

EN BANC

[G.R. No. 128148, February 16, 2004]

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOHNNY MALINAO
Y NOBE, APPELLANT.**

DECISION

AUSTRIA-MARTINEZ, J.:

On automatic review is the Decision,^[1] dated October 31, 1996, of the Regional Trial Court of Catbalogan, Samar (Branch 29) convicting appellant Johnny Malinao y Nobe of Illegal Possession of Firearm in its aggravated form under the second paragraph of Section 1 of P.D. No. 1866 (Illegal Possession of Firearm Law) and sentencing him to suffer the supreme penalty of death.

The facts are as follows:

In an Information dated January 16, 1995, docketed as Criminal Case No. 3998, appellant was charged with Murder, committed as follows:

That on or about the 14th day of November, 1994, at nighttime which was purposely sought, in the Municipality of Catbalogan, Province of Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a handgun, with deliberate intent to kill, with treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and shoot one Nestor Otanguin with the use of said handgun with which the said accused had conveniently provided himself for the purpose, thereby hitting and inflicting upon said Nestor Otanguin gunshot wounds on his body and head, which wounds on his body and head, which directly caused his instantaneous death.

CONTRARY TO LAW.^[2]

Upon arraignment on March 3, 1995, appellant pleaded not guilty to the crime charged.^[3]

In an Information dated March 30, 1995, docketed as Criminal Case No. 4039, appellant was charged with Illegal Possession of Firearm and Ammunition (P.D. No. 1866), committed as follows:

That on or about the 14th day of November, 1994, in the Municipality of Catbalogan, Province of Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, being then a private person and with deliberate intent to possess, did then and there willfully, unlawfully and feloniously carry, control, possess and have in his possession a Caliber .38 firearm in a public place and outside of his

residence without first securing any authority, and/or permit as required by law.

CONTRARY TO LAW.^[4]

When arraigned on April 6, 1995, appellant also pleaded not guilty to the crime charged.^[5] The two cases were consolidated and joint trial ensued.

Based on the evidence of the prosecution, consisting of the testimonies of minors Rey Abarcar, Allan Federio, Jay-ar Federio, Danelle Ian Malindog; Haide Villamor, Teresita G. Otanguin, Ireneo Ordiano, Jr., Nicandro Canaleja, Dr. Frederick Beda C. Alli, Miguel Gallego and SPO4 Rodrigo Tolentino, the following facts are established:

Appellant and victim Nestor Otanguin were neighbors in Barangay 10, Muñoz Estate, Catbalogan, Samar. In the afternoon of November 9, 1994, the car in which Nestor, his wife Teresita and his brother-in-law were riding, driven by one Rodante Abarcar who was maneuvering it out of the garage gate of the Otanguin residence, accidentally hit and injured the fighting cock of appellant that was tied near said gate. Teresita immediately told appellant of the incident and promised to talk it over with him later as they were in a hurry to catch up with a plane flight to Tacloban City. Appellant did not say anything and just smiled. Nestor and family left for the airport.

At 4:30 in the afternoon of November 14, 1994, appellant, armed with a .38 caliber revolver, was drinking with some friends at a table on a sidewalk near his house at the corner of McKinley Street, a narrow alley. 9-year old Rey Abarcar,^[6] 12-year old Allan Federio, 11-year old Jay-ar Federio and 6-year old Danelle Ian Malindog were playing nearby. At 6:00 in the evening, Nestor was on his way home from work and passed by the place where appellant was drinking with some friends. As Nestor was approaching, appellant fired his gun and invited Nestor to join them and offered him a drink which Nestor accepted. Then Nestor excused himself for home but appellant offered him another drink, which he politely refused. Enraged at the refusal, appellant drew his revolver from his waist and shot Nestor on the chest. When Nestor fell, appellant shot him again at the back of the head, resulting in his immediate death.^[7]

On November 15, 1994, Dr. Frederick Beda C. Alli, Municipal Health Officer, conducted the autopsy on Nestor. From the autopsy report,^[8] it appears that Nestor died of cardio-respiratory arrest due to gunshot wounds on the head and chest. On the same day, Forensic Analyst Nicandro Canaleja, conducted a paraffin test on the hands of appellant. The test gave a positive result for the presence of gunpowder residue.^[9] Meanwhile, Ireneo Ordiano, Jr., a ballistics expert of the National Bureau of Investigation (NBI), conducted a ballistics examination on the two bullets recovered from the body of Nestor. The ballistics report^[10] revealed that the bullets were fired from the barrel of a caliber .38 firearm. A certification from the Philippine National Police (PNP) proved that appellant is "neither a firearm holder nor a licensee of any firearm of whatever caliber."^[11]

