

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. RAFAEL AVECILLA Y MOBIDO, ACCUSED-APPELLANT.

G.R. No. 117033. February 15, 2001

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

Accused-appellant was charged with the crime of Qualified Illegal Possession of Firearm, committed as follows:

That on or about December 24, 1991, in the City of Manila, Philippines, the said accused, not being allowed or authorized by law to keep, possess and carry a firearm, did then and there wilfully, unlawfully, and knowingly have in his possession, control and custody a firearm, to wit:

One (1) .38 Caliber Revolver Colt (Paltik) marked made in USA

without first obtaining the necessary license and/or permit to carry and possess the same and in connection and by reason of such possession, did then and there wilfully, unlawfully and feloniously, with intent to kill, fire and shoot one Macario Afable, Jr. y Canqui, thus inflicting upon the latter mortal gunshots and injuries which caused the death of the latter as a consequence.[1]

It appears from the records that at about 11:00 o'clock in the evening of December 24, 1991, accused-appellant arrived at the basketball court located on Dapo Street, Pandacan, Manila, and, for no apparent reason, suddenly fired a gun in the air. He then went to a nearby alley and, minutes later, proceeded to the closed store about four (4) meters away from the basketball court. There, he initiated an argument with the group of Boy Manalaysay, Jimmy Tolentino and Macario Afable, Jr. Afable tried to pacify accused-appellant, whereupon, the latter placed his left arm around Afable's neck and shot him pointblank on the abdomen. Afable ran toward the alley and accused-appellant ran after him. Another shot rang out, so one of the bystanders, Carlos Taganas, went to the alley and there, he saw accused-appellant and Afable grappling for possession of the gun. The Chief Barangay Tanod arrived and was able to wrest the gun away from accused-appellant, who immediately fled from the scene of the incident. Afable was rushed to the Philippine General Hospital, where he eventually expired.

On June 21, 1994, the Regional Trial Court of Manila, Branch 38, rendered judgment convicting accused-appellant of the crime of Qualified Illegal Possession of Firearm, sentencing him to suffer the penalty of reclusion perpetua, and ordering him to indemnify and pay damages to the victim's heirs.[2] Hence, this appeal filed by accused-appellant.

The records and the evidence show that the elements of the offense of qualified illegal possession of firearms, defined in the second paragraph of Section 1, Presidential Decree No. 1866, are present in this case. Specifically, there are:

- there must be a firearm;
- the gun was possessed by the accused;

- the accused had no license from the government; and
- homicide or murder was committed by the accused with the use of said firearm.[3]

The prosecution sufficiently established by evidence that accused-appellant had in his custody and possession the following firearms and ammunitions:

- One (1) .38 cal. Rev., Colt "paltik" without serial number, nickel plated with brown handle, two and one half inches barrel and marked "BC";
- Three (3) .38 Caliber cartridge cases marked BC-1, BC-2, BC-3;
- Two (2) .38 cal. Ammo. (used for test);
- One (1) .38 cal. slug (deformed) marked "F" from Medico legal.[4]

Likewise, per Certification of the Firearms and Explosives Office dated September 1, 1992,[5] it was proved that accused-appellant was not a licensed or registered firearm holder of any kind and caliber.

Finally, there was an eyewitness account positively asserting that accused-appellant had the subject firearm in his possession and used it in shooting the victim.[6] The medical examination on the victim disclosed that the gunshot wounds he sustained were caused by the same unlicensed firearm in accused-appellant's possession, and that the same were the direct cause of the death of the victim. The ballistics report established that the deformed .38 caliber slugs found in the victim's body were fired from the subject firearm.[7] The victim's cause of death was determined as "cardio-respiratory arrest due to shock and hemorrhage secondary to gunshot wound, left antero-lateral thorax." [8]

However, the law on illegal possession of firearms has been amended by Republic Act No. 8294, which took effect on July 6, 1994. The pertinent provision of the said law provides:

SECTION 1. Unlawful Manufacture, Sale, Acquisition, Disposition or Possession of Firearms or Ammunition or Instruments Used or Intended to be Used in the Manufacture of Firearms or Ammunition. - The penalty of prision correccional in its maximum period and a fine of not less than Fifteen thousand pesos (P15,000.00) shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose, or possess any low powered firearm, such as rimfire handgun, .380 or .32 and other firearm of similar firepower, part of firearm, ammunition, or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition: Provided, that no other crime was committed.

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If homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance.

If the violation of this Section is in furtherance of or incident to, or in connection with the crime of rebellion or insurrection, sedition, or attempted coup d'etat, such violation shall be absorbed as an element of the crime of rebellion, or insurrection, sedition, or attempted coup d'etat. (Underscoring provided)

It is clear from the foregoing that where murder or homicide results from the use of an unlicensed firearm, the crime is no longer qualified illegal possession, but murder or homicide, as the case may be. In such a case, the use of the unlicensed firearm is not considered as a separate crime but shall be appreciated as a mere aggravating circumstance. In view of the amendments introduced by Republic Act No. 8294 to Presidential Decree No. 1866, separate prosecutions for homicide and illegal possession are no longer in order. Instead, illegal possession of firearms is merely to be taken as an aggravating circumstance in the homicide case.[9]

Thus, in *People v. Nepomuceno, Jr.*, [10] we stated:

