

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
KARUNSIANG GUIAPAR AND SAPAL DADAS, DEFENDANTS,
KARUNSIANG GUIAPAR, DEFENDANT-APPELLANT.**

G.R. No. L-35465. May 31, 1984

Ponente: MAKASIAR, J.

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MAKASIAR, J.:

This case comes to Us on automatic review of the decision of the Honorable David P. Avila of the Court of First Instance (CFI) of Cotabato City in Criminal Case No. 40, entitled "People of the Philippines vs. Karunsiang Guiapar and Sapal Dadas," sentencing to death Karunsiang Guiapar for robbery with homicide qualified by treachery, and aggravated by evident premeditation, abuse of superior strength, and craft.

On August 26, 1970, an information (docketed as Criminal Case No. 40) for robbery with homicide was filed in the CFI of Cotabato City as follows:

"The undersigned First Assistant Provincial Fiscal accused Karunsiang Guiapar and Sapal Dadas, of the crime of robbery with homicide, committed as follows:

"That on or about June 3, 1969, in the Municipality of Nuling, Province of Cotabato, Philippines and within the jurisdiction of this Honorable Court, the said accused, in company with Karim Abo who is still at large conspiring, confederating together and helping one another and with intent of gain, by means of force and violence against person, did then and there willfully, unlawfully and feloniously take and carry away one (1) revolver, caliber .38, with Serial No. LA-695, valued at P400.00 and pocket money containing P70.00 cash, Philippine currency, belonging to Demetrio Fernandez without the consent and against the will of the latter to the damage and prejudice of said Demetrio Fernandez in the aforesaid sum, and by reason or on the occasion of such robbery, the said accused, armed with a hard wood and hunting knife with intent to kill, conspiring, confederating together and helping one another, did then and there willfully, unlawfully and feloniously assault, hit, attack and stab said Demetrio Fernandez with said hard wood and hunting knife, and as a result thereof, said Demetrio Fernandez sustained several stab wounds which directly caused his death.

"Contrary to law" (p. 7, rec.).

Nuling and Sultan Kudarat are one and the same municipality.

Upon arraignment on October 26, 1970 (p. 20, CFI rec.), both accused pleaded not guilty.

On January 5, 1971, the prosecution presented its first two witnesses: Dr. Rogelio Chua, attending physician to the deceased victim, and Patrolman Rakman Tomas (p. 19, rec.).

On March 17, 1971, one of the accused, Sapal Dadas, through counsel, manifested his intention to change his plea. After being appraised of the consequences of his change of plea, Sapal Dadas was re-arraigned. He pleaded guilty to the crime of robbery with homicide. After hearing on the same day, he was sentenced to reclusion perpetua (p. 20, rec.; TSN, March 17, 1971, pp. 4-12). With the consent of the trial court, and the People, said

Sepal Dadas was allowed to testify for the defense. He exculpated his co-accused, Karunsiang Guiapar, from any participation in the commission of the crime charged.

On March 24, 1971, the prosecution closed its evidence with the testimonies of Kasan Lampak, an inmate in the municipal jail of Sultan Kudarat at the time of the commission of the crime, and Patrolman Marumpil Lilang (p. 21, rec.). Kasan Lampak was presented as an eyewitness. The next day, March 25, 1971, the defense closed its evidence with the testimony of the accused-appellant, Karunsiang Guiapar (p. 22, rec.).

The facts as recapitulated by the Solicitor General are as follows:

"At about 5:00 a.m. on June 3, 1969, policeman Demetrio Fernandez of Sultan Kudarat, Cotabato, opened the door of the municipal jail to let out appellant Karunsiang Guiapar, Sapal Dadas, Karim Abo and Kasan Lampak, all detainees, so that they may attend to their personal necessities. As soon as the first three were out of the cell door, appellant struck Pat. Fernandez with a piece of 3 x 3 wood in the left occipital region. Pat. Fernandez fell to the floor. Sapal Dadas took the hunting knife of Pat. Fernandez and stabbed him with it in the abdomen. On his part, Karim Abo kicked the prostrate policeman. After doing the above, the three prisoners took the service revolver and wallet containing P70.00 of Pat. Fernandez and fled. Prisoner Kasan Lampak remaining in the cell (pp. 3-7, TSN, March 24, 1971).

