

## PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. FRANCISCO ABARCA, ACCUSED-APPELLANT.

*G.R. No. 74433. September 14, 1987*

Ponente: SARMIENTO, J.

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### SARMIENTO, J.:

This is an appeal from the decision of the Regional Trial Court of Palo, Leyte, sentencing the accused-appellant Francisco Abarca to death for the complex crime of murder with double frustrated murder.

The case was elevated to this Court in view of the death sentence imposed. With the approval of the new Constitution, abolishing the penalty of death and commuting all existing death sentences to life imprisonment, we required the accused-appellant to inform us whether or not he wished to pursue the case as an appealed case. In compliance therewith, he filed a statement informing us that he wished to continue with the case by way of an appeal.

The information (amended) in this case reads as follows:

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The undersigned City Fiscal of the City of Tacloban accuses Francisco Abarca of the crime of Murder with Double Frustrated Murder, committed as follows:

That on or about the 15[th] day of July, 1984, in the City of Tacloban, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent to kill and with evident premeditation, and with treachery, armed with an unlicensed firearm (armalite), M-16 rifle, did then and there willfully, unlawfully and feloniously attack and shot several times KHINGSLEY PAUL KOH on the different parts of his body, thereby inflicting upon said KHINGSLEY PAUL KOH gunshot wounds which caused his instantaneous death and as a consequence of which also caused gunshot wounds to LINA AMPARADO and ARNOLD AMPARADO on the different parts of their bodies thereby inflicting gunshot wounds which otherwise would have caused the death of said Lina Amparado and Arnold Amparado, thus performing all the acts of execution which should have produced the crimes of murders as a consequence, but nevertheless did not produce it by reason of causes independent of his will, that is by the timely and able medical assistance rendered to Lina Amparado and Arnold Amparado which prevented their death.[1]

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On arraignment, the accused-appellant pleaded not guilty.

The Solicitor General states accurately the facts as follows:

Khingsley Paul Koh and the wife of accused Francisco Abarca, Jenny, had illicit relationship. The illicit relationship apparently began while the accused was in Manila reviewing for the 1983 bar examinations. His wife was left behind in their residence in Tacloban, Leyte (PP. 45-47, 65, tsn, Sept. 24, 1984).

On July 15, 1984, the accused was in his residence in Tacloban, Leyte. On the morning of that date he went to

the bus station to go to Dolores, Eastern Samar, to fetch his daughter. However, he was not able to catch the first trip {in the morning}. He went back to the station in the afternoon to take the 2:00 o'clock trip but the bus had engine trouble and could not leave (pp. 5-8, tsn, Nov, 28, 1985). The accused, then, proceeded to the residence of his father after which he went home. He arrived at his residence at the V & G Subdivision in Tacloban City at around 6:00 o'clock in the afternoon (pp. 8-9, tsn, id.).

Upon reaching home, the accused found his wife, Jenny, and Khingsley Koh in the act of sexual intercourse. When the wife and Koh noticed the accused, the wife pushed her paramour who got his revolver. The accused who was then peeping above the built-in cabinet in their room jumped and ran away (pp. 9-13, tsn, id.).

The accused went to look for a firearm at Tacloban City. He went to the house of a PC soldier, C2C Arturo Talbo, arriving there at around 6:30 p.m. He got Talbo's firearm, an M-16 rifle, and went back to his house at V & G Subdivision. He was not able to find his wife and Koh there. He proceeded to the "mahjong session" as it was the "hangout" of Kingsley Koh. The accused found Koh playing mahjong. He fired at Kingsley Koh three times with his rifle (pp. 13-19, tsn, id.). Koh was hit. Arnold and Lina Amparado who were occupying a room adjacent to the room where Koh was playing mahjong were also hit by the shots fired by the accused (pp. 34-49, tsn, Sept. 24, 1984). Kingsley Koh died instantaneously of cardiorespiratory arrest due to shock and hemorrhage as a result of multiple gunshot wounds on the head, trunk and abdomen (pp. 28-29, tsn, Sept. 24, 1984; see also exh. A): Arnold Amparado was hospitalized and operated on in the kidney to remove a bullet (pp. 17-23 tsn, Oct. 17, 1984; see also exh. C). His wife, Lina Amparado, was also treated in the hospital as she was hit by bullet fragments (p. 23, tsn, id.). Arnold Amparado who received a salary of nearly P1,000.00 a month was not able to work for 1-1/2 months because of his wounds. He spent P15,000.00 for medical expenses while his wife spent P1,000.00 for the same purpose (pp. 24-25, tsn, id.).[2]

On March 17, 1986, the trial court rendered the appealed judgment, the dispositive portion whereof reads as follows:

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WHEREFORE, finding the accused, Francisco Abarca guilty beyond reasonable doubt of the complex crime of murder with double frustrated murder as charged in the amended information, and pursuant to Art. 63 of the Revised Penal Code which does not consider the effect of mitigating or aggravating circumstances when the law prescribes a single indivisible penalty in relation to Art. 48, he is hereby sentenced to death, to indemnify the heirs of Khingsley Paul Koh in the sum of P30,000, complainant spouses Arnold and Lina Amparado in the sum of Twenty Thousand Pesos (P20,000), without subsidiary imprisonment in case of insolvency, and to pay the costs.