But, pursuant to the amendment, the use of an unlicensed firearm in the commission of murder or homicide is treated as an aggravating circumstance. There, the illegal possession or use of the unlicensed firearm is no longer separately punished. This Court emphatically said so in *People v. Bergante* (286 SCRA 629 [1998]), thus:

The violation of P.D. No. 1866 should have been punished separately conformably with our ruling in *People v. Quijada*. Nevertheless, fortunately for appellant Rex Bergante, P.D. No. 1866 was recently amended by Republic Act. No. 8294, otherwise known as "An Act Amending the Provisions of Presidential Decree No. 1866, as Amended." The third paragraph of Section 1 of said Act provides that "if homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance." In short, only one offense should be punished, viz., either homicide or murder, and the use of the unlicensed firearm should only be considered as an aggravating circumstance. Being favorable to Rex Bergante, this provision may be given retroactive effect pursuant to Article 22 of the Revised Penal Code, he not being a habitual criminal.

The crime of illegal possession of firearm, in its simple form, is committed only where the unlicensed firearm is not used to commit any of the crimes of murder, homicide, rebellion, insurrection, sedition or attempted coup d'etat. Otherwise, the use of unlicensed firearm would be treated either: (1) as an essential ingredient in the crimes of rebellion, insurrection, sedition or attempted coup d'etat; or (2) as an aggravating circumstance in murder or homicide.

With respect to the conviction of accused-appellant for illegal possession of firearms under P. D. No. 1866, it was held in the case of *People vs. Molina* (292 SCRA 742) and reiterated in the recent case of *People vs. Ronaldo Valdez* (G.R. No. 127663, March 11, 1999, 304 SCRA 611), that in cases where murder or homicide is committed with the use of an unlicensed firearm, there can be no separate conviction for the crime of illegal possession of firearms under P.D. No. 1866 in view of the amendments introduced by Republic Act No. 8294. Thereunder, the use of unlicensed firearm in murder or homicide is simply considered as an aggravating circumstance in the murder or homicide and no longer as a separate offense. Furthermore, the penalty for illegal possession of firearms shall be imposed provided that no other crime is committed (Section 1 of R.A. No. 8294). In other words, where murder or homicide was committed, the penalty for illegal possession of firearms is no longer imposable since it becomes merely a special aggravating circumstance (*People v. Molina*, supra, at p. 782).

It bears stressing, however, that the dismissal of the present case for illegal possession of firearm should not be misinterpreted to mean that there can no longer be any prosecution for the offense of illegal possession of firearms. In general, all pending cases involving illegal possession of firearms should continue to be prosecuted and tried if no other crimes expressly provided in R. A. No. 8294 are involved (murder or homicide, under Section 1, and rebellion, insurrection, sedition or attempted coup d' etat, under Section 3) (*People v. Valdez*, supra).[11]

Inasmuch as the amendatory law is favorable to accused-appellant in this case, the same may be retroactively applied. This new law applies even to violations that occurred prior to its effectivity as it may be given retroactive effect under Article 22 of the Revised Penal Code.[12]

R.A. 8294 took effect on July 6, 1997. The crime involved in the case at bench was committed on May 5, 1991. As a general rule, penal laws will generally have prospective application except where the new law will be advantageous to the accused. In this case R.A. 8294 will spare accused-appellant from a separate conviction for the crime of illegal possession of firearm. Accordingly, said law should be given retroactive application.[13]

Neither can accused-appellant be charged with simple illegal possession. As stated above, the same may only be done where no other crime is committed.[14]

With more reason, accused-appellant cannot be convicted of homicide or murder with "the use of the unlicensed firearm as aggravating," inasmuch as said felonies are not charged in the information but merely mentioned as the result of the use of the unlicensed firearm. Accused-appellant was not arraigned for homicide or murder. Hence, he cannot be convicted of any of these crimes without violating his right to be informed of the nature and cause of the accusation against him, not to mention his right to due process.

WHEREFORE, in view of the foregoing, the appealed decision is REVERSED. Criminal Case No. 92-105691, for Qualified Illegal Possession of Firearm, is DISMISSED.

SO ORDERED.

Davide, Jr., C.J., Puno, Kapunan, and Pardo, JJ., concur.

[1] Criminal Case No. 92-105691; RTC Record, p. 1.

[2] Penned by Judge Arturo U. Barias, Jr.; RTC Record, p. 141.

[3] *People v. Nepomuceno, Jr.*, 309 SCRA 466, 469 (1999).

[4] Exhibit "N-1".

[5] Exhibit "A".

[6] TSN, September 16, 1992, pp. 8-17.

[7] Exh. "N-1."

[8] Exh. "G".

[9] *People v. PO2 Samonte*, G.R. No. 126048, September 29, 2000; *People v. Ricafranca*, G.R. Nos. 124384-86, January 28, 2000; *People v. Lazaro*, 317 SCRA 435, at 452 (1999); *People v. De Vera, Sr.*, 308 SCRA 75, 100 (1999).

[10] *Supra*.

[11] *People v. Ringor, Jr.*, 320 SCRA 342, at 354-55 (1999).

[12] *People v. Bergante*, 286 SCRA 629 (1998).

[13] *People v. Lazaro*, *supra*, at 453.

[14] Republic Act No. 8294, Section 1, first par.

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