

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
ARCADIO PUESCA ALIAS "BIG BOY", WALTER APA,
FILOMENO MACALINAO, JR. ALIAS "WHITE", MAGNO
MONTAÑO ALIAS "EDOL", JOSE GUSTIL...**

G.R. No. L-27909. December 05, 1978

Ponente: PER CURIAM: Automatic review of the judgment of the Davao Court of First Instance in Criminal Case No. 6813, finding appellants Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping", Magno Montaña alias "Edol", Filomeno Macalinao, Jr. alias "White", Walter Apa and Ricardo Dairo alias "Carding" guilty beyond reasonable doubt of the crime of Robbery in Band with Homicide, attended by the aggravating circumstance of nocturnity, and imposing upon them the penalty of DEATH, ordering them to indemnify jointly and severally the heirs of the deceased Candido Macias in the amount of P6,000.00 and P20,000.00, the latter sum representing the money robbed, and to pay the costs. The following facts were the basis of the trial court's judgment: On the early evening of November 27, 1960, Candido Macias and his wife, Marcela Macias, were taking supper in their house located in Barrio Sinayawan. Sinayawan is a barrio of Hagonoy, Davao del Sur and lies near the road to Digos. Under the house were their son, Fortunato Macias, and son-in-law, Anacleto Delfino. Fortunato Macias was repairing a jeep, assisted by Anacleto Delfino who was holding a lighted "Petromax" lamp. Suddenly, strangers with firearms unceremoniously entered the house. Three of them went upstairs. Marcela Macias and Candido Macias heard the voice of one of them emanating from the sala, ordering the occupants of the house to lie down on the floor. Candido Macias left the table and went out to the sala. Two gun reports were heard and Candido Macias instantly slumped to the floor. Marcela Macias stood up and walked towards her husband but before she could reach him, she was met by one of the intruders who ordered her to lie flat on the floor, otherwise all of them would die. Someone under the house also directed Fortunato Macias and Anacleto Delfino not to move. Turning to his left, Fortunato Macias saw two armed men. He immediately ran towards the coconut plantation near the house where he took refuge. Anacleto Delfino also turned around to see who those persons were. When he held his lamp up, he saw two gunmen, one tall and the other short. He identified one of them as appellant Arcadio Puesca and the other as appellant Magno Montaña. According to Delfino, appellant Puesca fired at him and he was hit between the elbow and the armpit. Delfino brought down the lamp and lay flat on his belly. When he was brought to the sala which was then lighted by a "Petromax" lamp, Delfino saw his father-in-law, Candido Macias, lying on the floor near the door. He was already dead. He also noticed two persons with firearms whom he identified as appellants Jose Gustilo and Filomeno Macalinao, Jr.. At that time, Marcela Macias noticed that the intruders were ransacking the house. The trunk in the master's bedroom was forcibly opened, and the sum of P20,000.00 was taken. This sum represented the proceeds from the sale of a parcel of land for P17,000.00, together with their income from a twenty-four-hectare riceland and their three jeeps for hire. They also took the gun of Candido Macias which was lying on the bed, as well as his new pair of pants and other clothes. The aparador in the sala was toppled down by appellants Gustilo and Macalinao. When Francisco Macias, another son of Candido Macias, heard the gun reports he rushed to his father's house which was about eighty (80) meters away from his home. As he approached the house, two persons with carbines who were in the kitchen fired upon him. He was ordered to crawl to the sala and to lie flat on his stomach on the floor. He observed that the house was being ransacked. When Francisco Macias tried to look around, two men kicked him on the head. Later, Francisco was told to go downstairs and to get the key of one of the jeeps from his house. As he went down, he was followed by two other armed men. The gun reports in the house of Candido Macias were also heard by the spouses Marietta Macias-Olarte and Epifanio Olarte, daughter and son-in-law, respectively, of Candido Macias. They immediately left their house to find out what was happening in Candido Macias' house. On their way thereto, they heard bullets whistling over their heads. They sought shelter in the house of Anacleto

Delfino, whose wife, Antonia Macias, was the sister of Marietta Macias-Olarte. Francisco Urbano, a tenant of Candido Macias, happened to reside at that time in said house. When the firing subsided, Marietta Macias-Olarte, Epifanio Olarte, Antonia Macias and Francisco Urbano went to the backyard of Delfino's house. The distance from the house of Anacleto Delfino to the house of Candido Macias was some forty (40) meters. The group of Marietta Macias-Olarte then saw three men coming from the house of Candido Macias. As the three men neared their place, Epifanio Olarte tried to talk to Francisco Macias, but he was immediately pushed back and one of the escorts of Macias fired at him. Marietta Macias-Olarte and Francisco Urbano testified that they recognized the tall, stoop-shouldered gunwielder as Walter Apa because of the light of the moon and his proximity to them. They also recognized the shorter fellow as appellant Ricardo Dairo, whom they saw was carrying a gun. Appellant Ricardo Dairo remained with the group of Marietta, while Francisco Macias and appellant Walter Apa continued on their way. Francisco Macias was not allowed by appellant Apa to turn his face sideways. After they secured the key from his house, Francisco Macias and appellant Walter Apa returned to the house of Candido Macias, passing through the backyard of the house of Delfino where they were joined by appellant Ricardo Dairo. Under the house of Candido Macias, Francisco Macias started the motor of one of the jeeps, and thereafter, eight of the men boarded the jeep. Apparently to prevent pursuit, the tires of the other jeep were fired upon. The jeep which was driven by Francisco proceeded towards Barrio Liling on the way to Davao City. After a while Francisco Macias was ordered to stop the vehicle and someone alighted from the rear, and Francisco Macias was ordered to move over to the center of the front seat. According to Francisco Macias, he was able to recognize fully the man who took over the steering wheel. He identified him as appellant Jose Gustilo. When Francisco tried to look sideways, one of them hit him on the head with a pistol. After the jeep had run for more than one hour, it was stopped. Francisco Macias went down the jeep and one of the men said that he should be shot. Francisco Macias pleaded for his life. Appellant Jose Gustilo intervened and suggested to his companions that they spare Francisco's life. Francisco Macias was then hogtied and stripped of his clothes. The men then fled away in the jeep. After their departure, Francisco was able to untie his feet, and he walked about two kilometers to a friend's house, where he borrowed a pair of pants and shirts. Later, he boarded a passenger bus for Digos, a municipality adjacent to Hagonoy. The robbery and killing in the house of Candido Macias were reported that same night, November 27, 1960, by Francisco Macias to Antonio Viran, Chief of Police of Hagonoy, Davao. Accompanied by police officers, Chief Viran went to the house of Candido Macias in Barrio Sinayawan and found Candido Macias dead. The furniture in the house were in topsy-turvy condition. The officer interviewed persons in the house and the latter assured him that they could recognize the culprits. The get-away jeep was recovered near a bridge on the road to Davao City. The following morning, Chief Viran returned to the house of Candido Macias, accompanied by Mayor Llanos of Digos, Zosimo Melendez, Chief of Police of Digos, Sgt. Baño and Lt. Javier of the Digos Police Force. Chief Viran found P17.00 in one-peso bills, while Chief Melendez found empty shells in the sleeping room of Candido Macias, and a bullet slug on the floor of the sala. They also saw downstairs a jeep with flat tires and a 'Petromax' lamp destroyed by bullets. Chief Viran reported the incident to the Provincial Governor of Davao. Col. Jacinto Romero, Chief of Police Affairs Unit in the Office of the Provincial Governor, then joined hands with the police to solve the robbery-killing incident. On December 1, 1960, Sgt. Lucio Baño met one Roger Cahilog who informed him that appellants Arcadio Puesca alias "Big Boy" and Jose Gustilo alias "Peping", slept in his house on the night of November 26, 1960 and that he overheard the two talking about robbery. He thus became suspicious of the two. On December 2, 1960, appellants Puesca and Jose Gustilo were apprehended by Sgt. Baño and Lt. Javier in Davao City. On December 10, 1960, appellant Puesca, who was detained in the municipal jail of Digos, told Sgt. Baño and Chief Melendez that he would like to see Mayor Llanos in order to confess his participation in the crime. In the evening of that date, Mayor Llanos met appellant Puesca in his office on the second floor of the municipal building. Appellant Puesca was questioned by the Mayor on his participation. Present were Chief Melendez, Chief Viran, Lt. Javier and Lei Hong, owner of a tape recording machine. Appellant Puesca's investigation was tape recorded by Lei Hong. Puesca confessed that he was one of the gang who entered the house of Macias and committed the robbery and killing therein. He mentioned as his companions Jose Gustilo alias 'Peping', Magno Montaña alias 'Edol', Felimon, Carding and Mariano. He said that there were others who were with them whose names he did not know but whom he could identify if he saw again. The confession of appellant Puesca was taken down in writing (Exhibit "L"). Appellant Jose Gustilo, like Puesca,

