

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. PERLITO SOYANG AND CRESENCIO SOYANG, DEFENDANTS AND APPELLANTS.

G.R. Nos. L-13983-85. December 31, 1960

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

Brothers Cresencio and Perlito Soyang were charged with murder and direct assault upon a person in authority in two separate informations filed before the Court of First Instance of Zamboanga del Sur (Case Nos. L-13983 and L-13984). Cresencio was further accused before the same court also in a separate information of the crime of illegal possession of firearm and ammunition (Case No. L-13985). Upon agreement of the parties because the offenses charged arose from related incidents, the three cases were tried jointly.

After trial the lower court found the two brothers guilty of the offenses charged and were convicted as follows: In the murder case, they were sentenced each to suffer reclusion perpetua and to indemnify jointly and severally, the heirs of the deceased in the sum of P3,000.00; in the case of assault, they were sentenced each to suffer an indeterminate penalty of 4 months and 1 day of arresto mayor as minimum to 4 years 9 months and 10 days of prison correctional as maximum, and to pay a fine of P500.00, with the corresponding subsidiary imprisonment in case of insolvency; and in the case of illegal possession of firearm, Cresencio was sentenced to suffer an indeterminate penalty of from 1 year as minimum to 1 year and 8 months and 1 day as maximum. They were sentenced to pay costs in the three cases. The pistol found in possession of Cresencio was ordered confiscated.

Not satisfied with¹ this decision, the two brothers interposed the present appeal.

The version of the prosecution, as narrated in the brief of the Solicitor General, is as follows: On August 1, 1957, Philippine constabulary soldiers Silvestre Bagumba and Eustico Mercoleta of the 57th company stationed at Tacloban City departed from their camp to escort a prisoner detainee Leonardo Malinao to the Court of First Instance of Pagadian, Zamboanga del Sur. The boat taken by them first touched Ormoc, then Cebu, and arrived at Malangas, Zamboanga del Sur on August 6, 1957. While the boat was docked at Malangas, soldier Mercoleta went to the market to buy fish and on his return he brought along Perlito Soyang for whom a warrant of arrest had been issued. Perlito was placed under custody by the two soldiers and was questioned about the whereabouts of his brother Cresencio whose apprehension was also sought by the authorities. On being informed that Cresencio was in Tigbalogo, the two soldiers left for that place aboard the launch "Mercedita" belonging to the Soyang brothers, which they had also been ordered to confiscate. On failing to locate Cresencio at Tigbalogo, the two soldiers extended their search to Gapi, and on finding that Cresencio was not to be found in that place, they returned once more to Tigbalogo. This time their search was fruitful because Perlito was able then to lead them to his brother Cresencio who was at once placed under arrest. When the latter was searched by the two soldiers, one Colt automatic, caliber 38, serial No. 67240, with one ammunition, was found in his possession.

From Tigbalogo, the two soldiers proceeded back to Malangas with their prisoners and on their arrival they went

immediately to the police station with the intention of lodging (their prisoners in the town jail for the night. The police of Malangas, however, denied their request because, according to them, their jail was not safe, and to better safeguard the prisoners, the soldiers brought them back to the launch "Mercedita". At dawn of the following day, at three o'clock, the two soldiers, together with their prisoners, set sail for Pagadian aboard the family launch. Before starting on their journey, however, the soldiers tied the hands of the Soyang brothers with rope for security reasons and placed them on the prow of the boat. At about five o'clock in the morning of August 8, 1956, prisoner detainee Malinao noticed that the Soyang brothers were already untied and so he immediately informed soldier Bagumba about it, who immediately tried to apprise his companion, Mercoleta, who was supposed to be watching the prisoners, but at this very instant the two brothers grappled and pushed Mercoleta to the water, the three falling together. Bagumba at once turned the boat but before being able to do so he heard a shot. At a distance of 60 yards from the place of the incident, Bagumba saw the Soyang brothers, but Mercoleta has disappeared. Perlito who was then in possession of Mercoleta's carbine fired at the approaching boat, which Bagumba answered back with his own pistol. The latter's firearm, however, got jammed at the fifth shot forcing him to discontinue the fight and go to the shore of Panubigan and Pitogo where he asked the help of the people there to look for Mercoleta and apprehend the two brothers. Among the persons who answered the request for help were Geronico Malinao, a farmer from Pitogo, Dimataling, Zamboanga del Sur, and Lope Velencio, a policeman from the same municipality.

