

**THE PEOPLE OF THE PHILIP-PINES, PLAINTIFF-APPELLEE, VS.
ONTING BIRUAR, EUGENE RUS-LIN, ABRAHAM LIM ALIAS TITING
LIM, ANGEL DY ALIAS BABA ISA, CEFERINO CATURAN ALIAS FRED,
EDGARD...**

G.R. Nos. L-32202-04. July 25, 1984

Ponente: CONCEPCION JR., J.

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CONCEPCION JR., J.:

REVIEW of the decision of the Court of First Instance of Davao finding the accused Abraham Lim, alias Titing Lim, Angel Dy, alias Baba Isa, Ceferino Caturan, alias Fred, Edgardo Señeres, alias Broke, Romualdo Raboy, alias Romy, and Saturnino Galliano guilty of the crimes of Robbery in Band, Arson, and Robbery with Homicide and Physical Injuries, and sentencing each of them, in (1) Crim. Case No. 9987, for Robbery in Band, to suffer an indeterminate penalty ranging from TWO (2) YEARS and FOUR (4) MONTHS of prision correccional, as minimum, to EIGHT (8) YEARS and ONE (1) DAY of prision mayor, as maximum, with the accessory penalties of the law, and to indemnify, jointly and severally, Gorgonio Mosende in the amount of P720.00, without subsidiary imprisonment in case of insolvency, and to pay the costs; (2) Crim. Case No. 9988, for Arson, to suffer the penalty of reclusion perpetua, with the accessory penalties of the law, to pay, jointly and severally, the heirs of the deceased George Kalitas the amount of P20,000.00, without subsidiary imprisonment in case of insolvency, and to pay the costs; (3) Crim. Case No. 9989, far Robbery with Homicide and Physical In-juries, to suffer the death penalty, and to indemnify, jointly and severally, the heirs of the deceased George Kalitas in the amount of P12,000.00, without subsidiary imprisonment in case of insolvency.

The inculpatory facts are as follows: At about 10:00 o'clock in the evening of July 2, 1966, while Gorgonio Mosende and his wife, Fausta, were preparing to go to sleep in their house in Sitio Suapit, Barrio Limot, Mati, Davao, several persons arrived and called: "Good evening, tiyo." Thinking that they were relatives of his wife, Mosende invited the callers to come up. Two men, armed with .45 cal. pistols, later identified as the accused Romualdo Raboy and Edgardo Señeres came up and demanded: "hain na ang iyong armas" - where is your firearm? Mosende denied having a firearm, but his wife was so frightened that she told the armed men: "Do not kill my husband, if you want the arm, the shotgun is here," and raised the mosquito net covering their sleeping mat and pointed to the shotgun. The accused Edgardo Señeres took the gun and asked the couple for money. Fausta, in fear, opened their aparador which the accused Edgardo Señeres then ransacked, taking therefrom P170.00 in coins and paper bills. The two accused then left, taking with them the shotgun of Mosende valued at P550.00. Not long thereafter, Mosende heard gunshots coming from the direction of the house of George Kalitas, about 25 meters away. Mosende and his wife went down their house and sought cover behind a coconut tree. A few minutes later, Mosende saw a blaze start from the house of George Kalitas which spread rapidly until the entire house was engulfed in flames and completely burned down.[1]

All the inmates of the house of George Kalitas were fast asleep when the firing started and were awakened by the gunfire. George Kalitas, a 70-year old paraplegic, was sleeping inside their bedroom with his wife, Sylvia

Mingming, his grandchildren Jessie Renopal and "Bebot" and their maid's son, Fortunato "Ato" Malapong.[2] Narciso Bauyot, a nephew of George Kalitas, slept in the dining room, while the maid Babbadon Odal slept in the kitchen.[3]

Upon hearing the fusillade, Babbadon Odal rushed to the master's bedroom to get her son, "Ato." But, as she was about to raise the mosquito net covering her son, she was hit by a bullet on the left wrist and immediately lost consciousness, regaining the same only at the Mati Baptist Hospital, where she was brought for treatment of her injury.[4]

Jessie Renopal, the 11-year old granddaughter of George Kalitas, was also grazed by a bullet in the head when she stood up upon hearing the volley.[5] She felt pain, but she did not lose consciousness, thus enabling her to see five robbers enter the house while two others remained by the door.[6]

Narciso Bauyot who was sleeping in the dining room, ran to the kitchen upon hearing the gunfire and hid in an aparador. But, when the toilet of the main house of George Kalitas was set on fire, he left his hiding place and went out of the house, passing through a small window in the kitchen. He landed safely on the ground only to fall into the hands of the accused Romualdo Raboy who pointed a gun at his abdomen telling him: "you surrender, if you will not surrender, I will kill you." The accused Edgardo Señeres also told Narciso to surrender and raise his hands, which Narciso did. Señeres then continued firing at the house of George Kalitas. Another armed man, later identified as the accused Saturnino Galliano, also approached Narciso and threatened to pour a can of kerosene on him. But, Narciso pleaded: "Don't pour it on me because I might be burned," and was spared. The accused Saturnino Galliano, instead, poured the can of kerosene on the walls of the kitchen of the house and ignited it with some dried fronds.[7]

The robbers then started to break open the main door of the house with an axe.[8] After the robbers had broken the door and gained access to the, sala, George Kalitas fired at them with his "Stevens" 12-gauge shotgun,[9] hitting one of them.[10] George Kalitas had crawled with his wife and grandchildren after Jessie Renopal and Babbadon Odal were hit by bullets.[11] The armed men fired back, hitting George Kalitas, who dropped his shotgun. His grandson, Bebot, picked up the shotgun, but, when the robbers shouted: "surrender, surrender, throw that gun to us; throw the gun below, by the stairs," he panicked and threw the shotgun to them.[12]

