

JOVITO CABUSLAY, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND SANDIGANBAYAN (THIRD DIVISION),RESPONDENTS.

G.R. No. 129875. September 30, 2005

Ponente: TINGA, J.

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TINGA, J.:

Assailed in this petition for review[1] under Rule 45 of the 1997 Rules of Civil Procedure is the Decision[2] dated 25 June 1997 of the Sandiganbayan in Criminal Case No. 19586 finding Jovito Cabuslay, petitioner herein, guilty beyond reasonable doubt of the crime of homicide and sentencing him as follows:

WHEREFORE, accused Celso G. Regencia, Rosello Canoy, Nilo Montebon and Gerry Cane are ACQUITTED on reasonable doubt. Accused Jovito Cabuslay is found GUILTY beyond reasonable doubt of the crime of homicide and is sentenced to an indeterminate penalty of imprisonment of Ten (10) years and One (1) Day of prison mayor as minimum, to Fourteen (14) Years, Eight (8) Months and One (1) Day of Reclusion Temporal, as maximum, with all the accessory penalties provided for by law, and to indemnify the heirs of Pacquito Umas-as in the amount of Fifty Thousand Pesos (P50,000.00) for actual damages and Fifty Thousand Pesos (P50,000.00) for moral damages, and to pay the costs.

SO ORDERED.[3]

In an Information[4] dated 10 August 1993, petitioner SPO2 Jovito Luna Cabuslay, Senior Inspector Celso Gomera Regencia, SPO4 Rosello Rodriguez Canoy, C2C Nilo Rico Montebon and C2C Gerry Orillaneda Cane were charged with murder, committed as follows:

That on or about August 5, 1992, in Kauswagan, Lanao del Norte, Philippines, within the jurisdiction of this Honorable Court, the said accused, SENIOR INSPECTOR CELSO G. REGENCIA, SPO4 ROSELLO CANOY, SPO2 JOVITO CABUSLAY, C2C NILO MONTEBON AND C2C GERRY CANE, all public officers, being then members of the Philippine National Police assigned at the PNP Provincial Headquarters of Lanao del Norte, acting in the capacities aforesaid and conspiring, confederating and helping one another, while manning amobile checkpoint at Libertad, Kauswagan, Lanao del Norte, thus committing the offense in relation to office, and with intent to kill, did then and there wilfully, unlawfully, feloniously and treacherously shoot PAQUITO UMAS-AS, with their firearms, thereby inflicting mortal wounds upon the latter which caused his instantaneous death.[5]

On arraignment, petitioner and his co-accused all pleaded not guilty. Forthwith, trial ensued with the prosecution presenting as witnesses Dr. Tammy Uy, Bernabe Purificacion Arenga, Leoncio Tagapulot Zaragosa and Generoso Caayao Umas-as.

The prosecution presented evidence proving the following as facts:

Paquito Umas-as, 34, was one of the four children of Generoso Umas-as of Bulua, Cagayan de Oro City. Still single, Paquito earned a living as a collector of payments for assorted articles such as jackets, mats, thermos and plates that he sold on credit. Paquito collected as much as P70,000.00 for a period of four months and the net

profit of such collections was divided equally between him and his employer. [6]

In collecting payments, Paquito used a motorcycle he bought on credit from his employer.[7] His collection brought him to such places as Manticao, Iligan and Kolambogan.[8] He rented a house in Iligan City but every fifteenth (15th) day of the month, Paquito would go home to his family to give them a sack of rice.[9]

At around 8:30 in the morning of 5 August 1992, Leoncio Tagapulot Zaragosa, a refrigeration technician helper and resident of Roosevelt Street, Iligan City, was conversing with Felix Lauriana[10] near the school building in Lapayan, Libertad, Kauswagan, Lanao del Norte when a Hammer (Hummer) truck parked in front of them.[11] Four policemen alighted, followed by a driver. The police thereafter halted the collector who was riding a motorcycle from Lapayan. The collector was wearing a blue denim jacket with folded sleeves and blue denim pants.[12]

The police asked the collector to show his identification card (ID). The collector took the ID out of his left pocket and when it reached the "front man," one of the policemen, who Zaragosa later verified as the petitioner, opened fire at the collector whose right hand was then raised. The four other policemen meanwhile had their firearms pointed at the collector. [13]

