

BENITO CALIM, PETITIONER, VS. COURT OF APPEALS AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 140065. February 13, 2001

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

This is a petition for review on certiorari of the decision[1] of the Court of Appeals, dated August 4, 1999, which affirmed the judgment of the Regional Trial Court, Branch I, Borongan, Eastern Samar, finding petitioner Benito Calim guilty beyond reasonable doubt of the crime of homicide and sentencing him to an indeterminate penalty of ten (10) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal, as maximum, and ordering him to pay the heirs of the deceased the amount of P50,000.00 as death indemnity and P20,000.00 by way of moral damages.

Benito Calim was charged with murder in an information, filed on December 21, 1993, by the provincial prosecutor, which alleged -

"That on August 14, 1993, at about 12:30 o'clock in the morning, in front of Bistro Francisco Disco house at Francisco St., Borongan, Eastern Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with intent to kill and with evident premeditation and treachery, did then and there willfully, unlawfully and feloniously attack, assault, shoot and wound ESMERALDO A. TY, with the use of a handgun (Revolver), which the accused provided himself for the purpose, thereby inflicting gunshot wounds, which were the direct and immediate cause of his death, to the damage and prejudice of the heirs of the victim.

CONTRARY TO LAW."[2]

The accused was tried after a plea of not guilty.

The evidence for the prosecution, as established by the testimonies of its witnesses, namely: Dennis Apar, Eutopia Ty, Dr. Norma Villa Macapanas and Desiderio Alvor, Jr., was summarized in the People's Comment as follows:

"On August 14, 1993, at around 12:30 o'clock in the morning, friends Esmeraldo Ty, Dennis Apar, Desiderio Alvor, Jr., Peter Daza, and Longlong Lopez emerged from a drinking session in Bistro Francisco, a disco house at Francisco Street, Borongan, Eastern Samar. While they engaged in small talk and were about to go home, petitioner Calim, a member of the Philippine National Police, Regional Command Intelligence Group VIII, Eastern Samar, also came out of Bistro Francisco. Suddenly, from five [5] meters away, petitioner fired his .38 caliber towards Ty who was hit on the head, right chest and on the leg successively. Even as Ty was falling down, petitioner continued firing his gun on him. After the fifth gunfire, petitioner fled from the scene going south and disappeared. Ty died on the spot.

Later, at around 8:34 that morning, Ty's cadaver was examined by the District Medical officer, Dr. Norma Villa-Macapanas whose report dated August 14, 1993 disclosed that Ty sustained the following injuries, to wit: Gunshot wound, entrance, post-auricular area (right ear, back) ¾ inch below 1.8 inch from the right post-auricular area, roughly circular in shape with uneven contusion collar, measuring 0.8 cm long and 0.8 cm

wide, directed medial and superiorly to the temporo-parietal area of the head, producing a wound of exit after involving the brain, depth at 4.5 inches, with severe busting of the skull bone of the right temporo-parietal area, excavation of the brain. The exit wound measures $\frac{3}{4}$ inch long and 1 inch wide with irregular edges.

Gunshot wound (entrance) face, right side, $\frac{1}{2}$ inch from the right ear, roughly circular in shape, with uneven contusion collar, measuring 0.8 cm wide, 0.85 cm long directed medially with exit to the mouth, after a depth of $\frac{1}{2}$ inch.

Gunshot wound, chest (ENTRANCE) right side, 2 inches below the right nipple and $\frac{3}{4}$ inch from the anterior midline of the chest, roughly oval in shape, measuring 0.8 cm wide directed medially and inferiorly to the left penetrating the right side lobe of the lung, the heart, the left lobe of the left lung.

Hemothorax-400 cc

Gunshot wound, entrance, located at the right arm (upper third) lateral aspect roughly circular in shape, with uneven contusion collar, directed medially and ends blindly after a depth of 4 inches.