Immediately, thereafter, four (4) armed men, later identified as the accused Angel Dy, Romualdo Raboy, Saturnino Galliano, and Abraham Lim rushed them. Angel Dy held Mrs. Kalitas by the neck and kicked the wounded George Kalitas, while the others went inside the bedroom of George Kalitas and forcibly opened a trunk placed under the bed which contained the amount of P40,000.00, in cash, at the last counting two months before the incident. They also took some old coins which Mrs. Kalitas had kept in a container inside the trunk. Saturnino Galliano and Angel Dy also got the money of Jessie Renopal.[13]

After getting the money, the robbers left.[14] The inmates of the house also went out because of the fire and brought the wounded to the hospital. But, George Kalitas died before they could reach the hospital in Mati.[15]

Meanwhile, the fire continued to spread until the main house of George Kalitas and his bodega, including their contents, and a truck parked in between the buildings, all valued at P34,545.00, were completely destroyed.[16]

The crime was reported to the police authorities immediately thereafter and Sgt. Jose Blones of the 433rd PC Company stationed at Mati, Davao, conducted an investigation. He learned that a light green Buick Electra 225 sedan, 1964 model, with Plate No. H-6357-Manila-'65, is had refueled at a Caltex gasoline station in the poblacion of Mati and then proceeded towards Barrio Limot at about 9:00 o'clock in the evening of July 2, 1966, and was seen again parked at some distance from the house of George Kalitas. PC Sgt. Blones also went to the

still smouldering house of George Kalitas and recovered twenty-nine (29) spent cartridges of various calibers and a mutilated slug, which he turned over to the PC Company investigator. An alarm was, likewise, flashed to intercept the Buick car and apprehend its occupants.[17]

At about 3:00 o'clock in the afternoon of July 3, 1966, Pat. Bonifacio Daño of the Davao City Police Department, received a telephone call from the Sasa Police Precinct that the wanted car was spotted going towards Davao City. Pat. Daño and two (2) companions boarded a jeep to intercept the car, and at Bajada, near the EMCOR, they saw the car stop and a man with a sack alighted therefrom. They gave chase, but the car sped away. They then tried to run after the man with the sack, but the man threw the sack away and disappeared in the tall cogon grasses. They recovered the abandoned sack and found it to contain a pistolized carbine, a .45 cal. pistol, with several rounds of ammunition, a barong tagalog, four (4) flashlights, and a pair of gloves. The next day, July 4, 1966, a police team saw the wanted car parked in the corner of Monteverde and Guerrero Streets, in front of the Cosmopolitan Funeral Parlor, in Davao City. They found the accused Angel Dy in-side car who, when asked who the owner of the car was, pointed to Onting Biruar at the Kingston Hotel. The policemen went to the hotel and found Onting Biruar together with Romualdo Raboy and Edgardo Señeres whom they brought to the police headquarters for investigation. Upon questioning, Angel Dy informed the police investigators that the car was driven by Abraham Lim on the night of July 2, 1966, and led a police posse to Barrios Obrero and Piapi, both in Davao City, in an effort to catch the said Abraham Lim. But, they failed to find him. Instead, they found the accused Ceferino Caturan in Barrio Piapi, who was nursing a bullet wound on his left upper leg. From Piapi, Angel Dy brought the police team to a house in Toril, Davao City, where they finally found Abraham Lim in the company of Eugene Ruslin. The policemen found a .45 cal. pistol, with seven rounds of ammunition under the pillow used by Abraham Lim.[18]

Later, the police team arrested the accused Saturnino Galliano who was implicated in the crime.[19]

The Buick sedan was turned over to the PC detachment and PC Sgt. Diomedes Cagas, upon inspection of the said car, recovered a .45 cal. pistol, with seven rounds of ammunition, hidden under the floor mat, near the gas pedal of the said car.[20]

As a consequence, Onting Biruar, Abraham Lim alias Titing Lim, Angel Dy alias Fred, Edgardo Señeres alias Broke, Romualdo Raboy alias Romy, Eugene Ruslin, and Saturnino Galliano were charged with Robbery in Band, Arson, and Robbery with Homicide and Physical Injuries before the Court of First Instance of Davao, in three (3) separate informations docketed therein as Crim. Case Nos. 9987, 9988, and 9989, respectively.

All the accused denied the commission of the crimes charged and, except for the accused Abraham Lim, interposed the defense of alibi. The trial court summarized the evidence of the defendants, which they claim to be substantially correct, as follows:

"1. TESTIMONY OF ACCUSED ONTING BIRUAR

Defendant Onting Biruar testified that on June 28, 1966 he came to Davao City to renew the coastwise license of his motor boat; that he rode on his Buick (Electra) car; that he registered in a room at Kingston Hotel, Davao City and did not go out until the following day; that on June 29, and 30, 1966, he went to the Customs office to renew his license, but he failed to obtain his purpose; that on July 1, 1966 Abraham Lim came to his hotel to borrow his car for the purpose of bringing his wife to a hospital to deliver; that he consented and gave his car; that as the car was not returned he became apprehensive and he began looking for it; that on the same day, he met Romualdo Raboy alias Romy and Edgardo Señeres alias Broke and one Sammy, driver of the Provincial Governor of Cotabato and asked them to help him find his car to which they acceded; that from that day they began the search and continued until the next day but in vain; that on July 3, he (Onting Biruar) was apprehended by the D.C.P.D. Commando. Unit in his hotel on a charge that his car was used in the commission

of the crimes charged herein at Limot, Mati. Later, he corrected a mistake that it was on July 4 when he was arrested and not July 3. It was explained to him that his involvement with other accused lies solely in his being the owner of the car subject of the present inquiry; that he admitted that he was taken at the P.C. barracks where he was investigated by Sgt. Abalayan.

