

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
EMANNUEL FELIPE, VELASCO, ET AL., ACCUSED, EMMANUEL
FELIPE VELASCO Y SARNO, DEFENDANT-APPELLANT.**

G.R. No. L-54335. December 14, 1981

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

This is an appeal from the decision of the Circuit Criminal Court of Cebu convicting the appellant, Emmanuel F. Velasco of the crime of murder and sentencing him as follows:

"WHEREFORE, the Court finds the accused Emmanuel Felipe Velasco y Sarno guilty beyond reasonable doubt of the crime of Murder described in the aforequoted information. Appreciating in favor of the accused the mitigating circumstance of voluntary surrender, which circumstance is offset by the aggravating circumstance of nighttime, the accused should be, as he is, hereby sentenced to the penalty of reclusion perpetua, with the accessory penalties of the law; to indemnify the heirs of the deceased Ricardo Barbado in the sum of P15,000.00 by way of actual and compensatory damages and the sum of P50, 000.00 by way of moral and exemplary damages; and to pay the costs." [1]

The appealed judgment is mainly based on appellant's sworn statement which the trial court considered as an extra-judicial confession perfectly admissible under the Constitution with its strict requirement on the admissibility of extra-judicial confessions given during custodial investigation. [2]

The thrust of the appeal is that the supposed extra-judicial statement was improperly admitted, and that assuming it to be admissible, it is insufficient to support conviction. For its decisive importance in the resolution of the issues as above intimated the statement of appellant must be, as it is hereunder reproduced in full:

"PRELIMINARY STATEMENT:

"You are hereby informed that you are here investigated in connection with a certain case wherein you were involved. According to Our Constitution, you have the right to remain silent and to answer or not to answer the questions propounded to you in this investigation because all what you will state here will be used as an evidence in your favor or against you in any court of justice here in the Philippines. You have also the right to avail the services of counsel of your own choice to assist you. Do you clearly understand all these?

"ANSWER:

"Yes, sir.

"1. Q. - After you were informed of your constitutional rights, are you willing to give your statement and to answer the questions in this investigation?

A. - Yes, sir.

"2. Q. - Will you swear to tell the truth and nothing but the truth in this investigation?

A. - Yes, sir.

"3. Q. - Please state your name and other personal circumstances?

A. - EMMANUEL FELIPE VELASCO, ye SARNO, 27 years old, married and a resident of 1460-A M.J. Ave., Mabolo, Cebu City.

"4. Q. - Do you know why are you here in the Police Station?

A - I'm here because I surrendered after knowing that I was hunted.

"5. Q. - After you surrendered, were you told by the police why you were hunted?

A. - Yes, I know. It is about the driver of an Elite taxi who was killed on March 21, 1978.

"6. Q. - Do you have some knowledge about that incident wherein the driver of an Elite taxi was killed on March 21, 1978?

A - Yes.

"7. Q. - Will you please narrate to us all what you know about that incident?

A - Last March 21, 1978, at about 9:00 o'clock in the evening, I, together with Ben Verano, Boy Kho (Agustin Kho) and Ben del Rosario were strolling at Barracks, Mabolo, Cebu City and not long after, we agreed that I and Boy Kho will go ahead and the two Ben will be left behind because they have to go to the house of Cesar Pelonio at Cabantan St., Boy Kho then hailed a taxi, an Elite taxi, and then we boarded. I was sitted at the back while Boy Kho was sitted at the front seat besides the driver and Boy Kho ordered the driver to deliver us to M.J. Cuenco Ave. When we arrived at San Jose dela Montaña, at the corner of the street leading to Casal's Village, Boy Kho ordered the driver to stop the vehicle and pointed a revolver at the driver and said, "DON'T MOVE'BAY, WE NEED YOUR VEHICLE" and at this moment, the driver attempted to fight back but was prevented to by Boy Kho who was a little bigger than the driver and I was ordered by Boy Kho to be the one to drive the vehicle and the driver transferred at the back seat and who was at all times being pointed to by Boy Kho of his revolver. I was the one who drove the taxi and from there we went back to Barracks and then we picked-up Ben Verano and Ben del Rosario and the two Ben were sitted at the back. Ben Verano was sitted at the right side of the driver and Ben del Rosario was at the left side. Ben Verano and Boy Kho agreed to proceed to Opra Village passing thru Capitol Site. While on our way to Opra I saw that Ben Verano also got his revolver and pointed it to the driver and when we arrived at the Caltex Station at Escario St., the driver attempted to jump (this is the place where the Office of the Elite taxi is located), and so there-was a commotion at the back and all of a sudden I heard two shots coming from the revolver of Boy Kho and at this moment we were already ascending to Opra and I saw the driver leaning at the back seat and was no longer moving and Ben Verano said: "I was hit". When we arrived at Camp Marina, I stopped the vehicle and Ben Verano, Ben del Rosario and Boy Kho immediately alighted and not long after Boy Kho returned and we ran but we parted our ways and I went home together with Ben del Rosario at Gil Tudtud, Mabolo. I left Ben del Rosario at home and I looked for Ben Verano and I found him in the house of Cesar Pelonio at Cabantan St. and Ben Verano had a gunshot wound and was treated by Cesar Pelonio and the ammuni-tion was already removed from his wrist and Ben Verano accompanied me to my house and there I treated his wound again.

