

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MICHAEL TADEO, ACCUSED-APPELLANT.*G.R. Nos. 127660 & 144011-12. September 17, 2002*

Ponente: BELLOSILLO, J.

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To pump mercilessly more bullets into the head of an adversary than necessary to kill him is wretchedness; to snuff off the life of his victim only because the latter called him "barako" is sheer inanity.

On 4 November 1993, around 11:30 in the morning, accused-appellant Michael Tadeo was drinking with the deceased Mayolito Cabatu and several others in a party hosted by Nicomedes Cabacungan in Sto. Domingo, Quirino, Isabela, to celebrate the successful installation of a water pump that would supply potable water to their barangay. Around 4:00 o'clock in the afternoon, after five (5) hours of imbibing alcohol, Mayolito was so dead drunk that he excused himself and proceeded to the pavement adjacent to Nicomedes Cabacungan's house where he sat wobbly on the gutter. Ricky Cardona, one of the carousers, and Florencia Cabatu, Mayolito's mother, approached Mayolito and assisted him in going home. But, before they could leave, Mayolito shouted "barako," apparently to tease accused-appellant and titillate him into a "fight" who, true enough, took offense against the mocking remark.[1]

Drunk and wobbly too, accused-appellant Michael Tadeo instantaneously grabbed a beer bottle and tried to whack Mayolito with it on the head. But Ricky Cardona and Florencia Cabatu quickly intervened to prevent accused-appellant from inflicting harm upon Mayolito. Accused-appellant briskly went home exclaiming, "Aguray kadta a!" which means "Wait, I will come back!" Then he hastily returned clutching a .38 cal. revolver and confronted Mayolito, Ricky and Florencia why they were intervening.[2] Mayolito vainly tried to grapple with accused-appellant who lost no time in shooting Mayolito six (6) times, some bullets piercing his head. Accused-appellant then trained his gun on Florencia, but unfortunately, the pistol did not fire as it was already empty. So he approached her instead and whipped her on the face with the butt of his revolver.

Rogelio Cabatu, who had just arrived from his farm, scurried to rescue his brother Mayolito and mother Florencia, and with a bolo on hand, hacked accused-appellant on the head. With blood oozing from his head, accused-appellant retreated towards his house to reload his gun, and upon his return, immediately shot Florencia on her left buttock, while Rogelio sought cover in the house of Nicomedes Cabacungan. As Florencia limped to the detachment of the barangay civilian security force, accused-appellant darted away from the crime scene.

At around 5:00 o'clock in the afternoon, the barangay kapitan of Sto. Domingo, Quirino, Isabela, reported the crime to the police precinct. SPO3 Victoriano Ramos and other policemen responded and went to the house of Mayolito Cabatu where his body was brought after being fatally shot. From Mayolito's house the policemen left "to look for the suspect," and proceeded to the house of the barangay kapitan of Sto. Domingo[3] where they met accused-appellant's father who assured them that Michael would surrender. In good faith he led them to his house where accused-appellant had gone after the shooting episodes.[4] The father yielded a gun to the policemen which

he said was the weapon used in the crime, while accused-appellant turned himself in.[5]

Accused-appellant Michael Tadeo was accordingly charged with murder for the fatal shooting of Mayolito Cabatu (Crim. Case No. 23-498), frustrated murder for the injury sustained by Florencia Cabatu (Crim. Case No. 23-494), and violation of par. 2, Sec. 1, PD 1866, or qualified illegal possession of firearm, i.e., use of an unlicensed firearm in committing murder or homicide (Crim. Case No. 23-499). Accused-appellant pleaded not guilty to the charges and offered self-defense as his version of the incident. He claimed that Mayolito dared him into a fist-fight by uttering, "Hoy, barako, let us fight!" which he bravely accepted. As they fought, Mayolito suddenly pulled out a gun which accidentally went off when accused-appellant tried to wrest it from him. After accused-appellant successfully took possession of the gun, he fired several shots more, injuring Mayolito in different parts of his body. Accused-appellant however failed to explain how Florencia Cabatu sustained the gunshot wound in her left buttock as well as the surrender of the gun by his father inside their house.

