

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
JERBERTO DIAMONON, DEFENDANT-APPELLANT.***G.R. No. L-38094. November 07, 1979*

Ponente: CONCEPCION, JR., J.

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AUTOMATIC REVIEW of the judgment rendered by the Circuit Criminal Court, Pasig, Rizal in Criminal Case No. CCC-VII-1000-Q.C. finding the accused guilty of the crime of murder and sentencing him to suffer the penalty of DEATH, for the killing of Ciriaco Macasinag.[1]

The record shows that at about 10:00 o'clock in the evening of November 17, 1971, Jerberto Diamonon, Ely Calicdan, Jr. and the latter's brother arrived at the Tito Amor's Furniture Shop, located at No. 15-A Matatag St., Piñahan, Quezon City. Jerberto Diamonon and Ely Calicdan, Jr. already drunk when they entered the shop, told Reynaldo Mars, a furniture maker work-ing on a table, to move to one end and thereafter settled down to drink the two bottles of gin they had brought along with them.[2]

A few minutes later, Ciriaco Macasinag passed by[3] and Ely Calicdan, Jr. invited him to drink with them. Ciriaco Maca-sinag accepted the invitation.[4] After consuming the two bottles of gin, Jerberto Diamonon and Ely Calicdan, Jr. left the shop. Not long, thereafter, Reynaldo Mars went home. While on his way, he passed by Diamonon and Calicdan, Jr. at the water pump near the stairway of his house. He overheard Diamonon ask Calicdan: "Sino ba iyan utol?" Ely Calicdan, Jr. answered: "He is a matadero, at the NEPA-Q-MART." Diamonon then said: "Kursunada ko iyan", to which Calicdan, Jr. replied: "Yes, go ahead, I will follow you. (Susundan kita)." Upon hearing this, Reynaldo Mars interceded in behalf of Ciriaco Macasinag and told Diamonon and Calicdan: "Huwag naman ninyong gawin iyan sa tao, wala namang kasalanan ang tao sa inyo." Then he went back to the shop to warn Ciriaco Macasinag. But, Diamonon and Ely Calicdan, Jr. followed him to the shop and asked Macasinag for some cigarettes. Macasinag, however, had no cigarettes and told Diamonon and Calicdan: "We had no cigarette here, wait a minute, I will buy with Rene." So, Macasinag and Reynaldo Mars left the shop to look for some cigarettes. While buying cigarettes, they noticed that Diamonon and Calicdan had followed them. After buying the cigarettes, Macasinag gave them to Diamonon and Calicdan. Reynaldo Mars then told Ciriaco Macasinag that they better go home. On their way, Mars saw Diamonon pull out a "patalim", so that he told Macasinag: "Faster, they might over-come us. They might overtake us." But, Macasinag did not believe him. Diamonon overtook Macasinag at the foot of the stairs of the latter's house and immediately stabbed him with a "patalim", "at the left side lower or below the armpit." Ely Calicdan, Jr. went after Reynaldo Mars. But the latter was able to run home and his wife had immediately closed the door after him. While inside the house, Reynaldo Mars heard a commotion (kalabugan) outside near the stairs of the house of Macasinag.[5] After a time, the wife of Ciriaco Macasinag was heard shouting for help: "Tulungan ninyo kami, ang asawa ko sinasaksak." Juan Mateos, a neighbor, answering the call for help, went down his house and saw Ciriaco Macasinag lying flat on his back and Ely Calicdan was stabbing Ciriaco Macasinag with a "veinte-nueve (29) Batangas knife." Jerberto Diamonon, who was beside Ely Calicdan was holding a "patalim," and about to stab Ciriaco Macasinag. ("May

akma siyang sumaksak"). Mateos was afraid so he went back to his house. After a few minutes, he heard another call for help. He went down and saw Ciriaco lying prostrate on the ground. Ciriaco was alone. So, he lifted Ciriaco and carried him to the store to call for a taxicab that would take them to the hospital. But, Jerberto Diamonon and Ely Calicdan, with weapons in hand, blocked his way. He was asked: "Where are you going? Do you like to die?" He was afraid, so, he returned to his house. Sometime later, a police mobile car arrived and Ciriaco was brought to the V. Luna Hospital.[6] Reynaldo Mars assisted in taking Ciriaco to the hospital. When they arrived thereat, Ciriaco Macasinag was already dead, and on removing his clothes, Reynaldo Mars saw that Macasinag had stab wounds on the chest, face and both arms.[7]

