

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EUTROPIO TIOZON Y ACID, ACCUSED-APPELLANT.

G.R. No. 89823. June 19, 1991

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

In an information filed by the Asst. City Prosecutor of Caloocan City on 27 February 1989 with Branch 131 of the Regional Trial Court (Caloocan City) of the National Capital Judicial Region, accused-appellant was charged for violation of Presidential Decree 1866, as amended, committed as follows:

"That on or about the 24th day of February 1989 in Kalookan City, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, without any lawful motive or purpose, did then and there wilfully, unlawfully and feloniously have in his possession, custody and control one .38 cal. revolver, marked Squires Bingham with SN 180169 with three live ammunitions without authority of law, which firearm was used with treachery and evident premeditation in shooting one Leonardo Bolima y Mesia, which caused his death."[1]

Accused-appellant pleaded not guilty when arraigned on 15 March 1989.[2] Pre-trial was conducted and thereafter the trial court received the evidence for the parties.

In a decision promulgated on 30 June 1989,[3] the court a quo found accused-appellant guilty and sentenced him as follows:

"WHEREFORE, in view of all the foregoing, the court finds the accused EUTROPIO TIOZON Y ACID guilty beyond reasonable doubt of the crime of P.D. 1866 and Murder qualified by treachery and hereby sentences him to suffer life imprisonment; to indemnify the heirs of the deceased Leonardo Bolima the sum of P30,000.00; to reimburse the heirs of the victim the sum of P50,000.00 as reasonable expenses for the wake and burial expenses and to pay the costs."

According to the trial court, were it not for its abolition, "the death penalty, the sentence imposable under 2nd pa., Section 1 of P. D. 1866, as amended", should have been imposed.

On 5 July 1989 Accused-appellant filed a motion to reconsider the decision[4] which, however, was denied by the court in its order of 16 August 1989.[5] On 17 August accused-appellant filed a Notice of Appeal.[6] Hence, the case is now before Us.

The facts as found by the court a quo are as follows:

x x x

"That at around 11:00 o'clock in the evening of February 24, 1989, while she and her husband were sleeping inside their house, they were awakened by the loud knocks on their door; Her husband opened the door and they saw that the person who was knocking was their "Pareng Troping", accused herein; her husband invited the accused, who appeared to be very drunk, to come inside their house; once inside their house, accused sat

down and the two (accused and victim) exchanged pleasantries; she even saw the accused showing a gun to her husband and the latter even toyed with it; she got irritated by her husband's playing with the gun, so she took a few steps away from the two, however, when she looked back to the place where her husband and the accused was, she found out that the two had already left; five minutes later and/or after she had heard two successive gunshots, she heard accused knocking at their door and at the same time informing her that he accidentally shoot (sic) her husband, "Mare, mare, nabaril ko si Pare, hindi ko sinasadya" she got scared by the appearance of the accused who was full of bloodstains so she pushed him away from her; she immediately went to her sister-in-law Marilyn Bolima and both of them proceeded to the house of the accused; thereat, they saw the victim lying with his face up; she took her husband's pulse and when she still felt some warmth on his body, she sought help that her husband be brought to the hospital; accused extended his help by helping them in carrying the victim towards the main road, however, after a few steps, he changed his mind and put down the victim; accused reasoned out that the victim was already dead; she pushed the accused and even without the latter's help, they were able to reach the main road; afterwhich, some of her neighbors arrived bringing with them lights; thereafter, Kalookan policemen arrived and so she caused the arrest of the accused; she spent about P100,000.00 in connection with burial and wake of her husband.

Pat. Orlando Valencia of the Kalookan Police Force on the witness stand testified that on February 24, 1989 in line with his duty as policeman, a shooting incident was reported to him; he responded to the said report by proceeding to the crime scene, thereat, he saw the lifeless body of the victim as well as the accused whose clothing was full of bloodstains; the cadaver of the victim was referred to the Philippine Constabulary Crime Laboratory (PCCL) while the person of the accused was turned over to the Homicide Section of the Kalookan City Police Station; the day after, at around 10:00 o'clock in the evening and upon instruction of Pfc. Alilam, he together with some Kalookan policemen accompanied the accused in retrieving the firearm (Exh. "F") whom the accused threw at the grassy area particularly at the back of the latter's house; aside from the firearm they also recovered two (2) spent bullets (Exh. G-6 and G-7) and three live ammunitions (Exh. G-12, G-13 and G-14).

NBI Ballistician Ernie Magtibay testified that he has been a ballistician of the NBI since 1984; that pertinent to this case, he happened to examine a caliber .38 Squires Bingham with serial number 180169 (Exh. "F"); that as per his findings the evidence shells (Exhs. G-6 and G-7) were fired from the gun, subject matter of this case.

