

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. RICARTE MACARIOLA, DEFENDANT-APPELLANT.

G.R. No. L-40757. January 24, 1983

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Automatic review of the Decision of the Circuit Criminal Court, Seventh Judicial District, Pasig, Metro Manila, in Case No. CCC-VII-1346-Rizal, finding the accused Ricarte Macariola, a prisoner (No. 66033-P) confined at the New Bilibid Prisons, Muntinlupa, Metro Manila, guilty of the crime of MURDER for the death of Romeo de la Peña, a prisoner in the same penal institution, and sentencing the accused to suffer the capital penalty of DEATH.

The Information, dated June 1, 1973, filed against accused-appellant alleged:

" . . .

"That on or about the 21st day of September, 1971, in the New Bilibid Prisons, Muntinlupa, Rizal, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused while then confined at the said institution, with treachery and evident premeditation, and armed with improvised deadly weapon did then and there willfully, unlawfully and feloniously assault and wound therewith one Romeo de la Peña, No. 29820-P, a sentenced prisoner in the same institution, inflicting upon him multiple stab wounds, while then unarmed and unable to defend himself from the attack launched by the accused, as a result of which the said Romeo de la Peña died instantly.

CONTRARY TO LAW."[1]

The defense does not dispute that the deceased prisoner was stabbed and killed by the accused. It maintains, however, that the accused stabbed the deceased in self-defense.

The facts established by the prosecution and synthesized in the People's Brief follow:

"On September 21, 1971, between the hours of 8:00 and 9:30 o'clock in the morning, Romeo de la Peña, No. 29820-P, an inmate at the New Bilibid Prisons in Muntinlupa, Rizal, was standing in his cell when suddenly he was approached and stabbed by appellant Ricarte Macariola with an improvised weapon called 'matalas' (Exhibit 'B'). The stabbing incident took place while they were inside their cell at Brigade No. 2-D and was witnessed by fellow inmates Romeo Sato, Fernando Gomez, now deceased, a certain Alvarez and Severino Pingkian (TSN, September 30, 1974, pp. 3, 16 and 30; Exhibit 'G', Rec., p. 127; Exhibit 'C', Rec., p. 128). Romeo de la Peña shouted, 'Inay, Inay' and ran to a 'kubol'. He was pursued by the appellant and by inmates Nelson Biñas and a certain 'Bugok'. De la Peña dropped to the ground and lay prostrate inside the 'kubol'. Again appellant stabbed him followed by thrusts from Nelson Biñas and 'Bugok'. De la Peña died inside the 'kubol'. (TSN, September 30, 1974, pp. 10-11).

Meanwhile, Fernando Gomez, considered the 'Mayor' at Brigade No. 2-D since 1970, upon hearing the victim shout 'papatayin ako, papatayin ako,' entered the cell and saw the victim in a lying position with the appellant bending over him with a blood stained knife in his hand. Immediately, he reported the incident to prison keeper

Alfredo Manzano who opened the door of the cell. Alberto Supetran, another prison keeper, entered the cell. Appellant then approached the latter to whom he surrendered the improvised weapon ('matalas') which he used in stabbing the victim (Exhibit 'C', Rec., p. 128).

On the same day, an investigation of the stabbing incident was conducted. Prison guard Jesus B. Tomagan took the sworn statements of appellant (Exhibit 'A', Rec., p. 125) and prison inmate Fernando Gomez (Exhibit 'C', Rec., p. 128), who a year later, or on September 12, 1972, was also stabbed to death (Rec., pp. 37 and 66). Francisco A. Cometa, another prison investigator, took the sworn statement of prison inmate Romeo Sato (Exhibit 'G', Rec., p. 127). When appellant was investigated, he admitted having stabbed the victim Romeo de la Peña (TSN, May 29, 1974, p. 10).

An autopsy was conducted on the body of the victim by Dr. Cristino S. Garcia, medico-legal officer of the National Bureau of Investigation. The Necropsy Report (Exhibits 'D' & 'D-1', Rec., pp. 123-124) prepared by him shows that the victim sustained a total of sixteen stab wounds, of which, wounds nos. 11 and 12 were considered fatal. Stab wound No. 11 involved the left lobe of the liver and penetrated the left ventricle of the heart. Stab wound No. 12, was five in number and penetrated the upper and middle lobe of the right lung (Exhibits 'D-4', and 'D-5', Rec., p. 124). These wounds produced severe hemorrhage and caused the death of the victim (TSN, May 31, 1974, pp. 6 and 8).

