

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PO3
ELEUTERIO TAN, PO3 LEONILO MARANGA, PO3 ALEXANDER
PACIOLES, PO1 PAULO DE LA PEÑA, PNP, NAVAL, BILIRAN,
ACCUSED-APPELLANTS.**

G.R. Nos. 116200-02. June 21, 2001

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

Four policemen were charged with murder and two counts of attempted murder for the killing of Ramon Gabitan and the wounding of Judith Cerilles and Edward Villaflor

The facts as condensed from the records are as follows:

At around 10:30 pm on May 12, 1991, PT Officer Second Class Ramon Gabitan, CAGU member Andres Lapot, and one Danilo Dumdum, all belonging to the Philippine Coast Guard, together with the Chiefmate and other crew members of M/V Dang Delima, a foreign vessel, were drinking beer at the Twin's Disco Pub in Naval, Leyte (now in Biliran province). The group danced with some of the waitresses of the disco house. One of them, Froilan Acorda, a crew member of the M/V Dang Delima, danced most of the time with waitress Rosie Catigbe, an alleged girlfriend of accused-appellant PO3 Eleuterio Tan, who was also in the said disco house with two companions. After dancing, Rosie Catigbe sat beside Acorda, and the latter rested his hand on the thigh of the former. Later, Gabitan's group left the disco house together with five waitresses, among whom were Rosie Catigbe and Jovith Cerilles.[1] They were to proceed back to the foreign vessel M/V Dang Delima which was anchored a few miles away from the shores of Naval, Leyte by riding the pumpboat owned by Lapot. As they were leaving the disco house, accused-appellant Tan approached them and talked to two of the waitresses who were walking behind the group. The two waitresses turned back and did not join the group anymore after they were told by Tan that they will be brought to the foreign vessel. Thereafter, Tan confronted Froilan Acorda and introduced himself as a police officer. Froilan asked for his badge. Tan instead took out his .38 caliber gun. Froilan hit Tan with a karate blow and the gun fell to the ground. Disarmed, Tan rode his bicycle and left.

Gabitan's group, together with the three remaining waitresses, Jovith Cerilles, Ina Corpin and Rosie Catigbe, boarded the pumpboat. As they were about to leave the pier, a fire truck arrived. Tan was on top of the water tank. Accused-appellant PO3 Leonilo Maranga jumped off as the truck stopped and positioned himself in front. Accused-appellant PO3 Alexander Pacioles was behind the wheel of the truck. Accused-appellant SPO1 Paulo dela Peña also jumped off the rear of the truck. Armed with M-16 rifles, one of the accused-appellants allegedly fired two warning shots to stop the pumpboat. But as the small vessel moved on, accused-appellants opened fire at the moving pumpboat. Gabitan was hit by a bullet and fell overboard,[2] as the pumpboat sped away. His dead body was recovered the following day in the ocean by fishermen. Jovith Cerilles sustained five wounds while Edward Villaflor, who was also on board the pumpboat, was hit in the right leg. The latter two were brought to different hospitals and survived their wounds.

All the accused-appellants were subsequently charged with murder and two counts of attempted murder before the Regional Trial Court of Biliran, which were respectively docketed as Criminal Cases Nos. 1530, 1531 and 1532. However, upon motion of the prosecution, this Court ordered a change of venue and the cases were transferred to the RTC of Tacloban City.[3] The cases were re-raffled and docketed anew as Criminal Cases Nos. 92-07-343, 92-09-477 and 92-09-478. The Informations read:

Criminal Case No. 92-09-343[4]

That on or about May 12, 1991 at around 10:30 o'clock in the evening in the Municipality of Naval, Province of Biliran and within the jurisdiction of this Honorable Court above-named accused conspiring, confederating and mutually helping each other with evident premeditation and treachery and with intent to kill did then and there wilfully, unlawfully and feloniously fire, shoot, and discharge their M16 "Armalite" rifles at Ramon Gabitan who was at that precise time riding in a pumpboat catching the latter by surprise hitting him in his chest which caused his instantaneous and untimely death.

CONTRARY TO LAW. (Italics supplied)

Criminal Case No. 92-09-477[5]

That on or about May 12, 1991 at around 10:30 o'clock in the evening in the Municipality of Naval, Province of Biliran and within the jurisdiction of this Honorable Court above-named accused conspiring, confederating and mutually helping each other with evident premeditation and with intent to kill did then and there wilfully, unlawfully and feloniously fire, shoot and discharge their M16 "armalite" rifles at Judith Cerilles who was at that precise time riding in a pumpboat catching the latter by surprise hitting and wounding the victim at her left shoulder which required immediate medical assistance resulting to (sic) the damage and prejudice of the victim.

CONTRARY TO LAW. (Italics supplied)

Criminal Case No. 92-09-478[6]

That on or about May 12, 1991 at around 10:30 in the evening in the Municipality of Naval, Province of Biliran and within the jurisdiction of this Honorable Court above-named accused conspiring, confederating and mutually helping each other with evident premeditation and treachery and with intent to kill did then and there wilfully, unlawfully and feloniously fire, shoot and discharge their M16 "armalite" rifles at Edward Villaflor who was at that precise time riding in a pumpboat catching the latter by surprise hitting and wounding the victim in his right thigh which required immediate medical assistance resulting to (sic) the damage and prejudice of the victim.