On being informed of the incident, the aforesaid persons immediately boarded a small vinta and proceeded at once to the place indicated by soldier Bagumba at the scene of the crime. On arriving at the place indicated, Malinao and Velencio saw a man (who turned out to be Perlito) at a distance of about 50 yards swimming towards them. The man begged to be permitted to board the boat saying that "he is the soldier and the robbers are already dead and could not be seen." Almost At the same time, the other escapee, Cresencio, moved stealthily towards the edge of the boat and on reaching it, capsized the same. Immediately thereafter, the two brothers wrestled with policeman Velencio while Malinao took hold of a paddle and struck with it Perlito on the head. As soon as both were able to free themselves from the clutches of the two brothers, the former swam towards the shore while the latter boarded the vinta and paddled towards the opposite shore. This untoward event, however, did not deter the police from searching for soldier Mercoleta. For three successive days the surrounding area was meticulously combed for some traces of the missing soldier, but all efforts exerted in this direction proved in vain.

In the meantime, Cresencio and Perlito Soyang were apprehended by the police authorities after overcoming some difficulty. Sometime thereafter, Perlito gave a written statement before Sgt. T.S. Castro of Philippine constabulary stationed at Pagadian, Zamboanga del Sur, which was subscribed and sworn to before Judge Purisima of the same municipality on August 19, 1957. On the same date, Cresencio Soyang also gave a written statement before Sgt. Rodolfo Diaz of the municipal police of Margosatubig, which was also sworn to on August 20, 1957 before Justice of the Peace Benito P. Cinco.

The version given by the defense in exculpation of appellants appears narrated in the decision of the trial court as follows:

"They are natives of Gayad, Capoocan. Leyte. They are engaged in the fishing industry. Their father owns the equipment, like the fishnets, takle. A fast inboard motor named 'Mercedita' which they use in fishing belongs to Perlito Soyang. In March, 1957 a brother of theirs, a certain Vivencio Soyang, visited them in Gayad. He came from Margosatubig and Malangas, this province where they are residing; and he has seen the rich fishing grounds and the profitable fishing industry thriving hereabouts. He told them of these possibilities and invited them to come to Mindanao. So, they came—some in the FS boat and others in the motorboat 'Mercedita'. They are Perlito, Cresencio, Antonio Soyang, their wives, Arnulfo Soyang and members of the crew. They arrived in Margosatubig this province in May, 1957. Perlito Soyang with his launch formed his fishing outfit. Cresencio

worked in another outfit.

"On August 6th, 1957 Perlito was in the public market of Malangas early in the morning selling fish. This was his catch in the preceding evening. At about eleven, o'clock in the morning he saw Rustico Mercoleta and asked him why he was in Malangas. To the query the latter answered that he and his companions (another P.C. soldier) was escorting a prisoner from Leyte to Pagadian. Mercoleta learned from Perlito that he was returning to Margosatubig after selling the fish; and so, he asked the latter to let him ride the launch so that he could visit an aunt of his. This was agreed. Perlito then hurried his sale, collected proceeds from his customers, leaving those which he could not collect. He realized some P100.00 including credits. They then went to the motorsfiip 'Don Sulpicio' by which Mercoleta, his: companion, a certain Silvestre Bagumba, and the prisoner, one Leonardo Malinao came. There after the usual introduction, the soldiers and the prisoner disembarked from the boat. Perlito even helped carry their baggages and transferred them to his launch 'Mercedita'. They left Malangas in the afternoon and proceeded to Margosatubig for the visit to the aunt of Mercoleta. Upon arriving at their destination, and, after making inquiries from some persons, they were able to locate the house of the aunt. They were treated to a light refreshment, as it was afternoon. While they were in the house of the lady, Mercoleta called Perlito to the balcony and there the former told the latter that they brought a warrant of arrest directed at him (Perlito) and his brother, Cresencio, for robberies committed in Calubian and Maripipi, Leyte and Masbate, in which they were involved; but assured him, however, that they could be left unmolested provided they paid them (soldiers) eight hundred pesos. Perlito was at first taken aback but after some reflection, he told him (Mercoleta) that he could discuss the proposition alone without waiting for his brother. (By the way, Mercoleta insisted in seeing Cresencio first before closing the deal with Perlito.) The latter then said that he could raise only seven hundred pesos as that was the only amount he had. Without reaching any decision, they left for Tigbalogo, a barrio of Margosatubig, where the Soyangs are staying. A sister, Panfila Soyang who is married to one Cosine Espinosa, has been residing there for some time already. Cresencio was not there. They learned that he was in Gapi, another barrio, visit a cousin, a certain Basing or Ambrosio. They waited for him but until evening he did not arrive. So, Vivencio was sent to Gapi in the early morning of August seventh to fetch Cresencio. He came back at about eleven o'clock that same morning. Vivencio was the first one to get off from their vinta to the land. Cresencio was behind because he had to put , on his trousers. Vivencio brought along the pistol which Cresencio had deposited with him since he had arrived in Malangas. It is the same pistol which Lucilo Bracamonte gave him in Biliran for safekeeping. Thus, when Vivencio saw Cresencio in Gapi and informed the latter that Mercoleta desired to see him, he (Cresencio) was reminded of the pistol and thought that it was about it that he had sent for him. ,