Petitioner, who was four meters away from the collector, consumed the entire magazine of his M-16 armalite in firing at him. The collector fell to the ground and was still moving when the police placed him on board a vehicle and brought him to Kolambogan.[14] One of the policemen rode on the collector's motorcycle and likewise headed for Kolambogan.[15]

Upon the request of Pedro P. Legaspi, barangay captain of Bulua, Cagayan de Oro City,[16] NBI forensic chemist Bernabe P. Arenga examined the victim's body, later identified as Paquito Umas-as, on 10 August 1992 to determine the presence of gunpowder nitrates on his hands. Arenga's report revealed that the victim was negative for gunpowder nitrates.[17] Arenga opined that on the average, nitrates would be lost within a seventy-two (72)-hour period; that there had been instances when the substance would remain on a living person up to nine days; that nitrates could not penetrate rubber gloves; that no amount of washing can remove the nitrates; and that even the application of formalin does not affect the presence of nitrates in the hands of a person.[18]

On 11 August 1992, Dr. Tammy Uy, a medico-legal officer of the NBI in Cagayan de Oro City, conducted a post-mortem examination on the body of Paquito Umas-as. At the time of examination, the victim's body had already been cleaned and embalmed. Dr. Uy's examination disclosed that the cause of death was severe hemorrhage secondary to multiple gunshot wounds. There were eight (8) gunshot wounds and each wound was considered fatal.[19]

To prove damages, Generoso Umas-as testified that he lost consciousness upon learning of the death of his son Paquito. Paquito's family spent P8,000.00 for the wake and P10,000.00 for his burial. Paquito had left his father P12,000.00 to pay for some appliances the former had bought; but the latter, to underwrite funeral expenses, still had to sell his land for P100,000.00 only P25,000.00 of which had been paid in advance by the buyer. However, Generoso could not remember where he placed the receipts for the wake and burial expenses.[20]

The defense presented a different version of the commission of the crime. Petitioner presented as witnesses Julmunier Akbar Jubail, Celso Gomera Regencia and Jovito Luna Cabuslay.

Police Superintendent Julmunier A. Jubail, Provincial Director of the Philippine National Police (PNP), Lanao del Norte Command stated that he had received a reliable intelligence report of a plot to assassinate the Mayor and Vice-Mayor of Kauswagan, Lanao del Norte and Governor Abalos and his family. In response to the intelligence report, he dispatched a team of PNP personnel to conduct mobile checkpoints along the national highways in

several municipalities and to check on people who would possibly carry out the plot. Jubail claims that the intelligence report was proven accurate after a few months because the Vice-Mayor of Kauswagan was killed in Samborong, Linamon and in December of the same year, Governor Abalos was assassinated in Iligan City.[21]

The team headed by Senior Inspector Celso G. Regencia included SPO4 Rosello Canoy, SPO2 Jovito Cabuslay, C2C Nilo Montebon and C2C Gerry Cane. Their area of responsibility consisted of the twenty-two (22) municipalities of Lanao del Norte. In full military outfit, save for Canoy as he was assigned to the Intelligence Operatives Command, the men established a mobile checkpoint on 5 August 1992 at the national highway, Barangay Libertad, Kauswagan, Lanao del Norte for the purpose of intercepting armed men who intend to carry out the assassination plot.[22]

At about 8:30 in the morning, a man riding on a red Honda motorcycle[23] going to the direction of Pagadian City approached the mobile checkpoint. The motorcycle rider was allegedly wearing a black bonnet, sunglasses, sweatshirt and gloves that covered the half portion of his fingers.[24]

Regencia testified that he signaled the motorcycle rider to stop at the right side of the road. He asked for the identification card of the motorcycle rider who pretended to reach for his wallet, but instead pulled out a gun. He heard a shot and his thigh went numb. As he rolled to the ground, he heard a volley of gunshots after which petitioner approached him. Regencia then approached the motorcyclist and removed his bonnet to be able to identify him. Regencia later found out that the motorcycle rider was shot by petitioner. [25]

Regencia ordered his men to load the motorcycle rider to the truck. The victim later identified as Paquito Umas-as was still alive when he was loaded on the hummer vehicle to be brought to a hospital, but was pronounced dead on arrival by Dr. Caga, the attending physician. Regencia then asked that he be given first-aid treatment for the wounds he sustained. He thereafter turned over the rider's motorcycle, sunglasses and revolver to the police station at Kauswagan. And after bringing the victim's body to a funeral home in Kolambugan, he proceeded to Baroy General Hospital where his wounds were treated by a certain Dr. Fabin.[26]