CONTRARY TO LAW. (Italics supplied)

After arraignment, where they all pleaded not guilty, accused-appellants were tried and thereafter convicted as charged. The dispositive portion of the trial court's decision reads:

WHEREFORE, finding accused Eleuterio Tan, Leonilo Maranga, Alexander Pacioles and Paulo dela Peña guilty beyond reasonable doubt as principals of the crime of Murder qualified by treachery in Criminal Case No. 92-07-343 for the killing of Ramon Gabitan, defined and penalized under Article 248 of the Revised Penal Code with the aggravating circumstance of evident premeditation on the part of accused Eleuterio Tan only without any mitigating circumstance to offset the same, sentences accused Eleuterio Tan to Reclusion Perpetua.

The aggravating circumstance of evident premeditation not being applicable on the part of the three other accused, the Court hereby sentences accused Leonilo Maranga, Paulo dela Peña and Alexander Pacioles to an Indeterminate Penalty of from Ten (10) Years and One (1) Day of Prision Mayor as minimum to Seventeen

(17) Years and Four (4) Months of Reclusion Temporal as maximum. Accused Eleuterio Tan, Leonilo Maranga, Paulo dela Peña and Alexander Pacioles are hereby condemned to jointly indemnify the heirs of Ramon Gabitan the sum of Two Hundred Thousand (P200,000.00) Pesos without subsidiary imprisonment in case of insolvency.

The bond put up by accused Eleuterio Tan for his temporary liberty is hereby cancelled, and he should be incarcerated immediately.

Finding accused Eleuterio Tan, Leonilo Maranga, Paulo dela Peña and Alexander Pacioles guilty beyond reasonable doubt as principals in Criminal Case No. 92-09-477 for Attempted Murder, defined and penalized under Article 248 in relation to Article 51 of the Revised Penal Code with the aggravating circumstance of evident premeditation on the part of accused Eleuterio Tan only without any mitigating circumstance to offset the same, and applying Indeterminate Sentence Law, sentences accused Eleuterio Tan to an imprisonment of from Two (2) Years, Ten (10) Months and Twenty-one (21) Days of Prision Correccional as minimum to Eight (8) Years, and Twenty-one (21) Days of Prision Mayor as maximum.

The aggravating circumstance of evident premeditation being not applicable to the other three accused, the Court hereby sentences accused Leonilo Maranga, Paulo dela Peña and Alexander Pacioles to an Indeterminate Penalty of from One (1) Year, Seven (7) Months and Eleven (11) Days of Arresto Mayor as minimum to Six (6) Years, One (1) Month and Eleven (11) Days of Prision Correccional as maximum.

Accused Eleuterio Tan, Leonilo Maranga, Paulo dela Peña and Alexander Pacioles are hereby condemned to jointly indemnify the offended party Juvith Cerelles the sum of Twenty Thousand (P20,000.00) Pesos, without subsidiary imprisonment in case of insolvency.

Finding accused Eleuterio Tan, Leonilo Maranga, Paulo dela Peña and Alexander Pacioles guilty beyond reasonable doubt as principal in Criminal Case No. 92-09-478 for Attempted Murder, defined and penalized under Article 248 in relation to Article 51 of the Revised Penal Code with the aggravating circumstance of evident premeditation on the part of accused Eleuterio Tan only without any mitigating circumstance to offset the same, and applying Indeterminate Sentence Law, sentences accused Eleuterio Tan to a imprisonment of from Two (2) Years, Ten (10) Months and Twenty-one (21) Days of Prision Correccional as minimum to Eight (8) Years, and Twenty-one (21) Days of Prision Mayor as maximum.

The aggravating circumstance of evident premeditation being not applicable to the other three accused, the Court hereby sentences accused Leonilo Maranga, Paulo dela Peña and Alexander Pacioles to an Indeterminate Penalty of from One (1) Year, Seven (7) Months and Eleven (11) Days of Prision Correccional as maximum.

Accused Eleuterio Tan, Leonilo Maranga, Paulo dela Peña and Alexander Pacioles are hereby condemned to jointly indemnify the offended party Eduard Villaflor the sum of Twenty Thousand (P20,000.00) Pesos, without subsidiary imprisonment in case of insolvency.

SO ORDERED."[7]

Dissatisfied with the trial court's decision, accused-appellants interposed an appeal to this Court, basically imputing errors in the trial court's factual findings. After a careful review of the evidence on record, the Court finds that the appeal deserves no merit.

The prosecution maintained that accused-appellants suddenly fired upon the victims without warning. On the other hand, the defense argues that Gabitan's group was the first to fire shots against them after accused-appellants responded to a report of an alleged bicycle theft. The appeal raises the primary issue of credibility of witness upon which the resolution of all the other issues raised depends.

Andres Lapot, owner of the pumpboat, was an eyewitness to the events as they transpired, viz.:

Q.

Immediately upon arrival of the fire truck of Naval, Leyte, what happened?

A.

We were immediately strapped.

Q.

What do you mean by immediately strapped?

A.

When the fire truck arrived they immediately opened fire at us.

Q.

Who were the persons who were opened fire by the accused?

