

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.  
MARCIANO PARAYNO CIANONG, AND JOSE PARAYNO,  
DEFENDANTS-APPELLANTS.**

*G.R. No. L-24804. July 05, 1968*

Ponente: ANGELES, J.

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**ANGELES, J.:**

On appeal from the decision of the Court of Instance of Pangasinan in Criminal Case No. 21169), finding therein accused father and son, Marciano Parayno and Jose Parayno, guilty of the crime of murder and sentencing them to life imprisonment, to indemnify the heirs of the Rodrigo Fernandez, in the sum of P6, 000 and to pa the costs.

The record show that on September 1, 1956, at about 2:30 o'clock in the afternoon, while Francisco Fernandez was busy cutting grasses on the "pilapil" of their fishpond in Barrio Capataan; Municipality of San Carlos, Province of Pangasinan, his young nephews, Leonardo Fernandez nicknamed Adong, and Federico Fernandez nicknamed Maning, both aged 13, frantically called out to him and relayed the information that something had happened to his 9 year old son, Rodrigo Fernandez nicknamed Opring. Francisco Fernandez hurriedly went to the place where the two boys were, and after they pointed to him a certain place in the river where the body of his son had disappeared, he plunged into the river and soon fished out of the water, the lifeless body of Rodrigo. The father tried to re-vive the boy by applying artificial respiration, but the process proved futile - Rodrigo Fernandez was already dead.

The incident was reported to the Barrio Lieu-tenant of both Barrios Capataan and Quitong, for the river where the drowning took place was the common boundary between the said barrios. The police of San Carlos also made the necessary investigation of the incident and that same afternoon Marciano Parayno and his son, Jose Parayno, were arrested in their house some 130 meters from the place of the incident. They were brought by the police to the town (poblacion) of San Carlos for investigation.

At about 9:30 in the evening of that day, the Municipal Health Officer of San Carlos autopsied the body of Rodrigo Fernandez. In his examination report (Exh. A), dated September 2, 1956, the said official gave the following postmortem findings:

- "(1) Marked swelling with discoloration of right side of neck in the vicinity of the lower part of the right ear;
- (2) Face: Pale and livid at lips;
- (3) Finger and toe tips bluish;
- (4) Hands and feet with wrinkled or contracted skin with several folds (cutis anserina).

"CONCLUSION: - Postmortem finding No. (1) showed the deceased suffered physical injury probably caused by a hard and blunt object; Postmortem findings No. (2) (3) (4) show that the deceased exhibited signs of asphyxia by drowning. This is also supported by the history of the bloody froth coming from the nostrils, after the deceased was recovered from the water, as told by his alleged relatives."

For the death of Rodrigo Fernandez, Marciano Parayno and Jose Parayno were on September 3, 1956, charged and prosecuted in the Court of First Instance of Pangasinan under the following Information for Murder:

"That on or about the 1st day of September, 1956, in barrio Capa-taan, municipality of San Carlos, province of Pangasinan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and helping each other, with 'evident pre-meditation and taking advantage of superior strength, armed with a piece of wood, and with intent to kill, did, then and there, wilfully, unlawfully and feloniously attack, assault and hit one RODRIGO FERNANDEZ, a nine year old boy, with a piece of wood, and after the victim was rendered unconscious, rolled him down the river, thereby causing upon the victim the following:

- (1) Marked swelling with discoloration of right side of neck in the vicinity of the lower part of the right ear;
- (2) Face: pale and livid at lips;
- (3) Finger and toe tips, bluish;
- (4) Hands and feet with wrinkled or contracted skin with several folds (cutis anserina).

causing the death of the victim as a consequence.

"Contrary to Article 248 of the Revised Penal Code."

Upon being arraigned, both Marciano Parayno and Jose Parayno pleaded "not guilty" to the indictment. Thereafter, the prosecution commenced presenting evidence for the People.

