

FERNANDO ESTABAS MAHAWAN ALIAS PADO, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 176609. December 18, 2008

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

In this Petition for Review on Certiorari under Rule 45 of the Rules of Court,[1] petitioner Fernando Estabas Mahawan alias Pado, seeks the reversal of the Decision[2] of the Court of Appeals in CA-G.R. CR No. 00071, dated 25 May 2006, which affirmed in toto the Decision[3] of the Cebu City Regional Trial Court (RTC), Branch 10, in Criminal Case No. CBU-42385, dated 10 August 2004, finding him guilty of frustrated homicide.

The records of the case bear the following facts:

On 18 October 1996, an Information[4] was filed before the RTC charging petitioner with frustrated homicide. The accusatory portion of the information reads:

The undersigned Prosecutor I of Cebu City accuses FERNANDO ESTABAS MAHAWAN alias "PADO" of the crime of FRUSTRATED HOMICIDE, committed as follows:

That on or about the 5[th] day of October, 1995, about 9:30 p.m., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, armed with a firearm, with deliberate intent and with intent to kill, did then and there attack, assault and use personal violence upon the person of Diosdada Paradero, by firing shots at said Diosdada Paradero, hitting her on the vital parts of her body, thereby inflicting upon her the following physical injuries:

"GUNSHOT WOUND POINT OF ENTRY 3[rd] ICS (LEFT) MCL. NO POINT OF EXIT, 4 PT. PERFORATION DESCENDING COLON, GRADE II LIVER INJURY SEGMENT I, 1.5 CM. DIAPHRAGMATIC RENT (LEFT) INCISED WOUND (LEFT) EAR LOBULE, (RIGHT) WRIST"

which injuries, under ordinary circumstance, would cause the death of said Diosdada Paradero, thus performing all the acts of execution which would have produced the crime of homicide, but which nevertheless did not produce it by reason of causes independent of the will of the herein accused, that is, by the timely and able medical assistance rendered to said Diosdada Paradero which prevented her death.

When arraigned on 22 April 1997, petitioner, assisted by his counsel de parte, pleaded "Not guilty" to the charge.[5] Trial on the merits thereafter followed.

The prosecution presented as witnesses private complainant Diosdada S. Paradero (Paradero), Dr. James Guardiario (Dr. Guardiario), and Police Chief Inspector Myrna Arreola (Inspector Arreola). Their testimonies, woven together, produce the following narrative:

Paradero is a resident of B. Aranas Extension, Cebu City. Her house has two floors. She operates a store on the ground floor, while the second floor is utilized by her and her family as sala and bedrooms.

On 5 October 1996, at about 9:30 p.m., Paradero was tending her store when petitioner arrived and asked her for a

bottle of beer. She told petitioner that there was no more beer. When she was about to open the refrigerator in the store to show petitioner that there was really no more beer, petitioner sneaked inside the store. She closed the refrigerator and faced petitioner. Suddenly, petitioner pulled out a gun (caliber .38 revolver) and shot her on the left chest. She retreated and fell on the ground. As petitioner moved closer to her, she grabbed a kitchen knife nearby to defend herself. Petitioner shot Paradero again but the bullet this time merely grazed her left earlobe. Petitioner snatched the kitchen knife from her hand and fled the store.

Paradero's sister and some neighbors brought her to Chong Hua Hospital where the gunshot wound in her left chest was treated. She also underwent a surgical operation on her colon (large intestine), liver and diaphragm as these vital organs were hit by the trajectory of the bullet. Dr. Guardario performed the said treatment and operation.

Meanwhile, petitioner was brought by the police authorities to the Cebu City Police Station for investigation. Thereupon, a paraffin test was conducted on him by Inspector Arreola. The result of the test showed there was gun powder residue on his right hand.

On 16 October 1996, Paradero was discharged from the Chong Hua Hospital.

