

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PEDRO BORJA, PEDRO FUSTIGO, INOCENCIO DEMEN, RUFINO PAVIA, FELIPE BENAVIDES, DOMINADOR DE LOS SANTOS, JOHN DOE, AND RICHARD DO...

G.R. No. L-22947. July 12, 1979

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal from the consolidated decision of September 8, 1960, by the Court of First Instance of Albay, in Criminal Case No. 2578 for murder, and Criminal Case No. 2590 for frustrated murder, both bearing the identical titles, PP. vs. Pedro Borja, Pedro Fustigo, Inocencio Demen, Rufino Pavia, Felipe Benavides, Dominador de los Santos, John Doe and Richard Doe.

The decision convicted the accused, as follows:

In Criminal Case No. 2590, the Court, fully convinced that Pedro Borja, Pedro Fustigo, Inocencio Demen, Rufino Pavia, Felipe Benavides and Dominador de los Santos, are guilty beyond the peradventure of reasonable doubt of the crime of frustrated murder, as principals, hereby sentences each of them to undergo imprisonment ranging from six (6) years, one (1) month, and eleven (11) days of prision mayor, as the minimum, to fourteen (14) years, ten (10) months, and twenty-one (21) days of reclusion temporal, as the maximum; to suffer inherent accessory penalties; to indemnify the offended party, Salutiano Isorena, in the sum of P5,000.00, as moral and exemplary damages, severally and jointly, but not to undergo subsidiary imprisonment in case of insolvency, by reason of the nature of the penalty imposed; and to pay the costs of this proceeding on equal basis.

In Criminal Case No. 2578, the Court after having been convinced beyond the realm of reasonable doubt of the guilt of Pedro Borja, Pedro Fustigo, Inocencio Demen, Rufino Pavia, Felipe Benavides and Dominador de los Santos, of the crime of murder, as principals, deeply hurting as it is, hereby sentences each of them to the maximum penalty of death; to suffer inherent accessory penalties; to indemnify the offended parties, Mercedes Chuidian Vda. de Gancayco and her children in the sum of P6,000.00 for the death of Santiago Gancayco, Jr., as a matter of law and practice, and another amount in the sum of P30,000.00 as moral and exemplary damages, both severally and jointly, but not to undergo subsidiary imprisonment in case of insolvency, by reason of the nature of the penalty imposed; and to pay the costs of this proceeding on equal basis.

In the decision, the trial court - pursuant to the Revised Penal Code, Article 5 - recommended to the President, through the Secretary of Justice, with respect to the accused Dominador de los Santos, "that executive clemency be extended to him, or that at least his death penalty be minimized or commuted to life imprisonment." The court so recommended because "the testimony of this accused had contributed in a large measure to the Court in its pursuit of truth and justice in these cases." It should be stated here that by resolution of January 24, 1966, the Court noted the contents of de los Santos' motion withdrawing his appeal in this case.

It appears that on December 18, 1958, the Anderson Fil-American Guerrillas (AFAG) held a general meeting at

the bahay-pulungan of the religious sect known as Watawat Ng Lahi at Barrio Buragwis, Legaspi City. The locale of the meeting was so chosen because many AFAG members are also Watawat members. One of the accused, Pedro Borja, presided over the meeting, which was attended by more than a hundred members. Borja, who has the rank of a full colonel, is the AFAG head for the entire Bicol region, which is said to have 36,000 members. He had good news for the members: he announced that their backpay was forthcoming at the rate of P36,000.00 for a ranking officer, and a lesser amount for those of lower rank.

When the meeting ended, Borja called an exclusive conference among selected officers and members, including the other accused Rufino Pavia, Inocencio Demen, Pedro Fustigo, Felipe Benavides, Dominador de los Santos, Alejo Balimbing, and Tito Oljina. (The last two, now deceased, are referred to in the title of this case as John Doe and Richard Doe). At the secret meeting, Balimbing proposed to Borja that they conduct a raid the following morning at the Hacienda San Miguel, located at San Miguel Island, across the bay from Tabaco, Albay. That same evening, Demen cleaned a .45 caliber pistol. The conference over, all eight men slept in the bahay-pulungan.

When they woke up the next day, December 19, 1958, the eight men held an early-morning conference. Balimbing aired to Borja his grievances against Santiago Gancayco, Jr. the manager of the hacienda. Balimbing charged that it was Gancayco who killed Balimbing's cousin at Rawis, Tabaco, Albay. Balimbing further complained that it was Gancayco who ordered that the camote plantations of the hacienda squatters - who were related to Balimbing - should be bulldozed. It appears that Balimbing was only rehashing what he had already related to Borja several months before, at the AFAG regional headquarters at Pili, Camarines Sur.