Substantially stated, the story told by the witnesses for the prosecution was as follows:

Shortly after lunchtime on September 1, 1956, Federico Fernandez, aged 13, and his cousin Leonardo Fernandez, who was about his age, too, set out from their houses to gather "payar" fruits beside the river. It was a Saturday and they had no classes. As they passed by the house of their younger cousin, Rodrigo Fernandez who was aged 9, they were joined by the latter who first asked the permission of his father. As Rodrigo's father, Francisco Fernandez, did not object, the three young boys went on their way. They crossed a bamboo bridge over the river and went westward along the banks. They trekked over the "pilapil" of the fish-ponds bordering the river to a distance of about 100 meters from the bridge where they stopped and climbed the "payar" tree which grew on the "pilapil" of accused Marciano Parayno's fishpond by the northern bank of the river. For a while the three (3) young boys enjoyed gathering the ripe fruit of the "payar" tree, but shortly thereafter, they saw the owner of the fishpond, Marciano Parayno, and his son Jose coming. The boys heard the old man shout at them, "I will beat you all. Do not get those 'payar' fruits." Accused Marciano Parayno and his son were still some 30 to 40 meters from the "payar" tree when the boys heard the old man's voice, and as they approached, the young boys hurriedly came down the tree to escape. Federico Fernandez was first to reach the ground. He was followed by Rodrigo Fernandez; and last to get down the tree was Leonardo Fernandez. As soon as they were all down the "payar" tree, the young boys ran towards the west. They did not make any attempt to pass by the bamboo bridge up the river in the east anymore, because they figured the old man Marciano Parayno and his son will encounter and overtake them because that way was watery. At a distance of about 3 or 4 meters from the foot of the "payar" tree, the elder boys Federico and Leonardo jumped into the river and swam across. In a matter of a few minutes, they were on the other side of the river, which was about 4 to 5 meters wide. Upon reaching the dike of their grandfather's fishpond, on the opposite side of the river, Federico and Leonardo looked back. They saw their smaller companion, Rodrigo Fernandez, still there at the opposite side of the river for he did not know how to swim and could not cross. At that precise time, Marciano Parayno and his son Jose Parayno had reached the place; and catching up with the little boy, Marciano Parayno struck at Rodrigo Fernandez from behind with a piece of

wood, about the size of the wrist of the boy in diameter and two and a half (2-1/2) feet in length. Rodrigo Fernandez was standing on top of the "pilapil" of the fishpond when accused Marciano Parayno struck at him about half a meter from behind - striking at the little boy with a forward and downward direction from the level of the old man's neck. Rodrigo fell on the earthen pilapil of the fishpond, about one and a half (1-1/2) feet from the edge of the river. The elder boys then across the river, heard Jose Parayno told his father, "Let us roll him, father, so that it will be concluded that he drowned." Accused Marciano Parayno first laid aside the piece of wood with which he struck at the little boy and then he and his son Jose rolled over the body of Rodrigo Fernandez into the water of the river in one shove. Rodrigo's body sank into the water and soon disappeared.

Seeing the fate of their younger companion at the hands of accused Marciano Parayno and his son Jose Parayno, Federico Fernandez and his cousin Leonardo Fernandez cried out to Rodrigo's father who was cutting grass on the Southern pilapil of their own fishpond, some 60 to 70 meters from where the two boys stood and informed him that Mama Cianong (accused Marciano Parayno) had struck at his son Rodrigo and rolled him into the river. Immediately upon hearing the information relayed by his nephews, Francisco Fernandez rushed to the scene whereupon the two boys Federico and Leonardo reported their story. "What have you done to my son?", Francisco Fernandez exclaimed addressing accused Marciano Parayno and his son Jose Parayno, who were still on the opposite side of the river some 15 meters from the place where Francisco Fernandez and his nephews were. Marciano Parayno and Jose Parayno, however, ignored the protestation of Francisco Fernandez and hurriedly left toward their house, the old man Cianong still carrying the piece of wood with which he had struck at the boy Rodrigo Fernandez, for Cianong again had picked up the piece of wood shortly after he and his son had rolled over the body of the fallen Rodrigo into the river.

Apprised by the two boys of the place where his boy disappeared, Mama Ikoy (Francisco Fernandez) lost no time in trying to retrieve the body of his son from the water. He plunged into the river and searched for his son. He failed in his first attempt; but upon a second try, he fished the body of Rodrigo Fernandez near his, own fishtrap (sicop) built across the width of the river, some 3-14/2 meters from the place where, according to Francisco and Leonardo, the body of Rodrigo was rolled over into the water by accused Marciano Parayno and Jose Parayno. In that portion of the river where Rodrigo disappeared, the water was up to the mouth of Francisco Fernandez, but at the place of the fishtrap where he found the body of his son, the water was only up to his breast.