"Patrolman Rakman Tomas was the companion of Pat. Fernandez as guard in the municipal building of Sultan Kudarat from 2:00 to 6:00 a.m. that day of June 3, 1969. At about 5:10 a.m., he heard the opening of the steel door of the prison cell. Almost simultaneously, he also heard a call for help. He rushed to the cell. He saw Pat. Fernandez sprawled near the cell door bathed in blood. He asked Kasan Lampak who assaulted Pat. Fernandez. Kasan Lampak informed him that the three prisoners, appellant, Sapal Dadas and Karim Abo were the ones who did it. He also asked Pat. Fernandez who was still strong and able to talk who assaulted him. He received the same information. He immediately went out the municipal building to capture the escaping prisoners, but he was unsuccessful. He returned to the municipal building. He noticed that the service revolver and wallet of Pat. Fernandez which he knew contained P70.00 were missing (pp. 9-13, 16-17, TSN, January 5, 1971).

"Pat. Marumpil Lilang was one of the policemen assigned to relieve Pat. Fernandez and Pat. Tomas at 6:00 a.m. on June 3, 1969. At about 5:00 a.m., he was awakened by a commotion at the prison cell. He proceeded to the place and found Pat. Fernandez sprawled on the floor near the cell door bathed in blood. His revolver was missing. Prisoner Kasan Lampak was inside the cell. He brought Pat. Fernandez to the hospital (pp. 20--24, TSN, March 24, 1971).

"At the hospital, Pat. Fernandez was examined and operated on. He was found suffering from the following injuries: (a) stab wound in the abdomen, caused by bladed weapon; and (b) contusion and abrasion in the left occipital region, caused by a blunt instrument. The wound was fatal. After the operation, Pat. Fernandez died (Exhibit A; pp. 3-6, TSN, January 5, 1971).

"According to Kasan Lampak, the night before the killing of Pat. Fernandez, appellant brought inside the cell the piece of 3 x 3 wood identified as Exhibit B and kept it under his bed. The act of appellant was not unusual because the prisoners were allowed to cook inside the cell. That night, appellant told Kasan Lampak that Sepal Dadas, Karim Abo and he planned to escape. Appellant tried to induce Kasan Lampak to join. Kasan Lampak declined because his case for which he was in jail was nearing settlement (pp. 5-6, 14-16, TSN, March 24, 1971).

"Appellant was recaptured only after about ten (10) months from his escape. He was apprehended in Carmen, Cotabato (p. 47, TSN, March 25, 1971). Following his recapture, he was immediately charged before the trial court for robbery with homicide" (pp. 4-7, Brief for the Appellee; p. 113, rec.).

On March 31, 1971, the trial court rendered its decision, the dispositive portion of which reads as follows:

"WHEREFORE, the Court finds the accused, Karunsiang Guiapar, in conspiracy with Sapal Dadas and Karim Abo, guilty beyond reasonable doubt as co-principal by direct participation, of the crime of robbery with homicide, defined and penalized under paragraph No. 1 of Art. 294 of the Revised Penal Code, with the qualifying circumstance of treachery and with the aggravating circumstances of evident premeditation, abuse of superior strength, and craft by befriending the victim policeman, without any mitigating circumstance to offset the same, and hereby imposes upon said accused the capital punishment of death; to indemnify the heirs of Pat. Demetrio Fernandez the sum of P4,000.00, to pay the Municipal Government of Sultan Kudarat, Cotabato, the value of the service revolver in the sum of P450.00; to pay the sum of P70.00 to the heirs of Pat. Demetrio Fernandez representing the sum of money taken by the accused; to indemnify the heirs of said Demetrio Fernandez the sum of P4,000.00 and to pay the one third of the costs.

"In view of the youthfulness of the accused who claims to be Twenty-five (25) years old and his susceptibility to reform, it is respectfully recommended that the death penalty be commuted to life imprisonment.

"The piece of wood, Exhibit B, is hereby confiscated in favor of the state. SO ORDERED" (p. 18, rec.).

Thus, this appeal.

Appellant interposes this single assignment of error --

"The trial court erred in convicting the accused Karunsiang Guiapar after having rendered the decision convicting his co-accused on the strength of the latter's testimony that he committed the offense alone" (p. 79, rec.).

The assigned error is without merit.