That same morning, the eight men left by bus for Tabaco, via Legaspi City. They were armed as follows: Borja had two pistols tucked in a shoulder holster; Pavia had a .45 caliber pistol; Balimbing had a hunting knife with a scabbard; and Fustigo had a pistol. They were attired as follows: Borja wore a khaki suit, black jacket, buri hat, and sunglasses; Demen wore a khaki suit; Fustigo wore a blue shirt and khaki pants; de los Santos wore a red T-shirt, brown jacket, and maong pants; Benavides wore denim pants and printed polo shirt; Pavia wore a striped polo shirt and denim pants with jacket; Balimbing wore white pants; and Oljina wore a brown polo shirt and khaki pants.

In Tabaco, the group went to Barrio San Jose, where they ate breakfast at the house of de los Santos' brother. Upon Borja's instruction, Balimbing hired a motorboat operated by Mariano Burac, who observed at the trial that the eight men acted suspiciously and conferred sotto voce among themselves. They crossed the bay, and the group disembarked at the hacienda. At a seashore conference, they agreed to pose as members of the Philippine Constabulary, ostensibly on a mission to inspect the firearms of the hacienda. At this time, Borja started to wear a pair of white gloves. They proceeded on their way, and Balimbing tried to open the bamboo gate of the fence surrounding the manager's house. He was accosted by Emilio Lanon, a security guard and barrio lieutenant of the hacienda, who was later one of the principal eyewitnesses for the prosecution. Balimbing and Lanon knew each other. Balimbing introduced his companions as PC officers and soldiers, identifying Borja as a major and Pavia as a sergeant.

On Lanon's advice, Balimbing proceeded to the office and emerged with Salustiano Isorena, the hacienda overseer. Isorena told Lanon to inform Gancayco about the presence of the visitors. Then, on Pavia's advice, he and Isorena went to the house, where Isorena informed Mrs. Gancayco about the visitors. On Mrs. Gancayco's suggestion, the group went to the office to wait for Gancayco, who arrived later.

Gancayco shook hands with Borja and Pavia. He offered Borja a pack of cigarettes, from which Borja took one stick. Informed of the group's alleged mission, Gancayco instructed Isorena to present the license of the firearms. But Isorena failed to find the license in the office, so Gancayco went to the house to look for it there. While in the

house, he instructed his wife to prepare a meal for the guests.

Gancayco returned to the office, gave the license to Isorena, and then left. Isorena presented the license to Borja, who remarked that the license listed only five firearms, as against reports received at the headquarters in Albay that there were ten firearms in the hacienda. Borja then ordered Isorena to produce the firearms for inspection; Isorena, in turn, instructed Lanon to get the firearms. Lanon went to the house and obtained a carbine, the magazine of which he removed; as well as a shotgun.

On his way back to the office, he met de los Santos and Oljina, who took the firearms and the magazine from him. Isorena again instructed Lanon to get the other firearms. In compliance, Lanon sent Jaime Rawit to get the grease-gun from Lanon's house, while Lanon himself went to Gancayco's house to get another grease-gun which had no magazine. Rawit and Lanon met at Gancayco's house and from there, while Lanon was carrying the two grease-guns, he met Demen and Benavides, who took them away.

The group had now succeeded in obtaining possession of four of the five firearms, and they were not able to get the one remaining firearm only because it was with an hacienda employee guarding cattle some kilometers away. An atmosphere of menace descended on the hacienda as the men loaded the firearms and took a hostile stance. An apprehensive Isorena asked the equally perturbed Gancayco for instructions, but was only cautioned to remain calm and deal courteously with the group, as Gancayco had already sent someone to Tabaco to request police assistance.

During this time, Balimbing was investigating Lanon inside the bodega. Lanon was surrounded by Balimbing with a hunting knife, Pavia with a .45 caliber pistol, and Benavides with a grease-gun. In the course of his interrogation, Balimbing told Lanon that they were going to kill Gancayco, Isorena, Lanon, and one Pablo Balimbing, chief herder of the hacienda, because these employees were bootlickers to the Gancaycos. Then Balimbing pushed Lanon out of the bodega.

Gancayco and Isorena were talking at the balcony of the house. They were approached by Demen who had a grease-gun, and Oljina who had a shotgun. De los Santos with a carbine posted himself under the citrus tree near the water tank in front of the house. Gancayco asked to see a search warrant from Demen and Oljina, who referred him to Borja. So Gancayco and Isorena descended and inquired for the warrant from Borja, who was standing in front of the house. Instead of replying, Borja talked to Pavia, who was near the guardhouse. Borja then called Balimbing and, referring to Gancayco and Isorena, ordered him to "fix them up" since it was already getting on towards noon. Borja herded the other men of the hacienda inside the bodega, where they were guarded by Benavides who was armed with a grease-gun, and Fustigo with a pistol. Borja faced the hacienda personnel, holding in readiness his two pistols. Lanon stood in front of him, facing out of the bodega.