admitted to Mayor Llanos his participation in the commission of the crime and mentioned as his companions Arcadio Puesca alias "Big Boy", Magno Montaña alias "Edol", Filomeno Macalinao, Carding, Mariano and others. The questioning of appellant Gustilo was tape recorded by Lei Hong, and was taken down in writing (Exhibits "R", "R-1", "R-2"; "U", "U-1"; "V", "V-1", "V-2"; "W", "W-1" and "W-2"). Following the confession of appellants Puesca and Gustilo, appellant Magno Montaña alias "Edol" was arrested by Chief Viran. In his own handwriting (Exhibits "Q", "Q-1" to "Q-3"), appellant Montaña confessed his guilt and named as his confederates in the crime Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping" and Felimon Macalinao. Appellant Montaña's confession was tape recorded by Lei Hong in the presence of Mayor Llanos and the police officers. The confessions of appellants Puesca and Montaña (Exhibits "L" and "Q") were subsequently subscribed and sworn to by the declarants before Augusto H. Fernandez, Justice of the Peace of Digos. Appellant Gustilo, on the other hand, refused to sign his confession (Exhibit "R") and did not give any reason for his refusal. On December 15, 1960, appellant Filomeno Macalinao, Jr. was arrested at the Sasa Airport, Davao City, as he was about to board a plane for Cebu. In a confrontation with appellant Puesca and later with appellant Gustilo, he was identified by the two as the person they had mentioned in their confessions as their companion in the commission of the crime. In order to identify all the culprits, Chief Viran showed to Francisco Urbano and Marietta Macias-Olarte the pictures of some police characters, from which the two picked out the pictures of appellant Walter Apa (Exhibit "S") and Ricardo Dairo (Exhibit "T"). They told the officer that Apa and Dairo were among those whom they saw on the night of the incident. Appellants Apa and Dairo were picked up by the police and confined in jail. Sometime in December 1960, Marietta Macias-Olarte, Anacleto Delfino, Francisco Macias and Francisco Urbano were invited to the municipal jail of Digos, where, from a group of detained prisoners, they pointed to appellants Arcadio Puesca, Jose Gustilo and Magno Montaña as three of the men who had participated in the robbery and killing of Candido Macias. Subsequently in January 1961, Francisco Urbano was called to the municipal building of Hagonoy, and from among a group of persons he pointed to appellant Ricardo Dairo as one of the culprits he recognized. The cadaver of Candido Macias was autopsied by Dr. Julio M. Layug, Municipal Health Officer of Digos, Davao, as the Municipal Health Officer of Hagonoy was away. The result of his autopsy examination is found in the report, Exhibit "A", and reads as follows: "1. Gunshot wound 3 inches above the left mammary gland more on the left side of the manubrium measuring 1 cm. in diameter, penetrating the skin, muscle, aorta of the heart, lung and the slug was lodged between the right 8th and 9th ribs at the back and between the muscle and the skin between the spinal column and the right scapula. The slug found was caliber 38. "2. Gunshot wound 3 inches below the left mammary gland externally at the left axillary line measuring 1 cm. in diameter, penetrating the skin, muscle, lung, liver, and the right lumbar region. The gunshot wound at this place of exit measures 1-1/2 cms, in diameter and in overt position." Dr. Layug testified that the second shot was fired while the victim was falling down, and that death supervened in only three or four minutes. The cause of death was due to "shock with internal hemorrhage caused by the gunshot wounds". Counsel de oficio for all of the appellants maintains that the court a quo erred: (1) in giving more weight and credence to the "biased and unbelievable declarations of relatives of the deceased"; (2) in admitting and believing the confessions of some of the appellants which "were extracted through third degree"; and (3) in denying the motion of appellants for new trial. In a supplemental brief, counsel for appellant Filomeno Macalinao, Jr. argues that the evidence on record, outside of the confessions, is inadequate to prove conspiracy; that there is no evidence that appellants took and carried away the money, pistol and clothes of Candido Macias; that none of the witnesses saw the slaying of Candido Macias; that the identification of Macalinao by Anacleto Delfino is "shaky and indecisive"; and that nocturnity should not have been considered as an aggravating circumstance. To begin with, appellants can no longer raise in issue the denial of their motion for new trial. They have previously challenged before this Court by certiorari the correctness of the order of the court a quo denying their motion for new trial.[1] This Court found the petition devoid of merit, hence, the same was dismissed on July 28, 1967. Entry of judgment was made on September 20, 1967. On the question of sufficiency of the evidence as basis for the conviction of appellants, the Court finds that the evidence clearly shows that appellants were positively identified by the prosecution witnesses as participants in the crime. Thus, Anacleto Delfino declared that appellants Arcadio Puesca and Magno Montaña were the persons he saw under the house of Candido Macias, his father-in-law; that he recognized them because he raised the lamp higher to find out who they were; and that it was appellant Arcadio Puesca who fired at him, hitting him between the elbow and the

armpit. He further stated that when he placed the lamp down on the ground, Puesca shot the lamp and ordered Anacleto to go upstairs. Puesca admitted in his confession that he fired at a man holding a "Petromax" "with the intention of hitting the light and to scare the man * * *" (Exhibit "L"). Anacleto Delfino also testified that upon reaching the second floor of the house, he saw two armed men whom he identified as appellants Jose Gustilo and Filomeno Macalinao, Jr.. After he was made to lie on the floor, he heard sounds in the room of something being broken. According to Puesca, a certain Felimon and Jose Gustilo were the first to go up the house followed by Magno Montaño, then he heard two shots fired inside the second floor of the house. This was confirmed by Magno Montaño (Exhibit "Q-1") who stated that Jose Gustilo and Felimon Macalinao went up the house and that after he heard those shots he asked Jose Gustilo why he shot the victim, and Gustilo replied that he "wanted to challenge me" (Exhibit "Q-2"). Marietta Macias-Olarte and Francisco Urbano testified that appellants Walter Apa and Ricardo Dairo were the ones who escorted Francisco Macias when they came from the house of Candido Macias, passing through the backyard; that when they talked with Francisco Macias and Olarte tried to place his hands on the shoulders of Francisco, Walter Apa pushed him; that Apa fired at Olarte who fell to the ground. Marietta and Francisco testified that they recognized Walter Apa as the tall stoop-shouldered person holding a gun and that the shorter fellow, also armed with a carbine, was Ricardo Dairo. After Francisco Macias and Walter Apa had proceeded to the former's house, it was Ricardo Dairo who guarded Olarte, Antonio Macias, Delfino and Francisco Urbano. After a few minutes, Francisco Macias returned with Apa and then all of them returned to the house of Candido Macias. Francisco Macias declared that two persons armed with carbines fired at him; that while lying face downwards on the floor, he heard "sounds as if something have (sic) been ransacked * * * persons going down * * *. The aparador was (sic) tumbled down * * *." He further testified that when he drove the jeep of the deceased with the appellants aboard, it was appellant Jose Gustilo who took over the wheel from him. In their attempt to impugn the credibility of the testimony of Anacleto Delfino, appellants contended that this witness could not have recognized appellants Arcadio Puesca and Magno Montaño, much less Jose Gustilo and Filomeno Macalinao, Jr.. It is claimed that it would have been difficult for Anacleto Delfino to recognize Arcadio Puesca and Magno Montaño because when Delfino turned around and put up the lamp, the lamp blocked Delfino's face, preventing him from getting a clear view of the two. This contention, however, is not borne by the facts. When the witness, Anacleto Delfino, held the lighted lamp, he did not hold it directly in front of his face. He held the lamp at the right side of his face in such a manner that his view of the appellants who were just three meters away should not in the least be impeded. Moreover, because of the bright light of the "Petromax" lamp, identification of the culprits was not an improbability. Appellants further argued that it was improbable for Delfino to have recognized Jose Gustilo and Filomeno Macalinao, Jr., since he saw them for the first time under the light of a kerosene lamp, and he was gripped by fear and lying on the floor with his face downward. Contrary to appellants' contentions, fear does not necessarily detract from a person's physical ability to observe. It should be borne in mind that a person will easily remember another who does him harm, because consciously or unconsciously he turns his attention to the offender.[2] At any rate, according to Delfino, he was looking straight at the appellants whose faces were clearly visible to him under the bright light of the kerosene lamp in the sala. "Q. Those persons looked at you squarely and plainly, without any attempt of hiding their identities, is that not correct? A. I do not know whether they were looking at me, but I was looking at them. Maybe they were looking at me also. Q. The robbers did not shoot at this small lamp or put out its light? A. No, this lamp was placed at the center of the sala. Q. The two men nonchalantly were carrying their arms under the brightness of the light of this lamp, this kerosene lamp, correct? A. Yes, they were lighted by that lamp." (pp. 364-365, t.s.n., italics supplied). Appellants further argued that it is doubtful for Marietta Macias-Olarte to have recognized appellants Walter Apa and Ricardo Dairo because she only saw the illumination of the moon but did not see the moon itself. This argument ignores the possibility that a person may be aware of the presence of the moon in the sky not necessarily because he looks at it directly but because of its manifestations, such as its effulgence on the structures on the ground. Moreover, Olarte recognized Walter Apa and Ricardo Dairo because of their proximity to her. Neither can Francisco Urbano's identification of Walter Apa and Ricardo Dairo be successfully impugned. Urbano identified the two on the basis of distinct physical characteristics which have not been denied, such as the fact that Walter Apa was the taller one and stoop-shouldered, while Ricardo Dairo was the shorter one. Urbano clearly saw the two when they were only a meter from him, under bright moonlight. To find out the identities of the perpetrators of the offense, Chief

