

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
AGRIPINO CARZANO, ET AL., DEFENDANTS, FILOMENO QUITARA
AND AGRIPINO CARZANO, DEFENDANTS-APPELLANTS.**

G.R. No. L-29571. January 22, 1980

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal by Agripino Carzano and Filomeno Quitara from the decision of the Court of First Instance, Branch III, Cebu, in Criminal Case No. V-12394, *People vs. Agripino Carzano, Gavino Carzano, Primitiva D. Carzano, Irineo Villahermosa, Filomeno Quitara, and Roman Pia* for murder and frustrated murder.

The information alleged:

"That on or about the 31st day of March, 1967, in the Municipality of Dalaguete, province of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating with one another with Felix Tamayo who is at large and shall be prosecuted separately when arrested, with deliberate intent to kill, evident premeditation and treachery, in consideration of reward or prize, taking advantage of nighttime, superior strength and armed with bolos and canes did, then and there wilfully, unlawfully and feloniously attack and assault Juana Carzano Revalde and her son Sulpicio Revalde by hacking and hitting them with the aforementioned weapons, thereby inflicting upon the former (Juana) wounds in the different parts of the body which produced her death shortly thereafter; and upon Sulpicio Revalde several contusions in arms and forehead which required medical treatment for not more than 15 days and incapacitated him from his customary labor for the same period; the accused having performed all the acts of execution which could have produced another case of murder but nevertheless were unable to produce it for reason of a cause independent of their will, in that said Sulpicio Revalde was able to parry the attack of his assailants."

One of the accused, Roman Pia, was discharged so that he could be a state witness. The other accused, except the two appellants, were acquitted of both the charge of murder and frustrated murder. The two appellants were acquitted of frustrated murder but they were convicted of murder and sentenced to die. Hence, this appeal.

On March 31, 1967, Juana Carzano Revalde and her son Sulpicio Revalde, 29 years old, attended the interment of a neighbor at the local cemetery in Kawayan, Malones. From the cemetery, they stayed for about two hours in the house of a bereaved daughter, in order to condole with the family. At past 8:00 o'clock in the evening, they started their walk for home in Upper Malones, so-called because it was situated on high ground across a valley. To reach home they had to pass through the valley, on a trail lined with bushes and trees.

Since the night was dark and moonless, Sulpicio lighted a torch made out of dry coconut leaves, and held it aloft as he led the way for his mother. They managed to reach peacefully the ascent from the valley, some eighty meters away from their home.

Without any warning, three armed men sprang out of the thick and dark bushes lining one side of the trail and attacked mother and son.

Sulpicio testified that one of the men at once hacked and stabbed his mother with a bolo. He himself was attacked by an assailant with a long bolo but he parried the thrust with the burning torch. Its lighted end dropped to the ground and ignited clumps of dry grass. By the glow of the burning grasses, he was able to recognize three of the accused: Filomeno Quitara (one of the appellants), Roman Pia (the state witness) and Felix Tamayo (the one at large).

Sulpicio continued that during the attack, he was separated from his mother who shouted at him not to resist but to run and save his life. So he ran but his attacker pursued him, calling on the others to join the chase. Sulpicio recognized his assailant's voice as that of Felix Tamayo. Felix overtook Sulpicio three times and each time, Sulpicio grappled and wrestled with him. At the third time, Felix rode astride Sulpicio and tried to place a rope around his neck, apparently to strangle him. But Sulpicio in a desperate burst of energy succeeded in freeing himself and managed to lose his attacker in the woods.

Sulpicio reached home and called for his father, but there was no response. Sulpicio then ran to the nearby house of a neighbor, Maria Pialan, and sought refuge there.

Maria Pialan testified that Sulpicio arrived at her house panting, and with wounds and bruises on his brow, arms and left ankle. Since the walls were made of thin bamboo slats, Maria hid Sulpicio in a corner and covered him with a mosquito net. Soon thereafter, Maria and Sulpicio heard footsteps and voices outside, apparently belonging to the ambushers who were looking for Sulpicio. Maria peeped out of the bamboo slats and she saw three men with objects in their hands, walking back and forth, and training their flashlights on the surrounding bushes as though searching for something. They were Minoy (Filomeno Quitara), Feling (Felix Tamayo) and Oman (Roman Pia).

Dr. Salvador Floren, medical health officer of Moalboal, Cebu, who later exhumed and examined the body of Juana, declared that the multiple wounds could have been caused by a sharp-bladed instrument. He attributed death to severe hemorrhage due to lacerations in the heart and lungs.

