

JOSE FRIAS, JR. AND GERVACIO TACAS, PETITIONERS-APPELLANTS, VS. PEOPLE OF THE PHILIPPINES AND SANDIGANBAYAN, RESPONDENTS-APPELLEES.

G.R. No. 65762. June 23, 1984

Ponente: RELOVA, J.

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RELOVA, J.:

In this petition for review by certiorari, petitioners-appellants seek reversal of the decision of the Sandigan-bayan, the dispositive part of which reads:

"WHEREFORE, accused P/Cpl. GERVACIO TACAS and JOSE FRIAS, JR. are hereby found guilty beyond reasonable doubt as principals of the crime of Murder, qualified by taking advantage of superior strength, defined and penalized under Article 248 of the Revised Penal Code. Taking into account the mitigating circumstance of voluntary surrender without any aggravating circumstance to offset the same and applying the Indeterminate Sentence Law, both accused are each sentenced to an indeterminate penalty ranging from ELEVEN (11) YEARS and ONE (1) DAY of prision mayor, as minimum, to EIGHTEEN (18) YEARS and SIX (6) MONTHS of reclusion temporal, as maximum; to pay to the heirs of the deceased Bartolome Arellano, jointly and severally, P15,000.00 for the death of said victim; P5,311.45 as actual damages; P15,000.00 as moral damages; compensatory damages of P40,000.00, by way of unrealized earnings; and to pay the costs.

"Subject homemade 'bulldog' gun marked Exhibit 1-a is hereby confiscated in favor of the state; but let the armalite marked Exhibit 1-e which was issued as official service firearm of P/Cpl. Gervacio Tacas be returned to Sta. Teresita, Cagayan police station for proper disposition." (pp. 96-97, Rollo)

Appellant Gervacio Tacas is a member of the police force of Sta. Teresita, Cagayan; has been a policeman for 24 years and was on duty on August 3, 1980. He admitted having shot Bartolome Arellano on August 3, 1980. However, he claims that he did so in self-defense and/or in the fulfillment of duty or lawful exercise of a right or office. As aptly stated by respondent court, "[t]o avoid criminal liability therefor, he has to show to the satisfaction of the Court the attendance of justifying circumstance or circumstances and must rely on the strength of his own evidence. He can not depend on the weakness of the prosecution's evidence for even if weak, it could not be disbelieved after the accused himself owned the killing." (p. 81, Rollo)

Respondent court based its finding of guilt of herein appellants on the testimony of Edita Arellano, daughter of the deceased, and the testimonies of Francisco Arellano and Ricardo Bilag who both claimed to have witnessed the killing. Their testimonies, as summarized by the trial court, are as follows:

Testimony of Edita Arellano

"Second witness for the People was Edita Arellano y Pajela, daughter of the deceased Bartolome Arellano. She testified that her father was a farmer by occupation, planting rice to a 3-hectare land with an average yield of 80 sacks per harvest every semester at P50.00 per sack. According to her, her late father was an early riser. On August 3, 1980, he was up at 4:00 in the morning and after preparing food, he went out to the field, as he

usually did, to see his carabao. He was in short pants and sweater and unarmed.

"Then, at around 5:30 that fateful morning, she heard a single gunfire followed by three 'bang, bang, bang' and a series of gunshots thereafter, after which somebody who was running told her that her father was dead. So, she rushed to the highway and found her dead father lying face down with hands and feet stretched and right forearm supporting the forehead. Many people were around the cadaver and even as she went nearer, she saw policemen taking photographs of the deceased. Then, Cpl. Tabarrejo turned the cadaver face upward and placed over the abdomen a gun and knife after which pictures thereof were again taken; but she did not see where Cpl. Tabarrejo got the said gun and knife.

