

ANGELITO ORTEGA, PETITIONER, VS. THE HONORABLE SANDIGANBAYAN, RESPONDENT.

G.R. No. 57664. February 08, 1989

Ponente: SARMIENTO, J.

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SARMIENTO, J.:

This is a petition for review of the decision of the Sandiganbayan of June 19, 1981, the dispositive portion of which reads:

WHEREFORE, in view of the foregoing, the Court finds the accused, Angelito Ortega y Carandang, guilty beyond reasonable doubt as principal of the crime of homicide defined and penalized under Art. 249 of the Revised Penal Code, without any mitigating or aggravating circumstance; and applying the Indeterminate Sentence Law, he is hereby sentenced to an indeterminate penalty ranging from EIGHT (8) YEARS and ONE (1) DAY of prision mayor, as minimum, to FOURTEEN (14) YEARS, EIGHT (8) MONTHS and ONE (1) DAY of reclusion temporal, as maximum, to indemnify the heirs of the deceased, Marciano Donato y Hernandez, in the sum of P12,000, and to pay the costs.

SO ORDERED.[1]

Before us, the petitioner raises the following issues:

- I. DID THE HON. SANDIGANBAYAN ERR IN CONCLUDING THAT NO TENABLE EXPLANATION WAS GIVEN BY THE ACCUSED PETITIONER FOR HIS FAILURE TO OFFER THE CLAIMED MATERIAL EVIDENCES, NAMELY, HIS RAINCOAT AND VICTIM'S KNIFE?
- II. DID THE RESPONDENT HON. SANDIGANBAYAN COMMIT REVERSIBLE ERROR IN RELYING TOTALLY ON THE MEDICO LEGAL EXPERT'S OPINION ON VITAL MATTERS MATERIAL TO ITS FINDINGS?
- III. DID THE HON. RESPONDENT TRIBUNAL FATALLY ERR IN FINDING THAT THE ALLEGED CONTRADICTIONS AMONG WITNESSES FOR THE DEFENSE WERE REAL AND FATAL?
- IV. PRIOR TO THE PROMULGATION OF PRESIDENTIAL DECREE NO. 1606, PETITIONER HAD ACQUIRED THE VESTED RIGHT, NOT WAIVABLE, TO BE TRIED IN THE PLACE OF THE ALLEGED COMMISSION OF THE CRIME CHARGED, THUS DEPRIVING THE SANDIGAN-BAYAN OF TERRITORIAL JURISDICTION AND, HENCE; RENDERING INVALID THE PROCEEDINGS HELD IN THE PREMISES.
- V. LIKEWISE, THE TRIAL CONDUCTED BY SANDIGANBAYAN DEPRIVED PETITIONER OF ANOTHER VESTED RIGHT, i.e., TO AN APPEAL IN AN ORDINARY COURSE WHERE FINDINGS OF FACT OF THE TRIAL TRIBUNAL ARE SUBJECT TO OPEN REVIEW BY THE COURT OF APPEALS.

The evidence for the prosecution rests chiefly on the testimony of Dr. Maximo Reyes y Laro, Medico-Legal Officer of the National Bureau of Investigation, and the judicial admissions of the petitioner, duly assisted by his counsel, to wit: that he was a duly appointed and qualified member of the Integrated National Police stationed in San Pablo City; that he was in the actual performance of his official duties on July 17, 1977; and that while in such performance of his duties, he shot to death with his service pistol Marciano Donato y Hernandez.[2]

Testifying in his own defense, corroborated by Ernesto Obias y Sombilles and Pat. Cesar Belen y Abodasio of the San Pablo Police Station, the petitioner invoked self-defense to justify his otherwise criminal act.

