

RUJGERIC Z. PALAGANAS, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. NO. 165483. September 12, 2006

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

For what is a man, what has he got?
If not himself, then he has naught.
To say the things he truly feels;
And not the words of one who kneels.
The record shows I took the blows -
And did it my way!

The song evokes the bitterest passions. This is not the first time the song "My Way"[2] has triggered violent behavior resulting in people coming to blows. In the case at bar, the few lines of the song depicted what came to pass when the victims and the aggressors tried to outdo each other in their rendition of the song.

In this Petition for Review on Certiorari[3] under Rule 45 of the Revised Rules of Court, petitioner Rujgeric Z. Palaganas prays for the reversal of the Decision of the Court of Appeals in CA-G.R. CR No. 22689 dated 30 September 2004,[4] affirming with modification the Decision of the Regional Trial Court (RTC), Branch 46, of Urdaneta, Pangasinan, in Criminal Cases No. U-9608, U-9609, and U-9610 and U-9634, dated 28 October 1998,[5] finding petitioner guilty beyond reasonable doubt of the crime of Homicide under Article 249 of the Revised Penal Code, and two (2) counts of Frustrated Homicide under Article 249 in relation to Articles 6 and 50 of the same Code.

On 21 April 1998, petitioner and his older brother, Ferdinand Z. Palaganas (Ferdinand), were charged under four (4) separate Informations[6] for two (2) counts of Frustrated Murder, one (1) count of Murder, and one (1) count for Violation of COMELEC Resolution No. 2958[7] relative to Article 22, Section 261, of the Omnibus Election Code,[8] allegedly committed as follows:

CRIMINAL CASE NO. U-9608

That on or about January 16, 1998, in the evening at Poblacion, Manaoag, Pangasinan and within the jurisdiction of this Honorable Court, the above-named accused armed with an unlicensed firearm, with intent to kill, treachery and evident premeditation, conspiring together, did then and there willfully, unlawfully and feloniously shoot SERVILLANO FERRER, JR. y Juanatas, inflicting upon him "gunshot wound penetrating perforating abdomen, urinary bladder, rectum bullet sacral region," the accused having thus performed all the acts of execution which would have produced the crime of Murder as a consequence, but which nevertheless, did not produce it by reason of the causes independent of the will of the accused and that is due to the timely medical assistance rendered to said Servillano J. Ferrer, Jr. which prevented his death, to his damage and prejudice.

CONTRARY to Art. 248 in relation with Arts. 6 and 50, all of the Revised Penal Code, as amended.

CRIMINAL CASE NO. U-9609

That on or about January 16, 1998, in the evening at Poblacion, Manaoag, Pangasinan and within the jurisdiction of this Honorable Court, the above-named accused armed with an unlicensed firearm, with intent to kill, treachery and evident premeditation, conspiring together, did then and there willfully, unlawfully and feloniously shoot MICHAEL FERRER alias "Boying Ferrer", inflicting upon him gunshot wound on the right shoulder, the accused having thus performed all the acts of execution which would have produced the crime of murder as a consequence, but which nevertheless, did not produce it by reason of the causes independent of the will of the accused and that is due to the medical assistance rendered to said Michael "Boying" Ferrer which prevented his death, to his damage and prejudice.

CONTRARY to Art. 248 in relation with Arts. 6 and 50, all of the Revised Penal Code, as amended.

CRIMINAL CASE NO. U-9610

That on or about January 16, 1998, in the evening at Poblacion, Manaoag, Pangasinan and within the jurisdiction of this Honorable Court, the above-named accused armed with an unlicensed firearm, with intent to kill, treachery and evident premeditation, conspiring together, did then and there willfully, unlawfully and feloniously shoot MELTON FERRER alias "TONY FERRER", inflicting upon him mortal gunshot wounds in the head and right thigh which caused the instantaneous death of said Melton "Tony" Ferrer, to the damage and prejudice of his heirs.

CONTRARY to Art. 248 of the Revised Penal Code, as amended by R.A. 7659.

CRIMINAL CASE NO. U-9634

That on or about January 16, 1998 which is within the election period at Poblacion, Manaoag, Pangasinan, and within the jurisdiction of this Honorable Court, the above-named accused did then and there willfully, unlawfully and feloniously bear and carry one (1) caliber .38 without first securing the necessary permit/license to do the same.

CONTRARY to COMELEC RES. 2958 in relation with SEC. 261 of the OMNIBUS ELECTION CODE, as amended.[9] (Underscoring supplied.)

When arraigned on separate dates,[10] petitioner and Ferdinand entered separate pleas of "Not Guilty." Upon motion of Ferdinand,[11] the four cases were consolidated and were assigned to Branch 46 of the RTC in Urdaneta, Pangasinan.[12]

The factual antecedents as viewed by the prosecution, are summarized in the Comment dated 18 April 2005 of the Office of the Solicitor General,[13] to wit:

On January 16, 1998, around 8:00 in the evening, brothers Servillano, [Melton] and Michael, all surnamed Ferrer were having a drinking spree in their house because [Melton], who was already living in San Fernando, La Union, visited his three brothers and mother at their house in Sitio Baloking, Poblacion, Manaoag, Pangasinan. At 9:45 in the evening, the three brothers decided to proceed to Tidbits Videoke bar located at the corner of Malvar and Rizal Streets, Poblacion, Manaoag to continue their drinking spree and to sing. Inside the karaoke bar, they were having a good time, singing and drinking beer.

