

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
JUANITO DASCIL, TONY JAIRETTSSING @ MALAYA AND JOHN DOE @
PABLING, DEFENDANTS, JUANITO DASCIL, APPELLANT.**

G.R. No. L-36364. November 25, 1982

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PER CURIAM:

In the Court of First Instance of Cagayan at Sanchez Mira, an information for murder was filed on April 13, 1972, against JUANITO DASCIL, TONY JAIRETTSSING and JOHN DOE. The information alleges:

"That on or about March 22, 1969, in the municipality of Sanchez Mira, province of Cagayan, and within the juris-diction of this Honorable Court, the said accused Juanito Dascil, Tony Jairettssing alias Malaya and John Doe alias Pabling, with intent to kill, conspiring together and help-ing one another, with evident premeditation and with treachery, did then and there wilfully, unlawfully and feloniously assault, attack and shoot one Hilario Agdeppa, inflicting on his body gunshot wounds, which wounds caused his death.

"That the crime was committed with the aggravating circumstance of use of motor vehicle to facilitate the com-mission of the crime."

Only JUANITO DASCIL was arrested on April 18, 1972. He was arraigned on July 19, 1972; he pleaded not guilty. After trial, the court rendered the following judgment:

"WHEREFORE, the Court finds the accused Juanito Dascil, guilty beyond reasonable doubt of the crime of MURDER defined and penalized under Article 248 of the Revised Penal Code, and there being two aggravating circumstances without any mitigating circumstance to off-set it, the Court has no other alternative, no matter what is its belief and no matter how painful it may be, than to impose the maximum penalty provided for by the law. Accused Juanito Dascil is hereby meted the maximum penalty of DEATH, to pay the widow of the victim Hilario Agdeppa, the sum of P5, 000.00 as reimbursement for funeral expenses and P50,000.00 as moral damages, without subsidiary imprisonment in case of insolvency in view of the nature of the prin-cipal penalty and to pay the costs."

The court found that the killing was qualified by evident premedi-tation and treachery. The court, as stated in the judgment, held that the murder was aggravated by two circumstances: the use of a motor vehicle and nocturnity.

The judgment of the trial court is now before Us for automatic review imposing as it does the penalty of DEATH.

The People's version of the facts as set forth in the brief filed by the Solicitor General is as follows:

"At about 5:30 o'clock in the afternoon of March 22, 1969, (p. 16, ts, Nov. 13, 1972), the late Hilario Agdeppa dropped at the house of his close friend Con-rado Oroseo at Nagrangtayan, Sanchez Mira, Cagayan (p. 12, ts, ibid.). He told the latter that he just came from Claveria, Cagayan, to engage the ser-vices of a lawyer in a case which he had just filed against Tony Jairettssing, one of the accused in this case (p. 18, ts, ibid.).

"A little while thereafter, Conrado Oroseo saw the appellant Juanito Dascil and his co-accused pass by his house. They were riding on a jeep and were going at a very slow pace. All of them were armed. The appellant

was holding a carbine, with the butt of the gun resting on his right thigh; Tony Jairetsing was holding a Thompson submachine gun; and Pabling Tagalog was carrying a revolver (p. 26, tsn, *ibid.*).

"That evening, Hilario Agdeppa ate dinner at the house of Conrado Oroseo, and thereafter, he started for home at Barrio Callungan, Sanchez Mira, Cagayan. Since Oroseo was also intending to go towards the east which was the same direction as where Hilario was going, he rode with Hilario on the latter's motorcycle (p. 13, tsn, *ibid.*). Oroseo wanted to join his son and nephew who were then hunting migratory birds known as 'sawi' inside the plantation of Atty. Federico Galapia in sitio Ma-gacan (pp. 11-12, tsn, *ibid.*).

"Upon reaching the junction of the national road and the road going to the coconut plantation of Atty. Galapia, Conrado Oroseo alighted from the motorcycle of Hilario. Before parting, however, they stopped to converse, and Hilario Agdeppa was telling him that in the event that they would catch some migratory birds, he would like to buy some of them (p. 29, tsn, *ibid.*).