In his testimony during the trial, Dr. Garcia opined that because the stab wounds were of different sizes, more than two instruments were probably used in stabbing the victim and that, judging from the number of stab wounds found on the body of the victim, there were more than two assailants. He likewise noted that the five wounds found in stab wound No. 12 were very near each other, hence, they could have been delivered while the victim was in a lying position (Ibid, pp. 11-13)."[2]

On the other hand, the accused and another inmate, presented their own versions:

Accused RICARTE MACARIOLA, 29, single, serving sentence of 8 to 14 years for the crime of Robbery, testified that on September 21, 1971, he was confined at Brigade 2-D together with about 200 inmates, one of whom was the deceased (Romeo de la Peña); that at about 4:00 o'clock in the morning of that day, he and the deceased were gambling and playing "Hong Chang" near the deceased's "tarima"; that they gambled for about four hours; that the deceased lost in the said "Hong Chang" and the accused won all the deceased's money of about P6.00; that he gave the deceased a blanket as "balato"; that, while he was still holding the money he won, the victim snatched them from his hand; that when he (accused) was taking the money back, the victim kicked him on the left chest; that he was then sitting on the floor while the victim was seated on his "tarima"; that he fell down as a result; that he stood up and took his improvised weapon called "matalas" which is about 12 inches long, placed on his waist near the right pocket; that when the victim saw him holding his "matalas", the victim also tried to take his own "matalas" which said victim had under his pillow; that for fear that the victim might be able to get hold of his (victim's) "matalas" and would use it against the accused, the latter stabbed the victim on the stomach; that the victim failed to take hold of his "matalas" because it fell down; that both of them fell on the floor because the victim pulled him; that while the victim was holding him by the neck, the accused stabbed him again—although the accused says he does not know how many times he stabbed the victim; that the victim is taller, bigger and huskier than the accused; that the victim was a boxer; that their cell was closed and there was no exit; that there was no place to run away from the victim; that the accused had to use the "matalas" in order to disable the victim, thinking that his life was in imminent danger; that the victim died due to the stab wounds he had inflicted; that the accused surrendered himself and his "matalas" to jail-keeper Alberto Supetran when the latter came to the cell; that he also saw said official pick up the "matalas" of the deceased from under the latter's pillow; that the accused was brought to the office of the Prisons investigators where his statement was taken down in writing by Jesus Tomagan; that he swore to the truth of his statement before the Prisons Administrative Officer; that the stabbing

happened at about past eight in the morning of that day; that he does not know that inmate called "Bugok" and that he was placed in the "bartolina" after the incident for about five (5) months.[3]

It is to be noted that the accused mentioned no other participants in the stabbing. He owned responsibility for the entire incident.

ANTONIO VIVERO, 28, single, inmate of the New Bilibid Prisons, serving sentence of 12 to 17 years for Murder, declared that on September 21, 1971, he was confined in Brigade 2-D, along with Macariola and the deceased and many others of about 200; that at about 8 o'clock in the morning of that same day, while he was taking his breakfast, inside the cell, his attention was called by loud exchange of words—a heated discussion between Macariola and the deceased, who were about 3 meters away from him; that following the exchange of words, he saw the victim kick the accused; that the latter stood up and then, the accused and the victim faced each other; that the accused gave a thrust at the victim with a "matalas"; that the victim was thrown to the floor near his bed which is about one-half meter away; that a commotion occurred all over the cell; that the jail-keeper went inside the cell; that he saw the said-keeper inspect de la Peña's pillow and found thereunder an improvised weapon called "matalas"; that the victim's improvised weapon is 14 inches long made of tube, double-bladed; that he was not aware of the gambling incident between the victim and the deceased before the stabbing incident; and that the deceased was bigger in build than the accused.[4]

In its Decision dated January 10, 1975, the Trial Court found the aggravating circumstances of treachery, evident premeditation, and recidivism present and sentenced the accused as follows:

"WHEREFORE, finding the accused, Ricarte Macariola, GUILTY, beyond reasonable doubt, of the crime of Murder, under Article 248 of the Revised Penal Code, as charged in the information, the Court hereby sentences him to suffer the penalty of DEATH; to indemnify the heirs of the victim the amount of P10,000.00; to pay moral damages in the amount of P5,000.00 and another P5,000.00 as exemplary damages; and to pay the costs."[5]

The accused now alleges:

"I

The Court a quo erred in not giving credence to defendant-appellant's defense of complete self-defense.