"8.Q. - Do you know what happened to the driver which you left behind inside the taxi at Camp Marina?

A - I know that he is already dead.

"9. Q. Do you know the name of that driver who is already dead?

A - I was told that the name of that driver is Ricardo Barbado.

"10. Q. - What was your purpose why you brought the driver and his vehicle to Opra Village?

A. - We intend to get his money.

"11. Q. - Were you already aware of that intention at that time when Boy Kho pointed his revolver at the driver when you were still at San Jose dela Montaña?

A. - I do not know about it but I came to know about that when Ben Verano searched the driver about his money.

"12. Q. - Do you know already your companions before that incident on March 21, 1978?

A - I know this Ben Verano for about two weeks and also Boy Kho. This Ben del Rosario, I know him for quite a long time already because he is a security guard of my father.

"13. Q. - You said that Boy Kho and Ben Verano were armed with a revolver during that incident. How about you and Ben del Rosario, do you have also a revolver at that time?

A. - No, sir.

"14. Q. - Who is the owner of that revolver used by Ben Verano and Boy Kho?

A - The one brought by Boy Kho belonged to Rudy Inot and Ben Verano brought his own.

"15. Q. - Why did you say that the revolver brought by Boy Kho belonged to Rudy Inot?

A - Because a week before that incident of March 21, 1978, Boy Kho, Ben Verano and I were in the house of Rudy Inot at Mandaue City and while we were in the office of Rudy Inot, I saw Rudy handed the .30 cal. revolver to Boy Kho.

"16. Q. - That weapon used by Boy Kho in killing the driver was the same weapon given by Rudy Inot?

A. - Yes, sir.

"17. Q. - How do you know that the weapon used by Boy Kho belonged to Rudy Inot?

A - Because from the time Rudy Inot gave that weapon to Boy Kho, I had borrowed many times when we were in the house and I did not see any weapon of Boy Kho except that one given by Rudy Inot.

"18. Q. - Do you know the caliber of that weapon used by Boy Kho and Ben Verano?

A - Both cal. .38.

"19. Q. - I have nothing to ask you about that killing of the driver, Ricardo Barbado. Do you have something to say?

A - No more sir.

"20. Q. - Do you confirm to the truth of the statement you made before this investigation?

A - Yes, sir.

"21. Q. - Was there somebody who coerced, intimidated you or were you promised by a prize in order to say what you have stated in this investigation?

A. - No, sir.

"22. Q. - Do you have some complaint about this investi-gation?

A. - No, sir."[3]

The People's brief also reproduced the entire statement prefacing it, however, with a narration of facts relevant to

the determination of the question of its admissibility as an extra-judicial confession, which We quote from said brief as follows:

"Ricardo Barbado was one of the drivers of Manuel Concepcion, operator of "Allied Taxi" at Cebu City. On March 21, 1978, at or about 7:00 a.m., Barbado submitted his earning of P90.00 to his employer at the latter's house at 100 Escario St., Cebu City. Later in the day or about 8:30 p.m., the taxicab driven by Barbado passed by the house of Concepcion and immediately thereafter Concepcion, who was then outside his house waiting for a ride, heard two shots. Before he heard the shots, Concepcion noticed that the taxicab was being driven recklessly as though the driver was drunk and the rear left door was open. Not long thereafter or at about 9:00 p.m., Concepcion received a call informing him that Barbado was killed at Marina Camp. He went to the place and saw Barbado's body lying on the back seat of the taxi. There was blood inside the car and a bullet hole in the driver's seat. (pp. 3-7, 9, 12-17, 19-20, Hearing of October 26, 1978).

