

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOHNNY MALINAO Y NOBE, APPELLANT.

G.R. No. 128148. February 16, 2004

Ponente: AUSTRIA-MARTINEZ, J.

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AUSTRIA-MARTINEZ, J.:

On automatic review is the Decision,[1] dated October 31, 1996, of the Regional Trial Court of Catbalogan, Samar (Branch 29) convicting appellant Johnny Malinao y Nobe of Illegal Possession of Firearm in its aggravated form under the second paragraph of Section 1 of P.D. No. 1866 (Illegal Possession of Firearm Law) and sentencing him to suffer the supreme penalty of death.

The facts are as follows:

In an Information dated January 16, 1995, docketed as Criminal Case No. 3998, appellant was charged with Murder, committed as follows:

That on or about the 14th day of November, 1994, at nighttime which was purposely sought, in the Municipality of Catbalogan, Province of Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a handgun, with deliberate intent to kill, with treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and shoot one Nestor Otanguin with the use of said handgun with which the said accused had conveniently provided himself for the purpose, thereby hitting and inflicting upon said Nestor Otanguin gunshot wounds on his body and head, which wounds on his body and head, which directly caused his instantaneous death.

CONTRARY TO LAW.[2]

Upon arraignment on March 3, 1995, appellant pleaded not guilty to the crime charged.[3]

In an Information dated March 30, 1995, docketed as Criminal Case No. 4039, appellant was charged with Illegal Possession of Firearm and Ammunition (P.D. No. 1866), committed as follows:

That on or about the 14th day of November, 1994, in the Municipality of Catbalogan, Province of Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, being then a private person and with deliberate intent to possess, did then and there willfully, unlawfully and feloniously carry, control, possess and have in his possession a Caliber .38 firearm in a public place and outside of his residence without first securing any authority, and/or permit as required by law.

CONTRARY TO LAW.[4]

When arraigned on April 6, 1995, appellant also pleaded not guilty to the crime charged.[5] The two cases were consolidated and joint trial ensued.

Based on the evidence of the prosecution, consisting of the testimonies of minors Rey Abarcas, Allan Federio, Jay-ar Federio, Danelle Ian Malindog; Haide Villamor, Teresita G. Otanguin, Ireneo Ordiano, Jr., Nicandro

Canaleja, Dr. Frederick Beda C. Alli, Miguel Gallego and SPO4 Rodrigo Tolentino, the following facts are established:

Appellant and victim Nestor Otanguin were neighbors in Barangay 10, Muñoz Estate, Catbalogan, Samar. In the afternoon of November 9, 1994, the car in which Nestor, his wife Teresita and his brother-in-law were riding, driven by one Rodante Abarcar who was maneuvering it out of the garage gate of the Otanguin residence, accidentally hit and injured the fighting cock of appellant that was tied near said gate. Teresita immediately told appellant of the incident and promised to talk it over with him later as they were in a hurry to catch up with a plane flight to Tacloban City. Appellant did not say anything and just smiled. Nestor and family left for the airport.

At 4:30 in the afternoon of November 14, 1994, appellant, armed with a .38 caliber revolver, was drinking with some friends at a table on a sidewalk near his house at the corner of McKinley Street, a narrow alley. 9-year old Rey Abarcar,[6] 12-year old Allan Federio, 11-year old Jay-ar Federio and 6-year old Danelle Ian Malindog were playing nearby. At 6:00 in the evening, Nestor was on his way home from work and passed by the place where appellant was drinking with some friends. As Nestor was approaching, appellant fired his gun and invited Nestor to join them and offered him a drink which Nestor accepted. Then Nestor excused himself for home but appellant offered him another drink, which he politely refused. Enraged at the refusal, appellant drew his revolver from his waist and shot Nestor on the chest. When Nestor fell, appellant shot him again at the back of the head, resulting in his immediate death.[7]

On November 15, 1994, Dr. Frederick Beda C. Alli, Municipal Health Officer, conducted the autopsy on Nestor. From the autopsy report,[8] it appears that Nestor died of cardio-respiratory arrest due to gunshot wounds on the head and chest. On the same day, Forensic Analyst Nicandro Canaleja, conducted a paraffin test on the hands of appellant. The test gave a positive result for the presence of gunpowder residue.[9] Meanwhile, Ireneo Ordiano, Jr., a ballistics expert of the National Bureau of Investigation (NBI), conducted a ballistics examination on the two bullets recovered from the body of Nestor. The ballistics report[10] revealed that the bullets were fired from the barrel of a caliber .38 firearm. A certification from the Philippine National Police (PNP) proved that appellant is “neither a firearm holder nor a licensee of any firearm of whatever caliber.”[11]

Appellant admits having killed Nestor but claims self-defense. He testified that on the day of the incident, Nestor, armed with a .38 caliber handgun, drew his weapon to fire at appellant but appellant grappled with Nestor for possession of the gun and in the struggle, the gun exploded. He further stated that after he succeeded in wrestling the gun from Nestor, Nestor fought back and held his legs so he fired at Nestor. Thereafter, he left and went to the house of his brother in law. Later, he met Fiscal Wayne Villarin and they went to the Catbalogan Police Station where he surrendered to the police.[12]

The trial court sustained the evidence presented by the prosecution and found appellant’s claim of self-defense to be not credible. The trial court likewise found that the prosecution had established that appellant was not a licensee of any firearm. Thus, the trial court held that the crime of murder with the use of an illegally possessed gun was committed by the appellant.

