

**PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.  
ADRIANO DAGUNDONG, FEDERICO BULAON, MELCHOR LAO AND  
RICARDO SERRANO, DEFENDANTS. ADRIANO DAGUNDONG,  
FEDERICO BULAON AND RI...**

*G.R. No. L-10398. June 30, 1960*

Ponente: GUTIERREZ DAVID, J.

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**GUTIERREZ DAVID, J.:**

In the Court of First Instance of Rizal, Adriano Dagundong, Melchor Lao, Federico Bulaon, Ricardo Serrano and Joseph Ebrada were charged with the crime of frustrated robbery in band with homicide. Upon motion of the provincial fiscal, the court ordered Ebrada discharged from the information in order that he could be utilized as a state witness.

After due trial with respect to the rest of the accused, the court found all the defendants, except Dagundong, guilty of frustrated robbery with homicide, with the aggravating circumstances of nighttime, abuse of superior strength, and commission of the crime with the aid of a motor vehicle, without any mitigating circumstance, and sentenced each of the three defendants, Melchor Lao, Federico Bulaon and Ricardo Serrano to reclusion perpetua; found Adriano Dagundong guilty of murder, qualified by treachery, with the aggravating circumstance of nighttime, in band, abuse of superior strength and commission of the offense with the aid of a motor vehicle, without any mitigating circumstance, and sentenced him to death; and also sentenced all of the four accused to indemnify jointly and severally the heirs of the victim Mamey Lake Hewell in the amount of P6,000.00, with subsidiary imprisonment in case of insolvency, and the accessories of law, and to pay the costs.

All four accused appealed, but Melchor Lao subsequently withdrew his appeal. So, this is with respect only to the appeal of accused Adriano Dagundong, Ricardo Serrano and Federico Bulaon.

The following facts are not in dispute: On October 7, 1950, Alice Lake, more popularly known as movie actress Anita Linda, lived at No. 13 Pasong Tamo, Makati, Rizal, together with her son, her sister Mrs. Mamey Lake Hewell, and the latter's children, Josephine, Patricia, Johnny and Helen. At about 7 p.m. of said date, Alice, who was then in her bedroom, requested her niece Josephine, then 12 years old, to get her a glass of milk from the kitchen. As Josephine entered the kitchen, she suddenly came face to face with a man holding a gun. This gunman was small in stature, fairly, built and was wearing a checkered shirt with long sleeves, dark colored pants, gloves and army shoes. On his head he had a balangot hat, and over his face a black mask with two holes for the eyes. Instinctively, Josephine screamed. The gunman told her to keep silent and to return to the sala. With the gun held against her back, the gunman followed her into the sala, where they found Patricia. The gunman motioned Patricia to come nearer to Josephine.

At this time, Alice and her sister, Mrs. Hewell, startled by Josephine's scream, rushed out of the their respective bedrooms. When they reached the sala they came upon Josephine and Patricia, and the gunman who had his gun stuck at Josephine's back. As Mrs. Hewell knelt before the gunman and pleaded for her daughters, saying:

"Maawa po kayo, huwag po", Patricia and Josephine ran to their aunt Alice. Without compunction, the gunman levelled his gun straight at Mrs. Hewell's face.

Meanwhile, Alice, together with her nieces, had fled into her bedroom. Shortly thereafter, several shots, not less than five, were heard coming from the sala. Alice and the children screamed. Alice wanted to go out to help her sister, but the two girls prevented her by locking the bedroom door. A moment later, they heard someone knock on and then kick the door to Alice's bedroom. Then complete silence. After some minutes, Alice heard the noise of a jeep moving away and going towards Sta. Ana. Feeling certain that the malefactors had left for good, Alice shouted for help. Her outcries were heard by the driver of a passing taxicab, who lost no time in bringing the Makati police to the scene.

Upon entering the sala, the police came upon Mrs. Hewell's bullet-ridden body lying on the floor. In the course of their investigation, the policemen came across three .45 caliber empty shells about a meter from where Mrs. Hewell lay, and four other empty shells outside the premises. They also discovered five slugs, three of which were extracted from the wall leading to Alice's bedroom, and about two meters from Mrs. Hewell's feet, and the remaining two from the wooden cabinet which stood between the doors leading to the sala and the kitchen. On entering Mrs. Hewell's bedroom, the police found that it had been ransacked. After the removal of Mrs. Hewell's corpse, Alice went into her sister's bedroom and found it in the same condition as the policemen had found it, but she did not notice anything missing therefrom.

According to Dr. Enrique de los Santos, Chief, NBI, Medico Legal Division, who performed the necropsy on the body of Mrs. Hewell, she sustained 5 penetrating gunshot wounds, three of which were located on the right and left chest, and the other two on the back; that said wounds were produced by .45 caliber bullets; that the bullets hit the liver, lungs, and pancreas of the deceased; and that death was due to shock.

