

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
MARCELINO DEVARAS, FELIX CAÑAS, FLORANTE SERRANO AND
BERNARDO DEVARAS, ACCUSED. MARCELINO DEVARAS, FELIX
CAÑAS AND FLORANTE SE...**

G.R. No. L-48009. February 03, 1992

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

This is an appeal to the Court of Appeals[1] interposed by the accused-appellants from the decision[2] of the then Court of First Instance (now Regional Trial Court) of Leyte in Criminal Case No. 2042, promulgated on 22 April 1977, finding them guilty of the crime of murder and sentencing each of them to suffer the penalty of reclusion perpetua and to indemnify, jointly and severally, the heirs of the victim in the amount of P12,000.00.

In view of the penalty imposed,[3] the trial court forwarded the records of the case to this Court which accepted the appeal in its resolution of 12 April 1976.

During the pendency of the appeal, two (2) of the appellants, Marcelino Devaras and Felix Cañas, died. Devaras died on 23 March 1980 and his counsel filed a notice of death with a motion to dismiss only on 23 March 1983,[4] attaching thereto the death certificate.[5] After having verified the death certificate to be authentic, the Solicitor General filed a Comment, stating therein that the People offers no objection to the dismissal of the case insofar as appellant Devaras is concerned without, however, prejudice to his civil liability arising from the commission of the offense.[6]

In the resolution of 20 July 1983, this Court resolved "to DISMISS this case against accused Marcelino Devaras insofar as his criminal liability is concerned but without prejudice, however, to his aforesaid civil liability arising from the commission of the crime in favor of the offended parties." [7] Appellant Felix Cañas, on the other hand, died on 24 November 1982 and his counsel informed this Court of such fact only on 15 July 1988. The Solicitor General confirmed the fact of death on such date in his Manifestation of 8 September 1988. This case then is likewise dismissed as against appellant Felix Cañas without prejudice, however, to his civil liability arising from the commission of the crime.

This decision then is limited to the appeal of Florante Serrano.

The accused-appellants, together with Bernardo Devaras, were charged with the crime of murder in an Information filed on 7 August 1975, the accusatory portion of which reads as follows:

"That on or about the 6th day of July, 1975, in the Municipality of Dulag, Province of Leyte, Philippines and within the jurisdiction (sic) of this Honorable Court, the above-named accused, conspiring and confederating and acting in concert with one another, with intent to kill and with treachery and evident premeditation, did then and there wilfully, unlawfully and feloniously attack, assault, stab and wound one TEODORO BISNAR with bolos with which said accused purposely provided themselves, thereby inflicting upon said Teodoro

Bisnar the following wounds to wit:

- Stab wound, 3 inches long x 1 inch X 4 inches deep, cutting second costal cartillage, penetrating the heart, at the second intercostal space, left;
- Stab wound, 1½ inch (sic) long x ½ inch wide x ½ inch deep, proximal of arm right;
- Stab wound, 1 inch long x ¼ inch wide x 1/8 inch deep, right Hypochonrium;
- Stab wound, 1 inch long x ½ inch wide x 1/8 inch deep, umbilical region;
- Incised wound, 2 inches long x ½ inch wide x ½ inch deep, wrist posterior, left;
- Incised wound, 4 inches long x 1 inch wide x 1 inch deep, scapular region, right;
- Incised wound, 1½ inches long x 1 inch wide x ½ inch deep, supra-scapular region, right;
- Incised wound, 1½ inches long x ½ inch wide x 1 inch wide x 1 inch deep, lateral portion of arm, right;
- Stab wound, 1½ inches long x ½ inch wide x 1 inch deep, infrascapular region, right;
- Stab wound, 2 inches long x 1 inch wide 1½ inches deep, right lumbar region;
- Stab wound, 1½ inches long x ½ inch wide x ½ inch deep, midaxillary line at the level of the 7th rib, right;
- Incised wound, 2½ inches long x ¼ inch wide x 1/8 inch deep, cutting the scalp at the perietotemporal region, right;
- Incised wound, 2 inches long x ¼ inch wide x 1/8 inch deep, occipital region;
- Incised wound, 3 inches long x ½ inch wide x 1/8 inch deep, anterior aspect of thigh right;

Which caused his death.

Contrary to law."[8]

Each of the accused entered a plea of not guilty upon their arraignment on 17 September 1975.[9] Shortly thereafter, upon motion of the prosecution on the ground of insufficiency of evidence, the trial court ordered the provisional dismissal of the case as against Bernardo Devaras.

