

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
CARLOS ALETA AND BENJAMIN ENCARNACION,
DEFENDANTS-APPELLANTS.**

G.R. No. L-40694. August 31, 1976

Ponente: AQUINO, J.

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AQUINO, J.:

Carlos Aleta and Benjamin Encarnacion appealed from the decision of the Court of First Instance of Quirino, convicting them of murder, sentencing each of them to reclusion perpetua, and ordering them to indemnify solidarily the heirs of Zacarias N. Tottoc in the sum of P55,000 as compensatory, moral and exemplary damages (Criminal Case No. 678-50).

In handwritten letters dated April 25 and July 27, 1976 Encarnacion (Prisoner No. 11275-D) manifested that he was withdrawing his appeal despite the insistence of his counsel that his appeal should be submitted for resolution. His counsel explained in a manifestation dated June 26, 1976 that Encarnacion wanted to withdraw his appeal because he (appellant) wanted to enjoy the status of a convicted prisoner which allegedly was better than the situation of a detention prisoner; that it takes not less than eight years to decide appealed cases, and that the withdrawal of the appeal would enable Encarnacion to join his family either in the penal colony or in the national penitentiary. Appellant's counsel further alleged that Encarnacion vehemently articulated his innocence and clarified that the withdrawal of the appeal was not an admission of guilt.

To do justice to Encarnacion, the Court resolved to give preference to this case. It was submitted for decision on May 11, 1976. The evidence for the prosecution is as follows:

Between eight and nine o'clock in the evening of December 13, 1971 four employees of the provincial auditor's office, who had undertaken an auditing mission, had forgathered in the dining room of the Northeastern Nueva Vizcaya Emergency Hospital located near the municipal hall of Diffun, Quirino Subprovince. The employees took their supper there. They were Jose B. Dizon, Jr., 30, an assistant chief of division; Nopte P. Perlas, 28, examiner; Eudocia C. Ambatali, 39, chief of division, and Leon R. Velasco, Jr., 39, a cash examiner.

While waiting for the announcement that their beds were already prepared, they, together with Pedro Sajor, 40, a clerk in the hospital, and Delfin Vaquilar, the municipal secretary, played a card game called "Pepito". Also in the dining room were Zacarias N. Tottoc, Jr., 42, the disbursing officer of the hospital (whose accounts had just been audited by Eudocia C. Ambatali), and Romeo Peralta, 26, another clerk.

While the game of "Pepito" was being played, Virgilio Bunao, 38, the administrative officer of the hospital, entered the room. With Bunao were his wife and four persons named Benjamin Encarnacion, 25 (a former policeman like Peralta), Rodolfo Valdez, 21, Eduardo Lorenzo, 23, and Carlos Aleta, 25. Aleta, who had an aggressive bearing, introduced himself to the group as Councilor Aleta (he was formerly municipal secretary). He was holding a drinking glass. He had come from Bunao's house where he and his companions had drunk two cases of beer. Addressing the group playing "Pepito", Aleta offered to be the banker and dealer in a card game

known as "Lucky Nine". Sajor, Perlas and Velasco agreed to play "Lucky Nine". Aleta seated himself at the table. Behind him were his two companions, Valdez and Lorenzo. Peralta left the room. Tottoc had instructed him to go home because they were scheduled to go to Tuguegarao early in the morning.

Aleta lost a series of five games. He did not pay the bettors. He owed Perlas thirty-five or thirty pesos; Velasco, eight pesos and Sajor, five pesos. Tottoc, who had been observing the game and had noticed that the winners were not being paid, re-marked: "Isardengyon. Ano ba yan? Tawag ba ng sabungan?" ("What is that? Is that a bet in the cockpit?"). Or, according to other witnesses, Tottoc said: "Ano ba yan? Bilangan? Tawag sabungan, tawag simbahan?", meaning betting without money.

Aleta, resenting Tottoc's remarks, as shown in the change of his facial expression, dropped the cards on the table. The game was terminated. Tottoc went to another part of the room where Bunao and Eudocia were talking.