Upon finding the boy, Francisco Fernandez carried the victim and laid his body on the pilapil of the fishpond. He tried to revive the boy by applying artificial respiration, but it proved too late; the poor little boy had died. Blood oozed from his mouth and nose. A swollen portion of his neck, just below his right ear, was clearly noticeable.

Unable to revive the boy, Francisco called his brother and his father and told them to report the matter to the authorities. First to arrive, at the scene was the Barrio Lieutenant of Barrio Quitong, north of the river, followed by the Barrio Lieutenant of Barrio Capataan in the opposite side. Still later, policemen from the poblacion of San Carlos also arrived and conducted an investigation.

That same day, Francisco Fernandez and his two nephews, Federico and Leonardo, were questioned by the Chief of Police of San Carlos. Their individual statements were reduced to writing which they later signed before the Justice of the Peace of San Carlos.

The Municipal Health Officer of San Carlos also testified for the prosecution. Explaining his postmortem findings embodied in his examination report, he declared that the swelling on the neck of the victim just below the right ear, could have been caused by a hard blunt instrument like a piece of wood or bamboo applied on the injured portion with a strong force. He testified that such an injury could have produced unconsciousness of the victim which may last long. He declared further that such injury must have produced immediate unconsciousness on the

part of the child which might have lasted from several minutes to several hours; and that it could have produced death. He described the swelling on the right side of the neck as very marked, four (4) inches long and three (3) inches wide. It was elliptical in shape, in the longer accesses - vertical. The doctor also said that at the time of the examination, the relatives of the victim gave him the information that 'the child had been beaten. He concluded his direct testimony by saying that the other findings noted by him are signs that the victim died of drowning.

On cross examination, the witness admitted that the injury, found on the neck of the child below the right ear could have been caused by a violent fall of the body of the victim against the branches of a tree or the wooden stump in the river, if the fall is strong. He positively declared that the eyes of the child, at the time of the examination, were congested; the lips were discolored; and the wrinkles and folds of the skin were proper indices of drowning.

For the defense of Marciano Parayno and Jose Parayno, certain persons by the name of Francisco Fernandez (not the father of the victim) and Evaristo Caranto testified. They declared that on the day of the incident, they were present at the place of the incident. They went to the place with the intention of buying fish and shrimp, which they knew Francisco Fernandez, the father of the victim, used to catch from his fish-trap in the river separating the barrios of Quitong and Capataan. Francisco Fernandez was cutting grass on the pilapil of his fishpond when they arrived; and he informed them that he had no fish at the time, but they were told to wait as he would soon gather the catch from the fishtrap as soon as he was through with his work. As it was then raining, they decided to wait inside the hut of Francisco Fernandez in the fishpond near the river.

From the place, they saw Federico, Leonardo and Rodrigo swinging and playing on the branches of the "paya" trees across the river. The river was only about 4 to 5 meters wide, but because it was rainy season, the water almost reached the top of the pilapil of the adjoining fishponds and the current of the water was swift. Fearing for the safety of the boys, they warned them of the dangers of the swift current of the waters below, and advised the boys to come down the tree. Twice they repeated the warning, which the boys did not heed. They then called the attention of the father of Rodrigo who was cutting grass nearby, and the father himself advised the boys to come down the tree. Still the boys continued playing on the branches of the "paya" tree. By and by, they also heard a voice coming from the direction of Marciano Parayno's house telling the children to get down the tree.

When the young boys heard the voice coming from the direction of Marciano Parayno's house, they hurriedly came down the "paya" tree. They passed through the branch of the tree about two (2) meters above the pilapil of the fishpond by suspending themselves from the said branch and then releasing their holds as soon as their feet were near the ground. First to come down from the said branch was Leonardo, followed by Federico. When Rodrigo's turn came, however, he lost hold of the branch and fell on the pilapil, feet first, then fell on his right back side. Leonardo and Federico came back for the boy and held him by the sides to keep him in a standing position. They sort of dragged him to the bank of the river for Rodrigo seemed to be unconscious, his head dropping forward as they walked. Coming to the place of the fishtrap; Leonardo crossed the river by clinging fast to the side of the said fishtrap. Federico tried to follow, but as he was about to get down the bank of the river, he slipped and fell into the water, pulling down Rodrigo into the river with him. Federico lost hold of the hand of Rodrigo, who immediately sank and disappeared.