Dr. Alberto M. Reyes, Medico-Legal Officer of the NBI, conducted a post-mortem examination of the cadaver and found that the victim suffered the following lesions:

"Abrasion, hand, left, palmar aspect, 0.5 x 0.3 cm. right, incised wounds: Arms, upper third, lateral aspect, 3.0 cm. and left, 1.0 cm.; shoulder, left, lateral aspect, 1.5 cm. and 3.6 cm. and posterior aspect, 1.7 cm.; forearm, left, upper half lateral aspect, 7.0 cm.; hand, right, dorsal aspect, 1.3 cm.; buttocks, right, side, 1.5 cm.

Stab wounds: I Infra auricular region, left, 12.5 cm. from the anterior median line, elliptical in shape, edges clean cut, 1.5 cm. long, with a withdrawal wound of 1.1 cm., oriented backward and downward with sharp postero-inferior and contused antero-superior extremities, directed backward, downward and medially, involving skin and underlying soft tissues, grazing the left ramus of the mandible with an approximate depth of 5.0 cm.

II Pectoral region, right, 10.5 cm. from the anterior median line, elliptical in shape, edges clean cut, 3.0 cm. long, oriented downward and medially, with sharp infero-medial and contused supero-lateral extremities, directed backward, upward and laterally, involving only the skin and underlying soft tissues, with an approximate depth of 5.5 cm.

III Sternal region, left side, 1.0 cm. from the anterior median line, elliptical in shape, edges clean cut, 2.0 cm. long with a withdrawal wound of 1.0 cm., oriented down-ward and medially with sharp infero-medial and contused supero-lateral extremities, directed backward, downward and medially involving skin and underlying soft tissues, cutting the 1st left costal cartilage, piercing the innominate vein, with an approximate depth of 8.0 cm.

IV Infraclavicular region, left, 9.0 cm. from the anterior median line, elliptical in shape, edges clean cut, 2.0 cm. long, oriented upward and laterally with sharp supero-lateral and contused infero-medial extremities, directed backward, down-ward and medially, involving only the skin and underlying soft tissues, with an approximate depth of 6.5 cm.

V Hypochondriac region, left, 9.0 cm. from the anterior median line, elliptical in shape, edges clean cut, 1.7 cm. long, oriented downward and medially with sharp infero-medial and contused supero-lateral extremities; directed backward, downward and medially involving skin and underlying soft tissues, penetrating the 9th left inter-space along the anterior axillary line, perforating the diaphragm, grazing the spleen, perforating the stomach, with an approximate depth of 12.0 cm.

VII Axillary region, left, 10.0 cm. from the posterior medial line, elliptical in shape, edges clean cut, 1.8 cm. long with a withdrawal wound of 0.7 cm., oriented backward and down-ward with sharp postero-inferior and contused antero-superior extremities directed backward, upward and medially, involving the skin and underlying soft tissues, with an approximate depth of 6.5 cm.

VII Axillary region, left, 19.5 cm. from the posterior median line, elliptical in shape, edges clean cut, 2.0 cm. long oriented downward and backward with sharp postero-inferior and contused antero-superior extremities, directed backward and upward and medially involving only the skin and underlying soft tissues, with an approximate depth of 6.5 cm.

VIII Shoulder, left, posterior aspect, 23.0 cm. from the posterior median line, elliptical in shape, edges clean cut, 1.6 cm. long, with a withdrawal wound, of 0.5 cm., oriented downward and medially with sharp infero-medial and contused supero-lateral extremities, directed forward, downward and medially, involving only the skin and underlying soft tissues, with an approximate depth of 9.0 cm.

IX Sufrascapular region, left, 8.5 cm. front the posterior medial line, elliptical in shape, edges clean cut, 5.0 cm. long, oriented upward and medially with sharp supero-medial and contused infero-lateral extremities, directed forward, downward and medially involving skin and underlying soft tissues, penetrating the 8th left inter-space along the midscapular line, perforating the lower lobe of the left lung, with an approximate depth of 11.0 cm.

