

## SECOND DIVISION

[ G.R. No. 102706, January 25, 2000 ]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. LEON LUMILAN, ANTONIO GARCIA AND FRED ORBISO, ACCUSED-APPELLANTS.**

### D E C I S I O N

**DE LEON, J.:**

Before us is an appeal from the Decision<sup>[1]</sup> dated September 20, 1990 of the Regional Trial Court (RTC) of Ilagan, Isabela, Branch 16, in Criminal Case No. 955, finding accused-appellants Leon Lumilan and Antonio Garcia guilty beyond reasonable doubt of three (3) counts of murder, two (2) counts of frustrated murder, and three (3) counts of attempted murder, under an Information charging them and accused Fred Orbiso<sup>[2]</sup> with the crime of Qualified Illegal Possession of Firearms Used in Murder, in violation of Presidential Decree (P.D.) No. 1866.

The Information<sup>[3]</sup> reads as follows:

"The undersigned Provincial Fiscal accuses FRED ORBISO, LEON LUMILAN and ANTONIO GARCIA of the crime of QUALIFIED ILLEGAL POSSESSION OF FIREARMS USED IN MURDER, in violation of Presidential Decree No. 1866, committed as follows:

That on or about the 12th day of October 1987, in the municipality of Ilagan, Province of Isabela, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, not being authorized or allowed by the law to keep, possess and carry firearms, did then and there wilfully, unlawfully and feloniously have in their possession and under their control and custody, firearms without first having obtained the necessary permit and/or license to possess the same, and that on the occasion of such possession, the herein accused with treachery did then and there wilfully, unlawfully and feloniously with intent to kill suddenly and unexpectedly and without giving them chance to defend themselves, fired [sic] at and shoot Meliton Asuncion, Modesto Roque, and Eliong dela Cruz inflicting upon them gunshot wounds which directly caused their deaths; and further inflicting on the same occasion gunshot wounds upon Jerry Palomo, Romeo Pacho, Nolasco Estrada, Mario Palomo and Simeon Pacano, which injuries would ordinarily cause the death of the said Jerry Palomo, Romeo Pacho, Nolasco Estrada, Mario Palomo and Simeon Pacano, thus performing all the acts of execution which should have produced the crime of murder with respect to the last named victims as a consequence, but nevertheless, did not produce it by reason of causes independent of their will, that is, by the timely and able medical assistance rendered to the said Jerry Palomo, Romeo Pacho, Nolasco

Estrada, Mario Palomo and Simeon Pacano which prevented their deaths.

CONTRARY TO LAW."<sup>[4]</sup>

Upon being arraigned, appellants Leon Lumilan and Antonio Garcia entered the plea of "not guilty."

The evidence of the prosecution reveals that in the early evening of October 12, 1987, Meliton Asuncion, Modesto Roque, Eliong dela Cruz, Jerry Palomo, Simeon Pacano, Benito Alonzo, Nolasco Estrada, Mario Palomo and Romeo Pacho were drinking liquor inside the house of Policarpio Palomo when it was sprayed with bullets. The successive gunshots emanated from the fence about six (6) meters away from where they were drinking, killing Meliton Asuncion, Modesto Roque, and Eliong dela Cruz and seriously wounding Jerry Palomo, Simeon Pacano, Nolasco Estrada, Mario Palomo and Romeo Pacho. Prosecution eyewitness Simeon Pacano was hit in the left leg causing him to fall on his face. When the firing ceased, he remained in the said position pretending to be dead, as he recognized accused Fred Orbiso who entered the house and checked the bodies of the victims for survivors. Pacano also claims to have also recognized appellants Leon Lumilan and Antonio Garcia who joined Orbiso inside the house. They were purportedly after a certain Ben Estrada who was the barangay captain of Gayong-Gayong Sur, Ilagan, Isabela.

<sup>[5]</sup>

Prosecution eyewitness Benito Alonzo corroborated the eyewitness account of Simeon Pacano on the shooting incident. Benito Alonzo recalled that they were drinking at the house of Policarpio Palomo when successive gunshots were fired by three persons outside the fence of Palomo's house. He identified appellants Leon Lumilan and Antonio Garcia as two of the alleged assailants.<sup>[6]</sup>