"So, Vivencio delivered the pistol to Mercoleta as soon as he met him in the yard of the house of his sister, Panfila, in Tigbalogo. Mercoleta took it apart and cleaned it and then reassembled it. He then kept it. Cresencio followed Vivencio to the house and as he was hungry he went to the dining room and there met Bagumba who was still eating his lunch. He joined him at the table and ate his lunch too. Bagumba asked him if it was the pistol that Bracamonte had deposited with him and he answered in the affirmative.

"After lunch, they went to Malangas to conduct the soldiers and prisoner Leonardo Malinao in order to enable them to get transportation to Pagadian. Their companions were, besides Perlito and Cresencio, Vivencio, Cosme1 Espinosa, and others. Cresencio went because the regular pilot of the launch 'Mercedita' was absent and he had to act as the letter's replacement. Vivencio went because he was returning home to Malangas. Cosme brought the seven hundred pesos to be given to the P.C. soldiers.

"They arrived at Malangas at two or three o'clock in the afternoon. They accompanied the soldiers and the prisoner to the municipal building. The soldiers intended to deposit their prisoner in the local jail for safekeeping. They were, however, told that the jail was not safe; hence, the policeman guard refused to receive him. So, they all went to the house of Vivencio. The soldiers, Perlito, Cresencio, Cosme and Vivencio went inside a room in the house. There, Cosme gave the seven hundred pesos to Perlito. Vivencio also gave one hundred pesos to Perlito, thereby-completing the eight hundred pesos which was the irreducible amount

demanding by the P.C. soldiers for not arresting and taking the Soyangs to Leyte, or divulging their whereabouts. Perlito then counted the money in the presence of the soldiers and after doing so, he gave it to Mercoleta who in turn gave it to Bagumba. This proceeding commenced in the late afternoon and was completed in the evening. So, before breaking up, Bagumba invited the conferees to have dinner with them at the public market. The invitation was readily accepted; so, they went to the public market. Near the close of the dinner Bagumba ordered beer and they started drinking. They finished three cases of beer. The P.C. soldiers drank heavily. It was nearly midnight when they finished. Bagumba paid the bill.

"Upon inquiry, Bagumba learned that the FS Don Sulpicio had already gone and there was no other available transportation to this Capital town of Pagadian. So, Bagumba asked Perlito to conduct them in the launch 'Mercedita' to Pagadian. The latter at first excused himself, saying that he had to return to Tigbalogo to fish and it was already late. But Bagumba insisted and he would not even allow him (Perlito) to wait for the first catch of fish, before starting for Pagadian. So, he had to go reluctantly. But before they started on the trip, two cans gasoline and two liters of lubricating oil were purchased from the local store. It was still low tide and the launch was aground. At about three o'clock in the dawn, the launch was afloat. The P.C. soldiers and their prisoner who slept in the house of Vivencio nearby, went to the launch and boarded it. Cresencio was at the steering wheel while Perlito was at the motor. Mercoleta maneuvered the boat so as to put it on its course towards the sea. He had a pole to achieve this. They thus started on that fateful voyage in the early dawn of August 8, 1957.