2. TESTIMONY OF BERNARDINO SAMSON:

Bernardino Samson, driver of the Provincial Governor of Cotabato corroborated the statement of Onting Biruar referring to his having joined the party to search for Onting's car.

3. TESTIMONY OF ABRAHAM LIM:

Accused Abraham Lim testified that he came from Cotabato City and arrived at Davao City in the afternoon of June 29, 1966 in response to a telegram that he received from accused, Angel Dy alias Baba Isa; that he took a Minrapo bus and he met his wife in the house of his uncle, Can-dido Ramos at Piapi, Davao City; that he brought her to San Pedro Hospital on the following day (June 30) where she delivered; that on July 1st morning at about 7:00 he was able to borrow the car of defendant, Onting Biruar after assuring the latter that he would use it only for service of his wife who delivered in the hospital; that from that time the car was under his exclusive control until July 2, 1966. On July 4, 1966, he was arrested by the Davao City Commando Unit at Toril, Davao City together with Eugene Ruslin, one of the accused herein.

Abraham Lim admitted that he used the said car in going to Limot, Mati, Davao Oriental without the knowledge and permission of the owner; that on July 2, 1966, he left Davao City in company with Ceferino Caturan, Cesar Go and another unidentified man and arrived at Mati at about ten o'clock at night; that he proceeded to the house of George Kalitas with his men, but as no one was familiar with the road and the place, he needed a guide; that he passed at the house of Saturnino Galliano which was about 5 kilometers from the house of Kalitas and invited him to be his guide; that the latter accepted although that was the first time that Lim met him in Betty's store; that the purpose of accused Abraham Lim in going to Kalitas house is to collect accounts, an alleged indebtedness of George Kalitas in the amount of P15,000.00 which was advanced by him for the purchase of coprax; that on demand, Kalitas refused to pay; that Lim pressed him more and asked him to pay in kind particularly pointing to the coprax store in Kalitas' bodega; that this must have irked Kalitas and he commanded his nephew, Narciso Bauyot to get his carbine from his bed, but he was calmed down and promised to pay him on the first week of July; that as he insisted on his demand, Kalitas drew his pistol which was timely grabbed by him and at the same time he drew his own 22 caliber magnum pistol and pointed at the back of Kalitas head and dragged him towards the main door; that upon reaching the stairs they were fired upon by some people whom Lim suspected to be the neighbors of Kalitas; that the old man was hit in the upper part of his body and he (Lim) saw blood streaming down from his wound; that although wounded and under his (Lim) control, Kalitas shouted at his men to surrender which was heeded; that Aguedo, Mosende and four other neighbors came and surrendered their firearm to Lim which consists of one carbine and 5 pistols and were identified by Lim.

Aguedo surrendered his 45 cal. pistol, Mosende his 45 cal. pistol; confiscated from George Kalitas, is a nickel plated pistol marked Exh. 'B', one carbine from Narciso Bauyot and another 45 caliber pistol (Exh. 'C') from Mosende, one barong-tagalog, Exh. 'BB', which is his own (Lim) dress; that after the surrender of these firearm they went back to Davao City; that he saw Saturnino Galliano grab the carbine from Narciso Bauyot which he fired at the latter in order to scare the men of Kalitas, but his intention was only to shoot Narciso's shirt; that Galliano was with him and Kalitas when they were seeking shelter in the pile of lumber near the kitchen of Kalitas' house while there was shooting directed at them.

Accused Lim also admitted that he was investigated by the Davao City Police Commando and subsequently by the P.C. (Exhs. 'O', 'O-1' to 'O-4'); that he signed both affidavits taken by these investigators only under compulsion of force and duress; that he was kicked by his probers on his knees and pellets were inserted

between his fingers and pressed so strong that it caused him pain, in order to make confess.

Lim also admitted that he was convicted by final judgment rendered by the City Court of Davao City for illegal possession of firearm filed against him in Crim. Case No. 2490-C; that he was arrested at Toril, Davao City on July 4, 1966; that he explained that his appearance there was due to his purpose to see his friend, Joselito Ambrosio from whom he would borrow money to defray the hospital expenses of his wife, but he failed; that before the incident in question, he (Lim) was engaged in the business of buying and selling coprax, corn, rice and other agricultural products covering the coastal towns of Cotabato and the eastern old province of Davao; that he did not have license in his name, but he borrowed the license of his cousin, Felipe Uy; that pursuant to the operation of his business he came to know the deceased, George Kalitas since 1965; that they have a deal - Kalitas would be his agent to buy coprax and grains in his neighborhood; that on August 1965 he happened to meet Kalitas in a bus while on his way to Mati, that being an old man he could trust him; that he advanced to him P15,000.00 as capital for their business; that this money was given to Kalitas in his house at Limot in the presence of Saturnino Galliano and Kalitas' family; that Kalitas signed a receipt for said amount but he lost it during that scuffle incident in Kalitas' house including a notebook containing an entry of their business transaction; that Kalitas delivered to him a truckload of coprax worth P5,000.00; that he does not know how much additional cash advances he gave Kalitas; that he was investigated by the municipal judge of Mati on July 12, 1966; that during the investigation he did not tell the truth that he was kicked and maltreated by the Davao City Police and by the P.C. agents for fear of revenge.