It appears from the evidence that the deceased Khingsley Paul Koh and defendant's wife had illicit relationship while he was away in Manila; that the accused had been deceived, betrayed, disgraced and ruined by his wife's infidelity which disturbed his reasoning faculties and deprived him of the capacity to reflect upon his acts. Considering all these circumstances this court believes the accused Francisco Abarca is deserving of executive clemency, not of full pardon but of a substantial if not a radical reduction or commutation of his death sentence.

Let a copy of this decision be furnished her Excellency, the President of the Philippines, thru the Ministry of Justice, Manila.

SO ORDERED.[3]

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The accused-appellant assigns the following errors committed by the court a quo:

I.

IN CONVICTING THE ACCUSED FOR THE CRIME AS CHARGED INSTEAD OF ENTERING A JUDGMENT OF CONVICTION UNDER ARTICLE 247 OF THE REVISED PENAL CODE;

II.

IN FINDING THAT THE KILLING WAS ATTENDED BY THE QUALIFYING CIRCUMSTANCE OF TREACHERY.[4]

The Solicitor General recommends that we apply Article 247 of the Revised Penal Code defining death inflicted under exceptional circumstances, completed with double frustrated murder. Article 247 reads in full:

ART. 247. Death or physical injuries inflicted under exceptional circumstances.

-- Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro.

If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment.

These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducers, while the daughters are living with their parents.

Any person who shall promote or facilitate prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other spouse, shall not be entitled to the benefits of this article.

We agree with the Solicitor General that the aforequoted provision applies in the instant case. There is no question that the accused surprised his wife and her paramour, the victim in this case, in the act of illicit copulation, as a result of which, he went out to kill the deceased in a fit of, passionate outburst Article 247 prescribes the following elements: (1} that a legally married person surprises his spouse in the act of committing sexual intercourse with another person; and (2} that he kills any of them or both of them in the act or immediately thereafter. These elements are present in this case. The trial court, in convicting the accused-appellant of murder, therefore erred.

Though quite a length of time, about one hour, had passed between the time the accused-appellant discovered his wife having sexual intercourse with the victim, and the time the latter was actually shot, the shooting must be understood to be the continuation of the pursuit of the victim by the accused-appellant. The Revised Penal Code, in requiring that the accused "shall kill any of them or both of them... immediately" after surprising his spouse in the act of intercourse, does not say that he should commit the killing instantly thereafter. It only requires that the death be the proximate result of the outrage overwhelming the accused after chancing upon his spouse in the basest act of infidelity. But the killing should have been actually motivated by the same blind impulse, and must not have been influenced by external factors. The killing must be the direct byproduct of the accused's rage.

It must be stressed furthermore that Article 247, supra, does not define an offense.[5] In *People v. Araquel*[6] we said:

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As may readily be seen from its provisions and its place in the Code, the above-quoted article, far from defining a felony, merely provides or grants a privilege or benefit -amounting practically to an exemption from an adequate punishment - to a legally married person or parent who shall surprise his spouse or daughter in the act of committing sexual intercourse with another, and shall kill .any or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury. Thus, in case of death or serious physical injuries, considering the enormous provocation and his righteous indignation, the accused - who would

otherwise be criminally liable for the crime of homicide, parricide, murder, or serious physical injury, as the case, may be - is punished only with destierro. This penalty is mere banishment and, as held in a case, is intended more for the protection of the accused than a punishment. (People vs. Coricor, 79 Phil., 672.) And where physical injuries other than serious are inflicted, the offender is exempted from punishment. In effect, therefore Article 247, or the exceptional circumstances mentioned therein, amount to an exempting circumstance, for even where death or serious physical injuries is inflicted, the penalty is so greatly lowered as to result to no punishment at all. A different interpretation, i.e., that it defines and penalizes a distinct crime, would make the exceptional circumstances which practically exempt the accused from criminal liability integral elements of the offense, and thereby compel the prosecuting officer to plead, and, incidentally, admit them, in the information. Such an interpretation would be illogical if not absurd, since a mitigating and much less an exempting circumstance cannot be an integral element of the crime charged. Only "acts or omissions... constituting the offense" should be pleaded in a complaint or information, and a circumstance which mitigates criminal liability or exempts the accused therefrom, not being an essential element of the offense charged - but a matter of defense that must be proved to the satisfaction of the court - need not be pleaded. (Sec. 5, Rule 106, Rules of Court; U.S. vs. Campo, 23 Phil., 368.)

