

**THE PEOPLE OF THE PHILIP-PINES, PLAINTIFF-APPELLEE, VS.
RODOLFO CABILING AND ROB-ERTO LOPEZ,
DEFENDANTS-APPELLANTS.**

G.R. No. L-38091. December 17, 1976

Ponente: ANTONIO, J.

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ANTONIO, J.:

Automatic review of the judgment of the Circuit Criminal Court in Criminal Case No. CCC-VII--1332-Q.C., imposing upon appellant Rodolfo Cabling the penalty of death for the murder of Guido Fermin, and appeal of the same judgment insofar as it im-posed upon Roberto Lopez the penalty of from eight (8) years and one (1) day of prision mayor as mini-mum, to seventeen (17) years and four (4) months of reclusion temporal as maximum. Both appellants were likewise ordered to indemnify the heirs of the victim in the amount of P12,000.00, to pay P10,000.00 as moral damages, P10,000.00 as exemplary damages, and their proportionate shares of the costs. The following are the pertinent facts:

On April 28, 1973, the Assistant City Fiscal of Quezon City filed an Information for Murder against appellants Rodolfo Cabling and Roberto Lopez (alias Betty Lopez) and one John Doe, alleg-ing:

"That on or about the 11th day of December 1972 in Quezon City, Philippines, the above-named accused, conspiring together, confederating with and mutually helping one another, did, then and there, wilfully, unlawfully and feloniously, with intent to kill, qualified by evident premedita-tion and treachery and taking advantage of super-ior strength, attack, assault and employ personal violence upon the person of GUIDO FERMIN by then and there hitting him several times with a lead pipe on the head and inflicting upon said Guido Fermin serious and mortal injuries which were the direct and immediate cause of his death to the damage and prejudice of his heirs in such amount as may be awarded under the Civil Code."

Upon arraignment, defendants-appellants plead-ed "not guilty" and trial was accordingly had.

Benjamin Juliano, 21 years of age, resident of Jaen, Nueva Ecija, testified that on December 10, 1972, he and his companions, namely the driver of the truck --- the deceased Guido Fermin, Restituto Surbito, Danilo Sulit and their employer, one Mr. Ramos, left Jaen, Nueva Ecija to deliver a truck-load of rice in Manila. As they were about to enter Balintawak, Quezon City, their truck broke down due to a mechanical defect. Guido Fermin parked the truck on the shoulder of the North Diversion Road, just beyond the toll gates, after which Mr. Ramos left them to buy the necessary spare parts. No spare parts were, however, available as the stores were closed as it was Sunday. In the meantime, he and his companions spent the night in the truck. Shortly after noon of the following day, while he was seated on the driver's seat and his comrades were asleep, or resting on top of the sacks of rice, three men approached their truck. For no reason at all, one of the three men, whom he later identified as appellant Rodolfo Cabling, suddenly lunged at him and attempted to stab him with a knife. After he succeeded in parrying the thrusts, he slid down right side of the truck and ran away in order to summon help. In the ensuing melee, Guido Fermin woke up and alighted from the truck. He was immediately attacked by the two other men. One of them, wielding a lead pipe about two feet long,[1] start-ed hitting Guido on the head with the pipe. He identified

appellant Roberto Lopez as the one who clubbed Guido Fermin with the pipe.

From a distance, he saw Cabiling return to the place where his two other companions were and he also hit Guido Fermin. When a policeman arrived at the scene in answer to his outcries for help, the three ran away pursued by the policeman.

Restituto Surbito, 30 years of age, a resident of Jaen, Nueva Ecija, also testified that he was inside their truck at around 1:45 p.m. on December 11, 1972, when his companion, Danilo Sulit, woke him up. Sulit told him somebody was making trouble. Upon waking up, he saw a policeman chasing three men. At that juncture, he also noticed the driver already in a serious condition, hence, they had to bring him to the hospital in a car.

A few days after the incident, Benjamin Juliano had occasion to go to the market at Clover Leaf, Balintawak, Quezon City, and there he saw the man who clubbed Guido Fermin on the head with a lead pipe. He made inquiries at the market place and found out that his name is Roberto Lopez. He reported the matter to the police and his statement was taken down.[2] Earlier, or on December 15, 1972, he had given a statement to the police narrating the incident leading to the death of Guido Fermin.[3] At the time his supplemental statement was being taken, the police showed him pictures of several persons and from among them he picked out the picture of the accused Rodolfo Cabiling, whom he pointed to as the one who tried to stab him several times.[4] Rodolfo Cabiling was thus arrested by Pat. Cuenca. Roberto Lopez, on the other hand, upon being informed that he was implicated in the killing of Guido Fermin, voluntarily surrendered himself to the authorities.