4. TESTIMONY OF ANGEL DY:

Accused Angel Dy testified that he left Dadiangas, Cotabato on June 29, 1966 at about 7:00 AM together with the wife of accused Abraham Lim and a maid; that upon arrival in Davao City in the afternoon they proceeded to Piapi in the house of an uncle of Abraham Lim; that he met the latter in the C.B.C. terminal on June 30, 1966 at about five o'clock in the afternoon; that on July 1, 1966 they went out to see accused Onting Biruar, to borrow his car for the purpose of bringing Lim's wife to the hospital; that Lim's wife was brought to the hospital only on July 2 in the afternoon on Onting's car escorted by him and Abraham Lim and a housemaid and Caturan (t.s.n., 674-675 Barlaan); that on July 1 they spotted the car of Onting parked in a gasoline station; that accused Abraham Lim borrowed it and had full control thereof from that day; that from that time he was taking care of the car; that while he was watching it in the premises of the Cosmopolitan Funeral Parlor the Davao City Police Commando came and seized the car, telling him (Dy) it was used in committing the crime of robbery and homicide in Mati, that he told them he did not go to Mati, however, he was brought to Agdao where he was maltreated, then he was transferred in the office of the Police Detective Division boxed and manhandled by the police; that on July 4, 1966 he guided the police to locate the accused, Abraham Lim at Toril, Davao City; that Abraham was found there and was arrested together with Eugene Ruslin; that they were brought to the P.C. barracks and were jailed there; that he did not sign any statement; that he admitted he is also known as Baba Isa and he is the uncle of Abraham Lim; that he rode in Onting's car together with Abraham and his wife on July 1, 1966 in going to Talomo and back to Piapi.

On cross examination this witness (Dy) incurred in self-contradiction. He declared that he went to meet accused Abraham Lim in the CBC terminal after lunch on June 29, 1966 and testifying further he said that he arrived in Davao City from Cotabato at about 4:00 same day; that on July 1 at 8:00 A.M. Lim brought his wife to a clinic at San Pedro Street riding in Onting's car; that he slept in the hospital until July 4, 1966; that on that day from the hospital he brought the car to the premises of the Cosmopolitan Funeral Parlor where it was taken by the police.

5. TESTIMONY OF ROMUALDO RABOY:

Accused Raboy alias Romy testified that on June 22, 1966 he came for the first time from Cotabato City to take vacation in Davao City; that he was accompanied by his cousin, Nelly Agravante; that he lodged in her house at Talomo, Davao City, from June 22 to July 2, 1966; that he stayed in said house without going to any

other place outside Davao City; that on July 2, 1966 he took permission from his cousin to go to CBC terminal to make arrangement for him to take the last trip to Cotabato; that on his way at Acacia at about 7:30 A.M. he saw accused, Onting Biruar in Kingston Hotel, Onting whistled and called him and asked him to help him find his car to which he agreed; that he desisted from continuing his plan to go to Cotabato; that they searched the car during the whole day of July 2, but in vain; that he slept with Onting Biruar in Kingston hotel; that on the following day (July 3) they failed again to see the car; that on July 4, 1966 they were arrested in Kingston Hotel by the D.C.P.D. Commando, he, Onting Biruar and Edgardo Señeres; that he was brought to the office of the Police Detective Division; that he denied that he was in the house of the latter George Kalitas on July 2 and 3, 1966; that he does not know, nor met Silvia Kalitas; neither Narciso Bauyot, nor Gorgonio Mosende.

On cross examination he declared that his nickname is Romy, that he did not know Abraham Lim, Ceferino Caturan, Angel Dy and Eugene Ruslin; that he first met accused Onting Biruar for the first time at P.C. barracks at Davao City before he was brought to Mati by the P.C.; that he did not register his name in Kingston Hotel; that he was arrested in said hotel together with Onting Biruar and Edgardo Señeres; that from the Detective Division he was transferred to the PC barracks; that he was not investigated there; that the car finally arrived at 5:30 on July 3 according to what Onting Biruar informed him.

6. TESTIMONY OF NELLY AGRAVANTE:

Nelly Agravante, cousin of accused Romualdo Raboy has corroborated the statement of the latter covering that portion, from the time he arrived in Davao City on June 22, 1966 until he took permission from her to go back to Cotabato on July 2, 1966.

7. TESTIMONY OF SATURNINO GALLIANO:

Saturnino Galliano testified that he is 37 years old; that he is a resident of Waywayan, Mati, Davao Oriental; that since 1960 he cultivated a farm about four hectares with two cousins; that he was arrested on July 5, 1966 in the same place by the Mati Police; that he does not know the defendants Onting Biruar, Edgardo Señeres, Romualdo Raboy, Ceferino Caturan, Eugene Ruslin and Abraham Lim; that he met them only on July 12, 1966 at Mati when they were investigated; that he denied having robbed the houses of Gorgonio Mosende and the late George Kalitas on July 2 late at night and in early morning of July 3, 1966; that he denied having poured petroleum and set on fire the house of the latter; that he just met for the first time Silvia Kalitas, Narciso Bauyot, Mosende and others on July 12, 1966 in the Muni-cipal Court of Mati; that it is not true that he participated in the commission of robbery, killing and arson as charged in the information; that he resembled the accused Ceferino Caturan.

8. TESTIMONY OF CEFERINO CATURAN:

Ceferino Caturan declared that on the second week of June he was brought to Davao City by his employer, co-accused Abraham Lim to assist the latter's wife to deliver in the hospital; that they came in Davao City in a PU car together with the wife of Abraham Lim, a maid and himself; that upon arrival they proceeded to the house of his uncle at Piapi, Davao City; that for about six months he was employed as a checker of Lim in his motor launch; that before the incident in question his master, Abraham Lim was engaged in the business of buying and selling coprax, corn and rice; that Lim returned to Cotabato and came back on June 29, 1966 and rejoined his wife at Piapi; that on June 30, he brought Lim's wife to the hospital; that they rode on a hired taxi because he was not able to borrow Onting Biruar's car; that Lim's wife delivered on June 30, 1966 at night; that on the follow-ing morning he, Abraham Lim and Angel Dy took their breakfast in a restaurant; that on the afternoon of July 2, 1966 at about one o'clock he was brought by Abraham Lim to Mati; that they have started from a restaurant with three (3) companions; that along the way they picked up six other persons at Bajada; that he cannot see any of them in the Courtroom; that at the start he did not know the purpose of Lim in going to Mati, now he knows that it is to rob a certain house in Mati; that upon reaching Mati they refueled in a gasoline station and went to eat in a restaurant; that they met one Angelo Montero there who invited Lim to go

inside; that after eating they left with Montero guiding them until they reached a certain place where the car could no longer proceed due to bad road; that he received instruction to guard the car; that all the riders left and went towards certain direction; that after some time he heard successive shots coming from some distance; that at about two o'clock the following morning (July 3) two of his companions returned; that one of them wounded; that one of them shot him hitting his thigh; that half-hour later the bigger group with Abraham Lim arrived; that they started for Mati and from there they proceeded to Davao City passing at Kingking bridge where two or five of their companions got off the car; that they arrived at Davao City on July 3, 1966 at about 3:00 p.m.; that on July 4, 1966 he was apprehended by the Commando Police and brought to the P.C. barracks, Davao City where his affidavit (Exh. 'HH') was taken by Sgt. Almazar; that he did not sign it after it was typewritten but only on the following day after his wound was operated in the Davao General Hospital; that while he was confined in said hospital, Fiscal Angel Matondo arrived, but before he came he has already signed it; that he was weak and not feeling well when he signed his affidavit before it was explained to him.

On cross examination he declared that one of those 6 men who joined them in the car brought a sack wrapped in Manila paper; that Abraham Lim is the one who drove the car going to Mati; that he did not talk with him during the trip in going to and on return.

This witness (Caturan) was confronted with his answer to question 17 of his affidavit (Exh. 'HH') wherein he stated that he saw six of his companions being armed with pistol of different calibers and one carrying carbine and Abraham Lim carried his own .45 caliber pistol. Caturan explained that it is true that he saw his companions carry firearms, but it was during that time when they returned to the car from the place where they went. (t.s.n., p. 735, Barlaan)

This statement refers to that incident when the car stopped to a certain place when it could no longer proceed due to bad road, where all the riders except Caturan went off the car and came back later after 4 or 5 hours covering a period from July 2 at about 10:00 at night to 2 or 3 o'clock early morning of July 3, 1966.

9. TESTIMONY OF EDGARDO SEÑERES:

Defendant Edgardo Señeres testified that he came from Cotabato City and arrived at Davao City on June 28, 1966 riding on a CBC bus; that he had no companion; that his purpose in coming to Davao City is to deliver shrimps for sale in a place near the public market at Bankerohan; that upon arriving he proceeded to his aunt's house at Washington Street and stayed there continuously for 5 or 6 days; that he knew accused Onting Biruar, but not Romualdo Raboy, Eugene Ruslin, Ceferino Caturan, Angel Dy and Saturnino Galliano; that on his way to CBC station on July 2, 1966, Onting Biruar saw him passing his hotel and called him; that he asked him to help in looking for his car which was borrowed by someone and was not returned; that he agreed; that they have started the search but they could not find it on that day; that from that time he lodged in Kingston Hotel with Onting and Romualdo Raboy; that on July 4, 1966 in the morning he was apprehended by the Davao City Police together with Onting Biruar and Romualdo Raboy; that he did not know the cause of his arrest; that they were brought to Agdao, then transferred to the office of the detective division and finally to the P.C. barracks; that he was investigated there; that he was maltreated by the P.C. soldiers at the time he signed his affidavit; that he just met Ceferino Caturan, Angel Dy and Abraham Lim there; that he met Galliano at Mati; that he was detained together with others at the P.C. barracks at Mati on July 6, 7 and 8, 1966; that he did not go to Limot, Mati on July 2 or July 3, 1966; that he always was in Davao City during those days; that he denied statements of Narciso Bauyot; that he was seen in the house of Kalitas on the night of July 2, 1966; that he denied the statement of Mosende that he was one of the two men who robbed his house on same day; that the first occasion he met Romualdo Raboy was in P.C. barracks, so also Ceferino Caturan, Angel Dy and Eugene Ruslin; that he is known as Broke; that he knows Onting Biruar for he used to deliver crabs to him; that he does not know Fiscal Matondo; that his affidavit taken by the P.C. (Exh. 'N') has been extracted by force and duress."

The trial court, however, rejected the denials and excuses of the defendants and found that all of them, except

Onting Biruar, the owner of the Buick car used in the commission of the crimes, and Eugene Ruslin, who was found sleeping with Abraham Lim in Toril, Davao City, when the said Lim was arrested by a police team, did, in fact, actively participate in the commission of the crimes complained of, and that their claims that they were elsewhere when the crimes were committed are un-availing against their positive identification by the witnesses for the prosecution who testified in a natural and straightforward manner and had no motive or reason to pervert or suppress the truth or testify falsely against them.

We have examined the record of the cases with great care and found no convincing reason to disturb the findings of the trial court that the accused were the perpetrators of the offenses charged. The claim of Abraham Lim that he went to the house of George Kalitas to collect what the latter allegedly owed him is improbable and not worthy of belief. The following observations of the trial judge is more logical and consistent with human conduct:

"(3) Referring to improbabilities and inconsistencies of the defendants' statements, Abraham Lim declared that his purpose in going to the late Kalitas' house that night in question was to collect accounts from the deceased. If this is true, why did he bring along no less than four armed men with him and made demand at about midnight in the dwelling of Kalitas? He admitted in cross examination that by chance he met Kalitas in a bus while he was on his way for Mati in 1965; that being an old man he could trust Kalitas and he advanced to him P15,600.00 as capital for their business.