of Police Viran took to Sinayawan pictures which were provided by Col. Romero. These pictures were shown to the witnesses. The witnesses, Francisco Urbano and Marietta Macias-Olarte, picked out the pictures of Walter Apa (Exhibit "S") and Ricardo Dairo (Exhibit "T") and told Chief Viran that the two were among those who had robbed and killed Candido Macias. On this basis, Apa and Dairo were arrested. Nor can the circumstance that Francisco Macias could only identify Jose Gustilo, although he was with the other perpetrators of the crime, render the identification of appellants made by the other witnesses incredible. It should be recalled that there were circumstances which could have prevented Francisco Macias from recognizing the others. Thus, the moment Francisco Macias set foot on the house of the deceased he was fired upon, then ordered to lie flat, face downwards, on the floor. When he tried to move his head, he was immediately kicked by two of the assailants. When he was ordered to get the key, he was not even allowed to turn his head to look at the men behind him. When he got the key from his house, he noticed that his escort concealed himself behind the coconut trees. It was only appellant Jose Gustilo whom he had the best opportunity to recognize because Gustilo sat by his side in the jeep and took over the steering wheel from him. Even while he was in the jeep, whenever he attempted to look at the other people in the back of the jeep, he was immediately hit with the butt of a pistol. He was hogtied and left on the road. He remembered that Gustilo had a moustache and had a light complexion. Nor are we persuaded that the prosecution eyewitnesses should be disbelieved because they are related to the victim. It is true that except for Francisco Urbano, who was a tenant of the deceased, the rest are related to the victim, either by affinity or consanguinity. But relationship to the victim, standing by itself, does not prove that they are prejudiced and biased, considering that their testimonies are clear and convincing and corroborated by other facts and circumstances.[3] As the then Solicitor General Felix V. Makasiar (now Associate Justice of this Court) aptly observed: " * * * it does not appear that the prosecution eyewitnesses had some grievances or ill-feelings against any of the appellants; the record does not disclose any untoward or wicked motive which could have induced them to twist the truth or perjure themselves in a prosecution for a heinous crime as the present case. The prosecution witnesses were subjected to extreme cross-examination by defense counsel, and the falsity of their declaration, if indeed there were, could have been ferreted and exposed." The contention that there could not be robbery with homicide in this case, because there is "no evidence that appellants took and carried away the money" and the personal properties of Candido Macias, overlooks the fact that the taking and carrying away of the money and the personal properties of the deceased has been sufficiently established by testimony of the witnesses, confirmed and corroborated by the admissions of appellants Puesca, Gustilo and Montaño. Francisco Macias distinctly heard "sounds as if something have (sic) been ransacked" and that "the aparador which was in the sala, fell with a loud thud on the floor." Marcela Macias also declared that the intruders were ransacking the things inside their room. After the departure of the perpetrators of the offense, she saw that things were scattered in their room, the trunk containing their money appeared to have been forcibly opened and the P20,000 kept there, which was part of the proceeds of the sale of their land, was gone. So were the deceased's pistol and a pair of new pants. When the Chief of Police went to the crime scene, he found many things in disarray in the sala. The aparador was lying on the floor broken, and papers and other things were scattered. This robbery was further confirmed by the recitals contained in the confessions of Puesca, Gustilo and Montaño (Exhibits "L", "R" and "Q"), wherein they stated that when they met in the Holiday Canteen at Sta. Ana, Davao City on November 25, 1960 at about 7:00 o'clock in the evening, they planned originally to raid and rob the Christensen Plantation, but upon seeing the plantation well-guarded, they changed their plans and decided to rob the Macias family in Sinayawan; that they proceeded to Sinayawan in a jeep, alighting from the jeep at a distance of about 200 meters; that they walked to the house of Candido Macias; and that therein they committed the crime in a manner confirmatory to that testified to by the prosecution witnesses. According to Puesca, Felimon and Carding were the ones who took the cash from the Macias' house. Regarding the killing of Candido Macias, his wife testified that when the robbers came up the sala, she and her husband and two grandchildren were sitting by the dining table; that she was ordered to lie flat on the floor; that she saw her husband stand up then walk around the table; and that suddenly she heard two gun reports and saw her husband fall down. The evidence clearly and convincingly demonstrate that the appellants were engaged in a conspiracy to effect the object of their criminal purpose. Since conspiracy by its very nature is formed in utmost secrecy, it can seldom be proved by direct evidence.[4] Conspiracy is "generally proved by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished. If it be proved

that the defendants pursued by their acts the same object, one performing one part and another a part of the same, so as to complete it, with a view to the attainment of the same object, one will be justified in the conclusion that they were engaged in a conspiracy to effect the object * * *." [5] In contrast with evident premeditation, which requires as an essential condition that a sufficient period of time must elapse to afford full opportunity for premeditation and reflection on the possible consequences of the intended criminal act, conspiracy arises on the very moment the plotters agree, expressly or impliedly, to commit the felony and forthwith decide to accomplish it. Once this is established, each and everyone of the conspirators is made criminally liable for the crime committed by any member of the conspiracy. [6] The Solicitor General cites the following facts to show the existence of conspiracy: First, upon breaking into the premises of the house of the victim, Candido Macias, three men went upstairs into the house, two of them being appellants Jose Gustilo and Filomeno Macalinao, Jr., both with drawn guns, surprising the inmates Candido Macias and his wife, Marcela Macias, who were then having supper (pp. 489, 330, 321-322, t.s.n.). Candido Macias was ordered to lie down on the floor but he did not obey and walked towards the sala instead (p. 490, t.s.n.), whereupon he was shot. Thereafter, appellants ransacked the room of the victim, forced open the trunk and got therefrom P20,000.00 in cash (pp. 492, 502, t.s.n.). They also took the victim's new pants and clothes and his gun from his bed (p. 501, t.s.n.). Two others, appellants Arcadio Puesca and Magno Montaño, went under the house and immobilized Anacleto Delfino and Fortunato Macias who were then repairing a jeep (pp. 315-317, t.s.n.). They pointed their guns at them and ordered them not to move (pp. 314-315, t.s.n.). Fortunato, however, succeeded in running away towards the coconut plantation (p. 362, t.s.n.). Anacleto Delfino was told to go upstairs where he was made to lie flat on the floor (p. 320, t.s.n.). While all this was going on in the house, appellants Walter Apa and Ricardo Dairo, who were armed with carbines, were standing outside apparently on guard (pp. 417, 418, 131-134, t.s.n.). When Francisco Macias came to the house, he was ordered to get the key to the jeep from his house, and appellants Apa and Dairo followed Francisco from behind (pp. 419, 421, t.s.n.), passing through the backyard of the house of Anacleto Delfino, on their return to the place where the jeep was parked (pp. 135-137, t.s.n.). Francisco Macias having gotten the ignition key of the jeep, all of the appellants boarded the jeep, and with Francisco Macias driving it, the appellants left the scene of the crime (pp. 421-423, t.s.n.). Second, the confessions of appellant Arcadio Puesca (Exhibit "L"), appellant Magno Montaño (Exhibit "Q") and appellant Jose Gustilo (Exhibit "R") admit their participation in the commission of the crime at the house of Macias (pp. 924-992, 988-1133, t.s.n.). The confession of Jose Gustilo, however, was the only one which was unsigned as he afterwards refused to affix his signature thereto; but his confession was tape recorded and from the replay of the recording made during the trial, it may be seen that his confession was freely and voluntarily given (pp. 732, 748-749, 782, 791, 816-817, 828-836, 924-992, t.s.n.). Towards the end of his tape recorded confession, the following questions and answers were given: "In your confession now given to me, Peng, the incident of the hold-up in Makilala, the hold-up in Sinayawan, Hagonoy, Davao, in the house of the late Candido Macias, were you able to relate everything which you think you would tell me before you offered to make that confession? "Yes, sir, because I narrated all the things what I have already in mind. "You would like to tell me now that all the things which you just narrated are the truth and nothing but the truth? "Yes, sir. "Are you going to confirm the truth of the statement, which you told me now? "Yes, sir. "Are you going to affirm your confession even though these statements which you have narrated to me will be used against you? "Yes, sir." (pp. 990-991, t.s.n.). The confessions of Arcadio Puesca, Magno Montaño and Jose Gustilo are admissible against them. Their confessions could be considered as corroborative evidence of the testimonies of prosecution eyewitnesses pointing to them as the culprits who participated in the commission of the crime. Third, the testimonies of prosecution eyewitnesses find corroboration in the extrajudicial confessions of appellants Puesca alias "Big Boy", Gustilo alias "Peping", and Montaño alias "Edol", insofar as said confessions tell about the participation of their other companions in the commission of the crime. Thus, Arcadio Puesca, in his extrajudicial confession, named Jose Gustilo alias "Peping", Magno Montaño alias "Edol", Felimon, Carding, Mariano and two others whose names he did not know, as his companions in the perpetration of the crime (Exhibit "L", folder of exhibits; pp. 774-775, t.s.n.). He narrated how the plan to rob the Macias family was conceived, as well as the manner in which they implemented the plan. The person referred to as "Felimon", he said, was appellant Filomeno Macalinao, Jr. (p. 731, t.s.n.). Thus, in the tape recorded confession of appellant Jose Gustilo, he declared that his confederates in the crime were Arcadio Puesca alias "Big Boy", Magno Montaño alias "Edol",