"While thus conversing a passenger jeep approached them from the west, and when it reached the place where they were standing, the jeep slowed down to an exceedingly slow speed. At this juncture, Oroseo focused his flashlight towards the vehicle, and he saw four men inside, three of whom he recognized to be Tony Jairetsing, Pablo Tagalog, and the appellant, Patrolman Juanito Dascil. He failed to recognize the fourth individual inside the jeep (p. 5, tsn, *ibid.*).

"The jeep moved on and stopped at about 80 meters away from where Hilario Agdeppa and Conrado Oroseo were conversing (p. 6, tsn, *ibid.*).

The former wanted to go home, but Oroseo tried to prevent him, as he suddenly had the premonition that something wrong would happen. Hilario, however, insisted because, according to him, he had to attend a last canvassing in their barrio (p. 30, tsn, *ibid.*). Accordingly, he proceeded on his motor-cycle saying that he had no fault and, therefore, had nothing to be afraid of (p. 7, tsn, *ibid.*).

"Conrado Oroseo followed Hilario on foot to a distance of fifty meters from the junction, still convincing him not to continue. However, when he was about 30 meters away from the jeep, Oroseo stopped as he was afraid to go further (pp. 14 & 31-32, tsn, *ibid.*).

"As soon as Hilario Agdeppa had passed the jeep, appellant and his co-accused alighted from the vehicle and fired several shots at him, as a consequence of which, Hilario fell to the ground and expired (pp. 7-8, tsn, *ibid.*).

"The incident was also seen by Pablo Honorio who at the time was hunting migratory birds inside the plantation of Mr. Ramiro (pp. 25-26, tsn, Jan. 4, 1973), at a distance of only around 15 meters away from the national road where the incident happened (p. 43, tsn, *ibid.*).

"According to this witness, he first saw a red passenger jeep which he later recognized to be the one owned by Atanacio Negre, the then Mayor of Sanchez Mira, moving slowly down the road coming from the west (pp. 27-28, tsn, *ibid.*). The jeep was then about 30 meters away from him (p. 39, tsn, *ibid.*). Shortly thereafter, he saw the late Hilario Agdeppa trailing behind the jeep on a motor-cycle, whereupon, he saw somebody inside the jeep, whom he recognized to be Pabling Tagalog, signaling the motorcycle to slow down (pp. 28-29, tsn, *ibid.*). Hilario Agdeppa obliged (p. 40, tsn, *ibid.*), but suddenly, three men alighted from the jeep and gunned him down.

"The light of the jeep which was on and focused on the three gunmen enabled the two eye-witnesses Oroseo and Honorio to recognize them clearly. They recognized said gun men as the appellant who was in his police uniform (p. 37, tsn, Nov. 13, 1972; p. 30, tsn, Jan. 4, 1973), and his co-accused Tony Jairetsing @ Malaya, and Pablo Tagalog (p. 14, tsn, Nov. 13, 1972; and p. 30 tsn, Jan. 4, 1973). The fourth passenger of the jeep whom they could not recognize was behind the driver's seat (p. 31, tsn, Jan. 4, 1973).

"After the late Hilario Agdeppa had fallen to the ground with face downward (p. 34, tsn, Jan. 4, 1973), the aforesaid malefactors still fired several shots at him (p. 38, tsn, Nov. 13, 1972), after which, they forthwith boarded the jeep and left going to-wards the east (p. 34, tsn, Jan. 4, 1973).

"Upon witnessing the incident, witness Conrado Oroseo became so terrified that he ran away, failing to help the victim who was his close friend. He also forgot his main purpose in going with the victim, which was to join his son and nephew in the plantation of Atty. Galapia to hunt migratory birds (pp. 17 & 38-39, tsn, Nov. 13, 1972). Running post haste, this witness proceeded to the house of Councilman Hamoraban, and requested that he be conducted home (p. 9, tsn, *ibid*). The following morning, he went to the house of the deceased and related what he saw to his family. He likewise reported the matter to Sgt. Vinagresa of the P.C. two days later, executing a statement which he was not able to swear because of a letter he re-ceived threatening that he and his family would be killed if he continued to be a witness in this case (pp. 10; 19-20, tsn, *ibid*). Fearing for his life and the safety of his family, and knowing the notoriety of the three persons who killed Agdeppa, he left the place and went to live with his in-laws in Mag-singal, Ilocos Sur to hide (pp. 11, 20-21, & 40, tsn, *ibid*). It was only when things became normal again that he was able to summon the courage to go to Curva, Pamplona, Cagayan and report what he had witnessed to the authorities, as he was bothered by his conscience (pp. 40-41, tsn, *ibid*).