At that juncture, Bunao informed the employees that their beds had already been prepared. There was a discussion in a loud voice between Tottoc and Bunao as to where Eudocia Ambatali would sleep. Bunao wanted Eudocia (Dosing) to sleep in his house with the three male employees. Tottoc insisted that she should spend the night in his domicile. Eudocia said that she would sleep in the place where her co-employees would sleep.

While that conversation was taking place, Aleta stood up, approached Tottoc from behind, and snatched the latter's gun (Exh. B, M, M-1) from his left rear pocket. Addressing Tottoc, Aleta inquired: "Nagalit ka ba, Abay Karit?" ("Did you get angry, friend Karit?").

Tottoc turned around, faced Aleta, took a step forward and raised his hands as if to retrieve his gun. Before Tottoc could do anything, Aleta (who was taller than Tottoc) shot him point-blank in the abdomen (See sketch, Exh. A). Tottoc was shot at close range. He was only about a meter away from his assailant. They grappled for the possession of the gun. Aleta fired a second shot. At that point, Encarnacion (Boy) intervened. He took the gun from Aleta and positioned himself in a corner of the room. Tottoc followed him in order to recover the gun. Encarnacion kicked him. That blow knocked down Tottoc. He was sprawled on the floor, lying on his right side. In that condition, Encarnacion shot him twice.

Aleta, Encarnacion, Valdez and Lorenzo fled in a jeep bound for Santiago, Isabela.

The shots caused a commotion. The employees scampered out of the room and sought cover. Only Sajor remained to witness what Aleta and Encarnacion did. Aleta went out of the room after Encarnacion fired the first of two shots. After Encarnacion had fired the second shot, he backed out of the room. Peralta, who had left the hospital and who returned on hearing the shot fired by Aleta, went to the kitchen. He opened the door of the kitchen leading to the dining room. He saw Encarnacion holding the gun and backing out of the door of the dining room. After Encarnacion had exited out of the dining room, Peralta entered it and saw Tottoc sitting on the floor with outstretched legs.

Peralta tried to lift Tottoc but the latter refused to be carried. He ordered Peralta to run after Encarnacion and get the gun. Peralta went to the door. He saw Encarnacion boarding Aleta's jeep. He returned to Tottoc who was bleeding in the abdomen and left arm. He asked Tottoc twice who had shot him. Tottoc angrily answered that he was shot by Aleta and Encarnacion. He ordered Peralta to go after them.

He carried Tottoc to the emergency ward of the hospital. The victim's left arm was already dangling. He asked Eduardo de la Peña, another employee of the hospital, to call a doctor. De la Peña was not able to contact the doctor because while on his way to the doctor's quarters, he was collared by Encarnacion and forced to board Aleta's jeep which was going to Santiago.

It was ironical that in the emergency hospital no doctor was available to attend to the emergency case of its disbursing officer. Another employee suggested that Tottoc be brought to the sanitarium in Santiago, Isabela.

So, Tottoc was lifted and brought to the jeep of Dizon which was parked in the driveway. Dizon drove the jeep. He was accompanied by Perlas and Velasco and another hospital employee.

During the trip to Santiago, Tottoc, who was conscious, told his companions in the Gaddang dialect and in Tagalog: "Matayak nakoy. Pangbihira sila. Nakahiga na ako, pinagbabaril pa ako. Pakikuha ang baril ko kay Boy." ("Maybe I am going to die. It was quite extraordinary. I was already lying down. They still continued shooting me. My gun is in the possession of Boy.")

Before the jeep could reach Santiago, it had a flat tire. It was overtaken by the jeep owned by Tottoc and driven by Peralta. Mrs. Tottoc was with Peralta. Tottoc was transferred to his jeep. He was placed on the laps of his wife and Mrs. Quidado. He was restless. He was suffering paroxysms of pain. He told his wife that he was shot by Aleta. He said: "Rosing, I think I am going to die". He also told his wife that the wound in his left arm was inflicted "by the son-in-law of Kirem-Kirem" (156). Before the jeep reached Santiago, Tottoc died.