After due trial on the merits, the trial court rendered its decision, the dispositive portion of which reads as follows:

"IN VIEW OF THE FOREGOING, judgment is hereby rendered declaring accused Marceliano Devaras, Felix Cañas and Florante Serrano guilty of the offense of murder, without the attendance of any aggravating nor (sic) mitigating circumstance, and each of them is hereby sentenced to suffer the penalty of reclusion perpetua, and to indemnify jointly and severally the heirs of the deceased Teodoro Bisnar in the amount of P12,000.00.

The preventive imprisonment respectively undergone by accused in this case shall be deducted from the respective terms of imprisonment imposed herein to the full extent, if they signed an agreement to abide by the same rules imposed upon convicted prisoners while on detention, or only 4/5 thereof if they have not signed said agreement (Art. 29, Rev. Penal Code; U.S. vs. Ortencio, 38. Phil. 341; People vs. Lingao, L-28506, Jan. 31, 1977). According to the record, the herein accused have been under detention since (sic) July 12, 1975 (p. 11, record) until November 17, 1975 in the case of Florante Serrano (p. 100, record) until November 24, 1975) in the case of Marceliano Devaras (p. 115, record) and until December 2, 1975; in the case of Felix Cañas (p. 131, record).

Accused are finally sentenced to respectively pay ¼ of the costs.

SO ORDERED."

Treachery was considered by the trial court as the qualifying circumstance.

The evidence for the prosecution, upon which the trial court based its decision, is summarized in the People's Brief as follows:

"In the afternoon of July 6, 1975 between 4:00 to 5:00 o'clock, Paulita Borja, wife of Teodoro Bisnar, and their daughter, were fetching water from the pump about 2 meters away from the house of Bernardo Devaras in Barrio Ginawas, Dulag, Leyte. While fetching water from the pump, she saw Marcelino Devaras, Felix Cañas, Florante Serrano and Bernardo Devaras, drinking in the kitchen of the house of Bernardo Devaras. The door of the kitchen was facing the water pump. While she was then drawing water from the water pump, she heard Bernardo Devaras tell his companions: 'You drink now your tuba'. Afterwards, she and her daughter went home (pp. 2-5, tsn, Oct. 7, 1975; pp. 2-8, 17, tsn, Nov. 11, 1975).

That same afternoon of July 6, 1975 at about 4:30 o'clock, Joel Beringuel, then 10 years old and a Grade V pupil, residing at Bo. Vecinal, Dulag, Leyte, was at the store of Bernardo Devaras. The store was located on the porch of the said house, which was about two and a half meters away from its kitchen. There was no wall between the porch and the kitchen. Joel was sent to the said store by his grandmother Ema Devaras to buy sugar cake. While in the said store, Jose (sic) saw Bernardo Devaras, Marcelino Devaras and two other persons whom he later recognized and identified in court as Felix Cañas and Florante Serrano drinking in the kitchen of the said house. He overheard Marceliano Devaras say: 'Let us go to him', and then he heard Florante Serrano reply: 'This evening'. After buying the sugar cake, Joel returned to the house of his grandmother (pp. 16-20, tsn, Jan. 16, 1976).

After Paulita Borja and her daughter arrived at their house from fetching water that afternoon of July 6, 1975, her husband Teodoro Bisnar left to fish at the Daguitan River, also located in the same municipality (p. 6, tsn, Oct. 7, 1975; p. 20, tsn, Nov. 11, 1975).

Thus, at about 7:00 to 7:30 o'clock in the evening of July 6, 1975, Teodoro Bisnar was then fishing in the Daguitan River, using a net and a lighted torch. On the same occasion, Rosita Devaras and her son, Pascual Devaras, of Barrio Sabang, and Victoriano Gabrino, a fisherman and resident of Barrio Rizal, both barrios located in the same municipality of Dulag, were also fishing nearby, although at different places in the same river. Gabrino had his child for a companion who was then at the bank of the said river. A flashlight, which was not then lighted, was in the possession of his child (pp. 2, 6, tsn, Oct. 7, 1975; pp. 23-24, 27, tsn, March 3, 1976; pp. 1-4, 17-18, tsn, Dec. 5, 1975). Rosita Devaras, who was catching shrimps and fish for bait on one side of the river, noticed that Teodoro Bisnar was fishing with net (sic), using a lighted torch (dugalwong) at the opposite side of the river about 15 meters away from her (pp. 24, 27, 29, tsn, March 3, 1976). Gabrino, on the other hand, who was fishing on one side of the river, saw Teodoro Bisnar about 15 meters away from him, fishing with the use of a lighted torch (dugalwong) (pp. 2-5, tsn, Dec. 5, 1975).

At about 6:30 o'clock in the evening of that same day, July 6, 1975, while Paulita Borja was in their house, Marceliano Devaras came to ask her where her husband Teodoro Bisnar was. She told him that her husband was at the Daguitan River, catching fish. He asked her what time her husband usually returned home, and she replied: 'Sometimes eight o'clock and sometimes 10:00 o'clock' (pp. 6-7, tsn, Oct. 7, 1975; p. 21, tsn, Nov. 11, 1975).