The prosecution established by means of the testimony of Joseph Ebrada, one of the original accused but who was discharged in order to be a prosecution witness, that: On October 5, 1950, Melchor Lao went to see Ebrada in his place in Cavite, in order to borrow the jeep which Ebrada had in turn borrowed from a certain Terio Manimbao of Malagasang, Imus, Cavite. The jeep bore a PI plate number. At Lao's invitation, Ebrada went with him. They were then joined by appellants Dagundong and Serrano in going to the New Bilibid Prisons in Muntinlupa, Rizal. There, Lao and appellants Serrano and Dagundong visited Pablo Rabaton, an inmate. After thirty minutes they left and proceeded to Makati, Rizal. Along the way, appellant Dagundong stated that they must raise money with which to bail out Rabaton, and if necessary to commit robbery in order to do so. Ebrada, Lao and appellant Serrano agreed to this proposal.

At about 7 in the evening of October 7, 1950, Lao went to see Ebrada in his house in Guadalupe, Makati, Rizal, in order to borrow again the jeep. At Lao's behest, Ebrada drove the jeep to Olympia. There they picked up appellants Bulaon, Dagundong and Serrano. The jeep then proceeded to Buendia, Makati, Rizal. The jeep stopped some distance from the house of Alice Lake. Leaving Lao in the jeep, appellants and Ebrada, all of them armed, alighted and walked along the creek up to the stone wall behind the house. They then stepped over the wall which was about two feet high. Once inside the premises, appellant Dagundong instructed Ebrada to stand guard near the window on the left side of the house, and appellant Serrano on the right side. Dagundong and Bulaon then entered the house through the kitchen. After two minutes, Ebrada heard a shot coming from the house, whereupon, a .45 caliber pistol in hand, he rushed inside, passing through the kitchen door. Upon reaching the sala, he saw a woman sprawled on the floor. Dagundong and Bulaon came out of the room adjoining the sala. The former was holding a .45 caliber army pistol. In order to stop the screaming of the two little girls, Ebrada fired twice at the wall. Immediately after, Ebrada and his companions ran towards the waiting jeep and fled from the scene. On the way to Olympia, the three appellants got off. The jeep proceeded to Cavite City where Lao dropped off Ebrada

then drove to Malagasang, and upon arrival there returned the jeep to its owner.

Rejection of Ebrada's testimony is urged upon us by appellants on three grounds, to wit: (1) he had been improperly discharged from the information; (2) his testimony comes from a polluted source; and (3) he incurred many inconsistencies.

Appellants Serrano and Bulaon claim that Ebrada's discharge violates the provisions of Section 9, Rule 115, Rules of Court, more particularly paragraph 5, thereof, because Ebrada has twice been convicted of robbery. Whether or not he was improperly discharged is of no moment in determining his credibility. The provisions of Section 9, Rule 115, Rules of Court, are aimed at preventing the unnecessary or arbitrary exclusion from the information of persons guilty of the crime charged, but it has no bearing on the admissibility of their testimony or their competency as witnesses (*People vs. Castañeda*, 63 Phil., 480). The rule merely lays down the requisites which should control the court in the exercise of its discretion in discharging accused persons in order that they may be used as witnesses against their co-accused, so we must search elsewhere for the rules governing the competency, admissibility, relevancy and probative value of the testimony of these witnesses when it is offered in evidence, after they have been discharged by the court to become prosecution witnesses. (*U. S. vs. Abanzado*, 37 Phil., 658).

To a large extent, identification of the culprits depended on Ebrada. Appellants maintain that because he is confessedly one of the perpetrators of the crime, he does not merit credence. Having come from a polluted source, his testimony, naturally, was subject to the gravest suspicion, but a meticulous review of the evidence convinced us of Ebrada's reliability.

Before the filing of the criminal information, Ebrada had executed a sworn written statement before Lt. Ver and in the presence of Provincial Fiscal Nicanor Nicolas, wherein he admitted his complicity in the crime and he named the three appellants herein and also Melchor Lao as his companions in the commission thereof (Exhibit L). Lao also made a verified statement on the same date and before the same officials, wherein he likewise admitted his participation in the robbery (Exhibit K). Ebrada's testimony in court was but a more detailed reiteration of what he stated in his sworn statement. His testimony finds corroboration in Lao's statement which relates a version of the crime similar to that narrated by Ebrada.