A.

All of us.

Q.

Where?

A.

Naval pier.

x x x x x x x x

Q.

Who were the four accused?

A.

Pat. Eleuterio Tan, Leonilio Maranga, Alexander Pacioles and Paulo de la Peña.

Q.

Pat. Eleuterio Tan in relation to that fire truck of Naval, Leyte, where was he situated when he opened fire?

A.

On top of the fire truck.

Q.

On what particular place on top of the fire truck?

A.

On top of the water tank.

Q.

What was his position when you were fired?

A.

He was in a prone position.

Q.

And what firearm did Eleuterio Tan use?

A.

M-16 armalite rifle.

Q.

What about Pat Leonilo Maranga, in relation to the fire truck where was he?

A.

Infront of the fire truck.

Q.

What particular place in front of the fire truck?

A.

End of the front of the fire truck.

Q.

When the accused fired where was this Leonilo Maranga?

A.

Already on the ground but in front the fire truck.

Q.

What was his distance to the front of the fire truck when he opened fire?

A.

Very close.

Q.

What was the position of Leonilo Maranga when he opened fire?

A.

He was standing.

Q.

Will you please demonstrate how he opened fire?

A.

This way.

(Witness stands up as if pointing the firearm at the banca.)

Q.

What was the weapon used if you know?

A.

M-16 rifle.

Q.

Where was Alexander Pacioles in relation to the fire truck?

A.

He was at the driver's seat.

Q.

What about SPO1 Paulo de la Peña, in relation to the fire truck, where was he?

A.

At the rear of the fire truck.

Q.

At the time when he opened fire, what was his position?

A.

He was at the rear of the fire truck pointing his firearm at us.

Q.

What firearm?

A.

M-16 rifle.

Q.

From what place where Eleuterio Tan opened fire, to the pumpboat, what was the distance?

A.

10 to 15 meters.[8]

With the sudden burst of gunfire, Gabitan was hit with a bullet which produced two wounds, the entrance and the exit wounds. These were fatal wounds, having hit his lungs, a vital organ.[9] The wounds caused severe hemorrhage that led to his death.

The testimony of Andres Lapot was corroborated by one of the other victims, Juvith Cerilles, who was also on board the pumpboat:

Q. What was that incident about?

A. The firetruck suddenly arrived and while the firetruck was still running, I looked at the firetruck.

Q. How far was the firetruck ran, if you can estimate?

A. It was running fast.

Q. Where did it stop?

A. It stopped at the pier.

Q. How did it stop?

x x x x x x x x

A. It stopped and only two jumped.

PROS. TUGONON:

Q. You said there were two jumped?

A. Yes, sir.

Q. How were you able to recognize them when that was in the evening of May 12, 1991?

A. There was an electric light.

Q. How far did the firetruck stop in relation to the electric light?

A. Very near.

Q. From what part of the firetruck did these two jump?

A. One jumped from the rear, the other one from the front.

Q. Those who jumped from the rear, if you will see them again, were you able to recognize?

ATTY. AVILA:

Only one.

WITNESS:

A. Yes, sir.

PROS. TUGONON:

Q. Will you please look around from the gallery if the one jumped from the rear is present? We request you to go down from the witness stand and tap the shoulder of the witness.

A. Witness goes down from the witness stand and goes to the place where the accused are seated and taps the person who, when asked about his name, he answered that he is Paulo dela Peña.

Q. The other one who jumped from the front of the firetruck, were you able to recognize him?

A. Yes, sir.

Q. Will you please look around and please go down from the witness stand and tap his shoulder?

A. Witness goes down from the witness stand and taps the shoulder of Leonilo Maranga.

Q. Do you know who was the driver of the firetruck?

A. I can recognize his face.

Q. If he is here, please tap his shoulder.

A. Witness goes down from the witness stand and taps the shoulder of PO3 Alexander Pacioles who is present in Court.

x x x x x x x x

Q. Do you know where Eleuterio Tan was at the time when the firetruck arrived?

A. Yes, sir.

Q. Where was Eleuterio Tan?

A. He was on top of the firetruck.

Q. What was his position on top of the firetruck?

A. He was in a prone position.

Q. When the two persons whom you just tapped on the shoulder, one from the rear and one from the front, what happened immediately after that?

A. They shot at us with the use of the firearms.

Q. What about Eleuterio Tan, what did he do when you said he was on top of the firetruck?

A. He also fired.

Q. And when you said he fired, towards what direction or towards who did they fire?

A. At us on the pumpboat.

Q. What about the one who was at the driver's wheel, what did he do?

A. He also fired shots. Witness extends her right hand forward.

Q. Towards you and your companions at the pumpboat?

ATTY. AVILA:

Leading.