In the meantime, while Rosita Devaras was fishing in the middle of the river, she saw Marceliano Devaras, Felix Cañas and Florentino (sic) Serrano approaching her. When they came near her, they asked her if she had seen Doring, referring to Teodoro Devaras. She replied in the affirmative, and then she pointed to the place where Teodoro Bisnar was fishing about 15 meters away from her. Thereafter, the three above-named persons left her

and proceeded to the place pointed to by her (pp. 25-26, 29-30, tsn, March 3, 1976).

Not long thereafter, Rosita Devaras and Gabrino heard a shout for help, coming from the place where Teodoro Bisnar was then fishing. Both recognized that the voice shouting for help was that of Teodoro Bisnar (pp. 5-6, tsn, Dec. 5, 1975; p. 26, tsn, March 3, 1976). Both immediately turned towards the direction where the shout for help came from, and they saw persons attacking Teodoro Bisnar. Gabrino, in particular, saw Marceliano Devaras, Felix Cañas and Florante Serrano in the river stabbing and hacking Teodoro Bisnar. Gabrino also saw Bernardo Devaras on the bank of the river, flashing his flashlight towards the group attacking Teodoro Bisnar. Seeing thus (sic), Gabrino went ashore and left for his house because he was afraid (pp. 6-9, 22-24, tsn, Dec. 5, 1975). In her case, Rosita Devaras saw Florante Serrano slash Doring, while Marcelino Devaras and Felix Cañas were stabbing Doring. She recognized the assailants because the place where Doring was being attacked was bright with a lighted torch at the bank of the river. She then saw Teodoro Bisnar fall into the river, and thus presumed him to be dead. She approached her son and told him: 'Let us go home because there is fight there.' Both mother and son thus went home because they were afraid (pp. 26-27, 30-31, 33-34, 37-38, tsn, March 3, 1976).

In the case of Paulita Borja, when it was already 8:00 o'clock that same evening of July 6, 1975, and her husband has (sic) not yet returned from the river, she became apprehensive. Bringing along her son, Rogelio Devaras, they went to the river to look for her husband. She brought along a flashlight (pp. 7-8, Oct. 7, 1975). On their way to the river, Paulita Borja and her son Rogelio Devaras met Florante Serrano, Felix Cañas and Marceliano Devaras. She recognized them because she had flashed her flashlight at them when they came near her, although they swerved to one side about 10 meters away from her. She noticed that their pants were wet and they were carrying boloes. She and her son did not talk to them. Being already apprehensive for her husband, and seeing the three persons carrying boloes, she became afraid (pp. 8-9, tsn, Oct. 7, 1975; pp. 10-11, 14-17, 23-24, tsn, Nov. 11, 1975). When she and her son reached the river, her husband was nowhere to be found there. Hence, mother and son returned home. That evening, she could not sleep because she became more apprehensive when her husband still did not return home (pp. 9-10, tsn, Oct. 7, 1975).

Early the following morning of July 7, 1975, Paulita Borja and their four children went to the Daguitan River to look for her husband. Her son Rogelio later found his father under the water already dead. Rogelio then carried the cadaver of his father to the bank of the river. There, Paulita Borja noticed that her deceased (sic) husband sustained several wounds on all parts of the body, some at the back of the head (pp. 10-11, tsn, id.).

Thereafter, a sister-in-law of Paulita Borja went to the police department at Dulag to report on their grim discovery. A policeman went to the river to investigate the matter. The cadaver of the said deceased was later brought to his house (pp. 11-12, tsn, id.).

At about one o'clock in the afternoon of July 7, 1975, Victoriano Gabrino went to the house of the deceased Teodoro Bisnar, where he saw the deceased lay (sic) in state. He then talked to Paulita Borja, the surviving widow, informing her that he had witnessed and seen the persons kill her husband in the river, while he (Gabrino) was also catching fish there (pp. 9-10, 19-20, tsn, Dec. 5, 1975; p. 12, tsn, Oct. 7, 1975; pp. 8-9, tsn, Nov. 11, 1975; pp. 20-21, tsn, Dec. 5, 1975).

