

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JESUS G. RETUBADO
ALIAS “JESSIE,” APPELLANT.**

G.R. No. 124058. December 10, 2003

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

This is an appeal from the Decision[1] of the Regional Trial Court, Toledo City, Branch 29, in Criminal Case No. TCS-2153 convicting the appellant Jesus G. Retubado of murder, sentencing him to reclusion perpetua, and directing him to indemnify the heirs of the victim Emmanuel Cañon the sum of P50,000.00.

The appellant was indicted for murder in an Information, the accusatory portion of which reads:

That on the 5[th] day of November, 1993 at 9:30 o'clock in the evening, more or less, at Barangay I Poblacion, Municipality of Tuburan, Province of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent to kill, by means of treachery, evident premeditation and taking advantage of superior strength, did then and there willfully, unlawfully and feloniously attack, assault and shoot Emmanuel Cañon with the use of unlicensed revolver of unknown caliber, thereby hitting the latter on his forehead, resulting to the instantaneous death of the said victim.

CONTRARY TO LAW.[2]

Shortly before November 5, 1993, someone played a joke on Edwin Retubado, the appellant's younger brother who was mentally ill. Someone inserted a lighted firecracker in a cigarette pack and gave it to Edwin. He brought the cigarette home and placed it on the dining table as he was having dinner with his father. Momentarily, the firecracker exploded. The suspect was Emmanuel Cañon, Jr., The Cañons and the appellant were neighbors. The matter was brought to the attention of the barangay captain who conducted an investigation. It turned out that Emmanuel Cañon, Jr. was not the culprit. The barangay captain considered the matter closed. The appellant, however, was bent on confronting Emmanuel Cañon, Jr.

On November 5, 1993, at about 9:00 p.m., 50-year-old Emmanuel Cañon, Sr., a pedicab driver called it a day and decided to go home after a day's work. He drove his pedicab and stopped at the junction of Rizal and Gallardo Streets, at the poblacion of Tuburan. The appellant, who was conversing with Marcial Luciño saw him. "Noy, why is [it] your son did something to my brother?" Emmanuel ignored the appellant. The appellant was incensed and ran after Emmanuel. He overtook Emmanuel, grabbed and pushed the pedicab which nearly fell into a canal. Emmanuel again ignored the appellant and pedaled on until he reached his house. His wife, Norberta Cañon was in the balcony of their house, above the porch waiting for him to arrive. Emmanuel, Jr., meanwhile, was already asleep. Undeterred, the appellant continued following Emmanuel.

Shortly after Emmanuel had entered his house, the appellant arrived and tarried at the porch. Emmanuel suddenly opened the door and demanded to know why he was being followed. The appellant told Emmanuel that he just wanted to talk to Emmanuel, Jr., but Emmanuel told the appellant that his son was already asleep. Norberta went down from the balcony and placed her hand on her husband's shoulder to pacify him.

The appellant forthwith pulled out a handgun from under his T-shirt and shot Emmanuel on the forehead. The latter fell to the floor as the appellant walked away from the scene. Norberta shouted for help. The neighbors, her daughter, and her son-in-law arrived. They brought Emmanuel to the Tuburan District Hospital, but the victim died shortly thereafter. Dr. Ivar G. Arellano, the Municipal Health Officer, performed an autopsy on the cadaver of Emmanuel and prepared a report thereon with the following findings:

Examination in Detail:

On detailed examination, a gunshot wound was found at the left side of the forehead, measuring 1 cm. in diameter. At the skin surrounding this wound was found powder burns which measured 3 cms. in diameter as the skin had been blackened and burned by powder of the bullet. The underlying frontal bone was fractured and depressed. The underlying meninges of the brain as well as the frontal area of the brain was traumatized and injured. Blood and cerebrospinal fluid were leaking from this wound. The edges of this bullet wound was inverted thus this was the gunshot entry wound. The wound was found to be circular in shape. The exit wound was found at the left parietal bone measuring 1.2 cm. in size or diameter for this wound communicated with the entry wound of the left side of the forehead. The connection from the wound of entry to the exit wound measured 8 cms. The parietal bone was fractured and was depressed and the parietal part of the brain and meninges was traumatized. Blood and cerebrospinal fluid as well as brain tissues leaked out from this wound.

