

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
LUISITO ARIAS, EDILBERTO UGAY, ARTEMIO BOLIGAO, AND
ALEXANDER MELICOR, ACCUSED, LUISITO ARIAS, EDILBERTO
UGAY, AND ARTEMIO...**

G.R. No. L-40531. January 27, 1981

Ponente: PER CURIAM: MANDATORY REVIEW of the death sentence imposed upon the accused Luisito Arias, Edilberto Ugay, and Artemio Boligao by the Court of First Instance of Davao. The record shows that at about 7:00 o'clock in the evening of April 5, 1972, while Filemon Cordova, a septuagenarian, was preparing to go to sleep at his copra dryer, about 40 meters from his house which he had leased to Ricardo Timbol and his family, in Sitio Libertad, Barrio Canocotan, Tagum, Davao, a man, armed with a gun, whom he identified as the accused Edilberto Ugay, barged in and demanded money. When Filemon replied that he had none, he was struck in the cheek with the butt of the gun. Then, he was brought down and his hands were tied behind his back. He saw three other armed men downstairs. He was brought to the house occupied by Ricardo Timbol and ordered to call the persons inside to open the door.[1] Victor Cincoñique, a visitor in the house, heard the voices downstairs. He hung the guitar he was strumming in order to open the door, but one of the younger boys, Cipriano Buli, ran to open the door. When the door was opened, four armed men entered and ordered them not to move. A man, whom he identified as the accused Artemio Boligao, pointed a gun at him. Gloria Buli ran towards the door in order to get out, but she was told that they had companions downstairs. Filemon Cordova and Victor were boxed, and later made to lie on the floor, face downwards, their hands tied behind their backs and their mouths covered with cloth. Thereafter, the robbers ransacked the house for money and valuables.[2] The rings of Gloria and Herminia Buli were removed from their fingers. The robbers also took a coat, valued at P60.00, and cash in the amount of P380.00.[3] Gloria Buli, a 16 year old first year high school student, who was sitting at the table and studying her lessons when the robbers entered the house, was taken by a man, whom she identified as the accused Luisito Arias, to the bedroom and ordered to strip. She refused, so that Arias undressed her. Then Arias ordered her to lie down on the bed. She stated: "Q Did you obey him? A Yes, sir. Q Why? A He threatened to shoot me, if I will not lie down. Q What kind of firearm was he holding at that time? A Revolver. Q And when you lied down, what did he do to you? A He took off his pants and walker. Q And after that what happened? A He lay on top of me. Q And what happened after that? A He inserted his penis into my vagina. Q What did you do when he inserted his penis into your vagina? A I constantly moved because it was painful. Q Did you shout? A No, sir, because I was afraid. Q Was he still holding that revolver while he was on top of you? A Yes, sir. Q You said you feel the pain, was that your first experience with a man? A Yes, sir. Q After the intercourse, what did Arias do? A After the intercourse, he got out." After Arias left the room, his co-accused Edilberto Ugay entered the bedroom. He came from the kitchen and went inside when Arias got out. Ugay removed his pants and underwear and ordered her to lie down. He was pointing a hunting knife at her mouth. She laid on the bed and Ugay went on top of her. She moved continuously, but Ugay ordered her not to move. Ugay then inserted his penis into her vagina and had carnal knowledge of her. It was painful, but she could not shout as she was afraid. After Ugay had finished, she was brought to the sala and her hands were tied behind her back. Her mouth was also covered with a piece of cloth.[4] Herminia Buli, younger sister of Gloria, was left in the kitchen after Arias took Gloria to the bedroom. One of the robbers, who was left behind and whom she identified as Edilberto Ugay, ordered her to lie down on the floor and then "tore my dress and took it out and pulled it downward." Ugay then went on top of her and put his penis into her vagina. But, she took hold of the penis so that there was no complete penetration into the vagina. After Ugay had finished, another man, whom she identified as the accused Artemio Boligao, came towards her and took off his pants.

He ordered her to lie down, flat on her back. Then, he went on top of her and inserted his penis into her vagina. But again, there was no complete penetration as she also took hold of his penis. After Boligao had finished, she was brought to the sala and her hands were tied behind her back. She was also gagged.[5] Moments later, they heard a whistle,[6] and a person calling: "Sige na camo, sige na camo" - meaning "you hurry up, you hurry up, coming from the road,[7] and the robbers left. Soon thereafter, they heard the sound of two tricycles leaving for opposite directions, one for Davao City and the other for Tagum.[8] After the robbers had left, Gloria loosened her bonds and untied her companions. Upon being freed, Victor Cincoñique went to the highway and upon arriving thereat, saw Ricardo Timbol and his wife alighting from a tricycle. He informed them that they had been robbed and that Gloria and Herminia had been abused. Victor was told to report the incident to the barrio captain. Later, he and the barrio captain went to the municipal building and reported the incident to the police.[9] Pat. Carlos Cua, Sgt. Campos, and Pat. Catalan went to Canocotan with the barrio captain and Victor. They rode on a red panel truck. On their way, they saw a tricycle stop near the Visayan Village and a passenger alight therefrom. When they were near the tricycle, Pat. Cua recognized two of the passengers as Luisito Arias and Edilberto Ugay. They stopped the truck and ordered the passengers of the tricycle, who had separated and started to run in different directions, to stop. Pat. Cua went towards the two men, whom he later identified as Alexander Melicor and Artemio Boligao, and identified himself as a policeman. Melicor immediately threw a gun to the swamp nearby.[10] They looked for it, but it was nowhere to be found.[11] However, they confiscated two knives and a wire cutter from the accused.[12] Victor Cincoñique instantly recognized them as the robbers. He immediately "told the police that these were the very persons who committed the robbery, sir, and I recognize them." [13] The four were brought to the municipal building for investigation and were identified as the culprits. "A certain woman, I just could not remember the name, but one of the victims, immediately pinpointed to Luisito Arias as the one who raped her." [14] The following day, April 6, 1973, the victims were examined and the municipal health officer certified to the following: (Exhibit A - GLORIA BULI) "This is to certify that on the abovementioned date at about 3:30 P.M., the undersigned have physically and medically examined GLORIA BULI, 16 years and 7 months old, female, single, Filipino, First Year High School at Tagum Community High School, and residing at Libertad, Canocotan, Tagum, Davao del Norte, who claimed to have been abused by two persons last night at their residence. The findings are as follows: I. PHYSICAL EXAMINATION: A. Head and Neck: - No pertinent finding. B. Thorax: - Breast conical in shape, moderately soft in consistency, measuring 5 1/4 inches in diameter on both sides, with a hard mass of 1 1/2 inches in diameter at the upper quadrant of left breast and a hard mass of 1-3/4 inches in diameter at the middle quadrant of right breast. Nipples erect with light brown areola measuring 1 1/4 inches in diameter on both. C. Abdomen: - Flat shape, no striae, no abnormal masses. Height of the fundus of the uterus not palpable. Pubic region - with few amount of short black hairs. D. Extremities: - No pertinent finding. II. INTERNAL EXAMINATION: 1. Labia minora and majora coaptated, moderately thin and on opening, there is reddening at the insides of the labia minora. 2. Hymen recently ruptured showing the following fresh lacerations corresponding to the face of a watch: (a) superficial, complete at 1:00 o' clock (b) superficial, incomplete at 3:00 o' clock (c) superficial, incomplete at 4:00 o' clock (d) superficial, complete at 5:00 o' clock (e) superficial, complete at 7:00 o' clock (f) superficial, incomplete at 9:00 o' clock (g) superficial, incomplete at 11:00 o' clock 3. Vaginal orifice admits tube of two centimeters in diameter and one finger with moderate ease. Fresh menstrual blood coming out of the vagina. 4. Vaginal walls moderately elastic with the vaginal rugosities present on all walls. III. LABORATORY EXAMINATION: 1. Fresh specimen taken from the vaginal canal, placed on a slide and examined under the microscope did not reveal presence of sperm. 2. Underwear worn right after the incident was brought to the Regional Laboratory in Davao City for examination. IV. IMPRESSION: Physical Virginity very recently lost." (Exhibit B - HERMINIA BULI) "This is to certify that on the abovementioned date at about 3:00 P.M., the undersigned have physically and medically examined HERMINIA BULI, a 14 years 11 months old, female, Filipino, single, Grade VI Pupil at Canocotan Elementary School and residing at Libertad, Canocotan, Tagum, Davao del Norte, who claimed to have been abused by two persons last night at their residence. The findings are as follows: I. PHYSICAL EXAMINATION: A. Head and