X Infrascapular region, left, 14.5 cm. from the posterior median line, elliptical in shape, edges clean cut, 1.6 cm. long, oriented downward and medially with sharp infero-medial and contused supero-lateral extremities, directed forward, upward and medially involving only the skin and underlying soft tissues, with approximate depth of 4.5 cm.

XI Posterior lumbar region, left, 7.0 cm. from the posterior median line, elliptical in shape, edges clean cut, 1.8 cm. long with a withdrawal wound of 0.3 cm., oriented down-ward and laterally with sharp, infero-lateral and contused supero-medial extremities, directed forward and upward and medially involving only the skin and underlying soft tissues, with an approximate depth of 6.5 cm.

XII Arm, left, upper third, lateral aspect, 19.5 cm. above the left elbow, elliptical in shape, edges clean cut, 1.6 cm. long with a withdrawal wound of 1.0 cm., oriented upward and posteriorly with sharp supero-posterior and contused infero-anterior extremities directed slightly backward, upward and medially involving only the skin and underlying soft tissues, with an approximate depth of 4.5 cm.

XIII Arm, left, middle third, lateral aspect, 11.0 cm. above the left elbow, elliptical in shape, edges clean cut, 2.0, cm. with a withdrawal wound of 1.0 cm., oriented upward and posteriorly with sharp supero-posterior and contused infero--anterior extremities directed forward, slightly downward and medially involving only the skin and underlying soft tissues, with an approximate depth of 4.0 cm.

XIV Buttocks, left, 12.0 cm. from the anterior median line elliptical in shape, edges clean cut, 2.0 cm. long oriented upward and medially, with sharp supero-medial and con-tused infero-lateral extremities, directed for-ward, upward and laterally involving the skin and underlying soft tissues, with an approximate depth of 7.0 cm.

XV Buttocks, right, 8.0 cm. from the posterior median line elliptical in shape, edges clean cut, 1.5 cm. long with an withdrawal wound, of 1.1 cm., oriented upward and medially with sharp supero-medial and contused infero-lateral extremities, directs forward, upward and medially involving the skin and underlying soft tissues, with an approximate depth of 8.0 cm.

XVI Buttocks, right, 3.5 cm. from the posterior median line elliptical in shape, edges clean cut, 1.5 cm. long with a with-drawal wound of 0.5 cm., oriented upward and laterally with sharp supero- lateral and contused infero-medial extremities, directed forward, upward and laterally involving only the skin and underlying soft tissues, with an approximate depth of 4.5 cm.

Hemothorax, left, about 950 cc.

Hemoperitoneum, about 500 cc.

Brain and other visceral organs, pale.

Stomach, half full of moderately digested rice and other particles mixed with yellowish fluid.

CAUSE OF DEATH: Multiple Stab wounds."[8]

Accordingly, Ely B. Calicdan, Jr. and Jerberto (Edilberto) Diamonon were charged with the crime of murder committed as follows:

"That on or about the 17th day of November, 1971, in Quezon City, Philippines, the above-named accused, conspiring together, confederating with and mutually helping one another, did, then and there, wilfully, unlawfully and feloniously, with intent to kill, qualified by evident premeditation and treachery by taking advantage of superior strength, attack, assault and employ personal violence upon the person of CIRIACO MACA-SINAG by then and there stabbing him several times, hitting Ciriaco Macasinag on different parts of his body, thus inflicting upon him multiple stab wounds which were the direct and immediate cause of his death.

That, by reason of the death of Ciriaco Macasinag, the heirs suffered actual, moral and other damages, under the Civil Code.

Contrary to law."

Ely B. Calicdan, Jr., however, has not been arrested and still remains at large, so that trial proceeded against Jerberto Diamonon. Jerberto Diamonon denied that he stabbed Ciriaco Macasinag, saying that it was Ely Calicdan, Jr. alone who inflicted the injuries upon the victim. He declared that at about 10:00 o'clock in the evening of November 17, 1971, he went to Matatag Street at the Piñahan District to visit his friend Jimmy Surallo. While on his way, "Renato," the witness who had preceded him on the stand,[9] saw him, and invited him to have a drink with them at the compound of Calicdan. He went inside and saw this "Renato" and Calicdan drinking. He just looked at them and then left for the house of Jimmy Surallo nearby. While there, he heard a woman shout: "Saklolo" (help). He went towards the direction where the call emanated and saw Ely Calicdan astride Ciriaco Macasinag's chest and stabbing him on the breast. He shouted: "Tama na, tama na. (That is enough). Upon hearing him, Ely Calicdan turned and tried to stab him. So, he ran away.[10]

