

ARNEL COLINARES, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 182748. December 13, 2011

Ponente: ABAD, J.

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ABAD, J.:

This case is about a) the need, when invoking self-defense, to prove all that it takes; b) what distinguishes frustrated homicide from attempted homicide; and c) when an accused who appeals may still apply for probation on remand of the case to the trial court.

The Facts and the Case

The public prosecutor of Camarines Sur charged the accused Arnel Colinares (Arnel) with frustrated homicide before the Regional Trial Court (RTC) of San Jose, Camarines Sur, in Criminal Case T-2213.[1]

Complainant Rufino P. Buena (Rufino) testified that at around 7:00 in the evening on June 25, 2000, he and Jesus Paulite (Jesus) went out to buy cigarettes at a nearby store. On their way, Jesus took a leak by the roadside with Rufino waiting nearby. From nowhere, Arnel sneaked behind and struck Rufino twice on the head with a huge stone, about 15 ½ inches in diameter. Rufino fell unconscious as Jesus fled.

Ananias Jallores (Ananias) testified that he was walking home when he saw Rufino lying by the roadside. Ananias tried to help but someone struck him with something hard on the right temple, knocking him out. He later learned that Arnel had hit him.

Paciano Alano (Paciano) testified that he saw the whole incident since he happened to be smoking outside his house. He sought the help of a barangay tanod and they brought Rufino to the hospital.

Dr. Albert Belleza issued a Medico-Legal Certificate[2] showing that Rufino suffered two lacerated wounds on the forehead, along the hairline area. The doctor testified that these injuries were serious and potentially fatal but Rufino chose to go home after initial treatment.

The defense presented Arnel and Diomedes Paulite (Diomedes). Arnel claimed self-defense. He testified that he was on his way home that evening when he met Rufino, Jesus, and Ananias who were all quite drunk. Arnel asked Rufino where he supposed the Mayor of Tigaon was but, rather than reply, Rufino pushed him, causing his fall. Jesus and Ananias then boxed Arnel several times on the back. Rufino tried to stab Arnel but missed. The latter picked up a stone and, defending himself, struck Rufino on the head with it. When Ananias saw this, he charged towards Arnel and tried to stab him with a gaff. Arnel was able to avoid the attack and hit Ananias with the same stone. Arnel then fled and hid in his sister's house. On September 4, 2000, he voluntarily surrendered at the Tigaon Municipal Police Station.

Diomedes testified that he, Rufino, Jesus, and Ananias attended a pre-wedding party on the night of the incident. His three companions were all drunk. On his way home, Diomedes saw the three engaged in heated argument with Arnel.

On July 1, 2005 the RTC rendered judgment, finding Arnel guilty beyond reasonable doubt of frustrated homicide and sentenced him to suffer imprisonment from two years and four months of prision correccional, as minimum, to six years and one day of prision mayor, as maximum. Since the maximum probationable imprisonment under the law was only up to six years, Arnel did not qualify for probation.

Arnel appealed to the Court of Appeals (CA), invoking self-defense and, alternatively, seeking conviction for the lesser crime of attempted homicide with the consequent reduction of the penalty imposed on him. The CA entirely affirmed the RTC decision but deleted the award for lost income in the absence of evidence to support it.[3] Not satisfied, Arnel comes to this Court on petition for review.

In the course of its deliberation on the case, the Court required Arnel and the Solicitor General to submit their respective positions on whether or not, assuming Arnel committed only the lesser crime of attempted homicide with its imposable penalty of imprisonment of four months of arresto mayor, as minimum, to two years and four months of prision correccional, as maximum, he could still apply for probation upon remand of the case to the trial court.

Both complied with Arnel taking the position that he should be entitled to apply for probation in case the Court metes out a new penalty on him that makes his offense probationable. The language and spirit of the probation law warrants such a stand. The Solicitor General, on the other hand, argues that under the Probation Law no application for probation can be entertained once the accused has perfected his appeal from the judgment of conviction.

The Issues Presented

The case essentially presents three issues:

1. Whether or not Arnel acted in self-defense when he struck Rufino on the head with a stone;
2. Assuming he did not act in self-defense, whether or not Arnel is guilty of frustrated homicide; and
3. Given a finding that Arnel is entitled to conviction for a lower offense and a reduced probationable penalty, whether or not he may still apply for probation on remand of the case to the trial court.

