PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PO2 ALBERT ABRIOL, MACARIO ASTELLERO, AND JANUARIO DOSDOS, ACCUSED-APPELLANTS.

G.R. No. 123137. October 17, 2001

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

On appeal is the decision dated May 17, 1995, of the Regional Trial Court of Cebu City, Branch 10, in Criminal Cases Nos. CBU-30350 for murder and CBU-33664 for illegal possession of firearms, finding appellants Albert Abriol, Macario Astellero, and Januario Dosdos guilty beyond reasonable doubt of murder and violation of Presidential Decree No. 1866 on Illegal Possession of Firearms. Its decretal portion reads:

> WHEREFORE, judgement is hereby rendered:
>
> In Criminal Case No. CBU-30350 for Murder, the Court finds accused Albert Abriol, Macario Astellero and Januario Dosdos, GUILTY of murder beyond reasonable doubt and each is hereby sentenced to reclusion perpetua, with the accessory penalties provided by law; to indemnify the heirs of deceased Alejandro Flores the sum of P50,000.00; actual damages of P30,000.00, representing a reasonable amount for the embalming, vigil, wake, and burial expenses; P30,000.00 for attorney's fees; and to pay the costs.
>
> For insufficiency of evidence, accused Gaudioso Navales is hereby ACQUITTED with costs de officio.
>
> In Criminal Case No. CBU-33664 for Illegal Possession of Firearms, accused Albert Abriol, Macario Astellero and Januario Dosdos, are hereby sentenced to suffer an indeterminate penalty of 14 years, 8 months and 1 day to 17 years and 4 months and to pay the costs.
>
> The .38 caliber revolver, SN P08445 and the two .45 caliber pistols with SN PGO 13506 and SN 52469, are hereby confiscated and forfeited in favor of the Government and accordingly, the Clerk of Court of this Branch is directed to turn over the said firearms to the Chief of Police, Cebu City, or to the Firearms and Explosives Office (FEO) of the PNP Region 7, upon proper receipt.
>
> The Cebu City Chief of Police is directed to release immediately upon receipt hereof, the person of Gaudioso Navales, unless there be any other valid reason for his continued detention.
>
> SO ORDERED.[1]

This judgment was the culmination of proceedings beginning with the Amended Information dated September 6, 1993, docketed as Criminal Case No. CBU-30350, wherein appellants PO2 Albert Abriol of the Philippine National Police (PNP), Macario Astellero, Januario Dosdos, and PNP P/Chief Inspector Gaudioso Navales were charged with murder allegedly committed as follows:

That on or about the 5[th] day of June, 1993, at about 11:50 P.M., in the City of Cebu, Philippines and within the jurisdiction of this Honorable Court, the said accused, armed with handguns, conniving and confederating together and mutually helping one another, with treachery and evident premeditation, with deliberate intent, with

intent to kill, did then and there shot one Alejandro Flores alias Alex with the said handguns, hitting him on the different parts of his body, thereby inflicting upon him the following physical injuries:

> CARDIO RESPIRATORY ARREST DUE TO SHOCK AND HEMORRHAGE SECONDARY TO MULTIPLE GUNSHOT WOUNDS TO THE TRUNK AND THE HEAD
>
> as a consequence of which the said Alejandro Flores alias Alex died later.
>
> CONTRARY TO LAW.[2]

At the time of the incident, appellant Abriol, a policeman previously detailed as a jailguard at the Bagong Buhay Rehabilitation Center (BBRC) in Cebu City, was himself a detention prisoner in BBRC. He was charged with murder, a non-bailable offense, in Criminal Case No. CBU-28843 before the RTC of Cebu City, Branch 14.[3]

Appellant Astellero was a former prisoner at BBRC, who had served time for grave threats.[4] The warden then, Chief Inspector Navales,[5] employed him as his personal driver and general factotum.[6] Navales was found guilty of grave misconduct in Administrative Case No. 01-93 for allowing Abriol and Dosdos out of BBRC on the day of the murder and was summarily dismissed from the police force.

Dosdos had been convicted by the RTC of Cebu City, Branch 10, of highway robbery in Criminal Case No. CBU-18152 but Navales failed to act on the mittimus ordering Dosdos' transfer to the national penitentiary, and he remained in BBRC.[7] Abriol and Dosdos enjoyed special privileges at BBRC as the warden's errand boys[8] or "trustees."

The victim, Alejandro Flores alias "Alex," was a former policeman. He was dismissed from the PNP in August 1992 after testing positive for prohibited drugs.[9]

Abriol, Astellero, and Dosdos were also indicted for illegal possession of firearms in Criminal Case No. CBU-33664. The charge sheet reads:

> That on or about the 5[th] day of June 1993 at about 11:48 P.M. in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, conniving and confederating together and mutually helping one another, with deliberate intent, did then and there keep under their control and possession the following:
>
> 1. one (1) .38 cal. revolver (Armscor) with SN P08445 with six empty shells;
>
> 2. one (1) .45 cal. pistol (Colt) with SN P6013506 with 9 live ammunitions (sic);
>
> 3. one (1) .45 cal. Pistol (Colt) with SN 52469 with five live ammunitions.
>
> without first obtaining a permit or license therefor from competent authority.
>
> CONTRARY TO LAW.[10]

When arraigned, all the accused pleaded not guilty to both charges. Since the indictments arose from the same incident, the cases were jointly tried.

The facts of the case are as follows:

At around 11:50 P.M., June 5, 1993, Romeo Sta. Cruz, Jr., a radio news reporter then aboard his jeep, had just reached the ABS-CBN compound in P. del Rosario Street, Cebu City, when he heard a couple of gunshots. He looked around and saw a man running unsteadily towards the intersection of P. del Rosario Street and Jones Avenue (Osmeña Boulevard). The man was shouting "Tabang, tabang!" ("Help! Help!"). Sta. Cruz, Jr., saw a red "Jiffy" make a U-turn near the gate of the city central school that nearly ran over the man shouting for help. The

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man turned back and staggered towards the direction of Bacalso Avenue and Urgello Private Road, but after a few meters on wobbly legs, he stopped and collapsed.

Meanwhile, the "Jiffy" followed. It stopped beside the fallen figure and a tall, thin man alighted. The man fired several shots at the prostrate figure. He boarded the "Jiffy" which sped away towards Leon Kilat Street. Romeo Sta. Cruz, Jr., moved his jeep and focused its headlights on the victim.