Possible cause of death:

- Gunshot wound at the head (left side) with injury to brain and meninges
- Hypovolemic shock secondary to loss of blood (Severe loss of blood)

(Sgd.) Ivar G. Arellano
MUN. Health Officer[3]

Dr. Charity Patalinghug and the victim's daughter Loreta C. Claro signed Emmanuel's Certificate of Death. [4] The appellant surrendered to the police authorities but failed to surrender the firearm he used to kill the victim. Forensic Officer Myrna P. Areola of the PNP Regional Office subjected the appellant to paraffin tests. The Chemical Analysis of the paraffin casts gave the following results:

FINDINGS:

...

- POSITIVE for the presence of gunpowder residue on his left hand cast.
- NEGATIVE for the presence of gunpowder residue on his right hand cast.[5]

Norberta also testified on the expenses incurred by her family due to her husband's death. No documentary evidence was, however, offered to support the same. She declared that she felt sad and lonely as a result of her husband's death.

The Case for the Appellant

The appellant admitted shooting the victim but claimed that he was merely performing a lawful act with due care; hence, cannot be held criminally liable for the victim's death. He testified that when he insisted that Emmanuel wake up his son, Emmanuel went to his room and emerged therefrom holding a handgun with his right hand. Emmanuel's trigger finger was outside the trigger guard, and he held the firearm with the muzzle facing downward. Fearing that he would be shot, the appellant took hold of Emmanuel's right hand with his left, and pulled the gun towards Emmanuel's stomach. The appellant grabbed Emmanuel's free hand with his right hand, and the old man almost fell on his knees to the ground. Emmanuel still resisted. The appellant pulled the gun to

the level of Emmanuel's forehead, and the gun suddenly went off. The bullet hit Emmanuel's forehead. Norberta fled from the house. For his part, the appellant rushed to his house to change clothes. He placed the gun on the dining table before entering his bedroom. When he went back to the dining room to get the gun, his younger sister, Enrica told him that their brother Edwin had taken the gun. He found Edwin outside their house near the church, and the latter told the appellant that he threw the gun into the sea. When the appellant asked his brother to show him where he threw the gun, Edwin refused to do so.

Marcial Luciño corroborated the appellant's testimony. He testified that he was talking with the appellant at around 9:00 p.m. at the junction of Rizal and Gallardo streets when the victim Emmanuel passed by in his pedicab. When the appellant called the victim, the latter ignored the call, prompting the appellant to chase the victim, and eventually push the pedicab into a canal.

The appellant's father, Iñigo Retubado, testified that on the evening of November 5, 1993, he was in their house with Edwin, his son who was mentally-ill. It was already late when the appellant arrived. The appellant was disheveled, and laid down the gun he was carrying on the table. The appellant told his father that he would surrender to the police because he had shot somebody.[6] The appellant thereafter went to his room to change clothes while Iñigo went to the comfort room to answer the call of nature. When he was done, he saw the appellant frantically looking for the gun. As Edwin was also nowhere to be found, Iñigo concluded that Edwin might have taken the gun with him. He also testified on Edwin's mental imbalance and on the latter's confinement at the Psychiatric Department of the Don Vicente Sotto Memorial Medical Center in Cebu City sometime in 1991.[7]

On November 6, 1993, the appellant surrendered to the police authorities. Although he was required by the municipal trial court to file his counter-affidavit, the appellant refused to do so.

After due proceedings, the trial court rendered judgment in Criminal Case No. TCS-2153, convicting the appellant of murder, and sentencing him to reclusion perpetua. The decretal portion of the decision reads:

WHEREFORE, in view of the foregoing, this Court finds accused GUILTY beyond reasonable doubt of the crime of Murder under Art. 248 R.P.C. and sentences the accused to the penalty of Reclusion Perpetua and to indemnify the heirs of the deceased the sum of P50,000.00.

However, accused is given full credit of his preventive imprisonment.

SO ORDERED.[8]

On appeal, the appellant assails the decision of the trial court contending that:

I

First Assignment of Error

THE LOWER COURT ERRED IN NOT FINDING THE DEATH OF THE DECEASED AS CAUSED BY MERE ACCIDENT WITHOUT FAULT OR INTENTION OF CAUSING IT WHILE THE ACCUSED WAS PERFORMING A LAWFUL ACT WITH DUE CARE OR, IN THE ALTERNATIVE, IT ERRED IN NOT CONVICTING HIM JUST MERELY OF HOMICIDE INSTEAD OF MURDER.

II

Second Assignment of Error

THE LOWER COURT ERRED IN DISREGARDING THE VERY RELEVANT AND MATERIAL CONTENTS OF EXHIBIT "B" OF THE PROSECUTION --- CHEMISTRY REPORT, PARAFFIN TEST --

WHICH ARE FAVORABLE TO THE ACCUSED.