The respondent court capsulized the facts of the case as follows:

The deceased was shot dead in San Pablo City but his body was brought to the NBI official morgue at Funeraria Popular, Manila, where it was photographed by an NBI photographer (Exhs. "B", "B-1" to "B-3") and autopsied by Dr. Maximo Reyes y Laro on July 18, 1977. He found one gunshot wound with its point of entry below the right eye (Exh. "E-1"), the bullet from the point of entry trajecting upward and backward from right to left exiting at the back of the head. (Exh. "E-2".) Marks of burning and smudging of tissues surrounding the entry wound indicated that the muzzle of the gun at the time of firing was in near contact -- not more than six inches from the victim's cheek. Dr. Reyes issued Necropsy Report N-77-1135 (Exh. "A"), the certificate of postmortem examination (Exh. "C") and the corresponding death certificate. (Exh. "D")

The defense version of the incident that led to the death of the deceased, Marciano Donato y Hernandez, puts it that on July 17, 1977, between 3:00 and 4:00 p.m., Pat. Ortega was on traffic duty when one Mario Castillo complained that a person was extorting money from him and said he would point the extortionist. Castillo had a small wound on the neck which he said was caused by a knife poked by the extortionist. Pat. Ortega and Castillo went to Pat. Cesar Belen who was directing traffic at Paulino St., San Pablo City. Pat. Ortega asked Pat. Belen to accompany them. Pat. Belen left his post and joined Pat. Ortega and Castillo to Bonifacio St. At Cine Supreme, Castillo pointed to a man wearing a hat as the alleged extortionist. When they were about to approach the fellow, the latter saw them and ran away. They went to Burgos St. to intercept but the man saw them again at the corner of Zamora and Burgos Sts. and fled away. Pat. Ortega and Belen flagged down a passing tricycle driven by Ernesto Obias y Sombilles. They ordered the driver to drive against the flow of traffic along Burgos St. to overtake their quarry. They saw the man at Malvar St. going toward them but the man entered a yard upon seeing them. Pat. Ortega and Belen alighted from the tricycle in front of the gate of the yard while Obias stood by near his tricycle. Pat. Ortega sought cover behind one of the panels of the gate and shouted to the man who was behind a "kalamansi" tree to come out, introducing themselves as policemen. Pat. Belen positioned himself some three arms-length (dipa) from Pat. Ortega outside the fence. The man came out with a drawn kitchen knife and suddenly stabbed Pat. Ortega. The latter moved back to evade the blow and happened to lean on the tricycle, but his raincoat near the portion of his stomach was reached by the knife. With Pat. Ortega still leaning on the tricycle, the man stabbed him again but Pat. Ortega was able to draw his gun and fire at his assailant. The fellow fell to the ground. The three, Pat. Ortega, Pat. Belen and driver Obias, picked him up, boarded him on the tricycle and brought him to the hospital. Pat. Ortega also picked up the kitchen knife and brought it to the police headquarters[3]

Well settled is the rule that where the accused had admitted that he is the author of the death of the victim and his defense anchored on self-defense, it is incumbent upon him to prove this justifying circumstance to the satisfaction of the court. To do so, he must rely on the strength of his own evidence and not on the weakness of the prosecution, for the accused himself had admitted the killing. The burden is upon the accused to prove clearly and sufficiently the elements of self-defense, being an affirmative allegation, otherwise the conviction of the accused is inescapable.

The three requisites of self-defense as stated in par. 1 of Art. II of the Revised Penal Code are: (1) unlawful aggression; (2) reasonable necessity of the means employed to prevent or repel it; and (3) lack of sufficient provocation on the part of the person defending himself.

It is elementary that the first requisite of self-defense is indispensable. There can be no self-defense unless it is proven that there has been unlawful aggression on the part of the person injured or killed by the accused. If there is no unlawful aggression, there is nothing to prevent or to repel. The second requisite of self-defense will have no basis.[4]

Hence, the issue in this case boils down to whether or not the petitioner has proven his plea of self-defense by clear and convincing evidence.

After a review of the records, we find no grave abuse of discretion committed by the respondent court.

The petitioner insists that he was the object of unlawful aggression by the deceased, Marciano Donato, when the latter assaulted him twice with a knife, the first blow hitting his raincoat near the portion of his stomach. Then, simultaneous with the second strike of the knife, the petitioner was able to draw his service revolver and fire at the alleged unlawful aggressor causing the death of the latter.