"II

The Court a quo erred in finding defendant-appellant guilty beyond reasonable doubt of the crime of Murder.

"III

The Court a quo erred in finding defendant-appellant a recidivist."[6]

Having invoked self-defense, the burden of proving it is on the accused.[7] Self-defense should be established by clear, satisfactory and convincing evidence.[8]

The evidence for the defense falls short of that requirement. The accused claims that the victim was the unlawful aggressor in that prior to the stabbing, while he was trying to retrieve the money won from the victim, the latter kicked him on the chest causing to fall. That act, however, does not constitute such unlawful aggression as would justify the killing of the victim. It was not of such a nature that posed actual or imminent and real danger to the accused's life.[9] Defense witness Antonio Vivero testified that upon being kicked by the victim, the accused stood up and both protagonists positioned themselves against each other ("nag pormahan") "as if they were getting ready" before the accused stabbed the victim with a "matalas." This circumstance clearly shows that the accused and the victim were getting ready for a fight and that the act of the accused was more out of retaliation than of

self-defense.

Besides, even granting that there was unlawful aggression on the victim's part, it was not continuous. As prosecution witness Romeo Sato testified, the victim fled to a "kubol" after he was initially wounded and was pursued by the accused.[10]

"An act of aggression, when its author does not persist in his purpose, or when he discontinues his attitude to the extent that the object of the attack is no longer in peril, does not constitute an aggression warranting self-defense."[11]

The accused's contention that he drew from his waist his "matalas" only when the victim tried to get hold of his own weapon under his pillow, and that the victim's weapon fell on the floor because the accused was able to pull said victim[12], is not supported by the evidence. Defense witness, Antonio Vivero, himself declared that the deceased was not armed during the stabbing incident and that the victim's weapon was found under the pillow by the Prisons authorities after the incident.[13]

The primal requisite of unlawful aggression being absent, the arguments regarding the other elements of self-defense serve no useful purpose.

But while the victim's act of kicking the accused on the chest prior to the stabbing does not constitute unlawful aggression for purposes of self-defense, that act may nevertheless be considered as sufficient provocation on the victim's part, and a mitigating circumstance that may be considered in favor of the accused.[14]

Piecing together the evidence of the prosecution and the defense, this is what must have transpired: after the accused tried to snatch the money back from the victim, the latter, then seated on his "tarima", kicked the accused who was seated on the floor. Both stood up, the accused ready to box the victim. The latter turned to get something from under his pillow. The accused stabbed the victim the first time. It was this stabbing that prosecution witness Romeo Sato first saw and narrated. That witness did not hear the quarrel, nor did he see the victim kick the accused. The victim ran to a "kubol" pursued by the accused. From here on, the versions of the prosecution and the defense tally. The victim went under his "tarima". The accused dragged the victim from under and repeatedly stabbed him until he could move no more.

The commission of the crime was attended by treachery. It may be that, at the inception, treachery cannot be appreciated as the sudden assault made by the accused, as testified to by prosecution witness Romeo Sato, was merely an immediate retaliation for the act of kicking by the victim, thereby placing the latter on his guard.[15] Yet, although absent initially, if the attack is continued and the crime is consummated with treachery, it may still be taken into consideration.