According to witness Francisco Fernandez (not the father of the victim) he began to call at the father of the boy (Francisco Fernandez) and told him that his son had sunk and disappeared, and the latter rushed towards the bank of the river. Leonardo and Federico were already on the other side of the river when Francisco Fernandez came. He inquired from the two boys what happened and Leonardo and Federico allegedly said: "When we heard the angry voice of Lakay Marciano, we were scared, so we rushed to get down from the tree." Upon hearing the said report, and after he recovered the body of his son from the water but failed to revive him, Francisco Fernandez got

mad. Substantially, he said: "That old man is a beast were it not for his shouts, my son would not have drowned. I will make him answer for the death of my son." He then took his bolo and placed it on his waist, then crossed the river and proceeded to-wards-the house of Marciano Parayno, leaving the life-less body of the boy on top of the pilapil of the fish-pond. Knowing then that Francisco Fernandez would no longer have the time to attend to their needs regarding their desire to buy fish, the defense witness, Francisco Fernandez and his companion Evaristo Caranto decided to go home.

Asked under cross examination if they did any-thing when they saw the children crossing the river, more specially when they allegedly saw the youngest and smallest among them fell into the water, these witnesses explained that they could not do anything, as they themselves were afraid to brave the dangers of the swift current of the river. They explained, however, that as soon as the father fished the body of his son from the water, they helped him in trying to revive the boy, al-though their effort proved futile because, the boy was al-ready dead.

A former policeman of San Carlos, Tomas Rosario, also declared that at the time of the incident, he was ordered to make the necessary investigation of the drown-ing of Rodrigo Fernandez. Together with Patrolman Felipe Posadas, he went to barrio Capatean and questioned Francisco Fernandez, the-father of the victim, and, his two nephews, Leonardo and Federico, who were together with the victim immediately before he was drowned. He said that he inquired from both Leonardo and Federico how Rodrigo got drowned and this was the story they told him then: "We were gathering some fruits of the 'payer' tree. Then this old man Marciano shouted at us, his voice coming from his place. So, we went down fast and this Rodrigo fell and he held his head. Then, we went away running: When we arrived at the other side on the earth dike, we looked behind, us and Rodrigo was already missing, so that we told his father Francisco that his son was drowned, and then. Francisco Fernandez said: "This Marciano shouting at the children, that is why my son was drowned. So, it is his fault" He testified further that Leonardo and Federico never made mention to him that Marciano Parayno struck at Rodrigo, nor did they ever tell him then that Jose Parayno suggested to his father that they should roll the body of Rodrigo into the river. He admitted, however, that he took along Marciano Parayno and Jose Parayno to the poblacion of San Carlos that same afternoon because of the claim of Francisco Fernandez that they were the cause of the drowning of his son, although according to him, he never told Marciano Parayno and Jose Parayno that the father of the child was laying the blame on them. He narrated further that as soon as they reached town, he made a verbal report of his findings to the Chief of Police, although he admitted that he did not venture to tell the Chief of Police that he knew they were innocent, even after he learned later that a case of murder had been filed against them.

Accused Jose Parayno testified that he and his father, Marciano Parayno were at home roofing their house the whole day of September 1, 1956. He admitted that he heard shouts that afternoon that somebody was drowned in the river, but he did not come down their house because it was then raining. Indeed, he was astonished When suddenly Ikoy Fernandez and his father Felimon came to their house and shouted: "You are a beast, you will answer for the death of my child." It was only after some inquiry, that they were able to learn that Francisco Fernandez would want to lay the blame upon them for the death of his child because the children were frightened by certain voices coming from the direction of their house which was about 150 meters from the "payer" tree the children had climbed that afternoon. He admitted, however, that he saw the three boys atop the "payer" tree, although he was not aware whether or not the tree they climbed was the one on, their pilapil He declared also that his father was in the house when the angry Francisco Fernandez and his father came over to their place, but said that his father did not hear the accusation made by Ikoy because he was deaf.

Asked if he knew of any reason why the two young boys would want to testify falsely against them, accused Jose Parayno declared that he was not aware of any reason. He recalled, however, that sometime in the year 1955, Francisco Fernandez built his fishtrap very near the place where he had his own built earlier. He demanded from

Francisco Fernandez the removal of the same which Ikoy first refused. But later, he removed his fishtrap and transferred it farther down the river to its present location.

