PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JULIO RECTO Y ROBEA, APPELLANT.

G.R. No. 129069. October 17, 2001

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

Treachery cannot be appreciated to qualify a killing to murder, if the accused has not deliberately sought to attack the vulnerability of the victim. In the present case, the latter evidently had the opportunity to escape or to defend himself, but chose not to grab the opportunity; instead, he placed himself in a position more open to attack.

The Case

For automatic review by this Court is the Decision[1] dated April 2, 1997, promulgated by the Regional Trial Court (RTC) of Romblon (Branch 81), which found Julio Recto y Robea guilty beyond reasonable doubt of (1) two counts of the complex crime of qualified direct assault with frustrated homicide (Criminal Case Nos. 1970 and 1971), (2) the complex crime of qualified direct assault with murder (Criminal Case No. 1972), and (3) homicide (Criminal Case No. 1973). The decretal portion of the RTC Decision reads as follows:

> "WHEREFORE, in Criminal Case No. 1970, this Court finds accused JULIO RECTO GUILTY beyond reasonable doubt of the complex crime of qualified [d]irect [a]ssault [w]ith [f]rustrated [h]omicide and hereby sentences him to suffer the indeterminate penalty of from eight (8) years and one (1) day of prision mayor, as minimum, to ten (10) years and one (1) day of prision mayor, as maximum, with the accessory penalties of the law, and to pay the costs.
>
> "In Criminal Case No. 1971, this Court finds accused JULIO RECTO GUILTY beyond reasonable doubt of the complex crime of qualified [d]irect [a]ssault [w]ith [f]rustrated [h]omicide and hereby sentences him to suffer the indeterminate penalty of from eight (8) years and one (1) day of prision mayor, as minimum, to ten (10) years and one (1) day of prision mayor, as maximum, with the accessory penalties of the law, and to pay the costs.
>
> "In Criminal Case No. 1972, this Court finds co-accused JULIO RECTO GUILTY beyond reasonable doubt of the complex crime of qualified [d]irect [a]ssault [w]ith [m]urder and hereby sentences him to suffer the supreme penalty of DEATH. He is ordered to pay the heirs of the victim ANTONIO MACALIPAY the sum of P50,000.00 as indemnity for his death, without subsidiary imprisonment in case of insolvency, and to pay the costs.
>
> x x x x x x x x x
>
> "In Criminal Case No. 1973, this Court finds co-accused JULIO RECTO GUILTY beyond reasonable doubt of the crime of [h]omicide and hereby sentences him to suffer the indeterminate penalty of from eight (8) years and one (1) day of prision mayor, as minimum, to thirteen (13) years, nine (9) months and ten (10) days of reclusion temporal, as maximum, with the accessory penalties of the law, and he is ordered to pay the heirs of the victim EMILIANO `RENATO' SANTOS, alias REY, the sum of P50,000.00 as indemnity for his death, without subsidiary imprisonment in case of insolvency, and to pay the costs.

x x x x x x x x x

"The `pugakang' or homemade shotgun with one (1) live ammunition (Exh. C); twelve (12) gauge live ammunition (Exh. C-1); the revolver together with the three (3) live bullets and two (2) empty shells (Exhs. D, D-1 to D-5, respectively) are confiscated in favor of the government.

"After the judgment shall have become final, the [o]fficer-in-[c]harge, Office of the Clerk of Court, this Court, is ordered to deliver and deposit all the foregoing exhibits to the [p]rovincial [d]irector, PNP, of the Province of Romblon properly receipted. Thereafter, the receipt must be attached to any of the records of these cases and shall form part of these records.

"The period of preventive imprisonment both accused had undergone shall be credited in their favor to its full extent and the penalties herein imposed shall be served successively in accordance with Articles 29 and 70, respectively, of the Revised Penal Code, as amended."[2]

On September 22, 1994, four (4) Informations,[3] all signed by State Prosecutor II Felix R. Rocero, were filed against appellant. The fifth Information was dated October 18, 1994.

The Informations in Criminal Case Nos. 1970 and 1971 charged appellant with direct assault with frustrated murder, as follows:

Criminal Case No. 1970

"That on or about the 18[th] day of April 1994, at around 5:00 o`clock in the afternoon, in [B]arangay Ambulong, [M]unicipality of Magdiwang, [P]rovince of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused, with intent to kill, did then and there, by means of treachery, wilfully, unlawfully and feloniously attack, assault, and shoot with a shotgun locally called `pugakang' one MELCHOR RECTO, knowing that the latter is a duly appointed [b]arangay [c]hief [t]anod of Ambulong, Magdiwang, Romblon, while he was engaged in the performance of his official duties, inflicting upon the latter gunshot wounds in different parts of his body, thus performing all the acts of execution which should produce the felony of murder as a consequence, but nevertheless, did not produce it by reason of causes independent of the will of the accused and that is by the timely and able medical assistance rendered to the victim which prevented his death."[4]