Appellant admits having killed Nestor but claims self-defense. He testified that on the day of the incident, Nestor, armed with a .38 caliber handgun, drew his weapon

to fire at appellant but appellant grappled with Nestor for possession of the gun and in the struggle, the gun exploded. He further stated that after he succeeded in wrestling the gun from Nestor, Nestor fought back and held his legs so he fired at Nestor. Thereafter, he left and went to the house of his brother in law. Later, he met Fiscal Wayne Villarin and they went to the Catbalogan Police Station where he surrendered to the police.^[12]

The trial court sustained the evidence presented by the prosecution and found appellant's claim of self-defense to be not credible. The trial court likewise found that the prosecution had established that appellant was not a licensee of any firearm. Thus, the trial court held that the crime of murder with the use of an illegally possessed gun was committed by the appellant.

In convicting appellant, the trial court, applying *People vs. Barros*,^[13] held:

In a recent case, *People vs. Romeo Barros*, GR No. 101107, June 27, 1995, our Supreme Court reversing the trial court which convicted the accused of two offenses of murder and illegal possession of firearm and ammunition under PD 1866 the Supreme Court held that an accused who is charged with having committed murder or homicide with the use of an unlicensed firearm should be liable only for the graver offense of aggravated illegal possession of firearm under the second paragraph of Section 1 of PD 1866 because the situation contemplated therein is from the punitive standpoint, virtually of the nature of the so-called "special complex crimes," which should more appropriately be called composite crimes and only a single penalty is imposed for each of such composite crimes although composed of two or more offenses. ^[14]

Thus, the dispositive portion of the joint decision reads as follows:

WHEREFORE, the information for murder against Johnny Malinao in Criminal Case No. 3998 is hereby dismissed and in Criminal Case No. 4039 judgment is hereby rendered finding him guilty beyond reasonable doubt of illegal possession of firearm in its aggravated form under the second paragraph of Sec. 1 of PD 1866 and for this offense he is hereby sentenced to the penalty of death, to indemnify the heirs of the deceased Nestor Otanguin, represented by his wife Teresita G. Otanguin of Catbalogan, Samar, in the amount of Two Hundred Thousand Pesos (P200,000.00), without subsidiary imprisonment in case of insolvency, and to pay the costs.

SO ORDERED.^[15]

Hence, the case is before the Court on automatic review under Article 47 of the Revised Penal Code, as amended by Section 22 of Republic Act No. 7659.

In his Brief, appellant impugns solely his conviction for illegal possession of firearm. He submits that the trial court's dismissal of the Information for murder operates as an acquittal thereof; hence, he posits that only the conviction for illegal possession of firearms is the subject of herein automatic review. He seeks the retroactive effect of the beneficial provisions of Republic Act No. 8294 which amended P.D. No. 1866 (Illegal Possession of Firearm Law), reducing the penalties provided therein.

Prefatorily, it must be stressed that although the appellant himself does not refute the factual findings of the trial court, the Court nonetheless must conduct a thorough examination of the entire records of the case, based on the settled principle that an appeal in a criminal case opens the entire case for review on any question including one not raised by the parties.^[16] This rule applies especially to automatic review of death penalty cases before the Supreme Court such as the present. Having received the supreme penalty as imposed by the applicable law, appellant is entitled under that law to have the sentence and all the facts and circumstances upon which it is founded placed before the Highest Tribunal of the land to the end that its justice and legality may be clearly and conclusively determined.^[17]

Consequently, before the Court resolves appellant's submissions, it is imperative that the Court reviews the factual findings and conclusions of the trial court.