PROS. TUGONON:

Q. Towards what direction was that fire?

A. At us and seamen.[10]

With nowhere to escape and no place to hide, Cerilles and Villaflor were also hit by bullets fired by accused-appellants. Cerilles sustained five wounds which, as per medical examination, were described as gunshot wounds because of the presence of splinters, i.e., metal objects or pieces of wood embedded in the skin.[11] Her wounds were however, non-fatal. Moreover, it was found that the victim was situated at a lower level than the assailants because of the direction of the wounds,[12] which confirms the theory that accused-appellants were on a higher elevation than the victims. With respect to Villaflor, the examining physician found that he sustained abrasions on the right leg which were likewise caused by bullets. His wounds are merely considered superficial since they hit only the epidermis of his skin.[13]

The defense invokes the justifying circumstance of lawful performance of duty.[14] For this circumstance to be rightfully appreciated, two requisites must concur:

(1)

that the accused acted in the performance of a duty or in the lawful exercise of a right or office;

(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 or office.[15]

Accused-appellants contend that they were only responding to a citizen's complaint for theft of bicycle. It was alleged that those who took the complainant's bicycle were with the group of Gabitan. When accused-appellant Tan allegedly called for help from his fellow police officers, his co-appellants boarded the fire truck and directly went to the pier which was about 3-5 minutes walking distance away. At the pier, they saw a pumpboat which was about to leave the shore. According to the defense, someone on board the pumpboat fired a shot at them which impelled them to return fire.

This version is improbable in the light of the evidence on record and is contrary to the defense of lawful performance of duty. First, contrary to his assertion, accused-appellant Tan was positively identified by prosecution witnesses drinking beer inside the disco house prior to the incident.[16] At least three witnesses testified that he was not wearing a uniform, but maong pants,[17] white T-shirt and slippers.[18] If it were true that he was on patrol, he should not be inside the disco house drinking and he should be in the prescribed police uniform. The duty to patrol means that the officer is not on undercover police work, wherein he may not wear the proper police uniform because of the nature of the police operation. To conduct patrol work necessitates the physical presence of the officer in the street or in public places where he will be immediately recognized through his uniform as a police officer. Hence, accused-appellant could not have been on patrol duty, especially since he was seen drinking beer inside an entertainment house.

Second, it is strange that a fire truck was used by accused-appellants in the pursuit of the alleged thieves. Assuming for the sake of argument that accused-appellants were responding to a call, they would not position themselves on top of the water tank of the truck where they would be prone to any attack from the suspects. Assuming further that there was a complaint for theft, the usual procedure should have been to search for the suspects, and if they are located, to apprehend them employing the least force as may be necessary to effect a lawful arrest without warrant. Under Rule 113 of the Rules of Court then in force:

Sec. 2. x x x. No violence or unnecessary force shall be used in making an arrest, and the person arrested shall not be subject to any greater restraint than is necessary for his detention.

Although the employment of high powered firearms, which in this case were M-16 rifles, does not necessarily connote unnecessary force, the police had no reason to fire their weapons indiscriminately at a group of persons on board a moving boat. The Rules of Court mandates that the police officer or any person conducting arrest must identify himself as such and state his intention to arrest when there is no danger to himself or it would not prejudice the arrest.[19] Further, the rules of engagement, of which every police officer must be thoroughly knowledgeable and for which he must always exercise the highest caution, does not require that he should immediately draw or fire his weapon if the person asked or to be accosted does not heed his call. Pursuit without danger should be his next move and not vengeance for personal feelings or a damaged pride. Police work requires nothing more than the lawful apprehension of suspects since the completion of the process pertains to other government officers or agencies. The victims in this case and all those on the pumpboat were not under any obligation to surrender since they were not prisoners who had escaped from detention, nor were they identified suspects. Not even the presumption of regularity in the performance of duty[20] can be resorted to by appellants, nor does it find application in this case because they were no longer performing a duty when they immediately

fired their weapons.

Third, the evidence does not support the contention that it was Gabitan who was the first to shoot. There were no powder burns on Gabitan's hands to indicate that he fired a gun. Rather, when his dead body was recovered and brought to the Naval Police Station, his .38 caliber gun was still tucked in his waist.[21]

Fourth, when Acorda asked for accused-appellant Tan's badge, the latter instead drew his gun. Whenever a police officer introduces himself as such, he must show his police identification card or badge. Persons who deal with the police need not even ask for the officer's identification papers because the officer should have taken the initiative outright. His service firearm is not an identification card. The best and immediate evidence of police identity is the badge, the ID and the proper uniform. It is a basic norm of police work, particularly when approaching a stranger with whom he has no prior contact, not just to introduce himself properly but also to present his police badge and ID.

Finally, the party who invokes a justifying circumstance has the burden of proof. Failure on their part to discharge that burden justifies their conviction because of their admission of having authored the criminal act. This is the essence of a justifying circumstance which applies not only to self-defense cases but equally to the defense of performance of duty. For this reason, the Rules of Court allows the reversal of proceedings by requiring the party who invokes a lawful defense to present evidence ahead of the prosecution.[22]

Accused-appellants' defense cannot be given credence because the uncovered vessel was riddled with no less than 33 bullets holes,[23] in addition to those which hit the three victims. This could not have been self-defense, but plain and simple revenge for the trivial reason that accused-appellant Tan's girlfriend danced with and allowed her thigh to be touched by another man. Moreover, the defense of performance of duty, as an affirmative allegation, should be demonstrated with convincing credibility.[24] Accused-appellants version is lacking in truth, aside from being a mere afterthought and contrary to human nature. The physical evidence in this case runs counter to the testimonial evidence, in which case the former prevails.[25] Physical evidence is a mute but eloquent manifestation of truth, and it ranks high in the hierarchy of our trustworthy evidence.[26] 26 Being situated on a higher level than the pumpboat, the life of accused-appellants cannot be said to have been in immediate peril. As such, their judgment of firing at an "escaping" pumpboat was highly unjustifiable. The mere fact that their verbal warning or warning shots were not heeded was no justification to spray bullets on those persons on board. Accused-appellants should have known, as they ought to have known, that there were unarmed waitresses on board the pumpboat.