"Pointing to accused Gervacio Tacas in Court, this prosecution witness also testified that she did not know what to do and was crying hysterically in front of Tabarrejo when the aforementioned acts were being done with her dead father. She was the only one left at home because her mother went to Laoag City. Ignorant, helpless, shocked, and speech-less, she just watched what the policemen were doing to the mortal body of her late 56 year-old father." (pp. 38-39, Rollo)

Testimony of Francisco Arellano

"According to him, on the night of August 2, 1980, he was in the dance hall within the poblacion of Sta. Teresita, Cagayan. He slept there and went home at about 5:00 the following morning, reaching Simpatuyo by jeep an hour later. He met accused Gervacio Tacas on the bridge. Tacas, in underwears, was holding an armalite and was with Jose Frias, Jr. who was armed with a carbine. Being still a second cousin of Tacas, he was not afraid. He trailed Tacas just one and a half meter on the same side of the barangay road while Frias walked eight meters from them on the other side of the road. From such vantage position, he saw Frias aiming a carbine at Bartolome Arellano who was then facing Tacas and eight meters from Frias. Bartolome Arellano was unarmed and was walking slowly in a stooping manner at the place reflected in the sketch (Exhibit F). It was Tacas who first shot Arellano before Frias also fired at the latter but he could not tell if Bartolome was hit then. Thereafter, Bartolome Arellano ran and Tacas moved such that the latter was about to meet the former. However, when Bartolome Arellano noticed the approaching Tacas, Arellano turned around and ran back to where he was formerly (the spot marked B, Arellano in Exhibit F), even as Frias moved to the 'RIC' which is made of hollow blocks and Tacas returned to the edge of the LB canteen. He was beside Tacas when Tacas and Frias fired. Both Tacas and Frias fired twice but more reports came from Tacas who touched the automatic lever of his gun. After the firing was over, Arellano whirled around and fell face down in the place where there is a palm tree, witness recounted.

"Elaborating on how he managed to observe the happening in question, he explained that he was only a meter away from Tacas and five to six meters from Frias when the assailants shot the victim. Being still a second cousin to Tacas, he even commented to Tacas 'No more, Manong' but this was after the victim fell and was dead already. Upon seeing his dead cousin, fear seized him because Tacas might also turn against him. Before leaving the scene, however, he tried to go closer to the fallen victim but only to be told by Tacas 'Get away from there; otherwise, I will pulverize your face.' Apprehensive of what could happen to him in such a perilous situation, he left, witness narrated.

"This prosecution witness also identified Exhibits E and E-1 to be the pictures of the deceased Bartolome Arellano, a first cousin of his. He admitted that he was never investigated by the police and did not present himself to the PC authorities in Aparri or elsewhere for investigation in connection with the incident under inquiry; and that it was only before Fiscal Ferrer the day before he testified in court that he executed an affidavit for the first time in relation to this case. He never moved to another place since the time of the shooting at bar took place but he was not able to present himself as a witness earlier for the reason that some people in their locality made him understand that he is disqualified to be a witness in the case involving a first cousin of his. He was still at the scene of the crime when police probers arrived but because he was never asked, he did not volunteer any information. However, he told Edita, daughter of the deceased, that he

witnessed the shooting but she said 'Never mind, Tatang.' During the burial, he also informed other relatives, like his Uncles Mando Arellano and Tolentino Arellano, of what he saw in the same way that he told the bereaved widow of the victim. During the wake, there were also police investigators but inasmuch as nobody inquired as to who shot the victim, he did not tell anything to the investigators; besides, he was out for work, witness who insisted that he witnessed the shoot-ing complained of, pointed out.

"Finally, this witness divulged that the victim was not carrying anything at the time the two accused shot him (victim). In fact, the victim was only wearing short pants and 'bad shirt,' he added." (pp. 40-43, Rollo)

Testimony of Ricardo Bilag

"Ricardo Bilag y Sotelo, security guard by occupation and who stayed in barangay Simpatuyo, Sta. Teresita, Cagayan from July 23, 1980 to January 1981, was the fourth People's witness in this case. Among other things, he declared that during the aforesaid period, he sojourned with his cousin, Ernesto Lazo, whose house is located in the place indicated with initial 'EL' (Exhibit F-1) in Exhibit F. On August 3, 1980, he was, therefore, in the house of Ernesto Lazo. Waking up at 5:45 a.m. on said date, he was by the window facing the national road to San Vicente when he witnessed the unusual incident wherein Bartolome Arellano was killed. Before Bartolome Arellano was fatally shot, the latter was walking on the national road and was being followed by accused Gervacio Tacas who was with an armalite. Tacas was wearing brief and sleeveless shirt. Standing by the road behind Tacas was accused Jose Frias, Jr. who was with a carbine. At the far end of the barangay road walking to and fro around four meters from Tacas was Francisco Arellano. Bartolome Arellano was without any weapon. He was wearing dark shoes and brown long sleeves shirt.