At the trial, the prosecution presented in evidence the Necropsy Report,[5] prepared by Dr. Alberto M. Reyes, Medico-Legal Officer of the National Bureau of Investigation. In his testimony, Dr. Reyes stated that Guido Fermin died upon arrival at the National Orthopedic Hospital. His post-mortem examination of the deceased showed the presence of lacerated wounds and contused abrasions on the different parts of the body, thus:

"POSTMORTEM FINDINGS

Cyanosis, lips and nailbeds.

Blood coming out of nostrils and mouth.

Contused Abrasions: scalp, parieto-occipital region, right side, 10.0 x 8.0 cms.; back, right side, 36.0 x 16 cms.; elbow, right, antero-lateral aspect, 8.0 x 1.0 cm.; leg, left, upper third, posterior aspect, 12.0 x 5.0 cms.; foot, left, medial aspect, 12.0 x 9.0 cms.; foot, left, lateral aspect, 22.0 x 6.0 cms.

Wounds, lacerated, sutured: scalp, parieto-occipital region, right side, 6.0 cms.; leg, right, upper third, antero-lateral aspect, 19.0 cms.; leg, left, lower third, antero-medial aspect, 2.0 cms.

Hematoma, scalp, temporo-parieto-occipital region, right side.

Fractures: depressed, comminuted, skull, right, parieto-occipital bone, with linear extensions to the temporal bone, right, floor of the middle cranial fossa, bilateral, and posterior cranial fossa, right: compound, complete, comminuted, tibia and fibula, right, upper third; complete, simple, fibula, right, lower third; compound, complete, tibia and fibula, left, lower third.

Hemorrhages, meningeal, subdural and subarachnoidal, generalized.

Brain and other visceral organs congested.

Heart, small amount of dark clotted and fluid blood.

Stomach, one-half filled with partly digested rice and other food particles."

He attributed the death of the victim to: "Hemorrhages, intracranial, severe, secondary to traumatic injuries on the head."

On the part of the defense, appellant Rodolfo Cabiling, 20 years of age, resident of Sampaloc, Manila, testified that at around 1:00 o'clock in the afternoon of December 11, 1972, while he and his two companions – one "Boy Bicol" and a certain "Joe" -- were walking along the North Diversion Road towards the direction of Balintawak, intending to bring "Boy Bicol" home because he was drunk, the latter suddenly collided with a man who was running towards a parked truck. Upon noticing that the man was visibly irked by the physical collision, Cabi-ling apologized for "Boy Bicol". The man, however, retorted: "Iinom-inom kayo bago hindi naman kaya." This angered "Boy Bicol" and as he tried to hit the other man, Cabiling pushed "Boy Bicol" towards the wire fence. The other man then ran inside the truck and came out armed with a "buriki".[6] As the man went after "Boy Bicol", Cabiling ran behind the wire fence. The man and "Boy Bicol" confronted each other and when the former lunged at the latter, the two grappled for the possession of the "buriki". Cabiling, upon seeing another man coming down from the front left door of the truck, approached the man and tried to stab him several times, but this man was able to parry his attacks. Thereafter, the man returned to the truck. When he saw the other occupants come down from the vehicle, he ran away.

For his part, appellant Roberto Lopez alleged that on the day of the incident, at about 1:00 o'clock in the afternoon, he was at his residence at No. 19-C Balintawak, Quezon City. He denied ha-ving participated in the killing of Guido Fermin.

Pat. Ricardo Manuel, of the Caloocan City Po-lice, resident of 44 G. de Jesus, Caloocan City, testified that in the afternoon in question, while he was in the house of his elder brother in Progreso St., Bagong Bayan, Quezon City taking a bath, he heard a gun report coming from the direction of the North Diversion Road. At that moment, he saw three policemen, one of whom, he recalled, was Pat. Amparo of the Quezon City Police, chasing three (3) sus-pects. Upon seeing this, he joined the pursuers. He stated that he recognized only one of those three suspects. This man he identified as appellant Rodolfo Cabiling. He also declared that he did not see appellant Roberto Lopez on that occasion. On cross-examination, however, he admitted that Roberto Lopez is his neighbor, being the son of a policeman of Quezon City. He also admitted that he never gave any statement before any police authority in connection with the case, although he promised Det. Bijasa who was investigating the case that he will help him and that he testified not in response to any subpoena, but in compliance with the request of the father of the appellant who is also his neighbor. On re-direct, he mentioned that only two policemen chased the three suspects.