Appellant hinges his appeal on the testimony of co-accused Sapal Dadas given on March 17, 1971 (p. 82, rec.). This testimony consists of two parts: (a) that pertinent to Sapal Dadas' own participation in the crime (TSN, March 17, 1971, pp. 7-12); and (b) that pertinent to the appellant's involvement in the crime (ibid., pp. 17-28).

WE note that the first part of Sapal Dadas' testimony was given only to provide the said Sapal Dadas, having already pleaded guilty as charged, a chance to testify and clarify on his participation in the crime. The trial court stated that said testimony was "just for that purpose" (ibid., p. 7). It is therefore insufficient to exonerate a co-accused from any fault or participation in the commission of the crime charged.

The lower court acquiesced in the testimony of Sapal Dadas that it was Karim Abo, and not Karun-siang Guiapar, as the prosecution argues, who hit deceased Demetrio Fernandez in the base of his head with a piece of wood (ibid., p. 11). Appellant herein now proposes that the lower court, by such acquiescence erred in subsequently finding Karunsiang Guiapar guilty of the offense charged (pp. 88-89, rec.).

The proposition is untenable. WE reiterate that the testimony on which the above statement is based was made only to determine the participation of Sapal Dadas in the commission of an offense to which said Sapal Dadas had already admitted guilt. WE note further that the tenor of the statement saying that Karim Abo hit Demetrio Fernandez with a piece of wood is only descriptive of the circus stances of the commission of the crime as testified to by Sapal Dadas. The pertinent excerpt from the transcript reads:

"COURT:

xx xx For purposes of ascertaining his participation in the crime charged, the Court allowed the defense to place said accused on the stand and testify as to his participation in the commission of the crime. As a result, said accused admitted having directly participated in the killing of Pat. Fernandez, using his knife to stab the victim. After he had fallen to the floor, having been hit by Karim Abu with a piece of wood in the base of his head, he was stabbed by the accused xx x" (TSN, March 17, 1971, p. 11; *Italics Ours*).

The trial court merely reiterated Sapal Dadas' testimony without affording it credence.

And yet, assuming that the statement underscored did import a judgment by the trial court that Karim Abo inflicted the injury to the base of the deceased's head, still We rule that the same cannot preclude a subsequent ostensibly inconsistent finding of the same court that it was Karunsiang Guiapar, not Karim Abo, who hit the deceased with a piece of wood. Criminal Case No. 40 named only Karunsiang Guiapar and Sapal Dadas as accused. Karim Abo was not joined as party-defendant therein. A judgment rendered against Karim Abo in said case therefore would be null and void. To hold otherwise would run counter to the constitutionally guaranteed rights of the accused to be heard by himself or counsel, to defend himself in court, to have counsel, to be informed of the accusations against him, to be present at the trial, and to confront and cross-examine the witnesses against him. The judgment rendered against Karim Abo, if one may concede it to be, can be no more than a mere error of the court, which the said lower court may rectify in the course of the trial. The judgment rendered against Karunsiang Guiapar effected the correction.

Finally, appellant hoped to cast suspicion on the witness Kasan Lampak. He states:

"In its decision, the lower court took into account the testimony of Kasan Lampak who according to the lower court is the 'star witness.' We submit that Kasan Lampak is not a star witness, but a last-minute witness of the prosecution. This finds basis in the categorical statement of the prosecution, after presenting Dr. Rogelio Chua and Pat. Rakman Tomas, that it had no other witnesses aside from he two. xx xx

xx xx xx

"Indeed, where did the so-called 'star witness' come from if according to the prosecution, it had no other witnesses? Kasan Lampak was all the time available to the prosecution. He was one of those detained in the jail together with his co-accused. If he was an eyewitness to the crime, why did the prosecution not present him before the other two witnesses were presented?" (pp. 89-90, rec.).

However, WE agree with the People.

"It is respectfully manifested that the manifestation of the Fiscal was lifted out of context. The following circumstances show that what the Fiscal meant by his manifestation was that he had no more witnesses insofar as Sapal Dadas was concerned inasmuch as he had already admitted his guilt:

"1. Even before the manifestation was made, Pat. Tomas had testified that he was told by Kasan Lampak that he saw the commission of the crime (p. 12, TSN, January 5, 1971). This negates the claim that the presentation of Kasan Lampak as a witness was an afterthought and that he was trained or coached to testify against appellant.