"The case was investigated by Lt. Domiciano Angel of the Police Force of Cebu City after he re-ceived a dead person alarm at Marina Hill at about 8:00 o'clock in the evening of March 21, 1978 through a member of the barangay police. He proceeded to the place and found the body of Ricardo Barbado inside the taxi in the front seat. Lt. Angel contacted police in-formers and sometime on March 23, 1978, he received information that one Cesar Pelonio extracted a bullet from the hand of a certain Ben Verano. The house of Pelonio at Cabantan, Mabolo and the Peter Line Ga-rage where Pelonio was employed as driver were placed under surveillance. In the evening of the same day, Pelonio was arrested at the garage. Verano who was at the wheel escaped arrest. Pelonio admitted having extracted a bullet from the hand of Verano and he men-tioned the names of Boy Kho @ Agustin Kho, Ben Verano, Ben del Rosario and Emmanuel Velasco as the persons responsible for the killing of Ricardo Barbado. Lt. Angel did not know the persons named by Pelonio except Velasco who resided at Mabolo and whose father was a compadre of his superior officer Captain Ruiz. He contacted the father of Emmanuel Velasco and advised him to surrender his son. Following this advice of Lt. Angel, Velasco's father surrendered his son at the house of Lt. Angel who then brought Emmanuel to headquarters so that his statement may be taken. Atty. Maximino Ylaya rep-resented Velasco even before the latter gave his statement to the police and was present at the office of Lt. Angel and at the house of Velasco (pp. 2-12, 21, tsu, Hearing of May 11, 1979).

"The affidavit or statement of Emmanuel Velasco was taken down by police corporal Romeo Cordova after Velasco was turned over to him by Lt. Angel. Before the investigation was conducted, Cordova informed Velasco of his constitutional rights among others, to remain silent and to secure a lawyer. He was also told that anything he said might be used against him and Velasco offered no ob-jection saying only that he was willing to tell the truth (pp. 4-7, tsu, Hearing of April 30, 1979)."[4]

Hinting that there was some degree of threats and intimidation in the giving of his statement and signing it before the swearing officer, appellant would, however, more strongly rely for the inadmissibility of his extra-judicial confession, as he contends, an alleged promise of immunity by making him a state witness and thus impugn the volun-tariness of the confession. The non-attendance of counsel during its execution is also averred as further ground for its inadmissibility.

Appellant listed a number of circumstances which to him would show lack of free will or spontaneity on his part in giving his statement. Thus -

"First: appellant surrendered on April 1, 1978, yet he was investigated on April 4, 1978. He was not charged with a crime in court yet he had to stay under custody for three (3) days before investigation.

"Second: while the investigator admits the investigation to have been on April 4, 1978, the statements were sworn 22 days later on April 26, 1978 and all the time the appellant continued to be detained.

"Third: after the statements were sworn on April 26, 1978, the information was filed more than a month later

on May 29, 1978, with appellant continuously deprived of his liberty.

"Fourth: while the actual surrender of appellant was on April 1, 1978, the prosecution has not denied the testimony of the appellant that in the police blotter he was officially entered as having surrendered only on May 26, 1978 (Cf. Tsn-Sept. 18, 1979-p. 100).

"Fifth: knowing that the appellant was represented by a lawyer as early as the former's surrender, it sounds unnatural that such a lawyer would not be called upon to attend the investigation of the appellant by the police. (Cf. Tsn-May 11, 1979-p.20).

"Sixth: that the statements in Exhibit "C" were made "in consideration" of affiant's becoming a state witness. (Tsn-May 11, 1979 of Lt. Angel-pp. 21;16-17).

