

SECOND DIVISION

[G.R. No. 124058, December 10, 2003]

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JESUS G.
RETUBADO ALIAS "JESSIE," APPELLANT.**

D E C I S I O N

CALLEJO, SR., J.:

This is an appeal from the Decision^[1] of the Regional Trial Court, Toledo City, Branch 29, in Criminal Case No. TCS-2153 convicting the appellant Jesus G. Retubado of murder, sentencing him to *reclusion perpetua*, and directing him to indemnify the heirs of the victim Emmanuel Cañon the sum of P50,000.00.

The appellant was indicted for murder in an Information, the accusatory portion of which reads:

That on the 5th day of November, 1993 at 9:30 o'clock in the evening, more or less, at Barangay I Poblacion, Municipality of Tuburan, Province of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with deliberate intent to kill, by means of treachery, evident premeditation and taking advantage of superior strength, did then and there willfully, unlawfully and feloniously attack, assault and shoot Emmanuel Cañon with the use of unlicensed revolver of unknown caliber, thereby hitting the latter on his forehead, resulting to the instantaneous death of the said victim.

CONTRARY TO LAW.^[2]

Shortly before November 5, 1993, someone played a joke on Edwin Retubado, the appellant's younger brother who was mentally ill. Someone inserted a lighted firecracker in a cigarette pack and gave it to Edwin. He brought the cigarette home and placed it on the dining table as he was having dinner with his father. Momentarily, the firecracker exploded. The suspect was Emmanuel Cañon, Jr., The Cañons and the appellant were neighbors. The matter was brought to the attention of the barangay captain who conducted an investigation. It turned out that Emmanuel Cañon, Jr. was not the culprit. The barangay captain considered the matter closed. The appellant, however, was bent on confronting Emmanuel Cañon, Jr.

On November 5, 1993, at about 9:00 p.m., 50-year-old Emmanuel Cañon, Sr., a pedicab driver called it a day and decided to go home after a day's work. He drove his pedicab and stopped at the junction of Rizal and Gallardo Streets, at the poblacion of Tuburan. The appellant, who was conversing with Marcial Lucifño saw him. "Noy, why is [it] your son did something to my brother?" Emmanuel ignored the appellant. The appellant was incensed and ran after Emmanuel. He overtook

Emmanuel, grabbed and pushed the pedicab which nearly fell into a canal. Emmanuel again ignored the appellant and pedaled on until he reached his house. His wife, Norberta Cañon was in the balcony of their house, above the porch waiting for him to arrive. Emmanuel, Jr., meanwhile, was already asleep. Undeterred, the appellant continued following Emmanuel.

Shortly after Emmanuel had entered his house, the appellant arrived and tarried at the porch. Emmanuel suddenly opened the door and demanded to know why he was being followed. The appellant told Emmanuel that he just wanted to talk to Emmanuel, Jr., but Emmanuel told the appellant that his son was already asleep. Norberta went down from the balcony and placed her hand on her husband's shoulder to pacify him.

The appellant forthwith pulled out a handgun from under his T-shirt and shot Emmanuel on the forehead. The latter fell to the floor as the appellant walked away from the scene. Norberta shouted for help. The neighbors, her daughter, and her son-in-law arrived. They brought Emmanuel to the Tuburan District Hospital, but the victim died shortly thereafter. Dr. Ivar G. Arellano, the Municipal Health Officer, performed an autopsy on the cadaver of Emmanuel and prepared a report thereon with the following findings:

Examination in Detail:

On detailed examination, a gunshot wound was found at the left side of the forehead, measuring 1 cm. in diameter. At the skin surrounding this wound was found powder burns which measured 3 cms. in diameter as the skin had been blackened and burned by powder of the bullet. The underlying frontal bone was fractured and depressed. The underlying meninges of the brain as well as the frontal area of the brain was traumatized and injured. Blood and cerebrospinal fluid were leaking from this wound. The edges of this bullet wound was inverted thus this was the gunshot entry wound. The wound was found to be circular in shape. The exit wound was found at the left parietal bone measuring 1.2 cm. in size or diameter for this wound communicated with the entry wound of the left side of the forehead. The connection from the wound of entry to the exit wound measured 8 cms. The parietal bone was fractured and was depressed and the parietal part of the brain and meninges was traumatized. Blood and cerebrospinal fluid as well as brain tissues leaked out from this wound.

Possible cause of death:

1. Gunshot wound at the head (left side) with injury to brain and meninges
2. Hypovolemic shock secondary to loss of blood (Severe loss of blood)

(Sgd.) Ivar G.
Arellano
MUN. Health
Officer^[3]

Dr. Charity Patalinghug and the victim's daughter Loreta C. Claro signed Emmanuel's Certificate of Death. [4] The appellant surrendered to the police authorities but failed to surrender the firearm he used to kill the victim. Forensic Officer Myrna P. Areola of the PNP Regional Office subjected the appellant to paraffin tests. The Chemical Analysis of the paraffin casts gave the following results:

FINDINGS:

...

1. POSITIVE for the presence of gunpowder residue on his left hand cast.
2. NEGATIVE for the presence of gunpowder residue on his right hand cast. [5]

Norberta also testified on the expenses incurred by her family due to her husband's death. No documentary evidence was, however, offered to support the same. She declared that she felt sad and lonely as a result of her husband's death.