"According to this witness, when Tacas was following Bartolome Arellano, the latter went to hide behind the 'RIC' concrete marker even as Tacas was aiming the gun at him (Bartolome Arellano). After Tacas fired twice, Bartolome Arellano ran towards a 'silag' tree about 12 meters from the 'RIC' concrete marker but he was again followed by Tacas who crossed the national road and went near the same 'silag' tree; and when Bartolome Arellano tried to go to the national road and was passing by the store, the latter was shot by Tacas, at which precise time, Frias was at the roadside, lying with stomach down and aiming also his gun at Bartolome Arellano. Frias maintained such position while Bartolome Arellano was behind the 'RIC' concrete marker and fired once at the latter. Then, when Bartolome Arellano went to the place of the 'silag' tree, Frias remained thereat and when Bartolome Arellano was moving to the national road, Frias stood in the middle of the road and fired again but he (witness) could not tell if the victim was hit. After Bartolome Arellano was shot by Tacas, said victim slowly slumped to the ground and thereafter, Frias went home. It was Tacas who first fired at the victim when the victim was passing near the store. Frias fired later at the victim who was then slowly slumping to the ground. He subsequently saw Edita, daughter of the deceased, crying by the side of her fallen father, so this witness re-collected.

"He likewise divulged that he executed his affidavit (Exhibit G) on September 14, 1980 before Provincial Fiscal Bello in Aparri, Cagayan. Afraid that the culprits might kill him, he motored 30 kilometers to Aparri to subscribe and swear to such sworn statement of his. He is not related in anyway to the deceased. He actually saw Francisco Arellano at the crime scene. He even told Sianing Arellano, a brother of the deceased, of that fact.

"On cross-examination, this prosecution witness testified further that his permanent place of abode is Dapdap, Amulong, Cagayan, more or less 80 kilometers from Simpatuyo, Sta. Teresita. However, he used to go to Sta. Teresita for vacation. He only does not know if the people of said place know him well. In the last week of July 1980, he was staying in the house of his cousin, Ernesto Lazo, four houses from Gervacio Tacas' house. Before July 23, 1980, he did not personally know Bartolome Arellano. Although he knows Raymundo Arellano, supposed to be one of the richest resident in the place, he was not aware that Raymundo is the father of Bartolome. Reminiscing how he happened to be a witness in the case, this witness disclosed that upon the request of Sianing Arellano, Ernesto Lazo asked him if he was really present during the happening of the

incident in question and he answered his cousin affirmatively. He admitted, however, that he was never investigated by the police. Not having been asked by the police officers who were at the crime scene, he did not volunteer any information. Neither did he let Edita, daughter of the deceased, know what he saw. He only decided to give his written statement on September 14, 1980 in Aparri in which statement he was not able to mention the presence of Francisco Arellano at the crime scene. Said affidavit of his was made by Atty. Jose Brillantes in Bugey, Cagayan in the presence of another witness and a brother of the deceased. Prior thereto, he was also called once by Mayor Bernoli Arquero of Sta. Teresita and requested by the Mayor to testify for the prosecution; but the sole reason for him to testify in court is to help the court gather the truth regarding the shooting incident under inquiry.

"This witness also narrated that it was only after the incident at bar that he learned that Jaime Yerre, Jr. and Manuel Pajela were also shot on August 3, 1980 and he heard that it was Bartolome Arellano who shot the two during a mahjong game; but he does not know if the buckshot used by Bartolome Arellano in shooting said victims was recovered by the police authorities. According to him, Bartolome Arellano was not carrying anything when he saw him after hearing the first burst of gunfire." (pp. 43-47, Rollo)

The trial court said:

"Obviously, unlawful aggression is the main ingredient of self-defense. Without unlawful aggression, there can be no self-defense, complete or incomplete. And it is unlawful aggression which imperils one's life, limb or right either actually or imminently, that makes the invocation of self-defense feasible. In short, before he was shot to death, did the victim create or constitute any menace to the accused? Painstakingly evaluating the gamut of evidence at hand, We can not divine how an unarmed person could have done unlawful aggression against two heavily armed men. To be sure, the showing that Bartolome Arellano was without any deadly weapon when he met his violent death is too overwhelming to be overlooked. Waking up at 4:00 in the morning of August 3, 1980, as was his daily routine, he cooked food for his family after which, with short pants and 'bad shirt' to cover his body, he went down for the nearby ricefield to attend to his working animal. It does not appear that he had any gun or even a bolo. Indeed, from all appearances, he did not go out to do violence against anybody. In fact, he was seen later by the prosecution witnesses, notably Francisco Arellano, Jr. and Ricardo Bilag, going from one place to another in a determined effort to save dear life from the advancing Cervacio Tacas and Jose Frias, Jr. who were combat-ready and armed to the teeth. Said prosecution witnesses succinctly testified that Bartolome Arellano was not holding anything at that unlucky moment. If he had a bulldog gun and a bolo tucked to the waist, considering that it was already 6:00 in the morning at the time, bright enough for everybody to observe the happening under inquiry, it would be easy for the prosecution witnesses to detect any weapon in the possession of the victim but the truth is he had none and could not have been a real danger to the life and limb of Tacas and Frias who were respectively armed with an armalite and a carbine. As a matter of fact, the victim was actually running away. Then, too, if there was any call for him to surrender by the heavily armed Tacas who was assisted by Frias, Bartolome Arellano would have meekly heeded the same, no doubt.

"All things considered, We find the victim incapable of unlawful aggression. The situation he was in belies self-defense.

"Absent unlawful aggression on the part of the victim, it is needless for Us to discuss lengthily the other requirements for valid self-defense. As aptly held in a recent decision of Ours, when there is no unlawful aggression to speak of, there is nothing to defend against or repel. And the requisites that there be reasonable necessity in the means employed to repel unlawful aggression and lack of sufficient provocation on the part of the person defending himself have no room for application.

"Neither is the justifying circumstance of fulfillment of duty under paragraph 5 of Article 11 of the Revised Penal Code availing, it appearing that the victim was truly unarmed and it was not necessary to shoot him. Peace officers are never justified in using unnecessary force, wanton violence or dangerous means. Not even a

hardened criminal should be handled in the manner complained of." (pp. 82-84, Rollo)

However, the Solicitor General, in his Comment, said that the findings of the trial court are not supported by the evidence; that an objective analysis of the evidence in fact discloses overwhelming proof that Bartolome Arellano was armed and shot certain persons, including appellant Tacas. He recommends acquittal of petitioners-appellants.

Manuel Pajela and Jaime Yerre, Jr. testified that while they were playing mahjong at about 5:30 in the morning of August 3, 1980, they were fired at with a shotgun by Bartolome Arellano. Prosecution witness Ricardo Bilag confirms the version of the defense that Bartolome Arellano shot and wounded Pajela and Yerre with a shotgun. Hereunder is Bilag's testimony on this point -

"ATTY. PAZ:

Q And you heard that first shot before you saw Jose Frias, is that right?

WITNESS:

A Yes, sir.

ATTY. PAZ:

Q Now, tell the truth Mr. witness. Did you come to know that on the morning of August 3, 1980, Bartolome Arellano shot at the persons who were playing mahjong at Simpatuyo and wounded two of them?

WITNESS:

A After the incident I came to know there were two persons hit.

ATTY. PAZ:

Q And these persons whom you came to know who were hurt were Jaime Yerre, Jr. and Manuel Pajela?

WITNESS:

A Yes, sir.

ATTY. PAZ:

Q And you even heard after the incident that it was Bartolome Arellano who shot Jaime Yerre and Manuel Pajela which caused their injury?

WITNESS:

A After that incident I also heard the same thing that he shot Jaime Yerre and Manuel Pajela.

ATTY. PAZ:

Q And you heard also that Bartolome Arellano shot them on August 3, 1980 with a buckshot?

PRESIDING JUSTICE PAMARAN:

You are assuming that he knows what a buckshot is.

ATTY. PAZ:

I will lay the basis.

JUSTICE ESCAREAL:

Q Do you know what a buckshot is known in Cagayan?

WITNESS:

A Yes, sir.