The Court's Rulings

One. Arnel claims that Rufino, Jesus, and Ananias attacked him first and that he merely acted in self-defense when he hit Rufino back with a stone.

When the accused invokes self-defense, he bears the burden of showing that he was legally justified in killing the victim or inflicting injury to him. The accused must establish the elements of self-defense by clear and convincing evidence. When successful, the otherwise felonious deed would be excused, mainly predicated on the lack of criminal intent of the accused.[4]

In homicide, whether consummated, frustrated, or attempted, self-defense requires (1) that the person whom the offender killed or injured committed unlawful aggression; (2) that the offender employed means that is reasonably necessary to prevent or repel the unlawful aggression; and (3) that the person defending himself did not act with sufficient provocation.[5]

If the victim did not commit unlawful aggression against the accused, the latter has nothing to prevent or repel and the other two requisites of self-defense would have no basis for being appreciated. Unlawful aggression contemplates an actual, sudden, and unexpected attack or an imminent danger of such attack. A mere threatening or intimidating attitude is not enough. The victim must attack the accused with actual physical force or with a weapon.[6]

Here, the lower courts found that Arnel failed to prove the element of unlawful aggression. He alone testified that Jesus and Ananias rained fist blows on him and that Rufino and Ananias tried to stab him. No one corroborated Arnel's testimony that it was Rufino who started it. Arnel's only other witness, Diomedes, merely testified that he saw those involved having a heated argument in the middle of the street. Arnel did not submit any medical certificate to prove his point that he suffered injuries in the hands of Rufino and his companions.[7]

In contrast, the three witnesses--Jesus, Paciano, and Ananias--testified that Arnel was the aggressor. Although their versions were mottled with inconsistencies, these do not detract from their core story. The witnesses were one in what Arnel did and when and how he did it. Compared to Arnel's testimony, the prosecution's version is more believable and consistent with reality, hence deserving credence.[8]

Two. But given that Arnel, the accused, was indeed the aggressor, would he be liable for frustrated homicide when the wounds he inflicted on Rufino, his victim, were not fatal and could not have resulted in death as in fact it did not?

The main element of attempted or frustrated homicide is the accused's intent to take his victim's life. The prosecution has to prove this clearly and convincingly to exclude every possible doubt regarding homicidal intent.[9] And the intent to kill is often inferred from, among other things, the means the offender used and the nature, location, and number of wounds he inflicted on his victim.[10]

Here, Arnel struck Rufino on the head with a huge stone. The blow was so forceful that it knocked Rufino out. Considering the great size of his weapon, the impact it produced, and the location of the wounds that Arnel inflicted on his victim, the Court is convinced that he intended to kill him.

The Court is inclined, however, to hold Arnel guilty only of attempted, not frustrated, homicide. In *Palaganas v. People*,^[11] we ruled that when the accused intended to kill his victim, as shown by his use of a deadly weapon and the wounds he inflicted, but the victim did not die because of timely medical assistance, the crime is frustrated murder or frustrated homicide. If the victim's wounds are not fatal, the crime is only attempted murder or attempted homicide.

Thus, the prosecution must establish with certainty the nature, extent, depth, and severity of the victim's wounds. While Dr. Belleza testified that "head injuries are always very serious,"^[12] he could not categorically say that Rufino's wounds in this case were "fatal." Thus:

Q: Doctor, all the injuries in the head are fatal?

A: No, all traumatic injuries are potentially treated.

Q: But in the case of the victim when you treated him the wounds actually are not fatal on that very day?

A: I could not say, with the treatment we did, prevent from becoming fatal. But on that case the patient preferred to go home at that time.

Q: The findings also indicated in the medical certificate only refers to the length of the wound not the depth of the wound?

A: When you say lacerated wound, the entire length of the layer of scalp.

Q: So you could not find out any abrasion?