Another witness, Bernardo Romero, a barber, of Balong Bato, Quezon City, testified that when he went to fetch water at about 12:00 o'clock in the afternoon of the day in question, he saw Roberto Lopez. The latter was near his house, selling ice candy and arranging the queue of those who were get-ting water from his artesian well. He alleged that Lopez remained in that area for about two (2) hours. He also declared that he approached the defense counsel and volunteered to be a witness. Rodolfo Cabiling likewise stated that Roberto Lopez was not one of his companions at the time of the incident in question.

On the basis of the afore-mentioned evidence, the court a quo rendered the afore-mentioned judg-ment of conviction, stating that:

"The defense of denial and alibi made by the accused Roberto Lopez cannot be given much weight because admittedly being in his house which is near the North Diversion Road, the scene of the crime, he had all the chances within which to perpetrate the crime imputed to him by reason of geographical proximity. The trustworthiness of his corroborative witnesses cannot also be given much consideration, because admittedly, they are close friends of the accused Roberto Lopez and as such, it is expected that their testimonies would be

self-serving in a desperate effort to salvage a friend who is in trouble.

"On the part of the accused Rodolfo Cabiling, his testimony which was uncorroborated can-not be given much probative value it being self-serving to evade criminal liability."

The court a quo further found that:

"The killing of Guido Fermin was qualified by the circumstance of treachery. The deceased was sleeping at the time when the two accused and their unidentified companion approached the park-ed truck. He was awakened and when he alighted from the truck the accused Roberto Lopez struck him with a lead pipe. He was unarmed and defense-less at the time and he posed no resistance or danger to his killers.

"The fact that the accused and their companion used their combined strength in hitting and killing the victim convinced the Court that the crime was aggravated by the circumstance of abuse of superior strength."

Accordingly, the afore-stated penalties were imposed upon Rodolfo Cabiling and Roberto Lopez, the court appreciating, in favor of the latter, the mitigating circumstances of minority and voluntary surrender. Hence, the instant appeal. After the two appellants and the Solicitor General, in behalf of the People of the Philippines, had filed their respective briefs, and after this appeal had been submitted for decision, appellant Roberto Lopez, on October 30, 1976, filed a Motion for Withdrawal of Appeal.

I

Appellant Cabiling claims that there are inconsistencies in the statement of Benjamin Juliano in his affidavit of December 15, 1972,[7] his direct testimony and his testimony on cross-examination which render the testimony unworthy of credit. Thus, appellant claims that Juliano stated in his affida-vit,[8] as well as in his direct testimony, that appellant Cabiling, after attempting to stab him, ran away. It is contended that this is inconsistent with his testimony in court, when he declared that after Cabiling failed to stab him he jumped out of the truck, while Cabiling went to the side of the truck to join his two companions who were attacking the driver.

From a careful consideration of the affida-vit[9] and his testimony in court, We find no such inconsistency. The pertinent portion of Juliano's affidavit reads as follows: "When the three men had already approached us, one of them suddenly stabbed me repeatedly. I kept on parrying the thrusts, until Fermin woke up. When Fermin was about to alight from the truck, I saw the other two men approach Fermin and I saw that the other one was holding a lead pipe. I saw that they repeated-ly struck Fermin on the head with the lead pipe and afterwards, they ran away. When the three men had already left, a policeman happened to pass by." It is true that in the beginning of his testimony on direct examination, in answer to the question: "Was he able to hit you with the knife?", Juliano answer-ed: "The one who was stabbing was not able to stab me and he ran away.", but this statement must not be considered in isolation but in relation to the rest of his entire testimony. Thus, he subsequent-ly declared that after eluding the stabbing thrusts of Cabiling, he went down the left side of the truck, ran a few meters and shouted for help. Cabi-ling in turn went to the side of the truck to join his two companions who were attacking the driver, Guido Fermin. Thus, on cross-examination, he stated the following: "Q. You testified after that when you were able to get out from the truck this Cabiling ran away. Is that correct? A. That is it. He went to our driver." The contradictions pointed out by appellants do not affect the essential facts and they are such inconsistencies as may be committed by honest witnesses regarding unimportant details. They refer to minor matters which could be attribu-ted to defects in the translation of either the question or the answer of the witness, if not to confusion engendered by long cross-examination and his lack of experience as a witness. It has been noted that in view "of the lapse of time and different capacities for observation, the witnesses cannot be expected to recall with accuracy or uniformity matters connected to the main overt acts." [10] The stubborn fact that can be drawn from a careful con-sideration of Juliano's testimony is his certainty and conviction that the two appellants are the authors of the

cold-blooded death of Guido Fermin.