Gunshot wound, entrance, right leg, anterior aspect, $\frac{3}{4}$ inch below the right patellar area, roughly circular in shape, measuring 0.8 cm long, 0.8 cm wide directed supero-posteriorly, ends blindly at the right middle third of the same lower extremity (right thigh), posterior aspect, after a depth of 8.75 inches. A hard metallic object was extracted from said site, measuring 1.3 cm long, 0.8 cm wide.

CAUSE OF DEATH SEVERE HEMORRAHAGE SECONDARY TO MULTIPLE GUNSHOT WOUNDS OF CHEST (HEART), head, face."

On August 14, 1993, Alvor and Apar executed their joint affidavits attesting to what they saw during the killing of Ty, the contents and truthfulness of which they both affirmed during the trial of the case. Significantly, petitioner did not execute an affidavit and neither did he submit any counter-affidavit during the preliminary investigation of the case despite repeated notices.[3]

On the other hand, while petitioner admitted that he shot the victim, he claimed self-defense. As embodied in the Petition, the defense version runs thus:

". . . the victim, armed with a Batangas knife, started to create trouble outside the Bistro Francisco Disco House by puncturing the motorcycle tires of several persons. Although Boyoyoy Gonzales and Desiderio Alvar, the victim's companions prevented him, the latter refused to listen. When Max Operario, Jr. called the attention of the victim to stop puncturing the tire of Boyoyoy Gonzales, the victim thrust his knife towards Max. Meanwhile, the accused (herein petitioner) who was then coming out from the disco house looking for Max, witnessed the incident. Hence, accused fired a warning shot and introduced himself as a military man. The victim vented his ire towards the accused and remarked that he is not afraid of a military man. There and then, the victim attacked the accused. To prevent the victim from attacking the accused, the latter shot the hand of the victim to disarm him, however, the former persisted on rapidly advancing towards him. So, the accused aimed his gun at the victim's right knee but the latter's violence remained unabated. Cornered, accused retreated towards the panel of Bistro Francisco. When accused was cornered, leaning on the glass wall, he fired three (3) successive shots." [4]

The trial court gave credence to the version of the prosecution and found that the evidence for the defense failed to establish the justifying circumstance of self-defense, particularly, the defense failed to prove unlawful aggression on the part of the victim and the reasonable necessity of the means employed to prevent or repel the unlawful aggression. Thereafter, the trial court rendered judgment convicting petitioner of homicide and not murder. Upon review by the Court of Appeals, the conviction was affirmed in toto. In affirming the judgment of the trial court, the Court of Appeals held as follows:

"Foremost, Calim's version of the facts culminating in his shooting of Esmeraldo is incredible, to say the least. Given that Esmeraldo was drunk such that he was no longer in control of his emotions, there is still much to be desired to conclude that his intoxication caused him to be so bold and daring as to challenge and face a man who was not only armed with a gun but who had introduced himself as a military person as well! Especially so when Esmeraldo was alleged to have been merely brandishing a Batangas knife and about five (5) meters from Calim. What baffles the Court even more is that Esmeraldo was supposed to have unceasingly proceeded to attack Calim with a knife after being fired upon twice and actually hit.

Calim, while professing to be an active member of the PNP Provincial Intelligence Team, casually walked away from the scene of the incident leaving his victim down and dying on the ground not waiting for police authorities to perhaps assist in or submit himself for investigation. Instead, as he himself admitted, he went home to Tacloban City after the confrontation. Further, the weapon allegedly used by Esmeraldo, the Batangas knife, was conveniently never recovered. And to top it all, accused-appellant failed to file at least a report or execute any affidavit or sworn written statement concerning the incident.

Evidence to be believed, must not only proceed from the mouth of a credible witness, but must be credible in itself - such as the common experience of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous and is outside judicial cognizance.