"At about five-thirty o'clock in the morning Mercoleta who was sitting on the roof of the engine cabin, called Perlito. When the latter was before him, Mercoleta told him to accelerate the speed of boat. This was done. Again, Perlito was called. This time Bagumba gave Mercoleta a piece of rope and ordered him to tie Perlito's hands. This was happening outside, on the deck of the bow of the boat. Perlito and Mercoleta were on one side or edge of the boat. When Mercoleta thus approached Perlito with the rope, the latter was surprised at the sudden turn in the attitude of the soldiers; and in a tone of rebuke, he told them that it was not in accord with their previous agreement in accordance with which they already received full satisfaction of their demand. Mercoleta replied that he could not disobey the command of Bagumba because the latter was his superior. As he (Perlito) pulled his hand from the grip of Mercoleta both of them fell overboard because at that very moment the boat pitched on account of the waves and they were thus thrown off balance. Mercoleta carried his carbine, slung at his shoulder. When they were already in the water Mercoleta shouted at him to stay near him and not to separate. However, as he (Perlito) had his regular clothes on which obstructed his swimming, he tried instead to stay apart from the soldier; and, when he heard bullets falling around him, evidently fired from either the boat or Mercoleta, he dove and swam on the surface alternately until he was far from Mercoleta. He did not see him any more. The launch made two circlings in the area where they had fallen, and then turned towards the shore. He did not know what was happening to his brother, Cresencio, in the meantime. He continued swimming towards the shore.

"As for Cresencio, when Mercoleta and Perlito fell overboard, Bagumba went up and stood on the top of the roof of the engine room. He then faced him and levelled his pistol at him. Thinking that Bagumba intended to shoot him, he jumped into the sea and swam away from the launch which circled twice and then made for the shore. He continued swimming for two hours until he heard the shout of a man calling for help; and when he looked around, he saw a vinta with two men aboard. He swam towards it. As he approached it, he noticed for the first time that there was also another man swimming. At a distance of some thirty brazas or less he recognized the individual to be Perlito. Perlito was nearer the vinta than he. He heard the men aboard the boat, calling Perlito as one of the tulisanes or bandits. One of them with a gun was levelling it at his brother but fortunately it did not fire, notwithstanding the fact that he was pressing its trigger. The boat was being carried by the current towards Perlito. It was then when the other passenger struck him with a paddle, hitting him in the head. Perlito sank under water and when he surfaced, he was near the boat inside the outrigger. He was wounded on the head and was bleeding. The man with the gun then thrust at him with the muzzle of the gun; but before he could harm him (Perlito), held its barrel and supported himself with it, for he was fatigued and

could no longer endure the ordeal of swimming. While thus holding the barrel of the gun, the man fell overboard, evidently carried by his (Perlito's weight.) The man swam to the far side of the boat. By this time Cresencio was on the other side opposite Perlito. The boat had been carried by the current towards him. When the other passenger saw his co-passenger in the water already, he jumped into the sea and swam towards his companion. Both of them swam towards the shore, leaving the vinta. Cresencio then got on board and helped Perlito to get aboard also. As the latter was exhausted and could not sit erect, he lay at the bottom of the boat at the bow. Cresencio then paddled the boat towards the mangrove swamp nearby.

"By this time the outboard motor in which Bagumba and companions were riding, raced towards them. But they were able to reach shore first; and as it was low tide and the water was shallow, Bagumba could not overtake¹ the small vinta. Cresencio then ran towards the mangrove and hid himself among the trees while Bagumba fired shots in the air. About the same time Perlito left the boat and walked towards the mangrove and at a distance of some twenty brazas he fell to the ground, as he was still weak. While thus lying prostrate, he heard Bagumba calling to him: 'Dong, you surrender' (Dong, referring to Perlito.) The latter answered: 'Yes. But come along. I cannot stand. Let us talk about this matter.' Instead of capturing him or firing at him, Bagumba got the vinta and towed it to the outboard motor boat. Then, they left.