For his part, Marciano Parayno testified that he never went to the place of the "payer" tree that afternoon. He declared that his house was about 120 meters from the place where the tree was, and it was not even visible from their house because there were bamboo groves (bayog) between the two places. He denied that Francisco Fernandez ever went to his place that afternoon, although he said that his neighbors went to their house when they learned that a policeman had gone there and asked them to come to the poblacion of San Carlos for investigation in connection with the drowning of the son of Francisco Fernandez. Marciano Parayno maintained that he never struck at the boy, much less rolled his body into the water; for the truth of the matter was that he was not even aware that the boy had drowned, which was the very reason why he expressed surprise when he learned from the policeman who came to fetch them from their house that afternoon of September 1, 1956, that Francisco Fernandez had laid the blame on him and his son for the death of Rodrigo. He declared that he only came to know the place where the boy drowned after his release, for he and his son Jose were busy the whole day of September 1, 1956, working on the roof of their house.

With the foregoing evidence, the trial court found accused Marciano Parayno and Jos Parayno guilty of murder for the killing of Rodrigo Fernandez, and in its decision of May 3, 1965, sentenced them as follows:

"WHEREFORE, in view of the foregoing, the Court finds both accused guilty beyond reasonable doubt: of the crime of MURDER charged in the information and in view of the absence of any mitigating or aggravating circumstances and pursuant to the provisions of Art. 248 of the Revised Penal Code, both accused are hereby sentenced to life imprisonment, to indemnify the heirs of the deceased Rodrigo Fernandez in the sum of P6,000.00 and to pay the costs."

Both accused have appealed.

Appellants point out the fact that the injury behind the right ear of the victim was found by the examining physician to be vertical - from the back of the right ear down to the middle part of the neck. It is, therefore, contended that the injury could not have been inflicted by, the taller, 61-year old Marciano Parayno on the 9-year old boy, Rodrigo Fernandez, taking into consideration the testimony of Leonardo Fernandez that Mama Cianong struck at the boy with the piece of wood from behind "with a forward and downward motion from the level of his neck." We are not impressed with this argument. With the accused hitting the victim from behind in a sideward and forward and downward motion, it is but natural that the injury inflicted would be in a more or less vertical position.

CROSS EXAMINATION of witness LEONARDO FERNANDEZ by Arty. ROSARIO ?

"Q. - Will you demonstrate how Cianong swung his arm upon striking Opring?

A. - This way, sir, (witness swinging his right hand from behind at the level of the neck swinging forward and downward in a striking motion

Q. - The arms of Cianong were extended when he struck the blow?

A. - This way, sir, (witness giving a motion showing that the arms extended when the blow was given. It started with a bending motion swinging sideward -forward in a stretching down).

Q. - And you said that the length of that cane was approximately 2-1/2 feet?

A. - Yes, sir, this length."

We really do not see our way clear how with such alleged striking motion a horizontal injury could have been

in-flicted upon the victim as appellants would want to suggest. For even if we should consider the statement of the witness that Merciano Parayno struck in a sideward- downward motion and disregard his other statement that Cianong struck in a forward-downward motion, we do not find it totally improbable that the injury described by the examining physician could have been produced.

But appellants insist that with the striking motion described by the witness - what with the size of the wood allegedly used by the accused- the blow should have caused a fracture in the head of the 9-year old boy. The suggestion is conjectural, plain and simple, and should be disregarded. The mere fact that the blow did not produce any fracture in the head of the victim does not conclusively show that the testimony of the witness was improbable, for the resulting injury would surely depend upon the degree of force applied. In the light of positive testimony that the accused struck at the victim, and in the absence of any evidence showing the degree of force applied, nothing much should be made out of the circumstance that the attack did not result in any fracture.