The body of Tottoc was brought to the emergency hospital at Diffun. On the following day, December 14, Doctor Era L. Patac, a lady resident physician, conducted an autopsy on the cadaver of the forty-two year old victim (he was five feet and two inches in height) at the request of the chief of police. The victim sustained the following wounds:

1. A lacerated, circular wound in the abdomen, one centimeter in diameter, "with contusion colar", with blood oozing, four centimeters below the costal arch right paramedian line right. The wound had a downward direction. It was three inches deep.
2. A lacerated wound, one and a half inches, at the right lobe of the liver.
3. Multiple lacerations in the small intestine, with the omentum, containing blackish discoloration, probably powder burns.
4. Circular fracture, one and a half inches in diameter, at the left pelvic bone.
5. A lacerated circular wound, with contusion colar, one and a half centimeters in diameter, found at the middle left forearm. Wound had a downward direction to the skin medially. The humerus was fractured.
6. Abrasion with contusion on the right leg.
7. Abrasions on the thorax at the level of the sixth rib.

Bullets were embedded in the muscle of the left forearm and in the gluteal muscle of the buttocks (Exh. I and J). Powder burns were found in the left lumbar region of the abdominal wall. A liter of blackish, foul blood was taken from the abdomen. Death was due to internal hemorrhage, secondary to the gunshot wound in the abdomen (Exh. H and K). The hemorrhage was a consequence of the wounds in the liver, intestine and omentum. The wound in the left forearm aggravated the abdominal wound and contributed to the victim's death (185).

Rosenda Manlapig Vda. de Tottoc, a pharmacist at the emergency hospital, testified that she and Tottoc were married in 1968 (Exh. D). They begot two daughters who were less than three years old at the time of Tottoc's death. He was receiving more than three hundred pesos a month at the time of his death. The funeral expenses amounted to P3,345. Mrs. Tottoc contracted to pay the private prosecutor a fee of P4,000 of which the sum of P1,500 had already been paid.

Sergeant Alejandro Tablada of the Constabulary detachment at Cabarroguis was requested by the chief of police

at around two o'clock in the morning of December 14 to investigate the killing of Tottoc. Tablada was informed by Peralta that Aleta, Encarnacion, Valdez and Lorenzo were the suspects. Tablada, accompanied by two policemen and a Constabulary soldier, rode in Tottoc's jeep, driven by Peralta, and went to Santiago to arrest Aleta's group. They found Eduardo Lorenzo at his residence. Aleta was not at his residence. They found Aleta, Encarnacion and Valdez in a room of a certain house. Near that house was the jeep which Aleta's group had used. Aleta asked Tablada what happened to Tottoc. Tablada apprised him that Tottoc was dead.

Tablada asked Aleta to surrender Tottoc's revolver. Aleta directed Valdez to get the revolver. Valdez got the revolver under the mattress of the bed. Aleta handed it to Tablada (Exh. B). There were two bullets in its chamber (Exh. L and L-1). Tottoc had a license for the revolver (Exh. M).

Aleta requested Tablada to allow him to change his clothes at his residence because his coat and pants had mud. The mayor of Santiago asked Tablada not to bring Aleta to Diffun. Tablada rejected that request because the crime was committed at Diffun. He brought the four accused to the municipal jail of Diffun.

Tablada took the statements of Sajor, Bunao and Lorenzo. On the basis of those statements, he filed on December 14 a complaint for homicide against Aleta, Encarnacion, Valdez and Lorenzo in the municipal court. A warrant of arrest was issued. The four accused were released on bail.

Tablada later took the statements of Velasco, Dizon, Perlas and Eudocia C. Ambatali. On the basis of those statements, he filed on January 14, 1972 an amended complaint for murder against the four accused. Another preliminary examination was conducted by the municipal court. The four accused waived the second stage of the preliminary investigation. The case was remanded to the Court of First Instance. The fiscal filed an information for murder against the accused. Treachery was alleged as the qualifying circumstance.

After the prosecution had rested, the lower court in its order of June 4, 1974 dismissed the case against Lorenzo and Valdez for insufficiency of evidence. After the defense had pre-sented its evidence and memoranda, the lower court rendered the judgment of conviction already mentioned against Aleta and Encarnacion.