In the meantime, PO3 Alexander Rustela was at a vulcanizing shop near the intersection of Bacalso Avenue and Leon Kilat Street, when he heard gunshots coming from the north. He ran towards where the gunshots came and saw people scampering. All of a sudden, the "Jiffy" with three persons on board sped past him and made an abrupt left turn at Leon Kilat Street. Rustela immediately radioed for assistance. Minutes later, patrol car No. 201 with PO2 Herbert Ramos on board arrived. Rustela boarded the car and they followed the "Jiffy," while broadcasting an alarm to police headquarters and other mobile patrol cars.

On nearby Colon Street, SPO1 Eleazar Abrigana and PO2 Romeo Abellana were cruising aboard patrol car No. 208, when they heard a radio message that the suspects in the shooting incident were aboard a "Jiffy." As they turned left at Leon Kilat Street, they saw the "Jiffy" heading towards Carbon Market. They pursued the "Jiffy" which stopped in front of the Don Bosco Building near BBRC, when police car No. 205, with PO Eugenio Badrinas and PO2 Gerald Cue aboard, blocked the "Jiffy's" path. Cue fired a warning shot and three persons alighted. The driver was appellant Astellero, whom Cue had recognized and seen before at the BBRC. Abrigana and Cue approached the trio who stood a meter away from the "Jiffy." SPO1 Abrigana frisked Abriol and seized from his waist a .38 caliber revolver with serial number PO8485 with six (6) empty shells in its cylinder.[11] Under Abriol's seat, the police also found a .45 caliber pistol bearing serial number PGO 13506 with nine (9) live rounds in its magazine and another .45 caliber pistol with serial number 52469 loaded with five (5) unfired bullets.[12]

While the patrol cars were chasing the "Jiffy," another police team proceeded to the crime scene in response to the alarm. This team from Police Station No. 3 in San Nicolas, Cebu City rushed the victim to the Cebu City Medical Center, where he was pronounced dead on arrival. Meanwhile, PO3 Celso Seville, Jr., a homicide investigator of Police Station No. 3 found four (4) .45 caliber shells some four (4) feet away from the victim's body, and two (2) deformed slugs where the victim had lain, and submitted them to the Region 7 PNP Crime Laboratory for ballistics testing.[13]

Dr. Ladislao Diola, Jr., Chief of the PNP Region 7 Crime Laboratory autopsied the victim's body. He found that the cause of the victim's death was "cardiorespiratory arrest due to shock and hemorrhage secondary to multiple gunshot wounds to the trunk and head."[14] Dr. Diola recovered a .38 caliber slug from the corpse, which he later submitted for ballistics examination.

SPO4 Lemuel Caser, ballistician of the PNP Crime Laboratory, reported the following:

> 1. Fired cartridge cases marked "JA-1" to "JA-3" possesses similar individual characteristics markings with the test cartridge cases fired from cal .45 with SN: PGO13506;
>
> 2. Fired cartridge cases marked "JA-4" and "E-69-6" possesses similar individual characteristics markings with the test cartridge cases fired from cal .45 pistol with SN: 52469;
>
> 3. Fired bullet metal jacket marked "JA-5" possesses similar individual characteristics markings with test bullets fired from cal .45 pistol with SN: PGO13506;
>
> 4. Fired cartridge cases marked "E-45-1" to "E-45-6" possesses similar individual characteristics markings with the test cartridge cases fired from cal .38 Rev. SN: P8445;

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5. Fired bullets marked as "JA-6" and "LD" possesses similar individual characteristic markings with the test bullets fired from cal .38 Rev. SN: P8445.[15]

The following day, appellants underwent a paraffin test. The hands of appellants were found positive for gunpowder residues. A chemistry test on the firearms showed that the three handguns were also positive. Inspector Myrna Areola, Chief of the Chemistry Section of the PNP Region 7 Crime Laboratory, stated in her testimony that the firearms had been fired,[16] and that appellants had fired the guns within a period of seventy-two (72) hours prior to the examination.

The widow and relatives of the victim testified on the possible motive behind the killing. They claimed the victim, a confessed drug user, may have been "rubbed out" on the orders of Navales for failure to remit P31,000 as proceeds from pushing prohibited drugs. After failing to deliver the drug money to Navales, for whom he was repeatedly pushing drugs, the victim went into hiding, but later returned to Cebu City because he missed his family.[17]

Appellants deny the accusations. Abriol averred that he and Dosdos were among the several "trustees" at BBRC assigned to work in the kitchen. Appellant Astellero, who was the warden's driver, was also in charge of marketing for the prisoners' food. On the day of the incident, Astellero realized that there was no money for the next day's marketing so he asked Abriol to accompany him to the house of Navales, but since he was not in, they returned to BBRC and saw Navales an hour later. After they received the money from Navales' niece on their way back to BBRC, Dosdos heard gunshots. Abriol ordered Astellero, who was driving, to turn back. Then Abriol claimed he saw a tall, slim man alight from a "Jiffy" and shoot at a prone figure on the ground. Seconds later, the gunman returned to the "Jiffy," which sped off. Abriol said he ordered Astellero to chase that "Jiffy" but it had too much of a headstart and they lost sight of it. Abriol ordered Astellero to proceed to BBRC. At Colon Street, they heard gunshots behind them and the blaring siren of a police car. They explained that since they were detention prisoners, they had to evade meeting the police. They heard more gun shots. Upon reaching BBRC, the gates were closed, so they drove to the old airport. On their way back to BBRC several police cars blocked them and arrested them. SPO4 Eleazar Abrigana frisked him and took the .38 service revolver from his waist.[18]

Abriol also testified that he surrendered his service firearm to the BBRC Administrative Officer when he was served a warrant of arrest for murder in Criminal Case No. CBU-28843. However, the handgun was defective and it was returned to him for repair by Armscor, and upon repair he handed it over to the BBRC armory. The armorer returned it to him since there was no place to keep it. He said that although he was a detention prisoner, he had yet to be discharged from the service. He was assigned guard and escort duties by the warden.[19] Abriol said that on the day of the incident he was, as a BBRC jailguard, authorized to carry his service firearm.[20] He presented a Memorandum Receipt[21] authorizing him to carry the government-issued .38 revolver.[22]