Thereafter, at 10:30 in the evening, Jaime Palaganas arrived together with Ferdinand Palaganas and Virgilio Bautista. At that time, only the Ferrer brothers were the customers in the bar. The two groups occupied separate tables. Later, when Jaime Palaganas was singing, [Melton] Ferrer sang along with him as he was familiar with the song [My Way]. Jaime however, resented this and went near the table of the Ferrer brothers and said in Pangasinan dialect "As if you are tough guys." Jaime further said "You are already insulting me in that way." Then, Jaime struck Servillano Ferrer with the microphone, hitting the back of his head. A rumble ensued between the Ferrer brothers on the one hand, and the Palaganases, on the other hand. Virgilio Bautista did not join the fray as he left the place. During the rumble, Ferdinand went out of the bar. He was however

pursued by Michael. When Servillano saw Michael, he also went out and told the latter not to follow Ferdinand. Servillano and Michael then went back inside the bar and continued their fight with Jaime.

Meantime, Edith Palaganas, sister of Jaime and the owner of the bar, arrived and pacified them. Servillano noticed that his wristwatch was missing. Unable to locate the watch inside the bar, the Ferrer brothers went outside. They saw Ferdinand about eight (8) meters away standing at Rizal Street. Ferdinand was pointing at them and said to his companion, later identified as petitioner [Rujjeric] Palaganas, "Oraratan paltog mo lara", meaning "They are the ones, shoot them." Petitioner then shot them hitting Servillano first at the left side of the abdomen, causing him to fall on the ground, and followed by [Melton] who also fell to the ground. When Servillano noticed that [Melton] was no longer moving, he told Michael "Bato, bato." Michael picked up some stones and threw them at petitioner and Ferdinand. The latter then left the place. Afterwards, the police officers came and the Ferrer brothers were brought to the Manaoag Hospital and later to Villaflores Hospital in Dagupan. Servillano later discovered that [Melton] was fatally hit in the head while Michael was hit in the right shoulder.

On the other hand, the defense, in its Appellant's Brief dated 3 December 1999,[14] asserted the following set of facts:

On January 16, 1998, at around 11:00 in the evening, after a drinking session at their house, the brothers Melton (Tony), Servillano (Junior) and Michael (Boying), all surnamed Ferrer, occupied a table inside the Tidbits Café and Videoke Bar and started drinking and singing. About thirty minutes later, Jaime Palaganas along with his nephew Ferdinand (Apo) and friend Virgilio Bautista arrived at the bar and occupied a table near that of the Ferrers'.

After the Ferrers' turn in singing, the microphone was handed over to Jaime Palaganas, who then started to sing. On his third song [My Way], Jaime was joined in his singing by Tony Ferrer, who sang loudly and in an obviously mocking manner. This infuriated Jaime, who then accosted Tony, saying, "You are already insulting us." The statement resulted in a free for all fight between the Ferrers', on one hand, and the Palaganases on the other. Jaime was mauled and Ferdinand, was hit on the face and was chased outside of the bar by Junior and Boying Ferrer.

Ferdinand then ran towards the house of the appellant Rujjeric Palaganas, his brother, and sought the help of the latter. Rujjeric, stirred from his sleep by his brother's shouts, went out of his house and, noticing that the van of his uncle was in front of the Tidbits Videoke Bar, proceeded to that place. Before reaching the bar, however, he was suddenly stoned by the Ferrer brothers and was hit on different parts of his body, so he turned around and struggled to run towards his house. He then met his brother, Ferdinand, going towards the bar, so he tugged him and urged him to run towards the opposite direction as the Ferrer brothers continued pelting them with large stones. Rujjeric then noticed that Ferdinand was carrying a gun, and, on instinct, grabbed the gun from the latter, faced the Ferrer brothers and fired one shot in the air to force the brothers to retreat. Much to his surprise, however, the Ferrer brothers continued throwing stones and when (sic) the appellant was again hit several times. Unable to bear the pain, he closed his eyes and pulled the trigger.

On 28 October 1998, the trial court rendered its Decision finding petitioner guilty only of the crime of Homicide and two (2) counts of Frustrated Homicide.[15] He was, however, acquitted of the charge of Violation of COMELEC Resolution No. 2958 in relation to Section 261 of the Omnibus Election Code.[16] On the other hand, Ferdinand was acquitted of all the charges against him.[17]

In holding that petitioner is liable for the crimes of Homicide and Frustrated Homicide but not for Murder and Frustrated Murder, the trial court explained that there was no conspiracy between petitioner and Ferdinand in killing Melton and wounding Servillano and Michael.[18] According to the trial court, the mere fact that Ferdinand "pointed" to where the Ferrer brothers were and uttered to petitioner "Araratan, paltog mo lara!" (They are the ones, shoot them!), does not in itself connote common design or unity of purpose to kill. It also took note of the fact that petitioner was never a participant in the rumble inside the Tidbits Cafe Videoke Bar (videoke bar)

on the night of 16 January 1998. He was merely called by Ferdinand to rescue their uncle, Jaime, who was being assaulted by the Ferrer brothers. It further stated that the shooting was instantaneous and without any prior plan or agreement with Ferdinand to execute the same. It found that petitioner is solely liable for killing Melton and for wounding Servillano and Michael, and that Ferdinand is not criminally responsible for the act of petitioner.