At about 3:00 o'clock in the afternoon of the same day, July 7, 1975, Dr. Rodolfo Serrano, municipal health officer of Dulag, Leyte, conducted a postmortem examination of the cadaver of the deceased Teodoro Bisnar. The cadaver was already in complete rigor mortis. The doctor found fourteen stab and incised wounds on the body of the said deceased (which are enumerated in the above-quoted information). The said wounds were caused by blunt and sharp-edged instruments. According to the said doctor, Wound No. 1 was a fatal wound, which caused the death of the victim, because it penetrated the heart. Taken individually, the other wounds would not cause his

death, but collectively, said other wound (sic) would cause his death due to hemorrhage (pp. 2-5, tsn, Sept. 26, 1975; p. 12, tsn, Oct. 30, 1975). Dr. Serrano issued the corresponding medical report of his postmortem examination of the said deceased, the entries of which he confirmed as true in the course of his testimony in court (pp. 3, 5, tsn, Sept. 26, 1975; Exhibit "A").

Later, Rosita Devaras met Paulita Borja sometime on a Thursday in January 1976, during a market day of the said municipality. She saw the widow wearing black (sic) dress; and she asked her why she was wearing a black dress. The latter told her that her husband was killed at the Daguitan River. She asked the widow who killed her husband, and the latter told her husband was killed by Florante Serrano (sic), Felix Cañas and Marceliano Devaras. Rosita Devaras then told Paulita Borja that she had seen and witnessed the incident. The widow then asked her to be a witness in this case (pp. 27-28, 32, 36-37, tsn, March 3, 1976). On the other hand, Victoriano Gabrino, upon her previous request, accompanied Paulita Borja to the PC where she then filed a criminal complaint with the PC against the assailants of her deceased husband. Gabrino was also investigated by the PC on the same occasion (pp. 21-22, tsn, Dec. 5, 1975)."[10]

In exculpation, appellant Serrano, like his co-appellants, put up the defense of alibi, which the trial court summarized as follows:

"For his part, accused Florante Serrano, and with Antonio Tonido also testifying to corroborate him, also denied having anything to do with Teodoro Bisnar's death because at 6:00 o'clock in the evening of July 6, 1975, according to this accused, he was on the porch of his house in Dulag conversing with Antonio Fernandez and Rogelio Señase when Antonio Tonido arrived and told them that he had an engine trouble of (sic) his boat with the request that they help him drag it ashore. Shortly after this, the owner of the boat, Roque Boder and a mechanic, arrived in his house where the engine had been brought after these two left the house, Tonido, upon written invitation of Serrano's wife, took his supper with said accused and family, leaving the house at 9:00 p.m. He knew of the killing of Teodoro Bisnar only the following day when he was informed that a policeman went to his house (he was out then) looking for him and left word that he go to the municipal building."[11]

The parties agree that all the accused had been detained since 12 July 1975; they were "invited" in connection with this case in the evening of 11 July 1975 by the Philippine Constabulary (PC) authorities at Camp Bumpus, Tacloban City, and were taken into custody. They signed a waiver of detention. At the time the information was filed and the arrest warrants were issued, they were already in detention.[12]

In the Appellant's Brief, appellant Serrano insists on his innocence and contends that the trial court erred in:

FIRST. x x x holding clear and positive the identification of the appellants (and of Teodoro Bisnar) as the assailants (and the assaulted) in the stabbing incident alleged to have been witnessed by Victoriano Gabrino and Rosita Devaras at about seven or seven-thirty in the evening of July 6, 1975;

SECOND. x x x ignoring and disregard-ing or overlooking the substantial fact that Teodoro Bisnar met his death on July 7, 1975 (not July 6) and within the first hour immediately after he was wounded, which fact if properly appreciated would offset the results of the case;

THIRD. x x x denying the appellant's motion to dismiss filed for insufficiency of evidence;

FOURTH. x x x not giving the appel-lant's defense of alibi commensurate strength vis-a-vis the absence of sufficient and convincing evidence of identification;

FIFTH. x x x holding the appellants responsible for the untimely death of Teodoro Bisnar without the necessary proof of motive in the absence of convincing proof of identity;

SIXTH. x x x holding that the quali-fying circumstance of treachery was attendant in the killing of Teodoro Bisnar; and

SEVENTH. x x x not considering the attendance of the mitigating circumstance of voluntary surrender in the imposition of the proper penalty."

All of these errors, except for the seventh assigned error to which it graciously concedes and concurs, are refuted by the People in its well-written Brief.

We have carefully and meticulously examined and studied the records of this case and the evidence adduced by the parties and We find ourselves in full agreement with the findings of the trial court that appellant Serrano was among those responsible for the death of Teodoro Bisnar. However, as shall hereafter be discussed, in connection with the sixth assigned error, We are unable to agree with the trial court's conclusion that the killing was qualified by treachery.

We shall take up the assigned errors in the order they are presented.

- The first assigned error is without basis. Prosecution witnesses Rosita Devaras and Victoriano Gabrino positively identified appellant Serrano and his co-accused.

