

## THIRD DIVISION

[ G.R. No. 140065, February 13, 2001 ]

**BENITO CALIM, PETITIONER, VS. COURT OF APPEALS AND  
PEOPLE OF THE PHILIPPINES, RESPONDENTS.**

### D E C I S I O N

**GONZAGA-REYES, J.:**

This is a petition for review on certiorari of the decision<sup>[1]</sup> of the Court of Appeals, dated August 4, 1999, which affirmed the judgment of the Regional Trial Court, Branch I, Borongan, Eastern Samar, finding petitioner Benito Calim guilty beyond reasonable doubt of the crime of homicide and sentencing him to an indeterminate penalty of ten (10) years and one (1) day of *prision mayor*, as minimum, to fourteen (14) years, eight (8) months and one (1) day of *reclusion temporal*, as maximum, and ordering him to pay the heirs of the deceased the amount of P50,000.00 as death indemnity and P20,000.00 by way of moral damages.

Benito Calim was charged with murder in an information, filed on December 21, 1993, by the provincial prosecutor, which alleged -

"That on August 14, 1993, at about 12:30 o'clock in the morning, in front of Bistro Francisco Disco house at Francisco St., Borongan, Eastern Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with intent to kill and with evident premeditation and treachery, did then and there willfully, unlawfully and feloniously attack, assault, shoot and wound ESMERALDO A. TY, with the use of a handgun (Revolver), which the accused provided himself for the purpose, thereby inflicting gunshot wounds, which were the direct and immediate cause of his death, to the damage and prejudice of the heirs of the victim.

CONTRARY TO LAW."<sup>[2]</sup>

The accused was tried after a plea of not guilty.

The evidence for the prosecution, as established by the testimonies of its witnesses, namely: Dennis Apar, Eutopia Ty, Dr. Norma Villa Macapanas and Desiderio Alvor, Jr., was summarized in the People's Comment as follows:

"On August 14, 1993, at around 12:30 o'clock in the morning, friends Esmeraldo Ty, Dennis Apar, Desiderio Alvor, Jr., Peter Daza, and Longlong Lopez emerged from a drinking session in Bistro Francisco, a disco house at Francisco Street, Borongan, Eastern Samar. While they engaged in small talk and were about to go home, petitioner Calim, a member of the Philippine National Police, Regional Command Intelligence Group VIII, Eastern Samar, also came out of Bistro Francisco. Suddenly, from five <sup>[5]</sup>

meters away, petitioner fired his .38 caliber towards Ty who was hit on the head, right chest and on the leg successively. Even as Ty was falling down, petitioner continued firing his gun on him. After the fifth gunfire, petitioner fled from the scene going south and disappeared. Ty died on the spot.

Later, at around 8:34 that morning, Ty's cadaver was examined by the District Medical officer, Dr. Norma Villa-Macapanas whose report dated August 14, 1993 disclosed that Ty sustained the following injuries, to wit:

Gunshot wound, entrance, post-auricular area (right ear, back)  $\frac{3}{4}$  inch below 1.8 inch from the right post-auricular area, roughly circular in shape with uneven contusion collar, measuring 0.8 cm long and 0.8 cm wide, directed medial and superiorly to the temporo-parietal area of the head, producing a wound of exit after involving the brain, depth at 4.5 inches, with severe busting of the skull bone of the right temporo-parietal area, excavation of the brain. The exit wound measures  $\frac{3}{4}$  inch long and 1 inch wide with irregular edges.

Gunshot wound (entrance) face, right side,  $\frac{1}{2}$  inch from the right ear, roughly circular in shape, with uneven contusion collar, measuring 0.8 cm wide, 0.85 cm long directed medially with exit to the mouth, after a depth of  $\frac{1}{2}$  inch.

Gunshot wound, chest (ENTRANCE) right side, 2 inches below the right nipple and  $\frac{3}{4}$  inch from the anterior midline of the chest, roughly oval in shape, measuring 0.8 cm wide directed medially and inferiorly to the left penetrating the right side lobe of the lung, the heart, the left lobe of the left lung.

Hemothorax-400 cc

Gunshot wound, entrance, located at the right arm (upper third) lateral aspect roughly circular in shape, with uneven contusion collar, directed medially and ends blindly after a depth of 4 inches.

Gunshot wound, entrance, right leg, anterior aspect,  $\frac{3}{4}$  inch below the right patellar area, roughly circular in shape, measuring 0.8 cm long, 0.8 cm wide directed supero-posteriorly, ends blindly at the right middle third of the same lower extremity (right thigh), posterior aspect, after a depth of 8.75 inches. A hard metallic object was extracted from said site, measuring 1.3 cm long, 0.8 cm wide.

CAUSE OF DEATH SEVERE HEMORRAHAGE SECONDARY TO MULTIPLE GUNSHOT WOUNDS OF CHEST (HEART), head, face."