In this appeal Aleta and Encarnacion contend that certain circumstances, consistent with their innocence, were not taken into account by the trial court. They argue that the crime committed was not murder qualified by treachery. Encarnacion assailed Sajor's credibility.

Aleta's appeal . - His version was that on the night in question Bunao invited his (Aleta's) group composed of himself, Encarnacion, Valdez, Lorenzo and Ignacio Esquivel, 28 (a barrio captain), to play cards at the hospital. Aleta admitted that he acted as banker in the game of "Lucky Nine" and that he did not pay the winnings of the bettors. After playing for a few minutes, Tottoc entered the dining room, followed by Bunao. There was allegedly some trouble because Bunao and Tottoc were shouting and pushing each other.

Aleta testified that he tried to pacify Tottoc and Bunao "by parrying the gun" which Tottoc had allegedly pointed at Bunao, and by giving him the admonition: "Tama na, Pare". After Aleta warded off Tottoc's gun (Exh. B) by pushing it forward and sidewise, there was a gunshot. A commotion followed. Aleta went out of the room. When he was already outside the room, he heard three more gunshots. He went to his jeep which was parked about ten meters away. After he had started the jeep, Encarnacion and Lorenzo arrived and boarded the jeep. The three, together with Valdez, proceeded to Santiago.

On reaching Santiago, Lorenzo went home. Aleta, Encarnacion and Valdez went to the house of a doctor who treated Encarnacion's alleged gunshot wound. The trio spent the night in the house of Rolando Manzano. Aleta directed Manzano to inform the Constabulary command at Santiago that he and his companions were in Manzano's house. Aleta could not accommodate Valdez and Encarnacion in his house in Santiago which was small.

When Manzano returned, he was accompanied by Sergeant Tablada and other peace officers. They arrested the trio.

It is at once manifest that Aleta's version, which does not explain why Tottoc was seriously wounded, cannot be given any credence. It cannot prevail over the categorical declaration of five prosecution eyewitnesses, all government employees, namely, Perlas, Velasco, Dizon, Sajor and Eudocia C. Ambatali, who testified, without vacillation or tergiversation, that Aleta grabbed Tottoc's revolver from the rear pocket of his pants and in movie-cowboy or gangland fashion shot him in the abdomen. The autopsy revealed that Tottoc suffered a grave abdominal wound which injured his liver and intestines. All those eyewitnesses, except Sajor (an employee of the hospital), were members of the auditing team. They had no motive to prevaricate or frame up Aleta.

Moreover, as noted by the trial court, Lorenzo, a defense witness, testified that Tottoc was not able to draw his gun (274 tsn). That means that, contrary to Aleta's version, he did not have to parry or deflect Tottoc's gun since the deceased was unable to draw it. The truth is that Aleta seized Tottoc's gun and mercilessly and unjustifiably used it against Tottoc.

If the shooting was accidental, then, as rhetorically asked by the trial court, why did Aleta and Encarnacion (one a councilor and the other a former policeman) flee to Santiago, instead of going to the municipal hall across the street and informing the chief of police or the mayor of the accident?

Aleta assails the prosecution's version that he assaulted Tottoc. His counsel stresses that there was no altercation between Aleta and Tottoc before the incident occurred. Aleta implies that there was no motive for him to shoot Tottoc.

Three employees of the auditor's office and Sajor, an employee of the hospital, consistently testified that Tottoc during the card game remarked in connection with Aleta's failure to pay the bettors their winnings: "Ano ba yan? Tawag sabungan, tawag simbahan?" or words of similar import. Obviously, that remark which had insulting overtones, humiliated Aleta. It rankled in his mind. It gave the impression to the bettors, who were from Bayombong, Tottoc's town, that Aleta was a cardsharp or a cheat, if not a brazen swindler.

Aleta's inward resentment over Tottoc's sarcastic remark, which touched Aleta's amour propre, he being a councilor, impelled him to take violent measures against Tottoc. His temper and mental condition at that moment may be gauged from the circumstance that before the shooting incident he had imbibed copious amounts of beer and eaten wild pig's meat at Bunao's place.