On the witness stand, Astellero and Dosdos narrated a similar version of the incident as did Abriol. Both vehemently denied having any knowledge of the two .45 caliber pistols found by PO3 Cue in the "Jiffy."[23]

The defense also presented Dr. Jesus P. Cerna, medico-legal officer of the Cebu City PNP Command, to testify on the caliber of the firearms which might have caused the gunshot wounds of the victim. Relying on the Necropsy Report prepared by Dr. Diola, Dr. Cerna declared that wound nos. 1 and 2, which each measured 0.6 cm. by 0.6 cm., may have been caused by a .38 caliber firearm. As to wound nos. 3 and 4, which each measured 0.5 cm. by 0.5 cm., it was possible that a .38 handgun was used, or one with a smaller bore. Dr. Cerna opined that a .45 pistol could not have inflicted all the foregoing wounds, as the entry points were too small for a .45 caliber bullet. With respect to the grazing wounds found on the victim's body, Dr. Cerna testified that it was impossible to determine the caliber of the firearm used.[24]

The trial court found appellants' version of the incident neither convincing and credible and, as earlier stated, it believed the prosecution's version. Petitioners' were convicted of the offenses charged.

Hence, this appeal, with appellants assigning the following errors:

> I
>
> THE LOWER COURT ERRED IN CONVICTING THE ACCUSED-APPELLANTS OF THE CRIMES OF MURDER AND ILLEGAL POSSESSION OF FIREARMS DESPITE THE FLIMSY AND UNRELIABLE EVIDENCE PRESENTED BY THE PROSECUTION.
>
> II
>
> THE LOWER COURT ERRED IN FINDING THE GUILT OF THE ACCUSED-APPELLANTS OF THE CRIME OF MURDER AND ILLEGAL POSSESSION OF FIREARMS BEYOND REASONABLE DOUBT.

At issue is whether the prosecution's evidence, which is mainly circumstantial, suffices to convict appellants for murder and violation of Presidential Decree No. 1866, beyond reasonable doubt.

A. Criminal Case No. CBU-30350

On their conviction for murder, appellants argue that the prosecution's circumstantial evidence against them is weak, ambiguous, and inconclusive. Specifically, appellants contend that they should be acquitted because:

First, eyewitness Romeo Sta. Cruz, Jr., did not personally identify them as the culprits. At no point in his testimony did eyewitness Sta. Cruz, Jr., positively identify any of the appellants or appellant Abriol as the gunman. Sta. Cruz, Jr. only gave a general description of the assailants, despite attempts to make him give a categorical identification. He admitted he found out the name of Abriol from television and news reports and could not identify Abriol as the one whom he saw shot the victim. The transcript of his testimony is revealing.

> Q:
>
> Then after the Jiffy stopped in front of the fallen victim, what happened next?
>
> A:
>
> I saw that there was a man who disembarked from the Jiffy. He was a tall, thin fellow who disembarked from the Jiffy and at the same time, he shot the fallen victim.
>
> Q:
>
> How many times did he shoot the victim?
>
> A:
>
> I cannot count attorney but I saw him shooting the victim.
>
> Q:
>
> In your affidavit, you said that the person who disembarked from the Jiffy, whose name you know later on as PO2 Albert Abriol, PNP, shot the victim in the different parts of his body. If Albert Abriol is now in the courtroom, will you please point to him?
>
> A:
>
> I will know him attorney because of the TV shows and newspapers.

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COURT: (TO WITNESS)

Q:

You are referring to the name of that man who disembarked from the Jiffy and fired several shots at the fallen victim?

A:

Yes, I know his name Your Honor on (sic) the news cast.

COURT: (TO WITNESS)

Q:

Alright, forget the news. The man you saw when he alighted from the Jiffy and poured (sic) several bullets on the fallen man, look around if he is in the courtroom?

A:

I cannot identify Your Honor.

COURT:

Q:

You cannot?

A:

But [because] what I saw is a man who is tall and thin because it was dark.

x x x

Q:

How many persons fired a shot at the fallen man?

A:

I only saw that man Your Honor who alighted from the Jiffy.

Q:

Did you see his physical features?

A:

Only (t)his, I can only tell his height, he was tall and his body build is thin. Tall and thin. (Emphasis supplied)[25]

Since the sole eyewitness could not identify the gunman and his companions, the prosecution relied on circumstantial evidence from which the trial court could draw its findings and conclusion of culpability.[26] Circumstantial evidence may be relied upon, as in this case, when to insist on direct testimony would result in setting felons free.

Second, appellants assert that the paraffin tests are judicially recognized as unreliable and inconclusive. A paraffin test could establish the presence or absence of nitrates on the hand. However, it cannot establish that the source of the nitrates was the discharge of firearms. Nitrates are also found in substances other than gunpowder. A person who tests positive may have handled one or more substances with the same positive reaction for nitrates such as explosives, fireworks, fertilizers, pharmaceuticals, tobacco, and leguminous plants. Hence, the presence of nitrates should only be taken as an indication of a possibility that a person has fired a gun.[27] However, it must be borne in mind that appellants were not convicted on the sole basis of the paraffin test.

Third, appellants claim that the autopsy report of prosecution witness Dr. Ladislao Diola revealed serious ambiguities.[28] Dr. Jesus P. Cerna, using the same autopsy report, said that the gunshot wounds measuring 0.6 x 0.6 centimeters could not have been caused by a .45 caliber pistol because an entrance wound of that size was too small for a .45 caliber bullet.[29] Dr. Cerna claimed that a wound inflicted by a .45 pistol would have an entry point of anywhere from 1.1 to 1.3 centimeters. He declared that it was with more reason that an entrance wound measuring .5 x .5 centimeters could not be caused by a caliber .45 bullet.[30] Since no firearm smaller than a .38 caliber pistol was seized from appellants, they claim the observation of Dr. Cerna only shows that they could not have shot the victim.

We note, however, that during cross-examination, Dr. Diola carefully explained that a firearm's caliber is not the only basis for determining the cause of the gunshot wound. He said:

ATTY. REMOTIQUE:

Q:

So, normally the size of .5 cm x .5 cm which is the point of entry of gunshot wound No. 3 this may have been caused by a firearm of lesser caliber than caliber .38?