The respondent court said, and we concur, that the burden of proof being on him, and unlawful aggression being the main ingredient of self-defense, it is for the accused to establish the existence of the knife allegedly used by the victim in attacking him and of the raincoat allegedly worn by him and hit by the victim's knife; it is not for the prosecution to prove their non-existence. It is not sufficient that the accused testified that the knife was in the custody of the property custodian of the San Pablo City Police Station. He should have presented the knife itself and the property custodian to testify thereto; and this could not have been a problem to the accused since he is himself a member of the San Pablo City Police Force. The non-presentation of the knife only leads to the inference that there was no such knife, or, that nobody among the responsible members of the San Pablo City Police Force would lend himself to conjuring up the existence of an object when there is none.[5]

Indeed, the raincoat of the petitioner and the knife used by the alleged unlawful aggressor should have been presented in evidence to support his claim of self-defense especially when he did not sustain a single wound. This the petitioner failed to do. Absent such vital pieces of evidence, his plea of self-defense must necessarily fail. To reiterate, there can be no self-defense without unlawful aggression as there is nothing to defend against.

The respondent court also found the theory of the petitioner belied by the testimony of NBI Medico-legal Officer, Maximo Reyes, who conducted the post-mortem examination of the victim. The petitioner claims that the muzzle of his gun was about one foot (12 inches) from the deceased when he fired the fatal shot. The respondent court, however, refused to believe the petitioner's claim, in view of the opinion of Maximo Reyes that the presence of burned and smudged tissues at the point of entry below the victim's right eye shows that the muzzle of the gun could not have been more than six (6) inches from the victim's cheek.

The petitioner supports his claim with the opinion of other experts who maintain that powder burns can be found at or near the point of entry even if the muzzle of the gun is farther than six (6) inches from the body of the victim. Dr. Sixto delos Angeles is of the opinion that powder burns can be found if the muzzle of the gun is less than 25 centimeters (10 inches) away.

Dr. Pedro Solis is likewise of the opinion that gunpowder burns will be present if the muzzle of the gun is not more than twenty-four (24) inches away. The petitioner claims that even Dr. Maximo Reyes himself declared that:

PJ Pamaran

Q: When there will (sic) be clean surface, what will be the distance?

WITNESS (Maximo Reyes)

A: More than 24 inches, your Honor.[6]

We agree with the respondent court. Evidently, there can be burned and smudged tissues present even if the muzzle of the gun is beyond six (6) inches from the entry wound. But the degree of burning and smudging is necessarily greater when the muzzle is one (1) inch away compared to a muzzle which is 24 inches away from the entry wound. In this particular case, Dr. Maximo Reyes concluded that the muzzle of the gun could not have been more than six inches away.

ATTY DOMINGO

Q What would you say would be the maximum distance of the barrel of the firearm to the cheek, that is the point of entry that would produce this powder burns in the cheek of the victim?

WITNESS

A Near contact fire up to six (6) inches, sir

ATTY DOMINGO

Q You are saying that beyond six (6) inches, there would be no powder burns anymore?

"WITNESS

A It will depend on the degree of the velocity of the firearm that is used, sir. In this case, it is only up to six (6) inches.[7]

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At any rate, granting arguendo that the petitioner's gun was truly twelve (12) inches from the victim's face when the fatal shot was fired, still, the petitioner's evidence failed to show clearly and convincingly that he fired his firearm in self-defense. We must remember that he failed to prove the unlawful aggression by the deceased which is the cornerstone of self-defense.