To prove that he was wounded during the incident, Regencia showed to the court a quo the scars caused by the gunshot wounds. There were three scars, one of which was the entry of the bullet and the other two were splinter wounds. He said that the bullet used was the kind that splinters upon hitting an object. He presented a medical certificate under the signature of Dr. Demterio U. Opamen, Jr.[27]

For his defense, petitioner confirmed Regencia's testimony that the latter had directed an approaching motorcyclist to stop at the right side of the highway. He heard Regencia ask the motorcycle rider in Visayan dialect to show his identification card. Cabuslay then saw Paquito Umas-as shoot Celso Regencia. This and his belief that he was the next target prompted him to shoot the motorcycle rider with his M-16.[28]

Police Superintendent Jubail was immediately informed of the incident and on the basis of Regencia's account, he sent out a "Spot Report"[29] to inform Recon 9 and 13. The report is couched as follows:

"SPOT REPORT x x x CMM SPO2 JOVITO CABUSLAY CMM INSP REGENCIA'S BACK-UP OPEN FIRE (sic) HITTING AND FATTALY (sic) WOUNDING SAID UNIDENT(IFIED) PERSON WWITH (sic) MULTIPLE GUNSHOT WOUNDS IN HIS BODY AND DIED ON THE SPOT PD RESPONDING PNP ELEMETS RECOVERED FROM THE VICTIM'S BODY ALFA CAL. 38 REVOLVER SMITH AND WESSON (HM) SN 236701 WITH ONE (1) EMPTY SHELL AND 5 UNSPENT AMMO x x x "

The incident found its way to the police blotter of the police station of Kauswagan, Lanao del Norte.[30] It is embodied in a Certification[31] signed by Inspector Fulgencio dela Pena Raguine, Chief of Police, issued at the request of Atty. Arthur Abundiente for trial purposes and formulated in this wise:

Police Blotter Page Nr. 496-Entry Nr. 9187 & 9188=

050810H Aug 1992 – SPO3 Nestor S Ortiz, Intel NOR this station, left stn with elements from Lanao del Norte PNP under INSPECTOR CELSO G REGENCIA PNP and proceeded to Libertad, Kauswagan, LN to follow-up suspects allegedly hired for killing Mpl Mayor Myron B. Rico of Kaus, LN.

050835H Aug 1992 – SPO3 Nestor Ortiz PNP returned station informed that suspects were intercepted at Libertad, Kaus, LN but when confronted by the PNP team, fired and shot INSPECTOR CELSO G REGENCIA PNP using cal. 38 revolver (sic) (Homemade) hitting on his right thigh prompting SPO3 Cabustay (sic), fired back to the suspect hitting at the chest causing the instantaneous death of the suspect. One cal. 38 revolver (sic) (Homemade) with 5 live ammos and one empty shell at the chamber, one rayban (sunglass) and one motorcycle (Honda-Camel backtype) color red with out plate Nr.

Police Blotter Page Nr. 497- Entry Nr.9191=

081240H Aug 1992 – Romeo Umas-as, 42 years old x x x.

Police Blotter Page Nr. 501-Entry Nr.9228=

251315H Aug 1992 – Impounded Honda Motorcycle x x x.

Police Blotter Page Nr. 508-Entry Nr. 9100=

021130H Oct 1992 – COP Bartolini RD got the one deposited rev. cal. 38 SW S#236701 w/ (4) four live ammo and one empty shell past 30th day of Sep 92 for NBI examination at Cagayan de Oro City.

Petitioner justified the shooting of Paquito Umas-as because he believed that he would be the next person to be shot at by the victim; and having acted in defense of his person and that of his superior officer, he asserted before the court a quo that he has no criminal liability because of the attendance of the following circumstances: (a) unlawful aggression on the part of the victim; (b) reasonable necessity of the means employed to prevent or repel the unlawful aggression of the victim; (c) lack of sufficient provocation on his part, and in the case of defense of his superior officer, he was not induced by revenge, resentment, or other evil motives. All of these requisites being present, petitioner claimed there was legal justification for shooting Paquito Umas-as.[32]

The Sandiganbayan however gave credence to the version of the prosecution and rejected the version of petitioner. So, it found him guilty beyond reasonable doubt of the crime of homicide. It accorded full faith and credence to the testimony of Zaragosa as it was "categorical, straightforward, spontaneous and consistent." Moreover, it observed that no proof was adduced to show that Zaragosa was moved by some evil motive to falsely testify against the accused Cabuslay.[33]