neck: - No pertinent finding. B. Thorax: - Breasts conical in shape, moderately soft in consistency, measuring 4 inches in diameter on both sides, with a hard mass of 1 inch diameter at the upper middle quadrant of both breasts; Nipples erect with light brown areola measuring 3/4 inch diameter on both. C. Abdomen: - Flat shape, no striae, no abnormal masses, Height of the fundus of the uterus not palpable. Pubic region - with few amount of short black hairs. II. INTERNAL EXAMINATION: 1. Labia minora and majora coaptated, moderately thin and on opening, there is reddening at the insides of the labia minora. 2. Hymen moderately thin and elastic, showing the following fresh lacerations corresponding to the face of a watch: (a) very superficial, incomplete at 2:00 o'clock (b) very superficial, incomplete at 4 :00 o'clock (c) very superficial, incomplete at 6:00 o'clock (d) very superficial, incomplete at 8:00 o'clock, and (e) very superficial, incomplete at 9:00 o'clock. 3. Vaginal orifice admits tube of two centimeters in diameter and one finger with difficulty. 4. Vaginal walls firm in consistency with vaginal rugosities present on all walls. III. LABORATORY EXAMINATION: 1. Fresh specimen taken from the vaginal canal, placed on a slide and examined under the microscope did not reveal presence of sperm. 2. Underwear worn right after the incident was brought to the Regional Laboratory in Davao City for examination. IV. IMPRESSION: The presence of the fresh but very superficial lacerations of the hymen indicates that there was apparently an attempt but that there was no penile penetration." As a consequence, Luisito Arias, Edilberto Ugay, Artemio Boligao and Alexander Melicor were charged with the crime of Robbery in Band with Rape, defined and penalized under Art. 294, in relation to Art. 335, of the Revised Penal Code, committed as follows: "That on or about April 5, 1972, in the municipality of Tagum, Province of Davao del Norte, Philippines, and within the jurisdiction of this Court, and above-mentioned accused, conspiring and confederating with one another, armed with a hunting knife and firearms and with force upon things, did then and there wilfully, unlawfully and feloniously enter the house of Ricardo Timbol and once inside take, steal and carry away cash money in the amount of P380.00, pearl ring worth P45.00 and a coat worth P60.00, belonging to Ricardo Timbol, to the damage and prejudice of the said owner in the sum of FOUR HUNDRED EIGHTY FIVE (P485.00) PESOS, and on the occasion thereof, unlawfully and feloniously have carnal knowledge with Gloria Buli and Herminia Buli against the latters' will. "The commission of the foregoing offense is attended by the aggravating circumstances of nighttime, that the crime was committed at a dwelling of the victim and that the crime was committed with evident premeditation." The four accused denied having committed the crime. The accused Artemio Boligao testified that he left Mati for Tagum on April 5, 1972, in order to see one Baby Ruales at Sobrecarey Street, to ask for work. He left Mati at about 4:00 o'clock in the afternoon, intending to sleep in the house of the said Baby Ruales. While on board the bus, he met an old acquaintance, Alexander Melicor. They arrived in Tagum at about 7:00 o'clock in the evening and he invited Melicor to eat supper at a carinderia near the Filipinas Theatre. While they were eating, Melicor told him that he had a friend living at the Visayan Village who was a capataz in a banana plantation and Melicor invited him to go along. He agreed and after they had eaten, they waited for a tricycle stopped for them. So, they transferred to the other side of the road, in front of the Filipinas Theatre. After a few minutes, Arias and Ugay approached Melicor and the three of them talked. Not long thereafter, a tricycle stopped and the four of them boarded it. The driver was told to go to the Visayan Village. Upon reaching a certain road going to the village, the tricycle stopped and he and Melicor alighted. No sooner had they done so when a panel arrived and its passengers, upon alighting, pointed a gun at them and told them not to move. Pat Cua then hit him with the butt of a carbine and he fell. He asked why, but he was told not to ask questions. They were then brought to the police headquarters where they were taken to a room and ordered to undress. Their sexual organs and underwear were examined, after which they were brought outside. Then, he said: "When I was able to get out from the room, a certain stout old woman hit me with her umbrella and I asked the police, 'why, what is this?' and the police told us to sit down and the rest of my three companions." There were two other women present who were told to identify them and to point at them, but the woman did not do so. They were taken back to the investigation room. After a while, they were brought outside and the women were again told to identify them and to point at them. This time the women did so.[15] Luisito Arias declared that he was a salesman of one Mr. Montojo in Kaligutan, Asuncion. He and Edilberto Ugay were in Tagum since 5:00 o'clock in the afternoon of April 5, 1972. They came from Davao City and were going back to Kaligutan. But, upon arriving at Tagum, they found no more available transportation to Kaligutan. So, he and

Ugay decided to see a movie at the Filipinas Theatre. They got out of the moviehouse at about 8:00 o'clock in the evening and crossed the road to wait for a tricycle to take them to the house of Gregorio Betican in Bonifacio Street where they intended to sleep. There, he met his friend, Alexander Melicor, who was also waiting for a tricycle. When a tricycle stopped for Alexander Melicor and his companion, he asked the driver if he and his companion could ride up to Bonifacio Street. He stated: "When the driver was about to start, I talked to the driver if it could be possible that we will ride, and the driver said, 'Yes' and that time there were several tricycles and many passengers who were coming out from the theatre and the driver said 'Yes, but we are going to deliver them first because the place is only near and we will only pass about two crossings and then we will come back.' They drove towards the Visayan Village. "It is passing the highway. The tricycle was running along the national highway and I do not know exactly the place because I am not used to come to Tagum, but what I could remember is that, we passed a police check-point then the PC barracks and then a little further there was a road going inside and it was said to be a road leading to Visayan Village and there it stopped." Melicor and his companion alighted. "When this Melicor and Boligao were already in the other side of the road the red panel arrived and then they were approached by Cua and we were also apprehended by the policemen who were in civilian clothes." "When the panel arrived as it parked, I could not see anymore the two others who were on the other side of the road because the panel was covering us and we were just seated at the pedicab and we realized that it was already an apprehension because we heard that on the other side of the road the other two were already gnawing pain, they said 'Aray, sir, Aray, sir,' and the policemen who were near us searched us and nothing has been taken from us." They were then brought to the municipal building where they were taken to a room and were told to undress. Their sexual organs and underwear were examined. Later, they were brought outside. "As we got out from the investigating room, Boligao was ahead and I am following and while he was able to get out of the room, a stout woman met him and struck him with an umbrella and said 'So, they are the ones who robbed us and had raped us,' and after that, we were made to sit down on the chair." "At first the young women were hesitant to point at us." "Then again, we were brought inside the room and then later on we were brought outside again by the police and we had seated outside and then the police told the girls by saying, 'Alright, you identify them, these are really the persons who committed the crime, they are notorious.'" "We were pointed." After the girls had pointed to them, they were "manhandled." He admitted that he was previously jailed in Tagum for the crime of theft.[16] Alexander Melicor testified that he left Mati at about 4:30 o'clock in the afternoon of April 5, 1972, bound for the Visayan Village in Tagum, to see a friend and former neighbor, Silvestre Millomeda, Jr., who is a capataz at the Hijo banana plantation, to apply for work. On board the bus, he met Artemio Boligao with whom he had previously done some construction work. They arrived at Tagum at about 7:30 o'clock in the evening and ate their supper in a carinderia near the Filipinas Theatre. While they were eating, "We have conversation I told him I will take him to the Visayan Village." After supper, he rode on a tricycle, together with Artemio Boligao, Luisito Arias and his companion, whom Melicor had met on the road while waiting for a tricycle and who "agreed with the driver that they will be delivered to Bonifacio Street, but we will first go to Visayan Village." They were only able to reach the corner of the road going to the interior because the driver would not enter the village. He and Boligao alighted, and "As we cross the road going to the other side, a panel arrived and there were persons who alighted and with their guns stopped us." He could recognize only one of them because the name "CUA" was placed in his uniform. They were pushed and ordered to board the panel and were brought to the municipal building. They were taken to a room where they were stripped and their sexual organs and underwear were examined. Afterwards, they were brought outside where he saw two young women and one stout woman. The stout woman struck Artemio Boligao with an umbrella. Then, "the police had the woman identify us" after which they were taken back to the investigation room where they were boxed. He asked the policeman: "What was my fault? Why was I boxed?" and the policeman answered: "For sure you were the one who committed the crime because one among you had been here already." The policeman was referring to Luisito Arias.[17] Edilberto Ugay declared that he met Luisito Arias in the headquarters of the "KHIRO" in Mati on April 5, 1972. He and Arias left Mati for Kaligutan very early in the morning, maybe at about 4:00 o'clock. They ate their breakfast and lunch in the house of one Gorio Betica in Tagum. After lunch, he and Arias went to Davao City, to pay a visit to the members of the "KHIRO" in the house of Philip Verondo in Mapa Street. After the visit, they left for Kaligutan. They arrived in Tagum at about 4:00 o'clock in the afternoon. But, there was no more available transportation to Kaligutan. So he and Arias went to see a show. They were riding on a tricycle when they