"Seventh: while appellant was not mauled before the taking of the affidavit, there is the uncontradicted statement of the appellant (Tsn-Sept. 18, 1979-p.99) that after his surrender, nightly he would be threatened with bodily harm and before he was to have signed the statements before State Prosecutor Arzadon, Pat. Romeo Cordova reminded him of the mauling of Mauricio Petalcorin to near death, the lot which would befall appellant should he back out from signing the affidavit before the State Prosecutor (Tsn-Sept. 18, 1979-p.96).

"Eighth: there is no statement whatsoever from Lt. Angel or Romeo Cordova that appellant was made to read the finished typewritten statements of the latter; on the other hand, the positive declarations of the appellant that he was in front of the typewriter during the typing of the affidavit in question-and-answer form and therefore could not read what was typed has never been contradicted (Tsn-Sept. 18, 1979-pp. 89-91), nor is there a denial of the testimony of the appellant that he has not read the typed affidavit from the time it was taken until 22 days later when sworn before the State Prosecutor (Tsn-Sept. 18, 1979-pp. 92-93).

"Ninth: before the swearing appellant invited the attention of the Secretary of the State Prosecutor and Pat. Romeo Cordova that "some" portions of the affidavit were not appellant's. There is no rebuttal or contradiction to this piece of evidence purporting to show that what appellant declared was not faithfully recorded or typed by the Investigator (Tsn-Sept. 18, 1979-p. 93).

"Tenth: Atty. Ylaya for the appellant was promised by Lt. Angel that the former would be notified of the taking of the statements of the appellant (Tsn-Oct. 26, 1979-p. 18). This has not been denied or rebutted, thus it is odd that when the taking of appellant's statements was held on April 4, 1978, the same was done without the benefit of counsel's presence."[5]

What is immediately striking from the foregoing circumstances as set forth in appellant's brief is that there was a mixture of threat and cajolery employed in the execution of the extra-judicial confession. Either or both would vitiate the confession for lack of voluntariness, the one essential element for the admissibility of an extra-judicial confession, aside, of course, from the need of attendance of counsel in the execution thereof.

How does the prosecution try to show that the execution of the extra-judicial confession was attended with voluntariness? We quote from the appellee's brief:

"The alleged extra-judicial confession' referred to by appellant's counsel is Exhibit C (p. 6, folder of Exhibits) which is the statement given by the accused-appellant to Corporal Romeo Cordova of the Cebu City Police Department regarding the incidents that led to the death of Ricardo Barbado. According to appellant it was error for the lower court to admit Exhibit C because it "has been vitiated with involuntariness and executed without the attendance of counsel.' In the first place, appellant admitted in court his desire to surrender to the authorities and 'to give (his) side to the police so that the police will be enlightened about the incident' (p. 121, tsn. September 19, 1979; pp. 8, 10-11, 13, tsn, Hearing of September 20, 1979). He also identified Exh. C as the affidavit he gave on April 4 and sworn to on April 26, 1978 before State Prosecutor Benicio Arzadon (pp. 78-79, tsn, Hearing of September 18, 1979; p. 41, tsn, Hearing of September 20, 1979). It is also a fact

admitted by appellant that while he was at the Mabolo Police Station for safekeeping following his surrender, he was not mauled or harmed (p. 99, tsn, September 18, 1979; pp. 27-28, tsn, September 20, 1979)."[6]

The Government counsels, after reproducing in full, appellant's sworn statement[7] concluded without any explanation that appellant's, claim of involuntariness in the execution of his sworn statement is with-out merit. If the conclusion is based on the abundance of details as set forth in the statement which appellant alone could have supplied, as the lower court expressly so stated, and the fact that it tends to be ex-culpatory in the portions appellant gave as his answers (he denied certain portions as not given by him), We find the conclusions not well-founded.

What was stated in the statement to be the purpose of the hold-up was to get the money of the driver. But appellant, clarifying this matter, stated that he did not know of such an intention, even when Boy Kho pointed his gun at the driver. He came to know of it only when Ben Verano searched the driver about his money. This circumstance tends to exclude appellant from a previous understanding, if any, to rob the driver as to make him a co-conspirator in the commission of that crime. What is more, no robbery was actually committed, and so the charge is only for murder.

