

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. BULALAKAO MAMASALAYA, ET AL., DEFENDANTS AND APPELLANTS.

G. R. No. L-4911. February 10, 1953

Ponente: MONTEMAYOR, J.

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MONTEMAYOR, J.:

In the Court of First Instance of Cotabato Moro Bulalakao Mamasalaya and ten other Moros, and Lt. Mucio P. Cabelin and nineteen noncommissioned officers and enlisted men of the Philippine Constabulary, were charged with quadruple murder in criminal case No. 772. Before trial and upon motion of the provincial fiscal, the information was dismissed with respect to Sgt. Vicente Udang, Cpl. Jose Tejada and Pfc. Quirico Alfante. Cpl. Cabamongan was reported missing in action. Moro Adam Hadji Mukamad, died during detention. After trial, the remaining noncommissioned officers and enlisted men were acquitted, their guilt, in the words of the trial court, not having been established beyond reasonable doubt. The rest of the accused,—Lt. Mucio P. Cabelin, Bulalakao Mamasalaya, Pasukong Mamasalaya, Pasudol Mamasalaya, Buden Ebad, Palti Ebad, Kali Tambis, Mampok Hadji Adil alias Tahlil Kagui Adil, Alioden Kusa, Abedin Moro, Mua Zambaga—were found guilty beyond reasonable doubt of the crime of quadruple murder defined and penalized under article 248 of the Revised Penal Code and sentenced to twenty (20) years of reclusion temporal, with the accessories of the law, and to indemnify, jointly and severally, the heirs of Datu Mamasalawa Benito in the sum of P3,000; the heirs of Mesalama Landing in the amount of P3,000; the heirs of Kamad in the sum of P3,000 and the heirs of Sinaulan in the amount of P3,000. All the defendants thus convicted appealed to the Court of Appeals which tribunal after a study of the case came to the conclusion that their guilt had been established beyond reasonable doubt, but because of the existence of several aggravating circumstances the penalty to be applied should be death and/or reclusion perpetua, and so certified the case to this court.

From a careful review of the voluminous record of the case we find the following facts. In the month of March, 1949, appellant Lt. Mucio P. Cabelin was a junior officer of the 119th PC (Philippine Constabulary) Co. stationed in Cotabato, Cotabato and in charge of the patrol of the area consisting of Cotabato and Dinaig in which latter municipality the barrio of Sapalan was included. Capt. Antonio David was the Commanding Officer and Lt. Narciso Y. Degamon, the adjutant. In the morning of March 27, 1949, defendant Bulalakao Mamasalaya verbally reported to Lieutenant Cabelin the presence of many dissidents and bandits who were stealing palay and work animals belonging to the residents of Sapalan and otherwise threatening peace and order there. Lieutenant Cabelin investigated and afterwards referred him to Captain David who later ordered Cabelin to take Bulalakao to the Adjutant who also questioned Bulalakao. Evidently, the three officers believed and accepted Bulalakao's report because that same afternoon a patrol was organized consisting of sixteen soldiers armed with a machine gun and garand rifles, one rifle to each man and headed by Lieutenant Cabelin himself. The lieutenant advised and warned his men that they are going to a place where there were supposed lawless elements, cattle rustlers and bandits who were well-armed and that they must be ready for any eventuality. The lieutenant was shown a confidential report

showing that there were many loose firearms particularly in the place where they were going, arms such as machine, guns, automatic rifles, carbines and even hand grenades. He was advised by his superior officers that only three days before a Constabulary patrol had been ambushed somewhere in Koronadal. The mission of the patrol was to verify the reports of Bulalakao and gather information with respect to the condition of peace and order and to enforce the law and to disperse or annihilate or capture lawless elements.