were apprehended. A policeman pointed a gun at him and Arias and then they were searched. However, the policemen were not able to get anything from them. They were then ordered to board the truck and brought to the municipal building where they "were made to undress, to take off everything, and our underwears were examined in the light. I don't know what was their purpose, and they even examined our organs." Later, their clothes were returned to them and they were brought to the office of the chief of police where they were questioned. He was asked why he was in Tagum and he answered that he and Luisito Arias were going to Kaligutan but had missed their bus. He was asked other questions but he cannot remember them anymore "because at that time I was afraid because of the fact that we were apprehended without any cause." After the questioning, they "were ordered to get out of the room of the Chief of Police and when we went out, there was a woman who started hitting us." He did not do anything. The policemen, however, advised the woman to stop hitting him. Then, "the police told the women to identify us, whether we were the very persons who committed the crime," but "the women did not say anything. They did not talk." So, "the policeman told the woman, 'Alright, you point at them. Anyway, one of them, Luisito Arias, has been convicted and imprisoned here. He is already notorious.'" "What happened next is that, that woman (Witness pointing to the mother of the complaining witnesses) told her daughters, 'You tell them that they were the very persons who committed the crime,' I don't forget that woman. (Witness pointing to the woman inside the courtroom who gave her name as Lydia Buli)." They were then brought back to the office of the chief of police and "later on we were again ordered to get out, that was the time the two women identified us." [18] The trial court, however, rejected the defendants' claim, saying that the defense, which is really that of an alibi, is unavailing against the positive identification of the accused, as the perpetrators of the crime, made by the prosecution witnesses who have no motive to testify falsely against the accused. But, the trial court found that the offense committed was not robbery in band since one of the accused was holding a wire cutter when he was arrested and a wire cutter is not a weapon. The dispositive portion of the decision reads, as follows: "In the light of all the foregoing, the Court finds Luisito Arias, Edilberto Ugay, and Artemio Boligao guilty beyond any reasonable doubt of the crime of robbery with rape, with the aggravating circumstances of nighttime, that the crime was committed in the dwelling of the offended parties and with abuse of super strength, for which they are hereby sentenced to the supreme penalty of death by electrocution; while accused Alexander Melicor is found guilty of robbery in an inhabited house for which he is hereby sentenced to an indeterminate prison term of ten (10) years of prison mayor, as minimum, and seventeen (17) years of reclusion temporal, as maximum. Arias and Ugay shall indemnify their rape victim Gloria Buli in the amount of P5,000.00, in the concept of moral damages, while Ugay and Boligao shall indemnify their rape victim Herminia Buli the amount of P5,000.00, in the concept of moral damages. All the four accused, jointly and severally, shall indemnify the robbery victims in the amount of P485.00, the value of the stolen properties, and shall suffer all the accessory penalties of the law, and pay the costs." The accused, Alexander Melicor, appealed but subsequently withdrew his appeal, [19] so that the judgment is final insofar as he is concerned. It is now contended that the trial court erred in finding that the accused were positively identified as the perpetrators of the crime; and in imposing the death penalty upon the accused Luisito Arias, Edilberto Ugay and Artemio Boligao. It is argued that the witnesses for the prosecution could not have identified the accused as the culprits because the light inside the house, consisting of three (3) petroleum lamps with small wicks, two of which were placed in the kitchen and one in the bedroom, was inadequate to afford identification of the accused, and besides, the witnesses were under the grasp of fear and were lying on the floor, face downwards, with their hands tied behind their backs. We find no evidence to support their claim. While the illumination in the house consisted of three petroleum lamps, the witnesses for the prosecution categorically stated that the light was bright enough for them to see the faces of the accused. [20] Besides, it appears that the robbers stayed in the house for about two hours, [21] so that there was ample time for them to see and observe the features of the accused, even if the light may be said to be meager. The claim that the witnesses were under the grasp of fear, so that they could not have recognized the accused as the robbers, is belied by the immediate and spontaneous identification made by Gloria and Herminia Buli, as well as Victor Cincoñique. As a matter of fact, Victor Cincoñique pointed to the accused as the robbers when they were apprehended near the Visayan Village. While the witnesses may have entertained fear, there is no evidence that the fear was of such a magnitude as to produce hysteria for the witnesses to lose their senses. It is true that their hands were tied behind their backs and were lying on the floor, face downwards, and their mouths covered with a piece of cloth, but the hands of Gloria and Herminia Buli were tied

only after they had been abused and a few minutes before the robbers left, and Victor Cincoñique declared that about an hour elapsed from the time the robbers entered the house up to the time his hands were tied.[22] During such time, they could have overcome their initial panic, if any. The accused also claim that the witnesses for the prosecution could have made a mistake in identifying them because Pat. Carlos Cua, the policeman who apprehended the accused had committed a mistake in pointing to Melicor as Ugay, notwithstanding the fact that the jail, where the accused had been detained for some time, is adjacent to the police headquarters. The pertinent portion of the testimony of Pat. Cua referred to, reads, as follows: "Q If that Ugay is also here in the courtroom, will you point to him? A (Witness pointing to a person who when asked gave his name as Edilberto Ugay.) ATTY. SATOR: We would like to make of record that the witness pointed to a person in blue shirt, who is Melicor. ATTY. EDIG: We want to make of record, Your Honor, that the witness instantly corrected his answer." [23] But, it would appear that the error was immediately corrected and is not of such a degree as to destroy the credibility of the witness. Besides, the fact that Pat. Cua had committed the error in pointing to Melicor as Ugay is not sufficient to render incredible the testimony of the other witnesses whose credibility have been proven and accepted. The accused also make capital of the fact that the witnesses for the prosecution were not unanimous in their declarations as to who among the accused carried a gun. Indeed, Filemon Cordova declared that Ugay pointed a gun at him when Ugay barged into his copra dryer and demanded for his money, and Victor Cincoñique stated that Artemio Boligao was holding a gun when the robbers entered the house, while Gloria Buli testified that Luisito Arias had threatened her with a gun when she was raped. Aside from this, Pat. Carlos Cua said that Alexander Melicor had thrown a gun to the swamps. But, it should be noted that the gun was held by a different person at a different time and no two persons were alleged to have held the gun at one given time. It is possible that the gun changed hands during the different stages of the incident, so the non-unanimity in the declaration of the witnesses in this regard cannot be considered an indication that they were not telling the truth, or that their version of the incident is improbable or impossible of belief. Counsel for the accused also contend that there is not enough evidence to prove the participation of Alexander Melicor and Artemio Boligao in the commission of the crime for which they have been convicted since they were the least mentioned. Suffice it to state in this connection that Alexander Melicor had withdrawn his appeal, so that the judgment against him is already final. As for the accused Artemio Boligao, the evidence is sufficient to support his conviction. Victor Cincoñique declared that when the door was opened by Cipriano Buli, the robbers entered the house and the accused Artemio Boligao pointed a gun at him. His testimony reads as follows: "Q When the door was already opened by Cipriano Buli, will you tell us what happened? A The robbers went inside and a revolver was pointed to me. Q Will you tell us if that person who pointed a revolver to you is in the court room? Can you point to him? A He is the one. (Witness pointing to accused Artemio Boligao in Court.)" [24] Herminia Buli stated that the accused Artemio Boligao was one of the robbers who raped her. She said: "A Then another one came to me. Q Now, who was that the other one, if that other fellow who approached you after Edilberto Ugay abused you, is in the court room? Will you point to him? A That one, sir. Q The one who abused you? A Yes, sir. He is the one. (Witness pointing to a person who, when asked, answered as Artemio Boligao.) Q What did Artemio Boligao do when he approached you? A He took down his pants. Q And after taking out his pants, what did he do? A He came near me and raped me. Q How did he rape you? A He put me down flat on my back and placed himself on top of me and then raped me. Q When he placed himself on top of you while you were lying down, what did he do? A He inserted his penis into my vagina, sir." [25] Filemon Cordova also identified Artemio Boligao as the robber who "used a knife in opening his mouth." His testimony reads, as follows: "Q You said that Ugay was armed with a firearm, what about the other three companions of Ugay, did you see them bringing with them any weapons? A They were bringing a hunting knife. (Witness pointing to the exhibit on the table.) Q Now, I will show to you these exhibits for the prosecution, will you please examine these and tell us if these were the weapons they were bringing at the time? A Those weapons were the ones used by the accused and this stainless knife is the one used in opening my mouth. (Witness demonstrating how the knife was used in pointing at his mouth.) FISCAL: Witness pointing, Your Honor, to Exhibit 'C'. Q Now, please point to us who among these accused used this knife in pointing at your mouth? A (Witness pointing to Artemio Boligao.)" [26] There is, therefore, no doubt as to the criminal participation of the accused Artemio Boligao. The accused also claim that they could not have committed the crime because they were examined

soon after they were apprehended and no sign of ejaculation or blood marks or stains were found in their sexual organs and underwear. This claim, however, is not supported by evidence. On the other hand, Pat. Cua testified that they found blood stains or semen on the underwear of the accused. His testimony reads, as follows: "Q And when you brought the accused to the police headquarters, did you not examine their underwears or pants? A We examined. "Q Did you notice any semen or blood marks from their underwears or pants? A Yes, sir." [27] "Counsel for the accused has disputed the veracity of this portion of the records, saying that his notes showed that Pat. Cua's answer was in the negative and attached to his brief the affidavit of Pat. Cua to that effect. The affidavit of Pat. Cua, however, is not sufficient to offset the presumption that official duty has been regularly performed by the stenographer who took down notes of the proceedings because the affiant himself did not positively state that he had answered in the negative to the question of whether or not they saw semen or blood marks in the underwear of the accused. His declaration reads, as follows: "4. That I hereby declare categorically that the truth of the matter is that we did not see any blood stain in the underwears of the accused at the time of its inspection at the investigation room of the Police Department at Tagum, Davao, otherwise the underwears would have been retained by our office which were not, and this is confirmed by the investigator who investigated the case in our department; However, I cannot remember whether the question propounded to me which is quoted above was in the negative or affirmative." (italics supplied) [28] "At any rate, the absence of blood stains or dried semen on the underwear of the accused is not conclusive proof that they were not the rapists, because their victims testified that the accused first removed their underwear before having sexual intercourse with them. [29] "Besides, the absence of semen in the vaginal canal of the victim or in the underwear of the accused is not necessary in a prosecution for rape. [30] The accused also claim that if they were the culprits they would not have chosen a route which would make them pass the PC barracks and the police check-point. The accused stated that if one comes from the Filipinas Theatre at the poblacion of Tagum and goes to Canocotan, where the crime was committed, one has to pass the police check-point located near the PC barracks, then the Visayan Village, and finally, Canocotan, in that order. And since the tricycle they were riding in came from the directions of the Filipinas Theatre going towards the Visayan Village when they were apprehended, they could not have been the robbers. This contention is utterly devoid of merit. The accused could not have passed through the police check-point because the same was placed between the Visayan Village and the Filipinas Theatre. From Canocotan, where the crime was committed, to the Visayan Village, where the accused were arrested, there was no police check-point. The fact that the tricycle they were riding in was heading towards the Visayan Village from the direction of the poblacion of Tagum is not conclusive proof that the accused came from the poblacion of Tagum, passing through the police check-point, and going to the Visayan Village. It is possible that the accused had intended to go to the poblacion of Tagum after the commission of the crime, but had turned back when they realized that they had to pass through the "police check-point. It is also possible that they had to turn back in order to spend the rest of the night with their friends at the Visayan Village, instead of those in the poblacion of Tagum. The defense interposed is one of alibi which is one of the weakest of defenses and easy to concoct. It may be credited only if established by convincing and satisfactory proof and it must be also clearly shown that it was physically impossible for the accused to be at the scene of the crime at the time of its commission. In the instant case, the accused were in the vicinity of the Filipinas Theatre, which is only seven kilometers away from Canocotan, so that, as the trial court had found, it was not physically impossible for them to be in Canocotan when the crime was committed. Besides, the testimony of the four accused are full of improbabilities as to merit credence. Thus, Artemio Boligao declared that he left Mati for Tagum to see one Baby Ruales, who lived in Sobrecarey Street, to ask for work. If this was so, why would he leave Mati at 4:00 o'clock in the afternoon to arrive at Tagum at a late hour? If he indeed had an appointment with the said Baby Ruales, he should have presented him to corroborate his testimony. And why would he abandon his original plan to see Ruales and go with his co-accused Alexander Melicor, who did not even know the name of the capataz of the banana plantation whom they were going to see at the Visayan Village? [31] Furthermore, when Pat. Cua asked him why he was in Tagum that night, Boligao answered that he was delivering a letter to a certain woman at Sobrecarey Street, but that he could not produce said letter. [32] Alexander Melicor testified that he left Mati to see his friend and former neighbor in Bohol, one Silvestre Millomeda, Jr., who was residing in the Visayan Village and is a capataz in the Hijo banana plantation, in order to ask for work. Considering the lateness of the hour, the claim is difficult to believe. Besides, the said Millomeda