A: It is different laceration and abrasion so once the skin is broken up the label of the frontal lobe, we always call it lacerated wound, but in that kind of wound, we did not measure the depth.^[13]

Indeed, Rufino had two lacerations on his forehead but there was no indication that his skull incurred fracture or that he bled internally as a result of the pounding of his head. The wounds were not so deep, they merely required suturing, and were estimated to heal in seven or eight days. Dr. Belleza further testified:

Q: So, in the medical certificate the wounds will not require surgery?

A: Yes, Madam.

Q: The injuries are slight?

A: 7 to 8 days long, what we are looking is not much, we give antibiotics and antit[e]tanus - the problem the contusion that occurred in the brain.

x x x x

Q: What medical intervention that you undertake?

A: We give antibiotics, Your Honor, antit[e]tanus and suturing the wounds.

Q: For how many days did he stay in the hospital?

A: Head injury at least be observed within 24 hours, but some of them would rather go home and then come back.

Q: So the patient did not stay 24 hours in the hospital?

A: No, Your Honor.

Q: Did he come back to you after 24 hours?

A: I am not sure when he came back for follow-up.[14]

Taken in its entirety, there is a dearth of medical evidence on record to support the prosecution's claim that Rufino would have died without timely medical intervention. Thus, the Court finds Arnel liable only for attempted homicide and entitled to the mitigating circumstance of voluntary surrender.

Three. Ordinarily, Arnel would no longer be entitled to apply for probation, he having appealed from the judgment of the RTC convicting him for frustrated homicide.

But, the Court finds Arnel guilty only of the lesser crime of attempted homicide and holds that the maximum of the penalty imposed on him should be lowered to imprisonment of four months of *arresto mayor*, as minimum, to two years and four months of *prision correccional*, as maximum. With this new penalty, it would be but fair to allow him the right to apply for probation upon remand of the case to the RTC.

Some in the Court disagrees. They contend that probation is a mere privilege granted by the state only to qualified convicted offenders. Section 4 of the probation law (PD 968) provides: "That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." [15] Since Arnel appealed his conviction for frustrated homicide, he should be deemed permanently disqualified from applying for probation.

But, firstly, while it is true that probation is a mere privilege, the point is not that Arnel has the right to such privilege; he certainly does not have. What he has is the right to apply for that privilege. The Court finds that his maximum jail term should only be 2 years and 4 months. If the Court allows him to apply for probation because of the lowered penalty, it is still up to the trial judge to decide whether or not to grant him the privilege of probation, taking into account the full circumstances of his case.

Secondly, it is true that under the probation law the accused who appeals "from the judgment of conviction" is disqualified from availing himself of the benefits of probation. But, as it happens, two judgments of conviction have been meted out to Arnel: one, a conviction for frustrated homicide by the regional trial court, now set aside; and, two, a conviction for attempted homicide by the Supreme Court.

If the Court chooses to go by the dissenting opinion's hard position, it will apply the probation law on Arnel based on the trial court's annulled judgment against him. He will not be entitled to probation because of the severe

penalty that such judgment imposed on him. More, the Supreme Court's judgment of conviction for a lesser offense and a lighter penalty will also have to bend over to the trial court's judgment--even if this has been found in error. And, worse, Arnel will now also be made to pay for the trial court's erroneous judgment with the forfeiture of his right to apply for probation. Ang kabayo ang nagkasala, ang hagupit ay sa kalabaw (the horse errs, the carabao gets the whip). Where is justice there?

The dissenting opinion also expresses apprehension that allowing Arnel to apply for probation would dilute the ruling of this Court in *Francisco v. Court of Appeals*[16] that the probation law requires that an accused must not have appealed his conviction before he can avail himself of probation. But there is a huge difference between *Francisco* and this case.

In *Francisco*, the Metropolitan Trial Court (MeTC) of Makati found the accused guilty of grave oral defamation and sentenced him to a prison term of one year and one day to one year and eight months of prision correccional, a clearly probationable penalty. Probation was his to ask! Still, he chose to appeal, seeking an acquittal, hence clearly waiving his right to apply for probation. When the acquittal did not come, he wanted probation. The Court would not of course let him. It served him right that he wanted to save his cake and eat it too. He certainly could not have both appeal and probation.