Granting that Esmeraldo did try to attack Calim with a knife, the oral testimony of accused-appellant clearly showed that Calim was in no peril since the victim was three (3) to four (4) meters away from him when he fired the last three (3) shots and was already wounded at the time. Thus, We are in full agreement with the trial court when it aptly observed that:

". . . The life of a human being must not be taken upon slight grounds. There must be a necessity, either actual or apparent, for the killing or it cannot be justified. Accused Benito Calim has all the right to quell disturbance in a public place or public street, however, he should have resorted to the more reasonable and logical manner by shooting the victim, even assuming he was the aggressor, his limbs to disarm or disable him. While it is true that a policeman in the performance of his duty requires him to overcome his opponent the force he must employ against his assailant must be reasonable (sic) necessary. In this instant case, the victim sustained multiple gunshot wounds as shown in the post-mortem examination conducted by Dr. Norma Villa Macapanas...

x x x x x

Based on the . . . medical findings of the physician the nature and number of wounds inflicted on the person of Esmeraldo Ty belie the claim of self-defense, and the facts and circumstances of the case as shown, sufficiently indicate to us a determined effort by the accused to take away the life of Esmeraldo Ty."

When an accused invokes self-defense, the onus probandi to substantiate such assertion rests on him. He must prove clearly and convincingly its three elements, namely: (1) unlawful aggression on the part of the victim; (2) reasonable necessity of the means employed to prevent or repel the aggression; and (3) lack of sufficient provocation on the part of the person defending himself.

Calim invoked the justifying circumstance of self-defense but failed to discharge the burden of proving the presence of the reasonable necessity of the means he employed in repelling the aggression. On this point, the court a quo was not amiss when it held, that:

"As to the means employed to repel the unlawful aggression Benito Calim testified that after he fired a warning shot, the victim continued to advance towards him so he shot the deceased at his right hand for him to throw his weapon, however, the victim persisted in thrusting his knife towards him so he aimed his gun at the victim's knee and fired successive shots as he was leaning on the glass panel of the disco house. The gunshot wound on

the right arm and the right leg sustained by the victim could have been enough to disable Esmeraldo Ty. There was no need therefore for Benito Calim to shot (sic) the victim at his chest, head and face causing his sudden death.

With the positive and straightforward declarations of prosecution witnesses Dennis and Desiderio that accused-appellant Calim fired five (5) successive gunshots to a hapless and unarmed victim, therefore, the culpability of Calim for the death of Esmeraldo becomes cogently unquestionable." [5]

Hence, this petition on the following grounds:

I

WHETHER OR NOT THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN AFFIRMING THE DECISION OF THE REGIONAL TRIAL COURT DISREGARDING PETITIONER'S PLEA OF SELF-DEFENSE.

II

ASSUMING ARGUENDO THAT PETITIONER'S PLEA FAILS, WHETHER OR NOT THE HONORABLE COURT OF APPEALS AND THE TRIAL COURT ERRED IN NOT APPRECIATING THE PRIVILEGED MITIGATING CIRCUMSTANCE OF INCOMPLETE SELF-DEFENSE. [6]

After a careful examination of the evidence and study of the records on hand, the Court finds no merit in the appeal. The lower courts cannot be faulted for rejecting petitioner's theory of self-defense.

Firstly, self-defense, being essentially a factual matter is best addressed by the trial court. [7] Here, the trial court, having heard the witnesses and observed their deportment and manner of testifying during the trial, accorded credence and full faith to the testimonies of the prosecution witnesses. Likewise, between the conflicting versions of the prosecution and the defense, the Court of Appeals believed the version of the prosecution and found the evidence for the defense, particularly the testimony of petitioner Calim as incredible. We agree with the findings of the trial and appellate courts giving full faith and credit to the prosecution witnesses. His denial and claim of self-defense fails in light of the testimony of the prosecution witnesses that petitioner shot the victim without any unlawful aggression on the part of the latter.