III

Third Assignment of Error

THE LOWER COURT ERRED IN CONCLUDING THAT THE TESTIMONY OF THE SOLE WITNESS OF THE PROSECUTION IS SATISFACTORY AND SUFFICIENT TO CONVICT THE ACCUSED OF MURDER.

IV

Fourth Assignment of Error

THE LOWER COURT ERRED IN FAILING TO CONSIDER THAT THE ACCUSED HAS EXPLAINED WHY HE FAILED TO SURRENDER THE GUN WHICH HE GOT FROM THE DECEASED.[9]

The appellant asserts that he was merely performing a lawful act of defending himself when he grabbed the victim's hand which held the gun. The gun accidentally fired and the bullet hit the victim's forehead. The accident was not the appellant's fault. The appellant asserts that when he wrestled with the victim for the possession of the gun, he was merely defending himself. He contends that he had no intention of killing the victim, as he merely wanted to talk to his son. If he had wanted to kill the victim, he could have easily done so when he met the latter for the first time that fateful night of November 5, 1993. Moreover, the appellant submits, he did not commit any felony; hence, under paragraph 4 of Article 12 of the Revised Penal Code, he is not criminally liable for the death of the victim.[10] In the alternative, the appellant asserts that he should be convicted only of the crime of homicide under Article 249 of the Revised Penal Code, since the qualifying circumstance of treachery is wanting. He and the victim had a heated exchange of words before they grappled for the possession of the gun. Such heated discussion had already forewarned the victim and placed him on guard; thus, treachery cannot be legally considered.

The contention of the appellant has no merit. Article 11, paragraph 4 of the Revised Penal Code reads:

ART. 11. Justifying circumstances. –

...

4) Any person who, in order to avoid an evil or injury, does an act which causes damage to another provided that the following requisites are present: First. That the evil sought to be avoided actually exists;

Second. That the injury feared be greater than that done to avoid it;

Third. That there be no other practical and less harmful means of preventing it.

The provision was taken from Article 8, paragraph 7 of the Spanish Penal Code, which reads:

ARTICULO 8.

7. El que para evitar un mal ejecuta un hecho que produzca daño en la propiedad ajena, siempre que concurren las circunstancias siguientes:

Primera. Realidad del mal que se trata de evitar.

Segunda. Que sea mayor que el causado para evitarlo.

Tercera. Que no haya otro medio practicable y menos perjudicial para impedirlo.

Article 11, paragraph 4 of the Revised Penal Code is not an accurate translation of the Spanish Penal Code. The phrase "an injury" does not appear in the first paragraph in the Spanish Penal Code. Neither does the word "injury" appear in the second subparagraph of the Spanish Penal Code.

The justification is what is referred to in the Spanish Penal Code as *el estado de necesidad*:

Es una situacion de peligro, actual o inmediato para bienes, juridicamente protegidos que solo puede ser evitada mediante, la lesion de bienes, tambien juridicamente protegidos, pertenecientes a otra personas .[11]

The phrase "state of necessity" is of German origin. Countries which have embraced the classical theory of criminal law, like Italy, do not use the phrase. The justification refers to a situation of grave peril (*un mal*), actual or imminent (actual o inminente). The word *propiedad* covers diverse juridical rights (*bienes juridicos*) such as right to life, honor, the integrity of one's body, and property (*la vida, la integridad corporal, el pudor, el honor, bienes patrimoniales*) belonging to another.[12]

It is indispensable that the state of necessity must not be brought about by the intentional provocation of the party invoking the same.[13]

A number of legal scholars in Europe are of the view that the act of the accused in a state of necessity is justifying circumstance; hence, lawful. Under Article 12, paragraph 4 of the Revised Penal Code, a "state of necessity" is a justifying circumstance. The accused does not commit a crime in legal contemplation; hence, is not criminally and civilly liable. Civil liability is borne by the person/persons benefited by the act of the accused. Crimes cannot exist unless the will concurs with the act, and when, says Blackstone, "a man intending to do a lawful act, does that which is unlawful, the deed and the will act separately" and there is no conjunction between them which is necessary to constitute a crime.[14] Others are of the view that such act is a cause for exclusion from being meted a penalty; still others view such act as a case of excluding the accused from culpability.

According to Groizard, rights may be prejudiced by three general classes of acts, namely, (a) malicious and intentional acts; (b) negligent or reckless acts; (c) acts which are neither malicious, imprudent nor negligent but nevertheless cause damages.