In convicting appellant, the trial court, applying *People vs. Barros*,[13] held:

In a recent case, *People vs. Romeo Barros*, GR No. 101107, June 27, 1995, our Supreme Court reversing the trial court which convicted the accused of two offenses of murder and illegal possession of firearm and ammunition under PD 1866 the Supreme Court held that an accused who is charged with having committed murder or homicide with the use of an unlicensed firearm should be liable only for the graver offense of aggravated illegal possession of firearm under the second paragraph of Section 1 of PD 1866 because the

situation contemplated therein is from the punitive standpoint, virtually of the nature of the so-called “special complex crimes,” which should more appropriately be called composite crimes and only a single penalty is imposed for each of such composite crimes although composed of two or more offenses. [14]

Thus, the dispositive portion of the joint decision reads as follows:

WHEREFORE, the information for murder against Johnny Malinao in Criminal Case No. 3998 is hereby dismissed and in Criminal Case No. 4039 judgment is hereby rendered finding him guilty beyond reasonable doubt of illegal possession of firearm in its aggravated form under the second paragraph of Sec. 1 of PD 1866 and for this offense he is hereby sentenced to the penalty of death, to indemnify the heirs of the deceased Nestor Otanguin, represented by his wife Teresita G. Otanguin of Catbalogan, Samar, in the amount of Two Hundred Thousand Pesos (P200,000.00), without subsidiary imprisonment in case of insolvency, and to pay the costs.

SO ORDERED.[15]

Hence, the case is before the Court on automatic review under Article 47 of the Revised Penal Code, as amended by Section 22 of Republic Act No. 7659.

In his Brief, appellant impugns solely his conviction for illegal possession of firearm. He submits that the trial court’s dismissal of the Information for murder operates as an acquittal thereof; hence, he posits that only the conviction for illegal possession of firearms is the subject of herein automatic review. He seeks the retroactive effect of the beneficial provisions of Republic Act No. 8294 which amended P.D. No. 1866 (Illegal Possession of Firearm Law), reducing the penalties provided therein.

Prefatorily, it must be stressed that although the appellant himself does not refute the factual findings of the trial court, the Court nonetheless must conduct a thorough examination of the entire records of the case, based on the settled principle that an appeal in a criminal case opens the entire case for review on any question including one not raised by the parties.[16] This rule applies especially to automatic review of death penalty cases before the Supreme Court such as the present. Having received the supreme penalty as imposed by the applicable law, appellant is entitled under that law to have the sentence and all the facts and circumstances upon which it is founded placed before the Highest Tribunal of the land to the end that its justice and legality may be clearly and conclusively determined.[17]

Consequently, before the Court resolves appellant’s submissions, it is imperative that the Court reviews the factual findings and conclusions of the trial court.

Appellant admits authorship of the killing and invokes self-defense thereby shifting upon him the burden to prove by clear and convincing evidence, that: (a) the victim unlawfully attacked him; (b) he took the necessary means to repel the attack; and (c) he did not provoke said attack.[18] Unfortunately, appellant failed to discharge that burden of evidence since his self-defense theory remains uncorroborated. An uncorroborated self-defense theory is similar in many respects to bare denial. As such, it must fail as against the positive, categorical and straightforward witness accounts of eyewitnesses Rey Abarcar, Allan Federio, Jay-ar Federio and Danelle Ian Malindog. These prosecution eyewitnesses, minors all, clearly identified the appellant as the aggressor and not the victim Nestor. Without unlawful aggression on the part of the victim, there can be no viable self-defense.[19]

It is alleged in the Information for Murder that the killing was qualified by treachery and evident premeditation. The trial court did not make a finding as to the existence of any of these qualifying circumstances.

It is settled that treachery cannot be presumed but must be proved by clear and convincing evidence as conclusively as the killing itself. To appreciate treachery, two (2) conditions must be present, namely, (a) the

employment of means of execution that give the person attacked no opportunity to defend himself or retaliate, and (b) the means of execution were deliberately or consciously adopted.[20] In this case, the concurrence of these conditions is firmly anchored on the declarations of the prosecution eyewitnesses Rey Abarcar, Allan Federio, Jay-ar Federio and Danelle Ian Malindog. They witnessed appellant fire his gun and shoot at Nestor on the chest for the latter's refusal to drink another glass of liquor and when Nestor fell, they saw appellant shoot him again at the back of the head. These all too clearly indicate that Nestor could not have foreseen the deadly assault.