"On the other hand, witness Pablo Honorio, after seeing the accused leave the scene of the crime, called his two companions Ireneo Grande and Romeo Donato (p. 26, tsn, Jan. 4, 1973) who were then 40 meters away (p. 42, tsn, *ibid*), and went home (pp. 34-35, tsn, *ibid*). Because he was afraid, as the accused were then in power — the appellant being then a policeman, and Malaya and Tagalog, the bodyguards of the Mayor of Sanchez Mira (pp. 57 & 59, tsn), he did not narrate to his companions what he had just witnessed. It was only when they reached Callungan that he related the incident, but only to Brigido Donato. [According to Pablo Honorio, Brigido Donato is not different from Romeo Donato. TSN, Jan. 4, 1973, p. 53.] He did not inform the family of the deceased of what he saw (pp. 52-54, tsn, *ibid*), and consequently, he was never investigated (p. 53, tsn, *ibid*). However, after some months had passed, and when the accused were no longer in power (pp. 54-55; 57, tsn, *ibid*), he went to Curva to report the incident to the authorities (p. 54, tsn, *ibid*)."

Dr. Herman C. Asanias, Rural Health Physician of Sanchez Mira, Cagayan, performed an examination on the cadaver of Agdeppa and found the following:

"(1) Wound, gunshot, entrance, round, 2/3 cms. in diameter located at the supraclavicular region right, directed downwards and posteriorly with an exit wound (Hole) located at the supracular region, right, 1 2/3 cms. in diameter;

"(2) Wound, gunshot, entrance, round, 2/3 cms. in diameter located at the chest, left, lateral, about 11 cms. below the left axilla, directed upwards and anteriorly to an exit wound (hole) located at the 4th ICS, along the sternal line, 1 1/2 cms. x 1 cm. in diameter, about 7 cms. above and medial to the left nipple;

"(3) Wound, gunshot, entrance, round, 2/3 cms. in diameter, located at the lumbar region, 1 inch to the left of the vertebral column directed upwards and anteriorly with an exist wound (hole) located at the 3rd ICS, mid-clavicular line, 1 1/2 cms. x 1 cm., 9 cms. above the left nipple and 3 cms. above and lateral to wound No. 2;

"(4) Wound, gunshot, entrance, round, 2/3 cms. in diameter, located at the buttocks, upper inner quadrant, left, directed anteriorly with an exit wound 2 2/3 cms. x 1 cm. located at the upper third of the femur, left, medial aspect;

"(5) Wound, gunshot, entrance, round, 2/3 cms. in diameter, located at the forearm, right, dorsal aspect, directed anteriorly and laterally fracturing the bones of the forearm and with an exit wound, lacerated 12 x 4 cms. located at the forearm, lower third, lateral;

"(6) Wound, lacerated hand, right, dorsal aspect, located at the middle part of the carpal region;

"(7) Wound, lacerated hand, right, dorsum at the proximal part of the 3rd metacarpal with a sharp-nel recovered;

"(8) Several abrasions over the mandible, right."

He certified that the cause of death was "Hemorrhage severe, secondary to multiple gunshot wounds." (See Exh. "A", p. 91, Expediente.)

Isabel Agdeppa, widow of Hilario, testified that her husband used to be a police corporal; at the time of his death he was in the copra business; his annual income was P8,000.00 to P10,000.00; she has two children with the deceased, Mary Jane, a third year college student and Henry, 11 years old; her husband was the sole breadwinner of the family; she spent about P5,000.00 for the burial of her husband.

In asking for his acquittal, the appellant claims that:

"I. THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED-APPELLANT OF THE CRIME CHARGED IN THE INFORMATION ON THE BASIS OF THE EVIDENCE ON RECORD AND IN NOT ACQUITTING HIM OF SAID CHARGE.

"II. THE COURT A QUO ERRED IN ITS CONCLUSION THAT THE KILLING OF HILARIO AGDEPPA WAS QUA-LIFIED BY EVIDENT PREMEDITATION AND TREACHERY AND AGGRAVATED BY THE USE OF A MOTOR VEHICLE."