As mentioned earlier, the ultimate question, where the factual version of the prosecution and the defense contradict each other as in this case, is one of credibility of witness. Such issue is best left to the trial court because of its unique opportunity of having observed that elusive and incommunicable evidence of the witness' deportment on the stand while testifying, an opportunity denied to the appellate courts,[27] which usually relies on the cold pages of the silent records. In this case, it was not convincingly shown that the court a quo had overlooked or disregarded significant facts and circumstances which when considered would have affected the outcome of the case[28] or would justify a departure from the assessments and findings of the court below. The foregoing disquisition clearly demonstrates that the trial court's findings of facts are binding on this Court although not necessarily with respect to its conclusion drawn from such facts.

Assuming that accused-appellants first fired warning shots into the air to stop the pumpboat or that those on board suddenly fired at them, neither of these justified accused-appellants to spray the moving pumpboat with live bullets hitting it at least 33 times. There is nothing in the records which shows that accused-appellant were positive that those on board the pumpboat were the alleged thieves. The mere fact that a pumpboat is moving

cannot justify their acts of firing upon the vessel even if they may have presumed that the persons on board were fleeing from the police. The pumpboat was found moving away from the shore because its passengers were bound for the foreign vessel docked kilometers away from the shore.

There is treachery if the attack was so sudden and unexpected that the deceased had no time to prepare for his defense.[29] When Lapot, Gabitan, Villaflor, Cerilles, the two other waitresses and the rest of the group were already in the pumpboat, they were suddenly fired upon by accused-appellants. Placed in that dangerous situation, their only means of escape was to be far from the reach of the bullets. The remaining immediate option was to move the pumpboat as fast as they can towards the sea. Those on board had no time to prepare for any defense or even to seek cover. Under these circumstances, the suddenness and severity of the attack constituted treachery.[30] It could not be reasonably said that the victims should have expected accused-appellant Tan to chase them after the latter left them outside the disco house. Moreover, from the point of view of accused-appellants - one of whom was standing on top of the firetruck while another was at the rear of the truck - they were in a more advantageous position considering that the fire truck was on a higher level than the pumpboat. The pumpboat had no hard covering from which Gabitan's group could hide and protect themselves from the burst of gunfire. Not even the sea would be a good shelter for the bullets can easily penetrate the water.

For evident premeditation to be appreciated, the following elements must be proved as conclusively as the crime itself, i.e., by proof beyond reasonable doubt:[31]

- (1) The time when the accused decided to commit crime;
- (2) An overt act manifestly indicating that he has clung to his determination;
- (3) Sufficient lapse of time between decision and execution to allow the accused to reflect upon the consequences of his act.[32]

The essence of premeditation is that the execution of the act was preceded by cool thought and reflection upon the resolution to carry out the criminal intent during a space of time sufficient to arrive at a calm judgment.[33] To be considered, it is indispensable to show how and when the plan to kill was hatched or how much time had elapsed before it was carried out. Premeditation must be based on external acts which must be notorious, manifest, and evident[34]- not merely suspecting - indicating deliberate planning. In this case, there was no proof, direct or circumstantial, offered by the prosecution to show when accused-appellant Tan and his co-accused meditated and reflected upon their decision to kill the victim and the intervening time that elapsed before his plan was carried out. Between the time when accused-appellant Tan confronted Acorda and the time of the shooting of the pumpboat, there was only one continuing act during which there was no possible time of reflection. There was a lapse of at most only twenty minutes from the time of the confrontation outside the disco house up to the ambush at the pier, a period not enough for cool mind to set in. Evident premeditation cannot be presumed from the external acts alone. Mere suppositions or presumptions, no matter how truthful, cannot produce the effect of aggravating the liability of the accused.[35]

Though no evident premeditation was proven, conspiracy can be clearly inferred from the acts of accused-appellants. There is conspiracy when two or more persons come to an agreement concerning the commission of a felony and the execution of the felony is decided upon.[36] It is not necessary that there be direct proof that the co-conspirators had any prior agreement and decision to commit the crime, it being sufficient that the malefactors shall have acted in concert pursuant to the same objective.[37] Conspiracy arises on the very instant the plotters agree, expressly or impliedly, to commit the felony and forthwith decide to pursue it. So that whenever conspiracy is proven the act of one is the act of all.[38] When the fire truck arrived at the pier and stopped near the lamp post, accused-appellants immediately proceeded to their respective positions at different

locations of the truck with their firearms pointed towards the pumpboat. When their alleged call to stop the pumpboat went unheeded, they just suddenly fired at the persons on the moving pumpboat. Firing simultaneously their high-powered weapons and directing it towards the vessel indicate nothing more but a clear case of concerted action designed to accomplish the same purpose.