II

Neither are We impressed by appellant Lopez's alibi and claims of innocence. Benjamin Juliano clearly and positively identified Lopez as the person who clubbed the deceased with a lead pipe.[11] Obviously, Juliano had no motive to testify falsely and impute to appellant Lopez the commission of a serious crime. Neither he nor Lopez knew the other prior to the date of the incident. As a matter of fact, Juliano only learned of appellant's name when, upon seeing him some days later at the market near the Clover Leaf highway at Balintawak, and recognizing him to be the assailant of the deceased, he inquired from the people in that place appellant's name and address. It was only then that Juliano learned that the name of appellant is Roberto Lopez alias Betty Lopez, as well as his residence at Bagong Barrio, Cal-oocan City. The circumstance that he saw appellant for the second time and recognized him as the one who clubbed the deceased is confirmed by the fact that he executed a statement to that effect before Det. Rey S. Bijasa, of the Detective Bureau, Quezon City Police at 6:00 p.m. on January 16, 1973,[12] which statement he affirmed under oath before the City Fiscal of Quezon City on March 12, 1973.

In the absence of any reason or motive why a witness for the prosecution should testify falsely, the logical conclusion is that there is no such improper motive, and consequently, the testimony of such witness should be accorded full faith and credit.[13] There is no cogent and sound reason to doubt Juliano's identification of appellant Lopez. The crime was committed in broad daylight at 1:45 o'clock in the afternoon. It is not disputed that Juliano was present when the crime was committed. His promptness in informing the police on January 16, 1973 of the name of the afore-mentioned appellant immediately after he learned of it demonstrates his candor and sincerity. It will also be noted that the trial court has observed that Juliano " * * * stuck to the substance of his direct testimony, he has withstood the rigors of an intense and thorough cross-examination made by defense counsels. He has shown sincerity in his testimony. It is highly improbable for him to falsely testify against the interest of the two accused * * * considering that before the commission of the crime he is a total stranger to the accused." The rule is well-settled that when the issue involves credibility of witnesses, appellate courts will not generally disturb the findings of the trial court, as the latter is in a better position to decide the question, having seen and heard the witnesses themselves, and observed their behavior and manner of testifying. The exception is when it is shown that the trial court has overlooked certain facts of substance and value that, if considered, might affect the result of the case.[14] We find no ground to disturb such findings. Appellant Lopez having been positively identified by the prosecution witness as the person who clubbed the victim, his alibi is worthless. It has been repeatedly held that the defense of denial and alibi could not prevail over the positive identification of an accused by the prosecution witnesses as the author of the crime. This rule is well-settled.[15]

Apart from the foregoing, for an alibi to prosper, it is not enough to prove that the accused was somewhere else when the crime was committed but he must also clearly demonstrate that it was physically impossible for him to have been at the scene of the crime at the time it was committed.[16] According to the trial court, the house of appellant Lopez is situated near the North Diversion Road near the scene of the crime. It was not, therefore, impossible for Lopez to have left his house that afternoon, participated in the commission of the crime, and returned to his abode to evade arrest when they were pursued by the police.

It is true that Pat. Ricardo Manuel of the Caloocan City Police Department, in testifying for the defense, stated that he did not see appellant among the three men whom they were pursuing. It must be noted, however, that this witness conceded that he did not recognize two of the suspects they were pursuing. Assuming that he was telling the truth, it is possible that at the time he joined in the chase, appellant was already too far away for him to be able to recognize. At any rate, Pat. Manuel does not appear to be an impartial or disinterested witness. Roberto Lopez

is the son of Pat. Elinio Lopez of the Quezon City Police Department, a neighbor and an acquaintance of Pat. Manuel. His interest in testifying favorably for said appellant could have been motivated by a spirit of camaraderie or neighborliness. This is manifest from the fact that, although he was not subpoenaed, he voluntarily appeared as a witness for said appellant. This he did, according to the findings of the court a quo, without notifying the Chief of Police or his immediate superior in the police department, in violation of existing regulations.[17] Indeed, if it were true that he was one of the policemen who chased the three suspects, no explanations had been given why no official police report about the incident showing his participation had been submitted in evidence. Neither does it appear that he testified during the preliminary investigation of the case before the Assistant City Fiscal of Quezon City, nor has any police authority who had anything to do with the investigation of the crime been presented to corroborate his testimony. As a neighbor of appellant and one bound by fraternal ties to the father of said party, this witness was certainly interested in the exoneration of said accused. There is no question that the bias, interest or motive of a witness may affect his credibility and justify the court in disbelieving his testimony.