The Case for the Appellant

The appellant admitted shooting the victim but claimed that he was merely performing a lawful act with due care; hence, cannot be held criminally liable for the victim's death. He testified that when he insisted that Emmanuel wake up his son, Emmanuel went to his room and emerged therefrom holding a handgun with his right hand. Emmanuel's trigger finger was outside the trigger guard, and he held the firearm with the muzzle facing downward. Fearing that he would be shot, the appellant took hold of Emmanuel's right hand with his left, and pulled the gun towards Emmanuel's stomach. The appellant grabbed Emmanuel's free hand with his right hand, and the old man almost fell on his knees to the ground. Emmanuel still resisted. The appellant pulled the gun to the level of Emmanuel's forehead, and the gun suddenly went off. The bullet hit Emmanuel's forehead. Norberta fled from the house. For his part, the appellant rushed to his house to change clothes. He placed the gun on the dining table before entering his bedroom. When he went back to the dining room to get the gun, his younger sister, Enrica told him that their brother Edwin had taken the gun. He found Edwin outside their house near the church, and the latter told the appellant that he threw the gun into the sea. When the appellant asked his brother to show him where he threw the gun, Edwin refused to do so.

Marcial Lucifño corroborated the appellant's testimony. He testified that he was talking with the appellant at around 9:00 p.m. at the junction of Rizal and Gallardo streets when the victim Emmanuel passed by in his pedicab. When the appellant called the victim, the latter ignored the call, prompting the appellant to chase the victim, and eventually push the pedicab into a canal.

The appellant's father, Iñigo Retubado, testified that on the evening of November 5, 1993, he was in their house with Edwin, his son who was mentally-ill. It was already late when the appellant arrived. The appellant was disheveled, and laid down the gun he was carrying on the table. The appellant told his father that he

would surrender to the police because he had shot somebody.^[6] The appellant thereafter went to his room to change clothes while Iñigo went to the comfort room to answer the call of nature. When he was done, he saw the appellant frantically looking for the gun. As Edwin was also nowhere to be found, Iñigo concluded that Edwin might have taken the gun with him. He also testified on Edwin's mental imbalance and on the latter's confinement at the Psychiatric Department of the Don Vicente Sotto Memorial Medical Center in Cebu City sometime in 1991.^[7]

On November 6, 1993, the appellant surrendered to the police authorities. Although he was required by the municipal trial court to file his counter-affidavit, the appellant refused to do so.

After due proceedings, the trial court rendered judgment in Criminal Case No. TCS-2153, convicting the appellant of murder, and sentencing him to *reclusion perpetua*. The decretal portion of the decision reads:

WHEREFORE, in view of the foregoing, this Court finds accused GUILTY beyond reasonable doubt of the crime of Murder under Art. 248 R.P.C. and sentences the accused to the penalty of Reclusion Perpetua and to indemnify the heirs of the deceased the sum of P50,000.00.

However, accused is given full credit of his preventive imprisonment.

SO ORDERED.^[8]

On appeal, the appellant assails the decision of the trial court contending that:

I

First Assignment of Error

THE LOWER COURT ERRED IN NOT FINDING THE DEATH OF THE DECEASED AS CAUSED BY MERE ACCIDENT WITHOUT FAULT OR INTENTION OF CAUSING IT WHILE THE ACCUSED WAS PERFORMING A LAWFUL ACT WITH DUE CARE OR, IN THE ALTERNATIVE, IT ERRED IN NOT CONVICTING HIM JUST MERELY OF HOMICIDE INSTEAD OF MURDER.

II

Second Assignment of Error

THE LOWER COURT ERRED IN DISREGARDING THE VERY RELEVANT AND MATERIAL CONTENTS OF EXHIBIT "B" OF THE PROSECUTION --- CHEMISTRY REPORT, PARAFFIN TEST -- WHICH ARE FAVORABLE TO THE ACCUSED.

III

Third Assignment of Error

THE LOWER COURT ERRED IN CONCLUDING THAT THE TESTIMONY OF

THE SOLE WITNESS OF THE PROSECUTION IS SATISFACTORY AND SUFFICIENT TO CONVICT THE ACCUSED OF MURDER.

IV

Fourth Assignment of Error

THE LOWER COURT ERRED IN FAILING TO CONSIDER THAT THE ACCUSED HAS EXPLAINED WHY HE FAILED TO SURRENDER THE GUN WHICH HE GOT FROM THE DECEASED.^[9]

The appellant asserts that he was merely performing a lawful act of defending himself when he grabbed the victim's hand which held the gun. The gun accidentally fired and the bullet hit the victim's forehead. The accident was not the appellant's fault. The appellant asserts that when he wrestled with the victim for the possession of the gun, he was merely defending himself. He contends that he had no intention of killing the victim, as he merely wanted to talk to his son. If he had wanted to kill the victim, he could have easily done so when he met the latter for the first time that fateful night of November 5, 1993. Moreover, the appellant submits, he did not commit any felony; hence, under paragraph 4 of Article 12 of the Revised Penal Code, he is not criminally liable for the death of the victim.^[10] In the alternative, the appellant asserts that he should be convicted only of the crime of homicide under Article 249 of the Revised Penal Code, since the qualifying circumstance of treachery is wanting. He and the victim had a heated exchange of words before they grappled for the possession of the gun. Such heated discussion had already forewarned the victim and placed him on guard; thus, treachery cannot be legally considered.

The contention of the appellant has no merit. Article 11, paragraph 4 of the Revised Penal Code reads:

ART. 11. *Justifying circumstances.* –

...

4) Any person who, in order to avoid an evil or injury, does an act which causes damage to another provided that the following requisites are present:

First. That the evil sought to be avoided actually exists;

Second. That the injury feared be greater than that done to avoid it;

Third. That there be no other practical and less harmful means of preventing it.

The provision was taken from Article 8, paragraph 7 of the Spanish Penal Code, which reads:

ARTICULO 8.