In the meantime, Balimbing, Pavia, Demen, de los Santos, and Oljina escorted Gancayco and Isorena towards the office. Isorena went up the stairs and turned around when he reached the top; behind him, de los Santos held a carbine in a ready position. Benavides asked Gancayco for the magazine of the grease-gun he was holding. When Gancayco answered that it had no magazine, Benavides accused him of lying and sideswiped him with the grease-gun. Then Benavides left for the bodega.

Now the men surrounded Gancayco in front of the office. Facing him was Balimbing, who was swinging his hunting knife. Also facing him, to Balimbing's right, was Pavia whose jacket, draped over his left arm, concealed his right hand which held a .45 caliber pistol. To Pavia's right was Demen, who was aiming the grease-gun at Gancayco. Slightly behind Demen, Oljina aimed the shotgun at Gancayco.

Balimbing accused Gancayco of killing Balimbing's cousin, and demanded that Gancayco produce the .45 caliber

pistol which he claimed was used to perpetrate the death. Gancayco explained that it was not he but Solon Demetrio who accidentally shot Balimbing's cousin, and that Gancayco had no such pistol. Pavia interjected that it was unbelievable for Gancayco, as manager of the hacienda, not to have such a pistol. But Gancayco insisted that there was none.

While this exchange was taking place, Gancayco, who was unarmed, stood with his back towards the foot of the stairs. He was surrounded by Balimbing who held a hunting knife; Pavia who held a .45 caliber pistol concealed beneath his jacket; Demen who held the grease-gun with his arms down and the muzzle of the gun pointed slightly upward; and Oljina who held a shotgun. The four men were about two meters away from Gancayco. Up in the balcony, de los Santos stood guard with a carbine in ready position, standing slightly back of Isorena. Gancayco and the four men were about four meters away from Isorena and de los Santos.

Gancayco had insisted that he had no .45 caliber pistol. At this fateful moment, Pavia suddenly jerked his right hand upward and fired point-blank with his .45 caliber pistol at Gancayco. Hit, Gancayco stooped to hold the pit of his stomach and cried, "Aray ko po!" Instinctively, he stepped backward and was turning around when Demen fired at him with a grease-gun. He ran away in a crouching position towards the citrus plantation, while Demen continued firing at him. Then Demen aimed rapid fire at Isorena, who fell flat on the balcony floor. Demen's line of fire accidentally caught de los Santos in the forehead.

At the outburst of gunfire, Borja rushed out of the bodega. He saw Gancayco running towards the citrus plantation and he shouted: "Habulin! Habulin!" The men carrying their firearms gave chase; they were led by Demen and included de los Santos. They ran along the road towards a cluster of houses in the northern part of the hacienda, but they stopped in front of the house of Estrella Cortezano. Balimbing asked Cortezano whether she saw where Gancayco went, but he got a negative answer. As the men ran in pursuit, Gancayco traversed the citrus plantation and reached the cluster of houses. Although he was bleeding profusely, he managed to cross the road and to open the gate by removing one of the bamboo railings. He then turned towards the trail that wound through the abaca plantation at the left side of the road.

While the pursuers tracked their prey, Lanon left the bodega by the back door and went to Gancayco's house. Mrs. Gancayco told him to close all the windows and take the children downstairs, and he complied. Then he left the house and looked for Gancayco whom he found in the abaca plantation, climbing a small hill towards another cluster of houses at the hilltop. Lanon found Gancayco bleeding profusely in the breast.

Gancayco, his wife, and children, Isorena, and some other personnel of the hacienda, were able to rendezvous at the seashore. They got into a waiting motorboat and sped away towards Tabaco, in the hope of taking the wounded men to the hospital there. But this was not to be, for en route, Gancayco died in the arms of his wife. His body was brought to Manila, where it was examined and autopsied by the National Bureau of Investigation. Although seriously wounded, Isorena survived. He received first-aid treatment at the Tabaco Hospital and was airlifted the next day to Manila where he was confined, first at the North General Hospital, and then at the National Orthopedic Hospital. Dr. Casiano Flaviano, a resident physician at the National Orthopedic Hospital who treated Isorena testified that the latter would have died from his injuries had he not received immediate medical attention.