It is obvious from the first and principal assignment of error that the issue is the credibility of witnesses. This was the very pro-blem which confronted the trial court when it said:

"The Court finds from all these records and it becomes incontrovertible and indisputable that Hilario Agdeppa, a resident of Callungan, Sanchez Mira, Ca-gayan, was killed on the night of March 22, 1969. As to who was the author and can be held responsible for the commission of the crime, there seems to be a con-troversy. First , because the prosecution maintained that the three accused and a fourth unidentified individual were held responsible therefore; and the defense of the accused on trial, maintaining his innocence and lack of participation in the crime charged. Analyzing these two pieces of evidence, one presented by the prosecution and the other presented by the defense, the Court seems to have difficulty in arriving at a just and fair conclusion. But nevertheless, since this Court is duty bound to make such a finding, the Court has to weigh the evidence on the scale of justice and find which of these evidence will tilt in favor of what is fair and just." (Decision, p. 16.)

The appellant argues that credibility should tilt in his favor because the trial court itself is said to have "unabashedly confessed difficulty in arriving at a just and fair conclusion as to the guilt or innocence of the accused-appellant." Suffice it to say that a con-fession of difficulty does not necessarily spell failure to appreciate the probative value of evidence. Almost every trial, whether the case be civil or criminal, involves ascertainment of the facts which invariably depends on the credibility of witnesses. But this problem which confronts the judge does not mean that a decision cannot be made correctly. In truth, except in very rare cases, justice has been served because the judge correctly stated the facts.

In the case at bar, there is a polarization of the evidence. The evidence for the prosecution which consists of the testimony of Conrado Oroseo and Pablo Honorio point to the appellant as one of the killers of Agdeppa. Upon the other hand the evidence for the defense consisting of the testimony of four persons, including the appellant, is to the effect that he could not have shot Agdeppa because at the time of the incident he was detained at the municipal building of Pamplona, Cagayan, for excessive drunkenness. Hence, the appellant's defense is alibi.

The testimony of Conrado Oroseo is summarized in the decision of the trial court as follows:

"At about 6:00 o'clock to 7:00 o'clock in the evening of March 22, 1969, he was at the junction of the national road and the road leading to the coconut plantation of Atty. Galapia. He was conversing with the late Hilario Agdeppa with whom he rode on a motorcycle driven by the latter. While there, a passenger jeep coming from the west passed by. As the jeep neared them, it slowed down. He focused his flashlight on the jeep and saw four men inside, re-cognizing three of them as Tony Jairetsing, Pabling alias Tagalog, and Pat. Juanito Dascil, the accused who went into trial.

"After the jeep had gone a distance of about 80 meters away from them, it stopped. Hilario Agdeppa then wanted to go home but he prevented him because he had the pre-monition that something wrong might happen but Agdeppa said that since he has done no wrong, there was nothing to be afraid of.

"Hilario Agdeppa proceeded eastward but as he passed by the parked jeep, about 5-7 meters away, three of the passengers alighted and shot the late Hilario Agdeppa, whom he saw fall down from his motorcycle to the ground but Juanito Dascil and Pabling Tagalog continued shooting the victim at the back.

"Running eastward, he went to the house of Council-man Hamoraban and related what he witnessed, asking that he be conducted home.

"The following morning, he went to the house of the deceased and related what he saw to his family. He likewise reported the matter to Sgt. Vinagresa, two days after, executing a statement which he was not able to swear be-cause of a letter he received threatening him and his family not to appear as witness in the case, which letter caused him to leave for Magsingal, Ilocos Sur, as he feared for his life, knowing the notoriety of the three displayed in the cold blooded killing of Hilario Agdeppa.

"He explained his presence at the junction, which is in sitio Magacan, because he went to follow his son and nephew who went to hunt migratory birds locally known as 'sawi' in the coconut plantation of Atty. Galapia.

"Before going to Magacan, Hilario Agdeppa dropped at his house at Nagrangtayan and they dined together. When Agdeppa left and as he was going towards the same direction, Agdeppa invited him to ride with him in his motorcycle which invitation he readily accepted, asking that he be dropped at the junction but instead of parting immediately, they stopped to converse without Agdeppa alighting from his motorcycle and without stopping the motor as their conversation was merely centered on his request that they will sell to him part of their catch of migratory birds (sawi).