Rosita Devaras, whose husband Lorenzo Devaras is a cousin of accused Marcelino Devaras, and who had known the appellants long before 6 July 1975, testified as follows:

"Q While you were catching fish for bait with your son, in that river at about 7:30 in the evening of July 6, 1975, tell us if you have (sic) met these accused?

A Yes, because they were approaching us.

Q What did they do or what did they say in (sic) approaching you?

A When they approached me and my son catching (sic) fish and shrimps, they asked me whether I saw Doring.

Q Who asked you?

A Marcelino Devaras.

Q Do you know this Doring they were asking you about?

A Teodoro Bisnar.

Q What was your answer to that?

A I said that one where there is light. That is Doring who is catching fish by the use of a net (sic).

Q You pointed to fifteen meters (sic) distance where Doring was?

A Yes, because it was bright and I saw clearly.

Q After pointing Teodoro Bisnar to the three accused who approached you where did these three accused go?

A They approached Doring.

Q Did you go with them?

A No, sir. I just showed them the place.

Q Few minutes after these three accused left going to the place where you pointed them (sic), tell the court if there was anything unusual which you saw or heard or which happened?

A I heard somebody said (sic): 'Help'.

Q Coming from what direction?

A From Doring.

Q Were you able to recognize the voice crying for help?

A Yes, it was the voice of Doring.

Q After that what did you do, after you heard the cry for help?

A I turned my face towards them.

Q Turning your face, what did you see, please tell the court?

A When I turned my face to them I saw Florante Serrano slash Doring while Marcelino Devaras and Felix Cañas were stabbing him.

Q Why did you see them when it was night time?

A It was bright because there was a torch.

Q Whose torch?

A The torch of Doring Bisnar.

Q. Seeing the attack made by the accused on the deceased, what did you do and where did you go?

A I approached my son and said to my son, let us go home because there is fight (sic) there.

Q So you went home?

A Yes, sir."[13]

The cross-examination of Rosita by counsel for the accused strengthened further her positive identification of Serrano and elicited from her a clearer picture of what Serrano did. Thus:

"Q Will you please show to the court how, according to you, you saw Florante Serrano hack Teodoro Bisnar?

A I only saw that he slashed Teodoro Bisnar, but I did not mind how it was delivered.

Q Did you not say that you saw Florante Serrano hack Teodoro Bisnar?

A I saw that he hack (sic), but I did not see how he delivered the blow, but the fact is he hacked him.

Q Just exactly tell us how Florante Serrano or what was Florante Serrano doing when you saw him. You imitate.

A (witness standing and then raising her right hand making a downward movement as if slashing down, two times) saying, hitting him on the head and other parts of the body."[14]

The cross-examiner may not have expected this voluntary revelation from Rosita; however, he carelessly overdid his role by pressing the witness to demonstrate what exactly the accused did, a task which properly pertains to the prosecuting fiscal on direct examination to strengthen further the case against the accused.

Witness Victoriano Gabrino likewise positively identified the appellant as among the three perpetrators of the crime. Thus, on direct examination, he testified as follows:

"Q Now, while you were there fishing near one bank of the river while Teodoro Bisnar over there (sic) at the opposite side, will you kindly tell the Court of anything unusual that you heard?

A There was.

Q What was it which you heard?

A I heard a shout for help.

Q From which direction did that voice come and whose voice was that which you said you heard?

A That was Teodoro Bisnar's voice.

Q Hearing that shout for help coming from Teodoro Bisnar, what did you do?

A I went ashore.

Q When you heard this voice shouting (sic), will you kindly tell us why did Teodoro Bisnar shout for help?

A Yes, sir.

Q Why did he shout for help?

A There were persons near him.

Q Who were the persons near him when he shouted for help?

A Near Teodoro were Felix Cañas, Bernardo Devaras and Florante Serrano.

Q Do you know a person by the name of Marceliano Devaras?

A Yes, sir.

Q Do you know where Marceliano Devaras was at the time that Teodoro Bisnar was shouting for help?

A He was near Teodoro Bisnar.

x x x

Q Who were stabbing Teodoro Bisnar and/or hacking him?

A Florante Serrano and Felix Cañas.

Q How many were they?

A They were three.

Q Will you name these three?