was not presented in court to corroborate Melicor's claim. Arias and Ugay both declared that they were in Tagum that night because they missed their bus for Kaligutan. This statement, however, appears to be a mere concoction because Ugay declared that they left Mati very early in the morning. If their purpose was to go to Kaligutan, they could have reached their destination that day. But, Ugay stated that they ate their breakfast and lunch in the house of one Gorio Betica in Tagum and then went to Davao City after lunch to visit their friends in the house of one Philip Verondo, returning to Tagum only at about 4:00 o'clock in the afternoon. Arias also stated that he and Ugay went to see a movie at the Filipinas Theatre. However, Arias could not even name the title of the movie when asked.[33] Arias further stated that after seeing the movie, he and Ugay waited for a tricycle, intending to go back to the house of Gorio Betica in Bonifacio Street in the poblacion of Tagum where he and Ugay decided to spend the rest of the night, but were forced to ride with Boligao and Melicor to the Visayan Village because they could not find any vehicle which would take them to their destination, and the driver of the tricycle had agreed to take them to their destination provided that he would take Boligao and Melicor to the Visayan Village first. But, Bonifacio Street and the Visayan Village lie in opposite directions, and the distance from the Filipinas Theatre to the Visayan Village is one and a half (1-1/2) kilometers. Arias' claim, therefore, is difficult to believe. Besides, this claim of Arias is contradicted by Alexander Melicor who testified that Arias and Ugay rode with them to the Visayan Village because Arias wanted to find out where Melicor was staying so that Arias could visit him there. His testimony reads as follows: "Q What did he tell you in the pedicab? A He said that he will just as well go with me to the place where I am going so that he will know where I am staying and then they will go to his place." [34] The complainants are very young and innocent girls. They certainly would not tell a story of sexual violation, allow the examination of their private parts and thereafter subject themselves to a public trial, if they were not motivated by an honest desire to have the offenders apprehended and punished. Finally, counsel for the accused contends that the trial court erred in imposing the death penalty upon Luisito Arias, Edilberto Ugay, and Artemio Boligao. Counsel for the accused argues that the penalty to be imposed should be that provided for in Article 294 of the Revised Penal Code, and not that prescribed in Article 335 of the same Code. The contention is without merit. The Court has already ruled that where robbery with rape is committed, but the rape is qualified by the use of a deadly weapon, or is committed by two persons, the law to apply is Article 335 and not Article 294 of the Revised Penal Code. In the case of *People vs. Obtinolia*, [35] the Court said: "The accused challenge the correctness of the lower court's judgment sentencing each of them to the penalty of death. It is claimed that having been accused of the crime of robbery in band with rape, which is penalized by reclusion temporal in its medium period to reclusion perpetua by Article 294 (2) of the Revised Penal Code, they cannot be sentenced to the penalty provided for under Article 335 of the same Code, as amended by Republic Act No. 4111. "There is no merit in the contention. As pointed out by the trial court, if a rape alone, when committed by two or more persons, is penalized with death, it would be highly illogical and irrational to hold that when such rape is committed with the addition of a robbery, the offense should only be punishable with life imprisonment. Thus the reclusion perpetua prescribed by Article 294 (2) of the Revised Penal Code, for robbery with rape, must be understood as limited to cases where there is a single rapist, and that in those cases where the rape on occasion of the robbery is committed by two or more persons, the death provided by Republic Act No. 4111 must apply. All the more so because the crime was committed with the aggravating circumstances of its being perpetrated in the dwelling of the complainant victims, and with the attendant ignominy, since the rapes were done in the presence of the women's husband." The crime committed in this case is robbery accompanied by qualified rape since the rapes were perpetrated with the use of deadly weapons and by two men, and attended by the aggravating circumstances of nocturnity, dwelling, and abuse of superior strength. It results that the penalty imposed upon the said accused is correct. WHEREFORE, the judgment should be, as it is hereby affirmed. With proportionate costs against the accused. SO ORDERED. Makasiar, Concepcion, Jr., Fernandez, Guerrero, Abad Santos, De Castro, and Melencio-Herrera, JJ., concur. Fernando, C.J., concurs with the dissenting opinion of Justice Aquino conformably to the view expressed by him in *People v. Carandang* (L-31012, Aug. 15, 1973, 52 SCRA 259). Article 294 (b) of the Revised Penal Code before its amendment should apply. With the necessary ten votes for the imposition of death penalty lacking, the accused-appellants are sentenced to suffer reclusion perpetua. Teehankee, J., concur in line with his separate opinion in *People vs. Carandang*, 52 SCRA 259, 272.. Barredo, J., concur, but he hold that the number of death penalties should be in line with the case of *Jayme Jose et al.*, indeed, this

view may be deemed as a dissent. Aquino, J., see dissent. [1] t.s.n. of July 15, 1974, pp. 3-4. [2] t.s.n. of March 2, 1973, pp. 4-7. [3] t.s.n. of July 20, 1973, p. 11; t.s.n. of March 26, 1974, p. 11. [4] t.s.n. of March 26, 1974, pp. 4-12. [5] t.s.n. of July 20, 1973, pp. 8-13. [6] t.s.n. of March 26, 1974, pp. 26-28. [7] t.s.n. of July 15, 1974, p. 16. [8] t.s.n. of March 2, 1973, p. 7; t.s.n. of July 20, 1973, pp. 13-14; t. s n. of March 26, 1974, p. 27. [9] t.s.n. of March 2, 1973, p. 8. [10] t.s.n. of March 1, 1973, pp. 5-8. [11] t.s.n. of March 2, 1973, pp. 9-10. [12] t.s.n. of March 1, 1973, p. 8. [13] t.s.n. of March 2, 1973, p. 10. [14] t.s.n. of March 1, 1973, p. 12. [15] t.s.n. of Sept. 4, 1974, pp. 4-25. [16] Id., pp. 26-40. [17] t.s.n. of Sept. 13, 1974, pp. 4-19. [18] Id., pp. 21-37. [19] Rollo, p. 128. [20] t.s.n. of March 26, 1974, p. 10; t.s.n. of July 15, 1974, p. 13. [21] t.s.n. of March 2, 1973, p. 14. [22] Id. [23] t.s.n. of March 1, 1973, p. 6. [24] t.s.n. of March 2, 1973, p. 5. [25] t.s.n. of July 20, 1973, pp. 9-10. [26] t.s.n. of July 15, 1974, p. 6. [27] t.s.n. of March 1, 1973, p. 19. [28] Rollo, p. 96. [29] t.s.n. of July 20, 1973, pp. 9-10; t.s.n. of March 26, 1974, pp. 7-8. [30] People vs. Carandang, L-31012, Aug. 15, 1973, 52 SCRA 259. [31] t.s.n. of Sept. 4, 1974, p. 21. [32] t.s.n. of March 1, 1973, p. 13. [33] Id. [34] t.s.n. of Sept. 13, 1974, p. 18. [35] G.R. No. L-30190, April 30, 1971; 38 SCRA 651. DISSENTING OPINION AQUINO, J.

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PER CURIAM:

MANDATORY REVIEW of the death sentence imposed upon the accused Luisito Arias, Edilberto Ugay, and Artemio Boligao by the Court of First Instance of Davao.