Nuestra propiedad puede ser perjudicada, puede sufrir detrimentos por tres clases de hechos. Por actos maliciosos, intencionales, encaminados directamente a causarnos daño; por actos que, sin llevar ese malicioso fin y por falta de prudencia, por culpa o temeridad del que los ejecuta, den ese mismo resultado, y por actos que, sin concurrir en su ejecucion un proposito doloso, ni culpa, ni negligencia sin embargo produzcan menoscabo en nuestros bienes.[15]

The defense of a state of necessity is a justifying circumstance under Article 12, paragraph 4 of the Revised Penal Code. It is an affirmative defense that must be proved by the accused with clear and convincing evidence. By admitting causing the injuries and killing the victim, the accused must rely on the strength of his own evidence and not on the weakness of the evidence of the prosecution because if such evidence is weak but the accused fails to prove his defense, the evidence of the prosecution can no longer be disbelieved. Whether the accused acted under a state of necessity is a question of fact, which is addressed to the sound discretion of the trial court. The legal aphorism is that the findings of facts by the trial court, its calibration of the testimony of the witnesses of the parties and of the probative weight thereof as well as its conclusions based on its own findings are accorded by the appellate court high respect, if not conclusive effect, unless the trial court ignored, misconstrued or misapplied cogent facts and circumstances of substance which, if considered, will change the outcome of the case. We have meticulously reviewed the records and find no basis to deviate from the findings of the trial court that the appellant was the provocateur, the unlawful aggressor and the author of a deliberate and malicious act of shooting the victim at close range on the forehead.

First: When Norberta heard her husband and the appellant arguing with each other in the porch of their house, she went down from the balcony towards her husband and placed her hand on the latter's shoulders. She was shocked when the appellant pulled out his handgun and deliberately shot the victim on the forehead, thus:

Q

Now, you said that when your husband was about to go out again in order to see his trisicad and as he opened the door he saw Jesus Retubado near the door. What happened after that?

A

He asked Jesus Retubado why Jesus Retubado chased him when he was driving his trisicad.

Q

Now, as your husband was asking this question to the accused Jesus Retubado what was the distance to your husband at the time?

A

Just very near to him.

Q

And you to the accused at that very moment what was more or less your distance?

A

About an armslength.

Q

When your husband asked Jesus Retubado why the latter chased him while your husband was driving his trisicad what was the answer of Jesus Retubado, if any?

A

My husband asked the accused Jesus Retubado what is his grudge to him and Jesus Retubado answered that it is not you who has a grudge to me but it is your son.

Q

When Jesus Retubado uttered that statement what transpired after that?

A

He immediately pointed his firearm that he was bringing (sic) to my husband Emmanuel Cañon.

Q

By the way considering that you were just near to both your husband and the accused where did that firearm that you said was pointed by the accused to your husband come (sic) from?

A

While the accused was standing in front of our door his hands were placed inside his T-shirt covered by his T-shirt.

Atty. Pepito:

We move to strike out the answer. It is not responsive, Your Honor. The question was, where did it come from?

COURT:

Let the answer stay in the record but let the witness answer again.

A

From the hands of accused Jessie.

Fiscal Pansoy:

Q

Now, just a while ago you were making a motion using your hand placed inside your T-shirt. Now, when you saw the firearm for the first time where did you saw (sic) the firearm for the first time where did the firearm come from as you saw it from the hands of the accused?

Atty. Pepito:

Already answered. It came from the hands of the accused.

Fiscal Pansoy:

I will reform.

Q

Before you saw the firearm in the hands of the accused where did the firearm come from?

Atty. Pepito:

She is incompetent. We object.

COURT:

Reform the question.

Fiscal Pansoy:

Q

Now, Mrs. Witness, before this question was asked to you as to where the firearm came from you were making a motion by placing your hands inside your shirt when you were only asked as to where the firearm came from?

A

That was what the position of the accused when he was standing in front of our door and I do not know what was inside his T-shirt. I only know that he was carrying a firearm when it fired.

Q

Now, when the accused pointed the firearm to your husband and fired the same more or less what was the distance between the accused and your husband at the very precise time when the firing was made?

A

It was just very near because his hand did not bend. (Witness demonstrating by pointing to her forehead).

Q

Now, more or less, describe to the Court the approximate distance between the firearm that was pointed to your husband and the forehead of your husband at the time when the firing was done?

A

It touched the forehead of my husband.

Q

That was the very time that you heard the gunburst?

A

Yes.

Q

When the accused fired the firearm that was carried by him, what happened to your husband?

A

My husband fell down backward to the ground inside the house.

Q

By the way, what was the flooring of your house where your husband fell backward to the ground?

A

Cemented.

Q

By the way considering that you were just very near to where the incident occurred can you describe the length of the firearm that was used by the accused in firing your husband?