Further, it declared that there was no treachery that will qualify the crimes as murder and frustrated murder since the Ferrer brothers were given the chance to defend themselves during the shooting incident by stoning the petitioner and Ferdinand.[19] It reasoned that the sudden and unexpected attack, without the slightest provocation on the part of the victims, was absent. In addition, it ratiocinated that there was no evident premeditation as there was no sufficient period of time that lapsed from the point where Ferdinand called the petitioner for help up to the point of the shooting of the Ferrer brothers.[20] Petitioner was sleeping at his house at the time he heard Ferdinand calling him for help. Immediately, petitioner, still clad in pajama and sleeveless shirt, went out of his room to meet Ferdinand. Thereafter, both petitioner and Ferdinand went to the videoke bar where they met the Ferrer brothers and, shortly afterwards, the shooting ensued. In other words, according to the trial court, the sequence of the events are so fast that it is improbable for the petitioner to have ample time and opportunity to then plan and organize the shooting.

Corollarily, it also stated that petitioner cannot successfully invoke self-defense since there was no actual or imminent danger to his life at the time he and Ferdinand saw the Ferrer brothers outside the videoke bar.[21] It noted that when petitioner and Ferdinand saw the Ferrer brothers outside the videoke bar, the latter were not carrying any weapon. Petitioner then was free to run or take cover when the Ferrer brothers started pelting them with stones. Petitioner, however, opted to shoot the Ferrer brothers. It also stated that the use by petitioner of a gun was not a reasonable means to prevent the attack of the Ferrer brothers since the latter were only equipped with stones, and that the gun was deadlier compared to stones. Moreover, it also found that petitioner used an unlicensed firearm in shooting the Ferrer brothers.[22]

As regards the Violation of COMELEC Resolution No. 2958, in relation to Section 261 of the Omnibus Election Code, the trial court acquitted the petitioner of the offense as his use and possession of a gun was not for the purpose of disrupting election activities.[23] In conclusion, the trial court held:

WHEREFORE, JUDGMENT is hereby rendered as follows:

- Under CRIM. CASE NO. U-9608, [Rujjeric] PALAGANAS is hereby CONVICTED beyond reasonable doubt of the crime of FRUSTRATED HOMICIDE (Not Frustrated Murder), with the use of an unlicensed firearm, the Court sentences him to suffer the penalty of Prision Mayor in its maximum period or 12 years of imprisonment and to pay Servillano Ferrer the sum of P163,569.90 for his medical expenses and P50,000.00 for exemplary damages;

Ferdinand Palaganas is ACQUITTED for failure of the prosecution to prove conspiracy and likewise, for failure to prove the guilt of Ferdinand Palaganas beyond reasonable doubt.

- Under CRIM. CASE NO. U-9609, [Rujjeric] PALAGANAS is hereby CONVICTED beyond reasonable doubt of the crime of FRUSTRATED HOMICIDE (Not Frustrated Murder), with the use of an unlicensed firearm, the Court sentences him to suffer the penalty of Prision Mayor in its maximum period or 12 years of imprisonment; and to pay Michael Ferrer the sum of P2,259.35 for his medical expenses and P50,000.00 for exemplary damages;

Ferdinand Palaganas is ACQUITTED for failure of the prosecution to prove conspiracy and likewise, for failure to prove the guilt of Ferdinand Palaganas beyond reasonable doubt.

- Under CRIM. CASE NO. U-9609, [Rujjeric] PALAGANAS is hereby CONVICTED beyond reasonable doubt

of the crime of FRUSTRATED HOMICIDE (Not Frustrated Murder), with the use of an unlicensed firearm, the Court sentences him to suffer the penalty of Prison Mayor in its maximum period or 12 years of imprisonment; and to pay Michael Ferrer the sum of P2,259.35 for his medical expenses and P50,000.00 for exemplary damages;

Ferdinand Palaganas is ACQUITTED for failure of the prosecution to prove conspiracy and likewise, for failure to prove the guilt of Ferdinand Palaganas beyond reasonable doubt.

Ordering accused [Rujjeric] Palaganas to pay Mrs. Elena Ferrer, the mother of the Ferrer brothers, the amount of P100,000.00 as attorney's fees in CRIM. CASES NOS. U-9608, U-9609, U-9610.

- Under CRIM. CASE NO. U-9634, for failure of the prosecution to prove the guilt of [Rujjeric] Palaganas beyond reasonable doubt of the crime of Violation of COMELEC Resolution No. 2958 in relation with Section 261 of the Omnibus Election Code, the Court ACQUITS [RUJJERIC] PALAGANAS.[24]

Aggrieved, the petitioner appealed the foregoing Decision of the RTC dated 28 October 1998, before the Court of Appeals. In its Decision dated 30 September 2004, the Court of Appeals affirmed with modifications the assailed RTC Decision. In modifying the Decision of the trial court, the appellate court held that the mitigating circumstance of voluntary surrender under Article 13, No. 7, of the Revised Penal Code should be appreciated in favor of petitioner since the latter, accompanied by his counsel, voluntarily appeared before the trial court, even prior to its issuance of a warrant of arrest against him.[25] It also stated that the Indeterminate Sentence Law should be applied in imposing the penalty upon the petitioner.[26] The dispositive portion of the Court of Appeals' Decision reads:

WHEREFORE, the judgment of conviction is hereby AFFIRMED, subject to the MODIFICATION that the penalty to be imposed for the crimes which the appellant committed are as follows:

(1) For Homicide (under Criminal Case No. U-9610), the appellant is ordered to suffer imprisonment of ten (10) years of prision mayor as minimum to seventeen (17) years and four (4) months of reclusion temporal as maximum. Appellant is also ordered to pay the heirs of Melton Ferrer civil indemnity in the amount of P50,000.00, moral damages in the amount of P50,000.00 without need of proof and actual damages in the amount of P43,556.00.