The trial court, however, rejected the defendant's claim because he was positively identified by Reynaldo Mars, Juan Mateos and Elena Macasinag to be one of the assailants of Ciriaco Macasinag. Besides, the trial court said, it is only natural for him to "pass the buck" to his co-accused Ely Calicdan, Jr., in the belief that Calicdan, who had not yet been apprehended, was in no position to contradict this statement. Moreover, the act of the defendant of leaving his residence a month after the occurrence and in not returning thereto until after three years later, without any known reason or cause, is not the actuation of a man with a clear conscience.

Counsel for the accused now seeks the reversal of the judgment upon the ground that the guilt of the accused had not been established beyond reasonable doubt, pointing to a discrepancy in the declaration of Reynaldo Mars which would render his testimony unworthy of credit. Counsel prays, in the alternative, that the said judgment be modified and the penalty imposed upon the accused reduced, in view of the absence of evident premeditation, treachery, and abuse of superiority to qualify the offense or aggravate the penalty, and the presence of the alternative circumstance of intoxication to mitigate the penalty.

The Solicitor General, upon the other hand, contends that the defendant Jerberto Diamonon is guilty of murder, qualified by treachery; but recommends the reduction of the penalty to imprisonment of from 15 years, as minimum, to 20 years of reclusion temporal, as maximum, since evident premeditation and abuse of superiority were not attendant to the crime, and the presence of intoxication as a mitigating circumstance.

After examining the records, We find no reason to disturb the findings of the trial court that the accused Jerberto Diamonon was an active participant in the killing of Ciriaco Macasinag. Reynaldo Mars, a close friend of the accused, Juan Mateos, and Elena Macasinag positively identified him as one of those who stabbed Ciriaco Macasinag. The variance in the testimony of Reynaldo Mars to the effect that he saw the accused Diamonon and

Calicdan stab the deceased Ciriaco Macasinag, and the statement he gave to the police investigators after the stabbing incident,[11] wherein he said that he did not actually see the stabbing of Ciriaco Macasinag, had been sufficiently explained by him. He stated that he did not implicate Jerberto Diamonon and Ely Calicdan, Jr. in the killing of Ciriaco Macasinag when he executed the statement before the police because he was afraid of reprisals from Diamonon and Calicdan, Jr. who were at large and "this Ely Calicdan, Jr. used to return there and they were threatening me." [12]

At any rate, it was not Reynaldo Mars alone who witnessed the stabbing incident. Elena Macasinag testified that she saw Ely Calicdan and Jerberto Diamonon helping one another in stabbing Ciriaco Macasinag.[13] Juan Mateos also declared that he saw Jerberto Diamonon about to stab Ciriaco Macasinag. "May akma siyang sumaksak." [14] The trial court found that the capacity of these witnesses for telling the truth cannot be doubted since they have no motive to testify falsely against the accused, especially Reynaldo Mars who considers himself a friend of the accused Jerberto Diamonon, his teacher in karate.[15]

The information alleged that the crime of murder was qualified by evident premeditation, treachery, and taking advantage of superior strength. The facts of record, however, cannot sustain a finding of evident premeditation. The meeting between Diamonon and Macasinag was not sought after and the senseless killing of Macasinag for fun was made at the spur of the moment. Diamonon did not even know who Macasinag was and it was only when they were drinking that Diamonon met Macasinag for the first time, such that Diamonon was heard to ask Calicdan: "Sino ba iyan, utol?" Besides, no motive existed as to precipitate the killing, and, moreover, no sufficient period of time had inter-vened between the time the killing was conceived, (when Diamonon said: "Kursunada ko iyan," to which Calicdan replied: "Yes, go ahead I will follow you") up to the time of its perpetration, for the accused to have made a cool and circumspect deliberation of the consequences of their intended act.

