into account the attendant modifying circumstances. The penalty lower by one degree is arresto mayor whose range is from 1 month and 1 day to 6 months.

Hence, the proper penalty facing accused-appellant Leonardo Garcia is an indeterminate penalty from six (6) months of arresto mayor, as minimum, to four (4) years and two (2) months of prision correccional in its medium period, as maximum.

We also modify the award of damages. It is a settled rule that when death occurs due to a crime, the following damages may be awarded: (1) civil indemnity ex delicto for the death of the victim; (2) actual or compensatory damages; (3) moral damages; (4) exemplary damages; and (5) temperate damages.[35]

The grant of civil indemnity for the crime of homicide requires no proof other than the fact of death as a result of the crime and proof of the accused-appellant's responsibility therefor. The award of civil indemnity must be raised to P 75,000.00 in order for the award to conform with current jurisprudence.[36] With respect to actual or compensatory damages, the party seeking actual damages must produce competent proof or the best evidence obtainable, such as receipts, to justify an award therefor. Here, the prosecution was able to establish actual damages in the amount of P165,000.00, as evidenced by Official Receipt No. 0478 for P32,500.00[37], Official Receipt No. 0479 for P32,500.00[38] and Acknowledgment Receipt for P100,000.00[39].

However, we affirm, pursuant to Articles 2216[40], 2217[41] and 2219[42] of the Civil Code, the RTC's award of moral damages in light of the mental anguish that the heirs of Wilfredo Ortillano, Jr. suffered as a result of his death consistent with current jurisprudence[43].

WHEREFORE, in view of the foregoing, the appeal is DISMISSED for lack of merit. The Decision dated July 9, 2010 of the Regional Trial Court of Manila, Branch 20 in Criminal Case No. 98- 169236 is AFFIRMED BUT WITH MODIFICATION. Accused- Appellant Leonardo Henry Garcia is found guilty beyond reasonable doubt for the crime of homicide under Article 249 of the Revised Penal Code and is hereby sentenced to suffer an indeterminate penalty of six (6) months of arresto mayor, as minimum, to four (4) years and two (2) months of prision correccional in its medium period, as maximum. He is also ordered to pay the heirs of the victim, Wilfredo Ortillano, Jr. the amount of P75,000.00 as civil indemnity; P165,000.00 as actual damages; P50,000.00 as moral damages.

SO ORDERED.

Abdulwahid (Chairperson) and Barza, JJ., concur.

[1] Any person who, not falling within the provisions of Article 246, shall kill another without the attendance of any of the circumstances enumerated in the next preceding article, shall be deemed guilty of homicide and be punished by reclusion temporal.

[2] Record for Criminal Case No. 98-169236, p. 1.

[3] Record for Criminal Case No. 98-169236, p. 73.

[4] Record for Criminal Case No. 98-169236, p. 101.

[5] TSN dated September 21, 2004, p. 2.

[6] TSN dated September 21, 2004, p. 4.

[7] Id.

[8] Colloquially referred as “kinwelyo”.

[9] Colloquially referred as “kinwelyo”.

[10] "Section 5. Who must prosecute criminal action. - All criminal actions either commenced by complaint or by information shall be prosecuted under the direction and control of a public prosecutor. In case of heavy work schedule of the public prosecutor or in the event of lack of public prosecutors, the private prosecutor may be authorized in writing by the Chief of the Prosecution Office or the Regional State Prosecutor to prosecute the case subject to the approval of the court. Once so authorized to prosecute the criminal action, the private prosecutor shall continue to prosecute the case up to end of the trial even in the absence of a public prosecutor, unless the authority is revoked or otherwise withdrawn. x x x ."

[11] Record for Criminal Case No. 98-169236, p. 54, 60-63,70, 93,98, 100,104, 110.

[12] Record for Criminal Case No. 98-169236, p.118.

[13] Record for Criminal Case No. 98-169236, p.123, 125,129, 135, 137, 140, 143,146,151, 158 etc.