Aleta also contends that the credibility of the prosecution witnesses, Dizon, Perlas, Velasco and Eudocia C. Ambatali, is affected by the circumstance that they gave their sworn statements to the investigator twenty-two days after the shooting. That contention has no merit. The said witnesses could not give their statements immediately after the shooting because they had to leave Diffun on the following day in order to perform their official duties in the other municipalities of Nueva Vizcaya. The delay in the execution of their affidavits was not due to their fault. The chief of police and the Constabulary investigators did not investigate them right away.

Aleta's last contention is that there was no treachery under the facts proven by the prosecution, assuming arguendo that they are true. He cites the ruling in *People vs. Samonte, Jr.*, L-31225, June 11, 1975, 64 SCRA 319, 326 that there is no treachery in an attack which was the product of a momentary impulse and which was not consciously and deliberately adopted by the assailant to insure the killing. That ruling is not relevant to this case.

The instant case is covered by the rule that there is treachery in a sudden and unexpected attack under the circumstances which render the person attacked unable to defend himself by reason of the suddenness and severity of the attack (*U. S. vs. De Silva*, 14 Phil. 413) or in an unexpected attack made after the assailant had

carefully simulated friendship (People vs. Sakam, 61 Phil. 27).

What distinguishes this case from the Samonte case is that in the Samonte case the accused fired with his own gun at the victim who was also armed with a firearm. In the instant case, Aleta first disarmed Tottoc and then fired at him with Tottoc's gun. Thus, Aleta deliberately employed a method of assault which insured the killing without any risk to himself arising from any defense which Tottoc could have made (See art. 14[16], Revised Penal Code).

Although Aleta acted on the impetus of the occasion, he acted with malice aforethought. More relevant to this case is the ruling that if the attack was sudden and unexpected and was not preceded by any dispute and the deceased was unable to pre-prepare himself for his defense though he was face to face with his assailant, treachery may be appreciated in that situation (U. S. vs. Cornejo, 28 Phil. 457).

That rule was applied in People vs. Noble, 77 Phil. 93, a case similar to this case. In that case, Doctor Isabelo Noble came up the stairs with a pistol in his hand, walked straight to where George Ott was standing and said "George, this is your end". Ott turned around to see who was talking, whereupon Noble fired at him. Noble was convicted of murder qualified with treachery.

In this case, the trial court did not err in finding Aleta guilty of murder for initiating the killing of Tottoc.

Encarnacion's appeal . - He adopted Aleta's version that Aleta supposedly tried to pacify Tottoc and Bunao; that Tottoc's gun exploded when Aleta parried it and the gunshot wounded Tottoc; that when Tottoc was able to get possession of the gun, he aimed it at Aleta and that, at that juncture, Encarnacion grabbed the gun and it was again fired. Encarnacion left the dining room with Tottoc's gun and boarded Aleta's jeep. Encarnacion was allegedly wounded during the scuffle.

We have shown that that version is not worthy of credence. It cannot overthrow the prosecution's conclusive evidence that Aleta after disarming Tottoc shot him in the abdomen. Encarnacion's plea that he acted in defense of Aleta is incredible. What the evidence shows is that on noticing that Aleta was unsuccessful in immobilizing Tottoc, Encarnacion, although he had no personal animus against Tottoc and was motivated simply by the spirit of camaraderie (compañerismo), assumed the task of finishing Tottoc.

Encarnacion repeats Aleta's argument that there was no altercation between Tottoc, on one hand, and Aleta and Encarnacion, on the other. We have already disposed of that contention in our resolution of Aleta's appeal.

Encarnacion argues that after getting hold of Tottoc's gun, it was not wrong for him to run away with it. The trouble is that Encarnacion after taking the gun from Aleta, who had clumsily fired a second shot at Tottoc but did not disable him, used it against Tottoc. Encarnacion, with the intention of helping his pal, Aleta, and thinking that he could do a better job than Aleta in giving Tottoc the coup de grace, knocked down Tottoc and then fired two shots at him while he was lying down on the floor. It turned out that due perhaps to excitement or inexperience Encarnacion bungled the shooting of Tottoc.