On 3 February 1997, Paradero was confined and she underwent another operation on her colon at the Don Vicente Sotto Medical Center. She was discharged therefrom on 14 February 1997.[6]

The prosecution adduced documentary pieces of evidence to buttress the aforesaid allegations, to wit: (1) medical certificate of Paradero issued by Dr. Guardario (Exhibit A);[7] (2) medical certificate of Paradero issued by the chief of Vicente Sotto Memorial Medical Center (Exhibit B);[8] (3) list of expenses and official receipts as regards Paradero's treatment and confinement for a gunshot wound (Exhibit C);[9] (4) subpoena duces tecum issued by the RTC to Inspector Arreola (Exhibit D);[10] (5) physical science report on the paraffin test conducted on petitioner (Exhibit E);[11] and (6) letter-request for paraffin test on petitioner (Exhibit F).[12]

For its part, the defense presented the testimonies of petitioner and his friend/neighbor named Antonio Artiaga (Artiaga) to refute the accusations against him. Petitioner disclaimed any liability and invoked self-defense. His version of the incident, as corroborated by Artiaga on some relevant points, is as follows:

On 5 October 1996, at around 9:30 p.m., petitioner went to Paradero's store to buy cigarettes. Upon arriving there, he saw Paradero standing near the store's door. He asked Paradero if he could buy cigarettes. Paradero replied in a loud voice that she did not have any stock of cigarettes. Suddenly, Paradero, then holding a knife, went out of the store and approached him. Paradero tried to stab him with the knife but he parried the thrust. He and Paradero grappled for possession of the knife causing him injury on the left finger. He did let go of Paradero. The latter, however, attacked him again with the knife. This time he was slightly hit by the knife on the stomach. He drew his firearm and shot Paradero who, upon being hit by the bullet, slumped on the ground. He took Paradero's knife and went home. Subsequently, he proceeded to his brother's house where he called a policeman named Senior Police Officer 2 (SPO2) Quevedo. He surrendered to SPO2 Quevedo upon the latter's arrival at his (petitioner) brother's house. SPO2 Quevedo brought him to the Cebu City Police Station where he was investigated. Afterwards, he was taken to the Cebu City Medical Center for treatment of the injuries sustained during the incident. Later, he learned that Paradero attacked him with a knife because Paradero had a quarrel with his (petitioner) wife's relative named Dindo Ruiz (Ruiz), who was allegedly stabbed and killed by Paradero's bata-bata (subordinates).[13]

The defense likewise proffered the medical certificate of petitioner to support his claims. The medical certificate states that petitioner was treated for incised wounds on the left finger and for abdominal abrasion.[14]

After trial, the RTC rendered a Decision convicting petitioner of frustrated homicide, sentencing him to an

indeterminate term of 6 years of prision correccional, as minimum, to 10 years of prision mayor, as maximum. He was also ordered to pay Paradero the amounts of P110,000.00 as actual damages, P50,000.00 as exemplary damages, P9,000.00 as unearned income, and P50,000.00 as attorney's fees. The dispositive portion of the RTC Decision reads:

WHEREFORE, PREMISES CONSIDERED, this Court finds the accused FERNANDO ESTABAS MAHAWAN, GUILTY of committing the crime of FRUSTRATED HOMICIDE. He is hereby sentenced to suffer the indeterminate term of SIX (6) YEARS of PRISION CORRECCIONAL as minimum to TEN (10) YEARS OF PRISION MAYOR as maximum thereto.[15]

Petitioner filed a motion for reconsideration[16] of the RTC Decision but this was denied.[17] Undaunted, he appealed to the Court of Appeals.

On 25 May 2006, the appellate court promulgated its Decision affirming in toto the RTC Decision. Petitioner sought a reconsideration[18] of the appellate court's decision but it was denied.[19] Thus, petitioner lodged the instant petition before us assigning the following errors:

I.

THE HONORABLE COURT OF APPEALS ERRED IN CONCLUDING IN ITS QUESTIONED DECISION THAT ACCUSED-APPELLANT, PETITIONER HEREIN, FAILED TO FIRMLY ESTABLISH THAT UNLAWFUL AGGRESSION PRECEDED HIS ATTACK ON THE PRIVATE OFFENDED PARTY;

II.

COROLLARILY TO THE FOREGOING, BOTH THE HONORABLE COURT OF APPEALS AND THE REGIONAL TRIAL COURT LIKewise ERRED IN CONCLUDING THAT THE SECOND AND THIRD ELEMENTS OF SELF-DEFENSE ARE WANTING IN THE CASE AT BAR;

III.

THE HONORABLE COURT OF APPEALS LIKewise ERRED IN NOT FINDING THAT THERE WAS NO INTENT TO KILL ON THE PART OF ACUSED-APPELLANT, PETITIONER HEREIN;

IV.

BOTH THE HONORABLE COURT OF APPEALS AND THE REGIONAL TRIAL COURT ERRED IN NOT APPRECIATING THE "EQUIPOISE DOCTRINE" IN FAVOR OF THE ACCUSED-APPELLANT, PETITIONER HEREIN;

V.