Nestor was completely unaware of his impending death caused simply by his polite refusal to drink. The means, method, and form of the attack in this case were, therefore, consciously adopted and effectively forestalled Nestor from employing a defense against appellant's unexpected attack.

On the other hand, the circumstance of evident premeditation did not attend the killing. There was no proof or showing of (a) the time when the offender determined to commit the crime, (b) an act manifestly indicating that the offender had clung to his determination, and (c) a sufficient lapse of time between the determination to commit and the execution thereof, to allow the offender to reflect on the consequences of his act.[21] Evident premeditation must be based on external facts which are evident, not merely suspected, which indicate deliberate planning.[22] There must be direct evidence showing a plan or preparation to kill, or proof that the accused meditated and reflected upon his decision to kill the victim.[23] No such evidence was presented to prove the presence of this circumstance.

With the presence of qualifying circumstance of treachery, which was established as clear as the killing itself, the crime committed is murder.

Regarding the charge of illegal possession of firearm, conviction requires the concurrence of two (2) essential requisites: (a) the existence of the firearm, and (b) the fact that the appellant who owned or possessed the firearm does not have a license to possess the same. Both elements were established by the prosecution. In *People vs. Orehuella*,[24] the Court held that the existence of the firearm can be established by testimony, even without the presentation of the said firearm.[25] In this case, while the firearm was not presented in evidence, the existence of the same was sufficiently established by (a) the categorical testimonies of the prosecution eyewitnesses that appellant was in possession of a firearm handgun described as "caliber 32",[26] a "shortgun",[27] and a "small gun"[28] and had used it to kill Nestor, (b) the paraffin test on the hands of appellant tested positive for the presence of gunpowder residue,[29] and (c) the ballistics report revealed that the two bullets taken from the body of Nestor were fired from the barrel of a caliber .38 firearm.[30] The prosecution proved the second element by presenting a certification from the PNP to the effect that appellant is "neither a firearm holder nor a licensee of any firearm of whatever caliber." [31]

The guilt of appellant as to the crimes of murder and illegal possession of firearm having been established beyond reasonable doubt, the Court now turns to the claim of appellant that only his conviction for illegal possession of firearm should be the subject of herein automatic review because the trial court had dismissed the Information for murder.

Appellant's claim is not plausible. The trial court clearly found appellant guilty beyond reasonable doubt of the crime of murder, but merely considered it as aggravating circumstance in the crime of illegal possession of firearm, applying *People vs. Barros*[32] Inevitably, the contrariety arose when the trial court erroneously ordered the dismissal of the Information for Murder despite having earlier found in the text of his decision that the appellant is guilty of murder beyond reasonable doubt and having considered the crime of Murder as an aggravating circumstance in finding him guilty of "illegal possession of firearm in its aggravated form under Sec. 1 of P.D. No. 1866".

It is elementary that the dispositive part of the judgment should not be interpreted in a manner contrary to its ratio decidendi.[33] The dispositive part should be construed in harmony with the spirit of the decision as revealed in the text of the decision.

The crimes of murder and illegal possession of firearm were committed by appellant in 1994. Two separate Informations were filed but the cases were tried jointly as they sprung from the same incident involving the same victim and accused. The prevailing laws at that time are Article 249 of the Revised Penal Code and P.D. No. 1866.

At this point, it is imperative for the Court, so as to serve as a guide for the Bench and the Bar, to reproduce the separate opinion of illustrious Mr. Justice Florenz D. Regalado in the Barros case which was mentioned in the ponencia of then Chief Justice Andres R. Narvasa as having been subscribed to by all the then Members of the Court and now being made an integral part of herein decision, viz:

The main concern was as to whether or not, whenever a killing is effected with the use of an unlicensed firearm, the malefactor should be punished separately for both offenses, with the unlawful taking of life to be proceeded against under the corresponding provision of the Revised Penal Code and the illegal possession of the firearm under Presidential Decree No. 1866. The case now before the Court presents an opportunity for a reevaluation of the previous rulings on this issue.

A little legal archaeology would be in order. Presidential Decree No. 1866 took effect on June 29, 1983, imposing the stringent penalties therein by reason of the “upsurge of crimes vitally affecting public order and safety due to the proliferation of illegally possessed and manufactured firearms, ammunition and explosives.” The pertinent portion of Section 1 thereof provides for simple possession in the first paragraph and for one of the aggravated forms in the second paragraph, as follows:

The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose (of) or possess any firearm, part of firearm, ammunition or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition.

If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed.

At that time, the penalty for homicide was, as it still is, reclusion temporal in its full extent under Article 249 of the Code. The penalty for murder then was reclusion temporal in its maximum period to death under Article 248, although the death penalty was proscribed for some time by the 1987 Constitution. Thereafter, effective December 31, 1993, the penalty for murder was increased to reclusion perpetua to death when Article 248 of the Code was amended by Section 6 of Republic Act No. 7659.