Encarnacion tried to explain his flight to Santiago by alleging that he was wounded and that there were no medical facilities at Diffun. That explanation is unbelievable especially considering the testimony of Eduardo de la Peña, 37, an employee of the emergency hospital. De la Peña declared that while he was on his way to fetch Doctor Patac from her boarding house so that she could attend to Tottoc's wounds, he was collared by Encarnacion, when the latter learned that he was going to fetch a doctor. He was intimidated into going with Encarnacion and Aleta. He was practically kidnapped and prevented from securing medical aid for Tottoc.

That incident shows Encarnacion's perversity and male-volence and his desire that Tottoc should die. Tottoc's life

might have been saved if he was given immediately a blood transfusion at the Diffun emergency hospital. But Encarnacion forestalled medical aid by foiling De la Peña's effort to fetch the doctor.

De la Peña further testified that while he was in the front seat of the jeep, with Aleta and Encarnacion, someone at the back of the jeep (possibly Valdez or Lorenzo) fired his gun at Encarnacion. The latter, addressing the gunwielder at the back of the jeep, said: "Why did you squeeze the trigger? You see I was hit." That testimony of De la Peña indicates that the alleged wound of Encarnacion was inflicted after the affray in the dining room had ended. It must have been inflicted in order to make it appear that Encarnacion was not an aggressor in that shooting affray in the dining room.

Encarnacion and Aleta did not refute or contradict De la Peña's testimony. On the other hand, Valdez and Lorenzo, defense witnesses, confirmed partly that testimony. They testified that while they were with Aleta and Encarnacion in the jeep near the hospital's premises, waiting for their companion, Boy Esquivel, there was a person who came and said that he was going to call a doctor and that that person (who must be De la Peña) went with them and alighted at the Pantranco station.

Encarnacion's counsel assails the testimony of the prosecution witnesses regarding the alleged declaration of Tottoc, when he was brought by Peralta to Santiago. Counsel doubts that Tottoc declared that he was shot although he was already lying down, a declaration which shows the complicity of Encarnacion in the second stage of the shooting.

As correctly observed by the trial court, even if Tottoc's *res gestae* declarations were disregarded, there is "overwhelming direct and positive proof" as to the guilt of Aleta and Encarnacion.

Encarnacion impugns Sajor's credibility. It was Sajor who testified mainly on Encarnacion's firing at Tottoc during the later part of the melee.

As noted by Encarnacion's counsel, it is true that Sajor in his affidavit did not describe how Encarnacion assaulted Tottoc. Sajor merely stated that he saw Encarnacion brandishing a gun. However, during the preliminary examination, Sajor vividly described how Encarnacion attacked Tottoc. Sajor declared that while Tottoc and Aleta were grappling, two shots were fired. Then, Encarnacion grabbed the gun from Aleta, and when Tottoc fell on the floor, Encarnacion fired two shots at him. Substantially, that was also Sajor's testimony during the trial.

The discrepancies in Sajor's testimony, as meticulously detailed by Encarnacion's counsel, are not sufficient to impair his credibility. What is decisive is that he was in the dining room when the shooting occurred. His testimony was partly corroborated by Peralta who declared that he saw Encarnacion holding Tottoc's gun and leaving the dining room. Encarnacion himself admitted that he took Tottoc's gun, the incriminating weapon, the possession of which he was not able to explain satisfactorily.

As to the alleged grudge held by Sajor against Encarnacion because the latter, when he was still a policeman, allegedly scolded Sajor, we do not think that it is a sufficient motive to induce Sajor to pervert the truth and make Encarnacion suffer a long prison term.

Encarnacion was not satisfied with invoking the plea that he acted in defense of Aleta. He also invoked the justifying circumstance that he acted in order to avoid the evil that Aleta would be killed which evil was allegedly greater than the lesser evil of grabbing the gun from Tottoc. That plea, viewed in the light of the prosecution's evidence, is utterly farfetched and baseless, if not totally preposterous.