The Sandiganbayan likewise noted grave deficiencies in the evidence of the defense as follows: (1) The physical existence of the handgun allegedly used by the victim Paquito was not established as the same was not presented before the court during the trial;[34] (2) The affidavit executed by Gualberto Dayot Pasco—presented by the defense to impeach the credibility of Zaragosa—was taken under intimidating and dubious circumstances, which fact creates doubt as to the affidavit's voluntariness and credibility;[35] (3) The medical certificate purportedly evidencing that Regencia had been shot has no probative value as the doctor who executed the same did not testify during trial. Notably, the medical certificate was executed by a doctor different from the one who treated Regencia's wound;[36] (4) The number of gunshot wounds inflicted upon the victim betrays petitioner's claim of reasonable necessity of the means used to repel the unlawful aggression allegedly displayed by the victim.[37]

Hence, petitioner filed the instant petition before the Court, insisting that the Sandiganbayan erred in not crediting him the justifying circumstance of self-defense or defense of a stranger or the lawful exercise of a right or

office.[38]

Pursuant to the Court's Resolution[39] dated 3 September 1997, the Office of the Solicitor General (OSG) submitted before the Court a Manifestation and Motion In Lieu Of Comment[40] to aid the resolution of the instant petition. In said manifestation, the OSG stated that it is the Office of the Ombudsman which should represent the People in cases elevated to the Court from the Sandiganbayan except in cases filed under Executive Orders Nos. 1, 2, 14, and 14-A issued in 1986. Nevertheless, it opined that the conviction of petitioner should be reversed because the evidence of the prosecution when pitted against that of the defense "may not stand close scrutiny." It also asserted that the ponente of the appealed decision was not yet a member of the Third Division when the witnesses testified and when the parties presented their evidence; hence, the applicability of the Court's ruling in *People v. Gutual*,[41] that no respect can be accorded to the trial court's findings of fact where the judge who penned the questioned decision heard only one of the witnesses and only at the sur-rebuttal stage.[42]

In its Comment,[43] the Office of the Ombudsman through the Office of the Special Prosecutor seeks the denial of the instant petition on the ground that the defense failed to impeach the credibility of Zaragosa. It agrees with respondent court that petitioner's story was contrary to human experience and hence, it correctly debunked self-defense and defense of a stranger as grounds for petitioner's acquittal.[44]

The petition is without merit.

While the rule that the factual findings of the court a quo are generally not disturbed on appeal because the trial judge had the best opportunity to observe them and the manner by which they testify is concededly not applicable to the instant case considering that the ponente of the assailed Decision was not the one who heard all the witnesses, nevertheless, after a careful review of the records of the case, the Court finds no reason to disturb the conclusions reached by respondent court. As held in *Hugo v. Court of Appeals*,[45] "the efficacy of a decision is not necessarily impaired by the fact that the ponente only took over from a colleague who had earlier presided over the trial. For it does not follow that a judge who was not present during the trial cannot render a valid and just decision."

Moreover, it should be stressed that the Sandiganbayan, which functions in divisions of three Justices each, is a collegial body which arrives at its decisions only after deliberation, the exchange of view and ideas, and the concurrence of the required majority vote.[46]

Simply put, the ponente of the assailed Decision is not the Third Division of the Sandiganbayan. He alone does not speak for and on behalf of his Division. Each Division of the Sandiganbayan is a three-man body whose members each have one vote to cast in every deliberation concerning a case or any incident therein that is within its jurisdiction.

We have minutely scrutinized the assailed Decision and find it amply supported by the evidence on record.

Petitioner claims that he acted in self-defense and in defense of Regencia.

One who invokes self-defense admits responsibility for the killing. Accordingly, the burden of proof shifts to the accused who must then prove the justifying circumstance. He must show by clear and convincing evidence that he indeed acted in self-defense, or in defense of a relative or a stranger. With clear and convincing evidence, all the following elements of self-defense must be established: (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 claiming self-defense.[47]

Self-defense, like alibi, is a defense which can easily be concocted. It is well-settled in this jurisdiction that once

an accused has admitted that he inflicted the fatal injuries on the deceased, it is incumbent upon him in order to avoid criminal liability, to prove the justifying circumstance claimed by him with clear, satisfactory and convincing evidence. He cannot rely on the weakness of the prosecution but on the strength of his own evidence, "for even if the evidence of the prosecution were weak it could not be disbelieved after the accused himself had admitted the killing." [48] Thus, petitioner must establish with clear and convincing evidence that the killing was justified, and that he incurred no criminal liability therefor.

