

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EDUARDO TIONGCO Y LUSONG, ACCUSED-APPELLANT.

G.R. No. 108430. September 14, 1994

Ponente: MELO, J.

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MELO, J.:

Accused-appellant Eduardo Tiongco y Lusong appeals from the joint decision of the Regional Trial Court of the National Capital Judicial Region (Branch 103, Quezon City) in Criminal Cases No. Q-91-19504 (Murder) and Q-91-22623 (Illegal Possession of Firearms) promulgated on September 1, 1992, the dispositive portion of which reads:

ACCORDINGLY, judgment is hereby rendered finding the accused EDUARDO TIONGCO Y LUSONG GUILTY as principal beyond reasonable doubt of the crime of MURDER in Q-91-19504 committed on the person of Francis Penesa y Juatram and of the crime of Illegal Possession of Firearms in Violation of P.D. 1866 in Q-91-22623 and, consequently, said accused is hereby sentenced to suffer the following jail terms:

(1) In Q-91-19504 for murder, to RECLUSION PERPETUA; and

(2) In Q-91-22623 for Illegal Possession of Firearms, to RECLUSION PERPETUA as the subject firearm was used to kill and killed the victim Francis Penesa y Juatram.

On the civil aspect, accused Eduardo Tiongco y Lusong is hereby ordered to pay the heirs of Francis Penesa y Juatram the sum of P50,000.00 as damages. No costs.

SO ORDERED.

(p. 26, Rollo.)

The Information in Criminal Case No. Q-91-19504, dated March 25, 1991 charged:

That on or about the 20th day of March 1991, in Quezon City, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully and feloniously, with intent to kill, qualified by evident premeditation and treachery, assault, attack and employ personal violence upon the person of one FRANCIS PENESA Y JUATRAM, by then and there shooting him with a .38 caliber revolver, hitting him at the back, thereby inflicting upon him serious and mortal wounds which were the direct and immediate cause of his death, to the damage and prejudice of the heirs of said Francis Penesa Y Juatram in such amount as may be awarded under the provisions of the Civil Code.

(p. 49, Records.)

On the other hand, the Information dated June 20, 1991, for Illegal Possession of Firearms in Criminal Case No. 91--22623 alleged:

That on or about the 20th day of March 1991, in Quezon City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, without any authority of law, did, then and there, willfully,

unlawfully and feloniously have in his possession, under his control and custody one (1) caliber .38 "Paltik" marked Smith and Wesson without serial number without having first secured the necessary permit and/or license to possess/carry the same from the proper authorities, in violation of said law.

(p. 41, Records.)

Initially arraigned for Murder, accused-appellant pleaded "not guilty" on May 13, 1991 (p. 57, Records). On August 22, 1991, accused-appellant was arraigned for the offense of Illegal Possession to which he likewise pleaded "not guilty" (p. 76, Records). The two cases were tried jointly and as aforesaid, on September 1, 1992, the trial judge rendered his decision convicting accused-appellant in both cases.

The facts attendant hereto were summarized by the Solicitor General in the following manner:

At about 1 o'clock in the afternoon of March 20, 1991, as appellant Eduardo Tiongco was watching television at his residence located at No. 98 KJJ Kamias road, Quezon City, the ballcaster of the swivel chair which he sat on broke and got detached due to loose thread. Finding no replacement, appellant called on Francis Penesa, the victim, who was appellant's stepson, being the child of his wife, Crisanta Tiongco, by her first husband, to buy a ballcaster (TSN, 2/24/92, pp. 9-11; 7/27/91, pp. 5-8). Francis, however, was still asleep, as he had not slept the night before due to insomnia (TSN, 6/27/91, p. 27). Crisanta roused Francis from sleep but it took some time to wake him up. Appellant became angry and started saying bad words to Francis. When at last Francis awakened, he said "Opo" to appellant, then got dressed and went to the comfort room to brush his teeth. Appellant became even more angry, and when Francis passed in front of him, he beat him up by boxing him (id., pp. 8-10, 33). Francis parried the blows of appellant. Crisanta and the other people in the house intervened and held appellant back (id., 35). Francis then walked out of the house (id., pp. 11, 39). Appellant, who could not be suppressed, went upstairs and when he came down he already carried a .38 caliber gun and a dagger (Exh. "C", Rec., pp. 135-137; TSN, 6/27/91, pp. 35,40). Afterwards, appellant went out of the house to follow Francis (id., p. 11).