In the case of *People vs. Ibañez*,[8] quite correctly cited by appellant, this Court had occasion to state:

"x x x In other words, the accused must be shown to have had guilty participation in the criminal design entertained by the slayer, and this presupposes knowledge on his part of such criminal design. It is not enough that there be a relation between the acts done by the principal and those attributed to the person charged as co-principal or accomplice; it is, further-more, necessary that the latter, with knowledge of the former's criminal intent, should cooperate with moral or material aid in the consummation of the crime."

With respect to the killing, it appears abundantly clear that same was a sudden and unexpected act of Boy Kho and merely on a likewise sudden, unreflected impulse, when the driver made a sudden attempt to jump out of the taxi. So much so that when Boy Kho suddenly shot at the driver, Ben Verano was also hit. The manner the killing happened would thus seem also to exclude appellant from a previous conspiracy or under-standing to make him equally liable for the act of Boy Kho who took it upon himself to shoot at the driver prompted by the unexpected move of the driver of attempting to jump out of the taxi. There is, therefore, no circumstance upon which to base a finding of appellant participating in the criminal design of killing the driver, an element considered essential to make one a principal, or even as a mere accomplice, in the commission of a particular crime.[9]

In his uncontradicted testimony, appellant also brought out some significant facts that tend to firm up the conclusion already in-timated earlier that he could not be tagged as a co-conspirator in the crime charged.

Thus, appellant, feeling tired begged leave to go ahead from the party which they attended at Cesar Pelonio's residence, but Boy Kho, Ben Verano and Ben del Rosario accompanied him to the corner for a taxi. Once a taxi was hailed, Boy Kho decided to leave with appellant, while Ben Verano and Ben del Rosario went back to the party. In the taxi at the back seat, appellant felt very sleepy with heavy eyes, but opened them when the taxi stopped, surprised to see Boy Kho pointing his gun at the driver and commanding the latter to transfer to the back seat, appellant to take the driver's seat and drive the car. Appellant's protest against Boy Kho's order met with Kho's gun pointed at him.

After the killing, appellant stopped the car as if it had run out of gas, prompting his companions to rush into the darkness, hut appel-lant stayed behind to wait for the police or someone to come at the scene. But Boy Kho returned to urge appellant to leave the place for he may only be "salvaged" by the police. Appellant also left, afraid that Boy Kho might shoot him if he insisted on waiting for the police, but in the dark, he lost contact with Boy Kho. He and Ben del Rosario took a PU car from some distance and headed for the Velasco residence.

The foregoing acts, as testified to by appellant without rebuttal or contradiction, would establish the validity of appellant's claim of not being a conspirator in the commission of the crime. Conspiracy, like the guilt itself for the crime charged, must be proved beyond reasonable doubt.[10]

The Government of course tries to show that appellant's testimony is not quite believable. Thus, the fact that after the shooting, appellant and Boy Kho were together in an island of Bohol is pointed to as showing appellant's sharing in the criminal design. But Boy Kho went to appellant's house to fetch him. Appellant had to go with Boy Kho, obviously under threat, for at the earliest opportunity, he managed by some pretense or another, to break away from Kho's company.

The apparent contradiction in his testimony that he does not drink because of heart ailment, and that he was driving slowly because he was under the influence of beer, can be easily explained that he is supposed not to drink because of his heart ailment, but that on isolated occasion he may take to beer, which, however, would easily affect him because he is not a drinker.

As to why appellant acted too submissively to the orders of Boy Kho, which the Government also points to as rendering appellant's version unbelievable, considering that appellant had one of his father's security guard with him, Boy Kho must have drunk unrestrainedly that he was acting with unreasoning boldness over appellant, himself rendered more easily cowed by a mild drink of beer.

Appellant's testimony that although his companions left to escape when the taxi stopped for lack of fuel, he stayed behind intending to wait for the police, is, likewise, branded as a mere afterthought, for he had many opportunities to give himself up. The state counsels forgot that Boy Kho returned to urge appellant to leave the taxi, and the following morning, he fetched again appellant from the latter's home from which time Boy Kho kept appellant always with him until appellant succeeded, by some trick, in breaking away from Kho's company.

We, therefore, find, notwithstanding the attempt of the prosecution to discredit appellant's testimony, which as just demonstrated, is not quite convincing, that appellant's testimony is worthy of belief. The absence of contradictory testimony by a state witness makes the evidence of the prosecution insufficient to establish guilt beyond reasonable doubt, which thus consists of appellant's supposed extra-judicial confession which, as presently to be shown, is also inadmissible under the strict standard established by our New Constitution.