The theory of the defense is further weakened by the finding of the respondent court that the testimony of the petitioner, as corroborated by his witnesses, regarding his position relative to the deceased during that fatal incident, is not in accord with the medical findings of Dr. Maximo Reyes that the bullet entered just below the right eye of the victim. Said the Sandiganbayan:

Pat. Ortega is right-handed. It was with his right hand that he drew his gun and shot the deceased. Driver Obias demonstrated the relative positions of Pat. Ortega and the deceased at the time the shot was fired, thusly: Pat. Ortega was still leaning on the tricycle when the deceased lunged at him and delivered the second blow when Pat. Ortega drew and fired his gun with his right hand with the left side of Donato's body directly against the right side of Pat. Ortega. For his part, Pat. Ortega asserted that when he fired at his assailant who had stabbed him a second time their faces were directly toward each other. Neither of the above descriptions is sustained by the location of the entry wound in relation to the trajectory of the bullet. The entry wound was located below the right eye of the victim, the bullet trajecting from right to left. Such trajectory could not have resulted if the left side of the victim's body was directly against the right side of Pat. Ortega at the time of firing, as driver Obias portrayed it; or even if the victim's and Pat. Ortega's faces were directly toward each other, as Pat. Ortega described it. There is thus here

a serious credibility gap between testimony and fact.[8]

We also find certain material portions of the testimony of Pat. Ortega with regard to his account of the fatal incident to be contrary to human experience and most probably, a deviation from standard operating procedure of law enforcement agents.

We quote Pat. Ortega on the witness stand:

J ESCAREAL

Q You realized then that he was a dangerous person?

A Yes, sit, because the extortion victim informed me that he was carrying a long knife.

J ESCAREAL

Q When you hid behind the gate panel and told him to come out did you notice whether he was carrying any weapon?

WITNESS

A Yes, your Honor.

J ESCAREAL

Q He was holding it?

A Yes, your Honor.

J ESCAREAL

Q And when you asked him to come out he was still holding it?

WITNESS

A Yes, sir.

J ESCAREAL

Q And you did not draw your gun then?

A No.

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J ESCAREAL

Q Seeing him carrying the knife like that, did he say anything when you asked him to come out?

WITNESS

A Nothing, sir.

J ESCAREAL

Q He did not say that he was surrendering?

WITNESS

A No, sir.

J ESCAREAL

Q When you saw him coming out holding that knife in that position and not saying anything you did not draw your gun?

WITNESS

A Not yet. your Honor.[9]

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It is not believable for an officer of the law, confronting a suspected criminal showing no signs of surrender, seeing him armed and potentially dangerous, not to have drawn his holstered service revolver ahead of time in order to effect the arrest or to protect his person against a clear and imminent danger.

Finally, the petitioner seeks the annulment of the decision of the Sandiganbayan alleging that the latter is devoid of territorial jurisdiction to hear and decide this case against him and that the creation of the Sandiganbayan deprived him of a vested right to appeal before the Court of Appeals.

The arguments of the petitioner are manifestly without merit.

The constitutionality of the law creating the Sandiganbayan (P.D. 1606) has been upheld by this court in several cases.[10] Section 2 of P.D. 1606 provides that "The Sandiganbayan shall have its principal office in the Metro Manila area and shall hold sessions thereat for the trial and determination of all cases filed with it irrespective of the place where they may have arisen; xxx."

With regard to the alleged deprivation of the petitioner's right to appeal before the Court of Appeals, we quote Nuñez vs. Sandiganbayan. [11]

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[W]ould the omission of the Court of Appeals as an intermediate tribunal deprive petitioner of a right vital to the protection of his liberty? The answer must be in the negative. In the first place, his innocence or guilt is passed upon by the three-judge court of a division of respondent Court. Moreover, a unanimous vote is required, failing which "the Presiding Justice shall designate two other justices from among the members of the Court to sit temporarily with them, forming a division of five justices, and the concurrence of a majority of such division shall be necessary for rendering judgment." Then if convicted, this Court has the duty if he seeks a review to see whether any error of law was committed to justify a reversal of the judgment. Petitioner makes much, perhaps excessively so as is the wont of advocates, of the fact that there is no review of the facts. What cannot be too sufficiently stressed is that this Court in determining whether or not to give due course to the petition for review must be convinced that the constitutional presumption of innocence has been overcome. In that sense, it cannot be

said that on the appellate level there is no way of scrutinizing whether the quantum of evidence required for a finding of guilt has been satisfied. x x x This Court has repeatedly reversed convictions on a showing that this fundamental and basic right to be presumed innocent has been disregarded. It does seem far-fetched and highly unrealistic to conclude that the omission of the Court of Appeals as a reviewing authority results in the loss "vital protection" of liberty.