Obviously, then, the single indivisible penalty of death provided by Presidential Decree No. 1866 was designed to impose, as it still imposes, a higher penalty whenever an unlicensed firearm was used as the instrument for the commission of either homicide or murder, and such penalty shall be applied regardless of any mitigating or aggravating circumstances.

Under the dispositions heretofore made by the Court involving the crimes of homicide or murder through the use of an illegally possessed firearm, and the same is true with the case at bar, the following queries may be posed:

1. Should the crimes of homicide or murder, which are the end results, be punished separately from and in addition to the liability for illegal possession of the firearm as the instrument or the means employed?
2. On the other hand, should not the principal and sole offense be the aggravated form of illegal possession of a

firearm under the second paragraph of Section 1 of Presidential Decree No. 1866, with the homicide or murder being absorbed therein as an integral element of the crime in its aggravated form?

3. If either homicide or murder and illegal possession of firearm are so charged in one and the same information, should they be considered and punished as a single offense of homicide or murder with the use of an unlicensed firearm, or as a case of aggravated illegal possession of firearm resulting in homicide or murder, with the death penalty to be imposed in either case?

4. If homicide or murder is charged in a separate information while aggravated illegal possession of firearm is made the subject of a separate indictment filed simultaneously with or prior or subsequent to the former, but with the respective informations on the killing and the illegal possession mutually alleging facts regarding the other offense as an attendant circumstance, should the accused be held liable for two distinct crimes regardless of whether the cases are jointly tried by the same court or separately by the two courts where the informations were independently filed?

On the first question, it is true that from the theoretical concept of the requisite mens rea, the killing as the result of the criminal design arose from a specific criminal intent, that is, the animus interficendi or intent to kill. The illegal possession of the firearm requires a discrete and specific intent to possess the weapon, which is the animus possidendi, coupled with the physical possession thereof.

It would, therefore, appear at first blush that the two offenses having arisen from different criminal intents, this would be, under the philosophical bases for concurso de delitos, a case of material or real plurality under which different crimes have been committed and for each of which a separate criminal liability attaches. The flaw in this approach, however, is that although two crimes have been committed, they are not altogether separate or disconnected from each other both in law and in fact. The illegally-possessed firearm having been the weapon used in the killing, the former was at least the necessary, although not an indispensable, means to commit the other.

The situation thus borders closer to the concept of a complex crime proper, technically known as a delito complejo, rather than to the postulate of two separate crimes. It is true that former doctrines were to the effect that there can be no complex crime where one of the component offenses is punished by a special law. The rationale therefore was that in a complex crime, Article 48 of the Code prescribes that the penalty shall be for the gravest offense to be applied in its maximum period. Since, at that time, the penalties for crimes provided in special laws were not divided into periods, it would be impossible to apply Article 48.

The ratiocination no longer applies now, specifically with respect to the case at bar, since the penalties in Presidential Decree No. 1866 were all taken from the scale of penalties in the Code. The only possible difficulty in this novatory approach would be on the first kind of complex crime, that is, the delito compuesto since it exists “(w)hen a single act constitutes two or more grave or less grave felonies.” The use of that particular term for the delicts committed bars the application of that form of complex crime to offenses under Presidential Decree No. 1866, since “felonies” are offenses provided and defined in the Code.

That objection would not, however, apply to a delito complejo since it is sufficient therefor that “an offense is a necessary means for committing the other.” By these considerations, however, the writer does not mean to imply that a killing through the use of an illegally-possessed firearm is a delito complejo under Article 48 of the Code. As was carefully stated, such an offense merely borders closer to or approximates the concept of a delito complejo, but it thereby emphasizes the thesis that the offenses should not be considered as separate crimes to be individually punished under the principle of material plurality.

This premise accordingly brings up the second query as to whether or not the crime should properly be the aggravated illegal possession of an unlicensed firearm through the use of which a homicide or murder is committed. It is submitted that an accused so situated should be liable only for the graver offense of aggravated

illegal possession of the firearm punished by death under the second paragraph of Section 1, Presidential Decree No. 1866, and it is on this point that the writer dissents from the holding which would impose a separate penalty for the homicide in addition to that for the illegal possession of the firearm used to commit the former.

If the possession of the unlicensed firearm is the only offense imputable to the accused, the Court has correctly held that to be the simple possession punished with reclusion temporal in its maximum period to reclusion perpetua in the first paragraph of Section 1. Where, complementarily, the unlicensed firearm is used to commit homicide or murder, then either of these felonies will convert the erstwhile simple illegal possession into the graver offense of aggravated illegal possession. In other words, the homicide or murder constitutes the essential element for integrating into existence the capital offense of the aggravated form of illegal possession of a firearm. Legally, therefore, it would be illogical and unjustifiable to use the very same offenses of homicide or murder as integral elements of and to create the said capital offense, and then treat the former all over again as independent offenses to be separately punished further, with penalties immediately following the death penalty to boot.