Appellant admits authorship of the killing and invokes self-defense thereby shifting upon him the burden to prove by clear and convincing evidence, that: (a) the victim unlawfully attacked him; (b) he took the necessary means to repel the attack; and (c) he did not provoke said attack.^[18] Unfortunately, appellant failed to discharge that burden of evidence since his self-defense theory remains uncorroborated. An uncorroborated self-defense theory is similar in many respects to bare denial. As such, it must fail as against the positive, categorical and straightforward witness accounts of eyewitnesses Rey Abarcar, Allan Federio, Jay-ar Federio and Danelle Ian Malindog. These prosecution eyewitnesses, minors all, clearly identified the appellant as the aggressor and not the victim Nestor. Without unlawful aggression on the part of the victim, there can be no viable self-defense.^[19]

It is alleged in the Information for Murder that the killing was qualified by treachery and evident premeditation. The trial court did not make a finding as to the existence of any of these qualifying circumstances.

It is settled that treachery cannot be presumed but must be proved by clear and convincing evidence as conclusively as the killing itself. To appreciate treachery, two (2) conditions must be present, namely, (a) the employment of means of execution that give the person attacked no opportunity to defend himself or retaliate, and (b) the means of execution were deliberately or consciously adopted.^[20] In this case, the concurrence of these conditions is firmly anchored on the declarations of the prosecution eyewitnesses Rey Abarcar, Allan Federio, Jay-ar Federio and Danelle Ian Malindog. They witnessed appellant fire his gun and shoot at Nestor on the chest for the latter's refusal to drink another glass of liquor and when Nestor fell, they saw appellant shoot him again at the back of the head. These all too clearly indicate that Nestor could not have foreseen the deadly assault.

Nestor was completely unaware of his impending death caused simply by his polite refusal to drink. The means, method, and form of the attack in this case were, therefore, consciously adopted and effectively forestalled Nestor from employing a defense against appellant's unexpected attack.

On the other hand, the circumstance of evident premeditation did not attend the killing. There was no proof or showing of (a) the time when the offender determined

to commit the crime, (b) an act manifestly indicating that the offender had clung to his determination, and (c) a sufficient lapse of time between the determination to commit and the execution thereof, to allow the offender to reflect on the consequences of his act.^[21] Evident premeditation must be based on external facts which are evident, not merely suspected, which indicate deliberate planning.^[22] There must be direct evidence showing a plan or preparation to kill, or proof that the accused meditated and reflected upon his decision to kill the victim.^[23] No such evidence was presented to prove the presence of this circumstance.

With the presence of qualifying circumstance of treachery, which was established as clear as the killing itself, the crime committed is murder.

Regarding the charge of illegal possession of firearm, conviction requires the concurrence of two (2) essential requisites: (a) the existence of the firearm, and (b) the fact that the appellant who owned or possessed the firearm does not have a license to possess the same. Both elements were established by the prosecution. In *People vs. Orehuela*,^[24] the Court held that the existence of the firearm can be established by testimony, even without the presentation of the said firearm.^[25] In this case, while the firearm was not presented in evidence, the existence of the same was sufficiently established by (a) the categorical testimonies of the prosecution eyewitnesses that appellant was in possession of a firearm handgun described as "caliber 32",^[26] a "shortgun",^[27] and a "small gun"^[28] and had used it to kill Nestor, (b) the paraffin test on the hands of appellant tested positive for the presence of gunpowder residue,^[29] and (c) the ballistics report revealed that the two bullets taken from the body of Nestor were fired from the barrel of a caliber .38 firearm.^[30] The prosecution proved the second element by presenting a certification from the PNP to the effect that appellant is "neither a firearm holder nor a licensee of any firearm of whatever caliber."^[31]

The guilt of appellant as to the crimes of murder and illegal possession of firearm having been established beyond reasonable doubt, the Court now turns to the claim of appellant that only his conviction for illegal possession of firearm should be the subject of herein automatic review because the trial court had dismissed the Information for murder.

Appellant's claim is not plausible. The trial court clearly found appellant guilty beyond reasonable doubt of the crime of murder, but merely considered it as aggravating circumstance in the crime of illegal possession of firearm, applying *People vs. Barros*^[32] Inevitably, the contrariety arose when the trial court erroneously ordered the dismissal of the Information for Murder despite having earlier found in the text of his decision that the appellant is guilty of murder beyond reasonable doubt and having considered the crime of Murder as an aggravating circumstance in finding him guilty of "illegal possession of firearm in its aggravated form under Sec. 1 of P.D. No. 1866".

It is elementary that the dispositive part of the judgment should not be interpreted in a manner contrary to its *ratio decidendi*.^[33] The dispositive part should be construed in harmony with the spirit of the decision as revealed in the text of the decision.