"If he could trust the late Kalitas with such big amount, why did he make that demand in the presence of armed men who made use of force and terror to attain their aim?

"Again he related that on demanding payment of the debts, Kalitas was irked and he drew his pistol and aimed at Abraham Lim but the latter in turn grabbed it and drew his own 22 caliber magnum pistol and grazed it at the back of Kalitas head and then dragged him outside. In the ensuing scuffle he lost the receipt of the said loan of P15,600.00 and also a notebook containing an entry of their transaction.

"This is another brand of Lim's statements which is not only improbable and unnatural but is outright incredible. Kalitas was an old, sickly man who was alone facing a menacing group of armed men who shot their way to his bedroom. Would he, in his senses dare to provoke them in that manner?

"At least two inmates of the house declared that he was already shot during the first burst of gunfire coming from outside the house and before the defendants came up. This seem to be true because he was carried by two of them towards the main door and Lim admitted that they dragged him outside. How could Kalitas drew his pistol when he was severely wounded and could not even talk.

"Abraham Lim continued his story by stating that when Kalitas was brought outside, he was shot at the upper part of his body by others whom he suspected to be Kalitas' neighbors and yet he was able to shout at his men calling them to surrender and in fact, Mosende, Aguedo and four others surrendered to Abraham their respective firearms consisting of one carbine and five pistols which he identified in the courtroom. If his story is true, then no other logical conclusion can be drawn therefrom except that Abraham Lim and his men went to Kalitas' house on that night in question to fight, plunder and subdue Kalitas and his neighbors and in fact, according to him, they succeeded in forcing them to surrender thru Kalitas not only their persons but also their arms, but the Court would prefer to believe that a sham story of this nature is rather false, exaggerated and unbelievable because if Kalitas was really shot at a vital part of his body he could not have talked and moved, how then could he shout? Granting arguendo that Kalitas shouted at his men to surrender, the latter, following the natural instinct of self-preservation would flee from the scene of the crime and would not give up their arms and persons to such ruthless and dangerous foe under that horrible circumstances of firing, killing and burning of house. There is no evidence that they were cornered or trapped in such a tight situation that no other remedy could be availed of except to surrender... If Lim's story is to be accepted the Court cannot find good reasons to justify him to capture Kalitas and his neighbors if his purpose is only to collect debts."

Besides, the attack on the credibility of the witnesses for the prosecution is based upon trivial matters. Thus, counsel for the accused claims that the testimony of the prosecution witness Alfredo Matiga is not credible since the said witness even failed to recall, during his cross-examination, the number of the house where he was living and his birthdate. It should be noted, however, that the said witness testified to only one detail, and that is, the fact that he saw the Buick car of Onting Biruar refueling at a gasoline station in the poblacion of Mati on the night of July 2, 1966, which fact is admitted by the accused Abraham Lim and Ceferino Caturan.

The testimony of Narciso Bauyot is also assailed on the ground that he signed his sworn statement before the Municipal Judge during the preliminary investigation without reading its contents, or without having them read and explained to him. The conviction of the accused, however, was not based upon the sworn statement of the witness, but, on the collective testimony of Narciso Bauyot and the other prosecution witnesses who were subjected to a rigid cross-examination by the defense counsel during the trial of the case. Besides, counsel failed to point out how the failure of this witness to understand the substance of his affidavit could have cast serious doubt on the guilt of the defendants.

The testimony of Gorgonio Mosende regarding the robbery in his house is also impugned as improbable because the said Mosende had testified that the accused Romualdo Raboy and Edgardo Señeres had announced their presence to Mosende before coming to the house, which they need not have done in order to rob the couple. While it may be true that the accused had made known their presence to Mosende and that the latter had invited them to come up his house, Mosende did so because he thought that the callers were relatives of his wife. It may have been unwise for Mosende to do so, but that does not render his story improbable considering that the incident happened in the rural areas where the people are generally more hospitable. Besides, Mosende is a poor man and he had no reason to expect that he would be robbed. At any rate, the accused failed to impeach the testimony of the said Gorgonio Mosende.

Defense counsel also claims that no robbery was committed in the house of George Kalitas since there is no positive evidence presented to show the existence of the money allegedly taken from George Kalitas as well as the act of taking the same. To support his contention that no money was taken from George Kalitas, counsel quoted a portion of the testimony of Silvia Mingming Kalitas, the wife of George Kalitas, which shows that the trunk where the money was kept was burned without its being opened. Counsel further stated that the accused were apprehended within 48 hours after the commission of the crime and yet the money stolen or a part thereof was not traced to, nor recovered from the accused, much less presented in court.

The contention is devoid of merit. It had been positively established that the late George Kalitas had kept money in a trunk placed under his bed which the accused took on the night in question. Martillana Kalitas categorically stated in court that her father, George Kalitas, had money, amounting to P65,000.00, which he kept in a trunk placed under his bed, because he had no trust in banks.[21] Jessie Renopal testified that the accused broke open the said trunk with an axe on the night of July 2, 1966 and took the money placed inside.[22] Her testimony is corroborated by Silvia Mingming Kalitas, the wife of George Kalitas. Silvia Mingming Kalitas declared, however, that the money kept by her husband amounted to only P40,560.00 at the last counting.[23]

The testimony of Silvia Mingming Kalitas which was quoted by counsel for the accused, does not support his contention that no money was taken from George Kalitas on the night in question. The testimony, adverted to, reads, as follows:

"COURT:

Q Now, the Court wants to know whether that trunk which you have mentioned from which they got the P40,560.00 cash was taken before or after the house was set on fire. Which is which?