Premises considered, the conviction of the petitioner is ineluctable.

Under Article 249 of the Revised Penal Code, as amended, the prescribed penalty for homicide is reclusion temporal. To guide us in applying the Indeterminate Sentence Law, it is propitious to recall the early case of *People vs. Ducosin* where Justice Butte said:

This leads up to the important question: How shall the "maximum" and the "minimum" penalty be determined?

The maximum penalty must be determined, in any case punishable by the Revised Penal Code, in accordance with the rules and provisions of said Code exactly as if Act No. 4103, the Indeterminate Sentence Law, had never been passed. We think it is clear from a reading of Act No. 4103 that it was not its purpose to make inoperative any of the provisions of the Revised Penal Code. Neither the title nor the body of the Act indicates any intention on the part of the Legislature to repeal or amend any of the provisions of the Revised Penal Code. x x x.

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We come now to determine the "minimum imprisonment period" referred to in Act No. 4103. Section 1 of said Act provides that this "minimum which shall not be less than the minimum imprisonment period of the penalty next lower to that prescribed by said Code for the offense." We are here upon new ground. It is in determining the "minimum" penalty that Act No. 4103 confers upon the courts in the fixing of penalties the widest discretion that the courts have ever had. The determination of the "minimum" penalty presents two aspects: first, the more or less mechanical determination of the extreme limits of the minimum imprisonment period; and second, the broad question of the factors and circumstances that should guide the discretion of the court in fixing the minimum penalty within the ascertained limits.

We construe the expression in Section 1 "the penalty next lower that prescribed by said Code for the offense" to mean the penalty next lower to that determined by the court in the case before it as the maximum (that is to say the correct penalty fixed by the Revised Penal Code). x x x.[12]

In the case at bar, absent any mitigating or aggravating circumstance, the penalty of reclusion temporal should be imposed in its medium period, which is, from Fourteen (14) years, Eight (8) months, and One (1) day to Seventeen (17) years and Four (4) months. The indeterminate penalty is therefore from a minimum of prision mayor to a maximum of reclusion temporal in its medium period. The range of the minimum (prision mayor) is left to the unqualified discretion of the court. We find no abuse of discretion by the lower court. The petitioner was correctly sentenced by the Sandiganbayan to suffer the indeterminate penalty ranging from Eight (8) years and One (1) day of prision mayor, as minimum, to Fourteen (14) years, Eight (8) months, and One (1) day of reclusion temporal, as maximum.

WHEREFORE, in view of the foregoing, the decision appealed from is hereby **AFFIRMED** except as to the indemnity to the heirs of Marciano Donato y Hernandez which is hereby raised to P30,000.00.

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Feliciano, Gancayco, Padilla, Bidin, Cortes, Griño-Aquino, Medialdea, and Regalado, JJ., concur.

[1] Decision, penned by Associate Justice Conrado M. Molina, concurred in by Presiding Justice Manuel R. Pamaran and Associate Justice Romeo Escareal, First Division, Rollo, 36-37.

[2] *Id.*, 2; *Id.*, 30..

[3] *Id.*, 3-5; *Id.*, 30-33.

[4] *Andres v. C.A.*, No. L-48957, June 23, 1987, 151 SCRA 268; *People v. Picardal*, No. L-72936, June 18, 1987, 151 SCRA 170.

[5] Resolution dated July 22, 1981 of the Sandiganbayan, Original Records, 151-152.

[6] T.s.n., January 19, 1981, P. 45.

[7] T.s.n. January 19, 1981, 29-30.

[8] Decision, 6-7; Rollo, 34-35.

[9] T.s.n., March 26, 1981, 95-99.

[10] *Núñez vs. Sandiganbayan* Nos. L-50581-50617, January 30, 1982, 111 SCRA 433; *Cesar vs. Sandiganbayan, et al.*, Nos. L-54719-50, January 17, 1985, 134 SCRA 105.

[11] *Supra*.

[12] 59 Phil. 109 (1933).

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