Criminal Case No. 1971

"That on or about the 18[th] day of April 1994, at around 5:00 o`clock in the afternoon, in [B]arangay Ambulong, [M]unicipality of Magdiwang, [P]rovince of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused, with intent to kill, did then and there, by means of treachery, wilfully, unlawfully and feloniously attack, assault, and shoot with a shotgun locally called `pugakang' one Barangay Captain PERCIVAL ORBE, knowing that the latter is a duly elected barangay captain of Ambulong, Magdiwang, Romblon, while he was engaged in the performance of his official duties, inflicting upon the latter gunshot wounds in different parts of his body, thus performing all the acts of execution which should produce the felony of murder as a consequence, but nevertheless, did not produce it by reason of causes independent of the will of the accused and that is by the timely and able medical assistance rendered to the victim which prevented his death."[5]

The Information[6] in Criminal Case No. 1972, which charged appellant with direct assault with murder, was worded thus:

"That on or about the 18[th] day of April 1994, at around 5:00 o' clock in the afternoon, in [B]arangay Ambulong, [M]unicipality of Magdiwang, [P]rovince of Romblon, Philippines, and within the jurisdiction of this [H]onorable Court, the said accused with intent to kill, conspiring, confederating and mutually helping each other, did then and there, by means of treachery, willfully, unlawfully and feloniously attack, assault and

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> shoot with a shotgun locally called `pugakang' and strike with a long bolo, one ANTONIO MACALIPAY, knowing that the latter is a duly elected [b]arangay [k]agawad of Ambulong, Magdiwang, Romblon, while he was engaged in the performance of his official duties, inflicting upon the latter mortal wounds in different parts of his body which were the cause of his untimely death."[7]

In the Information[8] in Criminal Case No. 1973, appellant was charged with murder, as indicated hereunder:

> "That on or about the 18[th] day of April 1994, at around 5:00 o`clock in the afternoon, in [B]arangay Ambulong, [M]unicipality of Magdiwang, [P]rovince of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused, with intent to kill, did then and there, by means of treachery, wilfully, unlawfully and feloniously attack, assault and shoot with a shotgun locally called `pugakang' and strike with a long bolo, one EMILIANO `RENATO' SANTOS[9], alias EMY, inflicting upon the latter mortal injuries in different parts of his body which were the direct and immediate cause of his death."[10]

Finally, appellant was charged with illegal possession of firearm and ammunition in the Information in Criminal Case No. 1975, which we quote:

> "That on or about the 18[th] day of April 1994, at around 5:00 o`clock in the afternoon, in [B]arangay Ambulong, [M]unicipality of Magdiwang, [P]rovince of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused, with intent to kill, did then and there wilfully, unlawfully and feloniously have in his possession and under his custody and control, one (1) handgun locally called `pugakang' with one live ammunition, which he used in killing Barangay Kagawad Antonio Macalipay and Emiliano `Renato' Santos and [which was] confiscated by the police authorities."[11]

When arraigned on all the five charges on November 24, 1994, appellant, with the assistance of his counsel,[12] pleaded "not guilty."[13] In due course, he was tried and, thereafter, sentenced.

The Facts

Version of the Prosecution

The Office of Solicitor General summarized the evidence for the prosecution in this wise:[14]

> "In the early afternoon of April 18, 1994 at Ambulong, Magdiwang, Sibuyan Island, Romblon, Barangay Captain Percival Orbe was in his residence together with Barangay Kagawad Antonio Macalipay and Barangay Tanod Melchor Recto, appellant's cousin. They were trying to settle a land dispute involving Linda Rance and Cornelio Regis, Jr. While the meeting was in progress, Orbe was summoned by SPO4 Fortunato Rafol to proceed to the bodega of Rance.
>
> "There, they noticed that the padlock of the bodega was destroyed, and the palay stored therein, stolen. Forthwith, Barangay Kagawad Macalipay, who happened to be the chairman of the Barangay Agrarian Reform Committee (BARC), conducted an investigation.
>
> "SPO4 Rafol and SPO1 Male, also made their investigation and reported their findings to Linda Rance. At this point, Barangay Tanod Melchor Recto passed by. He saw SPO4 Rafol, Wilfredo Arce, [S]pouses Crestito and Linda Rance at the bodega. He went to Barangay Captain Orbe and inquired why they were there. Barangay Captain Orbe told him that the padlock of the bodega was destroyed and the palay, stolen. Orbe requested Melchor Recto to stay as he might be needed. Thereupon, Barangay Tanod Melchor Recto began his own ocular investigation.
>
> "While SPO4 Rafol and SPO1 Male were leaving the premises, the group of [A]ppellant Julio Recto, Cornelio Regis, Jr., Dante Regis, Melvar Relox, Teodoro de la Serna, Enrica Regis and Nida Regis arrived. The group stopped at the first `trampa' near the bodega. Barangay Captain Orbe advised them not to create trouble, but, Dante Regis pulled a piece of wood and threw it towards them. Thereafter, [A]ppellant Recto, while holding a