Unable to find Francis right away, appellant took a tricycle which was driven by Ronald Mado (id., p. 12; TSN, 6/28/91, p. 6). Appellant, who appeared angry, boarded the tricycle hurriedly, holding the gun. He told Ronald to proceed "straight ahead." Upon reaching Kasing-Kasing, appellant asked Ronald to stop as he looked for somebody. When he did not find what he was looking for, appellant asked Ronald to turn back to K-98 street. Again he failed to see what he was looking for and so appellant asked to be driven back to Kasing?Kasing. At the corner of Kasing-Kasing, appellant saw Francis. He immediately got out of the tricycle and poked his gun at Francis. (TSN, 6/28/91, pp. 7, 9, 12, 15). As Ronald drove ahead, he heard a gunshot. Consequently, he decided to proceed to the police station (id., p. 10).

When appellant alighted from the tricycle, Michael Calayag was at the Mark Store located at K-10 corner Kasing-Kasing, about ten (10) arms-length away (id., pp. 38, 30, 43). He saw appellant approach and poke a gun at Francis, saying, "Ano, lalaban ka ba?", and likewise shouted invectives at him (id., pp. 30, 48). Francis retreated and ran away. Appellant chased Francis and shot him at the back, causing the latter to fall to the ground. Appellant approached Francis, again poked his gun at him, saying, "Ano, lalaban ka ba," and then kicked Francis' body. Afterwards, appellant took out a dagger from his waistline and put it at the left hand of Francis. Then he looked around and walked away. (id., pp. 33--34). As appellant reached the corner leading to his house, a military man came out from somewhere and, with his long firearm pointed at appellant, he told the latter not to run but to give up his gun and to raise his arms. At first, appellant denied that he had a gun, but when the military man cocked his firearm, appellant took out his gun and put it on the ground and raised his hands. The military man approached appellant and picked up the latter's gun, after which they both went near the body of Francis. Later, Pfc. Jose Imbong of the Quirino Sub-Station in Quezon City, who responded to the incident, arrived at the scene (id., pp. 52, 34-36; TSN, 8/22/91, pp. 5-7). The military man turned over the person of appellant and the gun he confiscated from appellant to Pfc. Imbong. The gun had four (4) live ammunitions and one (1) empty shell (id., p. 8).

Crisanta Tiongco brought Francis to the V. Luna Hospital. On the way, Francis asked his mother to fight for him because he was shot by his daddy (appellant) through no fault of his (Francis) (TSN, 6/27/91, pp. 13-14).

(pp. 4-8, Appellee's Brief, ff. p. 71, Rollo.)

Accused-appellant seeks reversal upon the following alleged errors of the lower court:

I

. . . in not holding that accused-appellant acted in self-defense.

II

. . . in appreciating the qualifying circumstance of treachery.

III

. . . in not appreciating the mitigating circumstance of passion and obfuscation in favor of accused?appellant.

IV

. . . in convicting accused-appellant of the crime of Violation of PD 1866.

(p. 38, Rollo.)

Accused-appellant's version was synthesized by the trial judge as follows:

In his testimony the accused claimed that between 1:00 and 2:00 o'clock noon on March 20, 1991, while he was watching T.V. upstairs with his daughter the ballcaster of the chair where he was sitting got detached. As he could not find any replacement Eduardo went downstairs and asked his wife to wake up Francis (the herein deceased party) so Francis could buy a replacement of the broken ballcaster. Francis failed or refused to wake up despite incessant caller.