Filomeno Macalinao, Mariano, Carding and others (Exhibits "R", folder of exhibits; pp. 927-928, 930-931, 935, 940, 942-945, 946-952, 958-960, 963-965, 966, 968-969, 970-981, t.s.n.). And thus, in the confession of Magno Montaña alias "Edol", which was in his own handwriting and which was also tape recorded, he mentioned Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping" and Felimon Macalinao as his confederates in staging the hold up (pp. 999-1005, 1119-1120, 1122, t.s.n.; Exhibit "Q", folder of exhibits). According to his confession, it was Gustilo who shot to death the late Candido Macias (pp. 1002, 1122-1123, t.s.n.), and that it was Macalinao who got the .38 caliber pistol of the deceased (p. 1128, t.s.n.). Both declarants corroborated the narration given by Puesca. It is true that an extrajudicial confession is admissible only against the person who made it, but it is also settled that such confession is admissible as corroborative evidence of other facts that tend to establish the guilt of his co-defendants.[7] This Court has also allowed its admission against a co-accused as circumstantial evidence to show the probability of the co-conspirator having actually participated in the commission of the crime.[8] Fourth, the claim of the defense that the confessions of appellants Puesca, Gustilo and Montaña were extracted from them through force and violence is not supported by the evidence. No motive on the part of the investigating officials or officers has been proven that could have impelled them to concoct the facts narrated in the extrajudicial confessions. Judging from the details of the narration given therein, only the appellants could have supplied the facts. With respect to the extrajudicial confessions of appellants Puesca and Montaña, Judge Augusto Fernandez, before whom the confessions had been signed and sworn to, declared that the affiants read the contents thereof, and confirmed the said contents as true and correct, after which they freely affixed their signatures on the documents (pp. 828-831, t.s.n.). With respect to the extrajudicial confession of appellant Gustilo, it was first orally given and tape recorded, after which it was put down in writing (pp. 782, 791, 815, t.s.n.). However, appellant Gustilo refused to sign his confession before the justice of the peace without giving any reason for such refusal (p. 834, t.s.n.). The circumstance that he was able to refuse, without having been punished or maltreated for such refusal, is a strong indication that his confession was not extracted from him by force or intimidation. As a matter of fact, the tape recording of his confession shows that it was voluntarily given. The trial judge who heard the replay of Gustilo's confession could have surely noted from the manner in which appellant gave his answers if he had been maltreated (pp. 924-992, t.s.n.). The trial judge was positive that the verbal confession had all the indicia of voluntariness. The killing of Candido Macias was committed "by reason or on occasion of the robbery".[9] The original design of the perpetrators of the offense comprehended robbery in the dwelling of the victim. There is robbery with homicide if the homicide resulted by reason or on the occasion of the robbery. Thus, in *Mangulabnan*,[10] this Court stated that in order to determine the existence of the crime of robbery with homicide, the rule is that it is enough that a homicide resulted by reason or on the occasion of the robbery, and it is immaterial that the death supervened by mere accident. It is sufficient that the homicide was produced by reason or on occasion of the robbery, inasmuch as it is only the result obtained, without reference or distinction as to the circumstances, causes, modes or persons intervening in the commission of the crime, that has to be taken into consideration. There is homicide by reason of the robbery when there is a direct relation, an intimate connection, between the robbery and the killing, whether the killing be prior or subsequent to the robbery or whether both crimes be committed. Finally, counsel for appellant Filomeno Macalinao, Jr. poses the query --- if by the ruling in *People v. Apduhan*[11] robbery with homicide (subdivision 1, Article 294, Revised Penal Code) is not comprehended in Article 295, how would the circumstance of "band" be appreciated? The term "band" is defined both in paragraph 6, Article 14 and Article 296 of the Revised Penal Code. "Band" is a generic aggravating circumstance in robbery with homicide or robbery with rape, intentional mutilation or with physical injuries, resulting in insanity, impotency and blindness (subdivision 2, Article 263, Revised Penal Code), which means that it can be offset by a generic mitigating circumstance. But if "band" is present in the other kinds of robbery with violence mentioned in paragraphs 3, 4 and 5 of Article 294, then it is a qualifying or inherent circumstance which raises the penalty to the maximum period and cannot be offset by any generic mitigating circumstance. This qualifying circumstance should be expressly alleged in the information. In the case at bar, the crime committed is robbery with homicide. Considering that the crime was committed by six armed men, the circumstance of "band" should be considered merely as a generic aggravating circumstance. It is also obvious that the perpetrators of the offense waited for the night before committing the robbery to better accomplish their purpose. The trial court, therefore, correctly found the existence of "band" and "nocturnity".

These two aggravating circumstances, when occurring jointly in the commission of a crime, are generally treated only as one aggravating circumstance. Nevertheless, they may be considered separately when their elements are distinctly perceived and can subsist independently, revealing a greater degree of perversity.[12] In the instant case, it is not necessary to decide whether or not the two should be treated distinctly from each other, since the existence of one is sufficient for the imposition of the maximum penalty, and the concurrence of an additional circumstance will not alter the same.[13] However, the indemnity of P6,000.00 due the heirs of the deceased should be increased to P12,000.00. On July 13, 1977, during the pendency of this appeal, appellant Jose Gustilo alias "Peping" died at the New Bilibid Prisons Hospital. In view thereof, on September 8, 1977, this Court issued a Resolution, which states: " * * Considering the letter dated August 2, 1977 of Gerardo N. San Pedro, Administrative Officer IV, Bureau of Prisons, informing the Court of the death of appellant Jose Gustilo alias "Peping" last July 13, 1977, as well as the comment of the Solicitor General thereon, the Court Resolved to DISMISS the case as to appellant Jose Gustilo." (p. 580, rollo). WHEREFORE, except for the dismissal of the case as against Jose Gustilo alias "Peping" and with the foregoing modification as to the amount of indemnity, the decision appealed from is hereby AFFIRMED. SO ORDERED. Teehankee, Barredo, Antonio, Concepcion, Jr., Santos, Fernandez, and Guerrero, JJ., concur. Castro, C.J., concur in the opinion of Justice Aquino. Fernando and Makasiar, JJ., no part. [1] L-27835, Walter Apa, et al. v. Court of First Instance of Davao. [2] People v. Abatayo, L-2315, January 29, 1950. [3] People v. Miranda, L-18508, Feb. 29, 1964 and People v. Dajay, L-18509, Feb. 29, 1964, 10 SCRA 385; People v. Asmawil, L-18761, March 31, 1965, 13 SCRA 497; People v. Libed, L-20431, June 23, 1965, 14 SCRA 410. [4] People v. Cadag, L-13830, May 31, 1961, 2 SCRA 388. [5] People v. Cabrera, 43 Phil. 64. [6] People v. Monroy, et al., L-11177, October 30, 1958, 104 Phil. 759; People v. Abrina, et al., L-7840, December 24, 1957, 102 Phil. 695. [7] People v. Cabiltes, L-18010, Sept. 25, 1968, 25 SCRA 112, citing People v. Simbahon, et al., L-18073-75, Sept. 30, 1965, 15 SCRA 83. See also People v. Condemena, et al., L-22426, May 29, 1968, 23 SCRA 910; Moran, Comments on the Rules of Court, p. 255, Vol. No. 5, 1963 Ed. citing U.S. v. Perez, 32 Phil. 163. [8] People v. Lumahang, 94 Phil. 1048, L-6357, April 7, 1954; People v. Condemena, supra. [9] Article 294, par. 1, Revised Penal Code. [10] People v. Mangulabnan, L-8919, Sept. 28, 1956, 99 Phil. 992. [11] L-19491, August 30, 1968, 24 SCRA 798. [12] People v. Santos, et al., L-4189, May 21, 1952, 91 Phil. 320. [13] Ibid. CONCURRING OPINION AQUINO, J.