The Probation Law, said the Court in *Francisco*, requires that an accused must not have appealed his conviction before he can avail himself of probation. This requirement "outlaws the element of speculation on the part of the accused--to wager on the result of his appeal--that when his conviction is finally affirmed on appeal, the moment of truth well-nigh at hand, and the service of his sentence inevitable, he now applies for probation as an 'escape hatch' thus rendering nugatory the appellate court's affirmance of his conviction." [17]

Here, however, Arnel did not appeal from a judgment that would have allowed him to apply for probation. He did not have a choice between appeal and probation. He was not in a position to say, "By taking this appeal, I choose not to apply for probation." The stiff penalty that the trial court imposed on him denied him that choice. Thus, a ruling that would allow Arnel to now seek probation under this Court's greatly diminished penalty will not dilute the sound ruling in *Francisco*. It remains that those who will appeal from judgments of conviction, when they have the option to try for probation, forfeit their right to apply for that privilege.

Besides, in appealing his case, Arnel raised the issue of correctness of the penalty imposed on him. He claimed that the evidence at best warranted his conviction only for attempted, not frustrated, homicide, which crime called for a probationable penalty. In a way, therefore, Arnel sought from the beginning to bring down the penalty to the level where the law would allow him to apply for probation.

In a real sense, the Court's finding that Arnel was guilty, not of frustrated homicide, but only of attempted homicide, is an original conviction that for the first time imposes on him a probationable penalty. Had the RTC done him right from the start, it would have found him guilty of the correct offense and imposed on him the right penalty of two years and four months maximum. This would have afforded Arnel the right to apply for probation.

The Probation Law never intended to deny an accused his right to probation through no fault of his. The underlying philosophy of probation is one of liberality towards the accused. Such philosophy is not served by a harsh and stringent interpretation of the statutory provisions.[18] As Justice Vicente V. Mendoza said in his dissent in *Francisco*, the Probation Law must not be regarded as a mere privilege to be given to the accused only where it clearly appears he comes within its letter; to do so would be to disregard the teaching in many cases that the Probation Law should be applied in favor of the accused not because it is a criminal law but to achieve its beneficent purpose.[19]

One of those who dissent from this decision points out that allowing Arnel to apply for probation after he appealed from the trial court's judgment of conviction would not be consistent with the provision of Section 2 that the probation law should be interpreted to "provide an opportunity for the reformation of a penitent offender." An accused like Arnel who appeals from a judgment convicting him, it is claimed, shows no penitence.

This may be true if the trial court meted out to Arnel a correct judgment of conviction. Here, however, it convicted Arnel of the wrong crime, frustrated homicide, that carried a penalty in excess of 6 years. How can the Court expect him to feel penitent over a crime, which as the Court now finds, he did not commit? He only committed attempted homicide with its maximum penalty of 2 years and 4 months.

Ironically, if the Court denies Arnel the right to apply for probation under the reduced penalty, it would be sending him straight behind bars. It would be robbing him of the chance to instead undergo reformation as a penitent offender, defeating the very purpose of the probation law.

At any rate, what is clear is that, had the RTC done what was right and imposed on Arnel the correct penalty of two years and four months maximum, he would have had the right to apply for probation. No one could say with certainty that he would have availed himself of the right had the RTC done right by him. The idea may not even have crossed his mind precisely since the penalty he got was not probationable.

The question in this case is ultimately one of fairness. Is it fair to deny Arnel the right to apply for probation when the new penalty that the Court imposes on him is, unlike the one erroneously imposed by the trial court, subject to probation?

WHEREFORE, the Court PARTIALLY GRANTS the petition, MODIFIES the Decision dated July 31, 2007 of the Court of Appeals in CA-G.R. CR 29639, FINDS petitioner Arnel Colinares GUILTY beyond reasonable doubt of attempted homicide, and SENTENCES him to suffer an indeterminate penalty from four months of arresto mayor, as minimum, to two years and four months of prision correccional, as maximum, and to pay Rufino P. Buena the amount of P20,000.00 as moral damages, without prejudice to petitioner applying for probation within 15 days from notice that the record of the case has been remanded for execution to the Regional Trial Court of San Jose, Camarines Sur, in Criminal Case T-2213.

SO ORDERED.

Corona, C.J., Carpio, Velasco, Jr., Leonardo-De Castro, Del Castillo, Perez, Mendoza, and Reyes, JJ., concur.