Both Lumilan and Garcia interposed the defense of alibi. Appellant Garcia testified that he was in the company of Atty. Benjamin Olalia who stood as sponsor in the wedding of the daughter of a certain Hilario Laguna in Gayong-Gayong Sur, Ilagan, Isabela. They had late lunch at the house of Hilario Laguna and stayed there until 4:00 o'clock in the afternoon. Thereafter, Garcia and Atty. Olalia returned to the latter's house in Osmenia, Ilagan, Isabela, together with Martin Laguna, Juan Lorenzo, Felix Aguda, Romeo Callo, Rodrigo Junio, a driver, and two other individuals. They spent the rest of the day at the house of Atty. Olalia who corroborated Garcia's testimony.<sup>[7]</sup> On the other hand, appellant Lumilan testified that he was in Alibagu, Ilagan, Isabela the whole day of October 12, 1987.<sup>[8]</sup>

After an assessment of the evidence, the trial court declared that no proof beyond reasonable doubt was adduced by the prosecution to justify the conviction of appellants for Qualified Illegal Possession of Firearms Used in Murder. However, the trial court convicted the appellants for Murder, Frustrated Murder and Attempted Murder as it ruled that:

"x x x The eyewitness account of Simeon Pacano which was corroborated by Benito Alonzo can not be discounted. Both testified in a straitforward and candid manner, leaving no doubt as to their veracity.

"x x x

"From the evidence adduced, it is clear that the accused moved in concert, driven by a pre-conceived design that made each of them is (sic) liable in equal degree with the others for each of the three killings and for wounding five others. x x x

"As heretofore alluded to, the killing and wounding of the victims constituted the crime of Murder, Frustrated Murder and Attempted Murder, qualified by treachery. x x x

"In view of the eyewitness account of Pacano and Alonzo, the defense of alibi interposed by the (sic) both accused can not hold water.

"What crime or crimes were committed?

**"1. There is no sufficient evidence to prove Illegal Possession of Firearms.**

2. Relative to the death of Meliton Asuncion, Modesto Roque and Eliong dela Cruz, the crime committed was Murder.

3. Relative to the injuries sustained by Jerry Palomo and Simeon Pacano, the crime committed was Frustrated Murder while as to Romeo Pacho, Nolasco Estrada, and Mario Palomo, the crime committed is Attempted Murder.

**[4] As to the charge of Illegal Possession of Firearms, no evidence has been adduced to p[rove the charge. The guns were never presented.**

x x x."<sup>[9]</sup>

Accordingly, appellants were meted out the following penalties:

"WHEREOF, in view of all the foregoing, the Court finds the accused Antonio Garcia and Leon Lumilan guilty beyond reasonable doubt of the crime of 1) MURDER as defined and penalized under Article 248 of the Revised Penal Code in conjunction with Article 6 of the Revised Penal Code and in view of the absence of any mitigating or aggravating circumstances attending the commission of the crime, hereby sentences Antonio Garcia and Leon Lumilan to suffer the penalty of RECLUSION PERPETUA on three counts each for the killing of Meliton Asuncion, Modesto Roque and Eliong dela Cruz; 2) FRUSTRATED MURDER and are sentenced to a prison term of 8 years and 20 days as minimum to 14 years, 10 months, and 21 days as maximum on two counts each for the wounding of Jerry Palomo and Simeon Pacano and; 3) ATTEMPTED MURDER and are sentenced to a prison term of 5 years as minimum to 8 years and 21 days as maximum on three counts each for the wounding of Nolasco Estrada, Mario Palomo and Romeo Pacho, and to indemnify the heirs of the deceased MELITON ASUNCION damages in the amount of P30,000.00, moral damages of P10,000.00 each, actual damages of P4,150.00 and lost earning of P27,000.00 for one year as farmer; the deceased MODESTO ROQUE damages of P30,000.00, moral damages of

P10,000.00 each actual damages of P8,00.00 and lost earning of P10,000.00 for one year as farmer; and the deceased ELIONG DELA CRUZ, damages of P30,000.00 and moral damages of P10,000.00 each; for the wounding of SIMEON PACANO and JERRY PALOMO, moral damages of P10,000.00 each and actual damages of P11,550.00 for JERRY PALOMO; and for an attempt on the life of NOLASCO ESTRADA and MARIO PALOMO, an actual damages of P100.00 for NOLASCO ESTRADA and actual damages of P200.00 and lost earning of P 10,500.00 for one year as farmer for MARIO PALOMO, with costs.

SO ORDERED"<sup>[10]</sup>

Appellants file a motion for reconsideration which was, however, denied by the trial court in its Resolution<sup>[11]</sup> dated October 24, 1991. Hence, the instant appeal.

Appellants Leon Lumilan and Antonio Garcia raise the following errors:

## I

THE TRIAL COURT COMMITTED A REVERSIBLE ERROR IN FINDING THAT THE GUILT OF APPELLANTS WAS PROVEN BEYOND REASONABLE DOUBT.