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PER CURIAM:

Automatic review of the judgment of the Davao Court of First Instance in Criminal Case No. 6813, finding appellants Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping", Magno Montaña alias "Edol", Filomeno Macalinao, Jr. alias "White", Walter Apa and Ricardo Dairo alias "Carding" guilty beyond reasonable doubt of the crime of Robbery in Band with Homicide, attended by the aggravating circumstance of nocturnity, and imposing upon them the penalty of DEATH, ordering them to indemnify jointly and severally the heirs of the deceased Candido Macias in the amount of P6,000.00 and P20,000.00, the latter sum representing the money robbed, and to pay the costs.

The following facts were the basis of the trial court's judgment: On the early evening of November 27, 1960, Candido Macias and his wife, Marcela Macias, were taking supper in their house located in Barrio Sinayawan. Sinayawan is a barrio of Hagonoy, Davao del Sur and lies near the road to Digos. Under the house were their son, Fortunato Macias, and son-in-law, Anacleto Delfino. Fortunato Macias was repairing a jeep, assisted by Anacleto Delfino who was holding a lighted "Petromax" lamp.

Suddenly, strangers with firearms unceremoniously entered the house. Three of them went upstairs. Marcela Macias and Candido Macias heard the voice of one of them emanating from the sala, ordering the occupants of the house to lie down on the floor. Candido Macias left the table and went out to the sala. Two gun reports were

heard and Candido Macias instantly slumped to the floor. Marcela Macias stood up and walked towards her husband but before she could reach him, she was met by one of the intruders who ordered her to lie flat on the floor, otherwise all of them would die.

Someone under the house also directed Fortunato Macias and Anacleto Delfino not to move. Turning to his left, Fortunato Macias saw two armed men. He immediately ran towards the coconut plantation near the house where he took refuge. Anacleto Delfino also turned around to see who those persons were. When he held his lamp up, he saw two gunmen, one tall and the other short. He identified one of them as appellant Arcadio Puesca and the other as appellant Magno Montaño. According to Delfino, appellant Puesca fired at him and he was hit between the elbow and the armpit. Delfino brought down the lamp and lay flat on his belly. When he was brought to the sala which was then lighted by a "Petromax" lamp, Delfino saw his father-in-law, Candido Macias, lying on the floor near the door. He was already dead. He also noticed two persons with firearms whom he identified as appellants Jose Gustilo and Filomeno Macalinao, Jr.. At that time, Marcela Macias noticed that the intruders were ransacking the house. The trunk in the master's bedroom was forcibly opened, and the sum of P20,000.00 was taken. This sum represented the proceeds from the sale of a parcel of land for P17,000.00, together with their income from a twenty-four-hectare riceland and their three jeeps for hire. They also took the gun of Candido Macias which was lying on the bed, as well as his new pair of pants and other clothes. The aparador in the sala was toppled down by appellants Gustilo and Macalinao.

When Francisco Macias, another son of Candido Macias, heard the gun reports he rushed to his father's house which was about eighty (80) meters away from his home. As he approached the house, two persons with carbines who were in the kitchen fired upon him. He was ordered to crawl to the sala and to lie flat on his stomach on the floor. He observed that the house was being ransacked. When Francisco Macias tried to look around, two men kicked him on the head. Later, Francisco was told to go downstairs and to get the key of one of the jeeps from his house. As he went down, he was followed by two other armed men.

The gun reports in the house of Candido Macias were also heard by the spouses Marietta Macias-Olarte and Epifanio Olarte, daughter and son-in-law, respectively, of Candido Macias. They immediately left their house to find out what was happening in Candido Macias' house. On their way thereto, they heard bullets whistling over their heads. They sought shelter in the house of Anacleto Delfino, whose wife, Antonia Macias, was the sister of Marietta Macias-Olarte. Francisco Urbano, a tenant of Candido Macias, happened to reside at that time in said house. When the firing subsided, Marietta Macias-Olarte, Epifanio Olarte, Antonia Macias and Francisco Urbano went to the backyard of Delfino's house. The distance from the house of Anacleto Delfino to the house of Candido Macias was some forty (40) meters. The group of Marietta Macias-Olarte then saw three men coming from the house of Candido Macias. As the three men neared their place, Epifanio Olarte tried to talk to Francisco Macias, but he was immediately pushed back and one of the escorts of Macias fired at him. Marietta Macias-Olarte and Francisco Urbano testified that they recognized the tall, stoop-shouldered gunwielder as Walter Apa because of the light of the moon and his proximity to them. They also recognized the shorter fellow as appellant Ricardo Dairo, whom they saw was carrying a gun. Appellant Ricardo Dairo remained with the group of Marietta, while Francisco Macias and appellant Walter Apa continued on their way. Francisco Macias was not allowed by appellant Apa to turn his face sideways. After they secured the key from his house, Francisco Macias and appellant Walter Apa returned to the house of Candido Macias, passing through the backyard of the house of Delfino where they were joined by appellant Ricardo Dairo.

Under the house of Candido Macias, Francisco Macias started the motor of one of the jeeps, and thereafter, eight of the men boarded the jeep. Apparently to prevent pursuit, the tires of the other jeep were fired upon. The jeep which was driven by Francisco proceeded towards Barrio Liling on the way to Davao City. After a while

Francisco Macias was ordered to stop the vehicle and someone alighted from the rear, and Francisco Macias was ordered to move over to the center of the front seat. According to Francisco Macias, he was able to recognize fully the man who took over the steering wheel. He identified him as appellant Jose Gustilo. When Francisco tried to look sideways, one of them hit him on the head with a pistol. After the jeep had run for more than one hour, it was stopped. Francisco Macias went down the jeep and one of the men said that he should be shot. Francisco Macias pleaded for his life. Appellant Jose Gustilo intervened and suggested to his companions that they spare Francisco's life. Francisco Macias was then hogtied and stripped of his clothes. The men then fled away in the jeep. After their departure, Francisco was able to untie his feet, and he walked about two kilometers to a friend's house, where he borrowed a pair of pants and shirts. Later, he boarded a passenger bus for Digos, a municipality adjacent to Hagonoy.

The robbery and killing in the house of Candido Macias were reported that same night, November 27, 1960, by Francisco Macias to Antonio Viran, Chief of Police of Hagonoy, Davao. Accompanied by police officers, Chief Viran went to the house of Candido Macias in Barrio Sinayawan and found Candido Macias dead. The furniture in the house were in topsy-turvy condition. The officer interviewed persons in the house and the latter assured him that they could recognize the culprits. The get-away jeep was recovered near a bridge on the road to Davao City. The following morning, Chief Viran returned to the house of Candido Macias, accompanied by Mayor Llanos of Digos, Zosimo Melendez, Chief of Police of Digos, Sgt. Baño and Lt. Javier of the Digos Police Force. Chief Viran found P17.00 in one-peso bills, while Chief Melendez found empty shells in the sleeping room of Candido Macias, and a bullet slug on the floor of the sala. They also saw downstairs a jeep with flat tires and a 'Petromax' lamp destroyed by bullets.

Chief Viran reported the incident to the Provincial Governor of Davao. Col. Jacinto Romero, Chief of Police Affairs Unit in the Office of the Provincial Governor, then joined hands with the police to solve the robbery-killing incident.

On December 1, 1960, Sgt. Lucio Baño met one Roger Cahilog who informed him that appellants Arcadio Puesca alias "Big Boy" and Jose Gustilo alias "Peping", slept in his house on the night of November 26, 1960 and that he overheard the two talking about robbery. He thus became suspicious of the two.

On December 2, 1960, appellants Puesca and Jose Gustilo were apprehended by Sgt. Baño and Lt. Javier in Davao City. On December 10, 1960, appellant Puesca, who was detained in the municipal jail of Digos, told Sgt. Baño and Chief Melendez that he would like to see Mayor Llanos in order to confess his participation in the crime. In the evening of that date, Mayor Llanos met appellant Puesca in his office on the second floor of the municipal building. Appellant Puesca was questioned by the Mayor on his participation. Present were Chief Melendez, Chief Viran, Lt. Javier and Lei Hong, owner of a tape recording machine. Appellant Puesca's investigation was tape recorded by Lei Hong. Puesca confessed that he was one of the gang who entered the house of Macias and committed the robbery and killing therein. He mentioned as his companions Jose Gustilo alias 'Peping', Magno Montaña alias 'Edol', Felimon, Carding and Mariano. He said that there were others who were with them whose names he did not know but whom he could identify if he saw again. The confession of appellant Puesca was taken down in writing (Exhibit "L").

Appellant Jose Gustilo, like Puesca, admitted to Mayor Llanos his participation in the commission of the crime and mentioned as his companions Arcadio Puesca alias "Big Boy", Magno Montaña alias "Edol", Filomeno Macalinao, Carding, Mariano and others. The questioning of appellant Gustilo was tape recorded by Lei Hong, and was taken down in writing (Exhibits "R", "R-1", "R-2"; "U", "U-1"; "V", "V-1", "V-2"; "W", "W-1" and "W-2").