In order that defense of a stranger may be appreciated, the following requisites must concur: (1) unlawful aggression by the victim; (2) reasonable necessity of the means to prevent or repel it; and (3) the person defending be not induced by revenge, resentment or other evil motive. [49]

Unlawful aggression is the first and primordial element of self-defense. Of the three requisites, it is the most important. Without it, the justifying circumstance cannot be invoked. If there is no unlawful aggression, there is nothing to prevent or repel. [50]

Unlawful aggression refers to an attack or a threat to attack, positively showing the intent of the aggressor to cause injury. It presupposes not merely a threatening or an intimidating attitude, but an actual, sudden and unexpected attack or an imminent danger thereof, which imperils one's life or limb. Thus, when there is no peril, there is no unlawful aggression. [51]

It is crucial to ask whether the victim Paquito was an unlawful aggressor. We answer this question in the negative. Aggression to be unlawful, must be actual and imminent, such that there is a real threat of bodily harm to the person resorting to self-defense or to others whom that person is seeking to defend.

Petitioner asserts that he was the victim's next target, thus the need to shoot the victim in self-defense. His claim should be disbelieved. As he himself had explicitly testified before respondent court, the hummer jeep was behind him and was parked about three to four meters from the national highway. [52] He also stated that Paquito could not have seen the hummer jeep because it was obscured by Muslim houses. [53] It only follows that if from Paquito's perspective, he cannot see the hummer jeep which is a fairly large vehicle, then he could not have seen petitioner as well. If Paquito cannot see petitioner from where he was positioned, then Paquito could not have possibly aimed to shoot at petitioner. Petitioner's contention therefore that there was an imminent threat of bodily harm coming from Paquito upon his person is at best illusory. There was no peril, ergo, there was no unlawful aggression.

It should also be recalled that at the time, Cane was on top of the hummer jeep manning the machine gun. [54] If Regencia had indeed been shot as the defense insists, then Cane was better situated to defend Regencia. It is implausible how an officer like him, in such a strategic position and trained in the operation of the said weapon could have omitted firing a shot in Regencia's defense. More to the point, it is beyond credulity that the outbursts of gunfire hardly elicited any reaction from the other police officers who were only a few meters away from the crime scene and who continued conducting their search on the bus which was then about to pass the checkpoint. [55]

Likewise noteworthy is the fact that after the second burst of fire on Paquito, knowing that Paquito was still alive [56] and in all probability was still holding a handgun, [57] petitioner chose to assist Regencia instead of making sure that Paquito had been immobilized and disarmed, basic to a policeman's training.

In addition, the claim of the defense that Paquito shot Regencia on his right thigh is untenable. Petitioner would have the Court believe that Paquito dared challenge five policemen, four of them in full battlegear, at a checkpoint and armed with only a handgun. This is contrary to ordinary human experience, as well as the human instinct

which is to flee for dear life and seek safety. If indeed Paquito was armed and had criminal designs in his mind, the natural tendency upon seeing a checkpoint ahead would be to abort one's plans and leave the premises immediately. Petitioner's story not only was contrary to the ordinary course of nature and the ordinary habits of life, in all appearances it was also contrived.[58] Respondent court was correct in rejecting it.

We also confirm that the medical certificate presented by Regencia to prove that he had been shot by the victim has no probative value. The physician who signed the same was never presented as witness for the defense. We also note that the physician who signed said medical certificate, a certain Dr. Demterio U. Opamen, Jr., is different from the doctor who according to Regencia had treated his wounds.[59]

It is also worthy of note that the defense never presented in evidence the gun Paquito allegedly use to shoot Regencia. The gun was also not clearly identified. Unlawful aggression on the part of the victim must be positively proved and said gun would have been a vital evidence to establish this requisite.