III

Having found that the two appellants have committed the aforesaid criminal overt acts, the next question to be resolved is the criminal responsibility of each of the appellants. Appellant Cabiling insists that he cannot be held responsible for the death of Guido Fermin since there is no evidence that he clubbed the deceased. It was sufficiently established by the evidence, however, that the three --- appellants Cabiling, Lopez and another companion --- approached the truck of the deceased together; that two of them were armed, Cabiling with a knife while Lopez had a lead pipe; that upon reaching the truck, appellant Cabiling, without the slightest provocation from the occupants of the truck, immediately attacked Benjamin Juliano, who was then seated in the driver's seat, by attempting to stab him several times with his knife, but which thrusts Juliano was fortunately able to parry, while his two companions, upon seeing the driver Guido Fermin, alight from the truck, went after said driver and attacked him, appellant Lopez hitting Fermin on the head with a lead pipe; that later, Cabiling went to the assistance of Lopez and when the police authorities arrived, the three ran away together.

These circumstances sufficiently indicate in their totality that the three acted pursuant to a common criminal design. Certainly, Cabiling's action in immediately attacking Juliano with a deadly weapon, without any immediate provocation from the latter, while Lopez clubbed the driver, Guido Fermin, with a lead pipe the moment he alighted from the truck, shows the existence of a previous understanding among them to kill the personnel of the truck. The time-honored rule is that direct proof is not essential to prove conspiracy. It may be shown by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished and from which may logically be inferred that there was a common design, understanding or agreement among the conspirators to commit the offense charged.[18] It is not essential that each conspirator shall take part in every act, or that one should know the exact part to be performed by the other conspirator in the execution of the conspiracy. Conspiracy implies concert of design and not participation in every detail of execution.[19]

Thus, if it is proved that two or more persons aimed, by their acts, at the accomplishment of some unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and cooperative, indicating a closeness of personal association and a concurrence of sentiments, conspiracy may be inferred although no actual meeting between them to conspire is proved,[20] for the prosecution need not establish that all the parties thereto agreed to every detail in the execution of the crime or that they were actually together at all stages of the conspiracy. It is enough that from the individual acts of each accused, it may be reasonably deduced that they had a common plan to commit the felony.[21]

Conspiracy having been established, every one of the conspirators who took active part in its execution, such as Cabiling and Lopez, is, therefore, responsible for all of the acts of the others done in furtherance of the common design.[22]

Appellants assign as error the trial court's application of the qualifying circumstance of treachery and the aggravating circumstance of abuse of superior strength. It is argued that the driver could not have been unaware of the danger because the fact that he alighted from the truck as a consequence of the struggle between Cabiling and Julia-no indicates that he was alerted to the danger and was then moving away to ensure his own safety. We find such observations tenable.

There is treachery when the offender commits any of the crimes against persons, employing means, methods or forms in the execution thereof which tend directly and especially to insure its execution, without risk to himself arising from the defense which the offended party might make.[23] So it has been held that where the victim, upon stepping out-side her house, asked the accused: "What do you want of me?" and the latter, without saying anything, stabbed her mortally, the attack was held treacherous.[24] Similarly, where the victim was fetching some water from a container and the appellant suddenly gave him a blow with a bolo on the left side of the neck,[25] or where the victim and the accused were casually passing each other in the street, and the latter suddenly and unexpectedly stabbed the victim,[26] the attack was considered qualified by *alevosia*. In a case where the victim was awakened when the accused asked him: "Are you Tasio?" and this was followed by a thrust at the victim's abdomen, the assault was held treacherous. The Court ruled that: "Even if the deceased was already awake when the aggression commenced, and even if there was light, it is nevertheless true that Hichon (the victim) was down on his back, still drowsy, and unarmed. He was unaware of the defendant's intention; the blows were delivered of a sudden and without warning." [27] And in *People v. Jumdatal*, [28] where Jumdatal suddenly hacked Hadji-rol with his barong when they met in the trail, the Court held that sudden attack without the slightest provocation on the part of the victim constitutes treachery.