While events unfolded on Tabaco Bay, the group of eight men reached the seashore and chanced upon a motorboat anchored there. Balimbing wrapped the four firearms in some anahaw leaves. When the men discovered that the motorboat did not have enough gasoline, they looked for another and dragooned Bienvenido Taller into transporting them. Taller observed that the eight men were excited and apprehensive. Balimbing told him, with some braggadocio, that they had just killed Gancayco and Isorena. The men alighted at the lighthouse at

Malinao and immediately afterwards, Taller reported to the police authorities of the town. However, he was advised to report to the police authorities of Tabaco, who had jurisdiction over the case.

The eight men reached the poblacion of Malinao. On Borja's orders, they bought a jute sack where they placed the firearms. Borja instructed Pavia and Demen to make their separate way towards Barrio Buragwis. Before he left with Demen, Pavia left his .45 pistol with Balimbing. The remainder of the group boarded a passenger bus going to Tiwi.

As the bus stopped near the market at Tiwi, another car overtook it and policemen from Tabaco, headed by Chief of Police Ceferino Firaza, alighted and surrounded the bus. Firaza in a loud voice called for the surrender of all those in the bus responsible for the killing at the Hacienda San Miguel. He was suddenly fired upon by Borja and then by Balimbing. The fusillade hit him on the right cheek, and he ordered his men to return fire. The encounter resulted in the death of Balimbing and Oljina; the capture of Benavides and de los Santos; and the escape of Borja and Fustigo. Lt. Melanio Rey of the Tabaco police confiscated the firearms, magazines, and ammunition taken from the hacienda; the .45 caliber pistol and its shell; the hunting knife and its scabbard from the dead body of Balimbing; and other paraphernalia from the dead bodies of Balimbing and Oljina.

The encounter in Tiwi took place in the afternoon of December 19, 1958. Subsequently, the rest of the band fell one by one into the hands of the law. Pavia, Demen, Fustigo were arrested, and Borja, the last one to fall, was captured on February 27, 1959 after a nationwide manhunt.

The trial judge characterized this narration of the shooting of Gancayco and Isorena as both watertight and airtight. He found that the tenor of the evidence presented - consisting in the main of the testimony of Isorena, an eyewitness; and of the accused de los Santos, who testified for the state during Borja's separate trial - was confirmed by the testimonies of the medico-legal expert and the ballisticsian. He noted that the five accused who were separately tried from Borja admitted all the facts leading to the shooting, but interposed the common defense of fear of Borja, who, they claimed, had threatened disobedient AFAG members with death. The trial judge was not persuaded and he discounted this common defense, characterizing it as "an after-thought to save their respective skins in the face of the overwhelming evidence of the prosecution pointing to their voluntary participation in the commission of the crimes of murder and frustrated murder." Instead, the trial judge found that the five men participated in the killing "because they were inspired by the juicy thought or promise of an enormous amount of backpay for each."

Borja, who was still at large at the time the five accused were being tried, had a separate trial. The trial court found that he "has a version entirely distinct and separate from that of the five accused, which version in turn is astronomically far from the evidence presented by the prosecution." Borja washed his hands of any complicity in the killing which he sought to lay at Balimbing's door. Conveniently for Borja, Balimbing is dead and cannot tell his tale. But like his colleagues, Borja failed to convince the trial judge. Noting that Borja was the commanding officer of eight AFAG regiments in the entire Bicol region, while Balimbing was just a sergeant, the trial court refused to believe that Balimbing openly defied Borja by instigating the sanguinary episode at the hacienda. Instead, the trial court declared: "The contrary was the real and painful truth. Pedro Borja was the leader of the group that raided Hacienda San Miguel, and he was the very one who ordered the liquidation of Santiago Gancayco, Jr. and Salustiano Isorena."

The trial court found that conspiracy was "conclusively established" and that "the guilt of all the accused has been established by proof above the shadow of doubt." It found that the killing of Gancayco constitutes murder, while the shooting of Isorena constitutes frustrated murder. The trial court held that either evident premeditation or treachery qualifies the crimes to murder and frustrated murder; since the law requires only one qualifying

circumstance, the other should be considered as an aggravating circumstance.

The trial court found five aggravating circumstances against Fustigo, Demen, Pavia, Benavides, and de los Santos, to wit:

- (1) the crimes of murder and frustrated murder were committed by a band, or with the aid of armed men;
- (2) means were employed to weaken the defense, wherein is included taking advantage of superior strength;
- (3) craft, fraud and/or disguise were employed;
- (4) there was promise of backpay in the commission of the crimes; and
- (5) there was treachery or evident premeditation, depending upon whatever is used to qualify the crimes to murder and frustrated murder.

With respect to Pedro Borja in both cases, the trial court considered against him four aggravating circumstances, consisting of the five above-mentioned, but excluding the promise of backpay. It found another aggravating circumstance in the case of frustrated murder, i.e. dwelling. Hence, in the case of frustrated murder, it found six aggravating circumstances against Fustigo, Demen, Pavia, Benavides, and de los Santos; and five aggravating circumstances against Borja.