Petitioner, however, insists that he would have presented the gun had not respondent court pressured him to rest his case and submit it for decision. Such contention hardly inspires belief. Records reveal that petitioner never made it known to respondent court that the defense would be presenting the gun allegedly used by Paquito. What the defense did manifest was their intention to present one Major Bartolino to testify that he had received the gun allegedly used by Paquito and that he had brought it to the NBI on 30 September 1992 for examination. It should be underscored that the defense was not even sure that there was an NBI report on said examination. The counsel for the defense manifested before respondent court, as follows:

ATTY. ABUNDIENTE:

x x x

I intended, Your Honor, Please, to present two more witnesses, Major Bartolini who received the gun and he will testify on this particular testimony that he was the Station Commander of the municipality of Kauswagan, Lanao del Norte at the time of the incident and then he received this gun from the team of Capt. Regencia on August 5, 19 (sic) and that he took the gun for NBI Examination sometime in the month of October, 1992, no, on the 30[th] day of September, 1992.

CHAIRMAN:

This was covered by police blotter?

ATTY. ABUNDIENTE:

Yes, Your Honor.

CHAIRMAN:

You don't need the testimony of Bartolini, but do you have the report of the NBI?

ATTY. ABUNDIENTE:

That is why, Your Honor, because we have not received any communication from Bartolini . . .

CHAIRMAN:

How did you come to know that Bartolini sent this firearm to the NBI for examination? . . .

ATTY. ABUNDIENTE:

Because it is stated in the blotter, Your Honor, . . . dated September 1992 for NBI examination in Cagayan de

Oro City, Entry No. 91000, page 108 . . .

CHAIRMAN:

Does it matter – whether you can prove the examination report of the NBI or not?

ATTY. ABUNDIENTE:

I don't know if there was a report of the NBI examination . . .

CHAIRMAN:

Precisely . . ."[60]

The defense was well aware of the relevance of the NBI report to prove their allegations that the victim was carrying a gun and used the same on Regencia, especially since the victim was reported to be negative of nitrates on his hands. No cogent reason could be thought of for the failure to secure a copy of the report or even know of its existence. It should be noted that the examination was made as early as September 1992. A party's failure to produce evidence, which if favorable would naturally have been produced, is open to the inference that the facts were unfavorable to his case.[61] This Court can only conclude that said gun never existed, and this explains the failure of the defense to present it before respondent court. Thus, it is immaterial to delve on the issue raised by the petitioner on the discrepancy of the make of the gun as noted by respondent court in its Decision.

Parenthetically, petitioner stresses that the victim had tested negative for gunpowder nitrates as the latter had been wearing gloves at the time of the incident. This claim runs counter to his[62] and Regencia's[63] testimony that the only things recovered from Paquito and which were turned over to the Provincial Police Command were the victim's motorcycle, sunglasses and the alleged gun. The police blotter reporting the incident confirms their testimonies. Interestingly, said police blotter also makes no mention that gloves were recovered from the victim.[64]

Anent the credibility of Zaragoza, the sole prosecution eyewitness on whose testimony the version of the prosecution is anchored, we find that petitioner failed to impeach his credibility. No evidence was shown that Zaragoza was actuated by an improper motive. As such, there is no cogent reason why the Court should deny Zaragoza's testimony the full faith and credit it deserves.

On the alleged inconsistencies in Zaragoza's testimony, it is relevant to state that a witness is not expected to remember an occurrence with perfect recollection of the minute details. Thus, even the most truthful of witnesses may err and often give confusing statements. What is important is that Zaragoza unwaveringly, forthrightly and unequivocally declared that petitioner shot at the victim. Neither did he falter in identifying the gunman.[65]

All in all, petitioner has failed to prove unlawful aggression on the part of the victim. Without this essential element, petitioner cannot successfully invoke self-defense. Even assuming that he tried to defend a stranger, his defense would not prosper. In defense of a stranger, unlawful aggression on the part of the victim is also indispensable. In both self-defense and defense of a stranger, unlawful aggression is a primordial element.

Granting *arguendo* that there was unlawful aggression, we find that petitioner's contention that he employed reasonable means to repel the aggression must fail. It is settled that reasonable necessity of the means employed does not imply material commensurability between the means of attack and defense. What the law requires is rational equivalence.[66]

Also, the nature and number of wounds suffered by Paquito negate any claim of self-defense or defense of a stranger. The Court notes that the victim sustained eight gunshot wounds which were all fatal as they affected

vital organs.[67] Petitioner testified that he pulled the trigger of his armalite twice.[68] He aimed at "the front of his body, at the chest, up to the stomach."[69] Had petitioner merely defended himself from the victim's unlawful aggression, one shot to immobilize him would have been enough. There was no reason for petitioner to shoot him seven more times, even aiming at his vital organs. It bears repeating that the nature and number of wounds inflicted by the accused are constantly and unremittingly considered as important indicia which disprove a plea for self-defense or defense of stranger because they demonstrate a determined effort to kill the victim and not just defend oneself.[70] In the instant case, Paquito's wounds serve to tell us that petitioner was induced by revenge, resentment or other evil motive and that he was set on killing the victim.