After they had gone, he (Perlito) called his brother to help him. Cresencio came out of the mangrove and helped him walk towards the interior of the swamp; and when they found a hollow tree, Perlito went inside and rested there. He was able to sleep until about three o'clock in the afternoon. (Parenthetically, it should be stated that in swimming for several hours Perlito completely shed off his clothes so that he was entirely naked, while Cresencio also took off his clothes except his drawer. They had to do this in order to lighten themselves and thus remain afloat for several hours.) They were feeling hungry; so, they started moving in search of food. They followed a stream in its upper course. It led them to a patch of banana clump. They saw ripe bananas. They wanted to get them with which to satisfy their hunger; but before doing so, Perlito told his brother to go to a nearby house and ask its occupant to give or lend them clothes. As Cresencio approached the house, its occupant—a man—sounded a horn (a big shell or mollusk), as if to call Moros or some people. They were afraid. Coincidentally a woman appeared and warned them of the approach of armed people who were after them. They then ran but before doing so, Cresencio took two pieces of sugarcane nearby and gave one to Perlito. Perlito being still weak and unable to run, lay in a nearby mud to hide or elude the search. The men chased Cresencio. They passed by him without seeing him. When they were gone, he stood up and chewed the sugarcane. He waited for the men to return, with the intention of surrendering to them, if they caught Cresencio alive. When they came, he noticed that his brother was not among them; and fearing that they might harm him if he would surrender, he hid behind a fallen log and thus succeeded in eluding them. From then on he did not see his brother again except in jail. Being alone, he hid in the mangrove. It rained; so, he sought cover under a big bacauan tree and waited until evening. When it was already dark he went to a ricefield and there found an uninhabited house. He went there to sleep. At dawn he noticed the presence of several houses in the surrounding area. So, he left the house and went to the cogon grasses to hide. He stayed there until dark. He then stepped out from the cogon grasses and gathered some young coconuts which he broke and then drank the coconut water. Thus freshened, he started walking along the road until he reached some houses and the wharf of Dimataling. Then he was looking for the municipal building, thinking that it would be safer for him to go there and surrender than to remain in hiding. He did not find the place. On the way he met some people who remarked: 'That man is naked (pointing to him). What is he doing?' At dawn he followed the road and came near a house from which he could hear people conversing in Cebuano dialect. Covering his private parts, he approached the house and there found an old man who took pity on him. He was given a pair of patched trousers which he then put on. He asked to be taken to the barrio teniente—which was done. The latter after investigating him and finding that he was one of those involved in the incident of the drowning of the soldier, conducted him to the municipal building of Dimataling, together with some companions. But before going to the town he (Perlito) asked the teniente to tie his hands.

"When they reached the municipal building he was placed immediately in the cell of the municipal jail. The

Mayor who was there went inside the jail and boxed him and even struck him with his revolver or pistol. Then, the Sergeant of Police took turn to give him more punishment. Both investigated him and asked him about his brother, Cresencio. He told them that they were separated in the swamp and he did not know where he went after that. He was asked to confess by the Sergeant and his hands were tied. He (Perlito) overheard some people say: 'If Lope (Velencio, the policeman) will arrive, he will cut your ears; we will cut your ears; we will shoot you.' Lope Velencio, however, did not come.

"The Chief of Police, a certain Cuevas, came to visit him in jail. He was friendly.; they conversed with each other and found out they have a common relative in Bogo, Cebu—a certain Panday Flores (blacksmith). So, he was somewhat relieved, for here he found a friend to protect him. He also met Justice of the Peace, Purisima, in the morning. He too was sympathetic towards him. He said he would introduce him to Attorney Zulueta o.f Pagadian to be his lawyer. So, he wrote the latter. He (Perlito) wanted to write his brothers and sister in Margosatubig but he had no money with which to .buy writing materials. Upon knowing his need, the Chief of. Police gave him a piece of writing paper and an envelope. He wrote a letter and requested the Chief to mail the same and to.put the corresponding stamp. However, the latter never reached the. hands of the addressee. When a doctor came to treat him, he asked for a medical certificate but he not only refused but was mad at him.