When Francis finally stood up, he looked at Eduardo with burning eyes. When Eduardo inquired why Francis was behaving in that manner, Francis positioned himself as if he was challenging Eduardo to a fight. Mrs. Tiongco embraced Eduardo and pacified him. The other household members separated Francis and Eduardo. Eduardo was brought by his daughter Marivic and his wife upstairs. There he told Crisanta that it is better to return Francis to the hospital for psychiatric treatment.

According to the accused Francis has been in and out of a psychotherapy clinic from August 1985 to December 1988. This portion of the testimony of the accused is correct as the same is well-corroborated by documents of treatment and testimony of Drs. Alex Estrella and Theodore Habas.

Going back to the household at East Kamias, Eduardo later went downstairs for the purpose of taking Francis back to a hospital. When told that Francis has left, Eduardo took a tricycle to follow Francis. Told that Francis went to Kasing-Kasing Street, Eduardo went to the place where he knows Francis and his barkada used to stay.

When Eduardo saw Francis, he asked the latter to come with him in the tricycle. Francis refused several times. Then Francis' eyes started mean and sharp and then he pulled out a gun from his hips.

Eduardo wrestled with Francis for the possession of the gun - a revolver and the subject matter of the charge against Eduardo in Q-91-22623, Eduardo took hold of the nozzle and grabbed Francis' arm twisting it from behind. As he did that, the gun fired and Francis fell head first on the gutter.

x x x

(pp. 21-22, Rollo.)

Three witnesses, however, contradicted accused-appellant's version of the shooting incident and the Solicitor General summarizes their respective testimony as follows:

Witness Crisanta Tiongco, wife of appellant and mother of the victim, testified that appellant's aggression against the victim started in their house when appellant became angry because it took the victim some time to follow appellant's order to buy a ballcaster. Crisanta testified that appellant first beat up the victim by boxing him, and, when the victim left the house, appellant still followed him, armed with a gun and a dagger (TSN, 6/27/91, pp. 7-12, 40; Exh. "C"). Appellant then rode the tricycle driven by witness Ronald Mado in order to look for the victim. Ronald saw that appellant carried a gun and that he appeared angry. When appellant saw the victim at the corner of Kasing-Kasing Street, he alighted from the tricycle and poked his gun at the victim. As he drove away, Ronald heard a gunshot (TSN, 6/28/91, pp. 7-10, 12; Exh. "D"). Witness Michael Calayag, who was in a nearby store at K-10f corner Kasing--Kasing when appellant alighted from the tricycle and approached the victim, saw that appellant immediately poked his gun at the victim, saying, "Ano, lalaban ka ba," and likewise shouted invectives at him. He saw the victim retreat and run away, but appellant chased and shot him at the back (id., pp. 30-32; Exh. "E").

(pp. 12-13, Appellees Brief, ff. p. 71, Rollo.)

Accused-appellant claims that he shot Francis in self-defense. To bolster this stance, he states that when he saw Francis fall, he even knelt down and asked Francis what had happened. Such supposed show of concern must, nonetheless, be rejected because the prosecution's evidence shows that accused-appellant had intended to leave the bleeding Francis, but for the timely intervention of a military man.

It was Francis' mother, Mrs. Crisanta Tiangco, who brought Francis to the hospital. On the way there, Francis told his mother "to fight for him" because accused-appellant shot him although he (Francis) was not at fault (tsn, June 27, 1991, p. 14). The trial court correctly considered the statement as part of the *res gestae* and a dying declaration.

To constitute self-defense, Paragraph 1, Article 11 of the Revised Penal Code, prescribes three circumstances that must concur: 1) unlawful aggression; 2) reasonable necessity of the means employed to prevent it; 3) lack of sufficient provocation on the part of the person defending himself.