Murder is committed when a person kills another and the killing is attended by any modifying circumstance such as evident premeditation and treachery.[39] The circumstance of treachery alleged in the Information qualified the killing of Gabitan to murder.

However, the Informations in the two attempted murder cases failed to allege the essential elements necessary to convict accused-appellants of the said crimes. In particular, there was nothing in the latter two Informations from which it may be concluded that accused-appellants commenced the commission of the felony directly or by overt acts and did not perform all the acts of execution which should have produced the felony by reason of some cause or accident other than their own spontaneous desistance.[40] Without these allegations, the elements necessary to constitute the felony of attempted murder cannot be said to have been properly alleged, and accused-appellants cannot be convicted of a crime with which they were not charged. Otherwise, to convict them of attempted murder, when the same is not the crime charged in the Information, would be to violate their constitutional and statutory right[41] to criminal due process, and in particular, their right to be informed of the nature and cause of the accusation against them.[42] It must be remembered that it is not the designation of the offense in the Information described by the prosecution that governs, rather it is the allegations in the Information that must be considered in determining what crime is charged.[43] All that the Informations alleged was that accused-appellants fired and discharged their M-16 rifles against the moving pumpboat, hitting and wounding the injured complainants, who required medical attention. Clearly, these bare allegations are not enough to sustain a charge for attempted murder. At most, based on the allegations in the Information in Criminal Case Nos. 92-09-477 (1531) and 92-09-478 (1532), accused-appellants can be convicted only of physical injuries -- a lesser felony absorbed in the crime of attempted murder. At any rate, the Rules sanction a conviction for a crime which is necessarily included in the crime charged, so long as the former is proven.[44]

Cerilles and Villaflor suffered superficial wounds, but despite accused-appellants' manifest intent to kill, it cannot bring forth a conviction for attempted murder because of the insufficient allegation in the information to warrant conviction for such crime. The next issue to determine is the character of the physical injuries they sustained. According to the physician who examined the victims, the five wounds sustained by Cerilles on the different parts of her body were non-fatal.[45] Her wounds, barring any complications, may heal in seven to eight days. With respect to Villaflor, the abrasions he sustained may heal in 2 to 3 weeks' time. In fact, Villaflor did not even return to the doctor for further medical attention, first aid treatment being enough.[46] Injuries which require medical attention for a period of at least 10 but not more than 30 days is classified as less serious, falling under Article 265 of the Revised Penal Code.

On the assumption that a doubt exists as to the legal propriety of the allegations in said two Informations - whether it is attempted murder or physical injuries - such doubt should be resolved by convicting the accused only of physical injuries instead of attempted or frustrated murder or homicide,[47] if the evidence warrants such conviction.

No aggravating circumstance can be considered against accused-appellants for the death of Gabitan. Although treachery is also a generic aggravating circumstance, it can no longer be considered again since it already qualified the killing to murder. The Information in Criminal Case No. 92-09-477, which involved the wounding of Cerilles, contained no allegation of treachery. It cannot therefore be considered even if it was proven during trial. On the other hand, the proof of treachery and its allegation in the Information in Criminal Case No. 92-09-478

may be appreciated against accused-appellants. As for the aggravating circumstance of evident premeditation, though it was alleged in the Information, the prosecution failed to establish it with the required quantum of proof as discussed above; hence the same cannot be appreciated.

At the time of the commission of the crime in 1991, the penalty imposed for murder was reclusion temporal maximum to death. The higher penalty of reclusion perpetua to death, prescribed by R.A. 7659 which took effect after the commission of the crime in this case, cannot be given retroactive effect because it is unfavorable to accused-appellants.[48] Under Article 64 of the Revised Penal Code, when the penalty prescribed is composed of three periods and there is neither mitigating nor aggravating circumstance, the penalty shall be imposed in its medium period,[49] which is reclusion perpetua.[50] No indeterminate sentence can be imposed on accused-appellants because of the proscription of its applicability in cases where the penalty imposed is reclusion perpetua.[51]

As for the other two cases, the crimes committed are less serious physical injuries and slight physical injury. The penalties for these are prescribed in Article 265 and 266 of the Revised Penal Code, the relevant portions of which read:

Art. 265. Less serious physical injuries. -- Any person who shall inflict upon another physical injuries not described in the preceding articles, but which shall incapacitate the offended party for labor for ten days or more, or shall require medical assistance for the same period, shall be guilty of less serious physical injuries and shall suffer the penalty of arresto mayor.

Whenever less serious physical injuries shall have been inflicted with the manifest intent to kill or offend the injured person, or under circumstances adding ignominy to the offense in addition to the penalty of arresto mayor, a fine not exceeding 500 pesos shall be imposed.

Art. 266. Slight physical injuries and maltreatment. -- The crime of slight physical injuries shall be punished:

1. By arresto menor when the offender has inflicted physical injuries which shall incapacitate the offended party for labor from one to nine days, or shall require medical attendance during the same period. (emphasis supplied).

The injuries sustained by Villaflor will heal in 2 to 3 weeks. However, considering that the intent to kill was manifest because of the sporadic burst of high-powered firearms, the crime of less serious physical injury is qualified, in which case the imposition of the additional penalty of fine as provided in the second paragraph of Article 265 is warranted.