Forensic chemist from the NBI Edwin Purificando testified that the paraffin test he conducted on the dorsal aspect of the left and right hands, that is, from the wristbones to the fingertips, of the deceased, gave negative result on the presence of nitrates (Exh. "I"). Likewise, the paraffin test he conducted on the dorsal aspects of the left hand and right hand of the accused yielded negative results on the presence of nitrates (Exh. "J").

On the other hand, the version of the defense as testified to by the accused is as follows:

That at about 11:30 in the evening of February 24, 1989 accused on his way home, after coming from his work, passed by the house of his Pareng Nardo, the victim herein; while passing in front of the said house, his Pareng Nardo called him up; when he was about to enter the door of the house of the victim, the latter, from the back of the door, poked a gun at him; he grabbed the gun from his Pareng Nardo and at that instance, Rosalina Bolima emerging from her room, saw him holding the gun; he returned the gun to his Pareng Nardo and the latter tucked it in his waistline; he was served with a beer and after he and the victim consumed about two bottles of beer, they went out to buy some more; after they were able to buy some more bottles of beer, victim carried the same and left ahead of the accused; accused was left behind to answer the call of nature; while in the act of urinating, he heard two successive gunshots; he followed the victim and he saw the latter already sprawled on the ground; he inquired from his Pareng Nardo as to what had happened to him, "Pareng Nardo, ano ang nangyari sa iyo?" and the victim's replied (sic) was "Pare, binaril ako", he further inquired as to who shot him but the victim who was gasping for breath could no longer talk; thereafter, he saw a gun near the body of his Pareng Nardo; moved by his desire to bring the said gun to the wife of the victim, he picked the same, but after he got hold of the gun, he suddenly realized that the policemen might see him holding it, so he

threw the very same gun to the grassy area; he then ran towards the house of the victim and he informed the wife of the latter that his Pareng Nardo was shot to death; he returned to the place where he left the body of the victim but the body of the latter was no longer there; he later found out that townspeople carried the body of the victim towards the main road; when the policemen arrived he was ordered to go with them at the Kalookan Police Headquarters; when he was asked by the policemen as to who shoot (sic) the victim, his answer was, he did not see the actual shooting incident; never did he declare nor utter before her Mareng Lina or before any police authorities that he accidentally shoot (sic) the victim. However, he admitted that it was him who accompanied the policemen in retrieving the fatal gun at the grassy area at the back of his house."

In holding the accused-appellant guilty as above-stated, the court a quo relied on circumstantial evidence because the prosecution failed to present an eyewitness who could give an account as to the actual shooting incident. It considered the following circumstances which it deemed sufficient to convict the accused-appellant pursuant to Rule 133, Section 5, of the Revised Rules of Court:

"The following are among the circumstances which points to the culpability of the accused.

- 1) That the widow of the victim saw the accused holding a gun immediately before shooting incident happened;
- 2) That accused was the last person seen in the company of the victim immediately before the latter was shot to death;
- 3) That it was the accused who purposely went to the house of the victim on that fatal evening; The testimony of the accused that he was merely passing in front of the house of the victim when the latter who was standing at the window of his house called him up is less credible than the testimony of the widow of the victim, that they were already asleep (sic) inside their house when or the aforesaid time accused knocked at their door.
- 4) That it was the accused who guided the policemen as to the place where the fatal gun was recovered. Here the Court believes that the gun was purposely hid at the grassy area at the back portion of accused's house. The story of the accused that he picked the gun for the purpose of bringing it to the widow of the victim but for fear that the policemen might see him holding the gun, he then decided to throw it to the place where it was recovered, was too flimsy to merit belief. Firstly, what is his reason for bringing it to the widow of the victim when he surely knew fully well that it will be the policemen who will investigate the case. Secondly, he knew for a fact, that the said gun could lead as to the identity of the assailant of the victim, why then he threw it at the grassy area when he could easily leave the same to the place where he picked it up.
- 5) The testimony of the wife that after hearing two successive gunshots, accused went back to her house and informed ther (sic) that he accidentally shot her husband deserves merit. Besides, the Court sees no reason for the wife to concoct such story that would point to the accused as the culprit specially so that had not the accused became (sic) the prime suspect in this case, he would be the best person to be used as a prosecution witness, with more reason that from the evidence presented, it appears that the widow of the victim harbours no ill-feeling towards the accused otherwise, she would have prevented accused's entry in her house on that fatal evening.
- 6) The testimony of the wife that accused, immediately after the shooting incident took place admitted to her having accidentally shoot (sic) the victim is admissible evidence against the accused declarant since this is covered by the rule on res gestae or one of an exception to the hearsay rule.