The prosecution has established that accused-appellant was the aggressor in the case at bench, and that the victim attempted to run away from accused-appellant but was nonetheless shot, at the back at that. Accused-appellant having failed to establish the very first elementary requisite of his claim for justification of his act, there is no longer any need to go into further discussion of the two other elements of self-defense. Withal, the first assigned error must be rejected.

On the other hand, we agree with the Solicitor General that treachery is not present in this case. Francis had been forewarned of accused-appellant's fury and the possible consequences therefrom by the fighting stance that accused-appellant had assumed when he confronted Francis, with the words "O, lalaban ka ba!"

The Solicitor General narrates the sequence of events that negates treachery:

WITNESS:

A. I saw Eduardo Tiongco as if he was ran or chasing someone, at about the same time, I also saw Francis trying to hide.

Q. What happened after that?

A. I saw Eduardo Tiongco step down from a tricycle and I saw him poked a gun at Francis and I hear that Eduardo Tiongco say to Francis "Ano, lalaban ka ba."

Q. After that, what happened next?

A. Francis did not fight back.

Q. Did Francis talk?

A. Francis did not fight back, instead he ran away from Mr. Eduardo Tiongco.

Q. After that, what happened?

A. When Francis ran away, I saw Eduardo Tiongco chased him and shot Francis.

Q. Where did he shoot him, do you know?

A. Francis was shot at the back. (TSN, 6/28/91, pp. 30-32).

(p. 17, Appellee's Brief, ff. p. 71, Rollo.)

In the absence of the qualifying circumstance of treachery, accused-appellant may only be found guilty of homicide.

On the third assigned error, we are not persuaded by accused-appellant's claim that he was overcome by passion and obfuscation brought about by the belligerent reaction of Francis. What actually irked accused-appellant was Francis' slow response to accused-appellant's instructions to buy a ballcaster. Accused-appellant stated that he had, on at least five occasions, interceded and negotiated for Francis' release in robbery/theft cases filed against him (TSN, March 30, 1992, pp. 29-30). Perhaps, accused-appellant expected Francis to show appreciation for these favors. But Francis' half-hearted and delayed response angered accused-appellant, a very impatient man, who, according to his wife, was ". . . parang kidlat pag sinabing utusan ka, takbo agad" (T.S.N., June 27, 1991, p. 30).

The trial was thus correct when it held:

The court will not appreciate the mitigating circumstance of passion and obfuscation inasmuch as the anger of Eduardo at Francis did not arise from lawful sentiments. The delay of Francis in obeying Eduardo's request to buy a ballcaster being too trivial a matter as to fairly and justly cause such over reaction on the part of Eduardo.

(p. 26, Rollo.)

On the charge of illegal possession of firearms (Criminal Case No. Q-91-22623), We agree with the Solicitor General that the trial court did not err in convicting accused-appellant thereof.

Accused-appellant states that since the prosecution failed to present the military man who had initially apprehended and thereafter confiscated from accused-appellant the gun, then, Pfc. Imbong, to whom the gun was turned over by the apprehending military man, cannot competently testify on the charge of illegal possession of firearms so as to establish that accused-appellant was in possession of the gun described in the Information. In elaboration, it is argued:

There is no clear connection between the firearm presented in court and the firearm allegedly taken from appellant's body. The gun was allegedly confiscated by an unidentified military man, who handed the same to Pfc. Imbong. The unidentified military man was never presented in the witness stand. Pfc. Imbong, who had no personal knowledge of the confiscation of the gun from the appellant testified as follows:

Q - On March 20, 1991, was there any report to you of any shooting incident?

A - Yes maam, there is (sic) an alarm about the shooting incident.

Q - Did you try to find out what was the alarm?

A - We were dispatched by our desk officer to proceed to corner of K-10 and Kasing-Kasing Street.

Q - Upon arrival what happened if any?

A - Yes, maam, when we arrived at the scene, the suspect was already apprehended by a certain, identified himself as military man.