Brion, J., I join J. Peralta' concurring opinion. & dissenting opinion.

Peralta, J., see concurring & dissenting opinion.

Bersamin, J., I join J., peralta's concurring and dissenting opinion.

Villarama, Jr., J., see concurring and dissenting opinion.

Sereno, J., I join J. Peralta's and Villarama.

Perlas-Bernabe, J., join J. Villarama.

[1] Records, p. 25.

[2] Id. at 2.

[3] Rollo, pp. 109-128. Penned by Associate Justice Rebecca De Guia-Salvador, with Associate Justices Magdangal M. de Leon and Ricardo R. Rosario concurring.

[4] People v. Dagani, G.R. No. 153875, August 16, 2006, 499 SCRA 64, 73-74.

[5] *Oriente v. People*, G.R. No. 155094, January 30, 2007, 513 SCRA 348, 359.

[6] *People v. Se*, 469 Phil. 763, 770 (2004).

[7] Records, pp. 245-246 (TSN, May 5, 2004, pp. 28-29).

[8] *People v. Enfectana*, 431 Phil. 64, 76 (2002).

[9] *People v. Pagador*, 409 Phil. 338, 351 (2001).

[10] *Rivera v. People*, 515 Phil. 824, 832 (2006).

[11] G.R. No. 165483, September 12, 2006, 501 SCRA 533, 555-556.

[12] Records, p. 82 (TSN, June 17, 2002, p. 6).

[13] *Id.* at 83-84 (*id.* at 7-8).

[14] *Id.* at 84-85 (*id.* at 8-9).

[15] Sec. 4, Presidential Decree 968 also known as the Probation Law of 1976, provides: SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal. (Emphasis supplied)

An order granting or denying probation shall not be appealable.

[16] 313 Phil. 241, 255 (1995).

[17] *Id.*

[18] *Yusi v. Honorable Judge Morales*, 206 Phil. 734, 740 (1983).

[19] *Francisco v. Court of Appeals*, *supra* note 16, at 273.

DISSENTING and CONCURRING OPINION

PERALTA, J.:

I concur with the disposition of the majority as to the conviction of the accused.

However, as to the question relating to the application of the Probation Law in this case, I respectfully dissent to the majority opinion.

Probation is not a right granted to a convicted offender. Probation is a special privilege granted by the State to a penitent qualified offender,[1] who does not possess the disqualifications under Section 9 of Presidential Decree (P.D.) No. 968,[2] otherwise known as the Probation Law of 1976. Likewise, the Probation Law is not a penal law for it to be liberally construed to favor the accused.[3]

In the American law paradigm, probation is considered as an act of clemency and grace, not a matter of right.[4] It is a privilege granted by the State, not a right to which a criminal defendant is entitled.[5] In the recent case of *City of Aberdeen v. Regan*,[6] it was pronounced that:

The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative measure and, as such, is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving.[7]

In this jurisdiction, the wisdom behind the enactment of our own Probation Law, as outlined in the said law, reads:

- (a) promote the correction and rehabilitation of an offender by providing him with individualized treatment;
- (b) provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and
- (c) prevent the commission of offenses.[8]

Originally, P.D. No. 968[9] allowed the filing of an application for probation even if an appeal had been perfected by the convicted offender under Section 4, thus:

Section 4. Grant of Probation. -- Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal.

An order granting or denying probation shall not be appealable.[10]

Thereafter, the filing of an application for probation pending appeal was still allowed when Section 4 of P.D. No. 968 was amended by P.D. No. 1257.[11]

However, with the subsequent amendment of Section 4 of P.D. No. 968 by P.D. No. 1990,[12] the application for probation is no longer allowed if the accused has perfected an appeal from the judgment of conviction. Section 4 of the Probation Law now reads:

Sec. 4. Grant of Probation. -- Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable.[13]

The reason for the disallowance is stated in the preamble of P.D. No. 1990, thus:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their

application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

WHEREAS, probation was not intended as an escape hatch and should not be used to obstruct and delay the administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated;

WHEREAS, it becomes imperative to remedy the problems abovementioned confronting our probation system.[14]