> balisong or fan knife, approached Barangay Captain Orbe. The latter responded by telling the former to surrender the balisong. Appellant stepped backward, opened his jacket and pulled out a gun, a de sabog. Upon seeing the gun, Barangay Captain Orbe retreated, while Barangay Kagawad Antonio Macalipay stepped forward with both arms raised and uttered the words: `Do not do it. We'll just settle this. (Ayoson ta lang ine).' Julio Recto, however, immediately pulled the trigger, hitting Barangay Kagawad Macalipay, causing him to fall down on the ground. Then Cornelio Regis, Jr. approached the fallen Macalipay and flipped his bolo at the latter who rolled and fell into the rice paddy.
>
> "Melchor Recto saw the shooting from his hiding place behind a concrete pillar. He then ran inside the old dilapidated bathroom of the bodega. Barangay Captain Orbe also followed. Inside the bathroom, Melchor Recto peeped through the window and saw [A]ppellant Recto fire his gun at Emilio Santos. Santos also fired his revolver at appellant and later, turned around and crawled. While crawling, Santos fired another shot towards Regis, Jr[.], but, the latter was able to reach and hack the former with a bolo.
>
> "Amidst the din, Percival Orbe and Melchor Recto heard [A]ppellant Julio Recto saying: `Where is that kapitan?' When Melchor could no longer see Julio Recto, he jumped out of the bathroom window and ran. While running, Julio Recto shot him hitting the latter's thigh. Barangay Captain Orbe also got out of the bathroom through the top and landed [o]nto the ricefield. Before he could take a step, he was also shot by [A]ppellant Julio Recto at his right elbow, but was still able to continue running and cross the southern portion of the ricefield. He caught up with the wounded Melchor Recto and both went their separate ways. On the other hand, both Barangay Kagawad Antonio Macalipay and Emiliano `Renato' Santos died due to multiple wounds inflicted on them by herein appellant." (citations omitted)

Version of the Defense

On the other hand, the trial court presented appellant's version of the incident, as follows:[15]

> "x x x. Julio Recto interposed self-defense and defense of his co-accused Cornelio Regis, Jr. x x x According to co-accused Julio Recto they were berated at about 12 meters away from the bodega and it was there that the late Emiliano Santos shot co-accused Cornelio Regis, Jr. and he was hit and he (Julio) retreated two (2) steps backward. Then, he took two (2) steps forward and said why are you like that. Alberto Rance, the son of Mrs. Linda Rance, shot him, hitting him on his left side. He ran towards Alberto Rance who shot him with the latter behind the concrete porch holding his gun with his two (2) hands resting on the concrete wall (porch) of the bodega, and with Emiliano Santos also holding his gun [which] he used in shooting Regis, Jr. The distance between Alberto Rance and the unarmed Julio Recto was 11 ½ meters when x x x Julio Recto r[a]n towards Alberto Rance[;] the latter ran and he saw Wilfredo Arce [turn] and [pick] up a gun and he grabbed the gun and while pulling it, it fired and he did not know whether it hit somebody. Emiliano Santos incredibly was no longer there to shoot him. However, Julio Recto was able to take possession of this gun from Wilfredo Arce, took cover behind a post and still managed to shoot Santos who was somewhere else. He threw the gun later on the disputed land and ran to the direction of the banana plantation of Regis, Jr. and he reached his house. Both of them were outside the house of Regis, Jr. when x x x [M]aritime [P]oliceman Morada and Galin arrived. x x x." (citations omitted, underscoring in original)

Ruling of the Trial Court

The trial court found that appellant had fired at a barangay tanod, Melchor Recto, who was at the crime scene "on the occasion of the performance of his official duties."[16] It added that appellant had shot a barangay captain, Percival Orbe, also "on the occasion of the performance of his official duties."[17]

The lower court ruled out treachery in the killing of Emiliano Santos, because there had been a gun duel between him and appellant. However, it convicted and sentenced appellant to death for the murder of Antonio Macalipay.

Because of the trial court's imposition of the death penalty, this review by the Supreme Court is mandatory and

automatic, without need of a notice of appeal.[18]

Assignment of Errors

In his Brief, appellant faults the court a quo with the following alleged errors:[19]

> I
>
> "The lower court erred in finding the accused-appellant guilty of direct assault in Criminal Case Nos. 1970 and 1972 which accordingly resulted in his being convicted of complex crimes in those cases.
>
> II
>
> "The lower court erred in finding the presence of the qualifying circumstance of treachery in Criminal Case No. 1972 which accordingly resulted in his being convicted of murder in that case."

In the interest of justice and despite appellant's anemic Brief, we deem it wise to review the entire assailed Decision, particularly the crimes imputed and the penalties imposed by the trial court.

The Court's Ruling

The Decision of the trial court should be MODIFIED.

Self-Defense and Defense of a Relative

Appellant contends that he committed the crimes attributed to him in self-defense and in defense of his uncle, Cornelio Regis Jr.

By invoking self-defense and defense of a relative, appellant plainly admits that he killed Antonio Macalipay and Emiliano "Renato" Santos and fired the shots that injured Melchor Recto and Percival Orbe. Thus, appellant has shifted the burden of evidence to himself. Consequently, to escape criminal liability, he must prove, by clear and convincing evidence, the existence of the essential requisites of self-defense; namely, (1) unlawful aggression on the part of the victim, (2) reasonable necessity of the means employed to prevent or repel it, and (3) lack of sufficient provocation on the part of the person resorting to self-defense.[20] For defense of a relative[21]to prosper, appellant must prove the concurrence of the first and the second requisites of self-defense and "the further requisite, in case the provocation was given by the person attacked, that the one making the defense had no part therein."[22]

Appellant miserably failed to discharge this burden. In fact, he was clearly the aggressor. Without unlawful aggression on the part of the victim, there can be no viable self-defense or defense of a relative.[23]

"There is unlawful aggression when the peril to one's life, limb or right is either actual or imminent. There must be actual force or actual use of weapon."[24] In this case, Antonio Macalipay was unarmed and actually trying to pacify appellant when the latter shot him. After shooting Antonio, appellant again cocked his gun, pointed it at Emiliano Santos and shot him. The latter's act of drawing his gun and firing at him was merely self-defense.