All the five accused in the first trial admitted practically all the evidence for the prosecution in their testimonies in their own behalf, and additionally in their respective affidavits narrating their individual participation in the commission of the two crimes. Moreover, they freely and voluntarily re-enacted the crime at the hacienda, in the presence of the trial judge. The re-enactment proceedings were photographed and tape-recorded, and bore out the version testified to by Isorena and Lanon, eyewitnesses for the prosecution.

In the Brief for all accused-appellants except Pedro Borja, John Doe, and Richard Doe (John Doe and Richard Doe refer to Alejo Balimbing and Tito Oljina, who were killed during the encounter at Tiwi), the five accused - Fustigo, Demen, Pavia, Benavides, and de los Santos - do not deny their culpability for the offenses charged. In their Brief, they prayed for the reduction of the penalty from death and its accessory penalties, to reclusion temporal and its accessory penalties. They admitted with candor: "The finding of facts in the decision of the trial court having been found to be a faithful narration of the incident as related during the trial of the case and given in the two ocular inspections of the premises where the shooting happened, it would seem a use-less endeavor to reiterate said findings of facts. . . ." (Brief for the Accused-Appellants except Pedro Borja, pages 6-7).

The five accused controverted the findings of the trial court that there were five aggravating circumstances in the case for murder. Instead, they contended that the trial court should have appreciated only three aggravating circumstances. They reasoned that any of the alleged aggravating circumstances should necessarily be absorbed to qualify the crime of murder, thereby leaving only four aggravating circumstances. Moreover, they argued that the aggravating circumstance of promise of backpay was not alleged in the information, and consequently should not be taken as an aggravating circumstance.

We find that the trial court correctly considered that either treachery or evident premeditation qualifies the crime to murder, and hence the other alternative circumstance should be considered as aggravating. We reject the contention of the five accused; for while it is true that the aggravating circumstance of promise or reward was not alleged in the information, nevertheless, it was proven during the trial, and therefore can be considered as a generic aggravating circumstance, though not a qualifying circumstance. (*People of the Philippines vs. Navarro, et al.*, L-20860, November 28, 1964, 12 SCRA 530). On the other hand, as Borja contends, *infra*, the other aggravating circumstances are absorbed by alevosia or treachery. Hence, if it is treachery which is considered as

the qualifying circumstance, there remain two generic aggravating circumstances which attended the commission of the two crimes with respect to the five accused: evident premeditation; and promise or reward (which does not apply with respect to Borja.)

The five accused contended that there were three mitigating circumstances in their favor: lack of instruction; fear of Pedro Borja; and lack of motive. We find no merit in this contention. The argument of lack of instruction is based on the allegation that the five accused did not finish primary education. But the defense adduced no proof to establish the existence of this circumstance, leaving in full force the holding that extenuating circumstances must be proven positively and cannot be based on mere deduction or inference. (PP. vs. Sakam, et al., 41566, December 7, 1934, 61 Phil. 27). If by "lack of instruction" the defense refers to illiteracy, it is not sufficient to constitute a mitigating circumstance, for there must also be lack of intelligence. (PP. vs. Gorospe, L-10644-45, February 19, 1959, 105 Phil. 184; PP. vs. Ripas, L-6246, May 26, 1954, 95 Phil. 63; PP. vs. Semañada, L-11361, May 26, 1958, 103 Phil. 790; PP. vs. Tengyao L-14675, November 29, 1961, 113 Phil. 465).

The second mitigating circumstance advanced by the five accused is "awe and fear of Pedro Borja." But the element of fear is not one of those enumerated as a mitigating circumstance under the Revised Penal Code, Article 13. If the defense refers to the element of "uncontrollable fear or duress" which is an exempting circumstance under the Revised Penal Code, Article 12, the argument is still invalid, for it has been held that the element of duress should be based on real, imminent, or reasonable fear for one's life or limb and should not be speculative fanciful, or remote fear. (PP. vs. Quillo, No. L-2313, January 10, 1951, 88 Phil. 53). We find no evidence to support the claim that Borja threatened any or all of the other accused.

The third alleged mitigating circumstance is lack of motive. We are hard put to discuss this contention because the Revised Penal Code, Article 13 does not include "lack of motive" as one of the mitigating circumstances. Finally, the defense argues that "the undiplomatic attitude of Gancayco and Isorena, bordering on provocation" should be considered as another mitigating circumstance. This contention is not borne out by the evidence; on the contrary, it appears that instead of being "undiplomatic", Gancayco was pacific, and he counselled Isorena that "the best thing for us to do is to talk to them peacefully and follow them, whatever they want." (T.s.n. p. 1466). This leaves as the only remaining assertion of the five accused the claim that "the alleged premeditated conspiracy to kill Gancayco was not clearly revealed in the records of the case." We shall discuss this assertion in dealing with the defense of Borja.