After trial, the court a quo found the version of the defense to be incredible and convicted accused-appellant of the crimes charged and sentenced him to reclusion perpetua for murder; an indeterminate prison term of ten (10) years and one (1) day of prision mayor as minimum, to fourteen (14) years, ten (10) months and twenty (20) days of reclusion temporal as maximum, for frustrated murder; reclusion perpetua for qualified illegal possession of firearms; and, damages of P50,000.00 for the death of Mayolito Cabatu and P15,000.00 for the medical expenses of Florencia Cabatu.[6]

In this appeal, accused-appellant does not challenge the finding of the trial court that he killed Mayolito Cabatu and injured his mother Florencia Cabatu, nor that he was the possessor of the .38 cal. revolver, but questions the appreciation of the qualifying circumstances of treachery and evident premeditation, and claims that he should instead be held guilty of homicide and frustrated homicide only. Further, he insists that the trial court erroneously disregarded the mitigating circumstance of voluntary surrender in imposing the proper penalties, including the absence of any evidence indicating that the gun he used was unlicensed.

On the other hand, the Solicitor General seeks the affirmance of the conviction for murder and frustrated murder of accused-appellant but agrees with him that his verdict in the qualified illegal possession of firearm is incorrect hence must be reversed and set aside.

The appeal is partly meritorious. Verily, the established facts of these cases disprove the circumstances of treachery and evident premeditation to qualify the crimes charged in Crim. Case No. 23-498 and Crim. Case No. 23-494 as murder and frustrated murder, respectively.

In Crim. Case No. 23-498 and Crim. Case No. 23-494 accused-appellant Michael Tadeo and the deceased Mayolito Cabatu were both drunk and the fight was preceded by rising tempers. Invariably, accused-appellant was not in full possession of his faculties which would have been necessary for him to kill Mayolito Cabatu, or try to kill Florencia Cabatu with the attendant evident premeditation, i.e., the execution of the criminal act must come with sober thought and reflection upon the resolution to carry out the criminal intent during the space of time sufficient to arrive at a calm judgment.[7] In turn, because of accused-appellant's mental and moral stupor at the time of the perpetration of the criminal acts, the prosecution could not have proved the requisites of this qualifying circumstance: (a) the time when the offender determined to commit the crime; (b) an act manifestly indicating that the culprit has clung to his determination; and, (c) a sufficient lapse of time between the determination and the execution to allow him to reflect upon the consequences of his act and for his conscience to overcome his will.

In the same vein, having been inebriated and overtaken by anger immediately prior to the assault, accused-appellant cannot be accused of treachery. Under this state, he did not have the time nor the proper

disposition to reflect on the means or mode of attack for it to be said that he deliberately and consciously pulled out his gun and fired at the deceased to insure the commission of the crime without risk to himself.[8] Furthermore, the heated exchanges between him and the deceased prior to the attack must have placed the latter on his guard, hence, we cannot rule that Mayolito Cabatu was caught completely by surprise when accused-appellant took up arms against him.

For there to be treachery by reason of the suddenness and unexpectedness of the attack, there must have been no warning of any sort to the deceased or offended party.[9] Verily, the statement of accused-appellant to Mayolito Cabatu, viz, "Aguray kadta a!" meaning "Wait, I will come back!" which the deceased took seriously, as he did confront Michael Tadeo when he returned, shows convincingly that the victim was not unprepared nor stunned to see accused-appellant wielding a gun and firing at him. The element of a sudden unprovoked attack indicative of treachery was therefore missing.[10]

Similarly, we reverse the finding of the trial court that the attack against Florencia Cabatu was sudden and unforeseen. It bears stressing that the crime against her happened when accused-appellant was highly intoxicated and seething with anger against his perceived tormentor, and immediately after he had gunned down Mayolito Cabatu, after the same gun was aimed at her but did not fire for being empty, and after accused-appellant returned to his house to reload his gun. Evidently, these contemporaneous and preceding events must have already placed the victim on heightened alert and sufficient forewarning that a reprisal was in the offing. This crime which has been erroneously labeled as "frustrated murder" lacks the twin elements of *aleviosa*: (a) that at the time of the attack, the victim was not in a position to defend himself; and, (b) that the offender consciously adopted the particular means, method or form of attack employed by him.

Furthermore, accused-appellant should only be convicted for attempted murder, not frustrated murder, in *Crim. Case No. 23-494*, committed against Florencia Cabatu. She was hit in the left buttock which, concluding from the testimony of her attending physician, was not per se a mortal wound. This finding is fairly evident from Dr. Francisco Ricafort's testimony that Florencia Cabatu was "walking normally" when brought to the hospital for medical examination and treatment after a full five (5)-hour period from the time she was shot by accused-appellant.[11] This conclusion is corroborated by the medical certificate, Exh. "A," which verified that "under normal condition, without subsequent complication and/or deeper involvement present but not clinically apparent at the time of examination, the above-described physical injuries will require medical or will incapacitate the victim for a period of not less than nine (9) days but not more than thirty (30) days from the alleged date of infliction." [12] Clearly, where the wound inflicted on the victim is not as severe as to cause her death, the offender not having performed all the acts of execution that would have brought it about, the crime is perpetrated only in its attempted stage.[13]