"On August 18th he was brought to the P.C. headquarters in Pagadian where he was investigated by a certain Sergeant Castro in the afternoon. Bagumba was present during the investigation. Castro told him to state in the affidavit that it was his brother (Cresencio) who killed Mercoleta, thus saving not only himself but also Bagumba. Before his affidavit was taken in the afternoon he was placed in the stockade where he met other prisoners, among them, Moros. They told him that Sergeant Castro is a cruel and sadistic investigator and he always made the subject sign the confessions. They then taunted him to show if he (Perlito) could resist the persuasive methods of the Sergeant. So, before noon of the 19th of August, he was taken to the residence of Justice of the Peace Purisima in Pagadian. He was accompanied by Sergeant Castro and Corporal Bagumba. Purisima then asked him if he would sign the affidavit (Exh. E). He answered in the negative, saying that some of the facts narrated are not true. So, they left the Judge's residence. Then, Segreant Castro told Bagumba to fetch Attorney Zulueta in his residence. When the latter arrived, they went back to Purisima's residence. When they were there, Zulueta asked for a copy of the affidavit, so that he might read and study its contents before Perlito would sign it. Castro replied that Attorney Zulueta could have a copy after Perlito should sign the affidavit. The lawyer was disgusted at Castro's proposition and left the residence of Purisima in a huff. Nothing could be done as Perlito would not sign. So, they left again. While waiting at the road for transportation to the P.C. headquarters, he heard Sergeant Castro remark that he was disgusted with him (Perlito) and that his time was wasted in typewriting the affidavit and that for all of these he would let him (Perlito) pay at the headquarters. Bagumba also observed that he too knew how to kill. After hearing these threats, he remembered what the Moros and his other companions in jail told him about the methods of persuasion employed by Castro, like inserting a piece of coconut midrib into one's penis or putting paper into the urethra, both of which operations are painful; or even submerging one into the septic tank up to one's mouth or face—which is just as unendurable. His resistance began to weaken and finally he surrendered and told hia escorts that he was already persuaded to sign the affidavit. So, for the third time they went back to the residence of Justice of the Peace Purisima. When the latter saw him he asked if he was ready to sign, to which query he answered in the affirmative. So, without even reading the affidavit he signed it on an arm of an armchair. Purisima did not ask him to raise his right hand as a sign of swearing to the truth of the facts stated in the said affidavit. So, they returned to the headquarters.

"As for Cresencio, when he was pursued by the armed men, he ran into the mangrove and then climbed a tall tree to hide. He thus eluded the pursuit. After his pursuers had gone, he looked for Perlito but after searching for him, he could not find him. So, he moved shorewards in the hope of finding a house so that he might obtain food. When he reached shore, he followed its course until at about eleven to midnight he reached a place called Panaga. He awakened the occupants of a house. They opened the door and received him. He related the incident involving him, his brother, and the P.C. soldiers. One of them offered to take him to Dimataling. He

declined the offer but instead requested them to conduct him to a place called Lunib, for from there he could go to his brothers and get clothes. So, he was taken to Lunib; and before leaving, his Moro host even gave him twenty centavos with which he bought bread. From there he took a trail to Gabay where his brother, Vivencio, used to dry his fishing net. Arriving at Gabay, he waited for him; and sure enough he arrived with his companions from fishing. He told them of his desire to go to Margosatubig to surrender to the authorities; but he was advised against it, for the said authorities had received a telegram from Dimataling, telling them to capture him (Cresencio) or to shoot him on sight. So, another brother, Arnulfo Soyang, conducted him to a place called Colot in Margosatubig where he remained in hiding for three days. An old woman, a certain Rosales, gave him food. Then he went to Gapi by water. There he stopped at his cousin's house, a certain Ambrosio or Bosiong. The latter was afraid to harbor him in his house. So, he made him (Cresencio) stay in a hut in the middle of a ricefield. There he remained until he was arrested by a police patrol from Margosatubig in the early morning of August 19th. He was taken to Margosatubig and from six o'clock in the evening he was investigated by Sergeant Diaz of the police force of the said municipality. After the completion of the affidavit, he was made to sign it; but before doing so he asked the Sergeant to read its contents to him, but the latter told him that it was not necessary to do so. In the following morning he was taken to the office of the Justice of the Peace, Attorney Benito Cinco. The Judge read it and did not bother to ask him about the said affidavit (Exh. F). He simply signed it. He came to know of the contents of the affidavit when Attorney Fausto read it to him. Some of the facts therein stated are not true, since the truth is the one he declared in Court. He does not know how to read English, his attainment being only second grade in the primary school. After completing his second grade, he ran away from his parents and went to Manila and stayed there until he was old enough and returned to Leyte when he married in Burabud, Biliran, Leyte where he and his family resided before coming to Mindanao.

"As for the pistol Ex. A and the ammunition (Exh. B, B-1) it was given to him by P.C. agent Lucilo Bracamonte in Burabud, Biliran, Leyte, for safekeeping until he would come and get it back. Before coming to Mindanao, he looked for him in order that he might return it to him (Bracamonte) but he did not find him then. And as he was instructed by him not to deliver or surrender it to anyone, he carried it until his arrival in Malangas. There, he met his brother, Vivencio, and placed it in his hands for safekeeping. It remained in the possession of the latter until the morning of August 7th, when Vivencio fetched him in Gapi on request or order of Mercoleta; and, remembering about the pistol of Bracamonte, he thought that it was for its recovery or surrender that the soldier had sent for him. So, Vivencio brought the pistol along to Tigbalogo where Mercoleta and his companion were; and, upon arriving there, Vivencio gave it to Mercoleta in the yard."