In the Brief for the defendant-appellant Pedro Borja, the defense contended that since a separate trial was held for Borja, the trial court erred in rendering a single decision on which the findings of facts respecting Borja, based on evidence adduced during his separate trial, are not distinctively set forth, thereby prejudicially impairing Borja's substantial rights. We find no such impairment of the rights of the accused. The evidence shows that the prosecution established the same facts in the two separate trials. Isorena and Lanon testified as eyewitnesses to the incident of December 19, 1958; de los Santos testified as an eyewitness not only to the same incident, but also to events before and after the shooting, showing conspiracy among the accused. Other persons testified in both trials to supply corroborating evidence.

Borja also contended that the trial court erred in not according credence to Borja's defense and in finding him guilty on the basis in part of what is alleged to be incompetent evidence adduced not at his separate trial but at that of his co-accused, and in not acquitting him upon the ground that his guilt was not proven beyond reasonable doubt. This is a blanket allegation which can be dealt with summarily, because the testimonies of common witnesses in both trials clearly establish facts incriminatory to Borja. More specifically, Borja contended that the trial court erred in finding that a conspiracy existed between Borja and his co-accused. We find this contention to be an excursion outside the perimeters of credibility. Borja was the AFAG commander for the Bicol region. After

the second secret conference, he donned spurious armed forces get-up, complete with uniform and two guns. When he was introduced to the hacienda personnel as a PC major in command of the group, it does not appear that he raised any protest. Instead, the evidence shows that he issued the order to Balimbing to "fix them up," referring to Gancayco and Isorena; and he also issued the order "Habulin! Habulin!" when Gancayco ran for his life. Borja consistently acted the leader as he led the dash for illicit freedom. He led the group in fleeing the island; instructed that the firearms should be secreted away in a jute sack; and ordered his men to separate into two groups when his group was surrounded by Tabaco policemen near Tiwi, where Borja led the gunfight.

He eluded his trackers for more than two months until his capture. To flee the fold of the law is to admit that one has transgressed that law. (PP. vs. Wilson, et al., 30012-15, March 7, 1929, 52 Phil. 907). Borja's uncontested actions would be gratuitous and illogical, unless located within the frame of conspiracy, which is their only reasonable context. The evidence shows that Borja acted in concert with the other accused in pursuance of the same objective. Hence, conspiracy attaches and it is no longer necessary to obtain proof as to the previous agreement or decision to commit the crime. (PP. vs. Cadag, L-13830, May 31, 1961, 2 SCRA 388; PP. vs. Peralta, L-19069, October 29, 1968, 25 SCRA 759; PP. vs. Alcantara, L-26867, June 30, 1970, 33 SCRA 812).

Borja further contended that assuming his criminal liability, the trial court erred in appreciating the qualifying circumstances of treachery and evident premeditation; and the generic aggravating circumstances of band or aid of armed men; use of means to weaken the defense; craft, fraud, and/or disguise. This contention for the first part flies in the face of the evidence. Treachery was present because Gancayco was killed while he was unarmed, and surrounded by enemies with firearms, including two grease-guns. Thus, Gancayco was deprived of any means of defense while his enemies were exposed to no risk arising from the defense which the offended party might have made. True, Borja was inside the bodega when the shooting took place; at his physical absence does not exonerate him, for it was he who ordered the execution. Moreover, where there is conspiracy, treachery is considered against all the offenders. (PP. vs. Carandang, et al., 32039, February 26, 1930, 54 Phil. 503). The aggravating circumstance of evident premeditation was sufficiently proved, for prior to the shooting on December 19, 1958, the accused met in two secret conferences and discussed the raid on the hacienda in order to avenge themselves by exacting redress from Gancayco for allegedly killing Balimbing's cousin and bulldozing the camote plantations of Balimbing's relatives.