THE HONORABLE COURT OF APPEALS ERRED IN AFFIRMING IN TOTO THE AWARD FOR DAMAGES GRANTED BY THE LOWER COURT;

VI.

THE HONORABLE COURT OF APPEALS ERRED IN DENYING ACCUSED-APPELLANT'S, PETITIONER HEREIN, EARNEST MOTION FOR RECONSIDERATION WITHOUT CLEARLY SETTING FORTH THE FACTS AND LAW AS BASIS FOR THE DENIAL THEREOF.[20]

In the main, petitioner argues he should be acquitted because he merely acted in self-defense when he shot Paradero during the incident.

It is axiomatic that where an accused pleads self-defense, he thereby admits authorship of the crime. Accordingly, the burden of evidence is shifted to the accused who must then prove with clear and convincing proof the following elements of self-defense: (1) unlawful aggression on the part of the victim; (2) reasonable necessity of the means employed to prevent or repel the attack; and (3) lack of sufficient provocation on the part of the person defending himself. Although all three elements must concur, self-defense must rest firstly on proof of unlawful

aggression on the part of the victim. If no unlawful aggression attributed to the victim is established, there can be no self-defense, whether complete or incomplete. Unlawful aggression is a condition sine qua non for the justifying circumstance of self-defense to apply.[21]

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. There is an unlawful aggression on the part of the victim when he puts in actual or imminent danger the life, limb, or right of the person invoking self-defense. There must be actual physical force or actual use of weapon. 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.[22]

Petitioner asserts that the findings of the RTC and the Court of Appeals are in contrast as to whether there was unlawful aggression on the part of Paradero during the incident; that the Court of Appeals erred in concluding that he failed to establish unlawful aggression on the part of Paradero; that such conclusion contradicts the RTC's finding that there was unlawful aggression on the part of Paradero; and that the RTC's view is more consistent with the facts and evidence on record as compared with the disquisition of the Court of Appeals.[23]

We shall first ascertain whether the findings of the RTC and the Court of Appeals are contradictory as to whether petitioner failed to establish unlawful aggression on the part of Paradero.

In support of his claim that the RTC found unlawful aggression on the part of Paradero, petitioner quoted the following excerpts[24] from the RTC Decision:

This Court cannot sustain private complainant's claim that accused Mahawan, for a flimsy reason that she had no more beer, would immediately enter her store and shoot her with his firearm. x x x.

x x x x

Correspondingly, this Court would find Mahawan's claim that it was the private complainant who attacked him first, to be in accordance with human knowledge and experience of mankind, more so, that accused has a corroborative witness in the person of Mr. Antonio Artiaga, who testified that he saw private complainant holding a knife and was attempting to stab the accused.

As can be gleaned from the foregoing, the RTC believed petitioner's allegation that it was Paradero who attacked first during the incident. It should be observed, however, that the RTC does not specifically state or conclude that there was unlawful aggression on the part of Paradero.

In the succeeding paragraph, the RTC categorically pronounced that there was insufficient evidence to determine the unlawful aggressor during the incident, thus:

In the case at bar, there is insufficient evidence to determine who was the unlawful aggressor from the start, which would qualify accused's claim of self-defense. It was thus held that:

"In the absence of evidence showing that the victim was the unlawful aggressor at the start, the law will consider the aggression as reciprocal between the combatants." [25]

The subsequent disposition of the RTC implies that although the prosecution failed to show by sufficient evidence that it was petitioner who first attacked Paradero, the defense likewise failed to establish that unlawful aggression on the part of Paradero preceded petitioner's attack on her. This, in effect, means that petitioner failed to discharge his burden of proving with clear and convincing evidence that there was unlawful aggression on the part of Paradero. This conclusion was evident from the fact that the RTC disregarded petitioner's claim of self-defense and convicted the latter of frustrated homicide.[26]

The seemingly confusing statements in the RTC Decision may be a mere result of inadvertence in the drafting of the same. Nevertheless, petitioner cannot capitalize on such in arguing his case. He cannot pluck and cite some portions of the RTC Decision which fit his defense and disregard or omit those parts which are adverse to him. It should be borne in mind that the decision of the court should be read and understood in its entirety.[27]

Given the foregoing, we rule that there is no contradiction between the findings of the RTC and the Court of Appeals that petitioner failed to establish unlawful aggression on the part of Paradero.

We shall now determine whether the findings of both courts that petitioner failed to establish unlawful aggression on the part of Paradero were correct.