There can be no doubt that soldier Mercoleta met death on the occasion when he and his companion Bagumba were taking the two Soyang brothers on board the launch "Mercedita" to Pagadian, Zamboanga del Sur in order to surrender to the authorities of that place detainee Leonardo Malinao who was then under their custody and the two brothers after untying the rope with which their hands were tied grappled and pushed Mercoleta to the water causing the three of them to fall at which occasion Perlito wrested the carbine which Mercoleta had then in his possession and with it fired a shot that must have hit fatally Mercoleta who immediately sank and disappeared. Their intention to kill did not end there for soon thereafter another shot was heard intended for Bagumba who at the time turned the boat they were riding in order (to extend succor to his companion but missed and in order to save himself he left the two and headed for the shore where he asked the people there to help him look for Mercoleta and apprehend the two prisoners.

That Mercoleta received a fatal shot and went to the bottom of the sea dead cannot also be doubted, for, notwithstanding the efforts made by the local authorities to search for him for three successive days, their efforts proved in vain. And it cannot be doubted that the ones responsible for Mercoleta's death are the two brothers for, upon being arrested and placed on board the boat to be taken to Pagadian, they must have immediately hatched the plan to kill their captors in the process to free themselves which they succeeded when they grappled with

Mercoleta when he tried to again tie their hands and after depriving him of his carbine the two, or one of them, made use of it to kill him. We have arrived at this conclusion considering that the same finds support not only in the testimony of soldier Bagumba, who saw actually how the incident occurred, but also in the testimony of detainee Leonardo Malinao who also witnessed the incident and who, as a matter of fact, is the one who called the attention of Bagumba to the fact that the hands of the two prisoners had already been untied. The trial court found these two witnesses trustworthy and creditable for there is nothing in the evidence to show that they had any evil motive to prejudice the two brothers other than to tell the truth and vindicate their victim.

The defense tried to show that the Soyang brothers were not under arrest; that they were merely conducting the soldiers from Malangas to Pagadian as a favor they extended to the latter because the boat they were riding on belonged to the Soyangs; that the soldiers for a consideration of P800.00 which they received from the Soyang family with the understanding that they would be set free and would be allowed to escape to Borneo, had in fact agreed to leave them, and so it cannot be pretended that on that occasion they would for no reason grapple with soldier Mercoleta and deprive him of his life as the prosecution tried to establish. But this claim was stubbornly denied by soldier Bagumba who considers it to be a last minute concoction to lay the blame for the happening on the soldiers who took the Soyang brothers under arrest to the town of Pagadian.

We agree with the trial court that such attempt is of no avail for if it were true that the soldiers had actually received the sum of P800.00 with the condition to set them free and allow them to escape, we find no valid reason- why the soldiers would still hold them under arrest and bring them to Pagadian, together with their detainee Leonardo Malinao. It is true, as admitted by Corporal Bagumba, that the family of Soyang made an attempt to offer money to them to settle the case of the two brothers and in order not to discourage and disillusion them he pretended to have an open mind to give them the impression that he was amenable to the proposal, but the corporal explained why he adopted that attitude. He said that he acted as though he was receptive to the proposal if merely as a scheme to induce the family of Soyang to take them to the place where Cresencio was then residing to place him under arrest, and this explanation must be true as confirmed by the subsequent conduct of the two soldiers when not only they placed the two brothers under arrest once they were produced but had their hands tied at the back and placed on board the launch "Mercedita" when they proceeded to Pagadian to deliver them to the authorities thereat.

The defense, however, calls the theory of the prosecution unnatural and improbable pointing out certain portions of the testimony of the witnesses for the prosecution which, according to it, are inherently unbelievable: For instance, the defense claims that as Perlito was arrested on sight "he would not be so stupid as to go to a distant place in order to bring back his brother for the purpose of having him placed under arrest, especially when he knew for a fact that said wanted brother had been eluding the authorities for a long time already." It appears, however, that Perlito did not of his own volition undertake to lead the soldiers to the hideout of his brother but was rather prevailed upon to do so by the two soldiers who arrested him. The record is silent as to how the soldiers were able to persuade Perlito to lead them to his brother's hiding place, but the latter must have been made to realize that to continue eluding the authorities under the circumstances would be futile as sooner or later the law will catch up with them. And, then, we have the explanation given by Corporal Bagumba when Panfila Soyang broached to him the proposition to settle the case of her brothers by offering him certain amount of money, that he made her understand that he had an open mind with regard to that proposition merely to induce them to produce the person of Cresencio Soyang. This is another circumstance that must have induced Perlito to lead the soldiers to the hideout of Cresencio hoping that once he is produced the case of the two brothers may be amicably settled.