The assumption proposed by the prosecution that infection of the wound in the absence of timely medical attendance could have caused her death is too speculative and very remote to be even considered as the probable result of the criminal act proved against accused-appellant. As shown above, the actual nature of the wound on the left buttock of Florencia Cabatu indicated that it was not fatal nor that it was infected with tetanus at the time it was inflicted.[14] If in the realm of possibility tetanus could at all infect Florencia Cabatu's wound and make it mortal or fatal, the disease would only constitute an efficient intervening cause, therefore, distinct and foreign to the crime. Hence, we cannot conclude that all the acts of execution had been performed by accused-appellant to kill the hapless woman, for to classify the crime in the frustrated stage, the rule is that the probable death of the victim must be the direct, natural and logical consequence of the wounds inflicted upon him by the accused and, since we are dealing with a criminal conviction, that there be proof thereof beyond reasonable doubt.[15] Moreover, as has been established in the court *a quo*, accused-appellant failed to complete all the acts of execution

because Florencia Cabatu was able to evade him and hobble to the vicinity of the detachment of the barangay civilian security force.

The trial court also erred in not crediting accused-appellant with the mitigating circumstance of voluntary surrender. As can be gleaned from the testimony of SPO3 Victoriano Ramos who was one of the arresting police officers, at 5:00 o'clock in the afternoon of the same day of the shooting of Mayolito Cabatu and her mother Florencia Cabatu, the policemen converged at the house of the barangay kapitan where they met accused-appellant's father who assured them that his son would surrender and in good faith led them to his house where accused-appellant had gone after the shooting episodes. There the father yielded to the policemen a gun which he said was the weapon used in the criminal acts while accused-appellant on the same occasion and without hesitation turned himself in.

Clearly, the act of accused-appellant in surrendering to the authorities showed his intent to submit himself unconditionally to them and save them the trouble and expense that would have to be incurred in his capture. For this reason he complied with the requisites of voluntary surrender as a mitigating circumstance, namely: (a) the offender was not actually arrested; (b) he surrendered to a person in authority or to an agent of a person in authority; and, (c) his surrender was voluntary.[16] The spontaneity of his surrender cannot also be denied because even the weapon used in the crimes was yielded by his father to the policemen in his presence without objecting to its surrender nor denying his participation in the deadly clashes.

Finally, we must reverse and set aside the conviction of the accused in Crim. Case No. 23-499 where he was charged with illegal possession of a firearm used in perpetrating the homicide and attempted homicide, i.e., violation of par. 2, Sec. 1, PD 1866, as a result of the decriminalization of violations of PD 1866 by RA 8294 where the unlicensed firearm is used in carrying out the commission of other crimes -

Sec. 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 prison correccional in its maximum period and a fine of not less than Fifteen Thousand pesos (P15,000) shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose, or possess any low powered firearm, such as rimfire handgun, .380 or .32 and other firearm of similar firepower, part of firearm, ammunition, or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition. Provided, that no other crime was committed x x x If homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance.

The foregoing amendments obviously blur the distinctions between murder and homicide on one hand, and qualified illegal possession of firearms used in murder or homicide on the other. We have declared that the formulation in RA 8294, i.e., "[i]f homicide or murder is committed with the use of an unlicensed firearm, such use of an unlicensed firearm shall be considered as an aggravating circumstance," signifies a legislative intent to treat as a single offense the illegal possession of firearms and the commission of murder or homicide with the use of an unlicensed firearm.[17] Thus where an accused used an unlicensed firearm in committing homicide or murder, he may no longer be charged with what used to be the two (2) separate offenses of homicide or murder under The Revised Penal Code and qualified illegal possession of firearms used in homicide or murder under PD 1866; in other words, where murder or homicide was committed, the penalty for illegal possession of firearms is no longer imposable since it becomes merely a special aggravating circumstance.[18]

The use of an unlicensed firearm cannot be considered however as a special aggravating circumstance in Crim. Case No. 23-498 and Crim. Case No. 23-494. For one, it was not alleged as an aggravating circumstance in the Informations for murder and frustrated murder which is necessary under our present Revised Rules of Criminal

Procedure.[19] Moreover, even if alleged, the circumstance cannot be retroactively applied to prejudice accused-appellant; it must be stressed that RA 8294 took effect only on 6 July 1994 while the crimes involved herein were committed on 4 November 1993.[20] In any event, as correctly observed by the Solicitor General, there is no evidence proving the illicit character of the .38 cal. revolver used by appellant in killing Mayolito Cabatu and in trying to kill Florencia Cabatu, as to which requisite of the crime the record is eerily silent.