On the other hand, the crime of slight physical injuries, committed against Cerilles, is penalized by arresto menor.

The Indeterminate Sentence Law likewise does not apply in these two cases since said law excludes from its coverage cases where the penalty imposed does not exceed one year.[52]

The trial court held accused-appellants solidarily liable to the heirs of Gabitan for P200,000.00, and another P20,000.00 each to Juvith Cerilles and Edward Villaflor as indemnity. In murder, the civil indemnity has been fixed by jurisprudence at P50,000.00.[53] The grant of civil indemnity in murder requires no proof other than the fact of death as a result of the crime and proof of appellants' responsibility therefor.[54] On the other hand, the separate award of moral damages is justified because of the physical suffering and mental anguish brought about by the felonious acts, and is thus recoverable in criminal offenses resulting in physical injuries or death.[55] The amount of moral damages is also fixed at P50,000.00 for murder.[56] For the less serious physical injuries, moral damages of P10,000.00 shall be sufficient. Exemplary damages can be granted only in cases where there is an aggravating circumstance.[57]

WHEREFORE, the decision of the trial court is **AFFIRMED** subject to the following **MODIFICATIONS**:

- (1) Accused-appellants are found guilty of **MURDER** in Criminal Case No. 92-09-343 and each is sentenced to suffer the penalty of reclusion perpetua.
- (2) Accused-appellants are found guilty of **LESS SERIOUS PHYSICAL INJURIES** in Criminal Case No. 92-09-478 and each is sentenced to suffer imprisonment of six (6) months of arresto mayor maximum, **AND** pay a fine of P500.00 each.
- (3) Accused-appellants are found guilty of **SLIGHT PHYSICAL INJURIES** in Criminal Case No. 92-09-477 and each is sentenced to suffer imprisonment of thirty (30) days of arresto menor.
- (4) All penalties shall be served successively.
- (5) Accused-appellants are ordered to solidarily pay:
 - a. To the heirs of Gabitan, the reduced amount of P50,000.00 as civil indemnity and P50,000.00 as moral damages;
 - b. To Villaflor, moral damages of P10,000.00 in addition to the civil indemnity of P20,000.00 awarded by the trial court; and
 - c. To Ceriles, moral damages of P10,000.00 in addition to the civil indemnity of P20,000.00 awarded by the trial court; and
 - d. Exemplary damages in the amount of P10,000.00 each to Villaflor and Cerilles.

No subsidiary imprisonment shall be imposed in case of insolvency.

(6) Costs de oficio.

SO ORDERED.

Davide, Jr., C.J. (Chairman), Puno, Kapunan, and Pardo, JJ., concur.

[1] Sometimes spelled "Judith Ceriles" in some parts of the records.

[2] TSN, September 22, 1992, p. 16.

[3] Supreme Court Resolution dated June 4, 1992 in Adm. Matter No. 92-4-150-0 - Re: Request for Transfer of Venue of Criminal Cases Nos. 1530, 1531 and 1532, RTC Records, p. 154.

[4] RTC Records, p. 126.

[5] Ibid., p. 128.

[6] Ibid., p. 130.

[7] RTC, Branch 6, Tacloban City; Decision dated March 7, 1994, penned by Judge Getulio M. Francisco.

[8] TSN, September 21, 1992, pp. 13-15.

[9] TSN, September 23, 1992, p. 9.

[10] TSN, January 28, 1993, pp. 22-25.

[11] TSN, Dr. Mila Lisa Matigca, November 17, 1992, pp. 6, 9, 13.

[12] Ibid., p. 10.

[13] TSN, Dr. Nida Barja Cabtic, November 16, 1992, pp. 9-10.

[14] Revised Penal Code, as amended, Article 11. The following do not incur any criminal liability:

x x x x x x x x

5. Any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office.

[15] Frias, Jr. v. People, 215 Phil. 1 (1984). See also People v. Oanis, 74 Phil. 257 (1943).

[16] TSN, September 24, 1992, p. 11.

[17] TSN, January 28, 1993, p. 30; TSN, September 24, 1994, pp. 2, 12.

[18] TSN, September 22, 1992, p. 16.

[19] See Rules of Court, Rule 113, Sec. 8. Method of arrest by officer without warrant. -- When making an arrest without a warrant, the officer shall inform the person to be arrested of his authority and the cause of the arrest, unless the person to be arrested is then engaged in the commission of an offense or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer has opportunity so to inform him, or when the giving of such information will imperil the arrest.

Sec. 9. Method of arrest by private person. — A private person when making an arrest shall inform the person to be arrested of the intention to arrest him and cause of the arrest, unless the person to be arrested is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the person making the arrest has opportunity so to inform him, or when the giving of such information will imperil the arrest.

[20] Rules of Court, Rule 131, Section 3.

[21] TSN, September 22, 1992, p. 18.

[22] 2000 Rules on Criminal Procedure, Rule 119, SEC. 11 (formerly Section 3, Rule 119 of the 1989 Rules). Order of trial. - The trial shall proceed in the following order:

(e) When the accused admits the act or omission charged in the complaint or information but interposes a lawful defense, the order of trial may be modified.

[23] TSN, September 22, 1992, p. 5.