Part of the gestae - Statement made by a person while a startling occurrence is taking place or immediately prior ther (sic) subsequent thereto with respect to the circumstance thereof, may be given in evidence as a part of res gestae. x x x. (Sec. 36, Rule 130, Revised Rules of Court, as amended).

- 7) The testimony of the accused that he does not own the gun and that it is but (sic) the accused (sic) who owns

the same and in fact the latter even tucked it in his waistline immediately before the shooting incident happened is improbable, for, how come then that the assailant was able to draw (sic) the gun from the waistline of the victim and fired (sic) the same towards the back portion of the victim's body. Is it not that the natural reaction of a person was to face the person who suddenly and without permission drew something from one's waistline. (sic)

While there is no eyewitness who testified to having seen accused shoot (sic) the victim, yet all the foregoing circumstances meet the criteria set by Sec. 5, Rule 133 of the Revised Rules of Court, as amended, and therefore points (sic) to the accused as the person who unlawfully owns the fatal gun as well as the same person who shoot (sic) to death the victim. "Circumstantial (sic) evidence is admissible in the absence of an eyewitness to the commission of the crime" (People vs. Albofera, 152 SCRA 125 (1983)).

The Court does not give credence to the denial of the accused that he was not the one who shoot (sic) the victim as he was some distance away from the victim answering the call of nature when the victim was killed. Instead, the Court gives credence to the testimony of the widow that it was the accused whom he saw in possession of the gun, that it was the accused who was the last person seen in the company of the victim shortly before the latter died and it was the same accused who lead (sic) the policemen in retrieving the fatal gun.

Admittedly, as per findings of the NBI Forensic Chemist, the accused's right and left hand yielded negative result to the test of nitrates. However, the same witness testified that even when a person fired a gun, it does not necessarily follows (sic) that his hand would be positive to the test of nitrates, as there are still several factors which affects the presence or absence of nitrates in the hands of a person.

x x x

Although the fact of death of the victim (Exh. "E") is undisputed, still the presence of the qualifying circumstance of treachery and evident premeditation being alleged in the Information, must be proven like the crime itself.

To properly appreciate evident premeditation it is necessary to establish with proof, as clear as the evidence of the crime itself (1) the time when the offender determined to commit the crime; (2) an act manifestly indicating that the culprit had clung to his determination; and (3) a sufficient lapse of time to reflect upon the consequence of his act (People vs. Lorenzo, 132 SCRA 17 (1984); People vs. Obengue, 147 SCRA 1987). Although alleged in the Information, the record of this case is bereft of any indication that evident premeditation attended the killing of the victim.

However, the qualifying circumstance of treachery is appreciated in this case since its presence could be established by the position/location of the wound of the victim, that is at the back portion of his torso which necessarily imply that he was treacherously shot by his assailant."[7]

Accused-appellant assigns only one error in this appeal:

"THE TRIAL COURT GRAVELY ERRED IN CONVICTING THE ACCUSED-APPELLANT OF THE CRIME OF ILLEGAL POSSESSION WITH MURDER AS DEFINED UNDER SECTION 1 OF P.D. 1866. THE CIRCUMSTANTIAL EVIDENCES RELIED UPON BY THE TRIAL COURT IN ITS JUDGMENT OF CONVICTION ARE INSUFFICIENT TO PROVE BEYOND REASONABLE DOUBT THE GUILT OF ACCUSED-APPELLANT."[8]

and prays that the decision appealed from be reversed and another be entered acquitting him.

In support of the assigned error accused-appellant submits that:

(a) Contrary to the conclusion of the trial court, he was not the one holding the gun immediately before the shooting incident, for as admitted by the victim's wife, her husband also "toyed or played with the gun";[9]

(b) The testimony of the victim's wife that he was the last person seen in the company of the victim is unreliable because she was left in the house when the victim and accused-appellant went out to the store which is about 145 to 150 meters away;

(c) That the accused-appellant pointed the place where the gun allegedly used in the killing was recovered, should not create the unfavorable inference that he purposely hid the gun and should not be taken against him, for knowing the reputation of police authorities, what he did was dictated by the instinct of self-preservation rather than guilt;

(d) The testimony of the wife of the victim that after hearing two successive gunshots accused-appellant went back to her house and informed her that he accidentally shot her husband, should not have been considered by the trial court as part of the *res gestae*; and