"He was positive in his identification that it was Jairetsing, Tagalog and Dascil who fired and shot at Hilario Agdeppa because the headlight of the jeep was on and the shooting took place in front of the jeep. To prove that he really witnessed the incident, he went on to describe the firearms used as carbine for Dascil, Jairetsing using a thompson while Tagalog used a re-volver. He came to know Dascil because he is a police-man of Sanchez Mira, Tony Jairetsing and Pabling Tagalog as wards of Mayor Negre, employed as body-guard and driver, respectively. In addition to this, he made a sketch which the Court has marked as Ex-hibit "X" and adopted by the prosecution as Exhibit "C".

"His fear is best exemplified by his failure to help the victim who was his friend and to the extent of forgetting his main purpose in going with the victim which was to look for his son and nephew who went to hunt 'sawi' at the coconut plantation of Atty. Galapia." (pp. 2-4.)

The testimony of Pablo Honorio is also summarized in the same decision as follows:

"He is a resident of Callungan, Sanchez Mira, Cagayan since birth. In the afternoon of March 22, 1969, he went to the coconut plantation of Mr. Ramiro located between Callungan and Magacan, Sanchez Mira, Cagayan. He went there with Irineo Grande and Romeo Donato. Their purpose was to hunt wild migratory birds known as 'sawi'. It was north of the national road about 15 meters away from the middle of the road.

While in-side the coconut plantation, a jeep passed by, slowed down, coming from the west. It was a passenger jeep identified to have been owned by Ex-mayor Negre and the municipality of Sanchez Mira. A motorcycle was trailing the jeep and it was driven by the late Hilario Agdeppa. He saw somebody inside the jeep signalling the motorcycle to slow down and he identified the per-son making the signal as Pabling Tagalog. There were four persons inside the jeep. He was not able to re-cognize however, these people at first until such time as they alighted and went in front of the jeep.

"After they have gone in front of the jeep, he saw these persons who alighted to be the accused, Juanito Dascil, Pabling Tagalog and Malaya and one inside the jeep whom he did not at all recognized as he remained inside the jeep behind the driver's seat. That was the time when they fired upon the person riding on the motorcycle.

"He knew that the man who shot at the man on the motorcycle was Juanito Dascil because of the light of the jeep. He said that Juanito Dascil used a carbine, Pabling Tagalog used a short gun about 7 inches long, and Malaya used a Thompson. After they fired at the man on the motorcycle, the man identified later as Hilario Agdeppa, fell on the ground with face downward. The three men boarded the jeep and left, going east-ward. He then called for his two companions and they went home without continuing their purpose to hunt mi-gratory birds.

"As proof that he was present at the scene of the crime, on cross-examination, he was made to draw a sketch and which sketch has been marked by the pro-secution, instead of the defense as Exhibit "B".

"He justified the delay in making his report to Curva, Pamplona, Cagayan, the station of the 115th P.C. Co., because he was afraid as the accused were in power those days, and other than to Brigido Donato, to whom he related the matter, no one was ever informed of what he saw. (pp. 6-8.)

The testimony of Juanito Dascil, the appellant, has been sum-marized by the court a quo as follows:

"On March 22, 1969, he was a Policeman of Sanchez Mira, Cagayan. On the afternoon of that day, he was at the Pamplona Ferry. When he arrived there, because he had brothers, he had to stop at the Ferry, and that was then the time when he saw Nicolas Berion.

"When he went to the ferry, he was with Feliciano Baluran. He was invited by Nicolas Berion to drink and because that was what Berion told him, he ordered San Miguel gin and they consumed four (4) bottles of gin and four (4) bottles of Coca-cola they used in mixing their drink. When they were already drunk, because his com-panions were noisy, that was the time the Chief of Police, Alejandro Laragan, arrested them, brought them to the Municipal Building of Pamplona, Cagayan. Arrested with him is Nicolas Berion.

"Upon their arrival at the Municipal Building, the Chief of Police sent them to jail. It was Pat. Cenal who locked them up in the Municipal jail. Once inside the jail, because he was drunk, he laid down. He was released the following morning at about 6:00 A.M. His release was ordered by the Acting Chief of Police, Alejandro Laragan.