"2. Right after Sapal Dadas was sentenced, counsel for appellant filed a motion to defer the transfer of said accused to the National Penitentiary so that he may be utilized as witness for appellant. The trial court pointed out that the provincial jail was congested. To accommodate appellant, the Fiscal manifested that he will try to expedite the presentation of his witnesses, but that one of his witnesses, 'a prisoner who was in jail at that time,' an obvious reference to Kasan Lampak, was not available on that day. xx

xx xx xx

"It is clear from the foregoing that since the beginning the existence of Kasan Lampak as a witness and the intention of the Fiscal to present him on the witness stand was made manifest to the court and to appellant. Appellant should not, therefore, say that Kasan Lampak is a 'last-minute witness' (pp. 13-14, 15-16, Appellee's Brief; p. 113, rec.).

In addition, We note that a counsel presenting his party's witnesses has the discretion, at a given stage of the trial

as to the sequence of presenting his witnesses. This discretion emanates from his duty of safeguarding the interests of his client (53 Am. Jur. 359-360, cited in Revised Rules of Court of the Philippines, Vol. II, Vicente J. Francisco, 1966, p. 324). Finally, whether or not Kasan Lampak is a "last-minute witness" is of no moment, because what is significant is the credibility of his testimony.

WE now determine the question of credibility.

WE recall that the defense presented only two witnesses: Sapal Dadas, appellant's co-accused, convicted upon his own plea of guilty, and Karun-siang Guiapar, the appellant himself.

Appellee reiterates the lower, court's proposition that Sapal Dadas' testimony, being one of a co-accused, is polluted and undeserving of credence. WE modify this proposition. What is clear from Our past decisions is that the testimony of a co-accused is subject to grave suspicion insofar as it may benefit such co-accused/witness (People vs. Cañete, No. 30491, 43 SCRA 14 [Jan. 21, 1972]; People vs. Orzame, L-17773, 17 SCRA 161 [May 19, 1966]; U.S. vs. Manabat, No. 16717, 42 Phil. 569 [Dec. 22, 1921]). Where no such benefit is expected, such testimony may be afforded credence. In this latter case, what matters is the cogency or inherent probability of the testimony (People vs. Orzame, supra) viewed with other competent corroborating testimonies (U.S. vs. Remegio, No. 12822, 37 Phil. 599 [Feb. 11, 1918]). Sapal Dadas' testimony is wanting in these latter aspects.

The corroborating testimony of Karunsiang Guiapar, needless to say, is self-serving. Necessarily, it is subject to suspicion. And as shown next, said testimony, together with that of Dadas', is not credible.

The defense's version is that Karunsiang Guiapar did not participate in any manner in inflicting injury to the deceased, nor did he participate in any manner to perpetrate the crime; that it was Karim Abo, a co-escapee, and presently still at large, who hit Demetrio Fernandez with a piece of wood; that it was the same Karim Abo who forced Karunsiang Guiapar at gunpoint to escape with him and Sapal Dadas; and that Karunsiang Guiapar escaped with the two others for fear that Karim Abo might kill him if he did not.

The testimonies of the defense witnesses do not support the version. Appellant herein testified that there were four of them in jail at the time of the commission of the crime: Karim Abo, Sepal Dadas, Ka-runsiang Guiapar and Kasan Lampak (TSN, p. 31, March 25, 1971). If it were true that Karunsiang Guiapar escaped with Karim Abo and Sapal Dadas because Karim Abo threatened to kill him if he did not (TSN, *ibid.*, pp. 34-35; March 17, 1971, p. 21), WE wonder why Kasan Lampak was not equally threatened.

Both witnesses also testified that it was Karim Abo who fled first from jail; he was followed 40 meters behind by Sapal Dadas. Karunsiang Guiapar followed Sapal Dadas 20 to 30 meters behind (TSN, March 25, 1971, pp. 42-44; March 17, 1971, pp. 23-24). At a distance of 60 to 70 meters, WE wonder how Karim Abo could have effectively threatened herein appellant during an escape.

Karunsiang Guiapar further testified that at a certain junction of the National Highway, the escapees parted ways (TSN, March 25, 1971, p. 44); and that he proceeded alone from there to the municipality of Carmen where he was apprehended by enforcement agencies ten months after (*ibid.*, p. 46). Assuming that there was in fact a threat on the life of Karunsiang Guiapar at the time of escape, upon the circumstances described by the accused himself, said threat did not persist after the escape.