The police authorities in Dalaguete, who went to the scene of the crime, found a piece of reddish cloth about 1/2 yard long; 2 cardboard masks; 2 short pieces of rope; 1 long piece of rope; a cardboard scabbard; and a wooden club. A long bolo was later found by the policemen under a pile of coconut husks in the yard of the house belonging to Filomeno Quitara's common-law wife, Jovita Encorporada, who reported that Filomeno had concealed the bolo under the coconut husks when he and Roman, slept in her house in the evening of March 31.

Sulpicio positively identified the three assailants as Filomeno Quitara, Roman Pia and Felix Tamayo. Filomeno and Roman were arrested on April 5, 1967, in Cebu City. They were located by the police authorities while staying together in the house belonging to Roman's uncle in Barrio Tisa. Felix Tamayo was at large during the trial and is still presumably so.

Upon arrest, Filomeno and Roman executed their respective sworn statements, wherein they admitted their presence at the time and place of the ambush. But they pointed to Felix as the hatchet man who hacked and stabbed the old woman to her death. They implicated the deceased's own relatives, namely: Agripino Carzano, Juana's brother (the other appellant), Gavino Carzano, another brother; Primitiva Carzano, wife of Agripino; and Irineo Villahermosa, Agripino's son-in-law, as the instigators of the slaying.

It appears that long before the incident, Juana had a dispute with her brothers, Agripino and Gavino, over some parcels of land left by their deceased father. One of the parcels was, by their agreement, given to her for having served their father during the latter's illness. The other parcel went as inheritance to another brother, Victoriano, who sold the same, first to their sister Juana for P500.00 and subsequently to Agripino for P1,500.00. Agripino

was in possession of this parcel when the sister was killed. However, Juana appeared to have demanded from Agripino, the P500.00 she had paid to Victoriano but Agripino refused to pay her and told her to claim the amount from Victoriano who at that time had left for Camarines Norte.

Thus, the prosecution sought to establish criminal conspiracy among the accused for the killing of Juana. On the theory that the alleged land dispute motivated the relatives of the deceased to desire her elimination, the prosecution tried to prove that Juana's relatives planned the assassination and induced Filomeno, Roman and Felix to execute the plan hatched in the house of Agripino.

Roman, who turned state witness, testified that he was fetched by Felix from Minong's store in the early afternoon of March 31, 1967, and they proceeded to the house of Agripino. Present thereat were Gavino, Primitiva and Irineo. Filomeno came later.

In the presence of all, Agripino told Felix, "You kill her, my sister is grabbing all my lands," to which, Felix replied: "I will kill her, Inco." At the same time, Agripino provided Felix with an 18-inch bolo and a flashlight. Gavino intervened, by saying, "Kill her, brod."

Agripino, then gave Gavino a sundang, a piece of rope, and a flashlight; and to Roman, a baje or palm cane, with these words: "You take this along with you in the event that Feling would forget." Filomeno had his own sundang in a cardboard scabbard.

Afterwards, Gavino led Felix, Roman, Filomeno and Irineo out of the house to the valley to wait for Juana. Agripino and his wife, Primitiva, were left behind in the house.

Felix Tamayo assaulted, hacked and stabbed the old woman, while Gavino attacked and chased Sulpicio. Roman merely watched the assault.

Afterwards they waited for Gavino and went back to Agripino's house. The report of the ambush was received by Agripino and his wife with jubilation. Primitiva then gave Felix P120.00, P40.00 of which Roman received with reluctance.

Thereafter, Roman continued, he and Filomeno went to the latter's common-law wife, Jovita Encorporada, and spent the night at her house. The next day, they went to Cebu City and stayed in the house of Roman's uncle where they were arrested by the police.

Filomeno, for his own defense testified to the alleged agreement between Agripino and Felix to liquidates the former's sister that the agreement was made in the house of Agripino in the afternoon of March 31, 1967, in the presence of all the accused; that it was Agripino who distributed the weapons to the other accused; that Gavino led them to the ambush site; that during the ambush, Felix hacked and stabbed the old woman while Gavino was the one who attacked and pursued Sulpicio; that Gavino attempted to grab his bolo to use it against Sulpicio, and, that Agripino and his wife Primitiva remained at the house to await the result of their mission.