"He denied that he was with Tony Jairetsing alias Malaya, Pabling Tagalog, and an unidentified person in front of the coconut plantation of Mr. Ramiro on the night of March 22, 1969, and that he shot Hilario Agdeppa. He admits however, knowing Hilario Agdeppa, since the time he was married to a woman from Sanchez Mira because he was then a policeman, referring to the deceased Agdeppa. He also knows Tony Jairetsing alias Malaya, whom he came to know from the time accused became a policeman; that there were occasions when he became associated with him and in one occasion, he came to know that Tony Jairetsing alias Malaya had some mis-understanding with the deceased and he told him that whenever he saw his thigh, he remembers that it was shot by the deceased; so that everytime he saw the deceased, he made the passing remark, 'There will be a day for this'; and he advised Tony Jairetsing to forget the matter.

"Accused never had any misunderstanding with the deceased Hilario Agdeppa on or before March 22, 1969. He does not know of any reason why he should be implicated in this case as he knew no fault of his.

"On cross-examination, his most important statement, said that he came to know of Hilario Agdeppa's death upon his return from Pamplona the following day, which was March 23, 1969. In the Police Department of his he was a member, he learned that there was no suspect in the killing of Hilario Ag-deppa. Although he knew the statement that was uttered by Tony Jairetsing before the death of the deceased, on those occasions that they were together, he never made a direct confrontation with Jairetsing. Nevertheless, according to him, he made some dis-creet observations on the movements of Jairetsing, hoping that somehow he would be able to elicit some revelations from the mouth of Jairetsing that would, one way or another, be considered as his participation or responsibility in the commission of the crime that is now being the subject matter of trial.

"He said that he left Sanchez Mira on March 22, 1969, before lunch time, and he did not have special assignment that day because he was merely on patrol. When arrested and released, the Chief of Police merely told him, 'Why are you drinking so much?' He explained that the reason why he was not prosecuted by the Chief of Police was a statement or request he asked of the Chief of Police that it should not be placed in the blotter by reason of the fact that it would appear very embarrass-ing for a policeman to have been arrested for drunkenness." (Decision, pp. 13-15.)

Nicolas Berion corroborated the alibi of the appellant. He said that he and the appellant were arrested by Chief of Police Alejandro Laragan of Pamplona for being noisy while drinking. They were locked in the municipal building from about 5:00 p.m. on March 22, 1969, until they were released the following morning.

Alejandro Laragan testified on the arrest of Dascil and Berion as aforestated. He said that he personally made the entry in the police blotter for March 22, 1969, as follows:

"Reports of Policemen and Record of Events:

"Nicolas Berion and Juanito Dascil, a policeman of Sanchez Mira, were detained at the municipal build-ing for excessive drunkenness. They were apprehended at about 5:00 o'clock while they were about to create trouble in the restaurant of Rosing Adolfo." (Exhibits 1 (defense) and A-2 (prosecution).)

Exequiel Cenal testified that he was a policeman of Pamplona, Cagayan. On March 22, 1969, during his tour of duty, he saw Nicolas Berion and Juanito Dascil under the custody of Chief of Police Laragan. They were both drunk and were locked in jail. That was at about 5:00 p.m. In jail, Berion and Dascil slept.

The trial court found the evidence for the prosecution more credible because of the clear and positive identification which witnesses Oroseo and Honorio made in respect of the participation of the appellant in the commission of the crime. It held that these witnesses had no reason whatsoever to testify falsely against the accused as admitted by the latter himself. The trial court rejected the defense of alibi; obviously it did not believe the claim of the accused and his witnesses. It said that it was not physically impossible for the appellant, assuming that he was in Pamplona on the day of the incident to have gone to Sanchez Mira. The trial court also suspected that the entry in the police blotter was interpolated because of its appearance and the irregularity in its maintenance and upkeep. Accordingly, it did not consider the entry as clear, full and satisfactory evidence to support the defense of alibi. It described Chief of Police Laragan who owned making the entry in the blotter as "clever, witty and extra-ordinarily alert." Finally, the court described the environment during the trial in the following words:

"The Court cannot overlook mentioning this decision what transpired in the hearing of this case, where the prosecution and the Court employees manifested fear against the accused. This became evident at the start of the proceedings where the Prosecuting Fiscal wanted to seek postponement by reason of the presence of a Private Prosecutor who was then absent. And in the continuation, when although aware of the deficiencies of the private prosecutor, the Prosecuting Fiscal has to delegate the Prosecution of the case to the Private Prosecutor under the guise of having it nevertheless under his supervision, direction and control. And the Court

Interpreter's failure to comprehend questions to be interpreted and the answers given by the witnesses such that the Presiding Judge has to assume the role of an interpreter. For the Court feels that in cases of these nature where everybody seems to be laboring under a canopy of fear, somebody has to take up the cudgels and must show willingness to make himself the sacrificial lamb and while the Pre-siding Judge has likewise to value his life for the sake of his family, yet since he has assumed to accept the position of dispensing justice, then he must not shrink from that duty, no matter what is the cost." (Decision, p. 21.)

As previously stated, the first and principal assignment of error challenges the findings of the trial court. However, it is a cardinal rule in this jurisdiction that conclusions and findings of fact by the trial court will not be disturbed because it was in a better position to examine the real evidence and to observe the demeanor of witnesses. In contrast the appellate court has only the cold record before it. However, the rule will not be applied when there appears in the record some fact or circumstance of weight and influence which has been overlooked or the significance of which has been misinterpreted.

The appellant urges that the rule should not be applied to him. He attacks the credibility of Oroseo thus:

"Even the trial Court made of record the patent hesitancy and, at times, inability of the witness to answer simple questions of the trial Court of things or matters or events which the witness should have remembered or known, if indeed, he was present during the alleged commission of the crime charged. Thus, the simple question of the trial Court as to why Oroseo stopped at a distance of 30 meters from the jeep, the witness hesitated to answer (t.s.n., Oroseo, p. 33, November 13, 1972); when pointedly queried by the trial Court what was the color of his attire that evening of the incident, the witness hesitated to answer such a simple question; and when the Court after the witness grudgingly saying that he wore, at that time, black shirt and brown pants, asked the witness whether he was sure, could not answer the question for a period of two minutes! (at page 37, t.s.n., Oroseo, November 13, 1972); again, when the trial Court asked him whether Oroseo went to the 115 P.C. Company at Curva, Pamplona, Cagayan, without anybody telling him, the witness hesitated to answer (at page 41, *idea, supra*). Worse, Oroseo was caught lying on the witness stand when, at first, he averred that he was accompanied by some of his associates when he went to the P.C. Company at Curva, Pamplona, Cagayan, but when warned by the trial Court that he would be jailed if he was telling a lie, he finally admitted that he was alone when he went to the Philippine Constabulary." (Brief, pp. 8-9.)

The Solicitor General counters, and We agree, that the hesitancy of Oroseo in answering some questions was due either to his failure to understand a question or his inability to remember minute details of an incident which happened many years before he testified. As to whether he went alone or with others to the P.C. Company at Curva, Pamplona, suffice it to say that the question is neither significant nor material.

Oroseo's credibility is further assailed when he said that he walked with Agdeppa for about 50 meters towards the jeep although he already had a premonition that something wrong would happen. The appellant ask how "he was able to marshal raw courage by going with Agdeppa towards the jeep for a distance of fifty meters, trying to convince him not to proceed anymore, recklessly unmindful of his own safety?" The fact is Oroseo did not display raw courage on that occasion because he prudently did not proceed towards the jeep which was still 30 meters away. Oroseo testified that he pro-ceeded no further because he was afraid.

The appellant also asks, if Oroseo did in fact report the killing to Sgt. Vinagresa of the Philippine Constabulary two days later, why did not Vinagresa act? But Vinagresa could not have acted because Oroseo's statement was not under oath which circumstance was due to the fact that Oroseo had received a threat which made him flee to Magsingal, Ilocos Sur. Neither could Vinagresa question Pablo Honorio because Oroseo did not know and could not have told Vina-gresa that there was another witness to the killing.

The appellant asks why Oroseo did not report the incident to the P.C. authorities in Ilocos Sur or to the National Bureau of In-vestigation. The answer is he had already reported the matter to Sgt. Vinagresa albeit his report was

not under oath for he had to flee in fear.