Paradero testified that on the night of the incident, petitioner went to her store and asked for a bottle of beer. When she told petitioner that there was no more beer, the latter entered her store, confronted her, and shot her with a gun. There is nothing in the foregoing which evinces unlawful aggression on the part of Paradero. What is clear is that petitioner was the aggressor during the incident. We have carefully examined the testimony of Paradero and found it to be credible and trustworthy. She testified in a clear and consistent manner during the trial. She was faithful and steadfast in recounting her ordeal despite the grueling cross-examination of the defense. Besides, Paradero testified that petitioner was drunk at the time of the incident. She also declared that she had known petitioner since 1988 and that the latter had, under the influence of alcohol, assaulted several persons.[28] These circumstances reinforce the allegation petitioner's propensity for harming people when he gets drunk.

On the other hand, petitioner narrated that when he went to Paradero's store to buy cigarettes, the latter replied in a loud voice that she did not have any stock of cigarettes. Paradero, then holding a knife, suddenly went out of the store and attacked him. This testimony does not inspire belief. It is inconsistent with logic and human experience that after Paradero told petitioner that there were no more cigarettes, Paradero would thereafter immediately attack petitioner. Precisely, there was no reason for Paradero to be angry and thereupon assault petitioner. It was petitioner who had more reason to be angry and attack Paradero, because the latter had told him in a loud voice that there were no more cigarettes. Petitioner alleged that Paradero attacked him because she had a grudge against his wife's relative named Dindo Ruiz. He also claimed that Ruiz had been stabbed and killed by Paradero's bata-bata (subordinates). These uncorroborated allegations deserve scant consideration for being unsubstantiated and unsupported by evidence.

The fact that petitioner sustained injuries on his hand and stomach, allegedly caused by Paradero's knife, does not signify that he was a victim of unlawful aggression. The medical certificate presented by petitioner states that the latter sustained incised wounds on the 2nd and 5th fingers measuring 2 centimeters and abdominal abrasion measuring 2.5 centimeters. Petitioner was discharged on the same day he was treated in the hospital.[29] It is clear from the foregoing that the injuries he sustained were not serious or severe. The superficiality of the injuries was not indication that his life and limb were in actual peril.[30]

In stark contrast, Paradero sustained a gunshot wound on the left chest. The trajectory of the bullet hit and seriously injured her liver, colon and diaphragm. This caused her to undergo two surgical operations. She also sustained wounds on her left forearm, right wrist and left earlobe. Based on the foregoing, it is difficult to believe that Paradero was the unlawful aggressor. The gravity, location, and number of wounds she sustained belie self-defense on petitioner's part.[31]

Hence, the RTC and the Court of Appeals were correct in concluding that petitioner failed to establish unlawful aggression on the part of Paradero.

Apropos the second issue, petitioner maintains that the second element of self-defense, which is reasonable

necessity of the means employed to prevent or repel the attack, was present in the instant case; that although he was younger, taller, and heavier than Paradero, it does not mean that there was no reasonable necessity on his part to shoot Paradero; that the RTC and the Court of Appeals overlooked the fact that he was forced to shoot Paradero because the latter had already stabbed him twice and thus caused a wound on his belly measuring 4 centimeters; that people react differently to a given situation, and that he merely acted under the instinct of self-preservation; that any person placed in his situation during the incident would do the same thing he did and would not risk the chance of being stabbed for the third time or expose himself to unnecessary danger; and that it was unfair to judge his act as totally and morally wrong.

Further, petitioner avers that the third element of self-defense, which is lack of sufficient provocation on the part of the person making the defense, was present in the case at bar; and that he did not commit any act or omission which provoked Paradero to attack him.[32]

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.[33]

In the case at bar, there was no reason or necessity for petitioner to shoot Paradero with a gun. Paradero was merely tending her store and did not attack or place in danger the life of petitioner during the incident. Even if we are to adopt petitioner's version of the incident, his act of shooting Paradero would not also be a reasonable and necessary means of repelling the aggression allegedly initiated by Paradero. As aptly observed by the RTC:

Indubitably, considering the age, height, built and sex of the accused and the victim, the accused was 31 years old and about 5'9 to 5'10 in height and heavily built, while the victim is frail and about 5'1, more or less, in height, the struggle for the possession of the knife would be over in a few seconds and accused would be able to disarm the victim. There is, therefore, no immediate need for the accused to fire his gun to stop the victim from attacking him. Proof of this is the knife presented by the accused in court which he had allegedly confiscated from the private complainant.[34]