## II

THE TRIAL COURT COMMITTED A REVERSIBLE ERROR IN NOT GIVING CREDENCE TO THE EVIDENCE OF APPELLANTS.

The important first question We must answer is whether or not appellants may be properly convicted of murder, frustrated murder and attempted murder under an Information that charges them with qualified illegal possession of firearms used in murder in violation of Section 1 of Presidential Decree (P.D.) No. 1866, as amended<sup>[12]</sup>

At the time the trial court promulgated its judgment of conviction in September 1990, it had already been six (6) months since We held in *People v. Tac-an*<sup>[13]</sup> that the unlawful possession of an unlicensed firearm or ammunition, whether or not homicide or murder resulted from its use, on one hand, and murder or homicide, on the other, are offenses different and separate from and independent of, each other<sup>[14]</sup>. While the former is punished under a special law, the latter is penalized under the Revised Penal Code. Consequently, the prosecution for one will not bar prosecution for the other, and double jeopardy will not lie<sup>[15]</sup>

*Tac-an* was reiterated in *People v. Tiozon*<sup>[16]</sup>, *People v. Caling*<sup>[17]</sup>, *People v. Jumamoy*<sup>[18]</sup>, *People v. Deunida*<sup>[19]</sup>, *People v. De Gracia*<sup>[20]</sup>, *People v. Tiongco*<sup>[21]</sup>, *People v. Fernandez*<sup>[22]</sup>, *People v. Somooc*<sup>[23]</sup> and *People v. Quijada*<sup>[24]</sup>.

Under Sec. 7 of Rule 117 of the Revised Rules of Court, double jeopardy lies when after the accused has pleaded to the first offense charged in a valid complaint or information and he is subsequently convicted or acquitted or the case against him is dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, he is prosecuted for a second offense or any attempt to

commit the same or frustration thereof or any other offense, which necessarily includes or is necessarily included in the offense charged in the former complaint or information.

It cannot be said that murder or homicide necessarily includes or is necessarily included in qualified illegal possession of firearms used in murder or homicide. To state otherwise is to contradict *Tac-an* and its progeny of cases where We categorically ruled out the application of double jeopardy in the simultaneous prosecution for murder or homicide and qualified illegal possession of firearms used in murder or homicide against same accused involving the same fatal act.

Sec. 4, Rule 120 of the Revised Rules of Court provides that an accused may not be convicted of an offense other than that with which he is charged in the Information, unless such other offense was both established by evidence and is included in the offense charged in the Information. Since murder or homicide neither includes or is necessarily included in qualified illegal possession of firearms used in murder or homicide, the trial court may not validly convict an accused for the former crime under an Information charging the latter offense. Conversely, an accused charged in the Information with homicide or murder may not be convicted of qualified illegal possession of firearms used in murder or homicide, for the latter is not included in the former. As We have amplified in *Quijada*:

"The unequivocal intent of the second paragraph of Section 1 of P.D. 1866 is to respect and to preserve **homicide or murder as a distinct offense penalized under the Revised Penal Code and to increase the penalty for illegal possession of firearm where such firearm is used in killing a person.** Its clear language yields no intention of the lawmaker to repeal or modify, *pro tanto*, Articles 248 and 249 of the Revised Penal Code, in such a way that if an unlicensed firearm is used in the commission of homicide or murder, either of these crimes, as the case may be, would only serve to aggravate the offense of illegal possession of firearm and would not anymore be separately punished. Indeed, the words of the subject provision are palpably clear to exclude any suggestion that either of the crimes of homicide and murder, as crimes *mala in se* under the Revised Penal Code, is obliterated as such and reduced as a mere aggravating circumstance in illegal possession of firearm whenever the unlicensed firearm is used in killing a person. The only purpose of the provision is to increase the penalty prescribed in the first paragraph of Section 1—*reclusion temporal* in its maximum period to *reclusion perpetua—to death*, seemingly because of the accused's manifest arrogant defiance and contempt of law in using an unlicensed weapon to kill another, but never, at the same time, to absolve the accused from any criminal liability for the death of the victim.

Neither is the second paragraph of Section 1 meant to punish homicide or murder with death if either crime is committed with the use of an unlicensed firearm, *i.e.*, to consider such use merely as a *qualifying circumstance* and not as an offense. That could not have been the intention of the lawmaker because the term 'penalty' in the subject provision is obviously meant to be the penalty for illegal possession of firearm and not the penalty for homicide or murder. x x x