It is also obvious from the records that treachery was not present in the commission of the crime. Reynaldo Mars stated that, upon overhearing the foregoing remarks of Diamonon and Calicdan, he went back to the furniture shop to warn Ciriaco Macasinag of the peril to his life and he even tried to lead Macasinag to a place of safety, but Macasinag refused to believe him. Then, while on their way home, he saw Diamonon pull out a "patalim", so that he told Ciriaco Macasinag, "faster, they might overcome us. They might overtake us." Again, Macasinag did not believe what he was saying, so that they were overtaken at the foot of the stairs of the house of Ciriaco Macasinag and Diamonon stabbed Ciriaco Macasinag. The attack was frontal and the deceased had been forewarned of the intended attack. He had every opportunity to evade it, by running away, or to make whatever defense he is capable of.

But abuse of superiority had been duly proved. It appears that Diamonon and Calicdan, both armed with knives, had cooperated in such a way as to secure advantage from their combined superiority in strength and took turns in stabbing Ciriaco Macasinag, who was unarmed. Elena Macasinag, who was sleeping in the house of her brother on the night in question, declared that she was awakened by the commotion ("kalabugan") at the foot of their stairs and when she opened the door, she saw Ely Calicdan, Jr. and Jerberto Diamonon helping one another in stabbing Ciriaco Macasinag who was lying on the ground. Juan Mateos, a neighbor of Macasinag, upon hearing the cry of the wife of Ciriaco Macasinag for help, went down his house and saw Ciriaco Macasinag lying flat in his back and Ely Calicdan, Jr. was stabbing him with a knife. Jerberto Diamonon was beside Calicdan and about to stab Macasinag. ("May akma siyang sumaksak.") The crime committed is, therefore, murder, qualified by abuse of superiority.

The accused, however, is entitled to the mitigating circumstance of intoxication. Reynaldo Mars declared that Jerberto Diamonon and Ely Calicdan, Jr. were already drunk when they entered the furniture shop and continued

drinking the two bottles of gin they had brought along with them. He further declared that during the time he had known Diamonon, he had not seen him drunk in any other occasion. His testimony is, as follows:

"Q Where were these two persons, Ely Calicdan, Jr. and Jerberto Diamonon drinking at about 10:00 o'clock in the afternoon of November 17, 1971?

A In my place of work, sir.

Q Have you seen them drinking before the incident?

A I did not know that they were drinking but I saw them when they arrived at the place and I saw them with two bottles of beer.

COURT:

Q Days before that, did you see them drinking?

A No, your Honor.

Q Weeks before that, did you see them drinking?

A No sir.

Q So that intoxication is not habitual."[16]

Since the intoxication of the accused was not habitual nor intentional intoxication should be appreciated as a mitigating circumstance.

The crime committed is murder, qualified by abuse of superior strength. The imposable penalty is reclusion temporal in its maximum period to death.[17] There being the mitigating circumstance of unintentional or non-habitual intoxication which is not offset by any aggravating circumstance, the minimum period of the penalty should be imposed.

WHEREFORE, the judgment of the trial court is hereby modified to the effect that the accused Jerberto Diamonon should suffer an indeterminate sentence ranging from ten (10) years and one (1) day of prision mayor, as minimum, to seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum. Thus modified, the same is hereby affirmed in all other respects. With costs against the accused Jerberto Diamonon.

SO ORDERED.

Fernando, C.J., Barredo, Antonio, Fernandez, Guerrero, De Castro, and Melencio-Herrera, JJ., concur.

Teehankee, J., concurs with the dissenting opinion of J. Makasiar.

Makasiar, J., concurs and dissents in a separate opinion.

Aquino, J., see concurring and dissenting opinion.

Santos, J., concurs with the opinion of J. Aquino.

Abad Santos, J., took no part.

[1] The dispositive portion of the decision reads, as follows:

"WHEREFORE, finding the accused, Jerberto Diamonon, GUILTY, beyond reasonable doubt, of the crime of Murder, as defined under Article 248 of the Revised Penal Code, as charged in the information, the Court hereby sentences him to suffer the penalty of DEATH; to indemnify the heirs of the victim the amount of P12,000.00; to pay moral damages in the amount of P10,000.00 and another P10,000.00, as exemplary damages; and to pay the

costs.

Pursuant to Section 32, Rule 138 of the New Rules of Court, Atty. Jose O. Galvan, who was appointed as counsel de oficio for the accused, is hereby ordered compensated in the amount of P500.00, subject, however, to the availability of funds.