That the article in question defines no crime is made more manifest when we consider that its counterpart in the old Penal Code, (Article 423) was found under the General Provisions [ ] (Chapter VIII) of Title VIII covering crimes against persons. . There can, we think, hardly be any dispute that as part of the general provisions, it could not have possibly provided for a distinct and separate crime.

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We, therefore, conclude that Article 247 of the Revised Penal Code does not define and provide for a specific crime, but grants a privilege or benefit to the accused for the killing of another or the infliction of serious physical injuries under the circumstances therein mentioned xxx[7]

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Punishment, consequently, is not inflicted upon the accused. He is banished, but that is intended for his protection.[8]

It shall likewise be noted that inflicting death under exceptional circumstances, not being a punishable act cannot be qualified by either aggravating or mitigating or other qualifying circumstances. We cannot accordingly appreciate treachery in this case.

The next question refers to the liability of the accused-appellant for the physical injuries suffered by Lina Amparado and Arnold Amparado who were caught in the crossfire as the accused-appellant shot the victim. The Solicitor General recommends a finding of double frustrated murder against the accused-appellant, and being the more severe offense, proposes the imposition of reclusion temporal in its maximum period pursuant to Article 48 of the Revised Penal Code. This is where we disagree. The accused-appellant did not have the intent to kill the Amparado couple. Although as a rule, one committing an offense is liable for all the consequences of his act, that rule presupposes that the act done amounts to a felony.[9]

But the case at bar requires distinctions. Here, the accused-appellant was not committing murder when he discharged his rifle upon the deceased. Inflicting death under exceptional circumstances is not murder. We cannot therefore hold the appellant liable for frustrated murder for the injuries suffered by the Amparados.

This does not mean, however, that the accused-appellant is totally free from any responsibility. Granting the fact that he was not performing an illegal act when he fired shots at the victim, he cannot be said to be entirely without fault. While it appears that before firing at the deceased, he uttered warning words ("an waray labot kagawas"[10]), that is not enough a precaution to absolve him for the injuries sustained by the Amparados. We

nonetheless find negligence on his part. Accordingly, we hold him liable under the first part, second paragraph, of Article 365, that is, less serious physical injuries through simple imprudence or negligence. (The records show that Arnold Amparado was incapacitated for one and one-half months;[11] there is no showing, with respect to Lina Amparado, as to the extent of her injuries. We presume that she was placed in confinement for only ten to fourteen days based on the medical certificate estimating her recovery period.[12])

For the separate injuries suffered by the Amparado spouses, we therefore impose upon the accused-appellant arresto mayor (in its medium and maximum periods) in its maximum period, arresto being the graver penalty (than destierro).[13]

WHEREFORE, the decision appealed from is hereby MODIFIED. The accused-appellant is sentenced to four months and 21 days to six months of arresto mayor. The period within which he has been in confinement shall be credited in the service of these penalties. He is furthermore ordered to indemnify Arnold and Lina Amparado in the sum of P16,000.00 as and for hospitalization expenses and the sum of P1,500.00 as and for Arnold Amparado's loss of earning capacity. No special pronouncement as to costs.

**IT IS SO ORDERED.**

Yap, (Chairman), Melencio-Herrera, Paras and Padilla, JJ., concur.

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[1] Rollo, 10-11.

[2] Id., 88-89.

[3] Id., 23-24; penned by Regional Trial Court Judge Auxencio C. Dacuycuy.

[4] Brief for Accused-Appellant, rollo, 45.

[5] *People v. Araquel*, 106 Phil. 677 (1959).

[6] *Supra*.

[7] *Supra*, 681-683.

[8] *Supra*.

[9] Article 4 of the Code provides as follows:

Art. 4. Criminal liability. – Criminal liability shall be incurred:

By any person committing a felony (delito) although the wrongful act done be different from that which he intended.

By any person performing an act which would be an offense against persons or property, were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate or ineffectual means.

[10] Brief for the Accused-Appellant. The statement is translated as follows: "Those not concerned, get out." See t.s.n., session of November 28, 1985, 17-18.

[11] T.s.n. session of October 17, 1984, 24.

[12] Record, 29.

[13] REV. PEN. CODE, *supra*, art. 71; see *supra*, art. 48.

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