On August 14, 1993, Alvor and Apar executed their joint affidavits attesting to what they saw during the killing of Ty, the contents and

truthfulness of which they both affirmed during the trial of the case. Significantly, petitioner did not execute an affidavit and neither did he submit any counter-affidavit during the preliminary investigation of the case despite repeated notices.<sup>[3]</sup>

On the other hand, while petitioner admitted that he shot the victim, he claimed self-defense. As embodied in the Petition, the defense version runs thus:

" . . . the victim, armed with a Batangas knife, started to create trouble outside the Bistro Francisco Disco House by puncturing the motorcycle tires of several persons. Although Boyoyoy Gonzales and Desiderio Alvar, the victim's companions prevented him, the latter refused to listen. When Max Operario, Jr. called the attention of the victim to stop puncturing the tire of Boyoyoy Gonzales, the victim thrust his knife towards Max. Meanwhile, the accused (herein petitioner) who was then coming out from the disco house looking for Max, witnessed the incident. Hence, accused fired a warning shot and introduced himself as a military man. The victim vented his ire towards the accused and remarked that he is not afraid of a military man. There and then, the victim attacked the accused. To prevent the victim from attacking the accused, the latter shot the hand of the victim to disarm him, however, the former persisted on rapidly advancing towards him. So, the accused aimed his gun at the victim's right knee but the latter's violence remained unabated. Cornered, accused retreated towards the panel of Bistro Francisco. When accused was cornered, leaning on the glass wall, he fired three (3) successive shots."<sup>[4]</sup>

The trial court gave credence to the version of the prosecution and found that the evidence for the defense failed to establish the justifying circumstance of self-defense, particularly, the defense failed to prove unlawful aggression on the part of the victim and the reasonable necessity of the means employed to prevent or repel the unlawful aggression. Thereafter, the trial court rendered judgment convicting petitioner of homicide and not murder. Upon review by the Court of Appeals, the conviction was affirmed *in toto*. In affirming the judgment of the trial court, the Court of Appeals held as follows:

"Foremost, Calim's version of the facts culminating in his shooting of Esmeraldo is incredible, to say the least. Given that Esmeraldo was drunk such that he was no longer in control of his emotions, there is still much to be desired to conclude that his intoxication caused him to be so bold and daring as to challenge and face a man who was not only armed with a gun but who had introduced himself as a military person as well! Especially so when Esmeraldo was alleged to have been merely brandishing a Batangas knife and about five (5) meters from Calim. What baffles the Court even more is that Esmeraldo was supposed to have unceasingly proceeded to attack Calim with a knife after being fired upon twice and actually hit.

Calim, while professing to be an active member of the PNP Provincial Intelligence Team, casually walked away from the scene of the incident leaving his victim down and dying on the ground not waiting for police authorities to perhaps assist in or submit himself for investigation. Instead, as he himself admitted, he went home to Tacloban City after the

confrontation. Further, the weapon allegedly used by Esmeraldo, the Batangas knife, was conveniently never recovered. And to top it all, accused-appellant failed to file at least a report or execute any affidavit or sworn written statement concerning the incident.

Evidence to be believed, must not only proceed from the mouth of a credible witness, but must be credible in itself - such as the common experience of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous and is outside judicial cognizance.

Granting that Esmeraldo did try to attack Calim with a knife, the oral testimony of accused-appellant clearly showed that Calim was in no peril since the victim was three (3) to four (4) meters away from him when he fired the last three (3) shots and was already wounded at the time. Thus, We are in full agreement with the trial court when it aptly observed that:

" . . .The life of a human being must not be taken upon slight grounds. There must be a necessity, either actual or apparent, for the killing or it cannot be justified. Accused Benito Calim has all the right to quell disturbance in a public place or public street, however, he should have resorted to the more reasonable and logical manner by shooting the victim, even assuming he was the aggressor, his limbs to disarm or disable him. While it is true that a policeman in the performance of his duty requires him to overcome his opponent the force he must employ against his assailant must be reasonable (sic) necessary. In this instant case, the victim sustained multiple gunshot wounds as shown in the post-mortem examination conducted by Dr. Norma Villa Macapanas...

x x x x x

Based on the . . . medical findings of the physician the nature and number of wounds inflicted on the person of Esemraldo Ty belie the claim of self-defense, and the facts and circumstances of the case as shown, sufficiently indicate to us a determined effort by the accused to take away the life of Esmeraldo Ty."

When an accused invokes self-defense, the *onus probandi* to substantiate such assertion rests on him. He must prove clearly and convincingly its three elements, namely: (1) unlawful aggression on the part of the victim; (2) reasonable necessity of the means employed to prevent or repel the aggression; and (3) lack of sufficient provocation on the part of the person defending himself.

Calim invoked the justifying circumstance of self-defense but failed to discharge the burden of proving the presence of the reasonable necessity of the means he employed in repelling the aggression. On this point, the court *a quo* was not amiss when it held, that: