

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
POLICRONIO ESCALANTE Y ESPERA, ALIAS BAKYOT, LOPE DAIGAN
Y CUYSANG, ALIAS LOPE, DOMINGO BORNEO Y URDANETA, ALIAS
DOMING, M...**

G.R. No. L-37147. August 22, 1984

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal on the decision in Criminal Case No. B-220 of the defunct Court of First Instance of Leyte which imposed the death penalty on MELCHOR PRADO and an indeterminate prison term on DOMINGO BORNEO.

An information for robbery in band with homicide and multiple physical injuries was filed against POLICRONIO ESCALANTE y ESPERA, alias Bakytot, LOPE DAIGAN y CUYSANG, alias Lope, DOMINGO BORNEO y URDANETA alias Doming, MELCHOR PRADO y SIMINO, CONSTANCIO GONZAGA, alias Bata, JUNIOR PAREDES, ROGELIO BACUS alias Roger, alias Ely, BOY MONTEMAYOR alias Boy, alias Molo, BOY CABEJE alias Boy, alias Simo, PEDRITO TAN, Jr. alias Pedring, alias Rudy, alias Carling, alias Carlito, JOHN DOES and PETER DOES in the above-mentioned case. The information alleges:

"That on or about the 21st day of February, 1972, in the municipality of Baybay, province of Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, namely: Policronio Escalante y Espera, Lope Daigan y Cuysang, Domingo Borneo y Urdaneta, and Melchor Prado y Simino, (accused Constancio Gonzaga, Junior Paredes, Rogelio Bacus, alias Ely, Boy Montemayor, alias Molo, Boy Cabeje, alias Simo, Pedrito Tan, Jr., alias Rudy, John Does and Peter Does, are still at large) conspiring and confederating together and mutually helping with each other, and armed themselves with pistols, revolvers, carbines, shotguns, and grease guns which they themselves provided for the purpose, and without due respect to the authorities, taking advantage of night time, with intent of gain and by means of violence, force and intimidation against persons and things, did then and there wilfully, unlawfully and feloniously enter the stores and dwelling houses of the offended parties hereunder enumerated as well as the municipal building of Baybay, Leyte, and once inside rob the owners thereof, take, steal and carry away the following properties and things found therein, to wit:

1. Of Jose Berly:
 - a. Cash amounting to P1,500.00
 - b. Treasury Warrants 300.00
 - c. Rolex Wrist Watch 800.00

P2,600.00

2. Of Sabino Abril:

- a. One (1) Browning pistol caliber .380; &
- b. Eleven (11) rounds of ammunitions;

3. Of Un Se Eng:

- a. Cash amounting to P3,100.00

4. Of Uy Pho Ho:

- a. Cash amounting to P1,500.00
- b. Goods worth 2,500.00

P4,000.00

5. Of Jao Kee Tiong:

- a. Cash amounting to P3,000.00
- b. Jewelry worth 9,000.00
- c. Goods worth 2,000.00

P14,000.00

6. Of Un Giong:

- a. Cash amounting to P25,000.00
- b. Jewelry & Valuables 8,000.00
- c. Llama pistol
- d. Fifty (50) rounds of ammunitions for cal. .380 _____

P33,000.00

7. Of Virgilio Olan:

- a. One (1) caliber .45 pistol bearing serial No. 1760360;
- b. One (1) class ring worth P125.00
- c. One (1) Radio wrist watch 560.00
- d. Gold Necklace worth 180.00

P865.00

8. Of Marcelo Lorden:

- a. Cash amounting to P78.00
- b. Wrist watch (shallow) 35.00
- c. One (1) 12 gauge riot gun _____

P113.00

9. Of Guillermo Flores:

- a. Cash money amounting to P77.00
- b. Jade Ring worth 120.00
- c. Seiko wrist watch worth 350.00
- d. One (1) caliber .38 revolver with eight rounds of ammunitions bearing serial No. 456101 _____

P547.00

10. One (1) personal radio set of Mayor Eriberto V. Loreto worth P3,000.00

and One (1) polcom radio set of The Philippine government worth 2,000.00

P5,000.00

and on that same occasion shoot one Domiciana Castro which caused her death, inflict physical injuries on the following persons: (1) Arsenio Lipar contusions on the different parts of his body which will require medical attendance for a period of more than ten (10) days and which will incapacitate him for the same period of time; (2) Virgilio Olan wound and contusions on the different parts of his body which will require medical attendance for a period of more than eight (8) days and which will incapacitate him to perform his customary labor for a like period of time; (3) Marcelo Lordan wound and contusion on his body which will require medical attendance for a period of more than five (5) days and which will also incapacitate him to perform his customary labor for a like period of time; (4) Guillermo Flores contusions on his body which will require medical attendance for a period of more than three (3) days and which will also incapacitate him to perform his customary labor for a like period of time; and the first-two named persons are Philippine Constabulary soldiers while the last two-named persons are municipal policemen of Baybay, Leyte; and likewise on the following merchants, namely: (5) Dominador Chiong wound on his head which will require medical attendance for a period of more than seven (7) days and will incapacitate him to perform his customary labor for a like period of time; (6) Jao Kee Tiong wounds on the different parts of his body which will require medical attendance for a period of more than six (6) days and will also incapacitate him to perform his customary labor for a like period of time; (7) Un Se Eng contusion on his body which will require medical attendance for a period of more than two (2) weeks and also will incapacitate him to perform his customary labor for a like period of time; (8) Un Giong wound on his head which will require medical attendance for a period of more than one (1) week and which will incapacitate him to perform his customary labor for a like period of time; and (9) Uy Pho Ho wounds on the different parts of his body and which will require medical attendance for a period of more than seven (7) days and will also incapacitate him to perform

his customary labor for a like period of time; to the damage and prejudice of the offended parties in the respective amounts above listed." (Expediente, pp. 197-200.)

Only Policronio Escalante, Lope Daigan, Domingo Borneo and Melchor Prado were brought to trial. It was Judge Bernardo Ll. Salas who tried the case in Baybay, Leyte but he inhibited himself from rendering judgment because of "reports that a certain person in this town has been collecting money from several parties in connection with this case." (Id., p. 900.) Accordingly, the case was decided by Executive Judge Jesus N. Borromeo who rendered the following judgment:

"IN VIEW OF THE FOREGOING, judgment is hereby rendered declaring accused Melchor Prado guilty beyond reasonable doubt of the complex offense of multiple robbery with homicide, with the attendance of three aggravating circumstances not off set by any mitigating, and he is sentenced to suffer the supreme penalty of DEATH.

"The Court further orders accused Prado to indemnify the heirs of deceased Domiciana Castro in the amount of P12,000.00; to pay offended parties: (1) Un Se Eng, the amount of P3,000.00; (2) Uy Pho Ho, the amount of P4,000.00; (3) Jao Kee Tiong, the amount of P12,000.00; (4) Un Giong the amount of P33,000.00; (5) Virgilio Olan, the amount of P865.00; (6) Marcelo Lorden, the amount of P113.00; and (7) Guillermo Flores, the amount of P439.00, consisting of the respective values of the properties stolen from them; and to pay one-fourth (1/4) of the costs.

"Judgment is also rendered finding accused Domingo Borneo guilty beyond reasonable doubt of being an accomplice in the complex offense of multiple robbery with homicide, with the attendance of three (3) aggravating circumstances not off set by any mitigating, and he is sentenced to suffer the penalty of from TWELVE (12) years of Prison Mayor to TWENTY (20) years of reclusion temporal; to indemnify the heirs of deceased Domiciana Castro in the amount of P12,000.00, or any portion thereof which accused Prado may not be able to pay; and to pay the above-enumerated offended parties the amounts respectively setforth in the preceding paragraph, or any portion thereof which accused Prado may not be able to pay, and to pay one-fourth (1/4) of the costs.

"The preventive imprisonment accused Domingo Borneo may have been undertaken shall be deducted from the term of imprisonment imposed herein to its full extent if he signed an agreement to abide by the same rules imposed upon convicted prisoners while in confinement or only four-fifths (4/5) thereof if he has not signed said agreement.

"Finally, judgment is also rendered declaring accused Policronio Escalante and Lope Daigan not guilty of the complex offense of multiple robbery with homicide charged in the information and they are, therefore, acquitted from said charge, with two-fourths (2/4) of the costs de oficio.

"It appearing that they are presently detained in the Provincial Jail, the Court hereby orders the provincial warden to immediately release therefrom accused Policronio Escalante and Lope Daigan, unless they are held therein also for other charges." (Id., pp. 959-962.)

The evidence for the prosecution as summarized in the People's brief is as follows:

"At past 6:00 o'clock in the evening of February 21, 1972, while Sgt. Arsenio Lipar was in the Philippine Constabulary (PC) detachment in the poblacion of Baybay, Leyte (p. 81, tsn., Arradaza) with no companions, as the other members of the detach-ment were then out on patrol (p. 128, id.), four (4) men entered the detachment. One of them inquired from Sgt. Lipar what time the boat from Manila would arrive, but before the latter could answer, the stranger drew his pistol and pushed it to the side of Sgt. Lipar, and then he also pushed Sgt. Lipar into the room of the detachment and made him face the wall. The four men were all armed, one with a grease gun, two with .45 cal. pistols, and the fourth with a .38 cal. revolver. One of the armed men took the armalite weapon which was propped against the wall, and all four also tried but failed to get a carbine which

was handcuffed to a bunk bed inside the room (p. 82, id.). Unable to produce the key to open the handcuff, Sgt. Lipar was mauled by the four (pp. 82-83, id.), as a result of which he sustained contusions on the chest, abdomen, and left thigh that took nine days to heal (pp. 97-98, id., Exh. "A", p. 20, Rec.). The four men also took Lipar's .38 cal. Llama pistol, which they discovered on his person after one of them boxed him on the abdomen. The group also ransacked Sgt. Lipar's bag, and as they were doing so, they were covering him with a pistol pointed at his neck (pp. 83-84, id.).

"From the PC detachment, the band proceeded to the municipal building of Baybay, taking along with them Sgt. Lipar (p. 84, id.). Inside the radio room of the municipal building at the time were Patrolman Guillermo Flores, who was on duty as a radio operator (p. 11, id.), and Patrolman Marcelo Lordan, who was the building guard, both of the Baybay Police Department (p. 80, tsn., Rodriguez). Hearing some noises outside, Pat. Lordan went out and saw Sgt. Lipar and three of the armed men. He tried to inquire from Sgt. Lipar what was happening, but the latter could not talk. Then the man behind Sgt. Lipar fired at the latter but missed. Almost simultaneously, another man approached Pat. Lordan, pointed a gun at his back, and ordered him to stretch his arms (pp. 81-82, tsn., Rodriguez). Meanwhile, still another member of the band entered the radio room and ordered Pat. Flores not to move (p. 11, tsn., Arradaza), simultaneously firing at the radio equipment. The armed stranger then disarmed Pat. Flores and told him to go out of the building with raised hands (pp. 12-13, id.). The band also took a riot gun from the radio room (p. 87, tsn., Rodriguez).

"From the municipal building, Sgt. Lipar and Patrolmen Flores and Lordan, with their hands raised, were asked to proceed to the Vital Store some 100 meters away, the armed men closely behind them. While one of the band guarded their three hostages, whom they ordered to face the Family Theatre, his companions entered the store (pp. 14, 85, 86, tsn, Arradaza; pp. 83-85, tsn., Rodriguez). After having been made to stand outside the store for about 20 minutes, Sgt. Lipar and the two policemen were told by their captors to lie down on their bellies on the sidewalk (p. 86, Rodriguez; p. 86, Arradaza). Meanwhile, some five to eight more armed men arrived and also entered the store (pp. 85-86, Rodriguez; pp. 86-87, Arradaza). It was while Sgt. Lipar was lying on his belly on the sidewalk that he turned his head towards the inside of the store and saw and identified thereat the accused Melchor Prado and Domingo Borneo (pp. 87-89, Arradaza). It was also while in that same position that Pat. Flores was divested by the band of his watch worth P350.00, his ring valued at P20.00, and cash of about P67.00 (p. 18, id.), while Pat. Lordan was divested of his cash of P78.00 and a wrist watch worth P35.00 (p. 87, Rodriguez).

"Inside the store, the band ordered the store-owner, Uy Pho Ho, to open the drawers and vault and took therefrom cash in the aggregate amount of about P4,500.00, jewelry worth about P1,000.00, and watches valued at P2,000.00. During the robbery, one of the armed robbers struck Ho on the head, which caused the latter to bleed profusely, after which the robber also shot him at his right ear (pp. 38-46, id.; Exh. "D", p. 42, Rec.). Moreover, one Domiciana Castro, a helper who had earlier gone to the second floor of the store, was killed by a bullet from one of the guns fired by the band at the height of the robbery (p. 45, tsn., Rodriguez; p. 15, tsn, Arradaza; Death Certificate, p. 17, Rec.; autopsy report, p. 19, Rec.).

"After the robbery, the band ordered Sgt. Lipar and Patrolmen Flores and Lordan, along with some civilians, to march to the wharf where other companions of the band were waiting. The armed group, Sgt. Lipar estimated to consist by this time of about twenty (20) persons, then boarded a large pumpboat. It was only when the last robber had left for the pumpboat that Sgt. Lipar and the policemen were able to run away (pp. 16, 90-92, Arradaza; pp. 90, 91, Rodriguez).

"It appears that at the time of the aforesaid robberies at the PC detachment, the municipal building, and the Vital Store, other robberies were also being committed by other members of the band in other stores. Thus, five armed men also entered the Baybay Commercial owned by Un Se Eng that same evening and robbed him of P3,100.00 in cash (pp. 64-65, tsn, Rodriguez). Dominador Chiong and PC Lt. Virgilio Olan also happened to be at the Baybay Commercial at the time, and when Lt. Olan tried to draw his gun, one of the robbers struck him on the head with a shotgun, then took his gun, his class ring, his watch, and his cash of P130.00, after

which he was ordered to get inside the bodega of the store (pp. 148-149, 157 & 65, id.). The robbers then took Un Se Eng along with them and proceeded to the house of Eng's father Un Ciong. When Ciong failed to immediately open the door of the house, the robbers even mauled Eng (p. 67, id.; Exh. "F", p. 36, Rec.). Then, after they got into the house, the band robbed Ciong of cash in the amount of about P25,000.00 and jewelry and valuables worth about P8,000.00. One of them also knocked and injured Ciong in the head (pp. 76-78, tsn, id.; Exh. "G", p. 39, Rec.).

"Jao Kee Tiong, a retired merchant, was in the store of his common-law wife that fateful evening of February 21, 1972, when two (2) men - one armed with a pistol and the other, with a rifle, also entered his store and robbed him of cash in the amount of P3,000.00 and jewelry worth about P9,000.00. The robbers also kicked Tiong and hit him on the left side of the head with a pistol when he could not produce the key to one of the rooms (pp. 2-8, tsn, Arradaza; Exh. "I", p. 32, Rec.).

"Luckily, Lt. Olan was able to escape from the bodega of the Baybay Commercial store. After securing a carbine, he encountered the same armed group that had previously robbed said store, and in the exchange of fire, one of the robbers was fatally shot (pp. 149-150, tsn, Rodriguez; Exh. "E", p. 18, Rec.). The dead robber was later identified as one Avelino Flores, an ex-convict from Cebu City (pp. 36-37, tsn, Arradaza).

"The circumstances antecedent to the commission of the robberies in question are revealed by the accused Melchor Prado in three separate sworn statements executed and signed by him, substantial and material portions of which are quoted in the appealed decision and marked as Exhibits "T", "U", and "V" (pp. 49, 51 & 53, Rec.; English translations, Exhs. "T-1" & "U-1", pp. 50-52, Rec.).

"In his first statement marked Exhibit "T", which was taken down by PC Sgt Leonardo Dairo on February 24, 1972, Prado stated, among other things, that on February 20, 1972, he requested one Ambrosio Polo to buy bullets for a .30 cal. carbine; that said bullets were, according to his co-accused Domingo Borneo and two unidentified persons, to be used in a robbery that would be pulled by them somewhere in the poblacion of Baybay; and that Polo in fact gave him 6 rounds of bullets at 1:00 o'clock in the afternoon of February 21, 1972.

"In his second sworn statement marked Exhibit "U", which was also taken down by Sgt. Dairo on February 25, 1972, Prado further disclosed that on February 17, 1972, he attended a conference in Ormoc City in connection with the robbery that was to be staged in Baybay; that with Boy Montemayor, who called the conference, were Rudy and Carling; that in that meeting, he was informed by said other conferees that they would go to Baybay on February 20, 1972 to see the place, and that they in fact arrived in said municipality on February 20, 1972; that he later informed his co-accused Domingo Borneo about the result of the conference in Ormoc City; that on February 21, 1972, other members of the Montemayor group arrived in Baybay by pumpboat, among them the accused Pedring Tan, Boy Cabejas, and one Simo and Carling from Cebu; that the pump-boat docked at the wharf; and that he did not receive any share from the proceeds of the robbery in Baybay on the night of February 21, 1972 because the robbers 'immediately fled away'.

"In his last statement marked Exhibit "V", which was taken down by PC Sgt. Rodolfo Robles on February 28, 1972, Prado also recounted, among other things, that in the afternoon of February 13, 1972, he and the accused Domingo Borneo met the accused Boy Montemayor, one Rudy, and Carling in the public market of Baybay; that on February 15, 1972, he was instructed by Borneo to go to Ormoc City on February 17 to meet Boy Montemayor; that accordingly, he went to Ormoc City on February 17, 1972 and there conferred with Boy Montemayor, one called Rudy, and Carling, who told him to inform Borneo that they were going to Baybay on February 20 and that one Pedring of Cebu City and his companions would also be arriving in Baybay by pump-boat on February 21; that he transmitted the afore-said information and instructions of Boy Montemayor to Borneo; that on February 20, 1972, he was requested by Borneo to look for ammunition for a carbine; that in the afternoon of February 21, 1972, while in Bo. Palhi, Baybay, he was able to buy six (6) rounds of bullets from Botoy Polo, which he immediately gave to Borneo; that Borneo forthwith went to the

town proper of Baybay to see Boy Montemayor, Rudy, and Carling; that at about 5:00 o'clock that same afternoon, Borneo returned to Bo. Palhi and informed Prado that Boy Montemayor, Rudy, Carling, Constancio Gonzaga, Junior Paredes, Rogelio Bacus, Simo, Pedring, and their companions were already in the poblacion of Baybay; that he and Borneo went to the town proper on a motorcycle about 7:00 o'clock that evening; that later that night, at about 9 to 10 o'clock, he was picked up by Patrolman Notarte and was brought to Mayor Loreto in order to identify the dead robber who was left behind in Baybay; and that he told them that he did not know the dead man." (At pp. 7-15.)

Both Melchor Prado and Domingo Borneo interposed the defense of alibi.

Melchor Prado, with Rustico de la Cruz as a corroborating witness, disclaimed participation in the mass robbery. He said that from 12:00 noon to 7:00 p.m. on February 21, 1972, he was in Pahi, a barrio in Baybay, Leyte, where he was taking bets as a masyador in the cockpit.

Domingo Borneo, with Rosario Ciabo and Rustico de la Cruz as corroborating witnesses, likewise disclaimed participation in the robbery. He said that he was acting as referee in the cockpit in Pahi from 10:00 a.m. to 5:30 p.m. on February 21, 1972. He said that after drinking tuba at a store he was told about a clash involving the Philippine Constabulary and the police so that he and Melchor Prado rode on a motorcycle to go to the poblacion but they did not reach it because they were advised not to proceed.

The appellants claim that:

"I. THE LOWER COURT ERRED IN HAVING ONE SALA HEAR THE ENTIRETY OF THE EVIDENCE OF THE CASE AND STILL ANOTHER SALA DECIDE THE CASE ON THE BASIS OF THE RECORDS OF THE CASE ALONE.

"II. THE LOWER COURT ERRED IN DECLARING BOTH ACCUSED MELCHOR PRADO AND DOMINGO BORNEO GUILTY BEYOND REASONABLE DOUBT OF THE CRIME." (Brief, p. 1.)

The first assignment of error is devoid of merit for two reasons:

(1) Judge Salas issued an Order dated November 20, 1972, wherein he inhibited himself and transferred the case to the Executive Judge in Tacloban City. On November 23, 1972, counsels for accused Melchor Prado and Domingo Borneo gave their conformity to the Order by stating that they had decided not to ask for its reconsideration and asked instead that the record of the trial be transcribed and copies of the transcript be sent to the Executive Judge and also to counsels because the accused "are insolvent litigants." (Expediente, pp. 709-719.) The appellants are thus estopped from questioning the decision of Executive Judge Borromeo.

(2) It is not unusual for a judge who did not try a case to decide it on the basis of the record for the trial judge might have died, re-signed, retired, transferred, etc. And this Court has held:

"The fact that the Judge who heard the evidence is not the one who rendered the judgment and that for that reason the latter did not have the opportunity to observe the demeanor of the witnesses during the trial but merely relied on the records of the case does not render the judgment erroneous." (Co Tao vs. Court of Appeals, 101 Phil. 188, 194 [1957]. See also U.S. vs. Abreu, 30 Phil. 402 [1915].)

The second assignment of error deals with the appreciation of the evidence and involves principally the credibility of witnesses.

Because Executive Judge Borromeo was not the one who tried the case, We cannot fall back on the principle that the factual findings of the trial court are generally binding because it was in a better position to examine the real evidence as well as to observe the demeanor of the witnesses while testifying in the case. Nonetheless, We note that Judge Borromeo made a painstaking study of the record and wrote a comprehensive decision.

The appellants have interposed, as above stated, the defense of alibi. Accordingly, the only pertinent issue is whether or not the prosecution's evidence positively identified them and established their participation in the pillage perpetrated in the poblacion of Baybay, Leyte, on February 21, 1972. The answer is in the affirmative on both counts.

One of the principal witnesses for the prosecution was Sergeant Arsenio Lipar of the Philippine Constabulary. The substance of his testimony has been given in the People's version of the facts quoted above and need not be reproduced here. The appellants question the credibility of Sgt. Lipar; they claim "that, as demonstrated by the witness Sgt. Lipar at the Vital Store before the hearing court, it was physically impossible for said witness to have seen anyone inside the store." The burden of the appellants' argument is that the position of Lipar's head in relation to the place where they were said to be, it was physically impossible for Lipar to have seen them. This argument is negated by the appellant's own sketch (Brief, p. 8) which shows that from Lipar's position it was possible for him to see the two who were inside the Vital Store through its open door. Thus Lipar testified in part as follows:

"COURT:

Let us go to the scene of the incident at Vital Store.

(SESSION AT THE COURT ROOM WAS TRANSFERRED AT THE SCENE OF THE INCIDENT. THE HONORABLE PRESIDING JUDGE, THE ASSISTANT PROVINCIAL FISCAL, MARCIAL B. ESTELA, THE THREE (3) DEFENSE COUNSELS, ATTYS. TORRES, AUMENTADO AND FERNANDEZ, ALL THE ACCUSED AND WITNESSES, AND UNDERSIGNED STENOGRAPHER REPAIRED TO THE SCENE OF THE INCIDENT, VITAL STORE, LOCATED AT THE CORNER OF A. BONIFACIO STREET AND MAGSAYSAY BOULEVARD, BAYBAY, LEYTE, WHERE SESSION WAS RESUMED).

COURT: (To the witness)

Q Where were you lying down at that time when the incident was committed?

A I was lying down here (witness lying down face downwards on the sidewalk of the Vital Store along the Magsaysay Boulevard).

COURT:

Make if of record that as measured by Interpreter Polo the distance from the corner of Magsaysay Boulevard and A. Bonifacio Street to that part of the sidewalk where the feet of the witness, Sgt. Arsenio Lipa was said to have been situated, would measure a distance of four (4) meters and eight and one half (8-1/2) inches.

COURT:

Q Now, Sgt. Lipar, how far was the head of Flores from your head?

A About one foot.

Q Now, which door was opened that time?

A This door (witness referring to the door of the Vital Store along the Magsaysay Boulevard nearest the corner of A. Bonifacio Street and Magsaysay Boulevard).

COURT:

Make it of record that the witness pointed to the first door from the corner of both streets, the first door along the side of Magsaysay Boulevard.

Q Now, where were the piles of cartons?

A About a meter from the step of the door.

COURT:

Fiscal Estela, do you have any questions?

FISCAL ESTELA:

Yes, Your Honor.

Q Where was Domingo Borneo when you saw him?

A He was near the door bordering A. Bonifacio Street, about one (1) meter and thirty (30) inches from the door along A. Bonifacio Street.

Q Melchor Prado, where was he when you saw him?

A He was inside towards the door of A. Bonifacio Street.

Q You said that you were standing. These two (2) people you mentioned, where were their backs facing?

A They were facing north.

Q All right, for our clarification, we will bother you by illustrating before us how you were made to lie flat towards the pavement, and in a fleeting moment you saw both accused, Borneo and Prado?

A I was lying this way (the witness was lying on his belly flat on the cement floor, while his two (2) arms were bent at right angle to the north, and the head was turned towards the left facing the inside of the Vital Store." (TSN, Arra-daza, pp. 138-140.)

The credibility of Sgt. Lipar is further assailed by the circumstance that when he executed a sworn statement on February 23, 1972, two days after the pillage, said statement "is bereft by any identification of any of the malefactors, least of all, of the two herein appellants." (Brief, p. 11.) But the court a quo correctly observed:

"In this connection, the Court has gone over the contents of Lipar's first sworn statement (Exh. "X-2") and it would appear therefrom that the investigator concentrated his interrogation on identification of those who surprised Lipar at the PC Detachment so that this may be the reason why the latter could have missed to mention accused Borneo and Prado during said investigation. It should, precisely, be taken into account, that, as observed by the Court of Appeals, as a general rule, 'evidence taken on an affidavit is incomplete and often inaccurate for want of suggestion or inquiry which would impel the witness to recall all the facts.' (People vs. Panimbagan Dimdim, 50 O. G. No. 1, p. 252, January, 1954, CA)." (Expediente, pp. 935-936.)

When Lipar was again questioned on February 25, 1972, he mentioned names because his attention was so directed. Thus he said in part:

"Q I have also noted in your answer to Question No. 7 in the last portion that the robbers had ordered you to lie flat besides the Vital Store and was further told not to look around, do you mean to say that all the time since you have lied flat besides the Vital Store you have only stayed or have remained in such position up to the time that you and your com-panions were left behind by the robbers?

A I have not stayed to only one position all the time. I was able to turn around my head when the robbers went inside the Vital Store and robbed the said store.

Q When you were able to turn your head, what have you noticed or have seen?

A I was able to see, Melchor Prado, Domingo Borneo, with the robbers of no less than fifteen (15) persons whom I can only recognize them by their faces, except Melchor Prado and Domingo Borneo who are already known to me." (Exh. X-3, Id., p. 22.)

It should also be mentioned that according to Lipar when his first statement was taken he was lying in bed because of pains all over his body caused by the maltreatment he received from the robbers and as a result of which he was not mentally alert and the matter of having seen Melchor Prado and Domingo Borneo escaped his mind. (TSN, Arradaza, p. 115.)

The appellants state that the other prosecution witnesses did not point them out as among the brigands. This statement is true but it must be recalled that the appellants were at the Vital Store whereas the witnesses, except for Uy Pho Ho, were elsewhere. Mr. Ho's failure to identify the appellants may be attributed to the tension and excitement of the moment or to the well-known passivity and inscrutability of Chinese nationals. The fact that the case had become a cause celebre must also be considered and for which reason Judge Salas had to inhibit himself so that Mr. Ho perhaps felt that he could do no less.

Melchor Prado, whose death sentence is under review, executed three statements: Exhibits T, U and V. Their contents have been summarized in the People's version of the facts, *supra*, and in the decision of the court *a quo*, pages 940-947 of the Expediente.

Prado now contends that his three extra-judicial statements were not voluntary. This claim is made under the rubric "Manner of subscription of oaths of sworn statements of Melchor Prado" but the reasons therefor are not readily perceived; they seem to be based on alleged non-compliance with Circular No. 83 of the Department of Justice which the undersigned who was then Secretary of Justice issued on May 9, 1972, or long after the statements were made. The circular states, among other things, that when a sworn statement or confession of suspects is taken, the suspect should be informed of his Miranda rights. That Prado was so informed is not stated in his three sworn statements but it should be noted that when they were taken neither Circular No. 83 nor Miranda as embodied in the Constitution was in force and could not have rendered inadmissible the statements which must be presumed to have been made voluntarily.

That Prado's statements were voluntary and made without maltreatment or threats is attested by the following:

(1) Zenen A. Puray, Municipal Judge of Baybay, Leyte, who administered the oaths to Prado, testified that he read the contents of the affidavits and asked if they were true and correct and Prado answered in the affirmative.

(2) Prado admitted that he "did not complain anymore before Judge Puray" but claimed that the reason was "because they [Sgts. Pascual and Lipar of the PC] warned me if I will make any complaint I will be mauled again." (TSN, Rodriguez, p. 323.)

(3) Philippine Constabulary personnel who were involved in taking the statements said that they were voluntarily signed and denied that Prado was maltreated.

(4) As the court *a quo* observed:

"Analyzing carefully the above-reproduced contents of accused Prado's sworn statements, the Court is of the view that it should brush aside accused Prado's disclaimer of their having been voluntarily given by him for it is inconceivable that such kind of lengthy and detailed answers as are found in the statements could have been ex-tracted by force or violence or that they were simply the concoctions or inventions of the PC investigators." (Expediente, pp. 947-948.)

The appellants also argue that two identifying witnesses - Sgt. Arsenio Lipar and Mrs. Antonieta Salvacion - had

PC connections.

Mrs. Salvacion's husband was a member of the PC when the incident happened. She identified Lope Daigan and Policronio Escalante who were acquitted by the court a quo. For this reason it is not necessary to deal with her testimony.

As to Sgt. Lipar, he identified the two appellants. The substance of his testimony has been stated above and appraised as well. The fact that Sgt. Lipar was a member of the PC did not disqualify him as a witness. Precisely, he was qualified to be a witness not only because he was a law enforcement officer but also because he himself was a victim of the crime. It is to be noted in this connection that the appellants have not shown that Sgt. Lipar was motivated by improper considerations when he testified against them.

The testimony of prosecution witness Ambrosio Polo is questioned. The court a quo considered him a minor witness and mentioned his testimony in one sentence as follows: "Ambrosio Polo, a 35-year old jobless person, who confirmed the statement in his affidavit (Exh, "W") that accused Melchor Prado was implicated in the robbery of the 'Rosario A' and is a gambler and jobless;" (Id., p. 915.)

Indeed Polo was a mere corroborative witness and his testimony could be discarded without materially altering the result.

The testimony of Lt. Virgilio Olan of the PC is also questioned. He was a victim of the robbery; he lost his gun, class ring, watch and money. He admitted that while giving chase to the robbers Sgt. Lipar told him of Borneo's presence at the Vital Store. The appellants pose this question: during the investigation of Prado, why did Lt. Olan not bring up the presence of Borneo at the Vital Store? His explanation was that he was conducting his own investigation but which was interrupted because he had to go to Cebu.

Finally, the appellants claim that their behavior prior to their apprehension shows their innocence; they point to the fact that they did not flee Baybay after the robbery. True it is that a circumstance such as this is a factor in determining guilt or innocence but it is not decisive and must be considered with other evidence. In this case, the evidence points to the guilt of the appellants; their alibi must fail because they were identified to have been at the scene of the crime and they did not demonstrate that it was impossible for them to have been there at the time of its commission.

The court a quo concluded that aggravating circumstances were present and We agree; it said:

"Considering that the evidence presented in this case has clearly established the fact that, before the commercial establishments of Baybay were simultaneously robbed on the evening in question, and, at that time, there was no electricity in Baybay because the electric power plant was then destroyed by the typhoon, the malefactors, all armed and they were between fifteen (15) to twenty (20) in number, first disarmed or rendered helpless the PC Detachment and the municipal police force of said municipality obviously to prevent any hindrance in the accomplishment of their criminal design, the Court thinks that there existed in the commission of the offense involved in this case the aggravating circumstances of the crime having been committed: (1) in contempt of or with insult to the public authorities; (2) by a band; and (3) by taking advantage of the nighttime to facilitate commission thereof." (Id., pp. 955-956.)

WHEREFORE, the judgment of the court a quo convicting the appellants of the crime of robbery in band with homicide is affirmed but modified with respect to the penalty of Melchor Prado who is sentenced to suffer reclusion perpetua only because of the lack of necessary votes to impose the death penalty. The indemnity to be paid to the heirs of Domiciana Castro shall be P30,000.00. Costs against the appellants.

SO ORDERED.

Makasiar, Aquino, Concepcion, Jr., Guerrero, Melencio-Herrera, Plana, Escolin, Relova, Gutierrez, Jr., De La Fuente, and Cuevas, JJ., concur.

Fernando, C.J., on official leave.

Teehankee, Acting C.J., in the result.

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