(2) For Frustrated Homicide (under Criminal Case No. U-9609), the appellant is hereby ordered to suffer imprisonment of four (4) years and two (2) months of prision correccional as minimum to ten (10) years of prision mayor as maximum. Appellant is also ordered to pay Michael Ferrer actual damages in the amount of P2,259.35 and moral damages in the amount of P30,000.00.

(3) For Frustrated Homicide (under Criminal Case No. U-9608), the appellant is hereby penalized with imprisonment of four (4) years and two (2) months of prision correccional as minimum to ten (10) years of prision mayor as maximum. Appellant is also ordered to pay Servillano Ferrer actual damages in the amount of P163,569.90 and moral damages in the amount of P30,000.00.[27]

On 16 November 2004, petitioner lodged the instant Petition for Review before this Court on the basis of the following arguments:

I.

THE HONORABLE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF CONVICTION OF THE TRIAL COURT.

II.

THE HONORABLE COURT OF APPEALS ERRED IN NOT ACQUITTING ACCUSED-APPELLANT ON

THE GROUND OF LAWFUL SELF- DEFENSE.[28]

Anent the first issue, petitioner argued that all the elements of a valid self-defense are present in the instant case and, thus, his acquittal on all the charges is proper; that when he fired his gun on that fateful night, he was then a victim of an unlawful aggression perpetrated by the Ferrer brothers; that he, in fact, sustained an injury in his left leg and left shoulder caused by the stones thrown by the Ferrer brothers; that the appellate court failed to consider a material evidence described as "Exhibit O"; that "Exhibit O" should have been given due weight since it shows that there was slug embedded on the sawali wall near the sign "Tidbits Café and Videoke Bar"; that the height from which the slug was taken was about seven feet from the ground; that if it was true that petitioner and Ferdinand were waiting for the Ferrer brothers outside the videoke bar in order to shoot them, then the trajectory of the bullets would have been either straight or downward and not upward considering that the petitioner and the Ferrer brothers were about the same height (5'6"-5'8"); that the slug found on the wall was, in fact, the "warning shot" fired by the petitioner; and, that if this exhibit was properly appreciated by the trial court, petitioner would be acquitted of all the charges.[29]

Moreover, petitioner contended that the warning shot proved that that the Ferrer brothers were the unlawful aggressors since there would have been no occasion for the petitioner to fire a warning shot if the Ferrer brothers did not stone him; that the testimony of Michael in the trial court proved that it was the Ferrer brothers who provoked petitioner to shoot them; and that the Ferrer brothers pelted them with stones even after the "warning shot." [30]

Petitioner's contention must fail.

Article 11, paragraph (1), of the Revised Penal Code provides for the elements and/or requisites in order that a plea of self-defense may be validly considered in absolving a person from criminal liability, viz:

ART. 11. Justifying circumstances. - The following do not incur any criminal liability:

- Anyone who acts in defense of his person or rights, provided that the following circumstances concur;

First. Unlawful aggression;

Second. Reasonable necessity of the means employed to prevent or repel it;

Third. Lack of sufficient provocation on the part of the person defending himself. x x x.

As an element of self-defense, unlawful aggression refers to an assault or attack, or a threat thereof in an imminent and immediate manner, which places the defendant's life in actual peril.[31] It is an act positively strong showing the wrongful intent of the aggressor and not merely a threatening or intimidating attitude.[32] It is also described as a sudden and unprovoked attack of immediate and imminent kind to the life, safety or rights of the person attacked.[33]

There is an unlawful aggression on the part of the victim when he puts in actual or imminent peril the life, limb, or right of the person invoking self-defense. There must be actual physical force or actual use of weapon.[34] In order to constitute unlawful aggression, the person attacked must be confronted by a real threat on his life and limb; and the peril sought to be avoided is imminent and actual, not merely imaginary.[35]

In the case at bar, it is clear that there was no unlawful aggression on the part of the Ferrer brothers that justified the act of petitioner in shooting them. There were no actual or imminent danger to the lives of petitioner and Ferdinand when they proceeded and arrived at the videoke bar and saw thereat the Ferrer brothers. It appears that the Ferrer brothers then were merely standing outside the videoke bar and were not carrying any weapon when the petitioner arrived with his brother Ferdinand and started firing his gun.[36]

Assuming, arguendo, that the Ferrer brothers had provoked the petitioner to shoot them by pelting the latter with stones, the shooting of the Ferrer brothers is still unjustified. When the Ferrer brothers started throwing stones, petitioner was not in a state of actual or imminent danger considering the wide distance (4-5 meters) of the latter from the location of the former.[37] Petitioner was not cornered nor trapped in a specific area such that he had no way out, nor was his back against the wall. He was still capable of avoiding the stones by running away or by taking cover. He could have also called or proceeded to the proper authorities for help. Indeed, petitioner had several options in avoiding dangers to his life other than confronting the Ferrer brothers with a gun.

The fact that petitioner sustained injuries in his left leg and left shoulder, allegedly caused by the stones thrown by the Ferrer brothers, does not signify that he was a victim of unlawful aggression or that he acted in self-defense.[38] There is no evidence to show that his wounds were so serious and severe. The superficiality of the injuries sustained by the petitioner is no indication that his life and limb were in actual peril.[39]

Petitioner's assertion that, despite the fact that he fired a warning shot, the Ferrer brothers continued to pelt him with stones,[40] will not matter exonerate him from criminal liability. Firing a warning shot was not the last and only option he had in order to avoid the stones thrown by the Ferrer brothers. As stated earlier, he could have run away, or taken cover, or proceeded to the proper authorities for help. Petitioner, however, opted to shoot the Ferrer brothers.