(e) The "raciocination" of the trial court regarding the improbability of the testimony of accused-appellant that he does not own the gun but that it was the deceased who owned it which the latter tucked in his waistline before the shooting incident is baseless as the records show that the deceased was walking ahead of the accused-appellant who was left behind to answer a call of nature; therefore, it is not highly improbable that some other person whom the deceased might have met in the street could have taken the gun from the waistline and shot him with it. It would not also be highly improbable that a person from whose waistline a gun was grabbed could not face his assailant especially when he is carrying something with his both hands, like the deceased who was carrying one case of Gold Eagle beer when he was shot at. Moreover, accused-appellant was found negative for nitrates when a paraffin test was conducted on him by a forensic chemist of the NBI.[10]

The People, in its Brief filed by the Solicitor General on 18 April 1990, disagrees with the accused-appellant, maintains that the prosecution was able to establish his guilt beyond reasonable doubt, and prays that subject decision be affirmed in toto. It stresses that accused-appellant himself admitted and confirmed that he and the victim went out together to buy some more bottles of beer; he was with the victim after they bought the beer, and they separated only when he had the urge to urinate seconds before the incident. The widow did not testify that she saw what happened in the street; what she testified was that the accused and the victim went out together and five minutes later she heard two shots. There was, therefore, nothing improbable about her testimony.

Appellee likewise contends that the conclusion of the trial court on the hiding of the gun was based on the evidence on record; the accused himself testified that he threw the gun on a grassy area. It further argues that the conclusion of the court on the improbability of appellant's testimony concerning the ownership of the gun is not baseless; on the contrary, it is the theory of the appellant that it is probable that another person may have grabbed the gun from the victim that is highly improbable. Since appellant was behind the victim he could have seen a third person grabbing the gun. He did not testify that he saw one. The negative result of the paraffin test cannot be singled out to absolve the accused-appellant from liability.[11]

No Reply-Brief was filed.

We are now called upon to determine whether, on the basis of the evidence adduced, the judgment appealed from should be affirmed or the accused-appellant be acquitted.

We shall first focus our attention on the law under which accused-appellant is indicted.

Section 1 of P.D. No. 1866 imposes the penalty of reclusion temporal in its maximum period to reclusion perpetua "upon any person who shall unlawfully manufacture, deal in, acquire, dispose or possess any firearm, part of firearm, ammunition or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition." It goes further by providing that "if homicide or murder is committed with the use of an

unlicensed firearm, the penalty of death shall be imposed."

It may be loosely said that homicide or murder qualifies the offense penalized in said Section 1 because it is a circumstance which increases the penalty. It does not, however, follow that the homicide or murder is absorbed in the offense; otherwise, an anomalous absurdity results whereby a more serious crime defined and penalized in the Revised Penal Code is absorbed by a statutory offense, which is just a *malum prohibitum*. The rationale for the qualification, as implied from the exordium the decree, is to effectively deter violations of the laws on firearms and to stop the "upsurge of crimes vitally affecting public order and safety due to the proliferation of illegally possessed and manufactured firearms, x x x." In fine then, the killing of a person with the use of an unlicensed firearm may give rise to separate prosecutions for (a) violation of Section 1 of P.D. No. 1866 and (b) violation of either Article 248 (Murder) or Article 249 (Homicide) of the Revised Penal Code. The accused cannot plead one as a bar to the other; or, stated otherwise, the rule against double jeopardy cannot be invoked because the first is punished by a special law while the second, homicide or murder, is punished by the Revised Penal Code.

In *People vs. Doriguez*,^[12] We held:

"It is a cardinal rule that the protection against double jeopardy may be invoked only for the same offense or identical offenses. A simple act may offend against two (or more) entirely distinct and unrelated provisions of law, and if one provision requires proof of an additional fact or element which the other does not, an acquittal or conviction or a dismissal of the does information under one does not bar prosecution under the other. Phrased otherwise, where two different laws (or articles of the same code) defines two crimes, prior jeopardy as to one of them is no obstacle to a prosecution of the other, although both offenses arise from the same facts, if each crime involves some important act which is not an essential element of the other."^[13]

In *People vs. Bacolod*, *supra.*, from the act of firing a shot from a sub-machine gun which caused public panic among the people present and physical injuries to one, informations for physical injuries through reckless imprudence and for serious public disturbance were filed. Accused pleaded guilty and was convicted in the first and he sought to dismiss the second on the ground of double jeopardy. We ruled:

"The protection against double jeopardy is only for the same offense. A simple act may be an offense against two different provisions of law and if one provision requires proof of an additional fact which the other does not, an acquittal or conviction under one does not bar prosecution under the other."

Since the informations were for separate offenses - the first against a person and the second against public peace and order - one cannot be pleaded as a bar to the other under the rule on double jeopardy.