Q - Who is this suspect?

A - As per investigation, I know the name was Eduardo Tiongco.

Q - What else happened after he was given to you for your custody?

A - After identifying by military man and turned over to us the suspect and the weapon used by the suspect.

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Q - So, you (sic) only basis in concluding that was the gun used was on the basis of the fact that this was handed to you by military man, this gun was handed to you by military man?

A - Yes sir, because he said that was the gun used.

Q - You had testified here to (sic) a military man, what was the name of that military man?

A - We were not able to ask him sir, because our attention was focus (sic) on the suspect. (TSN, August 22, 1991, pp. 7-8, 17-18)

(pp. 9-10, Appellant's Brief, ff. p. 34, Rollo.)

The Solicitor General aptly disposes of this argument thusly:

The prosecution has indubitably shown that appellant was armed with a gun when he pursued the victim, and that he used the same gun to shoot the latter, with fatal result. The evidence disclosed, however, that appellant was not a licensed/registered firearm holder of any kind and caliber (Exhs. M and N, Rec., pp. 151-151A; TSN, 10-10-91, pp. 4-8; 2-20-92, pp. 3-9). Therefore, his possession of the gun, of whatever kind it may be, was unlawful or in violation of P.D. No. 1866.

Considering that appellant had not disputed the existence of the gun as well as his possession of the said gun at the time of the incident, it was not essential to present the person who confiscated the gun from appellant for the purpose of identifying the same, in order to prove the charge of illegal possession of firearms.

In any event, there is no doubt that the gun marked as Exh. I is the same gun which appellant used to shoot the victim. Crisanta Tiongco identified it as the gun used by appellant when it was shown to her on March 21, 1991 while executing her sworn statement (Exh. C), thus:

20. Tanong : May ipapakita akong baril sa iyo, ito ay isang kalibre .38 na revolver, six shooter, blue finish at may markang Smith and Wesson, ano and kinalaman sa pagpatay at pagbaril ni TIONGCO kay FRANCIS?

Sagot : Iyan and kinuha ni TIONGCO sa itaas ng bahay, itinutok pa niya sa akin at iyan din and ginamit ni TIONGCO sa pagbaril kay FRANCIS na siya niyang ikinamatay.

Similarly, the testimony of Pfc. Jose Imbong that the gun (Exh. I) was turned over to him by a military man

who arrested appellant (TSN, 8-22-91, pp. 7-8), was corroborated by Michael Calayag who testified that as appellant walked away from the crime scene, he was arrested by a military man who also confiscated his gun (TSN, 6-28-91, pp. 34-35). This was further corroborated by Crisanta Tiongco during her court testimony when she declared that, "The aid of Manglapus who is a captain got his (appellant) gun" (TSN, 6-27-91, p. 2).

(pp. 22-24, Appellee's Brief, ff. p. 71, Rollo.)

Under Article 249 of the Revised Penal Code, the penalty prescribed for homicide is reclusion temporal. In the case at bench there being no aggravating nor mitigating circumstance, and applying the Indeterminate Sentence Law, the proper penalty is an indeterminate penalty ranging from six (6) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months, and one (1) day of reclusion temporal, as maximum.

WHEREFORE, the joint decision appealed from is hereby affirmed en toto with regard to Criminal Case No. Q-91--22623 (Illegal Possession of Firearms), and affirmed with modification in respect to Criminal Case No. Q-91-19504 in which accused-appellant is found guilty not of murder but of homicide only in view of the absence of the qualifying circumstance of treachery. Consequently, the penalty imposed on accused-appellant in said Criminal Case No. Q--91-19504 is hereby reduced to an indeterminate sentence of six (6) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months, and one (1) day of reclusion temporal, as maximum.

No special pronouncement is made as to costs.

SO ORDERED.

Feliciano, (Chairman), Romero, and Vitug, JJ., concur.

Bidin, J., on leave.

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