As for Melchor Recto and Percival Orbe, no aggression ever emanated from them during the entire incident. They were unarmed and in fact already running away from appellant when he shot them. Clearly, there was no unlawful aggression from any of the victims.

For purposes of clarity and simplicity, we deem it wise to discuss separately the crimes attributed to appellant and the proper penalties imposed by the trial court.

Crime and Punishment

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The trial court convicted appellant of four (4) crimes: two counts of the complex crime of qualified direct assault with frustrated homicide, one count of the complex crime of qualified direct assault with murder, and one count of homicide. We will now discuss each of these crimes.

Qualified Direct Assault with Frustrated Homicide (Criminal Case Nos. 1970 and 1971)

In these two cases, appellant claims that he "did not mind" the two victims because they were not his enemies. He, however, testified that the de sabog gun had merely misfired and hit them. The court a quo was correct in not giving credence to his attempt to paint the victim's injuries as the result of an accident. Evidence to be believed must be credible in itself.[25] His weak and incredible testimony cannot prevail over the positive and categorical testimonies of the prosecution witnesses stating that he deliberately shot them.

However, the trial court erred in convicting appellant of qualified direct assault with frustrated homicide.

Direct assault, a crime against public order, may be committed in two ways: first, by "any person or persons who, without a public uprising, shall employ force or intimidation for the attainment of any of the purposes enumerated in defining the crimes of rebellion and sedition;" and second, by any person or persons who, without a public uprising, "shall attack, employ force, or seriously intimidate or resist any person in authority or any of his agents, while engaged in the performance of official duties, or on occasion of such performance."[26] The first mode is tantamount to rebellion or sedition, without the element of public uprising. The second mode, on the other hand, is the more common form of assault, and is aggravated when: (a) the assault is committed with a weapon, or (b) when the offender is a public officer or employee, or (c) when the offender lays a hand upon a person in authority.[27]

An agent of a person in authority is "any person who, by direct provision of law or by election or by appointment by competent authority, is charged with the maintenance of public order and the protection and security of life and property, such as barrio councilman, barrio policeman and barangay leader, and any person who comes to the aid of persons in authority."[28] In the case at bar, the victim, Melchor Recto[29] -- being then the barangay chief tanod of Ambulong, Magdiwang, Romblon -- was clearly an agent of a person in authority. However, contrary to the findings of the trial court, he was not "engaged in the performance of his official duties" at the time he was shot. Neither was he attacked "on the occasion of such performance," as we will now show.

It must be emphasized that Melchor Recto was on his way home when he happened to pass by the bodega of the Rance couple. He testified as follows:

"PROSECUTOR MORTEL:

Q:

On April 18, 1994 at around 4:00 o'clock in the afternoon, you said you were in the ricefield gathering the harvested palay[;] what time did you leave that place?

A:

Nearing 5:00 o'clock already.

Q:

And in going to your house, do you remember if you ha[d] to pass by the bodega of Rance?

ATTY MONTOJO:

Leading, Your Honor.

COURT:

Leading.

PROSECUTOR MORTEL continuing:

Q:

Now, did you go to your house that afternoon?

A:

No, sir.

Q:

Why?

A:

Because when I pass[ed] in the bodega there were plenty of people.

Q:

Whose bodega are you referring to?

A:

Rance.

Q:

Do you know the name of the owner?

A:

Yes, sir.

Q:

Please give us the name?

A:

First owned by Jose Rance now owned by Crestito and Linda Rance.

Q:

What relation has this Crestito Rance to Jose Rance?

A:

Jose is the father of Crestito Rance.

Q:

And this Linda, what relation has she with Crestito Rance?

A:

Wife.

Q:

You said, that when you passed by the bodega on your way to your house there were people in that bodega, please give us [the] names of the people thereat whom you know?

A:

SPO4 Fortunato Rafol, SPO1 Male, Bgy. Captain Percival Orbe, Kag. Antonio Macalipay, Wilfredo Arce and Spouses Crestito and Linda Rance and those who were threshing palay thereat."[30]

Melchor explained that when appellant's group arrived, it was Barangay Captain Percival Orbe and Kagawad Antonio Macalipay who talked to the group. Melchor did not do anything to avert the tension. He only watched what was transpiring and later hid himself when the first shot was fired. He continued:

"PROSECUTOR MORTEL continuing:

Q:

Because of that, what did Orbe tell you as a barangay tanod?

ATTY. MONTOJO:

Leading, Your Honor.

COURT: Leading.

PROSECUTOR MORTEL continuing:

Q:

What else did he say?

A:

He told me not to leave because he might need me.

Q:

And did you remain?

A:

Yes, sir.

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Q:

As you were there, did you observe what [t]he policemen were doing?