From the evidence, We are constrained to hold that the requirement of counsel being present during the taking of statement of a suspect in a custodial investigation, was not fulfilled. This is evident from the trial court's own statement relevant to this matter, which the People merely quoted in reliance thereof in meeting appellant's contention that the requirement of attendance of counsel during the taking of the statement has not been satisfied. Thus, the trial court said:

"x x x. Defendant's father and Atty. Ylaya accompanied the accused when the accused surrendered to the police authorities. Upon such a surrender, the police authorities could rightfully be assumed to immediately question and interrogate the accused in respect to the murder of Ricardo Barbado. That the accused's father and Atty. Ylaya would leave the accused to his own devices when questioned by the police is acquiescent of defendant's giving out a statement respecting the charge or charges against him. We are of the belief that the accused was indeed apprised of his constitutional rights under custodial interrogation but that he averred that he did not wish to avail himself of the services of a lawyer, to advice or guide him in the making of his statement. His lawyer, Atty. Maximino Ylaya, his father and five of his father's retained counsel was at defendant's back and call. What could have been easier for the accused to do than to give a ring by telephone to these lawyers or send a messenger to secure their appearance, had he felt that he needed one. It will be remembered that it was at the initiative of Atty. Maximino Ylaya that Lt. Domiciano Angel arranged with defendant's father for the surrender of the accused." [11]

It is clear from the trial court's own observation that there was no counsel in actual attendance during the taking down of the statement. The lower court actually found that there was a waiver on the part of appellant of his right to the assistance of counsel as required for the admissibility of the statement as an extra-judicial confession. We see no such waiver from the mere fact that the appellant had lawyers at his beck and call. What is more reasonable to infer from the non-attendance of counsel is that appellant was not informed of said specific right, as he ought to have been. As the statement itself shows unequivocally, appellant was allegedly informed of his constitutional rights, but was not even asked whether he wanted to exercise or avail himself of such rights. There is a manifest failure to comply with the constitutional requirement for the admissibility of extra-judicial confession. Consequently, the alleged extra-judicial confession of appellant was improperly admitted in evidence, resulting in utter lack of support of the lower court's judgment of conviction.

WHEREFORE, the guilt of appellant not having been established beyond reasonable doubt, appellant is entitled to an acquittal. Accordingly, the judgment appealed from is hereby reversed and appellant, acquitted, with cost de oficio.

SO ORDERED

Concepcion, Jr., Ericta, and Escolin, JJ., concur.
Barredo, (Chairman), J., concurs in a separate opinion.
Abad Santos, joins J. Aquino in his dissenting opinion.

[1] p. 2, Appellant's brief, p. 53, Rollo.

[2] Sec. 20, Art. IV, 1973 Constitution. "No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be admissible in evidence."

[3] pp. 5-8, Appellant's brief, p. 53, Rollo.

[4] pp. 3-5, Appellee's brief, p. 64, Rollo.

[5] pp. 16-18, Appellant's brief, p. 53, Rollo.

[6] page 14, Appellee's brief, p. 64, Rollo.

[7] pp. 15-19, Appellee's brief, p. 64, Rollo.

[8] 77 Phil. 664.

[9] *People vs. Portuguez*, 20 SCRA 901, 906.

[10] *People vs. Geronimo*, 53 SCRA 246; *People vs. Llamera*, 51 SCRA 48; *People vs. Custodio* 47 SCRA 289; *People vs. Bortolay, et al.* 42 SCRA 1; *People vs. Clemente*, 21 SCRA 261; *People vs. Portuguez*, supra.

[11] p. 21, Appellee's brief, p. 64, Rollo.

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DISSENTING OPINION

AQUINO, J.:

I dissent. At about nine o'clock in the evening of March 21, 1978, the lifeless body of driver Ricardo Barbado was found in-side his taxicab at Camp Marina, Cebu City. He sustained two fatal entrance gunshot wounds in the chest and abdomen and two exit wounds. Bullet holes were found in the upholstery of the cab, an indication that he was shot therein. His wallet contained thirty pesos but there was no money inside the driver's till.