Following the confession of appellants Puesca and Gustilo, appellant Magno Montaña alias "Edol" was arrested by Chief Viran. In his own handwriting (Exhibits "Q", "Q-1" to "Q-3"), appellant Montaña confessed his guilt and named as his confederates in the crime Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping" and Felimon Macalinao. Appellant Montaña's confession was tape recorded by Lei Hong in the presence of Mayor Llanos and the police officers.

The confessions of appellants Puesca and Montaña (Exhibits "L" and "Q") were subsequently subscribed and sworn to by the declarants before Augusto H. Fernandez, Justice of the Peace of Digos. Appellant Gustilo, on the other hand, refused to sign his confession (Exhibit "R") and did not give any reason for his refusal.

On December 15, 1960, appellant Filomeno Macalinao, Jr. was arrested at the Sasa Airport, Davao City, as he was about to board a plane for Cebu. In a confrontation with appellant Puesca and later with appellant Gustilo, he was identified by the two as the person they had mentioned in their confessions as their companion in the commission of the crime.

In order to identify all the culprits, Chief Viran showed to Francisco Urbano and Marietta Macias-Olarte the pictures of some police characters, from which the two picked out the pictures of appellant Walter Apa (Exhibit "S") and Ricardo Dairo (Exhibit "T"). They told the officer that Apa and Dairo were among those whom they saw on the night of the incident. Appellants Apa and Dairo were picked up by the police and confined in jail.

Sometime in December 1960, Marietta Macias-Olarte, Anacleto Delfino, Francisco Macias and Francisco Urbano were invited to the municipal jail of Digos, where, from a group of detained prisoners, they pointed to appellants Arcadio Puesca, Jose Gustilo and Magno Montaña as three of the men who had participated in the robbery and killing of Candido Macias. Subsequently in January 1961, Francisco Urbano was called to the municipal building of Hagonoy, and from among a group of persons he pointed to appellant Ricardo Dairo as one of the culprits he recognized.

The cadaver of Candido Macias was autopsied by Dr. Julio M. Layug, Municipal Health Officer of Digos, Davao, as the Municipal Health Officer of Hagonoy was away. The result of his autopsy examination is found in the report, Exhibit "A", and reads as follows:

"1. Gunshot wound 3 inches above the left mammary gland more on the left side of the manubrium measuring 1 cm. in diameter, penetrating the skin, muscle, aorta of the heart, lung and the slug was lodged between the right 8th and 9th ribs at the back and between the muscle and the skin between the spinal column and the right scapula. The slug found was caliber 38.

"2. Gunshot wound 3 inches below the left mammary gland externally at the left axillary line measuring 1 cm. in diameter, penetrating the skin, muscle, lung, liver, and the right lumbar region. The gunshot wound at this place of exit measures 1-1/2 cms, in diameter and in overt position."

Dr. Layug testified that the second shot was fired while the victim was falling down, and that death supervened in only three or four minutes. The cause of death was due to "shock with internal hemorrhage caused by the gunshot wounds".

Counsel de oficio for all of the appellants maintains that the court a quo erred: (1) in giving more weight and credence to the "biased and unbelievable declarations of relatives of the deceased"; (2) in admitting and believing the confessions of some of the appellants which "were extracted through third degree"; and (3) in denying the motion of appellants for new trial. In a supplemental brief, counsel for appellant Filomeno Macalinao, Jr. argues

that the evidence on record, outside of the confessions, is inadequate to prove conspiracy; that there is no evidence that appellants took and carried away the money, pistol and clothes of Candido Macias; that none of the witnesses saw the slaying of Candido Macias; that the identification of Macalinao by Anacleto Delfino is "shaky and indecisive"; and that nocturnity should not have been considered as an aggravating circumstance.

To begin with, appellants can no longer raise in issue the denial of their motion for new trial. They have previously challenged before this Court by certiorari the correctness of the order of the court a quo denying their motion for new trial.[1] This Court found the petition devoid of merit, hence, the same was dismissed on July 28, 1967. Entry of judgment was made on September 20, 1967.

On the question of sufficiency of the evidence as basis for the conviction of appellants, the Court finds that the evidence clearly shows that appellants were positively identified by the prosecution witnesses as participants in the crime. Thus, Anacleto Delfino declared that appellants Arcadio Puesca and Magno Montaño were the persons he saw under the house of Candido Macias, his father-in-law; that he recognized them because he raised the lamp higher to find out who they were; and that it was appellant Arcadio Puesca who fired at him, hitting him between the elbow and the armpit. He further stated that when he placed the lamp down on the ground, Puesca shot the lamp and ordered Anacleto to go upstairs. Puesca admitted in his confession that he fired at a man holding a "Petromax" "with the intention of hitting the light and to scare the man * * *" (Exhibit "L"). Anacleto Delfino also testified that upon reaching the second floor of the house, he saw two armed men whom he identified as appellants Jose Gustilo and Filomeno Macalinao, Jr.. After he was made to lie on the floor, he heard sounds in the room of something being broken. According to Puesca, a certain Felimon and Jose Gustilo were the first to go up the house followed by Magno Montaño, then he heard two shots fired inside the second floor of the house. This was confirmed by Magno Montaño (Exhibit "Q-1") who stated that Jose Gustilo and Felimon Macalinao went up the house and that after he heard those shots he asked Jose Gustilo why he shot the victim, and Gustilo replied that he "wanted to challenge me" (Exhibit "Q-2").

Marietta Macias-Olarte and Francisco Urbano testified that appellants Walter Apa and Ricardo Dairo were the ones who escorted Francisco Macias when they came from the house of Candido Macias, passing through the backyard; that when they talked with Francisco Macias and Olarte tried to place his hands on the shoulders of Francisco, Walter Apa pushed him; that Apa fired at Olarte who fell to the ground. Marietta and Francisco testified that they recognized Walter Apa as the tall stoop-shouldered person holding a gun and that the shorter fellow, also armed with a carbine, was Ricardo Dairo. After Francisco Macias and Walter Apa had proceeded to the former's house, it was Ricardo Dairo who guarded Olarte, Antonio Macias, Delfino and Francisco Urbano. After a few minutes, Francisco Macias returned with Apa and then all of them returned to the house of Candido Macias.

Francisco Macias declared that two persons armed with carbines fired at him; that while lying face downwards on the floor, he heard "sounds as if something have (sic) been ransacked * * * persons going down * * *. The aparador was (sic) tumbled down * * *." He further testified that when he drove the jeep of the deceased with the appellants aboard, it was appellant Jose Gustilo who took over the wheel from him. In their attempt to impugn the credibility of the testimony of Anacleto Delfino, appellants contended that this witness could not have recognized appellants Arcadio Puesca and Magno Montaño, much less Jose Gustilo and Filomeno Macalinao, Jr.. It is claimed that it would have been difficult for Anacleto Delfino to recognize Arcadio Puesca and Magno Montaño because when Delfino turned around and put up the lamp, the lamp blocked Delfino's face, preventing him from getting a clear view of the two. This contention, however, is not borne by the facts. When the witness, Anacleto Delfino, held the lighted lamp, he did not hold it directly in front of his face. He held the lamp at the right side of his face in such a manner that his view of the appellants who were just three meters away should not in the least

be impeded. Moreover, because of the bright light of the "Petromax" lamp, identification of the culprits was not an improbability.

Appellants further argued that it was improbable for Delfino to have recognized Jose Gustilo and Filomeno Macalinao, Jr., since he saw them for the first time under the light of a kerosene lamp, and he was gripped by fear and lying on the floor with his face downward. Contrary to appellants' contentions, fear does not necessarily detract from a person's physical ability to observe. It should be borne in mind that a person will easily remember another who does him harm, because consciously or unconsciously he turns his attention to the offender.[2]

At any rate, according to Delfino, he was looking straight at the appellants whose faces were clearly visible to him under the bright light of the kerosene lamp in the sala.

"Q. Those persons looked at you squarely and plainly, without any attempt of hiding their identities, is that not correct?

A. I do not know whether they were looking at me, but I was looking at them. Maybe they were looking at me also.

Q. The robbers did not shoot at this small lamp or put out its light?

A. No, this lamp was placed at the center of the sala.

Q. The two men nonchalantly were carrying their arms under the brightness of the light of this lamp, this kerosene lamp, correct?

A. Yes, they were lighted by that lamp." (pp. 364-365, t.s.n., italics supplied).

Appellants further argued that it is doubtful for Marietta Macias-Olarte to have recognized appellants Walter Apa and Ricardo Dairo because she only saw the illumination of the moon but did not see the moon itself. This argument ignores the possibility that a person may be aware of the presence of the moon in the sky not necessarily because he looks at it directly but because of its manifestations, such as its effulgence on the structures on the ground. Moreover, Olarte recognized Walter Apa and Ricardo Dairo because of their proximity to her.