However, Borja's contention for the second part is well taken. The defense argues that the circumstance of band and aid of armed men, cannot be taken separately from the circumstance of use of means to weaken the defense, and advantage of superior strength. It was correctly pointed out that all these circumstances are absorbed in treachery and may not be considered independently. (U.S. vs. Estopia, et al., No. 9411, September 29, 1914, 28 Phil. 97; U.S. vs. Oro, No. 5781, August 14, 1911, 19 Phil. 548; U.S. vs. Vitug, et al., No. 5430, September 8, 1910, 17 Phil. 1; PP. vs. Sespeñe, No. L-9346, October 30, 1957, 102 Phil. 199; PP. vs. Lumantas, L-28355, July 17, 1969, 28 SCRA 764; PP. vs. Agustin, L-18368, March 31, 1966, 16 SCRA 467; PP. vs. Layson, L-25177, October 31, 1969, 30 SCRA 32). It was also correctly pointed out that treachery absorbs the circumstance of craft, fraud and disguise. (PP. vs. Malig, et al., L-2083, May 30, 1949, 83 Phil. 804). Nonetheless, this leaves the aggravating circumstance of evident premeditation, which applies to all the accused; and the aggravating circumstance of promise of backup, which applies to all the accused, except Borja.

Lastly, Borja contended that, assuming he is criminally liable, the trial court erred in not according him the benefit of the mitigating circumstance of voluntary surrender. We do not view this as error. It appears that Borja did not surrender but was captured on February 27, 1959. His own witness, Captain Eliseo Farol of the Armed Forces of the Philippines, testified that he received a report that Borja was holed up at Barrio Sumakap, Cavinte, Laguna. Accordingly, he sent a ranger team which located the house and called on Borja to come down. As the house was

surrounded by soldiers, Borja offered no resistance. Capt. Farol also testified that while Borja was at large, he killed a PC soldier in an armed encounter at Catanauan, Quezon, as a result of which he was indicted for murder in the court of first instance in that province. Capt. Farol also declared that a prize of P2,000.00 was put on Borja's head for being a dangerous fugitive. These are not indicia of the personality seeking voluntary surrender.

Mr. Santiago Gancayco, Jr., manager of a 1,700-hectare hacienda and scion of a prominent family, is dead. His demise when he was only in his early thirties was rendered more tragic in that he breathed his last in the bosom of his grieving family, consisting of his wife and six small children, in the course of his flight from ostensible visitors who had suddenly been transformed into cold-blooded killers. Dr. Rizalino Reyes, Chief of the Medico-Legal Division of the National Bureau of Investigation who performed an autopsy on the body of Santiago Gancayco, Jr. testified that his death was due to hemorrhage, severe, secondary to multiple gunshot wounds of the body and that shock, traumatic was contributory. It was abundantly established in the trial court that his killing was attended by treachery, which qualifies the crime committed by the perpetrators into murder.

Five of the accused, namely: Pedro Fustigo, Inocencio Demen, Rufino Pavia, Felipe Benavides and Dominador de los Santos have been in custody since December 19, 1958, or shortly thereafter; while Pedro Borja was apprehended on February 27, 1959. It can thus be seen that all of them have been under detention for over twenty years.

WHEREFORE, the judgment of the lower court in Criminal Case No. 2590 is hereby affirmed in toto; that in Criminal Case No. 2578 is modified in respect of the principal penalty from death to reclusion perpetua for lack of necessary votes, and in respect of the civil indemnity from P6,000 to P12,000.00.

SO ORDERED.

Fernando, C.J., Makasiar, Concepcion, Jr., Santos, Fernandez, Guerrero, De Castro, and Melencio-Herrera, JJ., concur.

Teehankee, J., voted for affirmance of the death penalty.

Barredo, J., concurs in a separate opinion.

Antonio and Aquino, JJ., no part.

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CONCURRING OPINION

BARREDO, J.:

I concur, and I would like to explain why I am voting to impose upon appellants the penalty of reclusion perpetua in Criminal Case No. 2578, the murder case, notwithstanding that the record is clear that the commission of said offense was attended by aggravating circumstances not correspondingly offset by any mitigating circumstances, for which reason, by mandate of Art. 64 (4) of the Revised Penal Code in relation to its Article 248, the penalty legally imposable is death.

It has been my insistent position ever since I joined this Court ten years ago that the imposition of the penalty in

capital offenses, is a matter of strict law and does not and may not be based on the individual feelings of the Justices, singly or jointly, about the propriety or impropriety of the death penalty per se. Accordingly, when the required number of Justices are agreed on the guilt of the accused as well as the existence of any aggravating circumstance which under the above-mentioned provisions of the Code require the imposition of the death penalty, in my view, it is not for any of us to say that he votes for a lesser penalty simply because he does not believe in the death penalty itself. This is because we have sworn to apply the law regardless of our personal predilections, and in the premises just indicated, it leaves us no other alternative. Indeed, I have always maintained that just as the Court would not countenance any trial judge doing less than what the Revised Penal Code requires under the proven circumstances of any case, no member of the Court may refuse to vote for the imposition of death in appropriate instances, unless he expressly makes an individual finding or holding that the circumstances warranting the imposition of such penalty do not in his judgment appear.