In *Sable v. People*,^[15] the Court stated that "[Section 4 of] the Probation Law was amended to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid."^[16] Thus, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated; who manifest spontaneity, contrition and remorse.^[17]

Verily, Section 4 of the Probation Law provides that the application for probation must be filed with the trial court within the 15-day period for perfecting an appeal. The need to file it within such period is intended to encourage offenders, who are willing to be reformed and rehabilitated, to avail themselves of probation at the first opportunity.^[18] If the application for probation is filed beyond the 15-day period, then the judgment becomes final and executory and the lower court can no longer act on the application for probation. On the other hand, if a notice of appeal is perfected, the trial court that rendered the judgment of conviction is divested of any jurisdiction to act on the case, except the execution of the judgment when it has become final and executory.

In view of the provision in Section 4 of the Probation Law that "no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction," prevailing jurisprudence^[19] treats appeal and probation as mutually exclusive remedies because the law is unmistakable about it.^[20]

However, it has been proposed that an appeal should not bar the accused from applying for probation if the appeal is solely to reduce the penalty to within the probationable limit, as this is equitable.

In this regard, an accused may be allowed to apply for probation even if he has filed a notice of appeal, provided that his appeal is limited to the following grounds:

1. When the appeal is merely intended for the correction of the penalty imposed by the lower court, which when corrected would entitle the accused to apply for probation; and
2. When the appeal is merely intended to review the crime for which the accused was convicted and that the accused should only be liable to the lesser offense which is necessarily included in the crime for which he was originally convicted and the proper penalty imposable is within the probationable period.

In both instances, the penalty imposed by the trial court for the crime committed by the accused is more than six years; hence, the sentence disqualifies the accused from applying for probation. Thus, the accused should be allowed to file an appeal under the aforesaid grounds to seek a review of the crime and/or penalty imposed by the trial court. If, on appeal, the appellate court finds it proper to modify the crime and/or the penalty imposed, and the penalty finally imposed is within the probationable period, then the accused should be allowed to apply

for probation.

In addition, before an appeal is filed based on the grounds enumerated above, the accused should first file a motion for reconsideration of the decision of the trial court anchored on the above-stated grounds and manifest his intent to apply for probation if the motion is granted. The motion for reconsideration will give the trial court an opportunity to review and rectify any errors in its judgment, while the manifestation of the accused will immediately show that he is agreeable to the judgment of conviction and does not intend to appeal from it, but he only seeks a review of the crime and/or penalty imposed, so that in the event that the penalty will be modified within the probationable limit, he will apply for probation.

What Section 4 of the Probation Law prohibits is an appeal from the judgment of conviction, thus:

Sec. 4. Grant of Probation. -- Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.[21]

An appeal from the judgment of conviction involves a review of the merits of the case and the determination of whether or not the accused is entitled to acquittal. However, under the recommended grounds for appeal which were enumerated earlier, the purpose of the appeal is not to question the judgment of conviction, but to question only the propriety of the sentence, particularly the penalty imposed, as the accused intends to apply for probation. If the appellate court finds it proper to modify the sentence, and the penalty finally imposed by the appellate court is within the probationable period, the accused should be allowed to apply for probation after the case is remanded to the trial court for execution.

It is believed that the recommended grounds for appeal do not contravene Section 4 of the Probation Law, which expressly prohibits only an appeal from the judgment of conviction. In such instances, the ultimate reason of the accused for filing the appeal based on the aforestated grounds is to determine whether he may avail of probation based on the review by the appellate court of the crime and/or penalty imposed by the trial court. Allowing the aforestated grounds for appeal would give a qualified convicted offender the opportunity to apply for probation if his ground for appeal is found to be meritorious by the appellate court, thus, serving the purpose of the Probation Law to promote the reformation of a penitent offender outside of prison.

On the other hand, probation should not be granted to the accused in the following instances:

1. When the accused is convicted by the trial court of a crime where the penalty imposed is within the probationable period or a fine, and the accused files a notice of appeal; and
2. When the accused files a notice of appeal which puts the merits of his conviction in issue, even if there is an alternative prayer for the correction of the penalty imposed by the trial court or for a conviction to a lesser crime, which is necessarily included in the crime in which he was convicted where the penalty is within the probationable period.