Neither can Francisco Urbano's identification of Walter Apa and Ricardo Dairo be successfully impugned. Urbano identified the two on the basis of distinct physical characteristics which have not been denied, such as the fact that Walter Apa was the taller one and stoop-shouldered, while Ricardo Dairo was the shorter one. Urbano clearly saw the two when they were only a meter from him, under bright moonlight. To find out the identities of the perpetrators of the offense, Chief of Police Viran took to Sinayawan pictures which were provided by Col. Romero. These pictures were shown to the witnesses. The witnesses, Francisco Urbano and Marietta Macias-Olarte, picked out the pictures of Walter Apa (Exhibit "S") and Ricardo Dairo (Exhibit "T") and told Chief Viran that the two were among those who had robbed and killed Candido Macias. On this basis, Apa and Dairo were arrested.

Nor can the circumstance that Francisco Macias could only identify Jose Gustilo, although he was with the other perpetrators of the crime, render the identification of appellants made by the other witnesses incredible. It should be recalled that there were circumstances which could have prevented Francisco Macias from recognizing the others. Thus, the moment Francisco Macias set foot on the house of the deceased he was fired upon, then ordered to lie flat, face downwards, on the floor. When he tried to move his head, he was immediately kicked by two of the assailants. When he was ordered to get the key, he was not even allowed to turn his head to look at the men behind him. When he got the key from his house, he noticed that his escort concealed himself behind the coconut trees. It was only appellant Jose Gustilo whom he had the best opportunity to recognize because Gustilo sat by his side in the jeep and took over the steering wheel from him. Even while he was in the jeep, whenever he attempted to look at the other people in the back of the jeep, he was immediately hit with the butt of a pistol. He was hogtied and left on the road. He remembered that Gustilo had a moustache and had a light complexion.

Nor are We persuaded that the prosecution eyewitnesses should be disbelieved because they are related to the victim. It is true that except for Francisco Urbano, who was a tenant of the deceased, the rest are related to the victim, either by affinity or consanguinity. But relationship to the victim, standing by itself, does not prove that they are prejudiced and biased, considering that their testimonies are clear and convincing and corroborated by other facts and circumstances.[3]

As the then Solicitor General Felix V. Makasiar (now Associate Justice of this Court) aptly observed: "* * * it does not appear that the prosecution eyewitnesses had some grievances or ill-feelings against any of the appellants; the record does not disclose any untoward or wicked motive which could have induced them to twist the truth or perjure themselves in a prosecution for a heinous crime as the present case. The prosecution witnesses were subjected to extreme cross-examination by defense counsel, and the falsity of their declaration, if indeed there were, could have been ferreted and exposed."

The contention that there could not be robbery with homicide in this case, because there is "no evidence that appellants took and carried away the money" and the personal properties of Candido Macias, overlooks the fact that the taking and carrying away of the money and the personal properties of the deceased has been sufficiently established by testimony of the witnesses, confirmed and corroborated by the admissions of appellants Puesca, Gustilo and Montaño. Francisco Macias distinctly heard "sounds as if something have (sic) been ransacked" and that "the aparador which was in the sala, fell with a loud thud on the floor." Marcela Macias also declared that the intruders were ransacking the things inside their room. After the departure of the perpetrators of the offense, she saw that things were scattered in their room, the trunk containing their money appeared to have been forcibly opened and the P20,000 kept there, which was part of the proceeds of the sale of their land, was gone. So were the deceased's pistol and a pair of new pants. When the Chief of Police went to the crime scene, he found many things in disarray in the sala. The aparador was lying on the floor broken, and papers and other things were scattered. This robbery was further confirmed by the recitals contained in the confessions of Puesca, Gustilo and Montaño (Exhibits "L", "R" and "Q"), wherein they stated that when they met in the Holiday Canteen at Sta. Ana, Davao City on November 25, 1960 at about 7:00 o'clock in the evening, they planned originally to raid and rob the Christensen Plantation, but upon seeing the plantation well-guarded, they changed their plans and decided to rob the Macias family in Sinayawan; that they proceeded to Sinayawan in a jeep, alighting from the jeep at a distance of about 200 meters; that they walked to the house of Candido Macias; and that therein they committed the crime in a manner confirmatory to that testified to by the prosecution witnesses. According to Puesca, Felimon and Carding were the ones who took the cash from the Macias' house. Regarding the killing of Candido Macias, his wife testified that when the robbers came up the sala, she and her husband and two grandchildren were sitting by the dining table; that she was ordered to lie flat on the floor; that she saw her husband stand up then walk around the table; and that suddenly she heard two gun reports and saw her husband fall down.

The evidence clearly and convincingly demonstrate that the appellants were engaged in a conspiracy to effect the object of their criminal purpose. Since conspiracy by its very nature is formed in utmost secrecy, it can seldom be proved by direct evidence.[4] Conspiracy is "generally proved by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished. If it be proved that the defendants pursued by their acts the same object, one performing one part and another a part of the same, so as to complete it, with a view to the attainment of the same object, one will be justified in the conclusion that they were engaged in a conspiracy to effect the object * * *." [5] In contrast with evident premeditation, which requires as an essential condition that a sufficient period of time must elapse to afford full opportunity for premeditation and reflection on the possible consequences of the intended criminal act, conspiracy arises on the very moment the plotters agree, expressly or impliedly, to commit the felony and forthwith decide to accomplish it. Once this is established, each and everyone of the conspirators is made criminally liable for the crime committed by any member of the conspiracy.[6]

The Solicitor General cites the following facts to show the existence of conspiracy: First, upon breaking into the premises of the house of the victim, Candido Macias, three men went upstairs into the house, two of them being appellants Jose Gustilo and Filomeno Macalinao, Jr., both with drawn guns, surprising the inmates Candido Macias and his wife, Marcela Macias, who were then having supper (pp. 489, 330, 321-322, t.s.n.). Candido Macias was ordered to lie down on the floor but he did not obey and walked towards the sala instead (p. 490, t.s.n.), whereupon he was shot. Thereafter, appellants ransacked the room of the victim, forced open the trunk and got therefrom P20,000.00 in cash (pp. 492, 502, t.s.n.). They also took the victim's new pants and clothes and his gun from his bed (p. 501, t.s.n.).

Two others, appellants Arcadio Puesca and Magno Montaño, went under the house and immobilized Anacleto Delfino and Fortunato Macias who were then repairing a jeep (pp. 315-317, t.s.n.). They pointed their guns at them and ordered them not to move (pp. 314-315, t.s.n.). Fortunato, however, succeeded in running away towards the coconut plantation (p. 362, t.s.n.). Anacleto Delfino was told to go upstairs where he was made to lie flat on the floor (p. 320, t.s.n.).

While all this was going on in the house, appellants Walter Apa and Ricardo Dairo, who were armed with carbines, were standing outside apparently on guard (pp. 417, 418, 131-134, t.s.n.). When Francisco Macias came to the house, he was ordered to get the key to the jeep from his house, and appellants Apa and Dairo followed Francisco from behind (pp. 419, 421, t.s.n.), passing through the backyard of the house of Anacleto Delfino, on their return to the place where the jeep was parked (pp. 135-137, t.s.n.).

Francisco Macias having gotten the ignition key of the jeep, all of the appellants boarded the jeep, and with Francisco Macias driving it, the appellants left the scene of the crime (pp. 421-423, t.s.n.).

Second, the confessions of appellant Arcadio Puesca (Exhibit "L"), appellant Magno Montaño (Exhibit "Q") and appellant Jose Gustilo (Exhibit "R") admit their participation in the commission of the crime at the house of Macias (pp. 924-992, 988-1133, t.s.n.). The confession of Jose Gustilo, however, was the only one which was unsigned as he afterwards refused to affix his signature thereto; but his confession was tape recorded and from the replay of the recording made during the trial, it may be seen that his confession was freely and voluntarily given (pp. 732, 748-749, 782, 791, 816-817, 828-836, 924-992, t.s.n.). Towards the end of his tape recorded confession, the following questions and answers were given:

"In your confession now given to me, Peng, the incident of the hold-up in Makilala, the hold-up in Sinayawan, Hagonoy, Davao, in the house of the late Candido Macias, were you able to relate everything which you think

you would tell me before you offered to make that confession?

"Yes, sir, because I narrated all the things what I have already in mind.

"You would like to tell me now that all the things which you just narrated are the truth and nothing but the truth?

"Yes, sir.

"Are you going to confirm the truth of the statement, which you told me now?

"Yes, sir.

"Are you going to affirm your confession even though these statements which you have narrated to me will be used against you?

"Yes, sir." (pp. 990-991, t.s.n.).

The confessions of Arcadio Puesca, Magno Montaño and Jose Gustilo are admissible against them. Their confessions could be considered as corroborative evidence of the testimonies of prosecution eyewitnesses pointing to them as the culprits who participated in the commission of the crime.