In addition, petitioner was armed with a gun while Paradero supposedly held a knife. Petitioner should have fired a warning shot first to ward off Paradero or, if the latter persisted in attacking, fired a shot at a non-vital portion of her body in order to disable her instead of shooting her instantly in the chest. Further, when Paradero allegedly approached and tried to stab him, petitioner was not trapped or cornered in a specific area such that he had no way out. He testified that he and Paradero were outside the store during the incident. He could have run away and called the neighbors or police for help. In short, petitioner had other less harmful options than to shoot Paradero. Indeed, petitioner's act failed to pass the test of reasonableness of the means employed in preventing or repelling an unlawful aggression.

As we earlier found, petitioner shot Paradero when she told him there was no more stock of cigarettes. Paradero then was forced to grab a knife to defend herself. Clearly, petitioner provoked Paradero and not the other way around. Hence, the element of lack of sufficient provocation on the part of the person making the defense is also wanting in the present case.

Self-defense is inherently a weak defense because, as experience has demonstrated, it is easy to fabricate and difficult to prove.[35] Thus, for this defense to prosper, the accused must prove with clear and convincing evidence the elements of self-defense. He must rely on the strength of his own evidence and not on the weakness of that of the prosecution. Even if the evidence of the prosecution is weak, it cannot be disbelieved if the accused admitted responsibility for the crime charged.[36] In the case before us, petitioner failed to prove with plausible

evidence all the elements of self-defense. Hence, his plea of self-defense must fail.

Regarding the third issue, petitioner posits that the fact that he shot Paradero only once showed that he had no intent to kill her. There would have been intent to kill on his part if he shot Paradero several times, but such was not the case. Further, when Paradero fell on the ground, he immediately left the scene. He could have finished her off at that moment if he really intended to kill her.[37]

An essential element of homicide, whether in its consummated, frustrated or attempted stage, is intent of the offender to kill the victim immediately before or simultaneously with the infliction of injuries. Intent to kill is a specific intent which the prosecution must prove by direct or circumstantial evidence, while general criminal intent is presumed from the commission of a felony by *dolo*. [38]

Evidence to prove intent to kill in crimes against persons may consist, *inter alia*, of the means used by the malefactors; the nature, location and number of wounds sustained by the victim; the conduct of the malefactors before, at the time of, or immediately after the killing of the victim, the circumstances under which the crime was committed; and the motive of the accused.[39]

In the instant case, petitioner used a lethal weapon, i.e., a gun, in assaulting Paradero. He shot Paradero twice at a distance of two meters.[40] The bullet from the first shot hit Paradero's left chest. The trajectory of the bullet hit Paradero's vital organs such as the liver and colon. The bullet from the second shot hit Paradero's left earlobe. Moreover, Dr. Guardiaro testified that the injury on Paradero's colon was fatal and would have caused her death were it not for the timely medical attention given her.[41] The seriousness of Paradero's injuries was also shown by the fact that she was confined and operated on twice in different hospitals for the wound sustained in the colon. Verily, the foregoing circumstances clearly manifest intent to kill on the part of petitioner.

Even assuming, *arguendo*, that Paradero sustained only one gunshot wound, such does not negate intent to kill on the part of petitioner. The number of wounds inflicted is not the sole consideration in proving intent to kill.[42] As earlier mentioned, the means used by the malefactors and the nature and location of the wounds also manifest intent to kill. Petitioner's use of a gun in shooting Paradero on the chest and the fact that the bullet hit some of her vital organs of Paradero clearly indicate intent to kill.

With regard to the fourth issue, petitioner claims that his testimony was corroborated by Artiaga, while the testimony of Paradero was uncorroborated. As such, his testimony deserves credence and the *equipoise* doctrine should be applied in his favor.[43]

Credibility is weighed not by the number of witnesses but by the quality of their testimonies.[44] Witnesses are to be weighed, not numbered. Evidence is assessed in terms of quality and not quantity. Therefore, it is not uncommon to reach a conclusion of guilt on the basis of the testimony of a lone witness. For although the number of witnesses may be considered a factor in the appreciation of evidence, preponderance is not necessarily on the greatest number, and conviction can still be had on the basis of the credible and positive testimony of a single witness.[45]

We have earlier found the sole testimony of Paradero to be more credible than that of petitioner, even if the latter's testimony was corroborated by Artiaga on some relevant points. Paradero's account of the incident was clear and consistent. On the other hand, petitioner's narration of the incident, though corroborated by Artiaga, hardly inspires belief, as it does not conform to reason and human experience. Further, the RTC and CA upheld the sole testimony of Paradero over that of petitioner. They concluded that petitioner failed to prove his claim of self-defense despite the fact that her testimony was corroborated by Artiaga. Basic is the rule that factual findings of the trial court deserve great weight and respect especially when affirmed by the appellate court.[46] We found

no compelling reason to disturb the ruling of both courts. Given the foregoing, Paradero's testimony outweighs the testimonies of petitioner and Artiaga.