It is significant to note that the shooting resulted in the death of Melton, and wounding of Servillano and Michael. With regard to Melton, a bullet hit his right thigh, and another bullet hit his head which caused his instant death.[41] As regards Servillano, a bullet penetrated two of his vital organs, namely, the large intestine and urinary bladder.[42] He underwent two (2) surgeries in order to survive and fully recover.[43] Michael, on the other hand, sustained a gunshot wound on the right shoulder.[44] It must also be noted that the Ferrer brothers were shot near the videoke bar, which contradict petitioner's claim he was chased by the Ferrer brothers. Given the foregoing circumstances, it is difficult to believe that the Ferrer brothers were the unlawful aggressors. As correctly observed by the prosecution, if the petitioner shot the Ferrer brothers just to defend himself, it defies reason why he had to shoot the victims at the vital portions of their body, which even led to the death of Melton who was shot at his head.[45] It is an oft-repeated rule that the nature and number of wounds inflicted by the accused are constantly and unremittingly considered important indicia to disprove a plea of self-defense.[46]

Let it not be forgotten that unlawful aggression is a primordial element in self-defense.[47] It is an essential and indispensable requisite, for without unlawful aggression on the part of the victim, there can be, in a jural sense, no complete or incomplete self-defense.[48] Without unlawful aggression, self-defense will not have a leg to stand on and this justifying circumstance cannot and will not be appreciated, even if the other elements are present.[49] To our mind, unlawful aggression, as an element of self-defense, is wanting in the instant case.

The second element of self-defense requires that the means employed by the person defending himself must be reasonably necessary to prevent or repel the unlawful aggression of the victim. The reasonableness of the means employed may take into account the weapons, the physical condition of the parties and other circumstances showing that there is a rational equivalence between the means of attack and the defense.[50] In the case at bar, the petitioner's act of shooting the Ferrer brothers was not a reasonable and necessary means of repelling the aggression allegedly initiated by the Ferrer brothers. As aptly stated by the trial court, petitioner's gun was far deadlier compared to the stones thrown by the Ferrer brothers.[51]

Moreover, we stated earlier that when the Ferrer brothers allegedly threw stones at the petitioner, the latter had other less harmful options than to shoot the Ferrer brothers. Such act failed to pass the test of reasonableness of the means employed in preventing or repelling an unlawful aggression.

With regard to the second issue, petitioner asserts that the Court of Appeals erred in not acquitting him on the ground of lawful self-defense.

Petitioner's argument is bereft of merit.

In resolving criminal cases where the accused invokes self-defense to escape criminal liability, this Court consistently held that where an accused admits killing the victim but invokes self-defense, it is incumbent upon the accused to prove by clear and convincing evidence that he acted in self-defense.[52] As the burden of evidence is shifted on the accused to prove all the elements of self-defense, he must rely on the strength of his own evidence and not on the weakness of the prosecution.[53]

As we have already found, there was no unlawful aggression on the part of the Ferrer brothers which justified the act of petitioner in shooting them. We also ruled that even if the Ferrer brothers provoked the petitioner to shoot them, the latter's use of a gun was not a reasonable means of repelling the act of the Ferrer brothers in throwing stones. It must also be emphasized at this point that both the trial court and the appellate court found that petitioner failed to establish by clear and convincing evidence his plea of self-defense. In this regard, it is settled that when the trial court's findings have been affirmed by the appellate court, said findings are generally conclusive and binding upon this Court.[54] In the present case, we find no compelling reason to deviate from their findings. Verily, petitioner failed to prove by clear and convincing evidence that he is entitled to an acquittal on the ground of lawful self-defense.

On another point, while we agree with the trial court and the Court of Appeals that petitioner is guilty of the crime of Homicide for the death of Melton in Criminal Case No. U-9610, and Frustrated Homicide for the serious injuries sustained by Servillano in Criminal Case No. U-9608, we do not, however, concur in their ruling that petitioner is guilty of the crime of Frustrated Homicide as regards to Michael in Criminal Case No. U-9609. We hold that petitioner therein is guilty only of the crime of Attempted Homicide.

Article 6 of the Revised Penal Code states and defines the stages of a felony in the following manner:

ART. 6. Consummated, frustrated, and attempted felonies. - Consummated felonies, as well as those which are frustrated and attempted, are punishable.

A felony is consummated when all the elements necessary for the for its execution and accomplishment are present; and it 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 or causes independent of the will of the perpetrator.

There is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance (*italics supplied*).

Based on the foregoing provision, the distinctions between frustrated and attempted felony are summarized as follows:

- 1.) In frustrated felony, the offender has performed all the acts of execution which should produce the felony as a consequence; whereas in attempted felony, the offender merely commences the commission of a felony directly by overt acts and does not perform all the acts of execution.
- 2.) In frustrated felony, the reason for the non-accomplishment of the crime is some cause independent of the will of the perpetrator; on the other hand, in attempted felony, the reason for the non- fulfillment of the crime is a cause or accident other than the offender's own spontaneous desistance.