The doctrine deducible from the cases is that if the slayer makes a sudden and unexpected attack with a deadly weapon on an unarmed and unsuspecting victim under conditions which make it impossible for the party attacked to flee or make defense before the fatal blow is delivered, the criminal overt act has been considered as qualified with treachery.[29]

It must be recalled, however, that the deceased Guido Fermin alighted from the truck precisely because he saw his companion being attacked. At the time he went out of the truck, he was not unprepared as he must have sensed the impending danger they were in. The circumstance that the deceased sustained multiple injuries which were found on various parts of his body, such as lacerated wounds on the head and injuries on the legs, may indicate that there was some kind of a struggle between the victim and his aggressors. The circumstance that at the time he was attacked he was unarmed does not necessarily mean that he posed no resistance to his assailants. Besides, mere suddenness of an attack is not enough to constitute the qualifying circumstance of treachery where it does not appear that the accused had consciously chosen the method of attack directly and specially to facilitate the perpetration of the homicide without risk to himself arising from the defense that the victim might offer.[30] As indicated in *People v. Tumaob*: [31] "The qualifying circumstance of treachery can not logically be appreciated because the accused did not make any preparation to kill the deceased in such a manner as to insure the commission of the crime or to make it impossible or hard for the person attacked to defend himself or retaliate. This circumstance can only be applied, according to the tenor of article 13, sub-section 16 of the Revised Penal Code, when the culprit employs means, methods or forms of execution which tend directly and specially to insure the commission of the crime and at the same time to eliminate or diminish the risk to his own person from a defense which the other party might offer." [32]

It is not clear from the evidence of record that the appellants reflected on the means, method and form of killing the offended party.[33]

Finally, it is necessary to resolve whether or not the trial court erred in applying the aggravating circumstance of abuse of superior strength. Upon the question of whether the circumstance that two or more persons attack a single person is of itself sufficient to show a superiority of strength within the context of the penal law, no fixed and invariable rule can be established. Thus, the mere fact that the two accused may have inflicted fatal wounds on the deceased with their respective bolos does not justify a finding that advantage was taken of superior strength in the absence of proof showing that they cooperated in such a way as to secure advantage from their superiority of strength.[34] In the Lasada case,[35] where four men, three of whom were armed with clubs or sticks and the other one with a bolo or knife, simultaneously attacked an unarmed victim, the attack was considered aggravated by the circumstance of abuse of superiority. Upon the other hand, in the Bustos case,[36] where the two accused (Bustos and Macaspac) on meeting the victim pursued him until they overtook him, inflicted several wounds upon him as a result of which he died, the Court held that the mere fact that there were two aggressors cannot constitute per se abuse of superior strength in the absence of evidence in the record of the relative physical strength of the aggressors and the assaulted party. To take advantage of superior strength means to purposely use excessive force out of proportion to the means of defense available to the person attacked.[37] According to Cuello Calon, it is: "Abuse of superior numbers or employment of means to weaken the defense' (art. 10, 8. a). This circumstance greatly resembles alevosia when placed in a situation of advantage over those on whom it is employed, such that one is confused for the other. This circumstance should always be considered whenever there is a notorious inequality of forces between the victim and the aggressor, assuming a situation of superiority of strength notoriously advantageous for the aggressor selected or taken advantage of by him in the commission of the crime. To properly appreciate it, not only is it necessary to evaluate the physical conditions of the protagonists or opposing forces and the arms or objects employed by both sides, but it is also necessary to analyze the incidents and episodes constituting the total development of the event. There is no need for previous agreement among the aggressors." [38] Thus, in *People v. Verzo*, [39] this Court held that there was abuse of superior strength which qualified the killing where three of the defendants were wielding bolos, whereas the victim was unarmed and trying to flee.

In the case at bar, the circumstance that the victim was unarmed and had just alighted from the truck when he was suddenly attacked and clubbed by two assailants, to be joined later in the attack by their companion who was also armed, shows that the three assailants took advantage of their physical superiority. It must be noted that the deceased sustained contused abrasions on the right side of the scalp, right elbow, left leg, left foot; lacerated wounds on the scalp, right and left leg; and fractures on different parts of the skull (right, parieto-occipital bone with linear extension to the temporal bone, right, floor of the middle cranial fossa, bilateral and posterior cranial fossa, right), as well as compound and comminuted fractures on the tibia and fibula, which show that the victim was struck by different kinds of weapons, indicating that two or more armed men participated in the attack.