Petitioner's reliance on the equipoise rule is misplaced. Under the equipoise rule, where the evidence on an issue of fact is in equipoise (evenly balanced), or there is doubt on which side the evidence preponderates, the party having the burden of proof loses.[47] The equipoise rule finds application if the inculpatory facts and circumstances are capable of two or more explanations -- one of which is consistent with the innocence of the accused and the other with his guilt -- in which case the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction.[48]

In the instant case, there are no inculpatory facts and circumstances which are capable of two or more explanations because petitioner has already admitted shooting Paradero. In other words, there is no more issue as to the innocence or guilt of petitioner. What is left to be resolved is whether he can be relieved of liability by virtue of the self-defense he pleaded. We have earlier held that petitioner failed to discharge his burden of proving with clear and convincing evidence the presence of the elements of self-defense. Thus, the equipoise rule does not apply to this case.

As regards the fifth issue, petitioner avers that the award of actual damages to Paradero in the amount of P110,000.00 was unwarranted, because her name was not indicated in the hospital and medication receipts presented by the prosecution; that the grant of exemplary damages was not proper because there was unlawful aggression on the part of Paradero; that the award of P9,000.00 as unearned income was inappropriate, as there was no basis or evidence to support the same; and that the award of attorney's fees amounting to P50,000.00 was improper because there was unlawful aggression on the part of Paradero.[49]

To be entitled to an award of actual damages, there must be competent proof of the actual amount of loss. Credence can only be given to those that are supported by receipts.[50]

Most of the receipts on record[51] were issued in Paradero's name. Although her name was not stated in the other receipts, it appears, however, that these receipts were issued to Paradero's relatives and that the items covered by the same were purchased for Paradero. Also, it is a fact that some pharmacy outlets do not specify the name of the purchaser in the receipts they issue, but only indicate the items sold and their corresponding amounts.

The receipts on record show that Paradero incurred expenses in the amount of P22,426.06. She claimed other expenses, but they are not supported by receipts or other competent proofs. As such, the amount of actual damages awarded by the RTC and the Court of Appeals should be reduced from P110,000.00 to P22,426.06. However, we have held that when actual damages proven by receipts amount to less than P25,000.00, such as in the present case, the award of temperate damages amounting to P25,000.00 is justified in lieu of actual damages for a lesser amount.[52] This is based on a sound reasoning that it would be anomalous and unfair that the victim who tried but succeeded in proving actual damages of less than P25,000.00 only would be in a worse situation than another who might have presented no receipts at all but would be entitled to P25,000.00 temperate damages.[53] Thus, instead of P22,426.06, the amount of P25,000.00 as temperate damages should be awarded to Paradero.

We agree with petitioner that Paradero is not entitled to exemplary damages, but we differ in his reason for the disallowance thereof. Exemplary damages may be awarded only when one or more aggravating/qualifying circumstances are alleged in the information and proved during the trial.[54] In the instant case, no aggravating/qualifying circumstance was alleged in the information. Hence, the award of exemplary damages by the RTC and the Court of Appeals is unwarranted.

The general rule is that documentary evidence should be presented to substantiate a claim for damages for loss of earning capacity. As an exception, damages may be awarded in the absence of documentary evidence, provided that there is testimony that the victim was either (1) self-employed and earning less than the minimum wage under current labor laws, and judicial notice may be taken of the fact that in victim's line of work, no documentary evidence is available; or (2) employed as a daily wage worker earning less than the minimum wage under current labor laws.[55] In the case under consideration, no documentary evidence was adduced to support Paradero's claim for loss of earning capacity. Nonetheless, Paradero testified that she derived her income from operating a small sari-sari store, which she also owned. She also stated that she earned less than P50.00 a day from selling goods in her sari-sari store.[56] It is a fact and commonly recognized in our country that owners or operators of small sari-sari store, such as Paradero, do not issue official receipts since the quantity of the items being sold is minimal and these are sold cheap. Thus, Paradero is entitled to indemnity for loss of earning capacity. As to its proper amount, we agree with the RTC and the Court of Appeals that Paradero is entitled to P9,000.00. Records[57] show that Paradero underwent treatment and medication, which incapacitated her from working in her store for a period of 6 months. Hence, the computation is P50.00 multiplied by 180 days or 6 months. Consequently, the amount which she could have earned during the said period was P9,000.00.