It is suggested by the appellants that the injury on the head of the victim could have been caused either by the fall of the boy from the "payer" tree which rendered him unconscious and that is why the two larger boys had to come back and drag him along, or by the fall of the body of the victim upon any blunt object when he and Federico Fernandez fell on the stiff bank of the river. The suggestion should also be rejected. The defense witness testified that he saw the boy get down the tree by the same branch from which the two elder boys got down; that he saw Rodrigo fall from the branch - his feet touching the ground first - then on his right back side near the trunk of the tree; that later the elder boys came back for Rodrigo and guided him to the side of the river; and that as Federico and Rodrigo approached the bank of the river hand in hand, Federico slipped and pulled the smaller boy down with him into the water. But even if we were to assume for the moment that these were established facts, still we find the evidence wanting to show that Rodrigo hit any hard or blunt object when he fell from the branch of the tree or on the bank of the river. On the contrary, the same witness for the defense declared that the ground where Rodrigo alighted near the trunk of the tree was soft and slippery, for it had been raining the past week. And so with the bank of the river where the children allegedly slipped and fell; the same could not have endangered the life of the children, not only because there is no evidence that there was any stump or hard object in the vicinity, but also for the reason that according to the same defense witness the bank of the river was covered with water which almost reached the top of the pilapil of the adjoining fishpond. Suffice it to say then, that neither the fall from the branch of the tree nor the fall upon the bank of the river could have produced the injury on the head of the victim, if we are to consider also the testimony of the doctor, who conducted the postmortem examination of the victim, that the nature of the injury he found on the head of the boy could only be produced if the impact against the blunt instrument is very strong. Finally, the mere possibilities speculated upon by herein appellants, i. e., that the head of the victim might have bumped against a blunt object when he fell, cannot stand against the positive testimony of the children that they saw the accused. Marciano Parayno strike at the boy with a piece of wood.

Lastly, appellants charge that the lower court erred in imposing the same penalty for both accused Marciano Parayno and Jose Parayno. They disagree with the finding of the court below that they are equally guilty of the crime charged. In support of this view, it is pointed out that it was only during the trial of the case that the witnesses for the prosecution implicated accused Jose Parayno by declaring that both accused rolled the body of the deceased Rodrigo Fernandez into the river upon suggestion of Jose to his father which the two boys claimed to have heard after Marciano Parayno struck at the victim with the piece of wood, a fact they never made mention of their affidavits taken before the Chief of Police of San Carlos, Pangasinan, and in their testimonies before the Justice of the Peace of the place during the first stage of the preliminary investigation. Hence, they claim that the imputation of the crime against Jose Parayno was merely an afterthought of the father of the victim who harbored a grudge against said accused due to a previous heated argument and conflict over the placement of a

"tabagan" or fishtrap in the same portion of the river.

We find the charge to be worthy of consideration. It appears that before this case was forwarded to the trial court for further proceedings, affidavits were executed by the prosecution witnesses Francisco Fernan-dez, Federico Fernandez, and Leonardo Fernandez, and then a preliminary investigation was conducted by the Justice of the Peace of San Carlos, Pangasinan. The said affidavits, together with the record of the preliminary investigation were offered as exhibits for the defense and are now legally before the Court. They are admissible in evidence and may properly be considered for the purpose of testing the credibility of said witnesses. For ready reference, the pertinent portions of the affidavits aforementioned and the record of the preliminary investigation are hereunder quoted, as follows:

Portion of the affidavit of Francisco Fernandez:

"Q. - Will you relate to us the incident wherein your son was involved?

A. - That on or about 2:30 P.M. September 1, 1956, while I was gathering grass near our fishpond situated in the barrio of Capataan, I heard Maning and Adong boys about 12 or 13 of their age, shouting and calling for me wherein I have heard that something had happened to my boy, Rodrigo. I at once left my work and run to the place and upon arriving near them Adong and Maning informed me that my boy Rodrigo Fernandez has been hit resulting to his falling into the water. They told me that it was old man, Sianong who hit my boy with a piece of wood." (Page 11 of the Record) [Underscoring Supplied]

Portion of the affidavit of Federico Fernandez:

"Q. - Will you relate to us what was that incident you are referring to?

"A. - While we were on top of the payar tree gathering its fruits we notice that old man Sianong and his son Jose are coming and uttered in Pangasinan dialect 'PECPECQUEN TAKAYO LALASI ET' Meaning in English 'I will hit you all idiots.' So we hurriedly get down the tree and ran away. Old man Sianong was then running after us and Ofring was the last to run. Because he does not know how to swim across the river, so old man Sianong was able to overtake him thereby we saw Sianong Ofring with a piece of wood and the latter rolled down the bank of the river to the water." (Page 12 of the record.) [Underscoring supplied]

Portion of the affidavit of Leonardo, Fernandez:

"Q. - Will you relate to us the incident you are referring to?