A police investigator was apprised by informers that Agustin Kho, Ben Verano, Ben del Rosario and Emmanuel F. Velasco were responsible for the killing of Barbado. Velasco was surrendered by his father and his lawyer, Maximino S. Ylaya, to the police. Velasco gave a written statement to Corporal Romeo Cordova after he was informed that he had the right to remain silent and to secure the services of a lawyer.

Velasco in his confession revealed how the killing was perpetrated. He said that in the evening of March 21, 1978, while he and Kho were strolling at Barracks, Mabolo, Cebu City, Kho hailed a taxi and they boarded it. Velasco sat beside the driver in the front seat. Kho sat in the backseat.

When the taxi reached San Jose de la Montana at the corner of the street leading to Casal's Village, Kho ordered the driver (Barbado) to stop the vehicle and then poked a revolver at him and said: "Don't move, Bay. We need your vehicle."

The driver tried to fight back but Kho subdued him. He was directed to transfer to the backseat. Kho kept the revolver pointed at the driver. Kho ordered Velasco to drive the taxi. Velasco drove the taxi back to Barracks where he picked up Verano and Del Rosario who sat at the back. The taxi proceeded to Opra Village. Verano also pointed his revolver at Barbado.

When the taxi arrived at the Caltex gas station on Escario Street, where the office of the taxicab was located, Barbado attempted to jump out of the taxi. At that juncture, Kho fired two shots at Barbado.

Velasco stopped the taxi at Camp Marina. Velasco and Del Rosario went home at Gil Tudit, Mabolo. Verano went to the home of Cesar Pelonio at Cabantan Street.

Police Lieutenant Domiciano R. Angel testified that Velasco was represented by lawyer M. S. Ylaya, who re-sided in the Velasco compound and is a compadre of Velasco's father. It was Ylaya who advised the police to negotiate with Velasco's father for his surrender.

On the witness stand, Velasco gave a version substan-tially similar to that found in his extrajudicial confession. The trial Court took this fact into consideration in convicting Velasco. He declared that he and Kho were riding in the taxicab of Barbado in the evening of March 21, 1978. Kho was in the front seat while Velasco was in the backseat where he snoozed.

He was suddenly awakened when he heard Kho telling the driver to stop the cab and he (Velasco) thought that he had arrived at his destination. He saw Kho pointing his revolver at the driver. Kho ordered the driver to transfer to the back-seat and directed Velasco to drive the cab.

He drove the cab to Cabantan Street. Kho saw Del Rosario and Verano walking towards a sari-sari store. Kho whistled at the two and they boarded the cab. After Kho and Verano had conversed in the dialect, Velasco, as

instructed by Kho, drove the taxi to the Opra Village. Verano searched the pockets of Barbado.

When the taxi reached the gas station on Escario Street, Velasco heard a scuffle in the backseat and then he saw Kho shooting Barbado twice. Velasco wanted to stop the cab but Kho ordered him to continue driving. He drove the taxi to Camp Marina and told his companions that the taxi had run out of gas. They left the taxi and separated.

Velasco passed through the bushes in the field and met Del Rosario. They took a PU car near the Taoist temple and went home. He did not reveal the incident to the police because Kho warned him that if he squealed he and the members of his family would be killed.

Velasco and Kho left Cebu City and fled to the islands near Bohol. They returned to Cebu City on March 30, 1978. Velasco separated from Kho and returned home where his father told him to surrender to the police. As already stated, he executed a confession which was sworn to before District State Prosecutor Benicio L. Arzadon.

Velasco, who finished the third year of the commerce course, said that he was induced to make the confession because of the assurance by the police that he would be utilized as a State witness. He admitted that he was conversant with the constitutional provision regarding the admissibility of extra-judicial confessions.

He testified that he was told by the police that Ylaya, the lawyer of his father, had read his confession and had found it to be all right. Ylaya is Velasco's godfather, being a sponsor at Velasco's wedding. Ylaya testified that at the time Velasco was surrendered to the police he, (Ylaya) in-formed Lieutenant Angel that he (Ylaya) was Velasco's counsel. Indeed, Ylaya was Velasco's counsel at his arraignment and trial.