A:

I observed [them] going there and through around [sic] the bodega.

x x x x x x x x x

Q:

Now later on, do you remember what the policemen did?

A:

I observed that the policemen were already passing the rice paddies towards the road.

Q:

And after they were gone . . . . By the way, who were these policemen whom you observed going towards the road, will you please name them?

A:

SPO4 Fortunato Rafol and Male.

Q:

Do you know the first name of SPO1 Male?

A:

No sir.

Q:

Now, after they were gone, do you remember if there were persons who arrived?

ATTY. MONTOJO:

Misleading.

COURT:

Leading.

PROSECUTOR MORTEL (continuing):

Q:

After they were gone, what happened?

A:

I saw Cornelio Regis, Jr., Julio Recto, Melver Relox, Dante Regis, Teodoro dela Serna, Nida Regis, Enrica Regis. I saw these seven (7) passing through the rice paddies towards the bodega.

x x x x x x x x x

PROSECUTOR MORTEL continuing:

Q:

Were these group of people able to reach the bodega?

A:

No, sir.

Q:

Why?

A:

They stopped on the first trampa that they reached.

Q:

And upon reaching that place, what happened?

A:

Dante Regis thr[e]w a piece of wood.

Q:

Going to what direction?

A:

Towards the bodega.

Q:

And when Dante Regis thr[e]w that piece of wood towards the direction of the bodega, what happened?

A:

The barangay captain, Percival Orbe, approached them and told them not to do it.

Q:

And what did you observe . . . . By the way, who was that barangay captain?

A:

Orbe.

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Q:

And what did you observe when [B]arangay [C]aptain Orbe [told] them not to do it?

A:

I observed that the group got angry so Percival Orbe retreated.

Q:

And when Percival Orbe approached the group, did he have any companion?

A:

Yes, sir.

Q:

Who?

A:

Kagawad Antonio Macalipay.

Q:

And when Percival Orbe retreated, what did Antonio Macalipay do?

A:

When the barangay captain retreated, Antonio Macalipay proceeded towards the group and stop[ped] at the second trampa coming from the bodega.

Q:

Now, when you reached that place of the second trampa, what happened?

A:

Julio Recto raised his jacket and pulled out a gun and pointed it to Antonio Macalipay.

INTERPRETER:

Witness standing and demonstrating.

PROSECUTOR MORTEL continuing:

Q:

And when the gun was pointed to Kagawad Antonio Macalipay, what did Antonio Macalipay do?

A:

He raised both hands.

INTERPRETER:

Witness demonstrating by raising his two (2) arms up with open palms as if in surrender, and said [`D]o not do it we will just settle this.[`]

PROSECUTOR MORTEL continuing:

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Q:

And after Macalipay had said that, what happened?

A:

Julio Recto shot him.

Q:

And what happened to Macalipay after being shot?

A:

Antonio Macalipay fell down backward.

INTERPRETER:

Witness demonstrating x x x fall[ing] backward.

PROSECUTOR MORTEL continuing:

Q:

And when you saw Antonio Macalipay fall down backward, what did you do?

A:

I hid behind a pil[l]ar?

x x x x x x x x x

Q:

After hiding behind the pil[l]ar, what did you do?

A:

I ran towards an old broken down bathroom. x x x."[31]

Thinking that appellant had already left the bodega, Melchor, while hiding inside the old bathroom for several minutes, decided to jump out of a broken down window[32]and ran towards the national road.[33]

Clearly, from his arrival at the scene of the crime to his departure therefrom, Melchor was not engaged in the performance of his official duties. Neither was he attacked on the occasion thereof.

This fact was corroborated further by the testimony of Linda Rance, who said that it was Orbe and Macalipay who had pacified appellant and his six companions. She testified thus:

"PROSECUTOR VICTORIANO continuing:

Q:

While they were discussing, what happened?

A:

When they were discussing, Dante Regis thr[e]w a piece of wood.

Q:

To what direction was that piece of wood thr[own] by Dante Regis?

A:

Going towards our group.

Q:

And how is this Dante Regis related to Cornelio Regis, Jr.?

A:

He is the son of Cornelio Regis, Jr.

Q:

When that piece of wood was thrown towards your direction, was somebody hit?

A:

No, sir.

Q:

Where did that piece of wood land?

A:

In front of our bodega.

Q:

Was there anything hit by that piece of wood?

A:

No, sir.

Q:

When that piece of wood was thrown, what followed next?

A:

They were already agitated.

Q:

Now, because of the agitation, what happened?

A:

Bgy. Captain Orbe was trying to pacify them.

Q:

What about Bgy. Kagawad Antonio Macalipay, what did he do?

A:

He was trying to pacify but they would not be pacified.

Q:

Now, when they refused to be pacified, what did Julio Recto do?

A:

Julio Recto turned his way (witness turning to her left side) and open[ed] his jacket and drew a gun.

Q:

When Julio Recto drew his gun, what did Antonio Macalipay do?

A:

Antonio Macalipay said, ["L]et us settle this (witness raising x x x both [of her] hands) and do not do it. (at the same time raising x x x both [of her] hands as if in surrender[])"].

INTERPRETER:

Witness demonstrating.