JUSTICE ESCAREAL:

Q What is it?

WITNESS:

A A gun with 13 cage bullets.

JUSTICE ESCAREAL:

Q Meaning a shotgun using 12 bullets that is usually used in some parts of Cagayan even before Martial Law?

WITNESS:

A Yes, sir." (pp. 50-52, tsn., hearing November 19, 1981)

Further, he admitted that when he (Bilag) saw appellant Tacas that early morning, the latter was wearing only a brief and sleeveless shirt. This supports the testimony of Tacas that he was sleeping when he was suddenly awakened by the sound of gunfire followed by cries of Pajela's wife for help; that looking at the window, he saw Pajela bleeding and about to be carried inside his house; and that he then grabbed his service armalite and went down in his brief and undershirt. As observed by the Solicitor General, if Tacas did plan the killing of Arellano, he would have put on a more respectable attire. The fact that he went out in the street in his brief confirms the truth of his testimony that he merely responded to an urgent call for help.

Dr. Ferdinand Cariño of the Ponce Enrile Memorial Hospital testified that on August 3, 1980 he treated Manuel Pajela and Jaime Yerre for gunshot wounds and were thereafter confined at the hospital.

With respect to the testimony of Francisco Arellano, the Solicitor General claims that the same is "so unbelievable that no one hardly knows where to begin in pointing out the falsity of his declaration. Thus:

"1. The improbability of F. Arellano's testimony is no more manifest than from his claim that he was present when the crime was committed. Could it be believed that Tacas, a veteran policeman for 24 years, would be so rash as to ambush the deceased in the presence of his first degree cousin? (pp. 23-24, tsn., October 28, 1981).

"2. The testimony of F. Arellano that Bartolome Arellano was shot while unarmed and in cold-blood is rendered more improbable by the time and place of the incident. The road is hardly the place to commit murder, especially when it is 'already bright.' (pp. 20, 27, tsn., October 29, 1981).

"3. F. Arellano testified that before the shooting, there were many people near the bridge who witnessed the shooting. They were 'Edring, Dianong, Mr. Consejal Pagarigan, Macario Soliven, Ernesto Gallardo' and the father of the victim (pp. 32-34, tsn, October 29, 1981). Why would Tacas kill B. Arellano under the circumstances depicted by the prosecution? Common sense dictates against acceptance of a story that pictures a lawman kill-ing an old and defenseless man for no apparent reason and in the presence of so many witnesses.

"4. F. Arellano could not even be consistent. On direct examination, he declared that he was beside Tacas when the latter shot and killed B. Arellano (p. 8, Decision). On cross-examination, he was no longer beside Tacas but five to six meters away (p. 9, Decision).

"5. F. Arellano declared that Tacas was wearing 'short pants' (p. 11, Decision). What the other eyewitness for the prose-cution saw was something else. According to Bilag, Tacas was wearing only a 'brief' (p. 11,

Decision). If indeed Tacas was wearing a brief, Bilag's testimony complements the testimony of Tacas that he was sleeping when awakened by the sound of gunfire and hurriedly went down to investigate. Either F. Arellano or Bilag is lying. Both can not be right.

"6. F. Arellano's testimony was that Tacas and Frias were walking when they met B. Arellano (p. 8, Decision). What Bilag saw was B. Arellano being followed by Tacas (p. 11, Decision).

"7. F. Arellano declared that Tacas shot B. Arellano upon seeing him (p. 8, Decision appended to Petition). Bilag's testimony is different. Although on direct examination, Bilag declared that Tacas fired two shots when B. Arellano hid behind the 'RIC' concrete marker, he clarified this on cross-examination, declaring that when Tacas fired his first shot, the gun was aimed upwards (p. 64, tsn., November 19, 1981). Bilag further testified that when B. Arellano reached the silag tree, Tacas fired another shot aimed 'upwards' (p. 69, id.)

"x x x x x x x x

"8. F. Arellano was not listed as one of the prosecution witnesses. He simply appeared out of the blue as a witness for the prosecution on October 28, 1981, one year, two months after the incident and while the trial was in progress. In fact, his affidavit was executed only the day before he testified, or on October 27, 1981.