It is alleged, however, that Lao's extrajudicial confession is admissible only against himself but not against appellants herein. The rule is that a statement made by a conspirator relating to the conspiracy and during its existence, may be given in evidence against the co-conspirators after the conspiracy is shown by evidence other than such statement (Section 12, Rule 123, Rules of Court). As to the existence of the conspiracy, we have Ebrada's testimony that two days prior to the commission of the crime, he, Lao and appellants Dagundong and Serrano agreed on committing the robbery and that on the very day thereof, the four of them, joined this time by appellant Bulaon, carried into execution their criminal plot. The conspiracy having been proven, Exhibit K is therefore admissible in evidence even as against appellants.

No ill motive on Ebrada's part has been adduced to prove that he had testified falsely against appellants. Furthermore, his testimony bears the earmarks of truth in that it is replete with details which could have been known only to one who was actually present during the commission of the crime. He knew the description of the malefactor who was first in entering the victim's house, the very gunman who had intimidated Josephine Hewell, Patricia Hewell and Alice Lake, and had aimed his gun at Mrs. Hewell's face. According to Ebrada, said gunman was a little over 5 feet, 2 inches tall and fairly built; and that he had a black mask covering his face, a balangot hat on his head and wore fatigue pants and army shoes. This description tallies perfectly with that given by Alice Lake and Josephine Hewell, both of whom had seen the gunman at close range, and therefore were in a position to remember his appearance. Alice Lake, however, had added that the gunman also wore a long sleeved shirt and on

his hands he had gloves, while Josephine Hewell had specified that the gunman wore a checkered shirt with long sleeves. The height and build of the gunman, as described by Alice Lake and her niece, coincides with that of appellant Dagundong, so there can be no doubt as to the veracity of Ebrada's statement that he was the gunman who had first entered the victim's house.

Ebrada testified that right after he heard the sound of the first shot coming from the house he rushed into the sala; and that he then fired two shots directed at the wall in order to stop the screaming of the girls. Proof of this is that in the course of their investigation, the Makati police found in the sala of the victim's house, five slugs, three of which were embedded on the wall leading to Alice Lake's bedroom.

Mrs. Hewell's fatal wounds were produced by .45 caliber bullets. According to Ebrada, Dagundong was armed with a .45 caliber army pistol; and that after they left the house of Alice Lake and while they were on their way back to Olympia, appellant Dagundong handed his pistol to Lao and ordered him to dispose of it. This was confirmed by Lao in his statement (Exhibit K). As a matter of fact, Lao was charged with illegal possession of firearms for having been caught with the very same pistol in his possession (Exhibits J and J-1).

The alleged inconsistencies in Ebrada's testimony are merely superficial. It is true, as alleged by appellants, that he did not know about the plan to commit robbery in the house of Alice Lake. He knew that they were going to commit robbery, but at the time appellant Dagundong first apprised him of the criminal plan, the intended victim was not specified.

Appellant Dagundong's counsel appears confused as to the time and day that Lao borrowed Manimbao's jeep from Ebrada. This may be due to the fact that Lao borrowed the jeep twice, once, in the afternoon of October 5, 1950, in order to go to the national penitentiary in Muntinlupa; and the second time, in the evening of October 7, 1950, when they used the same jeep in committing the crime. Eleuterio Manimbao, owner of the jeep, testified that when the crime was committed, his jeep was in Ebrada's possession, having been borrowed by the latter.

Appellants argue that Ebrada committed an inconsistency when he declared that he heard one shot, when the fact was that there was more than one shot fired. What Ebrada stated was that upon hearing the first shot, he immediately ran inside the house. The succeeding shots were fired while he was running towards the sala, passing through the kitchen.

Another contention of appellants is that there is a contradiction between the testimony of Ebrada and that of Alice Lake respecting the time the crime was committed. We do not find such a discrepancy in their statements as would inescapably lead to the conclusion that either was lying. In fact they corroborate each other that the crime must have taken place between 7 and 8 in the evening of October 7, 1950.

The lower court which had the chance of observing Ebrada's deportment on the witness stand, after a painstaking scrutiny of his testimony, arrived at the conclusion that he deserved credence. We find no ground for reversing its findings.

Appellant Dagundong brands as incredible Alice Lake's statement that after she and her nieces had locked themselves in Alice's room, somebody knocked on and then kicked the door. We find nothing unbelievable in this. One of the malefactors wanted to enter Alice's bedroom and ransack it for valuables (as was done in Mrs. Hewell's bedroom), and upon finding it locked expressed his frustration by kicking the door. Contrary to appellant Dagundong's claim, Alice Lake was positive that there was more than one culprit. She saw only one of the malefactors but she heard outside her window the voices of the other robbers.

Attempt was made by appellants to show that Ebrada and Lao agreed to admit their guilt and incriminate appellants by making their respective statements, so they can claim the monetary reward allegedly offered by

Alice Lake. But there is not a shred of evidence proving that Alice Lake had offered a reward to anybody. She denied having put up a reward, or even of talking with either Ebrada or Lao. It was not shown that such offer of reward appeared in the newspapers. Besides, if Ebrada and Lao just wanted to collect such alleged reward, all they had to do was to confess to the crime, without need of implicating appellants.