A The fire was beginning, when it was advancing, that the time when the robbers came up.

Q Was that trunk from which the money was taken burned?

A It was burned; nothing is left, including the clothes.

Q Before it was burned, was it already opened?

A Before it was burned, it was not yet opened. It was they themselves who opened it."[24]

It is clear therefrom that the accused opened the trunk and took the money placed inside before it was burned.

The argument of counsel that the amount stolen, or a portion thereof, should have been presented in evidence in order to make the asportation credible, is untenable. Where the property stolen was not recovered, it would be impossible to present it in evidence. Besides, there is no law nor jurisprudence which requires the presentation of the thing stolen in order to prove that it had been taken away. It appears of record that there were other persons who participated in the commission of the offenses, but have not been charged. Ceferino Caturan stated that there were 9 of them inside the car when they went to the house of George Kalitas on the night in question, and Abraham Lim testified that one of his companions in going to the house of George Kalitas on the said night was one Cesar Go.[25] However, only 8 persons have been identified and charged and Cesar Go is not one of them. The money could be with him. Moreover, the accused were not apprehended immediately after the commission of the crimes, but a day later, or on July 4, 1966. The accused could have disposed of the money before their arrest. The failure of the prosecution to present in evidence the money stolen does not give rise to a reasonable doubt as to the guilt of the accused.

It is also contended by the accused that only one offense was committed since the robbery in the houses of Gorgonio Mosende and George Kalitas is one continuing offense, committed at the same time and on one occasion, and arising out of one criminal resolution, and the burning of the house of George Kalitas was the means to commit the crime of robbery. Counsel cites the case of *People vs. De Leon*,[26] in support of his contention.

The contention is without merit. In the case cited by counsel the defendant entered the yard of a house where he found two fighting cocks belonging to different persons and took them. In this case, however, the accused, after committing the crime of robbery in band in the house of Gorgonio Mosende, went to the neighboring house of George Kalitas where they committed the crimes of Arson and Robbery with Homicide and Physical Injuries. Obviously, the rule enunciated in the cited case cannot be made applicable since the herein accused performed different acts with distinct purposes which resulted in juridically independent crimes. The Court also rejected the applicability of the cited case of *People vs. De Leon* in the case of *People vs. Enguerro*,[27] and found the accused therein guilty of three (3) separate crimes of Robbery in Band, where the said accused, after committing a robbery in band in a store, went to another house where they committed a second robbery, and after committing it proceeded to another house where they committed a third robbery, all in the same barrio during the period from 7:00 p.m. to 11 p.m. of the same day.

The burning of the house of George Kalitas was not the means in committing the robbery. The evidence shows that the accused gained entry into the house of George Kalitas by breaking down the door with an axe and not by burning the same.[28]

Finally, the accused Abraham Lim pleads that he had been denied the right to be present and defend in person and by attorney at every stage of the proceedings against him, that is, from the arraignment to the promulgation of the judgment. He claims that the trial court proceeded with the trial of the cases despite his absence therefrom although he was charged with a capital offense.

The contention is devoid of merit. The provisions of the Rules of Court,[29] securing to an accused person the right to be present in all criminal prosecutions against him must be understood as securing to him merely the right to be present during every stage of his own trial and not at the trial of another. Since the accused Abraham Lim was present during his arraignment and jumped bail after giving his testimony in court and was absent only when his co-accused were presenting their evidence, none of which are prejudicial to the interest of the accused Abraham Lim whose attorney was present during all this time, and also present when the sentence was read to him, there was no infringement of the said defendant's right to be present at every stage of the proceedings against him.

The trial court, therefore, did not err in finding the defendants Abraham Lim alias Titing Lim, Ceferino Caturan alias Fred, Romualdo Raboy alias Romy, and Saturnino Galliano guilty of the crimes of Robbery in Band, Arson, and Robbery with Homicide and Physical Injuries.

The trial court found that the commission of the offenses charged was attended by the aggravating circumstances of nighttime, dwelling, use of motor vehicle, use of unlicensed firearm, and with the aid of armed men to ensure or afford impunity. The use of unlicensed firearm, however, cannot be appreciated as an aggravating circumstance in Crim. Case Nos. 9988 (Arson) and 9989 (Robbery with Homicide and Physical Injuries) since the special aggravating circumstance of use of unlicensed firearm is solely applicable to robbery in band under Art. 295 of the Revised Penal Code.[30]

This, notwithstanding, the death penalty imposed upon the accused Abraham Lim alias Titing Lim, Ceferino Caturan alias Fred, Romualdo Raboy alias Romy, and Saturnino Galliano in Crim. Case No. 9989, for Robbery with Homicide and Physical Injuries, is within the range of the penalty provided for by law. However, for lack of the necessary affirmatory votes, the penalty imposed upon them by the trial court is hereby reduced to reclusion perpetua.

We also find that the trial court had inadvertently ordered the defendants to indemnify, jointly and severally, the heirs of the deceased George Kalitas the amount of P20,000.00 for the money stolen from him and not recovered in Crim. Case No. 9988, and the amount of P12,000.00 for the death of the said deceased in Crim. Case No. 9989. Crim. Case No. 9988, however, is a prosecution for Arson, for the illegal burning of the property of George Kalitas valued at P34,545.00, while Crim. Case No. 9989 is one for Robbery with Homicide and Physical Injuries where the evidence showed that the amount of P40,000.00 was taken from the house of George Kalitas. The Solicitor General recommends that the defendants be ordered to indemnify the heirs of the late George Kalitas the amount of P34,545.00 in Crim. Case No. 9988, and the amounts of P12,000.00, for the death of the said deceased and P40,000.00, for the money stolen from him.