"A. - While I was climbing the payar tree, with Maning and Ofring we noticed that someone shouted and upon looking we found out that it was Sianong owner of the fishpond near the river. He said in Pangasinan dialect 'PECPECQUEN TAKAYO ET, AGKAYO MANAALA NA PAYAR' Meaning in English, 'I will hit you all, do not get there payar.' Then we went down the tree and run away and Sianong was running after us. Because Ofring cannot swim so Sianong was able to overtake him. I saw that he rolled down the bank of the river to the water because Sianong hit him with a piece of wood." (Page 13 of the Record) [Underscoring supplied]

Portion of testimony of Federico Fernandez during the Preliminary Investigation:

"Q. - Will you relate to the Honorable court the incident you are referring to?

"A. - While I was gathering fruits of the payar tree with these Adong and Ofring, old man Sianong and his son, Jose coming towards our place and uttered in a loud voice I will beat you, you idiots. So we hurriedly got down the tree and ran away. Old man Sianong with his son were then running after us and because Ofring could not swim he was left behind, and was overtaken by old man Sianong thereby we saw old man Sianong hit Ofring with the piece fell down. Old man Sianong with his son Jose rolled off down the bank of the river to the water. (Page 6 of the Record) [Underscoring supplied]

x x x x x

COURT:

"Q. - Was that person, Sianong stated by you able to overtake you?

A. - I and Leonardo Fernandez were able to run, while Rodrigo Fernandez was over- taken by Sianong and Sianong hit Rod-rigo Fernandez.

Q. - What happened with Rodrigo Fernandez when hit by Sianong?

A. - Rodrigo Fernandez felled and; rolled down the bank of the river until, he submerged into the water." (Page 10 of the Record) Underscoring supplied]

Portion of the testimony of Leonardo Fernandez during the preliminary investigation:

"Q. - Please relate to this Honorable Court the unusual incident you are referring to?

A. - While I was climbing the payer tree I heard someone shouted and upon looking, it was Sianong who owns the fishpond near the river. I heard him said: 'PECQUEN TACAYO ET, AM YO MANAALA NA PAYAR, meaning in English: I will beat you all, do not get the -payer fruits.

Q. - What did you do upon hearing this?

A. - Let once went down the tree with my companions and ran away and swam across the river. Because Ofring could not swim he was left behind and overtaken by Sianong with his son Jose. I saw Sianong hit Ofring with a piece of wood after which rolled him down the bank of the river to the water." (Page 7 of the Record [Underscoring supplied]

Analyzing the import of the foregoing statements, it will be seen that in the affidavits executed by Fran-cisco Fernandez, Federico Fernandez and Leonardo Fernan-dez before the Chief of Police of San Carlos, Pangasinan, after the commission of the crime, said witnesses were unanimous in their declarations that the deceased Rodrigo Fernandez fell and rolled down the bank of the river be-cause accused Merciano Parayno struck him with a piece of wood. No mention was ever made by them in that investi-gation by the said Chief of Police, that accused Jose Parayno participated in the act of striking and rolling the body of the victim down the bank of the river. Dur-ing the first stage of the preliminary investigation conducted before the Justice of the Peace of San Carlos on the following day, Leonardo Fernandez maintained his declaration in his affidavit that accused Marciano Pa-rayno alone hit Rodrigo Fernandez with a piece of wood, although he stated then that after beating the boy, Mer-ciano Parayno rolled him down the bank of the river to the water. On this occasion, Federico Fernandez appears to have made the first suggestion that accused Jose Pa-rayno also rolled the body of the victim into the water, but it will also be seen that he seems to have qualified again his statement later by telling the court that when Sianong (Marciano hit Rodrigo Fernandez with the piece of wood, the latter "fell and rolled down the bank of the river until he submerged into the water. " Such state-ments, altogether, generate doubts in our mind as to the veracity of the statements subsequently made in court dur-ing the trial by the same witnesses, to the effect that they heard accused Jose Parayno suggest to his father,, accused Marciano Parayno, "that they should roll the body of Rodrigo Fernandez down the bank of the river to make ' it appear that he had drowned. , " and that they saw both accused actually roll or shove away the body of the vic-tim into the water. It is worthy to note that the state-ments in the affidavits aforementioned were given imme-diatly after the occurrence of the beating and the drown-ing when all the three affiants have had no time to con-trive - and we see no reason why they all failed to mention in those statements the alleged rolling of the body of the victim into the water by both accused, if the same were true; and the fact that they only revealed the alleged participation of said accused during the trial, gives a ring of truth to the suspicion of herein appellants that the imputation was but an afterthought of the father of the victim designed to

implicate accused Jose Parayno in the crime committed by his father by making it appear later that both accused intentionally rolled the body of the victim into the water after the beating. We are, therefore, more inclined to acquit herein appellant Jose Parayno of the crime charged upon reasonable doubt.