WHEREFORE, the assailed Joint Decision of the RTC-Br. 23 of Roxas, Isabela, sentencing accused-appellant Michael Tadeo to reclusion perpetua for murder in Crim. Case No. 23-498, and to ten (10) years and one (1) day of prision mayor as minimum, to fourteen (14) years, ten (10) months and twenty (20) days of reclusion temporal as maximum, for frustrated murder in Crim. Case No. 23-494, is MODIFIED.

Accordingly, in Crim. Case No. 23-498, we find accused-appellant guilty of HOMICIDE and, considering the mitigating circumstance of voluntary surrender, sentence him to an indeterminate prison term of six (6) years, three (3) months and one (1) day of prision mayor minimum as minimum, to twelve (12) years, two (2) months and one (1) day of reclusion temporal minimum, as maximum.

In Crim. Case No. 23-494 we find accused-appellant guilty of ATTEMPTED HOMICIDE and, considering the mitigating circumstance of voluntary surrender, sentence him to an indeterminate prison term of three (3) months and twenty (20) days of arresto mayor medium as minimum, to one (1) year, four (4) months and fifteen (15) days of prision correccional minimum as maximum.

The monetary awards in the Joint Decision, i.e., indemnification in favor of the heirs of Mayolito Cabatu in the amount of P50,000.00 in Crim. Case No. 23-498, and actual damages of P15,000.00 to Florencia Cabatu in Crim. Case No. 23-494, are AFFIRMED.

The conviction of accused-appellant Michael Tadeo in Crim. Case No. 23-499 for illegal possession of firearm used in the commission of murder and frustrated murder, i.e., violation of par. 2, Sec. 1, PD 1866, and sentencing him to reclusion perpetua is REVERSED and SET ASIDE, and the accused is ACQUITTED. No costs.

SO ORDERED.

Davide, Jr., C.J., Puno, Vitug, Mendoza, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Morales, and Callejo, Sr., JJ., concur.

[1] TSN, 14 March 1995, p. 7.

[2] Record, p. 6.

[3] TSN, 3 November 1994, p. 5.

[4] Id., p. 7.

[5] Id., p. 8.

[6] Decision penned by Judge Wilfredo Tumaliuan, RTC-Br. 23, Roxas, Isabela.

[7] People v. Escabarte, No. L-42964, 14 March 1988, 158 SCRA 602, 612; see People v. Padrones, G.R. No. 85823, 13 September 1990, 189 SCRA 496, 511; People v. Anin, No. L-39046, 30 June 1975, 64SCRA 729, 734.

[8] People v. Briones, G.R. No. 128127, 23 October 2000, 344 SCRA 149.

[9] People v. Ruiz, No. L-33609, 14 December 1981, 110 SCRA 155.

[10] People v. Gonzales, 76 Phil. 473, 479; People v. Gupo, G.R. No. 75814, 24 September 1990, 190 SCRA 7, 19; People v. Rillorta, G.R. No. 57415, 15 December 1989, 180 SCRA 102, 107; People v. Macalino, G.R. No. 79387, 31 August 1989, 177 SCRA 185, 194.

[11]] TSN, 24 August 1995, p. 6.

[12] Record, p. 9.

[13] People v. Albacin, G.R. No. 133918, 13 September 2000, 340 SCRA 98; People v. Sumalpong, G.R. No. 124705, 20 January 1998, 284 SCRA 464; People v. Pagal, G.R. Nos. 112620-21, 14 May 1997, 272 SCRA 443; People v. Acusar, 82 Phil. 490 (1948).

[14] See People v. Almazan, G.R. Nos. 138943-44, 17 September 2001.

[15] Urbano v. Intermediate Appellate Court, G.R. No. 2964, 7 January 1988, 157 SCRA 1.

[16] People v. Guzman, G.R. No. 132750, 14 December 2001; People v. Mazo, G.R. No. 136869, 17 October 2001; People v. Librando, G.R. No. 132251, 6 July 2000, 335 SCRA 232.

[17] See People v. Orbiso, G.R. No. 102706, 25 January 2000, 323 SCRA 245.

[18] People v. Garcia, G.R. Nos. 133489 & 143970, 15 January 2002.

[19] People v. Candido, G.R. Nos. 134072-73, 10 June 2002.

[20] People v. Avecilla, G.R. No. 117033, 15 February 2001.

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