In addition to these distinctions, we have ruled in several cases that when the accused intended to kill his victim,

as manifested by his use of a deadly weapon in his assault, and his victim sustained fatal or mortal wound/s but did not die because of timely medical assistance, the crime committed is frustrated murder or frustrated homicide depending on whether or not any of the qualifying circumstances under Article 249 of the Revised Penal Code are present.[55] However, if the wound/s sustained by the victim in such a case were not fatal or mortal, then the crime committed is only attempted murder or attempted homicide.[56] If there was no intent to kill on the part of the accused and the wound/s sustained by the victim were not fatal, the crime committed may be serious, less serious or slight physical injury.[57]

Based on the medical certificate of Michael, as well as the testimony of the physician who diagnosed and treated Michael, the latter was admitted and treated at the Dagupan Doctors-Villaflor Memorial Hospital for a single gunshot wound in his right shoulder caused by the shooting of petitioner.[58] It was also stated in his medical certificate that he was discharged on the same day he was admitted and that the treatment duration for such wound would be for six to eight days only.[59] Given these set of undisputed facts, it is clear that the gunshot wound sustained by Michael in his right shoulder was not fatal or mortal since the treatment period for his wound was short and he was discharged from the hospital on the same day he was admitted therein. Therefore, petitioner is liable only for the crime of attempted homicide as regards Michael in Criminal Case No. U-9609.

With regard to the appreciation of the aggravating circumstance of use of an unlicensed firearm, we agree with the trial court and the appellate court that the same must be applied against petitioner in the instant case since the same was alleged in the informations filed against him before the RTC and proven during the trial. However, such must be considered as a special aggravating circumstance, and not a generic aggravating circumstance.

Generic aggravating circumstances are those that generally apply to all crimes such as those mentioned in Article 14, paragraphs No. 1, 2, 3, 4, 5, 6, 9, 10, 14, 18, 19 and 20, of the Revised Penal Code. It has the effect of increasing the penalty for the crime to its maximum period, but it cannot increase the same to the next higher degree. It must always be alleged and charged in the information, and must be proven during the trial in order to be appreciated.[60] Moreover, it can be offset by an ordinary mitigating circumstance.

On the other hand, special aggravating circumstances are those which arise under special conditions to increase the penalty for the offense to its maximum period, but the same cannot increase the penalty to the next higher degree. Examples are quasi-recidivism under Article 160 and complex crimes under Article 48 of the Revised Penal Code. It does not change the character of the offense charged.[61] It must always be alleged and charged in the information, and must be proven during the trial in order to be appreciated.[62] Moreover, it cannot be offset by an ordinary mitigating circumstance.

It is clear from the foregoing that the meaning and effect of generic and special aggravating circumstances are exactly the same except that in case of generic aggravating, the same CAN be offset by an ordinary mitigating circumstance whereas in the case of special aggravating circumstance, it CANNOT be offset by an ordinary mitigating circumstance.

Aside from the aggravating circumstances abovementioned, there is also an aggravating circumstance provided for under Presidential Decree No. 1866,[63] as amended by Republic Act No. 8294,[64] which is a special law. Its pertinent provision states:

If homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance.

In interpreting the same provision, the trial court reasoned that such provision is "silent as to whether it is generic or qualifying." [65] Thus, it ruled that "when the law is silent, the same must be interpreted in favor of the accused." [66] Since a generic aggravating circumstance is more favorable to petitioner compared to a qualifying

aggravating circumstance, as the latter changes the nature of the crime and increase the penalty thereof by degrees, the trial court proceeded to declare that the use of an unlicensed firearm by the petitioner is to be considered only as a generic aggravating circumstance.[67] This interpretation is erroneous since we already held in several cases that with the passage of Republic Act. No. 8294 on 6 June 1997, the use of an unlicensed firearm in murder or homicide is now considered as a SPECIAL aggravating circumstance and not a generic aggravating circumstance.[68] Republic Act No. 8294 applies to the instant case since it took effect before the commission of the crimes in 21 April 1998. Therefore, the use of an unlicensed firearm by the petitioner in the instant case should be designated and appreciated as a SPECIAL aggravating circumstance and not merely a generic aggravating circumstance.

As was previously established, a special aggravating circumstance cannot be offset by an ordinary mitigating circumstance. Voluntary surrender of petitioner in this case is merely an ordinary mitigating circumstance. Thus, it cannot offset the special aggravating circumstance of use of unlicensed firearm. In accordance with Article 64, paragraph 3 of the Revised Penal Code, the penalty imposable on petitioner should be in its maximum period.[69]

As regards the civil liability of petitioner, we deem it necessary to modify the award of damages given by both courts.

In Criminal Case No. U-9610 for Homicide, we agree with both courts that the proper amount of civil indemnity is P50,000.00, and that the proper amount for moral damages is P50,000.00 pursuant to prevailing jurisprudence.[70] However, based on the receipts for hospital, medicine, funeral and burial expenses on record, and upon computation of the same, the proper amount of actual damages should be P42,374.18, instead of P43,556.00. Actual damages for loss of earning capacity cannot be awarded in this case since there was no documentary evidence to substantiate the same.[71] Although there may be exceptions to this rule,[72] none is availing in the present case. Nevertheless, since loss was actually established in this case, temperate damages in the amount of P25,000.00 may be awarded to the heirs of Melton Ferrer. Under Article 2224 of the New Civil Code, temperate or moderate damages may be recovered when the court finds that some pecuniary loss was suffered but its amount cannot be proved with certainty. Moreover, exemplary damages should be awarded in this case since the presence of special aggravating circumstance of use of unlicensed firearm was already established.[73] Based on prevailing jurisprudence, the award of exemplary damages for homicide is P25,000.00.[74]

In Criminal Cases No. U-9608 and U-9609, we agree with both courts as to the award of actual damages and its corresponding amount since the same is supported by documentary proof therein. The award of moral damages is also consistent with prevailing jurisprudence. However, exemplary damages should be awarded in this case since the presence of special aggravating circumstance of use of unlicensed firearm was already established. Based on prevailing jurisprudence, the award of exemplary damages for both the attempted and frustrated homicide shall be P25,000.00 for each.