"Even though an attack may be begun under conditions not exhibiting the feature of alevosia, yet if the assault is continued and the crime consummated with alevosia, such circumstance may be taken into consideration as a qualifying factor in the offense of murder."[16]

Treachery exists when the offender employs means, methods or forms which tend directly and specially to insure the execution of the offense without risk to the accused arising from the defense which the victim might make.[17] The concurrence of the two conditions necessary for treachery to exist are present in this case, namely: (1) the employment of means, method or manner of execution which would insure the offender's safety from any defensive or retaliatory act on the part of the offended party, which means that no opportunity is given the latter to defend himself or to retaliate; and (2) such means, method or manner of execution was deliberately or consciously chosen.[18]

According to the accused's own version, after he was kicked by the victim and as the latter turned to retrieve

something from under his pillow, the accused drew his improvised deadly weapon from his waist, pulled the victim, and stabbed the latter on the back. Then, according to prosecution witness, Romeo Sato, the victim ran to the "kubol" where he was pursued by the accused and two other inmates and as the victim lay prostrate on the floor the accused and two other inmates kept on stabbing him without let-up. The risk to the accused arising from any defense that the victim might have made had ceased the moment the victim fled and hid under his "tarima" after being initially wounded. Yet, the accused went in pursuit and continued attacking the victim to his death. According to the accused himself, after he had stabbed the victim the latter sought refuge under his "tarima"; but the accused pulled him from under and continued assaulting him even as he was lying prostrate with half of his body under the "tarima." The victim was in no position to retaliate. He was unarmed and completely defenseless. The state of helplessness of the victim is evidenced by the 16 stab wounds he received. As the accused had described in his sworn statement (Exhibit "A"):

"Nagalit siya at sinipa niya ako sa dibdib dahil nasa itaas siya ng kanyang tarima, at ako naman ay nakaupo rin sa sahig. Tumayo ako upang siya ay suntukin ngunit pumihit siya at may kinukuha sa ilalim nang kanyang unan.

Ang ginawa ko binunot ko ang dala kong patalim na naka sukbit sa aking baywang at hinila ko siya nang kaliwa kong kamay upang huwag makuha kung ano man ang kanyang kinukuha sa kanyang unan sabay saksak ko sa kanyang likod. Siniko niya ako dahil sa hawak ko pa rin siya sa leeg kaya magkasama kaming natumba. Pumasok siya sa ilalim nang kanyang tarima at sinipa niya ako. Ang ginawa hinawakan ko siya sa paa at hinila ko palabas. Nang makalabas na ang katawan niya hanggang itaas nang suso sinaksak ko siyang sinaksak hanggang sa hindi na siya kumilos.

....."[19] (Italics ours).

The evidence, however, does not support a finding of the existence of evident premeditation. There is nothing in the testimonies of either prosecution or defense witnesses from which it may be concluded that the accused had meditated and reflected upon his decision to kill the victim. On the contrary, a quarrel had precipitated the stabbing episode.

Contrary to the stand of the Solicitor General's Office, the special aggravating circumstance of quasi-recidivism, under Article 160 of the Revised Penal Code, is attendant. The accused committed this new felony while serving sentence for Robbery imposed upon him by final judgment. Pursuant to the same provision, the maximum period of the penalty prescribed by law for this new offense should thus be imposed.

The presence of the mitigating circumstance of sufficient provocation is of no consequence as quasi-recidivism cannot be offset by any ordinary mitigating circumstance.[20]

The result is that the crime committed is Murder qualified by treachery, the maximum of the penalty for which is death.[21] For lack of the necessary votes to impose it, however, the penalty should be commuted to reclusion perpetua.

WHEREFORE, the judgment appealed from is modified as to the penalty imposed and the accused, Ricarte Macariola, is hereby sentenced to suffer reclusion perpetua. The indemnity awarded by the Trial Court of P10,000.00 is increased to P12,000.00.[22] The judgment is affirmed in all other respects.

Costs against accused-appellant Ricarte Macariola.

SO ORDERED.

Teehankee, Guerrero, Abad Santos, De Castro, Plana, Escolin, Vasquez, and Relova, JJ., concur.

Fernando, C.J., joins the dissenting opinion of Justice Aquino.

Makasiar, J., I agree with Justice Aquino that the crime committed is homicide.

Aquino, J., see dissent RCA.

Concepcion, Jr., J., is on leave.

Gutierrez, Jr., J., took no part.

[1] p. 2, Rollo.

[2] pp. 2-4, Brief for the Appellee.

[3] T.s.n., October 3, 1974, pp. 2-41, Exhibit "A", pp. 125-126, Original Records.