[24] People v. Tan, 73 SCRA 288 (1976).

[25] People v. Vasquez, 280 SCRA 160 (1997).

[26] People v. Uycoque, 246 SCRA 769 (1995).

[27] People v. Mahinay, 302 SCRA 455 (1999) citing People v. Tan, Jr., 264 SCRA 425 (1996). See also People v. Navarro, G.R. No. 132696, February 12, 2001.

[28] People v. Dio, 44 SCAD 559; People v. Matrimonio, 215 SCRA 613 (1992).

[29] People v. Perez, G.R. No. 134756, February 13, 2001.

[30] People v. Base, G.R. No. 109773, March 30, 2000.

[31] *People v. Derilo*, 338 Phil. 350 (1997); *People v. De Guia*, 177 SCRA 112 (1989).

[32] *People v. Jose*, G.R. No. 130666, January 31, 2000 cited in *People v. Herida*, G.R. No. 127158, March 5, 2001.

[33] *People v. Ariola*, 100 SCRA 523 (1980).

[34] *People v. Narit*, 197 SCRA 334 (1991).

[35] *U.S. v. Perdon*, 4 Phil. 141 (1904).

[36] See Article 8, Revised Penal Code.

[37] *People v. Sazon*, 189 SCRA 713 (1990).

[38] *People v. Ordoño*, G.R. No. 132154, June 29, 2000.

[39] Revised Penal Code, Article 248. Murder. -- Any person who, not falling within the provisions of Article 246 shall kill another, shall be guilty of murder and shall be punished by reclusion temporal in its maximum period to death, if committed with any of the following attendant circumstances:

1. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity.

x x x x x x x x (Prior to the effectivity of the Death Penalty Law).

[40] Revised Penal Code, Article 6. Consummated, frustrated, and attempted felonies. — Consummated felonies as well as those which are frustrated and attempted, are punishable.

A felony is consummated when all the elements necessary for its execution and accomplishment are present; and it is frustrated when the offender performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator.

There is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than this own spontaneous desistance. (emphasis supplied)

[41] Constitution, Article III, Sec. 14 (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall x x x enjoy the right x x x to be informed of the nature and cause of the accusation against him x x x;

2000 Rules on Criminal Procedure, RULE 115, SECTION 1. Rights of accused at trial. - In all criminal prosecutions, the accused shall be entitled to the following rights:

x x x (b) To be informed of the nature and cause of the accusation against him.

[42] *People v. Valdesancho*, G.R. Nos. 137051-52, May 30, 2001 citing *People v. Cruz*, 259 SCRA 109 (1996). See also *People v. Tresballes*, G.R. No. 126118, September 21, 1999.

[43] What controls is description not designation of the crime. - *People v. Reanzares*, G.R. No. 130656, June 29, 2000 citing *Socrates v. Sandiganbayan*, 253 SCRA 773 (1996); *People v. Maravilla*, 165 SCRA 392 (1988).

[44] 2000 Rules on Criminal Procedure, Rule 120, Sec. 4. Judgment in case of variance between allegation and

proof. - When there is variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved; See also *People v. Pambid*, G.R. No. 124453, March 15, 2000 citing *People v. Manalili*, 294 SCRA 220 (1998).

[45] TSN, November 17, 1992, pp. 7-8.

[46] [46] TSN, November 16, 1992, pp. 9-10.

[47] *People v. Francisco*, G.R. No. 130490, June 19, 2000.

[48] *People v. Langres*, 316 SCRA 769 (1999).

[49] Art. 64. Rules for the application of penalties which contain three periods. — In cases in which the penalties prescribed by law contain three periods, whether it be a single divisible penalty or composed of three different penalties, each one of which forms a period in accordance with the provisions of Articles 76 and 77, the court shall observe for the application of the penalty the following rules, according to whether there are or are not mitigating or aggravating circumstances:

1. When there are neither aggravating nor mitigating circumstances, they shall impose the penalty prescribed by law in its medium period. (emphasis supplied).

[50] *People v. Gailo*, 316 SCRA 733 (1999).

[51] *People v. Lampaza*, 319 SCRA 112 (1999). The Indeterminate Sentence Law (ISL) provides that it is not applicable where the penalty imposed is "life imprisonment", which is construed to cover "reclusion perpetua" for purpose of said law. See also *People v. Fabro*, 239 SCRA 146 (1994) where the Court did not apply the Indeterminate Sentence Law because the penalty imposed is reclusion perpetua.

[52] *Sps. Bacar v. Judge de Guzman, Jr.*, 338 Phil. 41 (1997).

[53] *Calim v. Court of Appeals*, G.R. No. 140065, February 13, 2001.

[54] *People v. De Leon*, G.R. No. 129057, January 22, 2001.

[55] *People v. Monte*, G.R. No. 125332, March 2, 2000; *People v. Ereño*, February 22, 2000 cited in *People v. Molina*, G.R. Nos. 134777-78, July 24, 2000; *People v. Bantillo*, G.R. No. 117949, October 23, 2000.

[56] *People v. Dela Cruz*, G.R. No. 128362, January 16, 2001.

[57] *People v. Bergante*, 286 SCRA 629 (1998); *People v. Reyes*, 287 SCRA 229 (1998).

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