Likewise, the award of attorney's fees in the amount of P50,000.00 is in order[58] because the records show that Paradero incurred such expenses in hiring a private prosecutor for the instant case.[59]

In his last assigned error, petitioner insists that the Court of Appeals erred in denying his motion for reconsideration without setting forth the factual and legal bases for the denial.

Art. VIII, Sec. 14 of the Constitution provides that "no petition for review or motion for reconsideration of a decision of the court shall be refused due course or denied without stating the legal basis therefor." This requirement was fully complied with when the Court of Appeals, in denying reconsideration of its decision, stated in its resolution that it found no reason to change its ruling, because petitioner had not raised anything new.[60] Thus, its resolution denying petitioner's motion for reconsideration states:

For consideration is accused-appellant's motion for reconsideration of this Court's decision promulgated on May 25, 2006. Acting on the motion filed by the accused-appellant, and considering that the same discloses no substantial argument or cogent reason to warrant a reconsideration or modification of our assailed decision which has already considered, if not squarely ruled upon, the arguments herein presented, we resolve to deny the motion.

WHEREFORE, there being no cogent reason for us to depart from our questioned findings, we hereby DENY the aforementioned motion.[61]

We shall now determine the propriety of petitioner's conviction for frustrated homicide and the corresponding prison term imposed.

We have held that the crime of frustrated homicide is committed if the following are present: (1) the accused intended to kill his victim, as manifested by his use of a deadly weapon in his assault; (2) the victim sustained fatal or mortal wound/s but did not die because of timely medical assistance; and (3) none of the qualifying circumstance for murder under Article 248 of the Revised Penal Code is present.[62]

All of the aforementioned are present and were duly establish in the case at bar. First, petitioner's use of a gun and his act of firing it twice from a distance of 2 meters towards Paradero clearly indicated his intent to kill her. Second, vital organs of Paradero like her liver and colon were hit by the trajectory of the bullet. Dr. Guardiola testified that the injury on Paradero's colon was fatal and would have caused her death were it not for the timely medical attention given her. And third, none of the qualifying circumstances for murder was alleged in the

information. Thus, the RTC and the Court of Appeals were correct in convicting petitioner of frustrated homicide.

Petitioner, nonetheless, alleges that he is entitled to the mitigating circumstance of voluntary surrender. We agree on this point with petitioner. For voluntary surrender to be appreciated as a mitigating circumstance, the following requisites must concur: (1) that the offender has not been actually arrested; (2) that the offender surrendered himself to a person in authority; and (3) that the surrender was voluntary.[63] The foregoing requisites are present in the case before us. Petitioner has not been actually arrested. After the incident, he immediately went to his brother's house and thereupon called via telephone a policeman named SPO2 Quevedo. He told SPO2 Quevedo that he wanted to surrender. Upon the latter's arrival at the house of petitioner's brother, petitioner turned himself in and, thereafter, he was brought to the police station.[64] The prosecution did not rebut the foregoing facts.

The penalty for frustrated homicide, pursuant to Article 250 of the Revised Penal Code, is prision mayor. There being one mitigating circumstance and no aggravating circumstance, pursuant to Article 64(2) of the Revised Penal Code, the minimum period of prision mayor should be imposed. Applying the Indeterminate Sentence Law, the range of the penalty is 4 years, 2 months and 1 day to 6 years of prision correccional as minimum, to 6 years and 1 day to 8 years of prision mayor as maximum. Thus, the RTC and the Court of Appeals erred in sentencing petitioner to a term of 6 years of prision correccional as minimum to 10 years of prision mayor as maximum. The proper penalty to be imposed on petitioner is 6 years of prision correccional, as minimum to 8 years of prision mayor, as maximum.

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. CR No. 00071, dated 25 May 2006, is hereby **AFFIRMED** with the following **MODIFICATIONS**: (1) petitioner Fernando Estabas Mahawan is sentenced to an indeterminate sentence of 6 years of prision correccional, as minimum to 8 years of prision mayor, as maximum; (2) the amount of P25,000.00 as temperate damages is awarded to Diosdada Pardo in lieu of the actual damages; and (3) the award of exemplary damages in the amount of P50,000.00 is deleted.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Nachura, and Reyes, JJ., concur.