A

It was a short firearm about 6 inches.

Q

Now, as your husband fell down to the floor where did the accused proceed and what did the accused do?

A

He was just casually walking away as if nothing had happened.

Q

Now, what did you do to your husband, if any, after he fell down to the floor?

A

I have done nothing because I was somewhat shocked. I could not move because I was shocked.[16]

Second: After shooting the victim, the appellant fled from the situs criminis. He surrendered to the police authorities only on November 6, 1993, but failed to surrender the gun he used to kill the victim. The appellant's claim that he placed the gun on the dining table before entering his bedroom to change his clothes is incredible. There is no evidence that the appellant informed the police authorities that he killed the victim in a state of necessity and that his brother, Edwin, threw the gun into the sea. The appellant never presented the police officer to whom he confessed that he killed the victim in a state of necessity.

Third: The appellant had the motive to shoot and kill the victim. The victim ignored the appellant as the latter talked to him at the junction of Rizal and Gallardo streets, in the poblacion of Tuburan. The appellant was incensed at the effrontery of the victim, a mere pedicab driver. The appellant followed the victim to his house

where the appellant again confronted him. The appellant insisted on talking with the victim's son but the victim refused to wake up the latter. The appellant, exasperated at the victim's intransigence, pulled out a gun from under his shirt and shot the victim on the forehead. It was impossible for the victim to survive. With the appellant's admission that he shot the victim, the matter on whether he used his right or left hand to shoot the latter is inconsequential.

We agree with the contention of the Solicitor General that there is no treachery in the present case to qualify the crime to murder. To appreciate treachery, two (2) conditions must be present, namely, (a) the employment of the means of execution that give the person attacked no opportunity to defend himself or to retaliate, and (b) the means of execution were deliberately or consciously adopted.[17] The prosecution failed to adduce an iota of evidence to support the confluence of the abovementioned conditions. Thus, the appellant is guilty only of homicide under Article 249 of the Revised Penal Code. Although the Information alleges that the appellant used an unlicensed firearm to shoot the victim, the prosecution failed to prove that the appellant had no license to possess the same. Hence, the aggravating circumstance of the use of an unlicensed firearm to commit homicide should not be appreciated against the appellant.

The appellant is entitled to the mitigating circumstance of voluntary surrender. He turned himself in to the police authorities prior to the issuance of any warrant for his arrest.

The trial court awarded P50,000.00 as civil indemnity[18] to the heirs of the deceased. In addition, the heirs are entitled to moral damages in the amount of P50,000.00[19] and the temperate damages in the amount of P25,000.00 since no sufficient proof of actual damages was offered.[20]

WHEREFORE, the appealed judgment is AFFIRMED with MODIFICATION. The appellant Jesus G. Retubado alias "Jessie" is found GUILTY beyond reasonable doubt of homicide defined in and penalized by Article 249 of the Revised Penal Code and is hereby sentenced to suffer an indeterminate sentence of ten (10) years of prision mayor, in its medium period, as minimum, to fifteen (15) years of reclusion temporal, in its medium period, as maximum, and to pay the heirs of the victim, Emmanuel Cañon, P50,000.00 as civil indemnity; P50,000.00 as moral damages; and P25,000.00 as temperate damages.

SO ORDERED.

Puno, (Chairman), Quisumbing, Austria-Martinez, and Tinga, JJ., concur.

[1] Penned by Executive Judge Gualberto P. Delgado.

[2] Record, p. 1.

[3] Exhibit "C," Records, p. 15.

[4] Exhibit "A," Id. at 10.

[5] Exhibit "H," id. at 9.

[6] TSN, 11 July 1995, pp. 8-9.

[7] Id. at 3-4.

[8] Rollo, p. 68.

[9] Id. at 41-42.

- [10] Supra.
- [11] Id. at 362, 365.
- [12] Cuello Calon, Derecho Penal, Volume I, 8[th] ed., p. 202.
- [13] "Que la situacion de necesidad no haya sido provocado intencionadamente por el sujeto." Id. at 368.
- [14] Burdick, Law of Crimes, Volume I, p. 238.
- [15] Groizard, El Derecho Penal de 1870, Volume 1, 1929 ed.
- [16] TSN, 26 July 1994, pp. 4-6.
- [17] People vs. Parba, 364 SCRA 488 (2001).
- [18] People vs. Delim, G.R. No. 142773, January 28, 2003.
- [19] See People vs. Cortez, 348 SCRA 663 (2000).
- [20] See People vs. Abrazaldo, G.R. No. 124392, February 7, 2003.

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