"If the inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with the innocence of the accused of the crime charged and the other consistent with their guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction." (U. S. vs. Maaño, 2 Phil. 718; People vs. Pacana, 47 Phil. 48; See also, People vs. Bautista, 81 Phil. 78)

This should not be construed, however, as a suggestion that the conclusion reached should necessarily result in the acquittal also of accused Marciano Parayno. The evidence may not be clear and convincing that he rolled the body of the victim into the river. The boy could have fallen into the water, and drowned accidentally as a result of the beating. Nevertheless, he should answer for the consequences of his act. We do not find it necessary also to discuss, in this connection, the alleged un rebutted testimony of Patrolman Tomas Rosario of the San Carlos Police Department, to the effect that after conducting an on-the-spot investigation of the drowning incident in the afternoon of September 1, 1956, he made a verbal report to the Chief of Police of San Carlos, Pangasinan, informing him that the accused were not in any way responsible for the death of the victim. The fact that he did not make any written report of the alleged investigation he conducted; and his failure to call the attention of his superior officer to his alleged verbal report on the innocence of the accused, even after he came to learn later that the said Chief, of Police had subsequently filed a complaint for murder against them by reason of the death of Rodrigo Fernandez, make his story too unnatural to be believable.

The crime committed, however, appears to be homicide - not murder. To be sure, the aggravating circumstance of evident premeditation cannot qualify the killing in this case to murder. There is nothing in the record to suggest the idea that Marciano Parayno had conceived of the thought to kill Rodrigo Fernandez and, had sufficient time thereafter to reflect upon the consequences of his act as to allow his conscience to overcome the resolutions of his will if he desires to harken to its warnings. In fact, it will be observed, that the intent to kill seems to be not even apparent. Considering the evidence that he had merely threatened 'the children on top of the "payar" tree with the words: "I will beat you all, do not get there payar", and chased the children when they got down the tree. True to his warning, Marciano Parayno did beat one of the children, Rodrigo Fernandez, with a piece of wood which produced the "marked swelling and discoloration of the right side of the neck in the vicinity of the lower part of the right ear", when Marciano Parayno caught up with the child; but the evidence is not conclusive, whether or not that injury was or could have been fatal to the life of the boy, the indubitable evidence being that the victim, had died of drowning. In view of this observation, and considering the conclusion earlier reached, that the evidence for the prosecution tending to show that the accused intentionally rolled the body of the victim into the river, is not free from doubt, the qualifying circumstance of evident premeditation should be ruled out. Under the same observation and conclusion, We also hold that the Parayno may under the peculiar circumstances said to have taken advantage of superior strength in the commission of the offense notwithstanding the fact that at the time thereof the said accused was already 61 years of age, victim was only 9.

Homicide is punished by reclusion temporal. In the absence of any aggravating or mitigating circumstance the penalty imposed by law for the crime committed should be imposed in its medium period. Applying the law on indeterminate sentence, the maximum term of the penalty should be within the range of reclusion temporal medium, while the minimum, should be within the range of prision mayor. Considering the peculiar circumstances surrounding the drowning of the victim, as already adverted, to above, however, and in the exercise of its discretion in fixing the minimum term of the sentence, the Court believes that the accused is entitled to the maximum of the benefits allowed under the said law.

WHEREFORE, appellant Jose Parayno is acquitted and his immediate release is hereby ordered, with costs de oficio; the decision appealed from' is modified as to appellant Marciano Parayno who is hereby sentenced to imprisonment of not less than six (6) years and one (1) day of prison mayor, as minimum, to seventeen (17) years and four (4) Months of reclusion temporal, as maximum, and as to whom, judgment of the lower court is affirmed in all other respects, with costs.

Concepcion, C.J., Reyes, JBL, Dizon, Makalintal, Zaldivar, Sanchez, Ruiz Castro and Fernando, JJ., concur.

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