[1] Rollo, pp. 15-39.

[2] Penned by Associate Justice Isaias P. Dicdican with Associate Justices Ramon M. Bato, Jr. and Apolinario D. Bruselas, Jr. concurring; rollo, pp. 41-50.

[3] Penned by Judge Soliver C. Peras; rollo, pp. 92-118.

[4] Records, pp. 1-2.

[5] Id. at 29.

[6] TSN, 30 June 1997, pp. 1-7; TSN, 10 March 1999, pp. 1-7.

[7] Records, p. 115.

[8] Id. at 116.

[9] Id. at 117-120 -125-187.

[10] Id. at 121.

[11] Id. at 122-124.

- [12] Id. at 188.
- [13] TSN, 9 October 2002, pp. 1-7; TSN, 11 April 2003, pp. 1-3.
- [14] Exhibit 1, records, p. 221.
- [15] Rollo, p. 118.
- [16] Records, pp. 375-381.
- [17] Id. at 390.
- [18] CA rollo, pp. 129-159.
- [19] Id. at 172.
- [20] Rollo, pp. 21-22.
- [21] *People v. Arizala*, 375 Phil. 666, 674-675 (1999).
- [22] *Palaganas v. People*, G.R. No. 165483, 12 September 2006, 501 SCRA 533, 549-550.
- [23] Rollo, pp. 22-24.
- [24] Id. at 107-109.
- [25] Id. at 111.
- [26] Id.
- [27] *People v. Belaro*, 367 Phil. 90, 100-101 (1999).
- [28] TSN, 18 January 2000, p. 2.
- [29] Records, p. 221.
- [30] *People v. Beltran, Jr.*, G.R. No. 168051, 27 September 2006, 503 SCRA 715, 731.
- [31] Id.
- [32] Rollo, pp. 25-31.
- [33] *Palaganas v. People*, supra note 22.
- [34] Rollo, p. 112.
- [35] *People v. Noay*, 357 Phil. 295, 306 (1998).
- [36] *Palaganas v. People*, supra note 22.
- [37] Rollo, pp. 31-33.
- [38] *Rivera v. People*, G.R. No. 166326, 25 January 2006, 480 SCRA 188, 196-197.
- [39] *People v. Delim*, 444 Phil. 430, 450 (2003).
- [40] TSN, 6 July 1999, p. 5.
- [41] TSN, 9 February 2000, p. 9.
- [42] *Novicio v. People*, G.R. No. 163331, 29 August 2008, p. 10.

- [43] Rollo, pp. 33-35.
- [44] Novicio v. People, supra note 42.
- [45] People v. Hillado, 367 Phil. 29, 45 (1999).
- [46] Mendoza v. People, G.R. No. 173551, 4 October 2007, 534 SCRA 668, 692.
- [47] Vergara v. People, G.R. No. 160328, 4 February 2005, 450 SCRA 495, 506.
- [48] Id.
- [49] Rollo, pp. 35-37.
- [50] People v. De Castro, 451 Phil. 664, 682 (2003).
- [51] Records, pp. 117-120.
- [52] People v. Beltran, Jr., supra note 30; People v. Dela Cruz, 459 Phil 130, 138-139 (2003).
- [53] Id.
- [54] People v. Cachapero, G.R. No. 153008, 20 May 2004, 428 SCRA 744, 758.
- [55] People v. Agudez, G.R. Nos. 138386-87, 20 May 2004, 428 SCRA 692, 711-712.
- [56] TSN, 10 March 1999, p. 5.
- [57] Records, pp. 15-116.
- [58] People v. Salva, 424 Phil. 63, 80 (2002); Resayo v. People, G.R. No. 154502, 27 April 2007, 522 SCRA 391, 409.
- [59] TSN, 10 March 1999, pp. 6-7.
- [60] Fr. Martinez v. Court of Appeals, 410 Phil. 241, 256-257 (2001); JRB Realty v. Court of Appeals, G.R. No. 119043, 14 April 1997, 271 SCRA 225, 230.
- [61] Rollo, p. 62.
- [62] Palaganas v. People, supra note 22.
- [63] Mendoza v. People, supra note 46.
- [64] TSN, 9 October 2002, pp. 5-6.

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