The record shows that at about 7:00 o'clock in the evening of April 5, 1972, while Filemon Cordova, a septuagenarian, was preparing to go to sleep at his copra dryer, about 40 meters from his house which he had leased to Ricardo Timbol and his family, in Sitio Libertad, Barrio Canocotan, Tagum, Davao, a man, armed with a gun, whom he identified as the accused Edilberto Ugay, barged in and demanded money. When Filemon replied that he had none, he was struck in the cheek with the butt of the gun. Then, he was brought down and his hands were tied behind his back. He saw three other armed men downstairs. He was brought to the house occupied by Ricardo Timbol and ordered to call the persons inside to open the door.[1]

Victor Cincoñique, a visitor in the house, heard the voices downstairs. He hung the guitar he was strumming in order to open the door, but one of the younger boys, Cipriano Buli, ran to open the door. When the door was opened, four armed men entered and ordered them not to move. A man, whom he identified as the accused Artemio Boligao, pointed a gun at him. Gloria Buli ran towards the door in order to get out, but she was told that they had companions downstairs. Filemon Cordova and Victor were boxed, and later made to lie on the floor, face downwards, their hands tied behind their backs and their mouths covered with cloth. Thereafter, the robbers ransacked the house for money and valuables.[2] The rings of Gloria and Herminia Buli were removed from their fingers. The robbers also took a coat, valued at P60.00, and cash in the amount of P380.00.[3]

Gloria Buli, a 16 year old first year high school student, who was sitting at the table and studying her lessons when the robbers entered the house, was taken by a man, whom she identified as the accused Luisito Arias, to the bedroom and ordered to strip. She refused, so that Arias undressed her. Then Arias ordered her to lie down on the bed. She stated:

"Q Did you obey him?

A Yes, sir.

Q Why?

A He threatened to shoot me, if I will not lie down.

Q What kind of firearm was he holding at that time?

A Revolver.

Q And when you lied down, what did he do to you?

A He took off his pants and walker.

Q And after that what happened?

A He lay on top of me.

Q And what happened after that?

A He inserted his penis into my vagina.

Q What did you do when he inserted his penis into your vagina?

A I constantly moved because it was painful.

Q Did you shout?

A No, sir, because I was afraid.

Q Was he still holding that revolver while he was on top of you?

A Yes, sir.

Q You said you feel the pain, was that your first experience with a man?

A Yes, sir.

Q After the intercourse, what did Arias do?

A After the intercourse, he got out."

After Arias left the room, his co-accused Edilberto Ugay entered the bedroom. He came from the kitchen and went inside when Arias got out. Ugay removed his pants and underwear and ordered her to lie down. He was pointing a hunting knife at her mouth. She laid on the bed and Ugay went on top of her. She moved continuously, but Ugay ordered her not to move. Ugay then inserted his penis into her vagina and had carnal knowledge of her. It was painful, but she could not shout as she was afraid. After Ugay had finished, she was brought to the sala and her hands were tied behind her back. Her mouth was also covered with a piece of cloth.[4]

Herminia Buli, younger sister of Gloria, was left in the kitchen after Arias took Gloria to the bedroom. One of the robbers, who was left behind and whom she identified as Edilberto Ugay, ordered her to lie down on the floor and then "tore my dress and took it out and pulled it downward." Ugay then went on top of her and put his penis into her vagina. But, she took hold of the penis so that there was no complete penetration into the vagina. After Ugay had finished, another man, whom she identified as the accused Artemio Boligao, came towards her and took off his pants. He ordered her to lie down, flat on her back. Then, he went on top of her and inserted his penis into her vagina. But again, there was no complete penetration as she also took hold of his penis. After Boligao had finished, she was brought to the sala and her hands were tied behind her back. She was also gagged.[5]

Moments later, they heard a whistle,[6] and a person calling: "Sige na camo, sige na camo" - meaning "you hurry up, you hurry up, coming from the road,[7] and the robbers left. Soon thereafter, they heard the sound of two tricycles leaving for opposite directions, one for Davao City and the other for Tagum.[8]

After the robbers had left, Gloria loosened her bonds and untied her companions. Upon being freed, Victor Cincoñique went to the highway and upon arriving thereat, saw Ricardo Timbol and his wife alighting from a tricycle. He informed them that they had been robbed and that Gloria and Herminia had been abused. Victor was told to report the incident to the barrio captain. Later, he and the barrio captain went to the municipal building and reported the incident to the police.[9]

Pat. Carlos Cua, Sgt. Campos, and Pat. Catalan went to Canocotan with the barrio captain and Victor. They rode on a red panel truck. On their way, they saw a tricycle stop near the Visayan Village and a passenger alight therefrom. When they were near the tricycle, Pat. Cua recognized two of the passengers as Luisito Arias and Edilberto Ugay. They stopped the truck and ordered the passengers of the tricycle, who had separated and started to run in different directions, to stop. Pat. Cua went towards the two men, whom he later identified as Alexander Melicor and Artemio Boligao, and identified himself as a policeman. Melicor immediately threw a gun to the swamp nearby.[10] They looked for it, but it was nowhere to be found.[11] However, they confiscated two knives and a wire cutter from the accused.[12] Victor Cincoñique instantly recognized them as the robbers. He immediately "told the police that these were the very persons who committed the robbery, sir, and I recognize them." [13]

The four were brought to the municipal building for investigation and were identified as the culprits. "A certain

woman, I just could not remember the name, but one of the victims, immediately pinpointed to Luisito Arias as the one who raped her." [14]

The following day, April 6, 1973, the victims were examined and the municipal health officer certified to the following:

(Exhibit A - GLORIA BULI)

"This is to certify that on the abovementioned date at about 3:30 P.M., the undersigned have physically and medically examined GLORIA BULI, 16 years and 7 months old, female, single, Filipino, First Year High School at Tagum Community High School, and residing at Libertad, Canocotan, Tagum, Davao del Norte, who claimed to have been abused by two persons last night at their residence.

The findings are as follows:

I. PHYSICAL EXAMINATION:

A. Head and Neck: - No pertinent finding.

B. Thorax: - Breast conical in shape, moderately soft in consistency, measuring 5 1/4 inches in diameter on both sides, with a hard mass of 1 1/2 inches in diameter at the upper quadrant of left breast and a hard mass of 1-3/4 inches in diameter at the middle quadrant of right breast. Nipples erect with light brown areola measuring 1 1/4 inches in diameter on both.

C. Abdomen: - Flat shape, no striae, no abnormal masses. Height of the fundus of the uterus not palpable. Pubic region - with few amount of short black hairs.

D. Extremities: - No pertinent finding.

II. INTERNAL EXAMINATION:

1. Labia minora and majora coaptated, moderately thin and on opening, there is reddening at the insides of the labia minora.

2. Hymen recently ruptured showing the following fresh lacerations corresponding to the face of a watch:

(a) superficial, complete at 1:00 o' clock

(b) superficial, incomplete at 3:00 o' clock

(c) superficial, incomplete at 4:00 o' clock

(d) superficial, complete at 5:00 o' clock

(e) superficial, complete at 7:00 o' clock

(f) superficial, incomplete at 9:00 o' clock

(g) superficial, incomplete at 11:00 o' clock

3. Vaginal orifice admits tube of two centimeters in diameter and one finger with moderate ease. Fresh menstrual blood coming out of the vagina.

4. Vaginal walls moderately elastic with the vaginal rugosities present on all walls.

III. LABORATORY EXAMINATION:

1. Fresh specimen taken from the vaginal canal, placed on a slide and examined under the microscope did not reveal presence of sperm.

2. Underwear worn right after the incident was brought to the Regional Laboratory in Davao City for examination.

IV. IMPRESSION:

Physical Virginity very recently lost."

(Exhibit B - HERMINIA BULI)

"This is to certify that on the abovementioned date at about 3:00 P.M., the undersigned have physically and medically examined HERMINIA BULI, a 14 years 11 months old, female, Filipino, single, Grade VI Pupil at Canocotan Elementary School and residing at Libertad, Canocotan, Tagum, Davao del Norte, who claimed to have been abused by two persons last night at their residence.

The findings are as follows:

I. PHYSICAL EXAMINATION:

A. Head and neck: - No pertinent finding.

B. Thorax: - Breasts conical in shape, moderately soft in consistency, measuring 4 inches in diameter on both sides, with a hard mass of 1 inch diameter at the upper middle quadrant of both breasts; Nipples erect with light brown areola measuring 3/4 inch diameter on both.

C. Abdomen: - Flat shape, no striae, no abnormal masses, Height of the fundus of the uterus not palpable. Pubic region - with few amount of short black hairs.

II. INTERNAL EXAMINATION:

1. Labia minora and majora coaptated, moderately thin and on opening, there is reddening at the insides of the labia minora.

2. Hymen moderately thin and elastic, showing the following fresh lacerations corresponding to the face of a watch:

(a) very superficial, incomplete at 2:00 o'clock

(b) very superficial, incomplete at 4 :00 o'clock

(c) very superficial, incomplete at 6:00 o'clock

(d) very superficial, incomplete at 8:00 o'clock, and

(e) very superficial, incomplete at 9:00 o'clock.

3. Vaginal orifice admits tube of two centimeters in diameter and one finger with difficulty.

4. Vaginal walls firm in consistency with vaginal rugosities present on all walls.

III. LABORATORY EXAMINATION:

1. Fresh specimen taken from the vaginal canal, placed on a slide and examined under the microscope did not reveal presence of sperm.

2. Underwear worn right after the incident was brought to the Regional Laboratory in Davao City for examination.

IV. IMPRESSION:

The presence of the fresh but very superficial lacerations of the hymen indicates that there was apparently an attempt but that there was no penile penetration."

