

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
PRIMITIVO PINGA ALIAS TIBOY, ET AL., DEFENDANTS, PRIMITIVO
PINCA ALIAS TIBOY AND PASCUALITO ADORA ALIAS LITOY,
DEFENDA...**

G .R. No. L-16595. February 28, 1962

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PER CURIAM:

Primitivo Pinca alias Tiboy, Venerando Pinca alias Bandoy, Armando Cerbito alms Narciso, Nery, Pascualito Adora alias Litoy and Valentin Crisologo alias Peter, were charged with Robbery in Band with Multiple Homicide and Serious Physical Injuries. They voluntarily pleaded guilty to the following Amended Information:—

"The undersigned Assistant Provincial Fiscal of Samar, accuses Primitivo Pinca alias Tiboy, Pascualito Adora alias Litoy, Venerando Pinca alias Bandoy, Armando Cerbito alias Narciso, Nery and Valentin Crisologo alias Peter of the crime of Robbery in Band with Multiple Homicide and Serious Physical Injuries committed as follows:

That on or about October 18, 1958, at about 1:00 o'clock in the morning, in sitio Cadahonan, municipality of Gamay, province of Samar, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, fully armed with deadly weapons, conspiring, confederating and mutually helping one another, with intent of gain and benefit, and by means of violence and intimidation upon persons and force upon things, with treachery and premeditation, did then and there wilfully, unlawfully and feloniously, forcibly entered the house of one Ambrosio Montallana by passing through a hole in the kitchen of the said house, an opening not intended for entrance or egress; and while thus inside the house, the above accused simultaneously attacked, assaulted, shot and wounded the occupants in the house who were then in their sound sleep, namely: Ambrosio Montallana, Donato Arceno, Gregorio Ortiz and Teodoro Montallana, with the use of carbines, pistol cal. .45, Japanese rifle and bolos which the said accused had then provided themselves for the purpose, thereby inflicting upon the person of said Ambrosio Montallana, Donato Arceno, Gregorio Ortiz and Teodoro Montallana multiple grave wounds on the different parts of their bodies, which injuries caused the instantaneous death of the first three (3) persons, and seriously inflicting upon said Teodoro Montallana, a 10 year old child, a grave wound on his left external ear involving the mastoid process and internal squint of both eyes and loss of hearing of his left ear, and further tied to one of the posts in the house the person of Virginia Tan de Montallana, wife of the deceased Ambrosio Montallana, and threatened her with death should she will not divulge the hiding place of their money, and then and there, the aforesaid accused, who, with intent of gain, wilfully, unlawfully and feloniously, took, stole and carried away with them the following, to wit:

CASH in the total amount of P5,000.00

One (1) ring 14 Kt w/birthstone valued at ..

35.00

One (1) ring ordinary valued at.....

6.00

One (1) necklace 12 kt valued at.....

17.00

One (1) necklace, chinese gold valued at.....

28.00

One (1) necklace, american gold, valued at....

60.00

One (1) wrist-watch (Elgin) valued at.....

120.00

One (1) flashlight (Eveready) valued at

5.00

One (1) flashlight (Hongkong) valued at

3.50

One (1) hatchet valued at.....

3.50

One (1) shelter half (tent) valued at.....

15.00

One (1) iron-pot valued at.....

2.00

Two (2) gantas rice valued at.....

_____2.00

P5,297.00

all belonging to the late Ambrosio Montallana and his family, against the will and consent of the latters, to the damage and prejudice of the owners hereof in the total losses of FIVE THOUSAND TWO HUNDRED NINETY-SEVEN PESOS (P5,297.00), Philippine Currency.

That the aggravating circumstances in the commission of the crime were: By taking advantage of night time to better commit the crime; the deadliness of high-powered firearms used, which were all unlicensed carbines, pistol cal. .45, Japanese-rifle, and bolos; the superiority in strength; uninhabited place; by forcibly entering the dwelling of the aforementioned offended parties thru a hole not intended for entrance or egress."

after which, Atty. de la Cruz, for the defense, was granted leave, upon his petition, to prove some mitigating circumstances, such as: lack of intention to commit so grave a wrong as that committed and incomplete self-defense. After the reception of the evidence, consisting of the testimony of several defense witnesses and

prosecution rebuttal witnesses, the Court rendered judgment, the dispositive portion of which reads—