Petitioner's avowal that his first shot was single but went automatic on the second shot is likewise unbelievable.[71] Petitioner's armalite has a selector that switches it from single shot to automatic. Since it was petitioner who was in possession of the firearm and he admitted that he fired the shots, we reasonably conclude that it was he who switched the firearm to automatic firing.

All told, petitioner failed to satisfy the requirements of self-defense and defense of a stranger to justify the shooting of Paquito.

Next, petitioner contends that the killing of Paquito resulted from the lawful performance of his duty as police officer. However, such justifying circumstance may be invoked only after the defense successfully proves that the accused acted in the performance of a duty, and the injury or offense committed is the necessary consequence of the due performance or lawful exercise of such duty.[72] These two requisites are wanting in this case. The victim was not committing any offense at the time. Petitioner has not sufficiently proven that the victim had indeed fired at Regencia. Killing the victim under the circumstances of this case cannot in any wise be considered a valid performance of a lawful duty by a man who had sworn to maintain peace and order and to protect the lives of the people. As aptly held in *People v. de la Cruz*,[73] "Performance of duties does not include murder.... Murder is never justified, regardless of the victim."

A final word on the civil liability. An appeal in a criminal proceeding throws the whole case open for review and it becomes the duty of the Court to correct any error in the appealed judgment, whether it is made the subject of an assignment of error or not. Therefore, we delete the award of P50,000.00 as actual damages. To seek recovery of actual damages, it is necessary to prove the actual amount of loss with reasonable degree of certainty premised upon competent proof and on the best evidence obtainable. Since the prosecution did not present receipts to prove the actual losses suffered, such actual damages cannot be awarded.[74]

On the other hand, consistent with prevailing jurisprudence, we award P50,000.00 by way of indemnity ex delicto to the heirs of Paquito. When death occurs as a result of a crime, the heirs of the deceased are entitled to such amount as indemnity for death without need of any evidence or proof of damages.[75]

We also affirm the award of moral damages in view of the finding that Generoso Umas-as lost consciousness and suffered anguish and sorrow because of the incident.

WHEREFORE, the assailed Decision dated 25 June 1997 of the Sandiganbayan in Criminal Case No. 19586 finding petitioner GUILTY of homicide is partially AFFIRMED with the following MODIFICATIONS: (a) the award of Fifty Thousand Pesos (P50,000.00) as actual damages is deleted; and (b) petitioner is ordered to pay fifty thousand pesos (P50,000.00) as indemnity ex delicto. No costs.

SO ORDERED.

Puno (chairman), Austria-Martinez, Callejo, Sr., and Chico-Nazario, JJ., concur.

[1] Rollo, pp. 4-21; Dated 9 July 1997.

[2] Rollo, pp. 22-36; Penned by Associate Justice Leonardo I. Cruz with the concurrence of Associate Justices Cipriano A. del Rosario and Sabino R. de Leon, Jr.

[3] Rollo p. 35.

[4] Rollo, pp. 22, 211.

[5] Rollo, pp. 22, 211; Sandiganbayan Records, p. 1.

[6] TSN, 26 October 1994, pp. 8-9, 10-12; See also Exhibit G.

[7] TSN, 26 October 1994, p. 27.

[8] TSN, 26 October 1994, p. 23.

[9] TSN, 26 October 1994, p. 16.

[10] Lauriana had invited Zaragosa to his place for them to gather young coconuts.

[11] TSN, 25 October 1994, pp. 21, 23-24, 46.

[12] TSN, 25 October 1994, pp. 24-25, 38.

[13] TSN, 25 October 1994, pp. 27-28, 32, 34-35.

[14] TSN, 25 October 1994, pp. 27-28, 32, 34-35.

[15] TSN, 25 October 1994, p. 34-25.

[16] Exhibit E-1; Addressed to NBI Director Sancho K. Chan, Jr.

[17] Exhibit E.

[18] TSN, 25 October 1994, pp. 10-20.

[19] Rollo, p. 23; Exhibit B.

[20] Rollo, p. 24; TSN, 26 October 1994, pp. 14-15, 17-18.