As a consequence, Luisito Arias, Edilberto Ugay, Artemio Boligao and Alexander Melicor were charged with the crime of Robbery in Band with Rape, defined and penalized under Art. 294, in relation to Art. 335, of the Revised Penal Code, committed as follows:

"That on or about April 5, 1972, in the municipality of Tagum, Province of Davao del Norte, Philippines, and within the jurisdiction of this Court, and above-mentioned accused, conspiring and confederating with one another, armed with a hunting knife and firearms and with force upon things, did then and there wilfully, unlawfully and feloniously enter the house of Ricardo Timbol and once inside take, steal and carry away cash money in the amount of P380.00, pearl ring worth P45.00 and a coat worth P60.00, belonging to Ricardo Timbol, to the damage and prejudice of the said owner in the sum of FOUR HUNDRED EIGHTY FIVE (P485.00) PESOS, and on the occasion thereof, unlawfully and feloniously have carnal knowledge with Gloria Buli and Herminia Buli against the latters' will.

"The commission of the foregoing offense is attended by the aggravating circumstances of nighttime, that the crime was committed at a dwelling of the victim and that the crime was committed with evident premeditation."

The four accused denied having committed the crime. The accused Artemio Boligao testified that he left Mati for Tagum on April 5, 1972, in order to see one Baby Ruales at Sobrecarey Street, to ask for work. He left Mati at about 4:00 o'clock in the afternoon, intending to sleep in the house of the said Baby Ruales. While on board the bus, he met an old acquaintance, Alexander Melicor. They arrived in Tagum at about 7:00 o'clock in the evening and he invited Melicor to eat supper at a carinderia near the Filipinas Theatre. While they were eating, Melicor told him that he had a friend living at the Visayan Village who was a capataz in a banana plantation and Melicor invited him to go along. He agreed and after they had eaten, they waited for a tricycle stopped for them. So, they transferred to the other side of the road, in front of the Filipinas Theatre. After a few minutes, Arias and Ugay approached Melicor and the three of them talked. Not long thereafter, a tricycle stopped and the four of them boarded it. The driver was told to go to the Visayan Village. Upon reaching a certain road going to the village, the tricycle stopped and he and Melicor alighted. No sooner had they done so when a panel arrived and its passengers, upon alighting, pointed a gun at them and told them not to move. Pat Cua then hit him with the butt of a carbine and he fell. He asked why, but he was told not to ask questions. They were then brought to the police headquarters where they were taken to a room and ordered to undress. Their sexual organs and underwear were examined, after which they were brought outside. Then, he said: "When I was able to get out from the room, a certain stout old woman hit me with her umbrella and I asked the police, 'why, what is this?' and the police told us to sit down and the rest of my three companions." There were two other women present who were told to identify them and to point at them, but the woman did not do so. They were taken back to the investigation room. After a while, they were brought outside and the women were again told to identify them and to point at them. This time the women did so.[15]

Luisito Arias declared that he was a salesman of one Mr. Montojo in Kaligutan, Asuncion. He and Edilberto Ugay were in Tagum since 5:00 o'clock in the afternoon of April 5, 1972. They came from Davao City and were going back to Kaligutan. But, upon arriving at Tagum, they found no more available transportation to Kaligutan. So, he

and Ugay decided to see a movie at the Filipinas Theatre. They got out of the moviehouse at about 8:00 o'clock in the evening and crossed the road to wait for a tricycle to take them to the house of Gregorio Betican in Bonifacio Street where they intended to sleep. There, he met his friend, Alexander Melicor, who was also waiting for a tricycle. When a tricycle stopped for Alexander Melicor and his companion, he asked the driver if he and his companion could ride up to Bonifacio Street. He stated: "When the driver was about to start, I talked to the driver if it could be possible that we will ride, and the driver said, 'Yes' and that time there were several tricycles and many passengers who were coming out from the theatre and the driver said 'Yes, but we are going to deliver them first because the place is only near and we will only pass about two crossings and then we will come back.' They drove towards the Visayan Village. "It is passing the highway. The tricycle was running along the national highway and I do not know exactly the place because I am not used to come to Tagum, but what I could remember is that, we passed a police check-point then the PC barracks and then a little further there was a road going inside and it was said to be a road leading to Visayan Village and there it stopped." Melicor and his companion alighted. "When this Melicor and Boligao were already in the other side of the road the red panel arrived and then they were approached by Cua and we were also apprehended by the policemen who were in civilian clothes." "When the panel arrived as it parked, I could not see anymore the two others who were on the other side of the road because the panel was covering us and we were just seated at the pedicab and we realized that it was already an apprehension because we heard that on the other side of the road the other two were already gnawing pain, they said 'Aray, sir, Aray, sir,' and the policemen who were near us searched us and nothing has been taken from us." They were then brought to the municipal building where they were taken to a room and were told to undress. Their sexual organs and underwear were examined. Later, they were brought outside. "As we got out from the investigating room, Boligao was ahead and I am following and while he was able to get out of the room, a stout woman met him and struck him with an umbrella and said 'So, they are the ones who robbed us and had raped us,' and after that, we were made to sit down on the chair." "At first the young women were hesitant to point at us." "Then again, we were brought inside the room and then later on we were brought outside again by the police and we had seated outside and then the police told the girls by saying, 'Alright, you identify them, these are really the persons who committed the crime, they are notorious.'" "We were pointed." After the girls had pointed to them, they were "manhandled." He admitted that he was previously jailed in Tagum for the crime of theft.[16]

Alexander Melicor testified that he left Mati at about 4:30 o'clock in the afternoon of April 5, 1972, bound for the Visayan Village in Tagum, to see a friend and former neighbor, Silvestre Millomeda, Jr., who is a capataz at the Hijo banana plantation, to apply for work. On board the bus, he met Artemio Boligao with whom he had previously done some construction work. They arrived at Tagum at about 7:30 o'clock in the evening and ate their supper in a carinderia near the Filipinas Theatre. While they were eating, "We have conversation I told him I will take him to the Visayan Village." After supper, he rode on a tricycle, together with Artemio Boligao, Luisito Arias and his companion, whom Melicor had met on the road while waiting for a tricycle and who "agreed with the driver that they will be delivered to Bonifacio Street, but we will first go to Visayan Village." They were only able to reach the corner of the road going to the interior because the driver would not enter the village. He and Boligao alighted, and "As we cross the road going to the other side, a panel arrived and there were persons who alighted and with their guns stopped us." He could recognize only one of them because the name "CUA" was placed in his uniform. They were pushed and ordered to board the panel and were brought to the municipal building. They were taken to a room where they were stripped and their sexual organs and underwear were examined. Afterwards, they were brought outside where he saw two young women and one stout woman. The stout woman struck Artemio Boligao with an umbrella. Then, "the police had the woman identify us" after which they were taken back to the investigation room where they were boxed. He asked the policeman: "What was my fault? Why was I boxed?" and the policeman answered: "For sure you were the one who committed the crime because one among you had been here already." The policeman was referring to Luisito Arias.[17]

Edilberto Ugay declared that he met Luisito Arias in the headquarters of the "KHIRO" in Mati on April 5, 1972. He and Arias left Mati for Kaligutan very early in the morning, maybe at about 4:00 o'clock. They ate their breakfast and lunch in the house of one Gorio Betica in Tagum. After lunch, he and Arias went to Davao City, to pay a visit to the members of the "KHIRO" in the house of Philip Verondo in Mapa Street. After the visit, they left for Kaligutan. They arrived in Tagum at about 4:00 o'clock in the afternoon. But, there was no more available transportation to Kaligutan. So he and Arias went to see a show. They were riding on a tricycle when they were apprehended. A policeman pointed a gun at him and Arias and then they were searched. However, the policemen were not able to get anything from them. They were then ordered to board the truck and brought to the municipal building where they "were made to undress, to take off everything, and our underwears were examined in the light. I don't know what was their purpose, and they even examined our organs." Later, their clothes were returned to them and they were brought to the office of the chief of police where they were questioned. He was asked why he was in Tagum and he answered that he and Luisito Arias were going to Kaligutan but had missed their bus. He was asked other questions but he cannot remember them anymore "because at that time I was afraid because of the fact that we were apprehended without any cause." After the questioning, they "were ordered to get out of the room of the Chief of Police and when we went out, there was a woman who started hitting us." He did not do anything. The policemen, however, advised the woman to stop hitting him. Then, "the police told the women to identify us, whether we were the very persons who committed the crime," but "the women did not say anything. They did not talk." So, "the policeman told the woman, 'Alright, you point at them. Anyway, one of them, Luisito Arias, has been convicted and imprisoned here. He is already notorious.'" "What happened next is that, that woman (Witness pointing to the mother of the complaining witnesses) told her daughters, 'You tell them that they were the very persons who committed the crime,' I don't forget that woman. (Witness pointing to the woman inside the courtroom who gave her name as Lydia Buli)." They were then brought back to the office of the chief of police and "later on we were again ordered to get out, that was the time the two women identified us." [18]

The trial court, however, rejected the defendants' claim, saying that the defense, which is really that of an alibi, is unavailing against the positive identification of the accused, as the perpetrators of the crime, made by the prosecution witnesses who have no motive to testify falsely against the accused. But, the trial court found that the offense committed was not robbery in band since one of the accused was holding a wire cutter when he was arrested and a wire cutter is not a weapon. The dispositive portion of the decision reads, as follows:

"In the light of all the foregoing, the Court finds Luisito Arias, Edilberto Ugay, and Artemio Boligao guilty beyond any reasonable doubt of the crime of robbery with rape, with the aggravating circumstances of nighttime, that the crime was committed in the dwelling of the offended parties and with abuse of super strength, for which they are hereby sentenced to the supreme penalty of death by electrocution; while accused Alexander Melicor is found guilty of robbery in an inhabited house for which he is hereby sentenced to an indeterminate prison term of ten (10) years of prison mayor, as minimum, and seventeen (17) years of reclusion temporal, as maximum. Arias and Ugay shall indemnify their rape victim Gloria Buli in the amount of P5,000.00, in the concept of moral damages, while Ugay and Boligao shall indemnify their rape victim Herminia Buli the amount of P5,000.00, in the concept of moral damages. All the four accused, jointly and severally, shall indemnify the robbery victims in the amount of P485.00, the value of the stolen properties, and shall suffer all the accessory penalties of the law, and pay the costs."