Third, the testimonies of prosecution eyewitnesses find corroboration in the extrajudicial confessions of appellants Puesca alias "Big Boy", Gustilo alias "Peping", and Montaño alias "Edol", insofar as said confessions tell about the participation of their other companions in the commission of the crime. Thus, Arcadio Puesca, in his extrajudicial confession, named Jose Gustilo alias "Peping", Magno Montaño alias "Edol", Felimon, Carding, Mariano and two others whose names he did not know, as his companions in the perpetration of the crime (Exhibit "L", folder of exhibits; pp. 774-775, t.s.n.). He narrated how the plan to rob the Macias family was conceived, as well as the manner in which they implemented the plan. The person referred to as "Felimon", he said, was appellant Filomeno Macalinao, Jr. (p. 731, t.s.n.). Thus, in the tape recorded confession of appellant Jose Gustilo, he declared that his confederates in the crime were Arcadio Puesca alias "Big Boy", Magno Montaño alias "Edol", Filomeno Macalinao, Mariano, Carding and others (Exhibits "R", folder of exhibits; pp. 927-928, 930-931, 935, 940, 942-945, 946-952, 958-960, 963-965, 966, 968-969, 970-981, t.s.n.). And thus, in the confession of Magno Montaño alias "Edol", which was in his own handwriting and which was also tape recorded, he mentioned Arcadio Puesca alias "Big Boy", Jose Gustilo alias "Peping" and Felimon Macalinao as his confederates in staging the hold up (pp. 999-1005, 1119-1120, 1122, t.s.n.; Exhibit "Q", folder of exhibits). According to his confession, it was Gustilo who shot to death the late Candido Macias (pp. 1002, 1122-1123, t.s.n.), and that it was Macalinao who got the .38 caliber pistol of the deceased (p. 1128, t.s.n.). Both declarants corroborated the narration given by Puesca.

It is true that an extrajudicial confession is admissible only against the person who made it, but it is also settled

that such confession is admissible as corroborative evidence of other facts that tend to establish the guilt of his co-defendants.[7] This Court has also allowed its admission against a co-accused as circumstantial evidence to show the probability of the co-conspirator having actually participated in the commission of the crime.[8]

Fourth, the claim of the defense that the confessions of appellants Puesca, Gustilo and Montaño were extracted from them through force and violence is not supported by the evidence. No motive on the part of the investigating officials or officers has been proven that could have impelled them to concoct the facts narrated in the extrajudicial confessions. Judging from the details of the narration given therein, only the appellants could have supplied the facts. With respect to the extrajudicial confessions of appellants Puesca and Montaño, Judge Augusto Fernandez, before whom the confessions had been signed and sworn to, declared that the affiants read the contents thereof, and confirmed the said contents as true and correct, after which they freely affixed their signatures on the documents (pp. 828-831, t.s.n.). With respect to the extrajudicial confession of appellant Gustilo, it was first orally given and tape recorded, after which it was put down in writing (pp. 782, 791, 815, t.s.n.). However, appellant Gustilo refused to sign his confession before the justice of the peace without giving any reason for such refusal (p. 834, t.s.n.). The circumstance that he was able to refuse, without having been punished or maltreated for such refusal, is a strong indication that his confession was not extracted from him by force or intimidation. As a matter of fact, the tape recording of his confession shows that it was voluntarily given. The trial judge who heard the replay of Gustilo's confession could have surely noted from the manner in which appellant gave his answers if he had been maltreated (pp. 924-992, t.s.n.). The trial judge was positive that the verbal confession had all the indicia of voluntariness.

The killing of Candido Macias was committed "by reason or on occasion of the robbery".[9] The original design of the perpetrators of the offense comprehended robbery in the dwelling of the victim. There is robbery with homicide if the homicide resulted by reason or on the occasion of the robbery. Thus, in *Mangulabnan*,[10] this Court stated that in order to determine the existence of the crime of robbery with homicide, the rule is that it is enough that a homicide resulted by reason or on the occasion of the robbery, and it is immaterial that the death supervened by mere accident. It is sufficient that the homicide was produced by reason or on occasion of the robbery, inasmuch as it is only the result obtained, without reference or distinction as to the circumstances, causes, modes or persons intervening in the commission of the crime, that has to be taken into consideration.

There is homicide by reason of the robbery when there is a direct relation, an intimate connection, between the robbery and the killing, whether the killing be prior or subsequent to the robbery or whether both crimes be committed.

Finally, counsel for appellant Filomeno Macalinao, Jr. poses the query --- if by the ruling in *People v. Apduhan*[11] robbery with homicide (subdivision 1, Article 294, Revised Penal Code) is not comprehended in Article 295, how would the circumstance of "band" be appreciated? The term "band" is defined both in paragraph 6, Article 14 and Article 296 of the Revised Penal Code. "Band" is a generic aggravating circumstance in robbery with homicide or robbery with rape, intentional mutilation or with physical injuries, resulting in insanity, impotency and blindness (subdivision 2, Article 263, Revised Penal Code), which means that it can be offset by a generic mitigating circumstance. But if "band" is present in the other kinds of robbery with violence mentioned in paragraphs 3, 4 and 5 of Article 294, then it is a qualifying or inherent circumstance which raises the penalty to the maximum period and cannot be offset by any generic mitigating circumstance. This qualifying circumstance should be expressly alleged in the information.

In the case at bar, the crime committed is robbery with homicide. Considering that the crime was committed by six armed men, the circumstance of "band" should be considered merely as a generic aggravating circumstance. It is also obvious that the perpetrators of the offense waited for the night before committing the robbery to better

accomplish their purpose. The trial court, therefore, correctly found the existence of "band" and "nocturnity". These two aggravating circumstances, when occurring jointly in the commission of a crime, are generally treated only as one aggravating circumstance. Nevertheless, they may be considered separately when their elements are distinctly perceived and can subsist independently, revealing a greater degree of perversity.[12] In the instant case, it is not necessary to decide whether or not the two should be treated distinctly from each other, since the existence of one is sufficient for the imposition of the maximum penalty, and the concurrence of an additional circumstance will not alter the same.[13] However, the indemnity of P6,000.00 due the heirs of the deceased should be increased to P12,000.00.

On July 13, 1977, during the pendency of this appeal, appellant Jose Gustilo alias "Peping" died at the New Bilibid Prisons Hospital. In view thereof, on September 8, 1977, this Court issued a Resolution, which states:

"* * * Considering the letter dated August 2, 1977 of Gerardo N. San Pedro, Administrative Officer IV, Bureau of Prisons, informing the Court of the death of appellant Jose Gustilo alias "Peping" last July 13, 1977, as well as the comment of the Solicitor General thereon, the Court Resolved to DISMISS the case as to appellant Jose Gustilo." (p. 580, rollo).

WHEREFORE, except for the dismissal of the case as against Jose Gustilo alias "Peping" and with the foregoing modification as to the amount of indemnity, the decision appealed from is hereby **AFFIRMED**.

SO ORDERED.

Teehankee, Barredo, Antonio, Concepcion, Jr., Santos, Fernandez, and Guerrero, JJ., concur.

Castro, C.J., concur in the opinion of Justice Aquino.

Fernando and Makasiar, JJ., no part.

[1] L-27835, Walter Apa, et al. v. Court of First Instance of Davao.

[2] People v. Abatayo, L-2315, January 29, 1950.

[3] People v. Miranda, L-18508, Feb. 29, 1964 and People v. Dajay, L-18509, Feb. 29, 1964, 10 SCRA 385; People v. Asmawil, L-18761, March 31, 1965, 13 SCRA 497; People v. Libed, L-20431, June 23, 1965, 14 SCRA 410.

[4] People v. Cadag, L-13830, May 31, 1961, 2 SCRA 388.

[5] People v. Cabrera, 43 Phil. 64.

[6] People v. Monroy, et al., L-11177, October 30, 1958, 104 Phil. 759; People v. Abrina, et al., L-7840, December 24, 1957, 102 Phil. 695.

[7] People v. Cabiltes, L-18010, Sept. 25, 1968, 25 SCRA 112, citing People v. Simbahon, et al., L-18073-75, Sept. 30, 1965, 15 SCRA 83. See also People v. Condemena, et al., L-22426, May 29, 1968, 23 SCRA 910; Moran, Comments on the Rules of Court, p. 255, Vol. No. 5, 1963 Ed. citing U.S. v. Perez, 32 Phil. 163.

[8] People v. Lumahang, 94 Phil. 1048, L-6357, April 7, 1954; People v. Condemena, supra.

[9] Article 294, par. 1, Revised Penal Code.

[10] People v. Mangulabnan, L-8919, Sept. 28, 1956, 99 Phil. 992.

[11] L-19491, August 30, 1968, 24 SCRA 798.

[12] People v. Santos, et al., L-4189, May 21, 1952, 91 Phil. 320.

[13] Ibid.

CONCURRING OPINION

AQUINO, J.:

I concur in the result. Band and nocturnity are distinct aggravating circumstances (People vs. Fontabla, 61 Phil. 589). Dwelling should also be considered as aggravating in this case. Hence, death is the proper penalty.

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