Velasco's extrajudicial confession is admissible under section 20, Article IV of the Constitution. He waived his rights not to incriminate himself, to be silent and to be assisted by counsel. During custodial interrogation, he could have availed himself of the services of his godfather, lawyer Ylaya, and of the five lawyers of his father in the latter's mining, real estate and foundry businesses. Velasco did not secure their services.

Velasco is a well-educated and intelligent person. He gave his confession voluntarily and without any outside pressure. It was corroborated by evidence of the corpus delicti.

The charge against Velasco and his companions is murder qualified by treachery. His three companions were not brought to trial because they have not been arrested. Although robbery was intended, robbery was not included in the indictment because the prosecution had no evidence to prove that robbery was actually committed.

The main evidence against Velasco is his own confession which was confirmed by his testimony. Do his confession and testimony prove the commission of murder?

A casual perusal of his confession and testimony dis-closes that the killing of Barbado was not attended with treachery. The killing was not deliberate and pre conceived nor was it a complete surprise to the victim. Two revolvers were pointed at the victim during the time that he was in the backseat of the taxicab.

The intention of the four malefactors (including Velasco) was to rob him and to enable themselves to use the taxicab. The killing was-made upon the spur of the moment and was triggered by Barbado's attempt to jump out of the taxi and escape from his captors.

So, the killing cannot be qualified by treachery. There was abuse of superiority but this circumstance was not alleged in the information. It is not a qualifying circumstance. The killing is homicide aggravated by abuse of superiority and use of a motor vehicle and mitigated by voluntary surrender to the authorities.

Can Velasco be regarded as a co-conspirator in the killing on the basis of his confession and testimony which are the only pieces of evidence against him?

The record does not show that Velasco conspired with Kho, Verano and Del Rosario to kill Barbado.

But his act of driving the taxicab with the knowledge that in the backseat Kho was pointing his revolver at Barbado and that later Verano was also poking his gun at Barbado is sufficient to implicate him as an accomplice in the homicide and to prove his community of design with his companions to inflict some wrong on Barbado. He knew that at any moment his companions might kill Barbado and yet, in spite of that knowledge, he continued driving the taxicab.

I am of the opinion that Velasco should be convicted as an accomplice in the homicide and sentenced to an indeterminate penalty of six years of prison correctional as minimum to eleven years of prison mayor as maximum and to pay an indemnity of six thousand pesos to the heirs of Barbado.

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CONCURRING OPINION

BARREDO, J.:

I concur because:

1. In respect to the violation of the constitutional right of the accused to counsel when his 'supposed confession was taken by the police, it has always been my position that to comply with the substantial import of Section 20 of the Bill of Rights, it is not enough for the investigator to just inform the person concerned of his right and then ask him if he is willing to give his statement. I maintain that to give bone and muscle to the constitutional right under discussion, it must specifically be shown that before the questioning was started, the detained person had been asked whether or not he wanted to avail of the right to counsel. I am aware that the Constitution is pertinently worded thus: "Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right." To my mind, the essence of this provision is not simply that the person under custody be informed but that he should be given the chance to exercise that right. Merely informing him of the right to counsel without asking him if he wishes to exercise the right is in my considered opinion to pay no more than lip service to the substantial right contemplated therein. To be sure every man may be presumed to know, as a rule, the law and the constitution, but unless he is asked if he desires to exercise his right under them, I cannot be satisfied that the wholesome intent of the charter's guarantee of fairness and justice can be satisfied. I agree, therefore, that the confession of appellant Velasco in this case should not be taken into account.

2. Assuming for the sake of argument that such confession may be considered, my conscience cannot lie easy on the conviction that Velasco's acts related to the purported robbery and unexpected shooting of Barbado as revealed in said confession could render him liable even as an accomplice in the crime committed by his companions. True, in his statement he said that their purpose in taking Barbado and his vehicle to Opra Village was "to get his money," but as, in fact, no getting of money took place, such statement is insignificant. That he continued to drive the taxi despite his seeing that Kho and Verano were pointing their guns at Barbado may be attributed to the fact that Kho practically threatened him. Besides, if indeed, Kho and Verano intended to rob Barbado of his money, the fact that Velasco saw them pointing their guns at Barbado does not necessarily mean

that Barbado was going to be hurt. In fact, Kho shot him only because he jumped out of the vehicle unexpectedly.

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