A:

Not necessarily. There is a very small difference in the size and this does not preclude that gunshot wound No. 3 may have also been caused by the same firearm which caused gunshot wounds Nos. 1 and 2. There are factors which often affect the size of the wounds at the time of the examination, perhaps a recission (sic) of the skin in the area where gunshot Wound No. 3 was inflicted so that gunshot wound becomes smaller.

Q:

Did you not say that normally the point of entry of the gunshot wounds vary with the caliber of the firearm which caused it, so that the point of entry caused by one firearm of a particular caliber may be bigger than the point of entry of a gunshot wound caused by another firearm of lesser caliber?

A:

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> I told you of other factors that often affect the size of the entry of the bullet although the caliber is one basis of the size of the wounds.
>
> x x x
>
> Q:
>
> Will you explain further on that because my understanding is that .5 cm wound must perforce be caused by a firearm of lesser caliber than that which caused the .6 cm wound?
>
> A:
>
> As I said there are ranges in the size of the wounds. The variance in the size of the wound when it is minimal does not exclude the possibility that a wound with a .5 cm size and .6 cm size could have been caused by the same caliber. (Emphasis supplied).[31]

The Office of the Solicitor General points out that Dr. Diola's testimony is supported by Dr. Pedro P. Solis, a medical expert, in his book entitled Legal Medicine. The factors which could make the wound of entrance bigger than the caliber include: (1) shooting in contact or near fire; (2) deformity of the bullet which entered; (3) a bullet which might have entered the skin sidewise; and (4) an acute angular approach of the bullet. However, where the wound of entrance is smaller than the firearm's caliber, the same may be attributed to the fragmentation of the bullet before entering the skin or to a contraction of the elastic tissues of the skin (stress supplied).[32] Dr. Diola testified that a .45 caliber pistol could have caused the grazing wounds on the victim's head and extremities.[33] Dr. Cerna corroborated Dr. Diola's findings in this regard.[34] Such expert opinions disprove appellants' theory that the .45 caliber handguns confiscated from them could not have been used in killing the victim.

Fourth, appellants allege that the testimony of P/Inspector Lemuel Caser, the prosecution's ballistics expert, clearly shows that: (1) He is ignorant about such ballistics instruments such as the micrometer, goniometer, and pressure barrel.[35] (2) He is not conversant with "the required references concerning ballistics," particularly books on the subject by foreign authorities.[36] (3) He could not "scientifically determine the caliber of a bullet."[37] Since P/Inspector Caser lacked adequate training and expertise in ballistics, they claim that his opinion that the test bullets and cartridges matched the slugs and cartridges recovered from the scene of the crime was not reliable. Appellants also assail Caser's failure to take the necessary photographs to support his findings.

An expert witness is "one who belongs to the profession or calling to which the subject matter of the inquiry relates and who possesses special knowledge on questions on which he proposes to express an opinion."[38] There is no definite standard of determining the degree of skill or knowledge that a witness must possess in order to testify as an expert. It is sufficient that the following factors be present: (1) training and education; (2) particular, first-hand familiarity with the facts of the case; and (3) presentation of authorities or standards upon which his opinion is based.[39] The question of whether a witness is properly qualified to give an expert opinion on ballistics rests with the discretion of the trial court.[40]

In giving credence to Caser's expert testimony, the trial court explained:

> The defense downgraded the capability of Caser in forensics ballistics and identifying firearms. Much stress is given to the absence of photographs of his examination. Nonetheless, the Court is satisfied (with) Caser's examination, findings and conclusions with the use of a microscope. Caser's conclusion based on his examination deserves credit. He found the impressions on the primer of the fired cartridges that were test-fired to have the same characteristics with those recovered at the scene of the crime. Whenever a triggerman pumps a bullet (into) the body of his victim, he releases a chunk of concrete evidence that binds him inseparably to his act. Every gun barrel deeply imprints on every bullet its characteristic marking peculiar to that gun and that gun alone. These marking might be microscopic but they are terribly vocal in announcing their origin. And

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they are as infallible for purposes of identification, as the print left by the human finger.[41]

We agree with the trial court that P/Inspector Caser qualifies as a ballistics expert. He is a licensed criminologist, trained at the Ballistics Command and Laboratory Center in Fort Bonifacio, in the PNP Crime Laboratory in Camp Crame, and in the National Bureau of Investigation. He had previously testified as an expert witness in at least twenty-seven (27) murder and homicide cases all over the country.[42] An expert witness need not present comparative microphotographs of test bullets and cartridges to support his findings.[43] Examination under a comparison microscope showing that the test bullet and the evidence bullet both came from the same gun is sufficient.[44] Moreover, the ballistician conclusively found similar characteristic markings in the evidence, test cartridges and slugs.

Fifth, appellants aver that the prosecution failed to show any plausible motive for appellants to kill the victim. The prosecution tried to prove that their co-accused Navales instigated them to kill the victim because Navales had a grudge against him. However, as Navales was acquitted, appellants insist that Navales' acquittal should redound to their benefit since no motive was imputed on their part.

Motive is not an essential element of a crime,[45] particularly of murder.[46] It becomes relevant only where there is no positive evidence of an accused's direct participation in the commission of a crime.[47] Stated otherwise, proof of motive becomes essential to a conviction only where the evidence of an accused's participation in an offense is circumstantial.[48] A careful perusal of the State's evidence reveals that the prosecution had established sufficient motive why appellants killed the victim, independent of any grudge which Navales may have had against the latter. At the time of the incident, appellants Abriol and Dosdos were both BBRC detention prisoners during Navales' term as warden. Abriol and Dosdos were treated as highly favored "trustees" of Navales and were never locked up. Abriol and Dosdos were even allowed to go out of BBRC to do the marketing for the prison's kitchen. Appellant Astellero, a former detention prisoner, was also a recipient of Navales' favors. Navales hired Astellero as his personal driver after the latter served his sentence. Navales and the victim, a former BBRC jailguard, were associates in dealing with prohibited drugs, until they had a falling out allegedly after the victim failed to remit to Navales proceeds from the sale of illegal drugs amounting to P31,000. Appellants apparently killed the victim to return the "special favors" Navales had showered them. Lack of a motive does not necessarily preclude conviction. Persons have been killed or assaulted for no reason at all, and friendship or even relationship is no deterrent to the commission of a crime.[49]

Sixth, in the present case, appellants contend that the PNP cannot be presumed to have done their work since it committed errors and blunders in transferring possession and custody of the physical evidence. They allege there was a possibility that the evidence was tainted, planted, or manufactured. Besides, appellants point out that the presumption of regularity cannot prevail over the constitutional presumption of innocence of the accused.