WE clearly perceive in the actuations of the appellant herein a deliberate intent to escape. And as correctly observed by the People, such flight is evidence of guilt.

The prosecution presented four (4) witnesses. Three of them, Dr. Rogelio Chua, Patrolmen Rakman Tomas and Marumpil Lilang testified on the circumstances prior to or after the commission of the crime. The other witness,

Kasan Lampak, testified as an eye-witness to the actual commission of the crime.

Kasan Lampak testified, among others, that on or about June 3, 1969, the three prisoners, Karunsiang Guiapar, Sapal Dadas and Karim Abo called the attention of the jail guard on duty, Patrolman Demetrio Fernandez, to open the jail gate to allow them to answer the call of nature (TSN, March 24, 1971, p. 7). Since this was a normal procedure in jail, the patrolman obliged. While the guard was closing the jail door after the three in-mates had gone out, Karunsiang Guiapar struck the guard at the base of the back of his head with a piece of wood (TSN, March 24, 1971, p. 5). As the said guard was falling down, Sapal Dadas grabbed the hunting knife from the guard's waist and stabbed the latter with it in the abdomen. As this was going on, Karim Abo kicked the falling guard (ibid., p. 6). Thereafter, the three fled.

According to Kasan Lampak, the night before the escape Karunsiang Guiapar invited him to escape with them. He refused said invitation accordingly because his own case was about to be settled (ibid., p. 5). In addition, he testified that the piece of wood which Karunsiang Guiapar used in the assault was brought inside the cell by accused-appellant the night before the offense (ibid., p. 14).

WE take the testimony of witness Kasan Lampak as credible. WE reiterate the lower court's declaration that there is no reason to doubt said testimony (pp. 14, 16, rec.). WE concede that at the time of the commission of the crime, Kasan Lampak was himself detained for homicide (TSN, March 24, 1971, p. 9). But that does not militate against the credibility of his narration inasmuch as he does not stand to gain anything by his testimony. Prior to the time he gave said testimony, he was already in fact a free man. Karunsiang Guiapar hit the deceased on the base of the back of his head with a piece of wood.

Nonetheless, granting arguendo, that he was not the perpetrator of the assault on the guard's head, such fact does not militate, nay even mitigate his liability for the crime charged.

The declaration of the deceased, as testified to by Patrolman Rakman Tomas (TSN, Jan. 5, 1971, p. 16) as to the circumstances of the assault against said deceased, corroborates Kasan Lampak's testimony that the three escapees (including herein appellant) were the perpetrators of the assault. WE agree with the State that the deceased's declaration qualify either as a "dying declaration" or a part of the *res gestae* admissible in evidence in court.

Meanwhile, the testimony of Kasan Lampak on how the assault was consummated -- Karunsiang Guiapar hitting the deceased with a piece of wood, Sepal Dadas stabbing the deceased with a knife, and Karim Abo kick-ing said deceased as the latter was falling -- reveals a concert of action towards a single objective. There was conspiracy. Perforce, Karunsiang Guiapar would still be guilty of the crime charged as a co-conspirator and a principal by direct participation.

Upon the testimonies of the witnesses and the foregoing discussions, We cull the following facts of the case: On or about June 3, 1969, at about 5:00 o'clock in the morning, three prisoners, Karunsiang Guiapar, Sapal Dadas and Karim Abo, got out of the prison cell of the municipality of Sultan Kudarat on the pretext or having to answer the call of nature. Upon being allowed out, one of them hit the guard on the base of the back of his head with a piece of wood; the other stabbed the said guard in the abdomen with the latter's own knife; the third kicked the guard even after the wound has already been inflicted. One of the three took the gun of the guard as they fled the scene of the crime; the other brought the guard's knife with him in the escape. The guard died not long after.

WE determine the intention of the offenders by their acts, prior to, contemporaneous with and subsequent to the commission of the crime. There is no doubt that escape was intended by the offenders. But if escape were the sole objective, then the same could have been attained after the first assault (hitting the guard on the head with a piece of wood). The kicking and the stabbing of the guard were unnecessary to effect the escape. Equally unnecessary

was the taking of the guard's gun and knife. These subsequent acts would merely delay the escape.