However, to justify the imposition of the increased penalty under Section 1 of P.D. No. 1866 because of the resulting crime of homicide or murder, the prosecution must allege in the information and prove by the quantum of evidence required for conviction violation of said section and, more specifically, the use of an unlicensed firearm and the commission of homicide or murder. In this regard, the information in this case is sufficient in form and substance. It alleges illegal possession of a firearm and of murder. The latter is covered by the clause "which firearm was used with treachery and evident premeditation in shooting one Leonardo Bolima y Mesia, which caused his death."

We agree with the findings and conclusion of the court *a quo* that more than one circumstantial evidence were duly proved and that these circumstances point, beyond reasonable doubt, to the accused-appellant as the one who shot and killed the deceased Leonardo Bolima y Mesia. For circumstantial evidence to be sufficient to convict an accused, it is necessary that the following requisites must be satisfied: (a) there must be more than one circumstance, (b) the facts from which the inferences are derived are proven, and (c) the combination of all the circumstances is such as to produce a conviction beyond a reasonable doubt.^[14] Or, as jurisprudentially

formulated, a judgment of conviction based on circumstantial evidence can be upheld only if the circumstances proven constitute "an unbroken chain which leads to one fair and reasonable conclusion which points to the defendant, to the exclusion of all others, as the guilty person,[15] i.e., the circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with any other hypothesis except that of guilty.[16]

The first to the sixth circumstances mentioned by the trial court were duly established and constitute an unbroken chain which leads to one fair and reasonable conclusion that the accused-appellant, and no other else, shot and killed the victim. We do not, however, agree with the additional observation of the trial court, in respect to the sixth circumstance, that the statement made by the accused-appellant to the wife of the victim immediately after the shooting incident that he accidentally shot the victim is covered by the rule on *res gestae*. This is a misapplication of the rule in the instant case. Statements as part of the *res gestae* are among the exceptions to the hearsay rule. The rule is that a witness "can testify only to those facts which he knows of or his own knowledge; that is, which are derived from his own perceptions." [17] Accordingly, a testimony of a witness as to what he heard other persons say about the facts in dispute cannot be admitted because it is hearsay evidence. There are, however, exceptions to this rule. One of them is statements as part of the *res gestae* under Section 36 of Rule 130 of the Revised Rules of Court. The exceptions assume that the testimony offered is in fact hearsay; but it is to be admitted in evidence. Under the aforesaid Section 36, statements may be deemed as part of the *res gestae* if they are made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof. Statements accompanying an equivocal act material to the issue and giving it a legal significance may also be received as part of the *res gestae*.

In the instant case, however, the questioned testimony of the wife of the victim is not hearsay. She testified on what the accused-appellant told her, not what any other party, who cannot be cross-examined, told her. The accused-appellant's statement was an "oral confession", not a part of *res gestae*, which he can easily deny if it were not true, which he did in this case.

In *People vs. Tulagan*, 143 SCRA 107, 116-117, We declared that a statement allegedly made by one of the accused to Natalia Macaraeg that "we killed him" (referring to himself and his co-accused) and which Natalia repeated in her testimony in open court was merely an "oral confession" and not part of the *res gestae*.

Moreover, even assuming that the testimony of the wife of the victim on the alleged statement of the accused-appellant is hearsay, the latter is barred from questioning its admission due to his failure to object thereto at the time the testimony was given. The transcript of the stenographic notes of the testimony of Rosalina Magat vda. de Bolima, wife of the victim, clearly shows the absence of an objection, thus:

X X X

"Atty. Villano:

]You said when you turned your back after taking a few steps and when you turned your back, they were no longer there, will you please tell what happened after that?

A : And that was when they left it was 11:30 and when he came back 11:35 he was already knocking (referring to the person of the accused) telling me while he was knocking: "Mare, mare, nabaril ko si pare, hindi ko sinadya."

Q : By the way Mrs. Witness, who is that "pare" you are telling us?

A : Troping, sir (as the witness pointed to).

Q : The same Troping here, is your "kumpare"?

A : Yes, sir."

(TSN, April 18, 1989, p. 13).

The seventh circumstance mentioned by the court below is haphazardly formulated. Something is wrong with the opening clause reading:

"The testimony of the accused that he does not own the gun and that it is but the accused who owns the same and in fact the latter even tucked it."

The words but the accused should have been the deceased.

Two more basic issues are left for determination, to wit: whether the prosecution has established beyond reasonable doubt that the accused is liable for illegal possession of firearms and whether the killing was attended by the qualifying circumstances of treachery and evident premeditation as alleged in the information.