PROSECUTOR VICTORIANO continuing:

Q:

Now, [in] spite of what Barangay Kagawad Antonio Macalipay did, what happened?

A:

Julio Recto shot him once."[34]

Unquestionably, Melchor Recto was a barangay chief tanod; however, at the crime scene he was a mere bystander. Apparently, he was not acting and had no occasion to act in the performance of his official duties that afternoon. Thus, the attack on him did not amount to direct assault.[35]

We now determine the criminal liability of appellant with respect to the attack. He shot Melchor only once, but the latter sustained five gunshot entry wounds[36]all located at his backside, at the vicinity of his buttocks. Because the gun used by the former was a de sabog,[37] each bullet contained several pellets inside.[38] In other words, a single shot from a de sabog results in the spewing of several pellets. The nature of the weapon used for the attack and the direction at which it was aimed -- the victim's back -- unmistakably showed appellant's intent to kill.

However, for reasons other than his own desistance, appellant was not able to perform all the acts of execution necessary to consummate the killing, since the wounds he inflicted were not mortal. In United States v. Eduave,[39] this Court has held that if the wounds would not normally cause death, then the last act necessary to produce homicide has not been performed by the offender. Thus, appellant's liability amounted only to attempted, not frustrated, homicide.

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The penalty that is lower by two degrees[40]than that prescribed by law for consummated homicide shall be imposed upon appellant. After applying the Indeterminate Sentence Law, it shall be taken from the medium period, since there were no aggravating or mitigating circumstances proven.

In Criminal Case No. 1971, the trial court was correct in ruling that the attack on Percival Orbe - then a barangay captain, a person in authority[41] -- amounted to qualified direct assault, because he was attacked on the occasion of the performance of his duty. At the time, he was attempting to pacify appellant and to keep the peace between the two groups.

A felony "is frustrated when the offender performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator." In this case, the nature of the weapon used by appellant unmistakably shows that he intended to kill Orbe. However, like the wounds inflicted by the accused on Melchor Recto, those on Orbe were not fatal.

As evidenced by the Medico-Legal Certificate[42]prepared by Dr. Ramon D. Villanueva of the Romblon Provincial Hospital and the testimony given by Dr. Giovannie C. Fondevilla of the same hospital, Orbe sustained several gunshot wounds in the vicinity of his right elbow. Those injuries could not have caused his death. Moreover, according to Dr. Fondevilla, no surgical intervention was required; only medication was given to him[43] to prevent any secondary infection from setting in.[44]

Evidently, appellant had not yet been able to perform all the acts of execution necessary to bring about the death of Orbe, because the latter was able to run away after being fired at. Although appellant had already directly commenced the commission of a felony by overt acts (shooting Orbe with a de sabog), he was not able to consummate that felony for some reason other than his spontaneous desistance. Thus, he committed attempted homicide.

Given these circumstances, appellant should therefore be convicted of the complex crime of qualified direct assault with attempted homicide. To be imposed therefor should be the penalty for the most serious crime -- in this case qualified direct assault -- the same to be imposed in its maximum period.[45] The Indeterminate Sentence Law should also be applied in this case.

Qualified Direct Assault with Murder

(Criminal Case No. 1972)

In Criminal Case No. 1972, appellant does not question the finding of the trial court that he shot Antonio Macalipay. However, he submits that it erred in finding the presence of the qualifying circumstance of treachery. We agree.

First, the victim's companions outnumbered those of appellant. As shown by the pleadings and records of the case, his group consisted of seven individuals; the victims, sixteen.[46]

Second, the heated confrontation on April 18, 1994 arose as a consequence of an earlier judgment[47]of the trial court in favor of appellant's group. This case strained the relations of the parties who, after all, were related by blood and marriage. In fact, prior to this event, appellant -- believing that his uncle Cornelio Regis Jr. should get the landlord's share of the palay or rice harvest -- attempted to harvest the fields thrice: (1) in October 1993; (2) in December 1993; and, (3) in March 1994.[48] All of these attempts failed, because Linda Rance hired a group of bodyguards headed by the victim, Emiliano "Renato" Santos.[49] In short, the confrontation was not totally unexpected.

Third, both groups were armed. The exchange of gunfire was substantiated by the Medico-legal Certificates

presented by both the prosecution and the defense.[50] Moreover, the deceased Santos carried a gun which Alberto Rance, son of Crestito and Linda, had given him for his protection.[51]

Fourth, appellant's group asked the police station commander to assemble the workers of the disputed rice field on April 15, 1994 at the Municipal Building of Magdiwang, Romblon, to inform them of the trial court's Decision awarding the land to Cornelio Regis Jr. For this reason, the members of the group were to start collecting the landlord's share of the harvest starting April 18, 1994.[52]

Fifth, appellant was seen holding a balisong or fan knife during the heated confrontation, before he pulled out the shotgun and pointed it at the other group.[53] Macalipay, in a bold yet foolish attempt, stepped forward in front of appellant and told him: "Ayosan ta lang ini?[54] (No, don't, because we will just settle this)."[55] And "[s]imultaneously with the last word in the phrase [`]don't because we will just settle this,[']"[56] appellant fired his gun, killing the victim.