The defense also impugns the finding of the trial court that while the hands of the two brothers were tied by the

soldiers before they set sail to Pagadian, the hands of the other prisoner, Leonardo, Malinao, who was fetched from Leyte, were not ordered tied in like manner, alleging that such act is discriminatory and unbelievable because said detainee appears to be more dangerous than the Soyang brothers because he is a known killer. In the first place, there is nothing in the record to show that detainee Malinao was a known killer. In the second place, if said detainee had been accorded a different treatment by the soldiers they must have their reasons for doing so one of them being his good behavior and deportment while he was being taken from their camp at Tacloban, Leyte to the municipality of Malangas, Zamboanga del Sur, which must have convinced them that he is not a dangerous prisoner.

The defense also claims that the body of the deceased has not been recovered and so there is no clear and positive evidence that he actually died. We cannot give much weight to this contention for the reason that, according to the evidence, the local authorities had made every effort to search for the body of the deceased in the surrounding place where he sank and disappeared for a period of three days and their effort, had been of no avail. This evidence is more than enough to prove that the unfortunate soldier had indeed died when he was shot by the accused and disappeared in the bottom of the sea.

The defense assails the finding of the lower court that appellants are guilty of direct assault by contending that "the grabbing and pulling of the rifle by Perlito is not the kind of force contemplated by Article 148 of the Revised Penal Code." To meet this point, suffice it to quote what the trial court said on this matter:

"Again, the version of the prosecution is more worthy of credit than that of the defense. Policeman Lope Velencio testified that in answer to the call for help of Corporal Bagumba, he and a companion, Geruncio Malinao, rode in a small vinta with a capacity for only two passengers; that they started from shore (barrio Pitogo) and paddled in the direction of the place indicated by the P.C. soldier where his companion and the prisoners fell; that at about eight to nine o'clock in the morning they saw one of them (whom they later identified to be Perlito) swimming towards them and supporting himself with a floating log; that upon being asked by the policeman who he was, he answered that he was the soldier who was dragged into the sea by the tulisanes or robbers and that he had killed both of them; that he begged to be allowed to get on board because he was very weak from utter exhaustion and that, however, not being sure of the identity of the swimmer, he (policeman) levelled his carbine at him and even pressed its trigger to shoot him because he kept on coming towards them, but it would not fire; that, without warning and being unnoticed, another individual surfaced at the other side of the boat; that the latter then held the outrigger on his side and they (he and his companion) capsized it, throwing the policeman and his companion into the sea; that when they were already in the water, the first one (who begged to be allowed to get on board) attacked the policeman and was joined in the assault by the other and both of them pushed him (policeman) under the water—the first even choking him; that, as he had his uniform and shoes on as well as the carbine which he was carrying, he swam deeper under the water, thus freeing himself from his enemies; that he then shed off his clothes, dropped his gun, thereby lightening himself, and emerged on the surface at some distance from them; that he was joined by his companion who during the fight struck one of his attackers—the first one—on the head with a paddle; that both of them then swam towards the shore, leaving the capsized vinta to his assailants; that the accused then floated it and rode on it towards the shore; that they (policeman and companion) were picked up by fishermen at about eleven o'clock in the morning".

Finally, we find untenable the claim of appellant Cresencio that he cannot be held guilty of illegal possession of firearm because the firearm found in his possession did not belong to him but to an agent of the Philippine constabulary named Lucito Bracamonte and he merely kept it for safekeeping, for even if the same were true it will not exculpate him from liability. The possession of a firearm which is punishable by law covers not only physical possession but also one that is constructive provided the element of animus possidendi is present. The absence of this element must be clearly established and here appellant Cresencio failed to do so.

It appearing that the decision of the trial court is in accordance with law and the evidence, we are persuaded to affirm the same, with costs against appellants.

Wherefore, the decision appealed from is affirmed, with costs.

Paras, C.J., Bengzon, Labrador, Concepcion, Reyes, J.B.L., Barrera, Gutierrez David, Paredes, and Dizon, JJ., concur.

Judgment affirmed.

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