But Filomeno attempted to exculpate himself. He declared that he was dragged by Felix and Roman to the house of Agripino at the latter's insistence, and that he was forced by Gavino to accompany the group from Agripino's house to the ambush site; that he did not know of the plan to kill the old woman until he heard the conversation of Felix and Agripino, and till after he himself was told by Gavino on the ambush site that they were about to waylay the latter's sister; that he learned of the reason behind the slaying only when Gavino told him after the slaying that his sister had to be killed because she grabbed all the lands of the Carzano brothers; that he did nothing during the assault except to watch since he was not given any assignment at all; that they reported back to Agripino at the latter's house, because he was after all in the company of the group. He admitted having gone with Roman to

Jovita's house after the incident and thereafter to Cebu at Barrio Tisa.

In order to fortify the theory of criminal conspiracy, the prosecution sought to establish that the land dispute between Juana and her brothers had degenerated into bitter hostilities that required the mediation not only of a family friend, former fiscal (then Judge) Celedonio Salvador, but also of the Chief of Police, Norberto Legaspi; but of no avail, for the dispute admitted no solution other than the elimination of the old woman.

The trial court gave credence to the testimonial evidence furnished by Roman and Filomeno and to the imputation of motive on Agripino. It found that a criminal conspiracy for the killing of Juana existed among Roman, Filomeno and Agripino. However, in view of Roman's having turned state witness, he was spared from criminal liability. Moreover, with respect to Agripino, the trial court considered his having gone on April 5, 1967, to Cebu, then to his farms in Laoang, Sadian, and Dumalan, as flight indicative of guilt. It likewise attached special significance to Agripino's admission that in the evening of April 2, Roman, Filomeno and Felix demanded from him (Agripino) at his house P1,000.00, later reduced to P600.00 to finance their escape, as corroborative of Roman and Filomeno's story that Agripino hired them to kill his sister.

Thus in the decision of April 16, 1968, Filomeno and Agripino were convicted of murder, as follows:

"IN VIEW OF THE FOREGOING, judgment is hereby rendered, finding the accused Filomeno Quitara and Agripino Carzano, guilty beyond reasonable doubt of the crime of murder, qualified by evident premeditation; and with the concurrence of the aggravating circumstances of treachery, abuse of superior strength and reward or price as the consideration for the commission of the crime insofar as the accused, Filomeno Quitara, is concerned, the Court hereby sentences both Filomeno Quitara and Agripino Carzano to suffer the extreme penalty of death, to indemnify the heirs of Juana or Angcay Carzano P6,000 and to pay one fifth each of the costs. They are hereby absolved from the charge of frustrated murder. The accused Primitiva Carzano, Gavino Carzano and Ireneo or Rene Villahermosa, are hereby acquitted with one fifth each of the costs de oficio. Their immediate release is hereby ordered."

This review, therefore, concerns the conviction of Agripino and Filomeno only.

Agripino takes issue with the trial court's finding of criminal conspiracy with respect to himself, contending, among other things, that the testimonies of Roman and Filomeno, implicating the Carzanos oughtnot to command credence emanating as they did, from corrupt sources, and adduced, precisely to shield themselves from punishment. He maintains that Roman and Filomeno, in order to finance their escape blackmailed the Carzanos into paying P1,000.00 later reduced to P600, under threats of implicating the Carzanos, as in fact they did. He vehemently denies that he instigated the killing of his sister; the existence of motive; and his alleged flight.

We have painstakingly reviewed the evidence on record and we are persuaded that Agripino had no involvement in the alleged conspiracy. We are not convinced that Agripino induced or hired Roman, Filomeno and Felix to kill his sister.

Our scrutiny of the testimony of Roman and Filomeno reveals that they failed to withstand the test of cross examination exhaustively propounded by Agripino's counsel de oficio. Their respective testimony are replete with inconsistencies, a predicament which seriously erodes their credibility.

Roman testified that he came to know that would kill Juana from the conversation of Felix and Agripino at the latter's house. But, he contradicted himself by declaring later that when he was fetched by Tamayo at Minong's store, Tamayo had told him low voice that "Pinong (Agripino) told him (Tamayo) to kill his sister." He declared that there were some twenty persons at Minong's store when he was fetched; and yet he could not even name anyone of them, this notwithstanding that according to him, he knew that these persons who were from Barrio Panias used to frequent Minong's store of which he was a habitue.