The appellant sustains his assault on Oroseo's testimony by questions such as why he kept silent for about 11 months; why he did not report the threat which made him flee to Magsingal; why he abandoned his son and nephew who were hunting sawi, etc. Suffice it to say that the questions raised by the appellant do not seriously impair Oroseo's credibility for he was positive and direct in his testimony that the appellant was one of the killers of Agdeppa.

The appellant attacks the credibility of Pablo Honorio on the ground that if Honorio indeed saw the shooting, he should have re-reported it to the police authorities and the family of the deceased. But as Honorio testified when he was cross-examined, he did report the matter to the authorities in Curva, Pamplona, after several months. He did not report the incident in Sanchez Mira "because he [Dascil] is a policeman" and he did not report it immediately because "I was then afraid because they were then in power in those days." (TSN, Jan. 4, 1973, pp. 53-55.)

As to the defense of alibi, the reasons given by the trial court re-stated above in rejecting it are well-taken. We need only add that even a superficial examination of the police blotter, Exhibit 1, shows that it is easily susceptible to tampering. Large empty spaces are left between entries so that it was easy to insert almost anything. The trial court in fact made the following comment:

"The appearance of the police blotter has attracted the attention of the Court and noticed how irregular the keeping and maintenance of said blotter. But this witness [Laragan] has been clever, witty and extra-ordinarily alert and explained that while it is irregular since that was the procedure that has been followed by his predecessors in office, he merely continued the same procedure. The Court invited his attention to the possibility of this blotter having been interpolated, intercalated and altered, and he said that under the manner that they were kept, that is possible but quick to retort that in so far as he is concerned, he as-sured the Court that none of the sort was made. As a matter of fact, he categorically stated that it was he himself who made the entry marked as Exhibit 1." (Decision, p. 12.)

In connection with the second assignment of error, the appellant submits the following question:

"(b) Assuming, gratis arguendo, that the accused-appellant was involved in the killing of Hilario Agdeppa, was the crime, as found by the court a quo, qualified by evident premeditation and treachery and aggravated by the use of a motor vehicle?" (Brief, p. 3.)

We stated above that the trial court found that the killing was qualified by evident premeditation and treachery and that the murder was aggravated by the use of a motor vehicle and nocturnity.

The Solicitor General submits that it was error on the part of the trial court to appreciate evident premeditation and nocturnity against the appellant. We agree. Evident premeditation cannot be attributed to the appellant because there is nothing in the record to show at what time prior to the murder the killers yielded to the inducement to kill their victim and finally resolved to perpetrate the dastardly deed. Neither can nocturnity be appreciated against the appellant because, again, there is nothing in the record to show that the killers purposely sought the darkness of the night in order to facilitate the commission of the offense. Moreover, under the circumstances, nocturnity would be absorbed by the qualifying circumstance of treachery which shall be discussed anon.

According to the Revised Penal Code, "There is treachery when the offender commits any of the crimes against the person, 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." (Art. 14, par. 16.) In the case at bar the killers parked their jeep about 80 meters from the spot where Agdeppa and Oroseo were conversing. When Agdeppa resumed his travel he had to pass the jeep and its passengers who

signalled him to slow down. Agdeppa complied but as he did so the appellant and his co-accused suddenly fired several shots at him using different kinds of guns. The scenario vividly shows that the killing took place without risk to the killers and without any opportunity on the part of Agdeppa to defend himself. There was indeed treachery.

The trial court correctly appreciated the aggravating circumstance of the use of a motor vehicle in the commission of the crime. The use of the jeep by the appellant and his co-accused facilitated the commission of the crime considering that their victim was driving a motor-cycle. Also, the jeep afforded the killers an easy means of escape from the scene of the crime.

In resume, the killing was qualified by treachery and aggravated by the use of a motor vehicle. Absent any mitigating circumstance, the applicable penalty is the maximum of the appropriate penalty - death.

WHEREFORE, the judgment of the court a quo is hereby affirmed in its entirety. Costs against the appellant.

SO ORDERED.

Makasiar, Aquino, Concepcion, Jr., Guerrero, Abad Santos, De Castro, Melencio-Herrera, Plana, Escolin, Vasquez, Relova and Gutierrez, JJ., concur.

Fernando, C.J., and Teehankee, J., no part.

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