"His appearance only at the trial is unnatural because, according to him, he had told the widow of the victim and his uncles, Raymundo Arellano and Tolentino Arellano, at the wake that he witnessed the incident (p. 33, tsn., October 28, 1981; pp. 12-15, tsn., October 29, 1981). He also claims to have told Edita, the victim's daughter, after the burial (p. 32, tsn., October 28, 1981). And yet he was not investigated. Nor did he present himself for investigation to the police, PC or fiscal. Plainly, he was a conjured witness for the prosecution.

"x x x x x x x x

"9. There is paucity of material details in the testimony of F. Arellano. Thus, Bilag who was farther away from Tacas heard more of Tacas' words and saw more of Tacas' movements and actions than F. Arellano who claims to have been only a few meters distant from Tacas.

"10. F. Arellano testified that he saw Ricardo Bilag before and after the shooting near or at the scene of the crime (pp. 30-34, tsn., October 29, 1981).

"According to Bilag, he was not investigated by the police because he 'did not get near the scene of the crime' (p. 38, tsn., November 19, 1981).

"11. The testimony of F. Arellano starts only from the time Tacas and Frias were about to shoot B. Arellano. It does not therefore refute the testimony of the defense witnesses that before Arellano was killed, he shot Manuel Pajela and Jaime Yerre, Jr. with a shotgun." (pp. 129-131, 134-135, Rollo)

On the other hand, appellant Gervacio Tacas testified that "at about 5:00 in the morning of August 3, 1980, he was awakened from his sleep by the sound of gunfire, that hearing a woman shouting for help east of his house, he opened the window and saw Pajela slumped on a table, blood oozing from his body, that he grabbed his armalite rifle, went out and saw Bartolome Arellano with a gun proceeding towards the RIC marker (p. 20-26, tsn., January 11, 1983." (pp. 126-127, Rollo)

Appellant Jose Frias testified that "at about 5:30 in the morning of August 3, 1980, he was awakened when he heard a loud explosion coming from the eastern side of his house, that he looked out of the window and saw Pajela lying on a table, bleeding, that he went down and saw Tacas, his father-in-law, calling upon Bartolome Arellano to surrender; and that Bartolome Arellano was in the street proceeding towards the RIC marker, and that Bartolome Arellano was armed with a "bulldog" shotgun (pp. 5-9, tsn., March 14, 1983)." (p. 127, Rollo)

The testimonies of petitioners-appellants were corroborated by Teodoro Paguirigan, a nephew of Bartolome

Arellano; Modesto Macarubbo, Station Commander of Sta. Teresita Police Station, and Cpl. Silvino Tabarrejo.

Teodoro Paguirigan declared that when he heard gunfires at about 5:00 in the morning of August 3, 1980, he stood-up, looked out of the window and saw Bartolome Arellano leaving the house of Pajela with a shotgun on his hand and a bolo on his waist. Later, Paguirigan saw Bartolome Arellano point his gun and shot at Tacas.

Modesto Macarubbo testified that when he arrived at the scene of the incident, he recovered a shotgun and a bolo from under the body of Bartolome Arellano. The gun had one (1) empty shell in its chamber.

Corporal Silvino Tabarrejo, who arrived at the place with Commander Macarubbo, said Bartolome Arellano's right hand was holding a homemade shot gun while on his waist was tucked a knife.

The above testimonies find corroboration on the fact that pellets, gauge 12 (Exhibits 1-b-2 and 1-b-3) were extracted by the police from one of the posts of Eny Peralta's store where appellant Tacas sought cover. These pellets match the empty shell, which is also gauge 12, found in the shotgun's chamber (Exhibit 1-b). As correctly observed by the Solicitor General, "these items, taken together with the testimonies of both the defense and prosecution witnesses, indubitably prove that Bartolome Arellano was armed and he shot at appellant Tacas." (p. 128, Rollo)

The law recognizes the non-existence of a crime when it expressly stated in the opening sentence of Article 11 of the Revised Penal Code that the persons therein mentioned "do not incur any criminal liability" If there is a circumstance justifying the defendant's act, he is exempt from both criminal and civil liability, except in paragraph 4 of this Article 11, where the civil liability is borne by the persons benefited by the act.