The accused, Alexander Melicor, appealed but subsequently withdrew his appeal,[19] so that the judgment is final insofar as he is concerned.

It is now contended that the trial court erred in finding that the accused were positively identified as the perpetrators of the crime; and in imposing the death penalty upon the accused Luisito Arias, Edilberto Ugay and

Artemio Boligao.

It is argued that the witnesses for the prosecution could not have identified the accused as the culprits because the light inside the house, consisting of three (3) petroleum lamps with small wicks, two of which were placed in the kitchen and one in the bedroom, was inadequate to afford identification of the accused, and besides, the witnesses were under the grasp of fear and were lying on the floor, face downwards, with their hands tied behind their backs.

We find no evidence to support their claim. While the illumination in the house consisted of three petroleum lamps, the witnesses for the prosecution categorically stated that the light was bright enough for them to see the faces of the accused.[20] Besides, it appears that the robbers stayed in the house for about two hours,[21] so that there was ample time for them to see and observe the features of the accused, even if the light may be said to be meager.

The claim that the witnesses were under the grasp of fear, so that they could not have recognized the accused as the robbers, is belied by the immediate and spontaneous identification made by Gloria and Herminia Buli, as well as Victor Cincoñique. As a matter of fact, Victor Cincoñique pointed to the accused as the robbers when they were apprehended near the Visayan Village. While the witnesses may have entertained fear, there is no evidence that the fear was of such a magnitude as to produce hysteria for the witnesses to lose their senses. It is true that their hands were tied behind their backs and were lying on the floor, face downwards, and their mouths covered with a piece of cloth, but the hands of Gloria and Herminia Buli were tied only after they had been abused and a few minutes before the robbers left, and Victor Cincoñique declared that about an hour elapsed from the time the robbers entered the house up to the time his hands were tied.[22] During such time, they could have overcome their initial panic, if any.

The accused also claim that the witnesses for the prosecution could have made a mistake in identifying them because Pat. Carlos Cua, the policeman who apprehended the accused had committed a mistake in pointing to Melicor as Ugay, notwithstanding the fact that the jail, where the accused had been detained for some time, is adjacent to the police headquarters. The pertinent portion of the testimony of Pat. Cua referred to, reads, as follows:

"Q If that Ugay is also here in the courtroom, will you point to him?

A (Witness pointing to a person who when asked gave his name as Edilberto Ugay.)

ATTY. SATOR:

We would like to make of record that the witness pointed to a person in blue shirt, who is Melicor.

ATTY. EDIG:

We want to make of record, Your Honor, that the witness instantly corrected his answer."[23]

But, it would appear that the error was immediately corrected and is not of such a degree as to destroy the credibility of the witness. Besides, the fact that Pat. Cua had committed the error in pointing to Melicor as Ugay is not sufficient to render incredible the testimony of the other witnesses whose credibility have been proven and accepted.

The accused also make capital of the fact that the witnesses for the prosecution were not unanimous in their

declarations as to who among the accused carried a gun. Indeed, Filemon Cordova declared that Ugay pointed a gun at him when Ugay barged into his copra dryer and demanded for his money, and Victor Cincoñique stated that Artemio Boligao was holding a gun when the robbers entered the house, while Gloria Buli testified that Luisito Arias had threatened her with a gun when she was raped. Aside from this, Pat. Carlos Cua said that Alexander Melicor had thrown a gun to the swamps. But, it should be noted that the gun was held by a different person at a different time and no two persons were alleged to have held the gun at one given time. It is possible that the gun changed hands during the different stages of the incident, so the non-unanimity in the declaration of the witnesses in this regard cannot be considered an indication that they were not telling the truth, or that their version of the incident is improbable or impossible of belief.

Counsel for the accused also contend that there is not enough evidence to prove the participation of Alexander Melicor and Artemio Boligao in the commission of the crime for which they have been convicted since they were the least mentioned. Suffice it to state in this connection that Alexander Melicor had withdrawn his appeal, so that the judgment against him is already final. As for the accused Artemio Boligao, the evidence is sufficient to support his conviction. Victor Cincoñique declared that when the door was opened by Cipriano Buli, the robbers entered the house and the accused Artemio Boligao pointed a gun at him. His testimony reads as follows:

"Q When the door was already opened by Cipriano Buli, will you tell us what happened?

A The robbers went inside and a revolver was pointed to me.

Q Will you tell us if that person who pointed a revolver to you is in the court room? Can you point to him?

A He is the one. (Witness pointing to accused Artemio Boligao in Court.)"[24]

Herminia Buli stated that the accused Artemio Boligao was one of the robbers who raped her. She said:

"A Then another one came to me.

Q Now, who was that the other one, if that other fellow who approached you after Edilberto Ugay abused you, is in the court room? Will you point to him?

A That one, sir.

Q The one who abused you?

A Yes, sir. He is the one. (Witness pointing to a person who, when asked, answered as Artemio Boligao.)

Q What did Artemio Boligao do when he approached you?

A He took down his pants.

Q And after taking out his pants, what did he do?

A He came near me and raped me.

Q How did he rape you?

A He put me down flat on my back and placed himself on top of me and then raped me.

Q When he placed himself on top of you while you were lying down, what did he do?

A He inserted his penis into my vagina, sir."[25]

Filemon Cordova also identified Artemio Boligao as the robber who "used a knife in opening his mouth." His testimony reads, as follows:

"Q You said that Ugay was armed with a firearm, what about the other three companions of Ugay, did you see them bringing with them any weapons?

A They were bringing a hunting knife. (Witness pointing to the exhibit on the table.)

Q Now, I will show to you these exhibits for the prosecution, will you please examine these and tell us if these were the weapons they were bringing at the time?

A Those weapons were the ones used by the accused and this stainless knife is the one used in opening my mouth. (Witness demonstrating how the knife was used in pointing at his mouth.)

FISCAL:

Witness pointing, Your Honor, to Exhibit 'C'.

Q Now, please point to us who among these accused used this knife in pointing at your mouth?

A (Witness pointing to Artemio Boligao.)"[26]

There is, therefore, no doubt as to the criminal participation of the accused Artemio Boligao.

The accused also claim that they could not have committed the crime because they were examined soon after they were apprehended and no sign of ejaculation or blood marks or stains were found in their sexual organs and underwear. This claim, however, is not supported by evidence. On the other hand, Pat. Cua testified that they found blood stains or semen on the underwear of the accused. His testimony reads, as follows:

"Q And when you brought the accused to the police headquarters, did you not examine their underwears or pants?

A We examined.

Q Did you notice any semen or blood marks from their underwears or pants?

A Yes, sir."[27]

Counsel for the accused has disputed the veracity of this portion of the records, saying that his notes showed that Pat. Cua's answer was in the negative and attached to his brief the affidavit of Pat. Cua to that effect. The affidavit

of Pat. Cua, however, is not sufficient to offset the presumption that official duty has been regularly performed by the stenographer who took down notes of the proceedings because the affiant himself did not positively state that he had answered in the negative to the question of whether or not they saw semen or blood marks in the underwear of the accused. His declaration reads, as follows:

"4. That I hereby declare categorically that the truth of the matter is that we did not see any blood stain in the underwears of the accused at the time of its inspection at the investigation room of the Police Department at Tagum, Davao, otherwise the underwears would have been retained by our office which were not, and this is confirmed by the investigator who investigated the case in our department; However, I cannot remember whether the question propounded to me which is quoted above was in the negative or affirmative." (italics supplied)[28]

At any rate, the absence of blood stains or dried semen on the underwear of the accused is not conclusive proof that they were not the rapists, because their victims testified that the accused first removed their underwear before having sexual intercourse with them.[29] Besides, the absence of semen in the vaginal canal of the victim or in the underwear of the accused is not necessary in a prosecution for rape.[30]

The accused also claim that if they were the culprits they would not have chosen a route which would make them pass the PC barracks and the police check-point. The accused stated that if one comes from the Filipinas Theatre at the poblacion of Tagum and goes to Canocotan, where the crime was committed, one has to pass the police check-point located near the PC barracks, then the Visayan Village, and finally, Canocotan, in that order. And since the tricycle they were riding in came from the directions of the Filipinas Theatre going towards the Visayan Village when they were apprehended, they could not have been the robbers.

This contention is utterly devoid of merit. The accused could not have passed through the police check-point because the same was placed between the Visayan Village and the Filipinas Theatre. From Canocotan, where the crime was committed, to the Visayan Village, where the accused were arrested, there was no police check-point. The fact that the tricycle they were riding in was heading towards the Visayan Village from the direction of the poblacion of Tagum is not conclusive proof that the accused came from the poblacion of Tagum, passing through the police check-point, and going to the Visayan Village. It is possible that the accused had intended to go to the poblacion of Tagum after the commission of the crime, but had turned back when they realized that they had to pass through the "police check-point. It is also possible that they had to turn back in order to spend the rest of the night with their friends at the Visayan Village, instead of those in the poblacion of Tagum.