On the witness stand, petitioner narrated that when he went out of the disco pub at past 12 midnight he noticed that there were many people and he saw a person being pacified and at the same time he heard the sound of air coming out of a tire. According to him, Esmeraldo was about to puncture the tire of the motorcycle of Boyoyoy Gonzales but Desiderio Alvor prevented him. Esmeraldo then thrust his knife toward Boyoyoy Gonzales but the latter was not hit because he pedaled backwards. Max Operario appeared advising him to stop. Instead of heeding Max's advice, Esmeraldo thrust his knife towards Max who was likewise not hit. When Esmeraldo was about to thrust his knife a second time against Max, petitioner fired a warning shot in the air. Esmeraldo turned to face him. Petitioner introduced himself as a military man, but Esmeraldo replied that he was not afraid of him. Esmeraldo then moved towards him while Desiderio Alvor placed his arm on the shoulder of the victim to pacify him. Esmeraldo freed himself from Alvor's hold. Petitioner went on to state that he shot the hand of Ty in order to disarm him, but Ty continued to thrust his knife towards him. Petitioner aimed and shot at the right knee of Ty. When his back was already against the glass panel of the Bistro he fired the three successive shots against Ty. On cross-examination, he testified that when he fired the first two (2) shots, the victim was about five (5) meters away from him and when he fired the last three (3) shots, the victim was more or less three (3) or four (4) meters away from him.

Assuming for the sake of argument that Esmeraldo Ty was armed with a knife and thrust the same towards

petitioner, still, no unlawful aggression could be gleaned from the said circumstance considering that Esmeraldo was standing a distant five (5) meters away from petitioner. It bears stressing that unlawful aggression presupposes an actual, sudden and unexpected or imminent danger on the life and limb of a person - a mere threatening or intimidating attitude is not sufficient.[8] At the said distance and armed only with a knife, Esmeraldo who was inebriated could not put in real peril the life or personal safety of petitioner who was armed with a revolver. Significantly, Esmeraldo missed hitting Boyoyoy Gonzales and Max Operario who were standing close to him when he allegedly attempted to take a swipe at them. In addition, we too find incredible Calim's testimony that Esmeraldo persisted to "attack" him with the knife after being shot in the right arm and the right knee. Notably, the knife allegedly wielded by Esmeraldo was never found and produced in court. In fine, unlawful aggression which is an essential and primary element of self-defense was not established.

Secondly, the lower courts did not err in rejecting petitioner's theory of self-defense considering the nature and number of gunshot wounds on the victim. The deceased Esmeraldo Ty suffered five (5) gunshot wounds on the head, face, chest, right arm and on the right leg. Verily, the nature, location and number of the wounds sustained by the victim made petitioner's theory of self-defense implausible.[9] It is an oft-repeated rule that the nature and number of wounds inflicted by the accused are constantly and unremittingly considered important indicia which disprove a plea of self-defense.[10] Dr. Norma Villa Macapanas who conducted the post-mortem examination on the victim revealed that either of the gunshot wounds on the head which burst the skull bone or on the chest may have caused the instantaneous death of the latter.[11] If petitioner shot the victim just to defend himself, it defies reason why he had to inflict several wounds on him. It may be that, petitioner took a shot at the victim's right arm and knee out of confusion and fear, but pumping bullets on the chest and on the victim's head clearly negates any semblance of good faith and manifests a deliberate and wanton intention to kill.

Thirdly, petitioner's conduct immediately after the shooting belies his claim of self-defense. Petitioner testified that after the shooting incident he simply "walked towards Abogado Street and waited for a ride for Sabang with the intention of going home to Tacloban City." [12] His actuation is akin to flight and flight negates an accused's plea of self-defense and indicates guilt.[13] The justifying circumstance of self-defense may not survive in the face of accused's flight from the crime scene and his failure to inform the authorities of the incident.[14] As a law enforcer himself, he should have proceeded to a police station to report the incident or await for the police and submit the matter for investigation. Persons who act in legitimate defense of their persons or rights invariably surrender themselves to the authorities and describe fully and in all candor all that has happened with a view to justify their acts.[15] They lose no time in going to the punong barangay, the municipal mayor or the police and lay before them all the facts.[16]