We further note that the penalty imposed upon the defendants in Crim. Case No. 9987 is less than what the law prescribes for the offense committed. In said case, the defendants were found guilty of Robbery in Band, attended, among others, by the aggravating circumstance of use of unlicensed firearms and sentenced to suffer an indeterminate penalty of from two (2) years and four (4) months of prision correccional, as minimum, to eight (8) years and one (1) day of prision mayor, as maximum. However, Article 295 of the Revised Penal Code, as amended, provides that if the robbery mentioned in pars. 3, 4 and 5 is committed by a band, the offenders shall be punished by the maximum period of the proper penalties, and Article 296 of same Code, as amended, also states that when any of the arms used in the commission of the offense be an unlicensed firearm, the penalty to be imposed upon the malefactors shall be the maximum of the corresponding penalty provided for by law. Hence, the penalty to be imposed upon the defendants should be the maximum of the maximum period of the penalty, even without the concurrence of any other aggravating circumstance,[31] or an indeterminate penalty of from four (4) years and two (2) months of prision correccional, as minimum, to ten (10) years of prision mayor, as maximum.

WHEREFORE, the judgment appealed from should be, as it is hereby AFFIRMED, with the modification that the defendants Abraham Lim alias Titing Lim, Ceferino Caturan alias Fred, Romualdo Raboy alias Romy, and Saturnino Galliano are sentenced: (1) to suffer an indeterminate penalty of from four (4) years and two (2) months of prision correccional, as minimum, to ten (10) years of prision mayor, as maximum, in Crim. Case No. 9987; (2) to suffer the penalty of reclusion perpetua in Crim. Case No. 9989; and (3) to indemnify, jointly and severally, the heirs of the deceased George Kalitas the amount of P34,545.00 in Crim. Case No. 9988, and the amount of P40,000.00 in Crim. Case No. 9989, for the money stolen from the said deceased. The indemnity for the death of George Kalitas is hereby increased to P30,000.00.[32] With costs against the accused Abraham Lim alias Titing Lim, Ceferino Caturan alias Fred, Romualdo Raboy alias Romy, and Saturnino Galliano in this instance.

Makasiar, Guerrero, Abad Santos, Melencio-Herrera, Plana, Escolin, Relova, Gutierrez, Jr., De la Fuente, and Cuevas, JJ., concur.

Fernando, C.J., in the result.

Teehankee, J., no part.

Aquino, J., appellant Lim was tried properly because his absence at the trial was unjustified (Sec. 19, Art. 14). The minimum of the penalty in Case No. 9987 should be taken from prision mayor minimum.

[1] t.s.n. of December 28, 1966, pp. 6-23.

[2] t.s.n. of March 10, 1967, pp. 193-194.

[3] t.s.n. of March 8, 1967, p. 179; t.s.n. of June 6, 1967, p. 312.

[4] t.s.n. of June 6, 1967, pp. 294-295.

[5] t.s.n. of March 7, 1967, p. 140.

[6] t.s.n. of March 6, 1967, p. 126; t.s.n. of March 7, 1967, pp. 140-141, 152.

[7] t.s.n. of March 8, 1967, pp. 156-190; t.s.n. of March 10, 1967, pp. 190, 199-204.

[8] t.s.n. of March 6, 1967, p. 129; t.s.n. of June 5, 1967, pp. 239-240, 243-244.

[9] t.s.n. of June 5, 1967, pp. 239, 242-243, 258-259.

[10] t.s.n. of June 5, 1967, pp. 239, 265; t.s.n. of March 7, 1967, pp. 149, 151.

[11] t.s.n. of March 6, 1967, pp. 113, 127-128, 140; t.s.n. of June 5, 1967, pp. 239-240, 250-251.

[12] t.s.n. of March 6, 1967, pp. 112, 131-132; t.s.n. of June 5, 1967, pp. 236, 258, 260.

[13] tsn of June 5, 1967, pp. 242, 246-249, 255-257, 266, 286, 290-291; tsn of March 6, 1967, pp. 116-124, 131-132; tsn of March 8, 1967, pp. 157, 168, 230; tsn of July 24, 1967, pp. 106-107.

[14] tsn of March 8, 1967, p. 168; tsn of March 10, 1967, pp. 206, 213.

[15] tsn of June 5, 1967, p. 255.

[16] tsn of March 6, 1967, p. 109; tsn of March 8, 1967, pp. 171-175; tsn of July 24, 1967; pp. 83-105.

[17] tsn of Aug. 29, 1967, pp. 132-147; tsn of Aug. 30, 1967, p. 188.

[18] tsn of Sept. 1, 1967, pp. 290-296.

[19] tsn of Aug. 29, 1967, pp. 214-215.

[20] tsn of July 24, 1967, pp. 33-39.

[21] tsn of July 24, 1967, pp. 105-107.

[22] tsn of March 6, 1967, pp. 121, 123-124.

[23] tsn of June 5, 1967, pp. 242, 248, 256-257.

[24] tsn of June 5, 1967, pp. 274-275.

[25] tsn of Dec. 16, 1967, p. 407.

[26] 49 Phil. 437.

[27] 100 Phil. 1001.

[28] tsn of March 6, 1967, p. 128; tsn of June 5, 1967, pp. 238-240; 243-244.

[29] Sec. 1(b), Rule 115, Rules of Court.

[30] People vs. Apduhan, G.R. No. L-19491, Aug. 30, 1968, 24 SCRA 798.

[31] III Aquino 296, citing People vs. Valeriano, 90 Phil. 15.

[32] People vs. Villeza, G.R. No. 56113, Jan. 31, 1984; People vs. De la Fuente, G.R. Nos. 63251-52, Dec. 29, 1983.

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