The fifth justifying circumstance which exempts a persons from criminal liability is found in this provision: "Any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office." The requisites of the defense of fulfillment of duty are: (1) that the accused acted in the performance of a duty or in the lawful exercise of a right or duty; (2) that the injury caused or the offense committed be the necessary consequence of the due performance of duty or the lawful exercise of such right.

The Solicitor General expressed the view, with reason, that Tacas acted in the performance of his duty. Again, We quote from the brief of the Solicitor General:

"x x x The information clearly states so, thus: 'That the crime was committed by the accused Gervacio Tacas in relation to his office as a policeman' (p. 2, Decision). And so do the facts - he was awakened from his sleep by the sound of gunfire followed by cries of a neighbor for help; he stood up, look out of the window, saw Pajela bleeding on top of a table about to be carried to his house; he grabbed his armalite rifle, went out of the house, saw Bartolome Arellano with a shotgun leaving Pajela's yard, went after him, fired warning shots and asked him to surrender - undisputed facts which clearly show that Tacas acted in the performance of his duty.

"Anent the second requisite - that the injury caused or the offense committed be the necessary consequence of duty or the lawful exercise of right or office - it is difficult not to give Tacas the benefit of the doubt. It is shown by the evidence that B. Arellano was armed with a shotgun. It is undisputed that Tacas fired a warning shot, asked B. Arellano to surrender, and then fired another warning shot. So when B. Arellano refused to surrender but tried to elude arrest and pointed his gun at Tacas, first at the RIC marker and then at the silag tree, Tacas had very little choice but to use his weapon. In fact, according to Paguirigan, B. Arellano and Tacas fired 'simultaneously' (p. 24, Decision).

"While there are limits to the lawful exercise of a right or duty, at the same time, it should not be required of a policeman to unnecessarily expose himself to peril. In this case, B. Arellano was armed, refused to surrender, tried to elude arrest, pointed his shotgun at Tacas and later shot at him. As it was the duty of Tacas to arrest B. Arellano and to prevent him from escaping, sooner or later, it would come to the point where the lawman and

the suspect had to face each other. In that crucial moment when Tacas and B. Arellano, both armed, faced each other, they had to make a split decision of putting their guns down or firing. They both elected to fire and B. Arellano was killed while Tacas survived. Under these circumstances, it can hardly be said that Tacas should not have fired at all. As his life was in peril, his judgment can not be questioned." (pp. 148-149, Rollo)

With respect to the case of appellant Frias, the Solicitor General submits that "apart from the dubious and false testimonies of F. Arellano and Bilag, the prosecution has not shown any positive and convincing evidence of conspiracy." He divulged that -

"1. There is total absence of motive for Frias to shoot B. Arellano, a fact plainly overlooked by the trial court. In the absence of motive, it is difficult to assume that Frias conspired with Tacas in murdering B. Arellano.

"2. There is total absence of evidence that Frias and Tacas planned to kill B. Arellano. In fact, the circumstances surrounding the death of B. Arellano simply point only to one question, that is, whether the killing was justified by the defense of fulfillment of duty.

"3. Assuming *arguendo* that Frias also shot at B. Arellano, his participation in the incident was purely accidental and unforeseen, geared most probably to the protection of Tacas, his father-in-law, as the trial court itself assumed (p. 58, Decision). That negates conspiracy.

"4. The relationship of Frias and Tacas is no proof of conspiracy (People vs. Geronimo, 53 SCRA 246). (p. 156, Rollo)

"It is settled rule that conspiracy can not be presumed, but must be proven as convincingly as the crime itself. The crime of murder has not been proven. There is therefore hardly any reason to convict Frias as a co-conspirator of Tacas." (p. 157, Rollo)

ACCORDINGLY, as recommended by the Solicitor General on the ground that Gervacio Tacas acted in the fulfillment of a duty and in the legitimate exercise of his authority, said appellant is hereby **ACQUITTED** of the crime charged.

For insufficiency of evidence, appellant Jose Frias, Jr. is also **ACQUITTED**.

SO ORDERED.

Makasiar, Concepcion, Jr., Guerrero, Melencio-Herrera, Plana, Escolin, Gutierrez, Jr., De la Fuente, and Cuevas JJ., concur.

Fernando, C.J., Teehankee, Aquino, and Abad Santos, JJ., no part.

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