We find incredible his testimony that the alleged conspirators stayed at Agripino's house for more than an hour, discussing the killing of Juana, and yet neither he nor Filomeno nor anyone else for that matter uttered a word except Felix and Agripino who were allegedly conversing in whispers. His recollection of how each in the group handled the ropes, the bolos, the canes and flashlights while they waited for their victim, was too detailed to be true, considering that it was improbable for him to observe such matters in the pitch darkness where they positioned themselves. And, again, his testimony was that the agreement was to kill the old woman alone; only to be impeached by a statement in his sworn declaration that Gavino allegedly told them to kill Juana together with Sulpicio.

Of course, Roman was corroborated by appellant Filomeno. But Filomeno likewise involved himself in inconsistencies which were never ironed out by the prosecution. He testified as to when he came to know of the plan to kill Juana, and he stated that he learned of it during the conversation between Felix and Agripino. Yet, he said that the two were conversing in a low tone, that Agripino was stuttering and consequently he did not hear them well. Later, he stated that he learned of the said plan only on the ambush site when Gavino allegedly told him that they were going to kill Juana. But the veracity of these assertions crumbled even more when he was impeached by his own sworn declaration wherein he stated that eight months before the incident, Gavino had proposed to him at Malones market to kill his sister. He corroborated Roman's testimony that Agripino distributed arms to the conspirators, i.e., a bolo was given to Gavino. But he later revealed his own untruthfulness when he narrated how Gavino unsuccessfully attempted during the attack to grab his own bolo to use it against Sulpicio.

We are not inclined to believe the story of Roman and Filomeno implicating Agripino and the other Carzano, i.e., that Gavino and Irineo went with them to the ambush site, on the strength of the testimony of Sulpicio, himself an eyewitness to the attack, that three and only three men staged the attack; and of Maria Pialan, that only three men were searching for Sulpicio after the attack. Both Sulpicio and Maria had identified the three as Filomeno, Felix and Roman. Moreover, they failed to say what Irineo did despite the fact that he was supposed to be with the group.

On the whole their story was belied by Agripino's evidence that on the same evening, he and his wife entertained two guests for supper, namely: Concordio Binaviente and Panyong Ybañez with whom Agripino previously contracted to haul rice from his farm in Dumalan. The two were at Agripino's house at six o'clock in that early evening of March 31, 1967. Binaviente stayed until ten o'clock and then left for his home, while Panyong slept at Agripino's house. The three discussed matters relating to Agripino's farms. Binaviente testified that he did not see any criminal gathering at Agripino's house, nor the persons alleged by Roman and Filomeno to have gathered thereat. Binaviente's testimony was tested on the stand and his testimony withstood the test of rigorous cross-examination.

Neither the imputation of motive upon Agripino lends credence to Roman and Filomeno's story. If Agripino was the principal who instigated the conspiracy for the murder of his sister, he must have possessed a motive so overwhelming as to break the natural bonds between brother and sister. But this is not the case of Agripino. It appears that the prosecution had magnified the alleged land dispute well beyond its actual proportion. For apparently, the disagreement was nothing more than the sister's unheeded demand for P500.00 from Agripino on account of what she had paid to Victoriano. Agripino was in possession of the parcel of land, and in fact he harvested three or four crops before the victim's death. It does not appear that the old and sickly woman had caused any serious disturbance in her brother's possession. Her claim for P500.00 could hardly be termed land grabbing, as otherwise described by the prosecution witnesses, which could provoke Agripino to instigate her execution.

That there could not have been bitter ill feelings between them is borne out by the uncontradicted testimony of

Judge Celedonio Salvador. He stated that he was able to effect settlement of the family dispute over some inherited parcels of land, long before this incident. And, police chief Legaspi could not bear witness to any hostility thenceforth, between brother and sister. In fact, a few months before her death, Juana and one of her sons visited Agripino on the occasion of the death of one of the latter's children, to give alms and condole with the bereaved. Such an action, in the context of the closely knit-ties of the Filipino family, belies the claim of rancor and animosity between brother and sister.

Agripino's itinerary after the interment of his sister could not be deemed flight indicative of guilt as otherwise viewed by the court a quo. It appears that he even attended the interment on April 2, and remained at his house until April 5. He went to Cebu City and then to his farms in Laoang, Badian, where he attended to his vegetable crops, gathered some pechay and other vegetables and sold them at Matalonga, Dalaguete. Thereafter, he attended to his dikes and rice paddies in Dumalan. He returned to Malones after having worked for nine days. These movements cannot be equated with flight of a person fearful of an evil deed. They are nothing more than routinary activities of a farmer ordinarily diligent in his vocation. Noteworthy is the fact that trial court acquitted Gavino, Primitiva and Irineo on the basis of substantially the same evidence it used in convicting Agripino.