Our painstaking review of the records and the evidence fails to disclose that the prosecution presented any evidence to prove that the accused-appellant was not authorized to possess the firearm alleged in the information. And, contrary to the finding of the trial court, there was no sufficient evidence to prove the presence of treachery.

It must be stated, however, that had illegal possession of firearms been duly proven as alleged, it would not have mattered whether the killing was simple homicide or murder since Section 1 of P.D. No. 1866 expressly provides that:

x x x

"If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed."

which penalty, however, had been automatically reduced to reclusion perpetua in view of the abolition of the death penalty.[18]

The issue concerning the failure of the prosecution to prove that he had no authority to possess the firearm has not been raised in this appeal. Interestingly, accused-appellant raised it in his motion to reconsider the decision of the trial court.[19] In its resolution denying the motion, the trial court admitted, in effect, that the prosecution did not offer any evidence to prove that the accused-appellant had no license to possess or carry the firearm in question; it however, threw the burden on the accused-appellant to prove that he has that authority. Thus, it ruled:

"Where accused relies as a matter of defense on an exception in a statute which is not in the enacting clause by which the offense is described and forbidden, he has the burden of proving that he is within the exception.

'Where the subject matter of a negative averment in the information, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof of such averment or fact is on him' (16 C.J. sec. 998, p. 530). An illustrative case of this rule may be found in prosecution for exercising a trade or profession, or doing other acts, without a license. In such cases, it would greatly inconvenience the prosecution to prove that the defendant had no license, whereas the defendant could easily prove that he did have one.

In cases of illegal possession of firearms, the burden of proof as to the negative averments in the information to the effect that the accused possesses the firearms without the corresponding license is on the defense. It is the accused who is called upon to prove that he possesses the license. In other words, the fact relied upon by the accused as a justification or excuse being one that is related to him personally or otherwise within his peculiar

knowledge, 'the general rule is that the burden of proof as to such averment or fact is on the accused' (Francisco, Handbook on Evidence, pp. 379-380, 1984 Ed., citing cases)."[20]

Section 1 of P. D. No. 1866 reads:

"SECTION 1. Unlawful Manufacture, Sale Acquisition, Disposition or Possession of Firearms or Ammunition or Instruments Used or Intended to be Used in the Manufacture of Firearms or Ammunition. - The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose, or possess any firearm, part of firearm, ammunition or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition.

If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed.

X X X

The penalty of prision mayor shall be imposed upon any person who shall carry any licensed firearm outside his residence without legal authority therefor."

Undoubtedly, there is unlawful possession under the foregoing section if one does not have the license to possess the firearm. Even if he has the license, he cannot carry the firearm outside his residence without legal authority therefor. It follows then that the lack or absence of a license is an essential ingredient of the offense which the prosecution must allege and prove. Every element of the crime must be alleged and proved.[21]

In *People vs. Pajenado*, L-27680-81, 27 February 1970,[22] We said:

"It is true that *People vs. Lubo*, 101 Phil. 179 and *People vs. Ramos*, 8 SCRA 758 could be invoked to support the view that it is incumbent upon a person charged with illegal possession of a firearm to prove the issuance to him of a license to possess the firearm, but We are of the considered opinion that under the provisions of Section 2, Rule 131 of the Rules of Court which provide that in criminal cases the burden of proof as to the offense charged lies on the prosecution and that a negative fact alleged by the prosecution must be proven if 'it is an essential ingredient of the offense charged', the burden of proof was with the prosecution in this case to prove that the firearm used by appellant in committing the offense charged was not properly licensed.

It cannot be denied that the lack or absence of a license is an essential ingredient of the offense of illegal possession of a firearm. The information filed against appellant in Criminal Case No. 3558 of the lower court (now G. R. NO. 27681) specifically alleged that he had no 'license or permit to possess' the .45 caliber pistol mentioned therein. Thus it seems clear that it was the prosecution's duty not merely to allege that negative fact but to prove it. This view is supported by similar adjudicated cases. In *U.S. vs. Tria*, 17 Phil. 303, the accused was charged with having criminally inscribed himself as a voter knowing that he had none of the qualifications required to be a voter. It was there held that the negative fact of lack of qualification to be a voter was an essential element of the crime charged and should be proved by the prosecution. In another case (*People vs. Quebral*, 68 Phil. 564) where the accused was charged with illegal practice of medicine because he had diagnosed, treated and prescribed for certain diseases suffered by certain patients from whom he received monetary compensation, without having previously obtained the proper certificate of registration from the Board of Medical Examiners, as provided in Section 770 of the Administrative Code, this Court held that if the subject of the negative averment like, for instance, the act of voting without the qualifications provided by law is an essential ingredient of the offense charged, the prosecution has the burden of proving the same, although in view of the difficulty of proving a negative allegation, the prosecution, under such circumstance, need only establish a prima facie case from the best evidence obtainable. In the case before Us, both appellant and the Solicitor General agree that there was not even a prima facie case upon which to hold appellant guilty of the illegal possession of a firearm. Former Chief Justice Moran upholds this view as follows:

"The mere fact that the adverse party has the control of the better means of proof of the fact alleged, should not relieve the party making the averment of the burden of proving it. This is so, because a party who alleges a fact must be assumed to have acquired some knowledge thereof, otherwise he could not have alleged it. Familiar instance of this is the case of a person prosecuted for doing an act or carrying on a business, such as, the sale of liquor without a license. How could the prosecution aver the want of a license if it had acquired no knowledge of that fact? Accordingly, although proof of the existence or non-existence of such license can, with more facility, be adduced by the defendant, it is, nevertheless, incumbent upon the party alleging the want of the license to prove the allegation. Naturally, as the subject matter of the averment is one which lies peculiarly within the control or knowledge of the accused prima facie evidence thereof on the part of the prosecution shall suffice to cast the onus upon him.' (6 Moran, Comments on the Rules of Court, 1963 edition, p. 8)."

There being no proof that accused-appellant had no license to possess the firearm in question, he could not be convicted for illegal possession of a firearm. The trial court then committed an error in holding the accused-appellant guilty thereof. However, as above-stated, the accused-appellant did not touch this issue in his Brief. Be that as it may, the rule is well-settled that an appeal in a criminal case opens the whole case for review and this includes the review of the penalty, indemnity and the damages involved.[23]

In *People vs. Borbano*, 76 Phil. 702, 708, We ruled:

"x x x In a criminal case, an appeal to the Supreme Court throws the whole case open for review, and it becomes the duty of the Court to correct such errors as may be found in the judgment appealed from, whether they are made the subjects of assignments error or not. (*People vs. Ofindo*, 47 Phil. 1)."

Accordingly, it is proper for this Court to consider in favor of the accused-appellant the absence of proof of illegal possession of a firearm. But, may accused-appellant be convicted for murder under the information for which he was tried? The answer is in the affirmative since, as We stated earlier, the information sufficiently alleges the commission of murder; hence, a conviction for murder, if warranted, by the facts, can be had under the information.[24] If murder is not proved by reason of the absence of any qualifying circumstance, conviction for the lesser crime of homicide is also proper.[25]

We are also unable to agree with the trial court that the qualifying circumstance of treachery was duly established.

There is treachery when the offender commits any of the crimes against persons employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make, which means that no opportunity was given to the latter to do so.[26] It cannot be presumed; it must be proved by clear and convincing evidence or as conclusively as the killing itself.[27] For, as held in *U.S. vs. Perdon*[28] where no particulars are known as to the manner in which the aggression was made or how the act which resulted in the death of the victim began and developed, it can in no way be established from mere suppositions, drawn from circumstances prior to the very moment of the aggression, that an accused perpetrated the killing with treachery.[29] Accordingly, treachery cannot be considered where the lone witness did not see the commencement of the assault.[30]

In *People vs. Manalo*, supra, We ruled:

"The fact that the fatal wounds were found at the back of the deceased does not, by itself, compel a finding of treachery. Such a finding must be based on some positive proof and not merely an inference drawn more or less logically from hypothetical facts. This Court has ruled that the suddenness of an attack is not, of itself, enough to constitute treachery when the method of the killing does not positively show that the assailant thereby knowingly intended to ensure the accomplishment of his purpose without risk to himself from any defense which the victim might put up. In other words, to sustain a finding of treachery, the means, method or

form of attack must be shown to have been deliberately adopted by the appellant." (citing *People vs. Carsano*, 95 SCRA 146; *People vs. Cabiling*, 74 SCRA 185; *People vs. Satone*, 74 SCRA 106; *People vs. Bongo*, 55 SCRA 547).

In *People vs. Ablao*, 183 SCRA 658, 669, We said:

"There being no direct evidence on how the shooting was committed, treachery cannot be appreciated."

In the instant case, no witness who could have seen how the deceased was shot was presented. Absent the quantum of evidence required to prove it, treachery cannot be considered against the accused-appellant.

Accordingly, accused-appellant could only be liable for HOMICIDE, which is punished by RECLUSION TEMPORAL. It shall be imposed in its medium period, whose duration is from 14 years, 8 months and 1 day to 17 years and 4 months, since neither aggravating nor mitigating circumstances had been proved.[31]

The Indeterminate Sentence Law benefits the accused-appellant. Applying it in this case, he may be sentenced to suffer an indeterminate penalty of eight years and one day of prision mayor, as minimum, to fourteen years, eight months and one day of reclusion temporal as maximum.