In conclusion, We hold that herein appellants are criminally responsible for the crime of murder because of the attendance of the qualifying circumstance of abuse of superior strength. The penalty for the offense of murder is reclusion temporal in its maximum period to death. In the case of appellant Cabling, the same should be imposed in its medium period or reclusion perpetua, there being no aggravating or mitigating circumstances. Insofar as appellant Roberto Lopez is concerned, he is entitled to the privileged mitigating circumstance of minority,[40] and the ordinary mitigating circumstance of voluntary surrender.[41] Being a minor of about 17 years of age, the penalty next lower in degree than that prescribed by law shall be imposed, which in this case should be prision mayor in its maximum period to reclusion temporal in its medium period (10 years and 1 day to 17 years and 4 months). In view of the existence of the mitigating circumstance of voluntary surrender which is

not offset by any aggravating circumstance, he should be sentenced to suffer an indeterminate penalty of from SIX (6) YEARS of prision correccional as the minimum, to TEN (10) YEARS and ONE (1) DAY of prision mayor as maximum.

WHEREFORE, modified as above indicated, the decision appealed from is hereby affirmed.

Fernando, Barredo, Makasiar, Muñoz Palma, Aquino, Concepcion, Jr., and Martin, JJ., concur.

Castro, C.J., and Teehankee, J., in the result.

[1] Exhibit "C".

[2] Exhibit "E", Supplemental Sworn Statement of Benjamin Juliano, dated January 16, 1973, CCC Records, p. 121.

[3] Exhibit "D", CCC Records, p. 119.

[4] Exhibit "E", supra.

[5] Exhibit "A", supra, p. 116.

[6] A metal tube with a length of about nine (9) inches.

[7] Exhibit "D", supra.

[8] Ibid.

[9] Ibid.

[10] People v. Navea, 87 Phil. 1.

[11] T.s.n., pp. 71-72, 150-151, 153-154, Hrg. of Aug. 27, 1973.

[12] Exhibit "E", supra.

[13] People v. Dizon, 76 Phil. 265; People v. Gonzales, 76 Phil. 473, citing U. S. v. Pajarillo, 19 Phil. 288 and People v. De Otero, 51 Phil. 201; People v. Borbano, 76 Phil. 702; People v. Macalindong, 76 Phil. 719; People v. Corpus, 107 Phil. 44.

[14] People v. Curiano, 9 SCRA 323; People v. Alban, 1 SCRA 931; People v. Espejo, 36 SCRA 400.

[15] People v. Esmael, 37 SCRA 601; People v. Amit, 37 SCRA 793; People v. Mercado, 38 SCRA 168; People v. Bagasala, 39 SCRA 236; People v. Cornelio, 39 SCRA 435; People v. Cuaton, 40 SCRA 386; People v. Kipte, 42 SCRA 198; People v. Tanjalali Gajali, 46 SCRA 130; People v. Olden, 47 SCRA 45; People v. Herila, 51 SCRA 31; People v. Carandang, 52 SCRA 259; People v. Dorico, 54 SCRA 172; People v. Diaz, 55 SCRA 178; People v. Bongo, 55 SCRA 547; People v. De la Cruz, 56 SCRA 84; People v. Geno-guin, 56 SCRA 181; People v. Ybañez, Jr., 56 SCRA 210; People v. Cardenas, 56 SCRA 631; People v. Aquino, 57 SCRA 43; People v. Cortez, 57 SCRA 308; People v. Made-ra, 57 SCRA 349; People v. Abletes, 58 SCRA 241; People v. Salazar, 58 SCRA 467; People v. Sangalang, 58 SCRA 737; People v. Sudoy, 60 SCRA 174; People v. Tumulip, 60 SCRA 303; People v. Ancheta, 60 SCRA 333; People v. Caoile, 61 SCRA 73.

[16] People v. Esmael, supra; People v. Diaz, supra; People v. Turalba, 55 SCRA 697; People v. Baylon, 57 SCRA 114; People v. Cortez, supra.

[17] Rule III, Section 26 of Executive Order No. 113, p. 164, Original Records (CCC).

[18] *People v. Cabrera*, 43 Phil. 64; *People v. Carbonel*, 48 Phil. 868.

[19] 12 C.J.S. 545.

[20] *People v. Ambahang*, 108 Phil. 325.