Evidently, the victim had all the opportunity to escape or defend himself from the aggression that was to ensue, yet chose not to grab the opportunity and instead placed himself in a position more open to attack.[57] Equally important, his vulnerable position had not been deliberately sought by appellant. It was thrust on the latter by the former himself. In short, appellant did not deliberately choose the mode of attack to kill the victim with impunity and without risk to himself.

Jurisprudence teaches us:

> "Treachery does not exist [when] the evidence does not show that appellant deliberately adopted a mode of attack intended to ensure the killing of [the victim] with impunity, and without giving the victim an opportunity to defend himself. Further, the shooting took place after a heated exchange of words and a series of events that forewarned the victim of aggression from appellant. In this case, it appears to have occurred on sudden impulse but preceded by acts of appellant showing hostility and a heated temper that indicated an imminent attack and put the deceased on guard.[58]
>
> "If the decision to kill was sudden, there is no treachery, even if the position of the victim was vulnerable, because it was not deliberately sought by the accused, but was purely accidental.[59]
>
> "When there is no evidence that the accused has, prior to the moment of the killing, resolved to commit the crime, or there is no proof that the death of the victim was the result of meditation, calculation or reflection, treachery cannot be considered."[60]

Section 16 of Article 14 of the Revised Penal Code states that "there is treachery when the offender commits any of crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make."

In this case, appellant was out in the open during the entire span of time from the heated discussion, to the brewing of the violence, and up to the shooting of Macalipay. At the time, his every action, which indicated the imminence of more violence, was visible to them -- to the victim and the latter's companions. Appellant was actually vulnerable to any attack that they could have made at the time, had they chosen to. His mode of attack was therefore not without risk to himself. Absent treachery, the killing is homicide, not murder.

Considering that Antonio Macalipay was a kagawad who was in the actual performance of his duties when he was shot, the attack on him constituted direct assault.

Applying the provisions of Articles 148 (direct assault), 249 (homicide) and 48 (penalty for complex crimes), appellant should be held liable for the complex crime of qualified direct assault with homicide. The penalty to be

imposed on him should be for homicide, which is the more serious crime, to be imposed in the maximum period. This penalty shall comprise the maximum of his indeterminate sentence, and the minimum shall be within the range of the penalty next lower than that prescribed for homicide.

Homicide (Criminal Case No. 1973)

We sustain appellant's conviction for homicide in Criminal Case No. 1973 because, in the words of the trial judge: "The late Emiliano Santos was only beaten to the draw by co-accused Julio Recto. It was a gun duel between the two."[61] In his Brief, appellant hardly disputed this holding. Neither do we. The maximum of the penalty imposed by the court a quo in this case was, however, taken from the minimum period of the penalty for homicide. Considering that no mitigating or aggravating circumstances were proven, the maximum of the indeterminate sentence in this case should be taken from the medium period.

WHEREFORE, the Decision dated April 2, 1997, issued by the Regional Trial Court of Romblon, is hereby MODIFIED as follows:

First, in Criminal Case No. 1970, appellant is hereby CONVICTED of attempted homicide and sentenced to suffer imprisonment for an indeterminate penalty of four (4) months of arresto mayor as minimum, to four (4) years and two (2) months of prision correccional as maximum.

Second, in Criminal Case No. 1971, appellant is hereby CONVICTED of the complex crime of qualified direct assault with attempted homicide and is hereby sentenced to suffer an indeterminate penalty, of six (6)months of arresto mayor as minimum, to six (6) years of prision correctional as maximum.

Third, in Criminal Case No. 1972, appellant is hereby CONVICTED of qualified direct assault with homicide aggravated by the use of a weapon and is sentenced to suffer an indeterminate penalty of twelve (12) years of prision mayor as minimum, to twenty (20) years of reclusion temporal as maximum. We AFFIRM the award of P50,000 as indemnity ex delicto.

Fourth, in Criminal Case No. 1973, the trial court's judgment convicting appellant of homicide and awarding to the victim's heirs an indemnity ex delicto of P50,000 is AFFIRMED; but the maximum of the penalty imposed is increased to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal.

All other portions of the trial court's disposition that were not modified in the above pronouncement are deemed AFFIRMED.

No pronouncement as to costs.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Kapunan, Mendoza, Quisumbing, Pardo, Buena, Ynares-Santiago, De Leon, Jr., and Sandoval-Gutierrez, JJ., concur.
Vitug, J., on official leave.

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[1] Penned by Judge Placido C. Marquez.

[2] Assailed Decision, pp. 19-20; rollo, pp. 64-65; records, pp. 165-66.

[3] Except for the Information charging appellant with illegal possession of firearm and ammunition, which was dated October 18, 1994, all the four Informations were dated September 22, 1994. Assailed Decision, pp. 2-4; rollo, pp. 10, 48-50.

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[4] Information dated September 22, 1994; quoted in the assailed Decision, p. 2; rollo, p. 48.

[5] Information dated September 22, 1994; quoted in the assailed Decision, pp. 2-3; rollo, pp. 48-49.

[6] Appellant was charged together with Cornelio Regis Jr.

[7] Rollo, p. 10; records, p. 1.

[8] Both appellant and Cornelio Regis Jr. were charged in the Information.

[9] Also called "Emilio."