SO ORDERED."

[2] t.s.n., Nov. 2, 1973, pp. 8, 19, 39, 48, 53.

[3] Id., pp. 9, 48.

[4] Id., p. 9.

[5] Id., pp. 9-29.

[6] t.s.n., Nov. 7, 1973, pp. 27-35.

[7] t.s.n., Nov. 2, 1973, p. 32.

[8] Exhibit A.

[9] Obviously, he was referring to Reynaldo Mars, nick-named "Rene", a witness for the prosecution.

[10] t.s.n., of December 3, 1973, pp. 4-13.

[11] Exhibit 1.

[12] t.s.n., of Nov. 2, 1973, p. 73; also t.s.n., of Nov. 7, 1973, pp. 6-19.

[13] t.s.n., Nov. 17, 1973, p. 13.

[14] t.s.n., Nov. 7, 1973, p. 31.

[15] t.s.n., Nov. 2, 1973, p. 83.

[16] t.s.n. of Nov. 2, 1973, pp. 39-41.

[17] Art. 246, Revised Penal Code.

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CONCURRING AND DISSENTING OPINION

AQUINO, J.:

I concur in the conviction for murder. The killing was ag-gravated by treachery and abuse of superiority. These circum-s-tances were alleged in the information.

I dissent as to the penalty imposed. While the intoxication seemed to be unintentional and, therefore, it should be mitigating, nevertheless, it is offset by the aggravating circumstance of dwelling.

Dwelling is aggravating because the killing took place at the foot of the stairs of the victim's house which were an integral part of his dwelling (Decision of January 8, 1884 of the Supreme Court of Spain cited in *People vs. Alcala*, 46 Phil. 738, 744; *People vs. Uday*, 85 Phil. 498, 504; *People vs. Madedis Sali*, 91 Phil. 911).

Hence, the proper penalty is reclusion perpetua, the medium period of reclusion temporal maximum to death.

Even if the penalty should be imposed in the minimum period, the appropriate indeterminate sentence (considering the perversity of the accused) should be seventeen years of reclusion temporal medium, as minimum, to twenty years of reclusion temporal maximum, as maximum.

6 pt 6 pt 0 3

SEPARATE CONCURRING AND DISSENTING OPINION

MAKASIAR, J.:

The appellant should be convicted of murder qualified by treachery and aggravated by abuse of superior strength and dwelling, mitigated only by intoxication, justifying the imposition of the supreme penalty of death. The victim was not prepared to defend himself as he did not believe the warning of his companion and state witness Reynaldo Mars that the appellant and his companion Ely Calicdan, Jr. were following them to assault him. And even if he shared the fears of Reynaldo Mars, he had no means with which to defend himself when he was attacked suddenly immediately after the two assailants overtook him at the stairs of his own house. The murder by these two thrill-killers of the deceased - a peaceful and trusting soul who earned his living as a butcher - was totally senseless because the deceased had not given them any provocation at all nor any reason for them to assault him; on the contrary, the deceased bought and gave them cigarettes when they asked such cigarettes from him. Night time, which is absorbed by treachery, was purposely taken advantage of by the assailants, who persisted in following the deceased until he reached his house, feeling secure that at that late hour of the night - about 11 o'clock or close to midnight - nobody would dare stop them from their criminal act, as in fact nobody dared. Even the neighbors who wanted to take the mortally wounded victim to the hospital were intimidated by the assailants from extending such help. Both assailants fled from the scene of the crime. Appellant Diamonon left his residence at Piñahan District, Quezon City, one month after the incident, which occurred at Matatag Street, Piñahan District, less than a kilometer from the Quezon City police headquarters near the corner of Epifanio de los Santos Avenue and Kamuning Street, and eluded the police until he returned thereto three years later. Until this date, or almost eight (8) years from the date of the incident on November 17, 1971, the other assailant Ely Calicdan, Jr. has not been apprehended despite the fact that he used to return to the neighborhood threatening state witness Reynaldo Mars with reprisal.

A copy of the decision herein should be furnished the Commanding General of the Metrocom, the chief of the Northern Police District Command at Quezon City, and the Commanding General of the Philippine Constabulary for the immediate arrest of Ely Calicdan, Jr.

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