"PREMISES CONSIDER, this Court declares Primitivo Pinca alias Tiboy and Pascualito Adora alias Litoy guilty of the crime of robbery with triple homicide and serious physical injuries with three (3) aggravating circumstances and with only one (1) mitigating circumstance to offset them and sentences them to suffer DEATH PENALTY and the accessory penalty provided for in Art. 40 of the Revised Penal Code; to indemnify jointly and severally the widow, Virginia Tan Vda. de Montallana, in the amount of P6,000.00 for the death of Ambrosio Montallana and, the heirs of Gregorio Ortiz and Donato Arceno at P6,000.00 each; to indemnify Teodoro Montallana in the amount of P1,000.00. Defendants Venerando Pinca alias Bando, Valentin Crisologo alias Peter and Armando Cerbito alias Narciso, Nery, the Court sentences them to suffer a penalty of RECLUSION PERPETUA, with the accessory penalties provided for in Art. 41 of the Revised Penal Code and to indemnify the heirs of the deceased as stated above, the widow of the deceased Ambrosio Montallana, the heirs of Donato Arceno and Gregorio Ortiz and to the boy, Teodoro Montallana, as stated above. Defendants are further sentenced to pay jointly and severally Mrs. Virginia Tan Vda. de Montallana the amount of P5,297.00 for the cash and jewelries and personal effects taken by the herein defendants from the house of the victims. Exh. "5" (Exh. "E" for the prosecution) a carbine; Exhs. "7" and "7-a", both are carbines (Exhs. "G" and "G-1" for the prosecution); Japanese Rifle Exh. "6" (Exh. "F" for the prosecution); Pistol Exh. "8" (Exh. "H" for the prosecution) and bayonet Exh. "10" are ordered confiscated in favor of the government. Exh. "B", a gold ring with birthstone; Exh. "C", a gold wedding ring, Exh. "D", gold chain with a cross; Each. "D-1", gold chain with a cross; Exh. "D-2", cash in the amount of P37.00 and Exh. "I", hatchet belonging to the deceased Ambrosio Montallana are hereby ordered returned to the widow, Mrs. Virginia Tan Vda. de Montallana."

The case is now before Us on automatic review in view of the penalty imposed upon Primitivo Pinca alias Tiboy and Pascualito Adora alias Litoy. The other accused did not appeal.

The circumstances upon which the two appellants base their claim for mitigating circumstances, may be summarized as follows:—

Appellant Primitivo Pinca alias Tiboy, declared that between 5:00 and 6:00 o'clock in the morning of October 18, 1958, he and his co-accused, one of whom was his brother Venerando Pinca, started for a journey from barrio Calomotan to Mapanas, Gamay, Samar, taking with them some clothing and a circular saw for sale and one carbine. Upon reaching Mapanas, Pascualito Adora, alias Litoy, mentioned to him the house of the deceased Ambrosio Montallana, who had plenty of cash, which place he knew, having once worked in the coconut plantation of said Montallana; that between him and Adora, but without the knowledge of the other accused, they planned to rob the place; that their group arrived in the vicinity at about 5:00 o'clock in the afternoon, but they bided their time under the coconut trees in the plantation. When it was quite dark, Adora left alone to ascertain whether the occupants were already asleep; upon Adora's return, the group proceeded to the house, but they found the household still awake. While waiting for the inmates to retire, several policemen arrived at the house of Montallana, who left at about 10:00 o'clock at night. When silence prevailed in the house, Pinca and Adora passing thru a hole in the kitchen, used for urinating, entered the house. The two proceeded towards the living room, in the process of which Adora stepped on something which produced noise and awakened Ambrosio Montallana, who started to get up. This was seen by Pinca, because of the light coming from a kerosene lamp on the table. Pinca fired four successive shots at Montallana with the carbine (Exh. 5), felling him; that after firing the shots, Pinca also saw two men (Donato Arceno and Gregorio Ortiz) trying to get a bayonet from one of the posts of the house, causing him to fire at them, a shot each, Adora thereafter hacked them with a bolo. Pinca asserted that when he fired his carbine, the victims were not asleep; Mrs. Montallana was curled up and covered with a blanket, and when the accused uncovered her and made her to stand, she voluntarily handed a bundle, saying: "Do not kill me, here is the money"; and that Mrs. Montallana was tied by them to a post and gagged in order to prevent her from screaming. This appellant also told the trial court that it was not his intention to kill the

victims; that two (2) carbines, two (2) Japanese rifles, a .45 caliber pistol, a bayonet and 200 rounds of ammunition were found inside the house of the Montallanas and seized by them. After committing the above acts, they left for their home barrio, and there Pascualito Adora distributed the money in the bag among themselves. They also agreed to contribute P5.00 each to be spent for a requiem mass for the victims; that he repented for his sins and while in jail, he received Holy Communion. He further informed the Court that he squandered his share in the loot, before his arrest; that while he thought of surrendering, he waited until he was arrested; that he voluntarily confessed and admitted the crime to the arresting officers and even re-enacted the same; and that he pointed to the PC soldiers the place where the firearms and ammunitions were hidden.

Appellant Pascualito Adora alias Lito, confirmed the testimony of appellant Pinca as to what had taken place the moment they entered the house of the Montallana; that it was Pinca who fired at Montallana and the two other deceased and he (Adora) hacked the other two, after Pinca had shot them, because they were shouting for help and were armed with bayonets; that it was Pinca who tied Mrs. Montallana; that they found firearms and ammunitions in the house of the victim; that they divided the loot and contributed P5.00 each for a requiem mass; that he was arrested in Manila by the P.C.; that he became familiar with the layout of the place where the crime was committed, thru his cousin Arturo de la Cruz, whose father was a tenant of the deceased Montallana; that he (Adora) told Pinca of Montallana's wealth; and that the three (3) other accused remained outside the house.