Encarnacion's contention that he did not conspire with Aleta shows lack of comprehension of the meaning of conspiracy. To prove conspiracy, it is not essential that there be evidence of a prior agreement to commit crime. It

is sufficient that the male-factors acted in concert to attain the same objective (*People vs. San Luis*, 86 Phil. 485). As a rule, the concurrence of wills, which is the essence of conspiracy, may be deduced from the facts and circumstances, which taken together, indicate that the assail-ants cooperated and labored to the same end (*People vs. Macul*, 86 Phil. 423).

In the instant case, the evidence shows that Aleta and Encarnacion were together at a drinking spree in Bunao's house. Then, they went to the hospital at Bunao's invitation. When Encarnacion saw his friend Aleta wrestling with Tottoc and firing a second shot which did not kill Tottoc, he (Encarnacion) instantaneously re-solved to perform the killing himself. He took the gun from Aleta and, employing a karate trick, kicked Tottoc and floored him, and then shot him twice. The use of the gun shows intent to kill.

Encarnacion's acts unmistakably indicate that he had community of design with Aleta to kill Tottoc. The fact that Encarnacion wounded Tottoc in the left arm and that that wound in itself was not sufficient to kill Tottoc, does not erase the fact that he was a co-conspirator of Aleta who had inflicted a fatal abdominal wound on Tottoc. After shooting Tottoc, Encarnacion rejoined Aleta in the jeep. Aleta was waiting for him. Together they fled to Santiago. They were in the same room when they were arrested. Their tacit and spontaneous coordination of their assaults against Tottoc shows that they collaborated to encompass his death.

Encarnacion's last contention that treachery cannot be appreciated against him is well-taken. The reason is that circumstances which consist in the material execution of the act, or in the means employed to accomplish it, serve to aggravate the liability only of those persons who had knowledge of them at the time of the execution of the act or their cooperation therein (Art. 62[4], Revised Penal Code. See *People vs. Babiera*, 52 Phil. 97, 112-3. Compare with *People vs. Cabeda*, 90 Phil. 871 and *People vs. Carandang*, 54 Phil. 503).

As to Aleta, there is no question that he acted in a treacherous manner. But it should be recalled that Aleta initiated the attack without Encarnacion's cooperation and without the latter's knowledge or approval. On the other hand, Encarnacion and Tottoc were face to face after the former had taken possession of the gun. Tottoc was trying to recover his revolver from Encarnacion in the same manner that previously he tried to retrieve it from Aleta. Encarnacion kicked Tottoc before shooting him. It cannot be held that Encarnacion acted with treachery.

However, he acted with manifest abuse of superiority. He was armed with a gun. Tottoc was already wounded and was un-armed. Since abuse of superiority was not alleged in the information, it should be treated as a generic aggravating circumstance (*People vs. Arioja*, 112 Phil. 343; *People vs. Cadag*, 112 Phil. 314; *People vs. Tagaro*, 117 Phil. 207; *People vs. Lacao*, L-32078, September 30, 1974, 60 SCRA 89; *People vs. Peje*, 99 Phil. 1052; *People vs. Jovellano*, L-32421, March 27, 1974, 56 SCRA 156; *People vs. Bautista*, L-23303, May 20, 1969, 28 SCRA 184). Encarnacion is guilty of homicide aggravated by abuse of superiority.

The withdrawal of an appeal after the case has been sub-mitted for decision is discretionary in the court (*U. S. vs. Sotto*, 38 Phil. 666, 677; *People vs. Madrigal-Gonzales*, 117 Phil. 956, 966). As we have reviewed the case on the merits and the result is in a way partly favorable to appellant Encarnacion, his motion to withdraw his appeal is denied.

The trial court's judgment as to appellant Aleta is affirmed. It is modified as to appellant Encarnacion. He is convicted of homicide and sentenced to an indeterminate penalty of twelve (12) years of prison mayor maximum, as minimum, to eighteen (18) years of reclusion temporal maximum, as maximum. In all other respects the lower court's judgment against Encarnacion is affirmed. Costs against the appellants.

SO ORDERED.

Fernando, Acting C.J., Barredo, Antonio, and Martin[*], JJ., concur.

Concepcion, Jr., J., no part.

[*] Designated to sit in the Second Division.

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