[10] Information dated September 22, 1994; quoted in the assailed Decision, p. 3; rollo, p. 49.

[11] Information dated October 18, 1994; quoted in the assailed Decision, p. 4; rollo, p. 50.

[12] Atty. Peter M. Montejo.

[13] Order dated November 24, 1994; records, p. 22.

[14] Appellee's Brief, pp. 4-10; rollo, pp. 147-53. The Brief was signed by Solicitor General Ricardo P. Galvez, Asst. Solicitor General Amy C. Lazaro-Javier and Associate Solicitor Joey Luis B. Wee.

[15] Assailed Decision, pp. 6-7; rollo, pp. 51-52. Appellant's Brief, signed by Atty. Peter M. Montojo, did not narrate the defense's statement of facts. It merely said: "Accused-appellant Julio Recto interposed self-defense and defense of his co-accused Cornelio Regis, Jr." See appellant's Brief, p. 7; rollo, 98.

[16] Decision, p. 8; rollo p. 117.

[17] Ibid.

[18] This case was deemed submitted for resolution on March 30, 2001, upon receipt by this Court of appellant's Reply Brief signed by Atty. Gordon S. Montojo, collaborating counsel for appellant.

[19] Ibid.

[20] Article 11(1) of the Revised Penal Code.

[21] This relative must either be "his spouse, ascendants, descendants, or legitimate, natural or adopted brothers or sisters, or his relatives by affinity in the same degrees, and those by consanguinity within the fourth degree, x x x." Article 11(2) of the Revised Penal Code.

[22] Ibid.

[23] People v. Bautista, 312 SCRA 475, August 17, 1999; People v. Antonio, 303 SCRA 414, February 19, 1999; People v. Sazon, 189 SCRA 700, September 18, 1990; People v. Bayocot, 174 SCRA 285, June 28, 1989.

[24] People v. Crisostomo, 108 SCRA 288, 298, October 23, 1981, per Fernandez, J.

[25] People v. Saban, 319 SCRA 36, November 24, 1999; People v. Capco, 319 SCRA 403, November 29, 1999; People v. Milan, 311 SCRA 461, July 28, 1999.

[26] Article 148 of the Revised Penal Code.

[27] People v. Abalos, 258 SCRA 523, 532, July 9, 1996, citing Aquino, R. C., The Revised Penal Code, Vol. II, 1987 ed., p. 146.

[28] Art. 52. Revised Penal Code, as amended.

[29] He is the younger brother of appellant.

[30] TSN, February 15, 1995, pp. 7-8.

[31] Ibid., pp. 11-17.

[32] Id., p. 23.

[33] Id., p. 26.

[34] TSN, June 9, 1995, pp. 9-12.

[35] United States v. Marasigan , 11 Phil. 27, July 25, 1908.

[36] Medico-legal Certificate, Exhibit E; records, p. 87.

[37] TSN, February 1, 1995, p. 25. Also referred to as a "pugakang"; TSN February 23, 1995, p. 26.

[38] TSN February 1, 1995, p. 38

[39] 36 Phil. 209, February 2, 1917.

[40] Art. 51, Revised Penal Code.

[41] Art. 152 of the Revised Penal Code.

[42] Medico-legal Certificate of Percival Orbe signed by Dr. Ramon D. Villanueva; records, p. 89.

[43] TSN, December 20, 1995, p. 13.

[44] Ibid., p. 11.

[45] Art. 48, Revised Penal Code.

[46] Antonio Macalipay, Emiliano "Renato" Santos, Melchor Recto, Percival Orbe, Wilfredo Arce, Juvenal Arce, Orlando Robea, Boy Carullo, Jose Robea, Anunciacion Robea, Josefa Marin, Amboy de Asis, Crestito Rance, Linda Rance, Alberto Rance, Paul Rance; TSN, August 14, 1984, pp. 11, 34.

[47] Cornelio Regis Jr., Plaintiff v. Spouses Crestito Rance and Linda Rance, Civil Case No. V-1101; ibid., p. 21

[48] TSN, June 9, 1995, pp. 35-36.

[49] Ibid., p. 31. Although Linda Rance denied this, we believe that it will explain why she spent P20,000 for the death of Santos and gave the family of Antonio Macalipay, the barangay tanod of their community, the sum of only P2,000. See ibid., pp. 23-24.

[50] See Exhibits "A," "B," "E" and "G"; records, pp. 83-89; and Exhibits "1," "2," "3" and "4"; records, pp. 124-127.

[51] TSN, February 22, 1996, p. 8.

[52] TSN, April 22, 1996, pp. 6-7.

[53] TSN, August 14, 1995, p. 44.

[54] TSN, January 24, 1995, p. 17.

[55] TSN, August 14, 1995, pp. 44-45.

[56] Ibid., p. 45.

[57] TSN, February 1, 1995, p. 38

[58] People v. Demonteverde , 290 SCRA 175, 184, May 19, 1998, per Regalado, J.

[59] People v. Cadag, 2 SCRA 388, 393-394, May 31, 1961, per De Leon, J.

[60] United States v. Balagtas and Jaime, 19 Phil. 164, 171, March 22, 1911.

[61] Decision, p. 10; rollo, p. 119; records, p. 156.

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