The defense interposed is one of alibi which is one of the weakest of defenses and easy to concoct. It may be credited only if established by convincing and satisfactory proof and it must be also clearly shown that it was physically impossible for the accused to be at the scene of the crime at the time of its commission. In the instant case, the accused were in the vicinity of the Filipinas Theatre, which is only seven kilometers away from Canocotan, so that, as the trial court had found, it was not physically impossible for them to be in Canocotan when the crime was committed. Besides, the testimony of the four accused are full of improbabilities as to merit credence. Thus, Artemio Boligao declared that he left Mati for Tagum to see one Baby Ruales, who lived in Sobrecarey Street, to ask for work. If this was so, why would he leave Mati at 4:00 o'clock in the afternoon to arrive at Tagum at a late hour? If he indeed had an appointment with the said Baby Ruales, he should have presented him to corroborate his testimony. And why would he abandon his original plan to see Ruales and go with his co-accused Alexander Melicor, who did not even know the name of the capataz of the banana plantation whom they were going to see at the Visayan Village?[31] Furthermore, when Pat. Cua asked him why he was in Tagum that night, Boligao answered that he was delivering a letter to a certain woman at Sobrecarey Street, but

that he could not produce said letter.[32]

Alexander Melicor testified that he left Mati to see his friend and former neighbor in Bohol, one Silvestre Millomeda, Jr., who was residing in the Visayan Village and is a capataz in the Hijo banana plantation, in order to ask for work. Considering the lateness of the hour, the claim is difficult to believe. Besides, the said Millomeda was not presented in court to corroborate Melicor's claim.

Arias and Ugay both declared that they were in Tagum that night because they missed their bus for Kaligutan. This statement, however, appears to be a mere concoction because Ugay declared that they left Mati very early in the morning. If their purpose was to go to Kaligutan, they could have reached their destination that day. But, Ugay stated that they ate their breakfast and lunch in the house of one Gorio Betica in Tagum and then went to Davao City after lunch to visit their friends in the house of one Philip Verondo, returning to Tagum only at about 4:00 o'clock in the afternoon.

Arias also stated that he and Ugay went to see a movie at the Filipinas Theatre. However, Arias could not even name the title of the movie when asked.[33] Arias further stated that after seeing the movie, he and Ugay waited for a tricycle, intending to go back to the house of Gorio Betica in Bonifacio Street in the poblacion of Tagum where he and Ugay decided to spend the rest of the night, but were forced to ride with Boligao and Melicor to the Visayan Village because they could not find any vehicle which would take them to their destination, and the driver of the tricycle had agreed to take them to their destination provided that he would take Boligao and Melicor to the Visayan Village first. But, Bonifacio Street and the Visayan Village lie in opposite directions, and the distance from the Filipinas Theatre to the Visayan Village is one and a half (1-1/2) kilometers. Arias' claim, therefore, is difficult to believe. Besides, this claim of Arias is contradicted by Alexander Melicor who testified that Arias and Ugay rode with them to the Visayan Village because Arias wanted to find out where Melicor was staying so that Arias could visit him there. His testimony reads as follows:

"Q What did he tell you in the pedicab?

A He said that he will just as well go with me to the place where I am going so that he will know where I am staying and then they will go to his place." [34]

The complainants are very young and innocent girls. They certainly would not tell a story of sexual violation, allow the examination of their private parts and thereafter subject themselves to a public trial, if they were not motivated by an honest desire to have the offenders apprehended and punished.

Finally, counsel for the accused contends that the trial court erred in imposing the death penalty upon Luisito Arias, Edilberto Ugay, and Artemio Boligao. Counsel for the accused argues that the penalty to be imposed should be that provided for in Article 294 of the Revised Penal Code, and not that prescribed in Article 335 of the same Code.

The contention is without merit. The Court has already ruled that where robbery with rape is committed, but the rape is qualified by the use of a deadly weapon, or is committed by two persons, the law to apply is Article 335 and not Article 294 of the Revised Penal Code. In the case of *People vs. Obtinalia*, [35] the Court said:

"The accused challenge the correctness of the lower court's judgment sentencing each of them to the penalty of death. It is claimed that having been accused of the crime of robbery in band with rape, which is penalized by reclusion temporal in its medium period to reclusion perpetua by Article 294 (2) of the Revised Penal Code, they cannot be sentenced to the penalty provided for under Article 335 of the same Code, as amended by

Republic Act No. 4111.

"There is no merit in the contention. As pointed out by the trial court, if a rape alone, when committed by two or more persons, is penalized with death, it would be highly illogical and irrational to hold that when such rape is committed with the addition of a robbery, the offense should only be punishable with life imprisonment. Thus the reclusion perpetua prescribed by Article 294 (2) of the Revised Penal Code, for robbery with rape, must be understood as limited to cases where there is a single rapist, and that in those cases where the rape on occasion of the robbery is committed by two or more persons, the death provided by Republic Act No. 4111 must apply. All the more so because the crime was committed with the aggravating circumstances of its being perpetrated in the dwelling of the complainant victims, and with the attendant ignominy, since the rapes were done in the presence of the women's husband."

The crime committed in this case is robbery accompanied by qualified rape since the rapes were perpetrated with the use of deadly weapons and by two men, and attended by the aggravating circumstances of nocturnity, dwelling, and abuse of superior strength. It results that the penalty imposed upon the said accused is correct.

WHEREFORE, the judgment should be, as it is hereby affirmed. With proportionate costs against the accused.

SO ORDERED.

Makasiar, Concepcion, Jr., Fernandez, Guerrero, Abad Santos, De Castro, and Melencio-Herrera, JJ., concur.

Fernando, C.J., concurs with the dissenting opinion of Justice Aquino conformably to the view expressed by him in *People v. Carandang* (L-31012, Aug. 15, 1973, 52 SCRA 259). Article 294 (b) of the Revised Penal Code before its amendment should apply. With the necessary ten votes for the imposition of death penalty lacking, the accused-appellants are sentenced to suffer reclusion perpetua.

Teehankee, J., concur in line with his separate opinion in *People vs. Carandang*, 52 SCRA 259, 272..

Barredo, J., concur, but he hold that the number of death penalties should be in line with the case of *Jayme Jose et al.*, indeed, this view may be deemed as a dissent.

Aquino, J., see dissent.

[1] t.s.n. of July 15, 1974, pp. 3-4.

[2] t.s.n. of March 2, 1973, pp. 4-7.

[3] t.s.n. of July 20, 1973, p. 11; t.s.n. of March 26, 1974, p. 11.

[4] t.s.n. of March 26, 1974, pp. 4-12.

[5] t.s.n. of July 20, 1973, pp. 8-13.

[6] t.s.n. of March 26, 1974, pp. 26-28.

[7] t.s.n. of July 15, 1974, p. 16.

[8] t.s.n. of March 2, 1973, p. 7; t.s.n. of July 20, 1973, pp. 13-14; t. s n. of March 26, 1974, p. 27.

[9] t.s.n. of March 2, 1973, p. 8.

[10] t.s.n. of March 1, 1973, pp. 5-8.

- [11] t.s.n. of March 2, 1973, pp. 9-10.
- [12] t.s.n. of March 1, 1973, p. 8.
- [13] t.s.n. of March 2, 1973, p. 10.
- [14] t.s.n. of March 1, 1973, p. 12.
- [15] t.s.n. of Sept. 4, 1974, pp. 4-25.
- [16] Id., pp. 26-40.
- [17] t.s.n. of Sept. 13, 1974, pp. 4-19.
- [18] Id., pp. 21-37.
- [19] Rollo, p. 128.
- [20] t.s.n. of March 26, 1974, p. 10; t.s.n. of July 15, 1974, p. 13.
- [21] t.s.n. of March 2, 1973, p. 14.
- [22] Id.
- [23] t.s.n. of March 1, 1973, p. 6.
- [24] t.s.n. of March 2, 1973, p. 5.
- [25] t.s.n. of July 20, 1973, pp. 9-10.
- [26] t.s.n. of July 15, 1974, p. 6.
- [27] t.s.n. of March 1, 1973, p. 19.
- [28] Rollo, p. 96.
- [29] t.s.n. of July 20, 1973, pp. 9-10; t.s.n. of March 26, 1974, pp. 7-8.
- [30] People vs. Carandang, L-31012, Aug. 15, 1973, 52 SCRA 259.
- [31] t.s.n. of Sept. 4, 1974, p. 21.
- [32] t.s.n. of March 1, 1973, p. 13.
- [33] Id.
- [34] t.s.n. of Sept. 13, 1974, p. 18.
- [35] G.R. No. L-30190, April 30, 1971; 38 SCRA 651.

DISSENTING OPINION

AQUINO, J.:

I dissent for reasons stated in my dissents in L-36504, People vs. Jose Yparraguirre and L-38548, People vs. Paulino Mabag.

The crime committed by the accused was robbery with rape, a crime against property, which can be prosecuted de

oficio being a public crime. The penalty to be imposed on the accused is reclusion perpetua, as provided for in article 294(b) of the Revised Penal Code before it was amended by Presidential Decree No. 767 which took effect on August 15, 1975 and which increased the penalty for robbery with rape to reclusion perpetua to death if the rape is committed with the use of a deadly weapon or by two or more persons. See *People vs. Olden*, L-27570-71, September 20, 1972, 47 SCRA 45.

We cannot impose on the accused the death penalty because that penalty is imposed by article 335 of the Revised Penal Code on rape, a private crime against chastity which cannot be prosecuted de officio.

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