We are left to contend with the motive of Roman and Filomeno in implicating Agripino (and the others too) in the evil deed. The answer is supplied by the showing that these two had asked Agripino to give or lend them the sum of P1,000, later reduced to P600, to finance the escape they meant to accomplish after the crime. Since, Agripino refused to comply, he became subject to imputation on the part of those whom he spurned. As to Gavino, it appears that during the fiesta of Malones, he prohibited the playing of a game called "hantac" which prohibition affected Roman and Filomeno because it was their only means of livelihood as they were vagrants. Hence, they implicated Gavino to even the score.

Upon the other hand, Filomeno though admitting his presence at the time and scene of the crime, pointed an accusing finger at Felix (who however was not on trial) as the one who killed Juana; and, at Gavino as the one who attacked Sulpicio. His defense was that, he was merely present at the time the conspiracy was planned by Agripino at the latter's house and that he was forced by Gavino to accompany the others to the ambush site. On the principle of mere knowledge of a criminal conspiracy without guilty participation, Filomeno argues for his acquittal.

It will be noted that Filomeno's conviction was premised upon the existence of a conspiracy instigated by Agripino. Hence, Filomeno's posture in his defense revolves within the context of such conspiracy.

Considering however, that we have altogether rejected the prosecution's theory of conspiracy instigated by Agripino, or that the crime was committed in consideration of a reward promised by Agripino, the position of appellant Quitara has thereby become academic. Nevertheless, our rejection of the Agripino-instigated conspiracy does not militate against the existence of a criminal conspiracy among those evidently present, at the time and place of the killing of Juana, namely: Felix, Filomeno and Roman for in this case we are confronted with a concerted attack which itself indicates conspiracy for the killing of the victim.

A settled rule is that conspiracy may be inferred from the acts and circumstances of the accused themselves when such acts and circumstances point to a common purpose and design. From the legal viewpoint, conspiracy exists if, at the time of the commission of the offense, the accused had the same purpose and were united in its execution. (*People vs. Binasing, et al.*, 98 Phil. 902 [1956].)

The facts remain clear on record, and by their own admission, Roman and Filomeno, together with Felix conveniently situated themselves along the dark trail and waited for Juana and Sulpicio. They were all armed, Roman with a club or cane, and Filomeno and Felix with bolos. When the awaited moment came, they launched a

sudden attack on the two, in the course of which Juana was killed, though Sulpicio successfully escaped similar fate. The three thereafter searched for Sulpicio from the ambush site to the vicinity of Maria Pialan's house. Parenthetically, Roman and Filomeno were absolved of the frustrated murder charge with respect to the assault on Sulpicio.

Of course, Filomeno pointed to Felix as the assailant of the old woman such that the manner of his participation in the assault is not at all clear. Assuming that this were true, the fact remains that Filomeno had not satisfactorily explained his presence at the point when the three of them all armed, were waiting, and at the time when the attack was made, except for his story which is however of very doubtful truthfulness. Neither did he show that he attempted to prevent the attack, or that he ran away during the assault. The fact of his presence at the very inception of the attack to its end indicated not only knowledge but also participation in the criminal design.

There being no question about the death of Juana as a result of the concerted attack, Filomeno cannot escape the penal consequences, by law, visited upon a conspirator. On the principle of collective criminal responsibility, each conspiratory will be held equally guilty as principal, irrespective of individual participation in the material execution of the crime.

The only question that remains is the motive which could have impelled Filomeno, Roman and Felix to the evil deed. It becomes important because it will show why Filomeno joined Roman and Felix in the criminal assault. It is recalled that in behalf of Agripino, the defense tried to show robbery as possible motive. However, the trial court rejected the same, precisely because it believed that the killing was for a consideration, or a reward from Agripino.

There is no evidence that Juana carried money in her person at that time. Not even her son, Sulpicio could tell. But there is evidence that a few days before, Juana had been walking around with some money in her purse, intending to buy a piece of land or some merchandise. In a small community like Upper Malones, it is not unusual that this matter would invite notice, specially on the part of those inclined to some evil schemes. It is not altogether improbable that the culprits thought or believed that the old woman had money in her person on that fateful evening. In fact, Sulpicio recovered and turned over to the chief of police a puntal or purse made of cloth which used to be tucked in his mother's waist. Sulpicio found it a few meters away from his mother's body. This prompted the police chief to suggest robbery as motive for the slaying. This is not to say that robbery was in fact committed. But that the culprits might have intended to rob the old woman of the money, they thought she was carrying, is not farfetched, considering, moreover, that the culprits were persons notorious in the community. In fact, the trial court describe Roman and Filomeno as vagrants.