In view of said testimonies, the trial court made the following observations:—

"The mitigating circumstances invoked by the defendants namely (1) lack of intention to commit so grave a wrong as that committed can not be taken into consideration in the present case because any one firing several shots to somebody and striking several blows with bolo at a person, can not claim that his intention was not to commit so grave a wrong as that committed; neither the defense of incomplete self-defense can be taken into consideration because as the prosecution aptly alleges that our Supreme Court in the case of *People vs. Buenafe*, 34 Off. Gaz. page 2504, said: 'There must be an unlawful aggression otherwise this defense cannot be invoked.' Even admitting that Ambrosio Montallana and his two tenants, Danato Arceno and Gregorio Ortiz, tried to defend themselves against the herein defendants, said acts can not be construed as an unlawful aggression. * * *".

The above findings and conclusions are borne out by the evidence produced by the appellants themselves, bringing to the fore, the fact that the only mitigating circumstance which would favor the appellants is the plea of guilty.

Counsel alleges that the trial court erred (1) in considering the aggravating circumstance of uninhabited place, as a separate and distinct aggravating circumstance from nocturnity; (2) In not considering that treachery absorbed the circumstance of nocturnity, and (3) In imposing the death penalty upon the appellants. In other words, it is maintained that the three aggravating circumstances should have been taken only as one, because they absorb each other, and there being a plea of guilty, the proper penalty should be life imprisonment.

The aggravating circumstance of uninhabited place (despoblado) does not exist; the aggravating circumstance of dwelling, however, is present. It is held that the aggravating circumstances of the dwelling and scaling were present in the commission of the crime of robbery with homicide, "* * * because the store where it was committed is a dwelling, the deceased Cua Loc having lived therein, and because there is scaling when entrance is effected through an opening not intended for said purpose. * * *. The two foregoing circumstances were certainly not inherent in the crime committed, because, the crime being robbery with violence or intimidation against persons, the authors thereof could have committed it without the necessity of violating or scaling the domicile of their victim" (*People vs. Valdez*, 64 Phil., 860). In the case at bar, Montallana and the other victims were killed by the appellants with firearm and bolo, inside the house of the former, after having gained entrance therein, thru an

opening not intended for entrance or egress.

Except in special cases, nighttime and treachery always go together and are absorbed in the same offense (People vs. Magsiling, 82 Phil., 271; People vs. Young, 83 Phil., 702). Nighttime cannot be considered as an aggravating circumstance and independent of that of treachery and abuse of superior strength (People vs. Balagtas, 68 Phil., 675). Abuse of superior strength is not treachery, although it might be absorbed by the latter (U. S. vs. Estopia, 28 Phil., 97). Superiority of strength may be derived from the number of assailants and the simultaneousness of the attack (U. S. vs. Lozada, 21 Phil., 287). If treachery is present, it may absorb superior strength (People vs. Mobe, 81 Phil., 58). In the present case, the element of treachery cannot also be successfully disputed. The position of the wounds clearly reveals that the victims were shot in their sleep. While the appellants deny that they were asleep; the bullet holes on the floor of the house, however, are mute but eloquent proofs that the said victims were at least lying down and not standing, when shot. In a case, treachery had been taken as an aggravating circumstance when the accused took advantage of the position of the victims who were lying down on the sacks of the mail, unable to offer any resistance or escape (People vs. Galang, 73 Phil., 184). Of course, the appellants claim that the victims were prepared for the occasion, stating that firearms were seized by the accused from the Montallana house. There could be no truth in this allegation, for if the Montallanas were really prepared or were anticipating the robbery, they could have guarded against the possible infiltration of the appellants. Moreover, the widow of Montallana denied this claim.

The crime was committed with the aid of armed men (par. 8, Art. 14, Rev. Penal Code; People vs. Villapa, et al., 91 Phil., 189). At least, two of the accused, the appellants herein, were armed with carbine and bolo, when the five accused perpetrated the crime. From which We may deduce that as far as the evidence in the case at bar is concerned, there exist three aggravating circumstances, to wit: dwelling, treachery and the crime was committed with the aid of armed men.

It results, therefore, that the three aggravating circumstances is offset by one mitigating circumstance, thereby justifying the painful imposition of the capital punishment upon the appellants. It should be stated in this connection that the whole record shows a criminal perversity, which entitles the State to demand the forfeiture of the appellants' right to live, in the name of peace, order and retributory justice.

Wherefore, the sentence imposed in the decision, subject matter of this automatic review, is affirmed, with costs against appellants.

Bengzon, C. J., Padilla, Bautista Angelo, Labrador, Concepcion, Reyes, J. B. L., Barrera, Paredes, Dizon and De Leon, JJ., concur.

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