A general statement in the decision that for lack of necessary votes, life imprisonment is being imposed does not reflect who of the Justices have not voted for the death penalty and their reasons for their votes. In such a situation, it follows, in my humble opinion, that there is no way of knowing whether or not the finding or holding of the existence or non-existence of the pertinent aggravating circumstances is justified or not, and consequently, it would be difficult to ascertain whether or not the legal norms established by the code and by jurisprudence have been observed and worse, whether or not justice has been done. Of course, I do not deny the prerogative of any member of the Court to act according to he dictates of his conscience, but I am unable to discern how anyone of us can ignore the unequivocal and terse injunction of the Constitution that "any Member dissenting from a decision -- and non-conformity with the penalty imposed in the main opinion is a dissent -- shall state the reasons for his dissent." (Section 8, Article X, Constitution of the Philippines.) Which, of course, means that the reasons must be of law and justice and all the parties and the people have a right to know them. I am not certain that the sense of responsibility which should be assumed motivate every Justice of the Supreme Court can sufficiently justify the omission.

In the case at bar, therefore, I deem it imperative that I should give my legal reasons for my vote that herein appellants should be penalized only with life imprisonment despite my being convinced on the basis of the evidence on record that aggravating circumstances attended their commission of the crime the Court has found them to be guilty of.

As stated in the main opinion, all the appellants have been under detention for more than twenty years. More than that, they have been living under the shadow of a sentence of death since September 8, 1960, almost nineteen years ago. In the light of these facts, I hold that while unquestionably, appellants deserved the death penalty at the time they were sentenced by the trial court, the passage of so many years of mental torture under the deplorable conditions obtaining in the national penitentiary during all those years has transformed that penalty into a cruel one within the contemplation of the human proscription of the Constitution against the inflicting of cruel and unusual punishment. (Section 21, Bill of Rights.)

It was certainly no fault of appellants that proceedings leading to their final conviction by this Court now have been prolonged beyond the reasonable period for the purpose. And it is hardly of any materiality at this juncture, to inquire where the fault for such a happenstance actually lies, for it cannot lessen the extreme agony they have already undergone. I do not believe it can be denied that living under the shadow of a sentence of death for more than ten years, what with the deplorable conditions in the death row and other parts of our national penitentiary, is a life that can be worse than death itself. Indeed, such an unusually long waiting amounts to cruelty, which should never be added -- and the law, I dare say, does not contemplate that it may be added -- to the penalty of death.

I do not believe that any new legislation is needed to legalize this position of mine. It is my considered opinion

and I so hold that the prohibition in the Bill of Rights of the Constitution that no "cruel or unusual punishment" shall be "inflicted" operates *ex proprio vigore* upon the legislature, the courts and the executive. Indeed, it may be said it contemplates any proceeding where some kind of punishment is imposed, whether criminal, civil, or administrative. Withal, I maintain that just as under our jurisprudence in civil cases, even a final judgment may not be executed pursuant to its specific terms when circumstances intervene that would make such rigorous execution inequitable, similarly, the imposition of the capital penalty under circumstances more afflictive and painful to the culprit than it should normally be should not be done. If it is borne in mind that in all civilized countries of the world where the death penalty is still in vogue, every effort is always made to make its execution as painless and as humane as possible -- thus, the electric chair and the gas chamber in lieu of hanging or other more cruel means -- one cannot but realize that to add years and years of detention to the death penalty itself is revolting to one's sense of humanity and justice.

It goes without saying that the Supreme Court can itself prevent the occurrence of such situation as herein contemplated -- by hastening the disposition of the unusual number of appeals involving capital offenses pending before it. That is easier said than done. Multiple compelling factors have contributed to cause such a lamentable backlog, and while remedial measures being taken may eventually minimize or altogether solve the problem, what is important at the moment is that we cannot escape the reality that until the desired improvement shall have materialized something has to be done for the poor innocent victims of the situation, in the interest of humanity and justice.

Before closing, I would like to make of record that I have proposed to the Court that this position of mine be adopted as a general rule to be observed in the cases before Us. I regret I have not been heeded. Some members of the Court feel that there are cases wherein the accused really deserve to be punished strictly in accordance with the applicable provisions of the Revised Penal Code because of the undeniable atrociousness and viciousness or obvious incorrigible criminal perversity characterizing the commission of the offense. I respect their views, but I submit that the injunction of the Constitution against "cruel and unusual punishment" contemplates the most heinous crime conceivable and yet does not distinguish. In the cases I have in mind, there is no justification for adding, in effect, another penalty to the one prescribed by the Revised Penal Code. Indeed, if the law says the penalty should be death and no more, how can we impose an additional penalty of prolonged detention thru no fault of the convict?

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