WHEREFORE, premises considered, the decision of the Court of Appeals dated 30 September 2004 is hereby AFFIRMED with the following MODIFICATIONS:

(1) In Criminal Case No. U-9609, the petitioner is found guilty of the crime of attempted homicide. The penalty imposable on the petitioner is prision correccional under Article 51 of the Revised Penal Code.[75] There being a special aggravating circumstance of the use of an unlicensed firearm and applying the Indeterminate Sentence of Law, the penalty now becomes four (4) years and two (2) months of arresto mayor as minimum period to six (6) years of prision correccional as maximum period. As regards the civil liability of petitioner, the latter is hereby ordered to pay Michael Ferrer exemplary damages in the amount of P25,000.00 in addition to the actual damages

and moral damages awarded by the Court of Appeals.

(2) In Criminal Case No. U-9608, the penalty imposable on the petitioner for the frustrated homicide is prison mayor under Article 50 of the Revised Penal Code.[76] There being a special aggravating circumstance of the use of an unlicensed firearm and applying the Indeterminate Sentence Law, the penalty now becomes six (6) years of prison correccional as minimum period to twelve (12) years of prison mayor as maximum period. As regards the civil liability of petitioner, the latter is hereby ordered to pay Servillano Ferrer exemplary damages in the amount of P25,000.00 in addition to the actual damages and moral damages awarded by the Court of Appeals.

(3) In Criminal Case No. U-9610, the penalty imposable on petitioner for the homicide is reclusion temporal under Article 249 of the Revised Penal Code.[77] There being a special aggravating circumstance of the use of an unlicensed firearm and applying the Indeterminate Sentence Law, the penalty now is twelve (12) years of prison mayor as minimum period to twenty (20) years of reclusion temporal as maximum period. As regards the civil liability of petitioner, the latter is hereby ordered to pay Melton Ferrer exemplary damages in the amount of P25,000.00 in addition to the actual damages and moral damages awarded by the Court of Appeals. The actual damages likewise awarded by the Court of Appeals is hereby reduced to P42,374.18.

SO ORDERED.

Panganiban. C. J., (Chairperson), Ynares-Santiago, Austria-Martinez, and Callejo, Sr., JJ. concur.

[1] Also referred to as Rojeric Palaganas y Zarate in the Informations, and Decisions of the trial court and the Court of Appeals.

[2] Music by Paul Anka; Sung and popularized by Frank Sinatra.

[3] Rollo, pp. 9-23.

[4] Penned by Associate Justice Vicente S.E. Veloso with Associate Justices Roberto A. Barrios and Amelita G. Tolentino, concurring; rollo, pp. 24-43.

[5] Penned by Judge Modesto C. Juanson; id. at 44-75.

[6] Records, Volume I, pp. 1-2 and 10, Volume II, pp. 1-2 and Volume III, p.1.

[7] RULES AND REGULATIONS ON: (A) BEARING, CARRYING OR TRANSPORTING FIREARMS OR OTHER DEADLY WEAPONS; (B) SECURITY PERSONNEL OR BODYGUARDS; (C) BEARING ARMS BY ANY MEMBER OF SECURITY OR POLICE ORGANIZATION OF GOVERNMENT AND OTHERS; (D) ORGANIZATION OR MAINTENANCE OF REACTION FORCES DURING THE ELECTION PERIOD IN CONNECTION WITH THE MAY 11, 1998 ELECTIONS. (Promulgated on December 23, 1997).

[8] Omnibus Election Code of the Philippines (December 3, 1985), Article XXII - ELECTION OFFENSES, Sec. 261. Prohibited Acts. - par. (p): Deadly weapons - Any person who carries any deadly weapon in the polling place and within a radius of one hundred meters thereof during the days and hours fixed by law for the registration of voters in the polling place, voting, counting of votes, or preparation of the election returns. However, in cases of affray, turmoil, or disorder, any peace officer or public officer authorized by the Commission to supervise the election is entitled to carry firearms or any other weapon for the purpose of preserving order and enforcing the law x x x. Par. (q) Carrying firearms outside residence or place of business. - Any person who, although possessing a permit to carry firearms, carries any firearms outside his residence or place of business during the election period, unless authorized in writing by the Commission x x x.

- [9] Rollo, pp. 45-47.
- [10] Records, Volume I, p. 43; Volume II, p. 39, and Volume III, p. 41.
- [11] Id. at 35-36; id. at 43-44; and id. at 52.
- [12] Id. at 37 and id. at 45.
- [13] Rollo, pp. 101-119.
- [14] CA rollo, pp. 123-148.
- [15] Rollo, pp. 44-75.
- [16] Id.
- [17] Id.
- [18] Id. at 68-69.
- [19] Id. at p. 69.
- [20] Id. at pp. 69-70.
- [21] Id. at pp. 70-71.
- [22] Id. at 71-72.
- [23] Id. at 72.
- [24] Id. at 73-75.
- [25] Id. at 39.
- [26] Id. at 39-41.
- [27] Id. at 41-42.
- [28] Id. at 17.
- [29] Id. at 17-18.
- [30] Id. at 18-19.
- [31] *People v. Alconga*, 78 Phil. 366, 374 (1947).
- [32] *People v. Arizala*, 375 Phil. 666, 675 (1999).
- [33] *People v. Bausing*, G.R. No. 64965, 8 July 1991, 199 SCRA 355, 361.
- [34] *People v. Crisostomo*, 195 Phil. 162, 172 (1981).
- [35] *Senoja v. People*, G.R. No. 160341, 19 October 2004, 440 SCRA 695, 703.
- [36] Records, TSN, 2 July 1998, pp. 7-10.
- [37] CA rollo, p. 132.
- [38] *Roca v. People.*, G.R. No. 114917, 29 January 2001, 350 SCRA 414, 423.
- [39] Id.