Having established that petitioner is not entitled to the justifying circumstance of self-defense, the next issue is whether petitioner is at least entitled to the mitigating circumstance of incomplete self-defense. Again, the answer is in the negative. Suffice it to state that if no unlawful aggression attributable to the victim is established, there can be no self-defense, complete or incomplete.[17]

We agree with the trial court that the crime committed by the petitioner is homicide, not murder, because the qualifying circumstances of treachery and evident premeditation as alleged in the information were not proven. In order to establish evident premeditation the prosecution must show the following requisites, viz: (a) the time when the accused determined to commit the crime, (b) an act manifestly indicating that the accused has clung to his determination, and (c) lapse of time, between the determination to commit the crime and the execution thereof, sufficient to allow him to reflect upon the consequences of his act.[18] In this case, there is no evidence as to when and how petitioner planned and prepared for the killing of his victim. Neither can treachery be appreciated against petitioner considering that no evidence was presented to show that the accused consciously and

deliberately adopted a mode of attack intended to ensure the killing without risk to the accused.[19] The evidence does not show that the accused made some preparation to kill the victim in such a manner as to insure the execution of the crime or to make it impossible or hard for the person attacked to defend himself.[20] In this regard, the judgment finding petitioner guilty only of homicide is in order. Under Article 249 of the Revised Penal Code, the penalty for homicide is reclusion temporal. There being no mitigating nor aggravating circumstance which attended the killing, the penalty that should be imposed on accused-appellant is reclusion temporal in its medium period. Applying the Indeterminate Sentence Law, the petitioner's sentence should be within the range of prison mayor, as the minimum, and reclusion temporal in its medium period, as the maximum. The penalty imposed by the court a quo is within the said range, hence, we sustain it. Finally, in accordance with current jurisprudence, the P50,000.00 death indemnity is sustained while the moral damages should be raised from P10,000.00 to P50,000.00.[21] Death indemnity in the amount of P50,000.00 is automatically granted to the heirs of the victim.[22] On the other hand, the award of moral damages is warranted on account of the grief and sorrow[23] suffered by the victim's mother at the sudden death of her son.[24]

WHEREFORE, the questioned decision of the Court of Appeals sustaining that of the court a quo, is **AFFIRMED**, with the **MODIFICATION** that the amount of moral damages is raised to P50,000.00.

SO ORDERED.

Melo, (Chairman), Vitug, Panganiban, and Sandoval-Gutierrez, JJ., concur.

[1] Per Justice Martin S. Villarama, Jr. and concurred in by Justices Romeo A. Brawner and Candido V. Rivera.

[2] Original Records, p. 3.

[3] Rollo, pp. 93-94.

[4] Rollo, pp. 11-12.

[5] Rollo, pp. 80-82.

[6] Rollo, p. 15.

[7] *People vs. Ignacio*, 270 SCRA 445 (1997).

[8] *People vs. De Gracia*, 264 SCRA 200 (1996); *People vs. Cabiles, Jr.*, 258 SCRA 271 (1996).

[9] *People vs. Borreros*, 306 SCRA 680 (1999).

[10] *People vs. Bitoon*, 309 SCRA 209 (1999).

[11] TSN dated August 4, 1994, p. 4.

[12] TSN dated October 4, 1995, p. 41.

[13] *People vs. Gregorio*, 255 SCRA 380 (1996).

[14] *People vs. Gerolaga*, 263 SCRA 143 (1996).

[15] *People vs. Manes*, G.R. No. 122737, February 17, 1999.

[16] *Ibid.*

[17] *People vs. Bautista*, 254 SCRA 621 (1996).

- [18] People vs. Castillo, 289 SCRA 213 (1998).
- [19] People vs. Chua, 297 SCRA 227 (1998).
- [20] People vs. Nitcha, 240 SCRA 283 (1995).
- [21] Pepito. et al., vs. Court of Appeals, G.R. No. 119942, July 8, 1999.
- [22] People vs. Obello, 284 SCRA 79 (1998).
- [23] TSN dated June 23, 1994, p. 31.
- [24] People vs. Gonzales, 311 SCRA 547 (1999).

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