A Felix Cañas, Florante Serrano, and Marceliano Devaras."[15]

- It is true that, as entered in the death certificate of the victim, Teodoro Bisnar,[16] the date of his death is the 7th -- not the 6th of July 1975. However, We agree with the explanation of the People that the date "July 7, 1975" was erroneously entered on the space for "Date of Death", to wit:

"A reading of both the postmortem report, Exhibit "A", and the death certificate in question, Exhibits "A-1" or "2", both issued on the same day, July 7, 1975, by Dr. Rodolfo Serrano, Dulag municipal health officer, however, reveals that the date 'July 7, 1975' was erroneously entered on the space for '4. Date of Death' in the said death certificate (Exhibit "2-A"). It was already 3:00 o'clock in the afternoon of July 7, 1975 when the said doctor conducted his postmortem examination on the cadaver of the said deceased (p. 11, tsn, Oct. 30, 1975). The body of the deceased was already in complete rigor mortis (p. 12, tsn, id.). After examining the wounds, the cause of death he (sic) placed on the said postmortem report was: 'HEMORRHAGE, secondary to stab wound of the heart (Exhibit "A", p. 9, Records), and soon thereafter, on the same day, July 7, 1975, he issued the corresponding death certificate of the deceased, wherein he placed the cause or causes of death as: (a) HEMORRHAGE, and (b) Stabwound of the heart' (Exhibits "A-1" or "2", p. 10, Records). Medically, the stab wound of the heart would cause hemorrhage which will eventually cause the death of the victim. But, as found by the said doctor, the stab wound, or Wound No. 1, which is: 'Stab wound, 3 inches long x 1 inch x 4 inches deep, cutting second costal cartilage, penetrating the heart, at the second intercostal space, left' (Exhibit "A"), is a fatal one, caused by a sharp-pointed instrument (pp. 4-5, tsn, id.). The said fatal wound, according to the said doctor, may not cause instant death, but the victim would only live for a few minutes, or not more than one hour (p. 10, tsn, Oct. 30, 1975). The truth of the matter is that when Dr. Serrano stated that the victim must have been dead 'for more than six hours' upon finding that the cadaver was already in complete rigor mortis (p. 12, tsn, id.), the point of time that the victim must have succumbed to the assault of the appellants and eventually died could even be long before the 'six-hour' limitation, computing from the time rigor mortis starts to set in and be completed. The evidence shows that Dr. Serrano found the body of the deceased at 3:00 o'clock in the afternoon of July 7, 1975, when he conducted his postmortem examination of said cadaver, already in complete rigor mortis, but he did not state that rigor mortis of the deceased's body set in or was completed at 3:00 o'clock in the afternoon of July 7, 1975. Consequently, when Dr. Serrano stated that the victim must have been dead 'for more than six hours', it could have been that the victim died even the night before."[17]

Moreover, in his cross-examination of Dr. Rodolfo Serrano, counsel for the accused, instead of casting doubt on the allegation that the death of the victim occurred in the evening of 6 July 1975, or bolstering the appellant's

contention that it occurred on 7 July 1975, elicited the response that it could have taken place before or after 7:30 in the evening of 6 July 1975. Thus:

"Q You want to say Doctor, in your opinion that the body of the victim could have been killed at 7:30 of July 6 in the afternoon?

A Before or after that time."[18]

- The third assigned error is absolutely without merit. Appellant's motion to dismiss was actually a demurrer to evidence, filed after the prosecution rested its case, on the ground of "insufficiency of evidence to prove the guilt of the accused beyond reasonable doubt." [19] The trial court denied it because:

"x x x going over the evidence presented by the prosecution, the Court is of the opinion that the prosecution has established prima facie the guilt of accused Marcelino Devaras, Florante Serrano and Felix Cañas in this case." [20]

and set the case for the reception of the evidence for the defense. Appellant did not even ask for a reconsideration of the Order; instead, he and his co-accused merely asked for time to prepare their evidence [21] which, on subsequent dates, they presented. Such acts effectively estopped him from resurrecting a motion the denial of which was, in the first place, proper and correct as borne out by the subsequent conviction of the accused and, in the second place, final as no motion for its reconsideration was thereafter pursued.

- Alibi is one of the weakest defenses that can be resorted to by an accused, [22] not only because it is inherently weak and unreliable but also because of its easy fabrication, without much opportunity at checking or rebutting it. [23] It must be proved by positive, clear and satisfactory evidence, [24] and when the accused were identified by the witnesses for the prosecution by clear, explicit and positive testimony, the alibi will not be credited. [25]

In numerous recent cases too many to enumerate, this Court has repeatedly reiterated the rule that the defense of alibi cannot prevail over the positive identification of the accused by the witnesses for the prosecution and that to establish it, an accused must show that he was at some other place for such a period of time that it was impossible for him to have been at the place where the crime was committed at the time of its commission. In the instant case, appellant was, as earlier stated, positively identified by the principal witnesses for the prosecution; besides, he did not even attempt to establish that it was impossible for him to be at the place where the crime was committed.