The trial court found the killing of Juana qualified by evident premeditation. We do not agree: First, because we have rejected its finding of prize or reward and second, because where, as in this case, conspiracy was inferred from the circumstances of the accused, there was therefore no direct and positive evidence of the time when the agreement was actually reached, and of the time that had elapsed from the inception to the execution of the crime. It cannot therefore, be determined whether the accused had sufficient opportunity to meditate and reflect dispassionately as to the consequences of their act. (People vs. Custodio, 97 Phil. 698 [1955].)

However, the evidence is convincing that treachery as alleged in the information, attended the killing of Juana Carzano. The fact that the assailants had previously lain in wait under the cover of darkness indicates that they had consciously adopted the means or method whereby they could ensure the execution of the crime without risk to themselves. Moreover, the instant case is covered by the rule that there is treachery in a sudden and unexpected attack which renders the victim unable to defend himself by reason of the suddenness and severity of the attack. (U.S. vs. de Silva, 14 Phil. 413 [1909].)

It is not proper to consider nocturnity and abuse of superior strength as separate generic aggravating circumstances because, on the facts, they form part of the treacherous mode of attack and, hence, are absorbed by treachery. (People vs. Sudoy, G. R. No. L-33572, Oct. 10, 1974, 60 SCRA 174.)

However, the accused Filomeno is a recidivist. He proved it himself:

"FISCAL CONDE:

Q: Were you not sentenced by the Municipal Court of Dalaguete, Cebu on June 1, 1961, to serve a penalty of one month and one day in R-894 entitled 'People of the Philippines vs. Filomeno Quitara?'

A: I was.

Q: Were you not also sentenced by the Municipal Court in Criminal Case No. R-2001 for malicious mischief in the case entitled 'People vs. Filomeno Quitara alias Minoy on June 14, 1965?'

WITNESS

A: No.

FISCAL CONDE:

Before I proceed further, Your Honor, I request that this certification from the Municipal Judge of Dalaguete, Cebu, dated 22 May 1967 be marked as Exhibit "N".

COURT:

Mark it."

(TSN, pp. 180-181, Sept. 15, 1967.)

Exhibit "N" certifies among other things, that according to the records of the Municipal Court of Dalaguete, Cebu, Filomeno Quitara had been convicted in Criminal Case No. R-894, for Less Serious Physical Injuries, on June 10, 1961, and sentenced to suffer one month imprisonment. Thereafter, the proceedings continued, thus:

"FISCAL CONDE:

Q: Aside from the conviction you have suffered in the Municipal Court of Dalaguete, Cebu, you were also confined in Muntinlupa, were you?

WITNESS:

A: Yes.

Q: For homicide?

A: Yes.

Q: How many years?

A: Four to six years.

Q: When were you released from Muntinlupa, do you remember?

A: In 1959.

Q: Released or parole?

A: Released."

(TSN, pp. 181-182, Sept. 15, 1967.)

It appears therefore, by his own admission, that: firstly, he was previously convicted for less serious physical injuries; and, secondly, he had served imprisonment in Muntinlupa National Penitentiary for homicide and was released on parole in 1959.

Generally, recidivism should be alleged in the information, otherwise, it cannot be proven over the objection of the accused. However, if by his own admission in open court, it is proved that at the time of his trial for one crime he had been previously convicted by final judgment of another crime or crimes embraced in the same title of the Revised Penal Code (as in this case), he cannot be allowed to escape the consequence of recidivism as an aggravating circumstance. (People vs. Luna, L-28812, July 31, 1974, 58 SCRA 198.)

WHEREFORE, the judgment of the lower court is modified by acquitting Agripino Carzano; affirming the conviction of Filomeno Quitara, but for lack of the required number of votes, his sentence is reduced to reclusion perpetua instead of the death penalty; and ordering him to indemnify the heirs of Juana Carzano Revalde in the amount of P12,000.00. Costs de oficio.

SO ORDERED.

Fernando, C.J., Teehankee, Barredo, Makasiar, Concepcion, Jr., Santos, Fernandez, Guerrero, and De Castro, JJ., concur.

Antonio, Aquino, and Melencio-Herrera, JJ., no part.

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