In view of the strong evidence establishing appellants' complicity, their respective alibis must necessarily be rejected as vain attempts calculated to evade criminal responsibility. The defense sought to prove that from the middle of September to about a week before Christmas, 1950, appellant Serrano was in Pulilan, Bulacan, harvesting palay. But his alibi failed to impress us. He could not say who was the overseer or the owner of the land he helped harvest; nor could he state how much rice he received as his share in the harvest. Appellant Dagundong's alibi is that from 3 in the afternoon of October 7, 1950 up to 5 in the morning of October 8, 1950, he was playing "44" at a gambling house located beside the Sta. Ana racetrack. But his witnesses had no reason to particularly remember October 7, 1950, and to distinguish it from the other days when he also played the game in the same place, it appearing that during the month of October, 1950, he played there almost everyday. Besides, according to one of the witnesses for Dagundong, the game of "44" is not played continuously for the players may leave for lengths of time. In view of this, and considering the nearness of the place to the house of Alice Lake, we believe that appellant Dagundong was one of the robbers. Appellant Bulaon claims that from October 1 to 10, 1950 he was in Santol, Guiguinto, Bulacan, "smoking" mango trees. But considering that Bulacan is not very far from Makati and that there is a great facility of transportation, Bulaon could easily have been in the scene of the crime at the time of its commission.

After judgment in this case was promulgated, a motion for new trial was presented, based on the alleged retraction of Joseph Ebrada and the affidavit of Pablo Rabaton to the effect that appellants never visited him in Muntinglupa; and that he and Melchor Lao were the ones who concocted the idea of opening the case of Mamey Lake Hewell so they could claim the big reward being offered by Alice Lake for the solution of her sister's death. Citing the case of *People vs. Castelo*, 97 Phil., 398; 51 Off. Gaz. [8] 4043), appellants argue that the lower court should have granted their motion in view of Ebrada's retraction. The cited case is authority for the rule that a motion for new trial may be granted when it is made to appear that there is no evidence sustaining the judgment of conviction other than the testimony of the recanting witness. But appellants' conviction does not entirely depend on Ebrada's testimony, but is supported by other evidence of record which we have already mentioned. Retractions of witnesses cannot be made the basis of new trial (*People vs. Olfindo*, 47 Phil., 1; *People vs. Follantes*, 64 Phil., 527), unless conviction of the accused rests solely on the testimony of the retracting witnesses (*U. S. vs. Decir*, 26 Phil., 503). And the latter is not the case herein. Furthermore, the affidavits of Ebrada and Rabaton cannot be deemed newly discovered evidence, for with the use of reasonable diligence, appellants could easily have obtained and presented such evidence during the trial. Indeed, during the cross-examination of Ebrada, the defense tried hard to make him admit that appellants were innocent of the charge, but Ebrada stuck to his declaration that appellants were participants in the crime. Also, appellants knew that Pablo Rabaton was confined in the New Bilibid Prisons and could have presented him in court during the trial, but they did not do so. The lower court was correct in denying the motion for new trial.

We agree with the lower court that appellants Bulaon and Serrano are guilty of the crime of frustrated robbery with homicide, under Article 297, Revised Penal Code, in relation with Article 296, Revised Penal Code, as amended by Republic Act No. 12 inasmuch as it has been proven beyond reasonable doubt that they had conspired to commit the robbery; and that they actually took part in the commission thereof, appellant Serrano by standing guard outside the victim's house while appellant Bulaon accompanied appellant Dagundong inside the house and helped him ransack the victim's room.

We believe, however, that the lower court erred in finding appellant Dagundong guilty of murder. It was established that it was he who had fired the fatal shots at Mrs. Hewell. But though the slaying was attended by treachery, his crime was not murder. The term "homicide" in paragraph 1, Article 294, Revised Penal Code, is used in its generic sense and the offense defined therein comprehends not only robbery with homicide in its limited sense, but also robbery with murder. So, an offense is not taken out of the purview of this article merely because the homicide "rises to the atrocity of murder" (People vs. Manuel, et al., 44 Phil., 333). And the same definition must be given to the term as it is used in Article 297, Revised Penal Code, which penalizes frustrated robbery with homicide.

Wherefore, we find appellant Dagundong guilty of frustrated robbery with homicide and sentence him to life imprisonment. Thus modified, the appealed decision is hereby affirmed in all other respects, with costs against appellants.

Paras, C. J., Bengzon, Montemayor, Bautista Angelo, Labrador, Concepcion, Reyes, J. B. L., and Barrera, JJ., concur.

Padilla, J., took no part.

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