[4] T.s.n., October 14, 1974, pp. 2-17.

[5] p. 8, Decision, p. 19, Rollo.

[6] p. 1, Brief for Defendant-Appellant, p. 69, Rollo.

[7] *People vs. Talaboc, Jr.*, 30 SCRA 87 (1969); *People vs. Obeda*, 101 SCRA 675 (1980).

[8] *People vs. Davis*, L-13337, February 16, 1961; *People vs. Solaña*, L-13967, September 29, 1962; *People vs. Mendoza*, L-16392, January 30, 1965; *People vs. Libed*, L-20431, June 23, 1965; *People vs. Ordiales*, 42 SCRA 238; *People vs. Encomienda*, 46 SCRA 522; *People vs. Aquino*, 54 SCRA 409; *People vs. Padiernos*, 69 SCRA 484; *People vs. Pay-an*, 84 SCRA 353.

[9] *People vs. Sumicad*, 56 Phil. 647 (1932).

[10] T.s.n., September 30, 1974, p. 11.

[11] *People vs. Yuman*, 61 Phil. 786 (1935).

[12] T.s.n., October 3, 1974, pp. 7, 21-22.

[13] T.s.n., October 14, 1974, pp. 9, 12.

[14] Art. 13, parag. 4, Revised Penal Code; *U.S. vs. Carrero*, 9 Phil. 544 (1908).

[15] *People vs. Regala*, 113 SCRA 613 (1982).

[16] *U.S. vs. Baluyot*, 40 Phil. 385 (1919).

[17] Art. 14(16), Revised Penal Code.

[18] *People vs. Samonte, Jr.*, 64 SCRA 319 (1975).

[19] p. 125, Exhibit "A-6".

[20] *People vs. Retania y Rodelas*, 95 SCRA 203 (1980); *People vs. Majuri*, 96 SCRA 472 (1980); *People vs. Villacores*, 97 SCRA 568 (1980); *People vs. Perez*, 102 SCRA 353 (1981).

[21] Art. 248, Revised Penal Code.

[22] *People vs. Pantoja*, 25 SCRA 468 (1968).

DISSENTING OPINION

AQUINO, J.:

There is no doubt that at about nine-thirty in the morning of September 21, 1971, Romeo de la Peña, 32, a member of the Happy-Go-Lucky gang, was killed in his place of confinement at Brigade 2-D of the national penitentiary in Muntinlupa, Metro Manila.

Seven incised wounds and sixteen stab wounds were found on his body. Two stab wounds, one in the abdomen, which injured his liver and lung, and another stab wound on the right side near his chest, which injured his right lung, were fatal (Exh. F-1 and F-2).

The examining doctor speculated that there was more than one assailant and that more than one weapon was used. He noted that no "defense wound" was inflicted (11-15 tsn May 31, 1974).

The question is whether Ricarte Macariola, 26, a prisoner serving sentence for robbery, who assaulted De la Peña, acted in self-defense, as claimed in his confession and testimony, or whether he is guilty of murder. The prosecution's evidence reveals two contradictory versions as to the killing.

One version is found in Macariola's extrajudicial confession (Exh. A), which seems to show that he acted in self-defense. Another version is found in the statement and testimony of Romeo Sato, a prisoner, who declared that Macariola and other prisoners feloniously killed De la Peña.

Did Macariola act in self-defense or was he merely provoked to kill De la Peña? Was De la Peña killed by Macariola and other prisoners without any justification?

The prison investigators did not take the trouble of making factual findings and ascertaining what really happened. This case and similar convict-against-convict killings show that it is sometimes difficult to ascertain the truth in the New Bilibid Prison in spite of the fact that there are witnesses to the killing and it is not as mysterious as a killing in an Agatha Christie novel.

Macariola's version that he acted in self-defense.- In his confession he said that he killed De la Peña under the following circumstances:

"8. T.- Bakit mo siya sinaksak? S. - Nagaway po kami. Mga tatlong linggo na ang nakaraan naliligo ako nang kunin niyang walang paalam ang sabon ko. Nang bawiin ko sa kanya sinabi niyang parang hindi raw ako Bisaya.