Clearly, robbery was equally intended and, in fact, consummated. The death of the guard resulting from the injury he sustained during the robbery quali-fies the offense to robbery with homicide. As long as homicide resulted during, or because of, the robbery, even if the killing is by mere accident, robbery with homicide is committed (People vs. Mangulabnan, et al., L-8919, 52 O.G. 6532 [Sept. 28, 1956]); it is only the result obtained, without reference or distinction as to the circumstances, causes, modes or persons inter-vening in the commission of the crime that has to be taken into consideration (People vs. Saliling, L-27974, 69 SCRA 427 [Feb. 27, 1976]; People vs. Arpa, et al., L-26789, 27 SCRA 1037 [April 25., 1964]).

Further, whenever a homicide has been committed as a consequence of or on the occasion of a robbery, all those who took part as principals in the commission of the crime are also guilty as principals in the special complex crime of robbery with homicide although they did not actually take part in the homicide unless it clearly appeared that they endeavored to prevent the homicide (People vs. Bautista, L-25095, 49 Phil. 389 [Sept. 18, 1926]; U.S. vs. Macalalad, L-2558, 9 Phil. 1, [Oct. 8, 1907]). There is no showing that Karunsiang Guiapar endeavored to prevent the injury to the deceased. It is of no consequence whether or not said Karunsiang Guiapar hit the deceased on the base of the latter's head; nor does it matter whether or not he took the guard's gun at the time of the commission of the crime. Robbery with homicide was committed, and Karunsiang Guiapar is guilty thereof together with his co-accused.

Finally, We consider the circumstances appre-ciated by the lower court in the imposition of the proper penalty. The lower court found Karunsiang Guiapar guilty of the crime of robbery with homicide "with the qualifying circumstance of treachery and with the aggravating circumstances of evident pre-meditation, abuse of superior strength, and craft by befriending the victim policeman, without any miti-gating circumstance to offset the same x x x" (p. 18, rec.).

Appellee concedes that the aggravating circum-stance of craft is not shown by the evidence of this case. WE agree.

"A careful examination of the evidence does not show any support for this finding of the trial court. There is no proof that the three assailants gained the confidence of Pat. Fernandez by pretending to be his friends. Besides, craft involves intellec-tual trickery and cunning on the part of the accused (Reyes, The Revised Penal Code, 1969 ed., Book I, p. 349). The mere act of befriending the victim cannot be said to be trickery or cunning" (p. 16, Appellee's Brief).

The opening of the jail by the deceased guard was normal at about 5:00 o'clock in the morning each day to permit the prisoners to attend to their personal necessities (TSN, March 25, 1971, p. 39).

To properly appreciate evident premeditation, it is necessary to establish with proof, as clear as the evidence of the crime itself, (1) the time when the offender determined to commit the crime; (2) an act manifestly indicating that the culprit had clung to his determination; and (3) a sufficient lapse of time between the determination and the execution to allow him to reflect upon the consequences of his act (People vs. Jardiniano, L-37191, 103 SCRA 530 [March 30, 1981]; People vs. Lim, L-34397-99, 71 SCRA 249 [June 10, 1976]; People vs. Tionson, et al., L-31228, 47 SCRA 243 [Oct. 24, 1972]). Evident premeditation is inherent in crimes against property (People vs. Daos, No. 40331, 60 Phil. 143 [April 27, 1934]); but it may be considered in robbery with homicide if there is evident premeditation to kill besides stealing (People vs. Pagal, et al., L-32040, 79 SCRA 570 [Oct. 25, 1977]; People vs. Nabual, et al., L-27758, 28 SCRA 747 [July 14, 1969]). Evident premeditation must be duly proved (People vs. Lacson, L-46338, 102 SCRA 457 [Jan. 27, 1981]) and clearly established (People vs. Rizal, L-43487-89, 103 SCRA 282 [Feb. 26, 1981]; People vs. Gida, L-41419, 102 SCRA 70 [Jan. 19, 1981]; People vs.

Roncal, L-26857-58, 79 SCRA 509 [Oct. 21, 1977]).

Concededly, there are badges of premeditation in the case at bar: (a) the conspiracy earlier dis-cussed; (b) the admission by Sapal Dadas that he and Karim Abo planned to kill Fernandez days before the date of escape; (c) one of the escapees bringing a piece of wood inside the prison cell the night before the assault; and (d) the alleged invitation to escape extended by Karunsiang Guiapar to Kasan Lampak the night before the escape.