- The fifth assigned error is based on the assumption that there was no convincing proof of identity. The assumption, however, as shown in the foregoing discussion, is clearly unfounded. Settled is the rule that motive is not essential to conviction when there is no doubt as to the identity of the culprit. [26] Motive is not essential when there are reliable eyewitnesses who fully identified the accused as the perpetrator of the offense. [27] And lack of motive for committing the crime does not preclude conviction for the offense when the crime and the participation the accused are definitely proved. [28]

- Nevertheless, We agree with appellant Serrano that the trial court erred in holding that the qualifying circumstance of treachery was present in the killing of Teodoro Bisnar.

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 specially to insure its execution, without risk to himself arising from the defense which the offended party might make. [29] It should be appreciated only against the assailant who resorted to that mode of attack. [30] In the instant case, there is an obvious paucity of evidence to show how the aggression was commenced or how the acts which resulted in the death of Teodoro Bisnar began and developed. All that the prosecution had were the testimonies of Rosita Devaras and Victoriano Gabrino who

both saw the appellant only after turning their faces towards where the victim was after hearing the latter's shout for help. At that particular instance, they saw the appellant and his co-accused hacking and stabbing the victim. They were not, therefore, in a position to see how the attack was begun and were not able to observe the position of the victim relative to each of the assailants, more particularly to that of Serrano. In *U.S. vs. Perdon*,^[31] and *U.S. vs. Pangilion*,^[32] this Court held that where no particulars are known as to the manner in which the aggression was made or how the act which resulted in the death of the victim began and developed, it can in no way be established from mere suppositions that the killing was perpetrated by treachery. Thus, it cannot be considered where the lone witness did not see the commencement of the assault.^[33] Accordingly, Serrano could only be liable for Homicide, and not Murder, since no qualifying circumstance attended the killing of Teodoro Bisnar.

- Despite the People's concurrence with the seventh assigned error, We find that the trial court did not err in failing to appreciate in favor of the appellant Serrano the mitigating circumstance of voluntary surrender. He did not offer any evidence to prove this circumstance. At the very least, he should have testified on direct examination that he voluntarily surrendered. While it is true that the investigating fiscal mentioned in his resolution that at the time the records of the case were turned over to him for purposes of the preliminary investigation, all the accused were detained at the Provincial Jail of Leyte where they were transferred from the Detention Center of the Philippine Constabulary in Camp Bumpus, Tacloban City,^[34] there is nothing on record to show that such detention was by virtue of a voluntary surrender, just as there is nothing to support the appellant's claim that, with his co-accused, he went to the PC Headquarters to comply with an invitation for an investigation in connection with the killing of Teodoro Bisnar and voluntarily signed a waiver of detention. On the contrary, in their Waiver, they explicitly admitted that they were arrested by elements of the 351st PC Company. The Waiver^[35] reads as follows:

"WAIVER FOR (sic) DETENTION

That we the undersigned having been arrested by elements of the 351st PC Company, Camp Bumpus, Tacloban City, we waive (sic) our rights and submit our persons voluntarily under the custody of the arresting officers/agency.

IN WITNESS WHEREOF, we have set our hands this 12th day of July 1975, at Tacloban City, Leyte, Philippines.

S/T MARCELLANO (sic) S/T FLORANTE SERRANO
DEVARAS (Affiant) (Affiant)
S/T BERNARDO DEVARAS S/T FELIX CAÑAS
(Affiant) (Affiant)

Witnesses:

SUBSCRIBED AND SWORN TO before, me this 12th day of July 1975, at Tacloban City, Philippines.

S/T ENRIQUE C. ACIS
1LT (JAGS) PC

HPC, Spl detail for
Leyte and Samar Const

Command”

For voluntary surrender to be appreciated, it must be spontaneous and made in such manner that it shows the interest of the accused to surrender unconditionally to the authorities, either because he acknowledges his guilt or because he wishes to save them the trouble and expenses necessarily incurred in his search and capture.[36] The fact of the arrest of the appellant, even if made before the issuance of a warrant of arrest, belies any claim of voluntary surrender since the element of spontaneity is necessarily absent. What seems clear in this case is that all the accused were arrested by the PC authorities without a warrant under paragraph (b), Section 6, Rule 113 of the 1964 Rules of Court,[37] reading as follows:

"Section 6. Arrest without warrant -? when lawful. — A peace officer or a private person may, without a warrant, arrest a person:

x x x

(b) when an offense has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it."

x x x

At the time of the arrest, the sworn statements of prosecution witnesses Paulita Borja (widow of Teodoro Bisnar), Joel Beringuel and Victoriano Gabrino were already taken by the PC authorities[38] and the latter had already reasonable ground to believe that Serrano and his co-accused committed the crime.