Both instances violate the spirit and letter of the law, as Section 4 of the Probation Law prohibits granting an application for probation if an appeal from the sentence of conviction has been perfected by the accused.

There is wisdom to the majority opinion, but the problem is that the law expressly prohibits the filing of an application for probation beyond the period for filing an appeal. When the meaning is clearly discernible from the language of the statute, there is no room for construction or interpretation.[22] Thus, the remedy is the amendment of Section 4 of P.D. No. 968, and not adaptation through judicial interpretation.

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- [1] *Sable v. People*, G.R. No. 177961, April 7, 2009, 584 SCRA 619, 625.
- [2] Sec. 9. Disqualified Offenders. -- The benefits of this Decree shall not be extended to those:
- (a) Sentenced to serve a maximum term of imprisonment of more than six years;
 - (b) Convicted of subversion or any crime against the national security or the public order;
 - (c) Who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
 - (d) Who have been once on probation under the provisions of this Decree; and
 - (e) Who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.
- [3] *Pablo v. Castillo*, G.R. No. 125108, August 3, 2000, 337 SCRA 176, 181; *Llamado v. Court of Appeals*, G.R. No. 84850, June 29, 1989, 174 SCRA 566, 577.
- [4] *People v. Anderson*, 50 Cal. 4th 19, 235 P.3d 11 (2010).
- [5] *Dean v. State*, 57 So.3d 169 (2010)
- [6] 170 Wash. 2d 103, 239 P.3d 1102 (2010).
- [7] Emphasis supplied.
- [8] P.D. No. 968, Section 2.
- [9] Establishing a Probation System, Appropriating Funds Therefor and Other Purposes, July 24, 1976.
- [10] Emphases supplied.
- [11] Amending Certain Sections of Presidential Decree Numbered Nine Hundred and Sixty-Eight, Otherwise Known as The Probation Law of 1976, December 1, 1977.

SECTION 1. Section 4 of Presidential Decree No. 968, otherwise known as the Probation Law of 1976, is hereby amended to read as follows:

SEC. 4. Grant of Probation. -- Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

The prosecuting officer concerned shall be notified by the court of the filing of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case, however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.

An order granting or denying probation shall not be appealable. (Emphasis supplied.)

- [12] Amending Presidential Decree No. 968, Otherwise Known as The Probation Law of 1976, October 5, 1985.

[13] Emphasis supplied.

[14] Italics supplied.

[15] Supra note 1.

[16] Id. at 627.

[17] Id.

[18] Id.

[19] *Sable v. People*, supra note 1; *Francisco v. Court of Appeals*, G.R. No. 108747, April 6, 1995, 243 SCRA 384; *Llamado v. Court of Appeals*, G.R. No. 84850, June 29, 1989, 174 SCA 566.

[20] *Sable v. People*, supra note 1, at 628.

[21] Emphasis and underscoring supplied.

[22] *Pablo v. Castillo*, supra note 3, at 181.

CONCURRING AND DISSENTING OPINION

VILLARAMA, JR.,J.:

I join the majority in ruling that petitioner should have been convicted only of the lesser crime of attempted homicide and that the maximum of the indeterminate prison term imposed on him should be lowered to four months of *arresto mayor*, as minimum, to two years and four months of *prision correccional*, as maximum. However, I disagree with their conclusion (by 8-7 vote) that on grounds of fairness, the Court should now allow petitioner the right to apply for probation upon remand of the case to the trial court.

I submit the following principles which should be controlling on the present issue:

- Probation being a mere privilege, this Court may not grant as relief the recognition that accused-appellant may avail of it as a matter of right.
- The probation law is not a penal statute and therefore the principle of liberal interpretation is inapplicable.

With the enactment of P. D. No. 968 (Probation Law of 1976), this Court held that the rule that if the accused appeals his conviction solely to reduce the penalty, such penalty already probationable, and the appellate court grants his appeal he may still apply for probation, had already been abandoned. We explained that the intention of the new law is to make appeal and probation mutually exclusive remedies.[1] Thus, where the penalty imposed by the trial court is not probationable, and the appellate court modifies the penalty by reducing it to within the probationable limit, the same prohibition should still apply and he is not entitled to avail of probation.