[21] Rollo, p. 25; TSN, 17 April 1995, pp. 5-8.

[22] Rollo, p. 26; TSN, 17 April 1995, pp. 28-31.

[23] Exhibit 6.

[24] Rollo, p. 26; TSN, 17 April 1995, p. 37.

[25] Rollo, p. 150.

[26] Rollo, p. 26; TSN, 17 April 1995, pp. 37-39, 41, 46-50, 51-55; TSN, 18 April 1995, p. 33.

[27] Rollo, p. 26; TSN, 17 April 1995, pp. 39-40, 53, 55-56; Exhibit 5.

[28] Rollo, p. 26; TSN, 18 April 1995, pp. 29-30.

[29] Exhibit 1.

[30] Rollo, p. 27.

[31] Exhibit 6.

[32] Rollo, p. 28.

[33] Rollo, pp. 29-30.

[34] Id. at 30.

[35] Id. at 32.

[36] Id. at 33.

[37] Ibid.

[38] Id. at 7.

[39] Id. at 38.

[40] Id. at 86-115; Dated 24 April 1998.

[41] 324 Phil. 244 (1996).

[42] Rollo, p. 87.

[43] Id. at 143-169; Dated 26 August 1998.

[44] Id. at 162.

[45] 437 Phil. 260, 269-270 (2002).

[46] *Mejorada v. Sandiganbayan*, Nos. L-51065-72, 30 June 1987, 151 SCRA 399, 408; *Consing v. Court of Appeals*, G.R. No. 78272, 29 August 1989, 177 SCRA 14, 21-22.

[47] *People v. Cawaling*, 355 Phil. 1, 37 (1998); *People v. Tan*, 373 Phil. 990, 1009 (1999); *People v. Aglipa*, 391 Phil. 879, 888 (2000); *Salcedo v. People*, G.R. No. 137143, 8 December 2000, 347 SCRA 499, 507; *People v. Asuela*, 426 Phil. 428, 443-444 (2002); *People v. Magnabe, Jr.*, 435 Phil. 374, 390 (2002).

[48] *People v. Belbes*, 389 Phil. 500, 507 (2000).

[49] *People v. Diego*, 424 Phil. 743, 751. (2002).

[50] KAPUNAN, R. AND FAYLONA, D. *CRIMINAL LAW* (1993 ed.) 58; *People v. Cawaling*, *supra* note 47 at 36.

[51] *People v. Sabdani*, 389 Phil. 840, 847 (2000); *People v. Janairo*, 370 Phil. 59, 32 (1999).

[52] TSN, 19 April 1995, pp. 7-8.

[53] Id. at 16.

[54] Id. at 7.

[55] Id. at 15.

- [56] Id. at 14-15.
- [57] TSN, 18 April 1995, pp. 13, 32.
- [58] *People v. Cabaya*, 411 Phil. 616, 630 (2001).
- [59] TSN, 17 April 1995, p. 55.
- [60] TSN, 19 April 1995, pp. 17-18.
- [61] *People v. Salangga*, G.R. No. 100910, 25 July 1994, 234 SCRA 407, 421-422.
- [62] TSN, 18 April 1995, p. 33.
- [63] TSN, 17 April 1995, p. 54.
- [64] Certification dated 25 October 1994, Exhibit 6, Exhibit 6-A.
- [65] See *supra* note at 45, p. 271.
- [66] *People v. Gutual*, 324 Phil. 244, 259 (1996).
- [67] TSN, 24 October 1994, p. 21.
- [68] TSN, 19 April 1995, p. 12.
- [69] Id. at 15.
- [70] *People v. Diego*, *supra* note 49 at 755.
- [71] TSN, 19 April 1995, p. 12.
- [72] Section 5, Article 11, Revised Penal Code; *People v. Belbes*, 389 Phil. 500, 508-509 (2000); *People v. Cawaling*, *supra* note 47 at 37-38.
- [73] G.R. Nos. 101000-01, 18 October 1993, 227 SCRA 278, 284.
- [74] *People v. Pansensoy*, 437 Phil. 499, 522-523 (2002); *People v. Cawaling*, *supra* note 47 at 43.
- [75] *People v. Calabroso*, 394 Phil. 658, 676 (2000); *People v. Pansensoy*, 437 Phil. 499, 522 (2002) citing *People v. Adoc*, 330 SCRA 626 (2000) and *People v. Solis*, 291 SCRA 529 (1998); see also *supra* note at 49, p. 273.

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