"Kagabi nagsugal kami ng Hongkiang. Natalo ko siya ng isang kumot at nabawi ko ang pantalon kong natalo sa kanya noong isang linggo. Nang kinukuha ko na ang sabi niya bukas niya ibibigay.

"Kaninang umaga pumunta ako sa kanya upang kunin ang pantalon at kumot. Hindi niya ibinigay sapagkat wala na raw sa kanya ang kumot at ang pantalon ay naibinta niya sa iba. Pinilit ko siyang kahit na hindi niya ibigay ang kumot ang pantalon man na sana.

"Nagalit siya at sinipa niya ako sa dibdib dahil nasa itaas siya ng kanyang tarima, at ako naman ay nakaupo rin sa sahig. Tumayo ako upang siya ay suntukin ngunit pumihit siya at may kinukuha sa ilalim nang kanyang unan.

"Ang ginawa ko binunot ko ang dala kong patalim na naka sukbit sa aking baywang at hinila ko siya nang kaliwa kong kamay upang huwag makuha kung ano man ang kanyang kinukuha sa kanyang unan sabay saksak ko sa kanyang likod. Siniko niya ako dahil sa hawak ko pa rin siya sa leeg kaya magkasama kaming natumba.

Pumasok siya sa ilalim nang kanyang tarima at sinipa niya ako.

"Ang ginawa ko hinawakan ko siya sa paa at hinila kong palabas. Nang makalabas na ang katawan niya hanggang itaas nang suso sinaksak ko siya ng sinaksak hanggang sa hindi na siya kumilos." (Exh. A.)

So, according to Macariola, he had a grudge against De la Peña, his companion in Brigade 2-D because three weeks before the killing, De la Peña got Macariola's toilet soap. The night before the killing, Macariola and De la Peña were engaged in a gambling game called Hongkiang. Macariola beat De la Peña in that game. He (Macariola) won a blanket and was able to redeem from De la Peña his pants which the latter won from Macariola the week before (No. 8, Exh. A).

According to the confession, on that fateful morning of September 21, 1971, Macariola demanded from De la Peña the blanket, and pants but the latter said that he did not have the blanket and he had sold Macariola's pants. Because Macariola nagged De la Peña about the blanket and pants, the latter, who was sitting on his wooden bed (tarima), allegedly got annoyed and he kicked in the chest Macariola who was sitting on the floor.

Macariola declared in his confession that after he was kicked, he stood up in order to box De la Peña but at that juncture De la Peña moved sidewise to get something under his pillow. Macariola with his left hand pulled De la Peña's neck and with his right hand stabbed De la Peña with a bladed weapon (matalas).

De la Peña elbowed Macariola. The two fell on the floor. De la Peña went under his bed (tarima) and again kicked Macariola who then pulled De la Peña's legs and when the latter's body up to the nipples was out of the tarima, Macariola repeatedly stabbed De la Peña until he stopped moving ("hanggang hindi na siya kumikilos").

He surrendered to Alberto Supetran, a prison official and delivered to the latter his bladed weapon (Exh. B), which when presented at the trial was wrapped with two pieces of paper. On one piece of paper were written the words: "Ito ang ginamit ko sa pagsaksak kay Romeo de la Peña, September 21, 1971" (15-16 tsn Sept. 30, 1974).

Macariola's version finds some corroboration in the statement of Fernando Gomez, 37, another prisoner, the "mayor" or "bosyo" of Brigade 2-D. He said that in the morning of September 21, 1971, when he heard someone shouting "papatayin ako, papatayin ako", he entered the cell (silda) No. 1 and he saw Macariola holding a bloody weapon and bending over the prostrate body of De la Peña.

Gomez reported the incident to Alfredo Manzano who then opened the cell. When Supetran asked who stabbed De la Peña, Macariola admitted that he was the assailant (Exh. C). Gomez said that only Macariola assaulted De la Peña.

At the trial, Macariola (who reached Grade four) confirmed his plea of self-defense but testified on details not found in his confession. His testimony was not coherent. His recital of how De la Peña was killed was fragmentary. It contained discrepancies and contradictions. In fact, it weakened his plea of self-defense. Evidently, he testified as a coached witness. His testimony should be disregarded.