[21] *People v. Catao*, 107 Phil. 861.

[22] *People v. Bersamin*, 88 Phil. 292.

[23] Article 14, Sub-section 16, Revised Penal Code.

[24] *United States v. Babasa*, 2 Phil. 102.

[25] *People v. Nargatan*, 48 Phil. 470, 472.

[26] *United States v. Virrey*, 37 Phil. 618, 627.

[27] *People v. Yadaon*, 82 Phil. 160, 163.

[28] 99 Phil. 220, 225.

[29] *People v. Pengzon*, 44 Phil. 224, 232. See also *People v. Dosal*, 92 Phil. 877.

"Requiere la alevosia empleo de determinados medios, mo-dos o formal en la ejecucion del delito para perpetrar-lo sin riesgo o peligro que proceda de la defensa del ofendido. Son estos expresion de una mayor perversidad y por consiguiente de una culpabilidad mas grave. En-tre ellos se admite el acometimiento rapido e inopinado, no precedido de disputa, cuando la victima fue herida por detras, si bien el acometimiento por la espalda no es siempre constitutivo de esta agravante; cuando esta desprevenida. Dicho empleo ha de ser intencionado y consciente. La alevosia proviene, a veces, segun doc-trina jurisprudencial, no de los medios, modos o for-mas de ejecucion del delito sino del estado de indefen-sion de la victima que permite ejecutarlo sin riesgo para el culpable, asi, concurre esta circunstancia en la muerte dada a un recien nacido o a un niño de corta edad, en la de un anciano; en el que hiere o mata a persona ciega; a una persona dormida. Semejante aplicacion extensiva de esta agravante a casos a los que debio ser aplicada la de abuso de superioridad, debese sin duda, como opina Anton, a que a los tribunales ha parecido poca agravacion la que procura esta y han bus-cado los efectos calificativos de la alevosia.

"Dichos medios, modos o formas han de tender directa y especialmente a asegurar la ejecucion del delito sin riesgo para la persona del delincuente. Es pues preciso que el delincuente los utilice con esta exclusiva fina-lidad. Pueden ser buscados de proposito o aprovechados los que la ocasion presenta. Es indiferente, declara un fallo del Tribunal Supremo, que esta circunstancia se medite con anterioridad al hecho o surja su empleo de manera espontanea. Pero aun cuando el texto legal exige, y asi lo declaran expresamente algunos fallos, que el empleo de los referidos medios, modos o formas ha de tender a la exclusion de todo riesgo para el cul-pable, la doctrina jurisprudencial establece que la ag-ravante existe aun cuando el peligro no se elimine por completo. El riesgo, segun la misma, ha de proceder de la defensa del agredido y no de otra persona." (Cuello Calon, Derecho Penal, 1960 ed., pp. 540-542.)

[30] *People v. Delgado*, 77 Phil. 11.

[31] 83 Phil. 738, 742.

[32] See also *People v. Cañete*, 44 Phil. 478, 481. Viada, 2 Supp. 3d ed. p. 76, reporting decision of Feb. 10, 1892, cited in *People v. Macalisang*, 22 SCRA 699, 704.

[33] See *U. S. v. Balagtas*, 19 Phil. 164; *People v. Abalos*, 84 Phil. 771.

[34] *People v. Trumata*, 49 Phil. 192.

[35] *United States v. Lasada*, 21 Phil. 287.

[36] *People v. Bustos*, 51 Phil. 385.

[37] *Albert's Commentaries on the Rev. Penal Code*, pp. 126-127.

[38] "'Abusar de superioridad o emplear medio que debilite la defensa' (art. 10, 8. a). Tiene esta circunstancia gran semejanza con la alevosia en cuanto coloca en situacion de ventaja a quien la emplea, tanto, que muchas veces se confunden ambas. Esta circunstancia debe estimarse siempre que exista notoria desigualdad de fuerzas entre agredido y agresor, supone una situacion de fuerza no-toriamente ventajosa por el agente elegida o aprovechada para la comision del delito. Para apreciarla no solo es necesario valorar las condiciones fisicas de los pro-tagonistas y las armas y objetos esgrimidos por ambos, sino tambien analizar los accidentes y episodios que constituyen el desarrollo total del suceso. No requie-re el concierto previo entre los agresores." (Cuello Calon, *supra*, pp. 548-549.

[39] 21 SCRA 1403.

[40] Article 68, par. 2, Revised Penal Code.

[41] Article 13, par. 7, *Ibid*.

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