The civil indemnity imposed by the trial court should be increased from P30,000.00 to P50,000.00 conformably with our ruling in *People vs. Sison*, G. R. No. 86455, 14 September 1990 and in *People vs. Sazon*, G. R. No. 89684, 18 September 1990.

WHEREFORE, judgment is hereby rendered MODIFYING the subject decision of the trial court, and as Modified, FINDING the accused-appellant EUTROPIO TIOZON Y ACID guilty beyond all reasonable doubt of the crime of HOMICIDE, as defined and penalized under Article 249 of the Revised Penal Code, for the killing of Leonardo Bolima, and applying the Indeterminate Sentence Law, he is hereby SENTENCED to suffer an indeterminate penalty of imprisonment ranging from EIGHT YEARS AND ONE DAY of prision mayor, as Minimum, to FOURTEEN YEARS, EIGHT MONTHS AND ONE DAY of reclusion temporal as Maximum, with the accessory penalties therefor, to INDEMNIFY the heirs of Leonardo Bolima in the sum of FIFTY THOUSAND PESOS (P50,000.00), without subsidiary imprisonment in case of insolvency, and to REIMBURSE said heirs in the sum of FIFTY THOUSAND PESOS (P50,000.00) as reasonable expenses for the wake and burial of Leonardo Bolima.

Accused-appellant shall be given full credit for the period of his preventive imprisonment.

Costs against accused-appellant.

SO ORDERED.

Fernan, C.J., Gutierrez, Jr., Feliciano, and Bidin, JJ., concur.

[1] Original records, 1.

[2] Original records, 2.

[3] *Id.*, 71-78.

[4] *Id.*, 82-86.

[5] *Id.*, 87-88.

[6] *Id.*, 89.

[7] Original records, 75-78.

[8] Brief for Appellant, 4; Rollo, 43.

[9] TSN, April 18, 1989, 13.

[10] Brief for Appellant, 5-11; Rollo, 44-50.

[11] Brief for Appellee, 6-13.

[12] 24 SCRA 163, 171.

[13] Citing *People vs. Bacolod*, 89 Phil. 621; *People vs. Capurro*, 7 Phil. 24; *People vs. Alvarez*, 45 Phil. 472.

[14] Sec. 5, Rule 133, Revised Rules of Court; *People vs. Alcantara*, 163 SCRA 783, 786.

[15] *U.S. vs. Villos*, 6 Phil. 510, 512; *People vs. Subano*, 73 Phil. 692, 693; *People vs. Colinares*, 163 SCRA 313, 320.

[16] *People vs. Trinidad*, 162 SCRA 714, 723, citing *People vs. Ludday*, 61 Phil. 216; *People vs. Cotante*, 12 SCRA 653. See also *People vs. Tolentino*, 166 SCRA 469, 482.

[17] Sec. 30, Rule 130, Revised Rules of Court.

[18] Section 19(1), Article III, 1987 Constitution.

[19] Original Records, 82-86.

[20] Original Records, 87.

[21] *People vs. Sy Gesiong*, 60 Phil. 614.

[22] 31 SCRA 812, 816-817.

[23] IV Moran, Comments on the Rules of Court, 1980 Ed., 348.

[24] Section 4, Rule 120, Revised Rules of Court.

[25] *U.S. vs. Macalintal, et al.*, 2 Phil. 448; *U.S. vs. Idica*, 3 Phil. 313; *U.S. vs. Sadlucap*, 3 Phil. 437; *U.S. vs. Asilo*, 4 Phil. 175; *U.S. vs. Andrada*, 5 Phil. 464.

[26] Article 14, par. 16, Revised Penal Code; *People vs. Gimongala*, 170 SCRA 632; *People vs. Bustos*, 171 SCRA 243; *People vs. Samson*, 176 SCRA 710; *People vs. Manzanares*, 177 SCRA 427.

[27] *People vs. Manalo*, 148 SCRA 98; *People vs. Gaddi*, 170 SCRA 549.

[28] 4 Phil. 141.

[29] See also *People vs. Ablao*, 183 SCRA 658.

[30] *People vs. Durante*, 53 Phil. 363; *People vs. Cananowa*, 92 SCRA 427; *People vs. Repe, et al.*, 175 SCRA 422; *People vs. Villapando*, 178 SCRA 341.

[31] Paragraph 1, Article 64, Revised Penal Code.

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