The situation contemplated in the second query is, from the punitive standpoint, virtually of the nature of the so-called “special complex crimes,” which should more appropriately be called composite crimes, punished in Article 294, Article 297 and Article 335. They are neither of the same legal basis as nor subject to the rules on complex crimes in Article 48, since they do not consist of a single act giving rise to two or more grave or less grave felonies nor do they involve an offense being a necessary means to commit another. However, just like the regular complex crimes and the present case of aggravated illegal possession of firearms, only a single penalty is imposed for each of such composite crimes although composed of two or more offenses.

On the other hand, even if two felonies would otherwise have been covered by the conceptual definition of a complex crime under Article 48, but the Code imposes a single definite penalty therefor, it cannot also be punished as a complex crime, much less as separate offenses, but with only the single penalty prescribed by law. Thus, even where a single act results in two less grave felonies of serious physical injuries and serious slander by deed, the offense will not be punished as a delito compuesto under Article 48 but as less serious physical injuries with ignominy under the second paragraph of Article 265. The serious slander by deed is integrated into and produces a graver offense, and the former is no longer separately punished.

What is, therefore, sought to be stressed by such alternative illustration, as well as the discussion on complex and composite crimes, is that when an offense becomes a component of another, the resultant crime being correspondingly punished as thus aggravated by the integration of the other, the former is not to be further separately punished as the majority would want to do with the homicide involved in the case at bar.

With the foregoing answers to the second question, the third inquiry is more of a question of classification for purposes of the other provisions of the Code. The theory in *Tac-an* that the principal offense is the aggravated form of illegal possession of firearm and the killing shall merely be included in the particulars or, better still, as an element of the principal offense, may be conceded. After all, the plurality of crimes here is actually sourced from the very provisions of Presidential Decree No. 1866 which sought to “consolidate, codify and integrate” the “various laws and presidential decrees to harmonize their provisions” which “must be updated and revised in order to more effectively deter violators” of said laws.

This would be akin to the legislative intent underlying the provisions of the Anti-Carnapping Act of 1972, wherein the principal crime to be charged is still carnapping, although the penalty therefore is increased when the owner, driver or occupant of the carnapped vehicle is killed. The same situation, with escalating punitive provisions when attended by a killing, are found in the Anti-Piracy and Anti-Highway Robbery Law of 1974 and the Anti-Cattle Rustling Law of 1974, wherein the principal crimes still are piracy, highway robbery and cattle rustling. Also, in the matter of destructive arson, the principal offense remains as arson although the same becomes a capital offense when, inter alia, death results as a consequence of the commission

of any of the acts punished under said article of the Code.

In the present case, the academic value of specifying whether it is a case of illegal possession of firearm resulting in homicide or murder, or, conversely, homicide or murder through the illegal possession and use of an unlicensed firearm, would lie in the possible application of the provision on recidivism. Essentially, it would be in the theoretical realm since, taken either way, the penalty for aggravated illegal possession of a firearm is the single indivisible penalty of death, in which case the provision on recidivism would not apply. If, however, the illegal possession is not established but either homicide or murder is proved, then the matter of recidivism may have some significance in the sense that, for purposes thereof, the accused was convicted of a crime against persons and he becomes a recidivist upon conviction of another crime under the same title of the Code.

Lastly, on the matter of the offense or offenses to be considered and the penalty to be imposed when the unlawful killing and the illegal possession are charged in separate informations, from what has been said the appropriate course of action would be to consolidate the cases and render a joint decision thereon, imposing a single penalty for aggravated illegal possession of firearm if such possession and the unlawful taking of life shall have been proved, or for only the proven offense which may be either simple illegal possession, homicide or murder per se. The same procedural rule and substantive disposition should be adopted if one information for each offense was drawn up and these informations were individually assigned to different courts or branches of the same court.

Indeed, the practice of charging the offense of illegal possession separately from the homicide or murder could be susceptible of abuse since it entails undue concentration of prosecutorial powers and discretion. Prefatorily, the fact that the killing was committed with a firearm will necessarily be known to the police or prosecutorial agencies, the only probable problem being the determination and obtention of evidence to show that the firearm is unlicensed.

Now, if a separate information for homicide or murder is filed without alleging therein that the same was committed by means of an unlicensed firearm, the case would not fall under Presidential Decree No. 1866. Even if the use of a firearm is alleged therein, but without alleging the lack of a license therefor as where that fact has not yet been verified, the mere use of a firearm by itself, even if proved in that case, would not affect the accused either since it is not an aggravating or qualifying circumstance.

Conversely, if the information is only for illegal possession, with the prosecution intending to file thereafter the charge for homicide or murder but the same is inexplicably delayed or is not consolidated with the information for illegal possession, then any conviction that may result from the former would only be for simple illegal possession. If, on the other hand, the separate and subsequent prosecution for homicide or murder prospers, the objective of Presidential Decree No. 1866 cannot be achieved since the penalty imposable in that second prosecution will only be for the unlawful killing and further subject to such modifying circumstances as may be proved.