- [40] Rollo, pp. 18-19.
- [41] CA rollo, p. 40, records, TSN, 6 July 1998, pp. 8-12.
- [42] Id. at 41-42, records, TSN, 27 July 1998, pp. 2-8.
- [43] Id.
- [44] Id. at 42-43; records, TSN, 27 July 1998, pp. 2-8.
- [45] Rollo, p. 117.
- [46] Id.
- [47] *People v. Cario*, G.R. No. 123325, 31 March 1998, 288 SCRA 404, 417.
- [48] *People v. Gallego*, 453 Phil. 825, 839 (2003).
- [49] *People v. Caratao*, 451 Phil. 588, 602 (2002).
- [50] *People v. Encomienda*, 150-B Phil. 419, 433-434 (1972).
- [51] Rollo, p. 70.
- [52] *Rendon v. People*, G.R. No. 127089, 19 November 2004, 443 SCRA 142, 146.
- [53] *People v. Castellano, Sr.*, 448 Phil. 482, 499-500 (2003).
- [54] *People v. Castillo*, G.R. No. 118912, 28 May 2004, 430 SCRA 40, 50.
- [55] *People v. Costales*, 424 Phil. 321, 334 (2002).
- [56] *People v. Castillo*, 426 Phil. 752, 768 (2002).
- [57] *People v. Asuela*, 426 Phil. 428, 452 (2002).
- [58] *Supra* note 43.
- [59] Id.
- [60] Rule 110, Sections 8 and 9 of the Revised Rules on Criminal Procedure.
- [61] *People v. Agguihao*, G.R. No. 104725, 10 March 1994, 231 SCRA 9, 21.
- [62] *Supra* note 59.
- [63] CODIFYING THE LAWS ON ILLEGAL/UNLAWFUL POSSESSION, MANUFACTURE, DEALING IN, ACQUISITION OR DISPOSITION, OF FIREARMS, AMMUNITION OR EXPLOSIVES; AND IMPOSING STIFFER PENALTIES FOR CERTAIN VIOLATIONS THEREOF AND FOR RELEVANT PURPOSES.
- [64] AN ACT AMENDING THE PROVISIONS OF PRESIDENTIAL DECREE NO. 1866, AS AMENDED, ENTITLED: CODIFYING THE LAWS ON ILLEGAL/UNLAWFUL POSSESSION, MANUFACTURE, DEALING IN, ACQUISITION OR DISPOSITION, OF FIREARMS, AMMUNITION OR EXPLOSIVES; AND IMPOSING STIFFER PENALTIES FOR CERTAIN VIOLATIONS THEREOF AND FOR RELEVANT PURPOSES.(6 June 1997)
- [65] Rollo, pp. 71-72.
- [66] Id. at 72.

[67] Id.

[68] *People v. Lumilan*, 380 Phil. 130, 145 (2000); *People v. Castillo*, 382 Phil. 503 (2002); *People v. Malinao*, G.R. No. 128148, 16 February 2004, 423 SCRA 34, 51.

[69] ART. 64. Rules for the application of penalties which contain three periods. - In cases in which the penalties prescribed by law contain three periods, whether it be a single divisible penalty or composed of three different penalties, each one of which forms a period in accordance with the provisions of articles 76 and 77, the courts shall observe for the application of the penalty the following rules, according to whether there are or are no mitigating or aggravating circumstances:

x x x

3. When only an aggravating circumstance is present in the commission of the act, they shall impose the penalty in its maximum period.

[70] *People v. Bangcado*, G.R. No. 132330, 28 November 2000, 346 SCRA 189, 213; *People v. Panado*, G.R. No. 133439, 26 December 2000, 348 SCRA 679, 691.

[71] *Nueva España v. People*, G.R. No. 163351, 21 June 2005, 460 SCRA 547, 556.

[72] The rule is that documentary evidence should be presented to substantiate a claim for loss of earning capacity. By way of exception, damages therefore may be awarded despite the absence of documentary evidence if there is testimony that the victim was either (1) self-employed, earning less than the minimum wage under current labor laws, and judicial notice is taken of the fact that in the victim's line of work, no documentary evidence is available; of (2) employed as a daily-wage worker earning less than the minimum wage under current labor laws. Id. at 556.

[73] *People v. Manambay*, G. R. No. 130684, 5 February 2004, 422 SCRA 73, 90.

[74] *Lamis v. Ong*, G.R. No. 148923, 11 August 2005, 466 SCRA 510, 519-520.

[75] ART. 51. Penalty to be imposed upon principals of attempted crime. - The penalty lower by two degrees than that prescribed by law for the consummated felony shall be imposed upon the principals in an attempt to commit a felony.

[76] ART. 50. Penalty to be imposed upon principals of a frustrated crime. - The penalty next lower in degree than that prescribed by law for the consummated felony shall be imposed upon the principal in a frustrated felony.

[77] ART. 249. Homicide. - Any person who, not falling within the provisions of article 246 shall kill another without the attendance of any of the circumstances enumerated in the next preceding article, shall be deemed guilty of homicide and be punished by reclusion temporal.

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