[14] Record for Criminal Case No. 98-169236, p.340.

[15] Record for Criminal Case No. 98-169236, p.344.

[16] Record for Criminal Case No. 98-169236,p. 374.

[17] Florante Soriquez vs. Sandiganbaya, G.R. No. 153526, October 25, 2005.

[18] G.R. No. 172606 , November 23, 2011.

[19] G.R. No. 169871 , February 2, 2011.

[20] Article 11. Justifying circumstances. The following do not incur any criminal liability:

1. Anyone who acts in defense of his person or rights, provided that the following circumstances concur:

First. Unlawful aggression;

Second. Reasonable necessity of the means employed to prevent or repel it;

Third. Lack of sufficient provocation on the part of the person defending himself.”

[21] G.R. No. 177743 , January 25, 2012 .citing People v. Nugas, G.R. No. 172606, November 23, 2011.

[22] TSN dated January 23, 2008, p.9-10.

[23] TSN dated May 5, 2008, p. 14.

[24] TSN dated May 12, 2009, p. 9.

[25] Record for Criminal Case No. 98-169236, p. 3.

[26] Record for Criminal Case No. 98-169236, p.11.

[27] G.R. No. 125185, May 5, 1999 .

[28] G.R. No. 191913 , March 21, 2012 .

[29] People of the Philippines vs. Wilson Gutual, G.R. No. 115233, February 22, 1996.

[30] TSN dated June 7, 2000, p. 17.

[31] TSN dated February 8, 2001, p. 24.

[32] “Q: What was the position of the accused relative to the victi, when the second shot was fired?

A:

The victim was “nakadapa”. See TSN dated June 7, 2000, p. 18.

"Q:

What was the actual position of Ortillano at the time you witnessed on that [sic] incident. Was his face lying on the ground?”

A:

He was lying on his right arm, stretched upn and his head laid on his arm.” See TSN dated February 8, 2001., p. 31

[33] Article 69 of the Revised Penal Code states, “Penalty to be imposed when the crime committed is not wholly excusable. - A penalty lower by one or two degrees than that prescribed by law shall be imposed if the deed is not wholly excusable by reason of lack of some of the conditions required to justify the same or to exempt from criminal liability in the several cases mentioned in Articles 11 and 12, provided that the majority of such conditions be present. The courts shall impose the penalty in the period which may be deemed proper, in view of the number and nature of the conditions of exemption present or lacking.”

[34] Article 249 of the Revised Penal Code states, “Homicide. - Any person who, not falling within the provisions of Article 246, shall kill another without the attendance of any of the circumstances enumerated in the next preceding article, shall be deemed guilty of homicide and be punished by reclusion temporal.”

[35] People of the Philippines vs. Samuel Anod, G.R. No. 186420, August 25, 2009.

[36] People of the Philippines vs. Hemiano de Jesus and Rodelo Morales, G.R. No. 186528 , January 26, 2011 .

[37] Record for Criminal Case No. 98-169236, p.299.

[38] Id.

[39] Record for Criminal Case No. 98-169236, p.300.

[40] Art. 2216. No proof of pecuniary loss is necessary in order that moral, nominal, temperate, liquidated or exemplary damages, may be adjudicated. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case.

[41] Art. 2217. Moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act for omission.

[42] Art. 2219. Moral damages may be recovered in the following and analogous cases:

- (1) A criminal offense resulting in physical injuries;
- (2) Quasi-delicts causing physical injuries;
- (3) Seduction, abduction, rape, or other lascivious acts;
- (4) Adultery or concubinage;
- (5) Illegal or arbitrary detention or arrest;
- (6) Illegal search;
- (7) Libel, slander or any other form of defamation;
- (8) Malicious prosecution;
- (9) Acts mentioned in Article 309;
- (10) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.

The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.

The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named.

[43] See People of the Philippines vs. PO2 Eduardo Valdez and Edwin Valdez, G.R. No. 175602, February 13, 2013.

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