WE note however that with reference to the appellant, these badges clearly do not indicate evident premeditation to kill the guard on duty. What is clear from the conspiracy is the intention to rob and to disable. Even the stabbing by Sapal Dadas of the deceased in the latter's abdomen does not in itself manifest an intention to kill as the wound on the abdomen was not per se fatal. Mean-while, the admission of Sapal Dadas to a plot to kill Fernandez extended only as between said Sapal Dadas and Karim Abo. Also, the bringing of the piece of wood inside the prison cell by one of the prisoners the night before the assault, does not insinuate any premeditation to kill; because accord-ing to undisputed testimony, the same was normal practice since the prisoners sometimes cooked food inside their cell. Finally, the alleged invitation to escape made by Karunsiang Guiapar to Kasan Lampak cannot be interpreted to cover an invitation to kill the guard. Perforce, We cannot affirm the trial court's appreciation of the aggravating circumstance of evident premeditation in the case at bar.

WE recognize earmarks of treachery in the commission of the crime herein.

"The assault on the deceased was sudden and un-expected to the point of incapacitating the deceased to repel or escape from it. Appellants adopted a method which tended directly to insure the accomplishment of their objective with no risk to themselves from any defense that the deceased might have been able to make" (People vs. Araja, L-24780, 105 SCRA 133, 149).

The stabbing of the victim as he was falling from the blow on the base of the back of his head is a positive evidence of treachery (People vs. Garcia, L-32071, 105 SCRA 325 [July 9, 1981]).

Meanwhile, We cannot affirm the trial court's finding that abuse of superior strength attended the commission of the crime. Superiority in number does not necessarily mean superiority in strength (People vs. Eliazaga, et al., L-2487, 86 Phil. 364 [May 18, 1950]). There is no marked difference in physical strength here to warrant the appreciation of the attending circumstance of abuse of superior strength (People vs. Capillas, et al., L-27177, 108 SCRA 173, [Oct. 23, 1981]; People vs. Gatch, L-27251, 103 SCRA 207 [Feb. 26, 1981]) notwithstanding that one of the assailants was armed with a piece of wood. The deceased had a gun and a knife. The fact that he did not have the opportunity to use them does not justify the appreciation of abuse of superior strength in this case. Properly, that fact serves to bolster further the finding of treachery. In any case, assum-ing there was abuse of superior strength, the same would be subsumed in treachery (People vs. Santiago, et al., L-12860-61, 110 Phil. 385 [Dec. 29, 1960]).

Finally, We recall the testimony of Patrolman Tomas that prior to the incident, Patrolman Fernandez counted the money in his wallet in the presence of the former; and that therefore said Patrolman. Tomas knew that the deceased had P70.00 in his wallet at the time of the assault. Immediately after the assault, Patrolman Tomas discovered that the wallet with its contents were missing. Evidently, the escapees effected their conspiracy to rob the victim of said wallet and its contents.

WHEREFORE, FOR LACK OF NECESSARY VOTES, DEFENDANT-APPELLANT IS HEREBY SENTENCED TO RECLUSION PERPETUA. THE INDEMNITY IN FAVOR OF THE HEIRS FOR THE DEATH OF THE VICTIM IS HEREBY INCREASED TO THIRTY THOUSAND (P30,000.00) PESOS.

IN ALL OTHER RESPECTS, THE JUDGMENT APPEALED FROM IS HEREBY AFFIRMED.

SO ORDERED.

Fernando, C.J., Teehankee, Concepcion, Jr., Guerrero, Abad Santos, De Castro, Melencio-Herrera, Plana, Escolin, Relova, Gutierrez, Jr., and De la Fuente, JJ., concur.

Aquino, J., see concurrence.

CONCURRING OPINION**AQUINO, J.:**

As Karunsiang Guiapar is a Non-Christian, reclusion perpetua may be imposed upon him pursuant to section 106 of the Administrative Code of Mindanao and Sulu which is apparently still in force (*People vs. Mori*, L-23511-2, January 31, 1974, 55 SCRA 382; *People vs. Bakang*, L-20908, January 31, 1969, 26 SCRA 840).

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