In any event, the foregoing contingencies would run counter to the proposition that the real offense committed by the accused, and for which sole offense he should be punished, is the aggravated form of illegal possession of a firearm. Further, it is the writer's position that the possible problems projected herein may be minimized or obviated if both offenses involved are charged in only one information or that the trial thereof, if separately charged, be invariably consolidated for joint decision. Conjointly, this is the course necessarily indicated since only a single composite crime is actually involved and it is palpable error to deal therewith and dispose thereof by segregated parts in piecemeal fashion.[34] (Emphasis supplied)

However, pending review of the trial court's decision, R.A. No. 8294 was enacted on July 6, 1997, amending P.D. No. 1866. Its effect on crimes of illegal possession of firearm and murder or homicide, committed before the enactment of said law and on P.D. No. 1866 is explicitly defined in *People vs. Tadeo*,[35] to wit:

Finally, we must reverse and set aside the conviction of the accused in Crim. Case No. 23-499 where he was charged with illegal possession of a firearm used in perpetrating the homicide and attempted homicide, i.e., violation of par. 2, Sec. 1, P.D. 1866, as a result of the decriminalization of violations of P.D. 1866 by R.A. 8294 where the unlicensed firearm is used in carrying out the commission of other crimes —

Sec. 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 . . . 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.

The foregoing amendments obviously blur the distinctions between murder and homicide on one hand, and qualified illegal possession of firearms used in murder or homicide on the other. We have declared that the formulation in R.A. 8294, i.e., “(I)f 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,” signifies a legislative intent to treat as a single offense the illegal possession of firearms and the commission of murder or homicide with the use of an unlicensed firearm. Thus where an accused used an unlicensed firearm in committing homicide or murder, he may no longer be charged with what used to be the two (2) separate offenses of homicide or murder under The Revised Penal Code and qualified illegal possession of firearms used in homicide or murder under P.D. 1866; 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.

The use of an unlicensed firearm cannot be considered however as a special aggravating circumstance in Crim. Case No. 23-498 and Crim. Case No. 23-494. For one, it was not alleged as an aggravating circumstance in the Informations for murder and frustrated murder which is necessary under our present Revised Rules of Criminal Procedure. Moreover, even if alleged, the circumstance cannot be retroactively applied to prejudice accused-appellant; it must be stressed that RA 8294 took effect only on 6 July 1994[36] while the crimes involved herein were committed on 4 November 1993. In any event, as correctly observed by the Solicitor General, there is no evidence proving the illicit character of the .38 cal. Revolver used by appellant in killing Mayolito Cabatu and in trying to kill Florencia Cabatu, as to which requisite of the crime the record is eerily silent.[37] (Emphasis supplied)

Applied to the present case, appellant may not now be convicted of illegal possession of firearm in its aggravated form by considering the commission of Murder or Homicide as an aggravating circumstance because under R.A. No. 8294, the use of an unlicensed firearm in a murder or homicide case is considered simply as a special aggravating circumstance in the crime of homicide or murder and no longer treated as a separate offense in its aggravated form. It should be noted however that in either case, whether for illegal use of firearm in its aggravated form under P.D. No. 1866 as discussed in the Barros case or whether Murder or Homicide is committed with the use of an unlicensed firearm, the imposable penalty is death.

The use of the unlicensed firearm by appellant in killing Nestor may not be used against appellant as a special aggravating circumstance because there is no allegation in Criminal Case No. 3998 that the crime of Murder was committed with the use of an unlicensed firearm, as mandated by Section 8 of Rule 110 of the Revised Rules of Criminal Procedure;[38] in much the same way as in Criminal Case No. 4039, it is not alleged in the Information that the use of illegal firearm caused murder or homicide.

In fine, appellant may be held liable only for murder which is punishable by reclusion perpetua to death under Article 248 of the Revised Penal Code as amended by R.A. No. 7659.

Nighttime, while alleged in the information, cannot be appreciated as an aggravating circumstance because there is no evidence that appellant purposely sought nighttime to facilitate the killing or to insure its execution or accomplishment or to evade his arrest.[39]

But the mitigating circumstance of voluntary surrender should be appreciated in favor of the appellant. First, he had not been actually arrested at the time he surrendered; second, he surrendered to a person in authority; and third, his surrender was voluntary.[40] The records reveal that appellant surrendered to a person in authority in the evening of November 14, 1995 after the killing[41] of Nestor in the afternoon of the same day.

Under Article 248[42] of the Revised Penal Code, as amended, the penalty for murder is reclusion perpetua to death. Article 63[43] of the same Code states that when the law prescribes a penalty consisting of two indivisible penalties and the crime is attended by a mitigating circumstance and no aggravating circumstance, the lesser penalty shall be imposed. Thus, for the murder of Nestor, we reduce the penalty of the appellant from death to reclusion perpetua.