The record shows that the police officers did not issue acknowledgement receipts in some instances. However, minor lapses do not mean that the State had failed to show an unbroken chain of custody of the subject firearms and ammunition, nor that said firearms and ammunition were tampered. The slugs and spent shells recovered from the scene of the crime and the victim's corpse were plainly identified in open court by the PNP investigators. The ballistician testified that the bullets and cartridges recovered from the crime scene had been fired from the subject handguns. Under these circumstances, we must respect the presumption of the regularity in the performance of duties.

Seventh, appellants insist that the prosecution failed to show that the red "Jiffy" used by them and seized by the police officers was the same vehicle used by the gunmen who killed Alejandro Flores. Appellants point out that PO3 Rustela, who was aboard police car No. 201, testified that they lost sight of the red "Jiffy" while chasing it

along Leon Kilat Street. Appellants argue that the "Jiffy" which was chased by patrol car No. 208 until it was cornered near BBRC by the other pursuing patrol cars was not the same vehicle originally sighted and tailed by patrol car No. 201.

In rejecting this theory, the trial court stated that:

> ...PO3 Rustela who was nearby, immediately ran to the scene of the crime and met the red jiffy with three persons on board, that speedily passed by him proceeding towards Leon Kilat Street. Car 208 readily picked up the trail and pursued the red jiffy from Leon Kilat, then making abrupt turns on downtown streets until other patrol cars joined the chase and captured them in Lahug, near the BBRC. The identity of the red jiffy was never interrupted. Members of the Mobile Patrol Cars identified in court without batting an eyelash, the red jiffy which was the object of the shooting alarm. There was no interruption, no let-up in the chase, right after Alejandro Flores was shot and there was no other red jiffy that the crews of the (pursuing) patrol cars noticed.
>
> The Court rejects their claim of innocence, for their very acts belied the same.
>
> Astellero could have stopped the jeep upon noticing that patrol cars were already running after them with sirens, blinkers and warning shots fired. From Leon Kilat Street to Lahug airport, there were several police stations that they could have sought shelter and police assistance. Guilt has many ways of surfacing. Instead of stopping, Abriol ordered Astellero to accelerate their speed. Their obvious purpose was to elude the patrol cars. Flight is indicative of guilt.[50]

But, in this case, is the totality of the circumstantial evidence relied upon by the trial court sufficient to support a conviction?

Circumstantial evidence is that which indirectly proves a fact in issue. For circumstantial evidence to be sufficient to support a conviction, all the circumstances must be consistent with each other, consistent with the theory that the accused is guilty of the offense charged, and at the same time inconsistent with the hypothesis that he is innocent and with every other possible, rational hypothesis, except that of guilt.[51] An accused can be convicted on the basis of circumstantial evidence where all the circumstances constitute an unbroken chain leading to one fair and reasonable conclusion pointing to the accused, to the exclusion of all others, as the culprit.[52]

In our assessment, the prosecution's evidence constitutes an unbroken chain of events leading to the inevitable conclusion of guilt on the part of appellants. First, the fatal shooting of Alejandro Flores occurred at around 11:50 P.M. of June 5, 1993 in front of the ABS-CBN compound in Cebu City. The gunman, who was tall and thin, alighted from a red "Jiffy," pumped several bullets into the prone victim, and got back aboard the "Jiffy" which then sped towards Leon Kilat Street. Second, eyewitness Romeo Sta. Cruz, Jr.'s description of the gunman as "tall and thin" perfectly matches the physique of appellant Abriol. Third, PO3 Alexander Rustela, who was close to the crime scene, heard the gunshots and ran towards the place where the sound of gunshots emanated. A red "Jiffy" with three persons aboard whizzed by him and abruptly turned at Leon Kilat Street. After Sta. Cruz, Jr. informed him that the gunmen were aboard a red "Jiffy," Rustela boarded patrol car No. 201, radioed an alarm, and commenced a pursuit of the fleeing vehicle. Police car no. 208 received the alarm, and on turning into Leon Kilat Street, encountered the speeding red "Jiffy." They immediately chased the "Jiffy" but failed to catch it. Police cars Nos. 208 and 205 cornered the vehicle in front of the Don Bosco building near BBRC. PO2 Gerald Cue, on patrol car no. 205 fired a warning shot at the vehicle and directed all those aboard to disembark. Three men got out, with their hands raised. SPO1 Abrigana, on patrol car no. 208 and PO2 Cue approached the trio. Abrigana frisked the man who was seated in the front passenger seat, who turned out to be appellant Abriol, and recovered from his waist a .38 caliber revolver with six empty shells. Cue searched the red "Jiffy" and found two loaded .45 caliber pistols under the front seat where Abriol had sat. Other police officers immediately went to the crime scene where they found the victim barely alive. PO3 Seville retrieved four .45 caliber slugs and two deformed slugs at the spot

where the victim was shot. The autopsy of the victim's remains showed that he died of cardio respiratory arrest due to shock and hemorrhage secondary to gunshot wounds. A deformed metal jacket of a .38 caliber slug was recovered from the corpse. Ballistics tests showed that the bullets and cartridges had identical individual characteristics with those of the test bullets and cartridges. Paraffin tests conducted on each of the appellants, one day after the incident, revealed that all were positive for gunpowder residues. The subject firearms were also chemically examined and found positive for gunpowder residue. Before the shooting incident, appellants were seen at Navales' house until around 7:30 P.M., when they left aboard Navales' red "Jiffy" with Astellero driving, Abriol in the front passenger seat, and Dosdos in the back seat.[53] Appellants' seating arrangements were exactly the same, several hours later, after they were pursued and cornered by police cars near BBRC. Appellants admitted that they dropped by the Navales residence at around 7:00 P.M. and 11:00 P.M.

These unbroken chain of events prove not only appellants' identities but also their participation and collective responsibility in the murder of Alejandro Flores. They reveal a unity of purpose and concerted action evidencing their conspiracy to kill him. Against this matrix of facts and circumstances, appellants' bare denials cannot stand. Their story of chasing a red "Jiffy" is merely a disingenuous diversion of no evidentiary value for the defense.

Finally, the information for murder alleged treachery and evident premeditation. We note, though, that the trial court did not state which circumstance qualified the killing into murder.