Even the testimony of the other defense witness, Antonio Vivero, a prisoner, impaired Macariola's claim of self-defense. Vivero categorically declared that he did not know and he could not tell whether Macariola acted in self-defense (13 tsn October 14, 1974).

In my opinion, on the basis of Macariola's confession alone, which was presented by the prosecution as its Exhibit A, he should be acquitted. The prosecution is bound by that confession which it offered as evidence.

Prosecution witness Sato's version that Macariola and other prisoners killed De la Peña without justification.— It should be noted that the Solicitor General in his brief ignored Macariola's confession and relied on the testimony of Romeo Sato, a prisoner who testified for the prosecution, and on the aforementioned statement (Exh. C) of

Gomez, the "mayor" or "bosyo" of Brigade 2-D. On the other hand, the trial judge did not mention at all the declarations of Sato and Gomez's statement.

Sato in his statement declared that he saw Macariola suddenly stabbing De la Peña and that the latter ran and fled to his tarima pursued by Macariola (No. 11, Exh. G).

On the witness stand, Sato declared that Macariola suddenly stabbed De la Peña when the latter was standing and that other prisoners, including Nelson Biñas and one called Bugok, stabbed De la Peña. Sato could not mention the names of the other assailants because his situation in prison was "very difficult" (6-7 tsn September 30, 1974).

According to Sato, after De la Peña was stabbed, De la Peña ran and took refuge inside a kubol, a tarima shielded by a blanket, empty flour sacks and clothes serving as curtains. He was pursued by Macariola, Biñas and Bugok.

The conflicting versions given in the prosecution's evidence engender doubt as to Macariola's guilt. His confession shows that he acted in self-defense while Sato's statement and testimony reveal that Macariola and other prisoners ganged up against De la Peña.

The circumstance that the prosecution failed to establish beyond shadow of doubt the manner in which De la Peña was killed justifies the dismissal of the murder charge against Macariola.

Alternatively, Macariola is only guilty of homicide.— If Macariola should be held criminally liable, then he should be adjudged guilty simply of homicide. The killing cannot be categorized as murder because of the absence of any qualifying circumstance.

There was no treachery because the assault was made face-to-face on the spur of the moment. (On cross-examination, the fiscal consulted defense witness Vivero as to the difference between murder and homicide. Vivero replied that the killing is homicide if "you did not plan it" and it is murder if "you planned it") (16 tsn October 14, 1974).

It is elementary that treachery in order to be regarded as qualifying should exist at the inception of the attack. A deliberate and unexpected initial attack is the distinguishing characteristic of alevosia. In this case, there was no such surprise and sudden attack. De la Peña should have known that after kicking Macariola, the latter would retaliate and injure De la Peña.

The retaliatory injury inflicted by Macariola was certainly not treacherous in the legal sense. Since De la Peña commenced hostilities by kicking Macariola on the chest, that circumstance precludes the appreciation of alevosia as a qualifying circumstance in the killing of De la Peña by Macariola.

The two extenuating circumstances of provocation and voluntary surrender to the authorities should be appreciated in favor of Macariola. On the other hand, the special aggravating circumstance of quasi-recidivism, which was alleged in the information and admitted by Macariola, would raise the penalty for homicide to the maximum period.

The trial court in mentioning recidivism was referring to quasi-recidivism as shown by the fact that it cited article 160 of the Revised Penal Code on quasi-recidivism and not to recidivism in article 14 of the said Code.

The presence of two mitigating circumstances cannot lower the penalty by one degree since the rule in article 64(5) regarding the lowering of the penalty by one degree when two or more mitigating circumstances are present contemplate a situation where "no aggravating circumstances are present". As already stated, Macariola is a quasi-recidivist.

The maximum period of the imposable penalty should be taken from the minimum period of reclusion temporal

maximum. For purposes of the Indeterminate Sentence Law, the penalty next lower in degree should be taken from reclusion temporal medium (*People vs. Gayrama*, 60 Phil. 796) or from prision mayor maximum, if the rule in *People vs. Gonzalez*, 73 Phil. 549, should be followed. An indeterminate penalty of twelve years of prision mayor maximum as minimum to eighteen years of reclusion temporal as maximum would be proper.

In view of the foregoing, I dissent from the conclusions found in the opinion prepared by Justice Melencio-Herrera.

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