Regarding the amount of damages, we note that the trial court awarded civil indemnity in the amount of P200,000.00. Under prevailing jurisprudence, the Court has set the amount at P50,000.00.[44] In murder, the grant of civil indemnity requires no proof other than the fact of death as a result of the crime and proof of the appellant's responsibility therefor.[45]

However, the award of civil indemnity is separate and distinct from the award of moral damages which is based on a different jural foundation and assessed by the court in the exercise of sound discretion. The prosecution has amply demonstrated by competent evidence that the heirs suffered mental anguish and wounded feelings.[46] Thus, the heirs of Nestor are entitled to moral damages pegged at P50,000.00 by controlling case law.[47]

Actual damages must likewise be awarded. While the widow, Teresita G. Otanguin, submitted a summary of expenses in the total amount of P228,557.00,[48] incurred due to the death of her husband, only receipts for funeral services (P18,000.00),[49] tomb lot (P25,000.00),[50] and tomb construction (P11,707.00)[51] were offered in evidence. Actual damages may only be awarded for expenses duly supported by receipts.[52] Courts cannot simply rely on speculation, conjecture or guesswork in determining the fact and amount of damages.[53] Hence, only P54,707.00 must be awarded as actual damages.

Moreover, the heirs of Nestor are also entitled to damages for the loss of the latter's earning capacity. In fixing the indemnity, account is taken of the victim's actual income at the time of his death and his probable life expectancy.[54] Thus, in *People vs. Napalit*[55] the following formula was adopted by this Court: no

New earning capacity = $2/3 \times (80 - \text{age of the victim at the time of this death})$

x

a reasonable portion of the annual net income which would have been received by the heirs for support.

In the absence of proof of living expenses, the net income is deemed to be 50% of the gross income.[56]

Nestor was 38 years old at the time of his death.[57] Per Certification[58] of the Philippine National Bank where Nestor worked as an Investment Specialist, his annual income is P55,380.00. Thus, by reason of the death of the victim, the heirs should be awarded the amount of P775,320.00 for loss of earning capacity, computed as follows:

Net earning capacity

$$= 2/3 \times (80-38) \times [P55,380.00-1/2 (P27,690.00)]$$

$$= 2/3 \times (42) \times P 27, 690.00$$

$$= 28 \times P 27, 690.00$$

$$= P775,320.00$$

Finally, the Court awards exemplary damages in the amount of P25,000.00, inasmuch as the qualifying circumstance of treachery attended in the killing of Nestor. In *People vs. Catubig*,^[59] we emphasized that insofar as the civil aspect of the crime is concerned, exemplary damages in the amount of P25,000.00 is recoverable if there is present an aggravating circumstance, whether qualifying or ordinary, in the commission of the crime.^[60]

WHEREFORE, the Decision dated October 31, 1996 of the Regional Trial Court of Catbalogan, Samar (Branch 29) is MODIFIED. The appellant, Johnny Malinao y Nobe, is found GUILTY beyond reasonable doubt of murder and sentenced to suffer the penalty of reclusion perpetua. The appellant is also ordered to pay the heirs of the victim, Nestor Otanguin, the amounts of Fifty Thousand Pesos (P50,000.00) as civil indemnity; Fifty Thousand Pesos (P50,000.00) as moral damages; Fifty Four Thousand Seven Hundred Seven Pesos (P54,707.00) as actual damages; Seven Hundred Seventy Five Thousand Three Hundred Twenty Pesos (P775,320.00) as loss of earning capacity; and Twenty Five Thousand Pesos (P25,000.00) as exemplary damages.

SO ORDERED.

Davide, Jr., C.J., Puno, Vitug, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Corona, Carpio-Morales, Callejo, Sr., Azcuna, and Tinga, JJ., concur.

[1] Penned by Judge Auxencio C. Dacuycuy.

[2] Original Record, Criminal Case No. 3998, p.1.

[3] *Id.*, p. 103.

[4] Original Record, Criminal Case No. 4039, p. 1.

[5] *Id.*, p. 53.

[6] Also referred to as “Raynard” and “Reymond” in the TSN, Ray Abarcas, April 6, 1995, pp. 6-7.

[7] TSN, Ray Abarcas, April 6, 1995, p. 12, 15-16; TSN, Allan Federio, April 6, 1995, pp. 44-48; TSN, Jay-Ar Federio, April 7, 1995, pp. 16-27.

[8] Exhibit “N”, Original Record, Criminal Case No. 3998, p. 17.

[9] Exhibit “J”, Folder of Exhibits, p. 15.

[10] Exhibit “I”, Folder of Exhibits, p. 14.

[11] Exhibit “Y”, Folder of Exhibits, p. 32.

[12] Decision, pp. 9-10, Rollo, pp. 98-99.

[13] 245 SCRA 312 (1995).

[14] Rollo, p. 104.

[15] Ibid.

[16] *People vs. Mataro*, 354 SCRA 27, 38 (2001); *People vs. Villaruel*, 261 SCRA 386, 397 (1996).