A review of the record would reveal that there was no evident premeditation. There is evident premeditation when the following are shown: (a) the time when the accused determined to commit the crime; (b) an act or acts manifestly indicating that the accused has clung to his determination; and (c) a lapse of time between the determination to commit the crime and the execution thereof sufficient to allow him to reflect upon the consequences of his act.[54] Evident premeditation indicates deliberate planning and preparation. Nowhere in the record is it shown when and how appellants planned and prepared to kill the victim.

Concerning treachery, however, it was shown that: (1) the means of execution employed gave the person attacked no opportunity to defend himself or retaliate; and (2) the means of execution was deliberately or consciously adopted.[55] These twin requisites were adequately proved.

Appellants had superiority in numbers and weapons. The victim was without any means to defend himself as no weapon was found or even intimated to be in his possession. The victim was running away from the "Jiffy" prior to the killing. That he was warned or threatened earlier is of no moment. Even when the victim is warned of danger to his person, if the execution of the attack made it impossible for the victim to defend himself or to retaliate, treachery can still be appreciated.[56] The victim was lying prostrate on the ground when he was deliberately and mercilessly riddled with bullets. The weapons used, the number of assailants, the swift and planned manner of the attack, and the multiple number of wounds inflicted upon the victim all demonstrate a determined assault with intent to kill the victim. No doubt there was treachery.

B. Criminal Case No. CBU-33664

On their conviction for illegal possession of firearms, appellants contend that the handguns and ammunitions allegedly taken from them by the police officers were illegally seized. They assert that the police had no warrant to effect a search and seizure, such that these illegally seized firearms were inadmissible as evidence, and it was error for the trial court to admit them.

There are eight (8) instances where a warrantless search and seizure is valid. They are: (1) consented searches;[57] (2) as an incident to a lawful arrest;[58] (3) searches of vessels and aircraft for violation of immigration, customs, and drug laws;[59] (4) searches of moving vehicles;[60] (5) searches of automobiles at

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borders or constructive borders; (6) where the prohibited articles are in "plain view;"[61] (7) searches of buildings and premises to enforce fire, sanitary, and building regulations; and (8) "stop and frisk" operations.[62]

In this case, the warrantless search and seizure of the subject handguns and ammunition is valid for two reasons. It was a search incidental to a lawful arrest. It was made after a fatal shooting, and pursuit of a fast-moving vehicle seeking to elude pursuing police officers, and a more than reasonable belief on the part of the police officers that the fleeing suspects aboard said vehicle had just engaged in criminal activity. The urgent need of the police to take immediate action in the light of the foregoing exigencies clearly satisfies the requirements for warrantless arrests under the Rules of Court.[63] Moreover, when caught in flagrante delicto with firearms and ammunition which they were not authorized to carry, appellants were actually violating P.D. No. 1866, another ground for valid arrest under the Rules.[64]

Appellants further contend that the trial court erred in convicting appellants Astellero and Dosdos of illegal possession of firearms. They point out that the .38 caliber revolver was recovered from appellant Abriol, who as a policeman was authorized to carry and possess said firearm, as evidenced by his Memorandum Receipt (MR), which had "not been recalled, cancelled or revoked until the time of the trial of these cases." Appellants claim that the two .45 caliber pistols could have been left in the vehicle by PNP personnel assigned at BBRC, considering that the red "Jiffy" was generally used as a service vehicle by BBRC personnel. They also argue that the prosecution failed to prove appellants' ownership, control, and possession of the .45 caliber pistols, considering that appellants were six meters away from the "Jiffy" when said handguns were allegedly found.

To sustain a conviction for violation of P.D. No. 1866, the prosecution must prove two elements of the offense: (1) the existence of the subject firearm; (2) the fact that the accused who owned or possessed the firearm does not have the corresponding license or permit to possess it.[65] These the prosecution did. It presented a .38 caliber revolver with serial number PO8445, a .45 caliber pistol with serial number PGO 13506 Para Ordinance, and a .45 caliber pistol with serial number 52469. The .38 caliber handgun was recovered from appellant Abriol, while the two .45 caliber automatics were found and seized from under the front passenger seat of appellants' vehicle. SPO4 Aquilles Famoso of the Cebu City PNP Metropolitan District Command's Firearms and Explosive Unit testified that appellants were not listed as licensed firearm owners in Cebu City.[66] The prosecution also presented a certification from P/Senior Inspector Edwin Roque of the Firearms and Explosives Division of PNP Headquarters at Camp Crame, Quezon City that appellant Abriol is not licensed to hold any firearm; that the .45 caliber pistols were unlicensed; and that a certification from the PNP Firearms and Explosives Office attesting that a person is not a licensee of any firearm, proves beyond reasonable doubt the second element of illegal possession of firearm.[67]

Abriol insists that he had a valid MR authorizing him to carry the .38 revolver. We agree with the observation of the trial court that:

> The claim of Abriol that .38 caliber was issued to him, as evidenced by the corresponding receipt (MR), is of no moment. While an MR is an authority of Abriol to possess the government firearm that was issued to him, when he was charged and detained at BBRC for an earlier case of murder, other than the case at bar, he was already then at that moment a detained prisoner and therefore, (un)authorized to carry a firearm. A military man or a member of the PNP who commits a crime, is immediately disarmed upon his arrest and stripped of all the rights and privileges that go with the function of his office, and this includes, in the case of Abriol, his MR. Thus, when he shot Alejandro Flores with his .38 caliber revolver, this firearm was already unauthorized and its use and possession illegal.[68]

Even if Abriol's MR was valid, said authorization was limited only to the .38 caliber revolver and not the two .45 caliber automatic pistols found under the front passenger seat of the "Jiffy." Appellants were still in the unlawful

possession of the .45 caliber pistols. Under P.D. No. 1866, possession is not limited to actual possession.[69] In this case, appellants had control over the pistols. They were all liable since conspiracy was established and the act of one is the act of all.[70]

Appellants claim that they were six meters away from the "Jiffy" when it was searched and the two .45 caliber pistols were seized. They suggest that the policemen who searched the vehicle could have planted said firearms. The trial court found that they were in fact only one meter away from the vehicle. Findings of fact of the trial court, when supported by the evidence on record, are binding and conclusive upon appellate courts.[71]

All told, on the charge of illegal possession of firearms, no reversible error was committed by the trial court when it found appellants guilty beyond reasonable doubt.