The foregoing considered, appellant should be convicted of the crime of Homicide sans the mitigating circumstance of voluntary surrender. There being no proof of any ordinary aggravating circumstance, following the first rule prescribed by Article 64 of the Revised Penal Code, the medium of the penalty for homicide, which is reclusion temporal under Article 249 of the same Code, shall be imposed. Appellant is, however, entitled to the benefits of the Indeterminate Sentence Law,[39] which mandates the imposition of an indeterminate penalty the maximum term of which shall be that which, in view of the attending circumstances, could be properly imposed under the rules of the Revised Penal Code and the minimum of which shall be within the range of the penalty next lower to that prescribed by the Code for the offense.

As regards the indemnity, following recent decisions of this Court,[40] the award of P12,000.00 should be increased to P50,000.00, the payment of which should take into account the effect of the death of appellants Marcelino Devaras and Felix Cañas as earlier adverted to.

WHEREFORE, taking into account the above modifications, judgment is hereby rendered finding appellant FLORANTE SERRANO guilty beyond reasonable doubt of the crime of Homicide, as defined and penalized under Article 249 of the Revised Penal Code, for the death of Teodoro Bisnar and, considering the absence of any mitigating or aggravating circumstance and applying in his favor the Indeterminate Sentence Law, said appellant is hereby sentenced to suffer an indeterminate penalty ranging from Eight (8) years and One (1) day of Prison Mayor, as minimum, to Fourteen (14) years, Eight (8) months and One (1) day of Reclusion Temporal, as maximum, and to indemnify, jointly and severally with the estates of Marcelino Devaras and Felix Cañas, the heirs of the deceased Teodoro Bisnar in the amount of P50,000.00. He is further ordered to pay one-third (1/3) of the costs.

IT IS SO ORDERED.

Gutierrez, Jr., (Chairman), Feliciano, Bidin, and Romero, JJ., concur.

[1] In their Notice of Appeal (Rollo, 45), accused-appellants erroneously manifested that they are appealing to the Court of Appeals.

[2] Id., 35-44.

[3] Under paragraph 2 (d), Section 5 of the 1973 Constitution, the governing law at the time, the Supreme Court had exclusive jurisdiction in appeals in cases in which the penalty imposed is death or life imprisonment.

[4] Rollo, 97.

[5] Id., 99.

[6] Id., 105.

[7] Id., 106.

[8] Rollo, 13-15.

[9] Id., 18.

[10] Brief for Appellee, 4-12.

[11] Rollo, 39-40.

[12] Brief for Appellants, 22; Id., 97; Brief for Appellees, 33-34; Id., 86, et seq.; Resolution of the Fiscal, Original Records, 4-5.

[13] TSN, 3 March 1976, 25-27. Underscoring supplied for emphasis.

[14] TSN, 3 March 1976, 30-31.

[15] TSN, 5 December 1975, 5-8. Underscoring supplied for emphasis.

[16] Exh. "2", which is also Exh. "A-1" for the People.

[17] Brief for Appellee, 14-16.

[18] TSN, 30 October 1975, 12.

[19] Original Records, 155.

[20] Id., 171.

[21] Id., 173.

[22] People vs. dela Cruz, 76 Phil. 601.

[23] People vs. Badilla, 48 Phil. 718; People vs. Medina, 71 Phil. 383; People vs. Rafallo, 86 Phil. 22.

[24] U.S. vs. Olais, 36 Phil. 828; People vs. Limbo, 49 Phil. 94; People vs. Pili, 51 Phil. 965.

[25] U.S. vs. Hudieres 27 Phil. 45; People vs. Cabantug, 49 Phil. 482; People vs. Palamos, 49 Phil. 601; People vs. de Asis, 61 Phil. 384.

[26] *People vs. Solaña*, 6 SCRA 60; *People vs. Indic*, 10 SCRA 130; *People vs. Romawak*, 12 SCRA 332; *People vs. Racquel*, 12 SCRA 441; *People vs. Reyno*, 13 SCRA 647; *People vs. Ner*, 28 SCRA 1151.

[27] *People vs. Evaristo*, 13 SCRA 172.

[28] *People vs. Lumantas*, 28 SCRA 764.

[29] Paragraph 16, Article 14, Revised Penal Code.

[30] *People vs. Tividad*, 20 SCRA 549.

[31] 4 Phil. 141.

[32] 34 Phil. 786.

[33] *People vs. Cananowa*, 92 SCRA 427.

[34] Original Records, 4.

[35] Original Records, 11. Underscoring supplied for emphasis.

[36] *People vs. Sakam, et al.*, 61 Phil. 27; *People vs. Gervacio, et al.*, 24 SCRA 960.

[37] Section 6 is now Section 5 of the same Rule.

[38] Original Records, 6-8.

[39] Act No. 4103, as amended.

[40] Among which are *People vs. Sison*, 189 SCRA 643 and *People vs. Sazon*, 189 SCRA 700.

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