[17] *People vs. Esparas*, 260 SCRA 539, 546 (1996), citing *U.S. vs. Laguna*, 17 Phil. 532 (1910) and *U.S. vs. Binayoh*, 35 Phil. 23 (1916).

[18] *People vs. Arnante*, 391 SCRA 155, 158 (2002); *People vs. Villegas*, 390 SCRA 111, 118 (2002).

[19] *People vs. Recto*, 367 SCRA 390, 402 (2001).

[20] *People vs. Ave*, 391 SCRA 225, 246 (2002); *People vs. Delmo*, 390 SCRA 395, 435 (2002).

[21] *People vs. Acojedo*, 369 SCRA 376, 384-385 (2001); *People vs. Silvano*, 350 SCRA 650, 661-662 (2001).

[22] *People vs. Loterano*, 391 SCRA 593, 607 (2002), citing *People vs. Mariano*, 347 SCRA 109, 125 (2000).

[23] *Id.*, pp. 607-608, citing *People vs. Gadin, Jr.*, 331 SCRA 345, 354 (2000); *People vs. Asto*, 277 SCRA 697 (1997).

[24] 232 SCRA 82 (1994).

[25] *Id.*, p. 96, cited in *People vs. Narvasa*, 298 SCRA 637, 647 (1998).

[26] TSN, Rey Abarcar, April 6, 1995, p. 12.

[27] TSN, Allan Federio, April 6, 1995, p. 46.

[28] TSN, Jay-Ar Federio, April 7, 1995, p. 24.

[29] Exhibit "J", Folder of Exhibits, p. 15.

[30] Exhibit "I", Folder of Exhibits, p. 14.

[31] Exhibit "Y", Folder of Exhibits, p. 32.

[32] *Supra*, Note 13.

[33] *Ong ching Kian Chung vs. Chinal National Cereals Oil and Foodstuffs Import and Export Corp.*, 333 SCRA 290, 401 (2000). See also *Morelos vs. Go Chin Ling*, 105 Phil. 814 (1959).

[34] *Supra*, note 13, pp. 325-332.

[35] 389 SCRA 20 (2002).

[36] Should be 1997.

[37] *Id.*, pp. 31-32; *People vs. Adame*, 346 SCRA 373, 381 (2000).

[38] Section 8, Rule 110 of the Revised Rules of Criminal Procedure provides:

Sec. 8. Designation of the offense. — The complaint or information shall state the designation of the offense given by the statute, aver the acts or omissions constituting the offense, and specify its qualifying and aggravating circumstances. If there is no designation of the offense, reference shall be made to the section or

subsection of the statute punishing it.

[39] *People vs. Lumacang*, 324 SCRA 254, 269 (2000).

[40] *People vs. Villegas*, 390 SCRA 111, 122 (2002); *People vs. Dawaton*, 389 SCRA 277, 285 (2002).

[41] TSN, Johnny Malinao, June 20, 1996, p. 7.

[42] ART. 248. Murder. — Any person who, not falling within the provisions of Article 246, shall kill another, shall be guilty of murder and shall be punished by reclusion perpetua to death if committed with any of the following attendant circumstances:

1. With treachery, taking advantage of superior strength, with aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity; . . . —

[43] Article 63. Rules for the application of indivisible penalties

. . .

In all cases in which the law prescribes a penalty composed of two indivisible penalties, the following rules shall be observed in the application thereof:

. . .

3. When the commission of the act is attended by some mitigating circumstance and there is no aggravating circumstance, the lesser penalty shall be applied.

. . .

[44] *People vs. Callet*, 382 SCRA 43, 55 (2002).

[45] *People vs. Whisenhunt*, 368 SCRA 586, 610 (2001); citing *People vs. Tan*, 359 SCRA 283, 308 (2001).

[46] TSN, Teresita Otanguin, May 19, 1995, pp. 10-11; December 14, 1995, pp. 7-9.

[47] *People vs. Panado*, 348 SCRA 679, 690 (2000); *People vs. Pirame*, 327 SCRA 552, 568 (2000).

[48] Exh. "X-4", Folder of Exhibits, p. 31.

[49] Exh. "Q", Folder of Exhibits, p. 19.

[50] Exh. "R", Folder of Exhibits, p. 20.

[51] Exh. "V", Folder of Exhibits, p. 28.

[52] *People vs. Kinok*, 368 SCRA 510, 522 (2001); *People vs. Feliciano*, 365 SCRA 613, 632-633 (2001).

[53] *Fernandez vs. Fernandez*, 363 SCRA 811, 829 (2001).

[54] *People vs. Barnuevo*, 366 SCRA 243, 253 (2001).

[55] G.R. Nos. 142919 and 143876, February 4, 2003.

[56] *Ibid.*

[57] Exh. "P", Original Record, Criminal Case No. 3998, p. 23.

[58] Exh. "W", Folder of Exhibits, p. 29.

[59] 363 SCRA 621 (2001).

[60] *Id.*, at 635.

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