The Office of the Solicitor General recommends that although appellants were charged with and convicted of two separate offenses of murder and violation of P.D. No. 1866, R.A. No. 8294, which amended said decree, should be applied to appellants retroactively, citing People v. Molina, 292 SCRA 742, 779 (1998) interpreting R.A. No. 8294.

We agree. We ruled in Molina that with the passage of R.A. No. 8294 on June 6, 1997, the use of an unlicensed firearm in murder or homicide is not a separate crime, but merely a special aggravating circumstance. This was recently reiterated in People v. Castillo, G.R. Nos. 131592-93, February 15, 2000.[72] Appellants are thus guilty only of murder with the special aggravating circumstance of use of unlicensed firearms. The imposition of the penalty of reclusion perpetua cannot however be modified since the murder took place before the effectivity of R.A. No. 7659.

A final word on the damages. In addition to the award of P50,000 as indemnity ex delicto, the trial court awarded P30,000 in actual damages, "representing a reasonable amount for the embalming, vigil, wake and burial expenses," and P30,000 as attorney's fees. To be entitled to actual damages, it is necessary to prove the actual amount of loss with a reasonable degree of certainty, premised upon competent proof, and on the best evidence obtainable by the injured party.[73] No such evidence was offered. The award of actual damages must, therefore, be deleted. However, temperate damages may be awarded since the family of the victim has demonstrably spent for the wake, funeral and burial arrangements. The amount of P20,000 should suffice as temperate damages. In addition, we find an award of exemplary damages in order, pursuant to Article 2230 of the Civil Code.[74] The killing was attended by the special aggravating circumstance of use of unlicensed firearms. Moreover, the public good demands that detained prisoners should not abuse their status as "trustees." Had the police been unsuccessful in their pursuit of appellants, the latter would have used the BBRC as shelter and as an alibi that they could not have committed the crime since they were then in detention. Thus, we find an award of P10,000 as exemplary damages in order. Accordingly, the award of attorney's fees is sustained.[75]

WHEREFORE, the assailed Decision of the Regional Trial Court of Cebu City, Branch 10, in Criminal Cases Nos. CBU-30350 and CBU-33664 is hereby MODIFIED. Appellants Albert Abriol, Macario Astellero, and Januario Dosdos are hereby found GUILTY of murder, qualified by treachery, with the special aggravating circumstance of use of unlicensed firearms and are hereby sentenced to suffer the penalty of reclusion perpetua with the accessory penalties provided for by law. Appellants Abriol, Astellero, and Dosdos are also ordered to pay, jointly and severally, the heirs of Alejandro Flores the sum of P50,000 as death indemnity, P20,000 as temperate damages, P10,000 as exemplary damages, and P30,000 as attorney's fees, as well as the costs.

SO ORDERED.

Bellosillo, (Chairman), Mendoza, Buena, and De Leon, Jr., JJ., concur.

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[1] Rollo, pp. 132-133.

[2] Vol. I, Records, p. 149.

[3] TSN, August 24, 1994, pp. 12, 39-40.

[4] TSN, July 27, 1993, pp. 8-9.

[5] Rollo, p. 196. See also TSN, October 14, 1994, pp.3-4.

[6] TSN, June 29, 1993, p. 3; TSN, July 21, 1994, pp. 8-9; TSN, September 6, 1994, pp. 4-5. TSN, October 14, 1994, pp.8-9.

[7] TSN, September 7, 1994, pp. 12, 24; TSN, September 13, 1994, pp. 3-4, TSN, October 14, 1994, pp. 9-15.

[8] TSN, May 4, 1994, pp. 7, 14-16; TSN, July 27, 1993, pp. 12-13; TSN, April 19, 1994, pp. 8-9; TSN, July 21, 1994, p. 41.

[9] TSN, July 14, 1994, p. 47.

[10] Vol. III, Records, p. 1.

[11] TSN, June 17, 1993, p. 30.

[12] TSN, June 17, 1993, pp. 22-43.

[13] TSN, March 23, 1994, pp. 4-7. TSN, May 3, 1994, pp. 4-6.

[14] Exhibit "P," Crim. Case No. CBU-30350, Vol. I, Records, p. 409.

[15] Exhibit "G", Crim. Case No. CBU-30350, Vol. I, Records, pp. 404-405; TSN, July 2, 1993, A.M., pp. 10-14.

[16] TSN, July 8, 1993, pp. 3-16.

[17] TSN, July 14, 1994, pp. 47-49; TSN, July 21, 1994, pp. 17-18.

[18] TSN, August 24, 1993, pp. 23-35.

[19] TSN, August 24, 1993, pp. 12-17, 41.

[20] TSN, August 24, 1993, p. 15.

[21] Exhibit "X," Crim. Case No. CBU-30350, Vol. I, Records, p. 434.

[22] TSN, August 24, 1993, pp. 17-21.

[23] TSN, September 6, 1994, pp. 6-19; TSN, September 7, 1994, pp. 15-20.

[24] TSN, November 8, 1994, pp. 11-15; TSN, November 17, 1994, pp. 4-8.

[25] TSN, June 17, 1993, pp. 9, 11

[26] People v. Salas, G.R. No. 115192, 327 SCRA 319, 328 (2000) citing People v. Lopez, G.R. No. 131151, 313 SCRA 114 (1999), People v. De La Cruz, G.R. No. 111704, 304 SCRA 702 (1999).

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[27] People v. Mumar, G.R. No. 123155, 333 SCRA 221, 231 (2000) citing People v. De Guzman, G.R. No. 116730, 250 SCRA 118 (1995).

[28] Rollo, p. 164.

[29] TSN, November 8, 1994, p. 12.

[30] Rollo, pp. 165-166.

[31] TSN, July 2, 1993, pp. 6-7.

[32] Solis, Pedro P., Legal Medicine, (1987 ed.) p. 359.

[33] TSN, July 2, 1993, p. 9.

[34] TSN, November 17, 1994, pp. 6-12.

[35] Rollo, pp. 168-169.

[36] Id. at 168.

[37] Id. at 22, 169.

[38] Moreno, Phil. Law Dictionary (1988 ed.) p. 348.

[39] Ibid.