In *Francisco v. Court of Appeals*, [2] the Court categorically declared that "[P]robation is not a right of an accused, but rather an act of grace of clemency or immunity conferred by the court to a seemingly deserving defendant who thereby escapes the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." Subsequently, the Court noted that the suggestion in *Francisco* that an appeal by the accused should not bar him from applying for probation where such appeal was solely for the purpose of correcting a wrong penalty - to reduce it to within the probationable range - may not be invoked by the accused in situations when he at the same time puts in issue the merits of his conviction.[3] The ponencia found the factual milieu in *Francisco* not on fours with this case. However, the accused here did not even raise the issue of his entitlement to probation

either as an alternative prayer to acquittal or as principal relief.

The majority reasoned that since the trial court imposed a (wrong) penalty beyond the probationable range, thus depriving the accused of the option to apply for probation when he appealed, the element of speculation that the law sought to curb was not present. Noting that the accused in this case claimed that the evidence at best warranted his conviction only for attempted, not frustrated homicide, the majority opined that said accused had, in effect, sought to bring down the penalty as to allow him to apply for probation.

I cannot concur with such proposition because it seeks to carve out an exception not found in and contrary to the purpose of the probation law.

The pronouncement in Francisco that the discretion of the trial court in granting probation is to be exercised primarily for the benefit of organized society, and only incidentally for the benefit of the accused, underscored the paramount objective in granting probation, which is the reformation of the probationer. This notwithstanding, the majority suggests that remorse on the part of the accused is not required, or least irrelevant in this case because "the Court cannot expect petitioner to feel penitent over a crime, which the Court now finds, he did not commit", as he only committed attempted homicide.

It must be stressed that in foreclosing the right to appeal his conviction once the accused files an application for probation, the State proceeds from the reasonable assumption that the accused's submission to rehabilitation and reform is indicative of remorse. And in prohibiting the trial court from entertaining an application for probation if the accused has perfected his appeal, the State ensures that the accused takes seriously the privilege or clemency extended to him, that at the very least he disavows criminal tendencies. Consequently, this Court's grant of relief to herein accused whose sentence was reduced by this Court to within the probationable limit, with a declaration that accused may now apply for probation, would diminish the seriousness of that privilege because in questioning his conviction accused never admitted his guilt. It is of no moment that the trial court's conviction of petitioner for frustrated homicide is now corrected by this Court to only attempted homicide. Petitioner's physical assault on the victim with intent to kill is unlawful or criminal regardless of whether the stage of commission was frustrated or attempted only. Allowing the petitioner the right to apply for probation under the reduced penalty glosses over the fact that accused's availment of appeal with such expectation amounts to the same thing: speculation and opportunism on the part of the accused in violation of the rule that appeal and probation are mutually exclusive remedies.

The ponencia then declares that the question in this case is ultimately one of fairness, considering the trial court's erroneous conviction that deprived petitioner of the right to apply for probation, from which he had no way of obtaining relief except by appealing the judgment.

Such liberality accorded to the accused, for the reason that it was not his fault that the trial court failed to impose the correct sentence, is misplaced.

It is settled that the Probation Law is not a penal statute.[4] In the matter of interpretation of laws on probation, the Court has pronounced that "the policy of liberality of probation statutes cannot prevail against the categorical provisions of the law." [5] In applying Sec. 4 of P.D. No. 968 to this and similar cases, the Court must carefully tread so as not to digress onto impermissible judicial legislation whereby in the guise of interpretation, the law is modified or given a construction which is repugnant to its terms. As oft-repeated, the remedy lies in the legislature and not judicial fiat.

I therefore maintain my dissent to the pronouncement in the ponencia recognizing the right of petitioner Arnel Colinares to apply for probation.

[1] *Bernardo v. Balagot*, G.R. No. 86561, November 10, 1992, 215 SCRA 526, 531.

[2] G.R. No. 108747, April 6, 1995, 243 SCRA 384.

[3] See *Lagrosa v. People*, G.R. No. 152044, July 3, 2003, 405 SCRA 357, 362.

[4] *Llamado v. Court of Appeals*, 174 SCRA 566 (1989).

[5] *Pablo v. Castillo*, G.R. No. 125108, August 3, 2000, 337 SCRA 176, 170.

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