[40] McGuire v. State, 239 Ala 315, 194 So 185 (1940); Cantu v. State, 141 Tex. Crim. 99, 135 SW 2d 705 (1940), cert. den. 312 US 689, 85 L Ed. 1126, 61 S. Ct. 617 (1941); Burchett v. State, 35 Ohio App. 463, 172 NE 555 (1930).

[41] Rollo, pp. 121-122.

[42] TSN, July 2, 1993, pp. 2-4; TSN, September 17, 1993, pp. 38-39.

[43] McKenna v. People, 124 Colo. 112, 235 P2d. 301 (1951).

[44] Roberts v. State, 164 So. 2d 817 (1964).

[45] People v. San Gabriel, G.R. No. 110103, 235 SCRA 80, 86 (1994).

[46] People v. Andres, G.R. No. 122735, 296 SCRA 318, 338 (1998).

[47] People v. Lozada, G.R. No. 130589, 334 SCRA 602, 622 (2000) citing People v. Padlan, G.R. No. 111263, 290 SCRA 388 (1998).

[48] People v. Orcula, Sr., et al., G.R. No. 132350, 335 SCRA 129, 142 (2000) citing People v. Villaran, G.R. No. 119058, 269 SCRA 630 (1997), People v. Nemeria, G.R. No. 96288, 242 SCRA 448 (1995).

[49] People v. Briones, G.R. No. 97610, 219 SCRA 134, 145 (1993), citing People v. Laureta, Jr., G.R. No. L-31245, 159 SCRA 256 (1988).

[50] Rollo, pp. 119-120.

[51] People v. Salas, G.R. No. 115192, supra at 328-329, citing People v. Olivarez, Jr., G.R. No. 77865, 299 SCRA 635 (1998).

[52] People v. Labuguen, G.R. No. 127849, 337 SCRA 488, 497 (2000) citing People v. Andal, G.R. No. 124933,

279 SCRA 474 (1997).

[53] TSN, July 14, 1994, pp. 8-10, 16-20; TSN, July 6, 1994, pp. 4-9.

[54] People v. Saragina, G.R. No. 128281, 332 SCRA 219, 239 (2000) citing People v. Platilla, G.R. No. 126123, 304 SCRA 339 (1999).

[55] People v. Fuertes, G.R. Nos. 95891-92, 326 SCRA 382, 408-409 (2000) citing People v. Villablanca, et al., G.R. No. 89662, 316 SCRA 382, 408-409 (2000).

[56] People v. Arizala, G.R. No. 130708, 317 SCRA 244, 257 (1999).

[57] People v. Solayao, G.R. No. 119220, 262 SCRA 255, 261 (1996); People v. Ramos, G.R. Nos. 101804-07, 222 SCRA 557 (1992).

[58] People v. Catan, G.R. No. 92928, 205 SCRA 235, 242 (1992); People v. Malmstedt, G.R. No. 91107, 198 SCRA 401 (1991).

[59] Hizon v. Court of Appeals, G.R. No. 119619, 265 SCRA 517, 527-528 (1996); Roldan, Jr. v. Arca, G.R. No. L-25434, 65 SCRA 336 (1975).

[60] Mustang Lumber v. Court of Appeals, G.R. Nos. 104988, 106424, 123784, 257 SCRA 430 (1996); People v. Balingan, G.R. No. 105834, 241 SCRA 277 (1995).

[61] People v. Musa, G.R. No. 96177, 217 SCRA 597, 610 (1993).

[62] Malacat v. Court of Appeals, G.R. No. 123595, 283 SCRA 159, 174-175 (1997).

[63] Rule 113, Sec. 5. Arrest without warrant; when lawful. - A peace officer or a private person may, without a warrant, arrest a person:

x x x

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it;

x x x

[64] Rule 113, Sec. 5. Arrest without warrant; when lawful. - A peace officer or a private person may, without a warrant, arrest a person:

(a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

x x x

[65] Gonzales v. Court of Appeals, G.R. No. 95523, 277 SCRA 518, 525 (1997), citing People v. Lualhati, G.R. Nos. 105289-90, 234 SCRA 325 (1994).

[66] TSN, July 14, 1993, pp. 14-17; Exhibit "B", Criminal Case No. CBU-33664, Vol. III, Records, p. 59.

[67] Mallari v. Court of Appeals, G.R. No. 110569, 265 SCRA 456, 465 (1996), People v. Solayao, G.R. No. 119220, 262 SCRA 255 (1996).

[68] Rollo, pp. 122-123.

[69] People v. De Gracia, G.R. Nos. 102009-10, 233 SCRA 716, 725 (1994), citing People v. Cruz, L-76728, 165

SCRA 135 (1988), People v. Fajardo, et al., L-18257, 123 Phil. 1348 (1966).

[70] People v. Carillo., G.R. No. 129528, 333 SCRA 338, 352 (2000).

[71] People v. Alagon and Rafael, G.R. Nos. 126536-37, 325 SCRA 297, 308 (2000).

[72] Molina supersedes earlier rulings of this Court in People v. Tobias, G.R. No. 114185, 267 SCRA 229 (1997); People v. Quijada, G.R. Nos. 115008-09, 259 SCRA 191 (1996); People v. Somooc, G.R. No. 100921, 244 SCRA 731 (1995); People v. Fernandez, G.R. No. 113474, 239 SCRA 174 (1994); People v. Deunida, G.R. Nos. 105199-200, 231 SCRA 520 (1994); People v. Jumamoy, G.R. No. 101584, 221 SCRA 333 (1993); People v. Caling, G.R. No. 94784, 208 SCRA 821 (1992); People v. Tiozon, G.R. No. 89823, 198 SCRA 368 (1991); and People v. Tac-an, G.R. Nos. 76338-39, 182 SCRA 601 (1990) that one who kills another with the use of an unlicensed firearm commits two separate offenses of either homicide or murder under the Revised Penal Code and aggravated illegal possession of firearm, under the second paragraph of Section 1 of P.D. No. 1866.

[73] People v. Samolde, G.R. No. 128551, 336 SCRA 632, 654 (2000), citing People v. Suelto, G.R. No. 126097, 325 SCRA 41 (2000).

[74] ART. 2230. In criminal offenses, exemplary damages as a part of the civil liability may be imposed when the crime was committed with one or more aggravating circumstances. Such damages are separate and distinct from fines and shall be paid to the offended party.

[75] Civil Code, ART. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

(1) When exemplary damages are awarded;

x x x

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