With Bulalakao as guide the patrol took the Tamontaka road leading to Sapalan via Laboñgan and spent the night at the Laboñgan elementary school building. The next morning, March 28th, the patrol continued its rather forced march reaching the environs of Sapalan in the afternoon and there pitched camp. About 3:00 the following morning, March 29th, the patrol proceeded toward the place indicated by Bulalakao as the hideout of the cattle rustlers and dissidents. By this time ex-corporal Felipe Daylo had been incorporated into the patrol by Lieutenant Cabelin to act as ammunition carrier. At about 4:00 in the morning Cabelin and his men with Bulalakao as guide reached a cornfield from where they could see a group of three houses with light coming from the larger one. Bulalakao told Cabelin that those were the houses where the dissidents and the cattle rustlers were hiding and the lieutenant informed his men that the lawless elements they were after were in those houses. At a distance of between 25 and 35 yards from the houses, he deployed his men in three flanks. The left was composed of five men under Sgt. Bernardo Olmoguez, the right was composed of five men under Sgt. Ruben Dumlao, and the third was to act as rear guard under Sgt. Estanislao Gaban. The soldiers on the right and left flanks assumed a prone position and faced the houses while those of the rear guard faced the opposite direction. Lieutenant Cabelin placed the machine gun operated by Pfc. Cabrido between the right and left flanks and took a position beside it. He warned his men not to fire until they received a signal from him which signal was to be a burst from the machine gun. Bulalakao was with the rear guard.

While the soldiers were observing the three houses, several dogs therein began barking. According to the evidence for the defense, lights were then flashed from the houses in the direction of the patrol. A moro named Badtuden was discovered roaming near the patrol and on being seized he shouted. Almost immediately, a volley of fire came from the three houses directed at the patrol. The defense claims that Lieutenant Cabelin and later Sergeant Olmoguez who had stayed in Mindanao for 27 years, in the Moro dialect, shouted at the top of their voices to the inmates of the three houses that they (members of the patrol) were soldiers, P. C, and not to shoot but in spite of this the firing from the three houses continued; so Lieutenant Cabelin ordered the firing of the machine gun and upon hearing this burst from the machine gun which was the prearranged signal the men from the left and right flanks fired in the direction of the three houses. The prosecution witnesses, however, denied that there had been any firing from the inmates of the three houses or that Lieutenant Cabelin or any of his men had ever shouted or called out that they were Constabulary soldiers.

After firing several rounds, according to the defense, several men about eight in number were seen jumping from the three houses and running away, and upon seeing this, Lieutenant Cabelin ordered his men to cease firing. When the shooting from the three houses ceased, Cabelin directed Sergeant Olmoguez and his men on the left flank to cordon the area and advance but to fire only if fired upon, the machine gun to cover their advance. Cabelin himself also advanced toward the houses ordering Sergeant Dumlao who was in charge of the right flank to cover him. Upon nearing the houses, Cabelin and the soldiers demanded that the inmates surrender because they were soldiers. On going up the big houses the soldiers found a dead person later identified as Datu Mamasalawa Benito and near him was a carbine (Exhibit 4) and quite a number of empty carbine shells. Cabelin gathered and kept about fifteen of these empty shells. In one of the small houses a shotgun (Exhibit 6) was found and several empty buckshot shells and Cabelin picked up and kept three of them. These empty shells were scattered in the house and on the stairway. Both carbine and shotgun were unlicensed. In the two smaller houses were found three dead persons, later identified as Mora Mesalama Landing, a six-year-old girl named Sinaulan

Tasil and a five-year-old boy named Kamad Talib. Behind the big house was found a dugout 5½ feet long, 1½ feet wide and a little over knee dip. After inspecting the houses and vicinity Lieutenant Cabelin and his patrol left at about 6:15 in the morning for its headquarters. On the way the patrol arrested Salim Ali for possessing a pistol. It also took Moro Badtuden, the man who was seized while roaming near the patrol just before the assault upon the three houses. Upon reaching his station Cabelin made his report to the adjutant and turned to the latter the carbine (Exhibit 4), the shotgun (Exhibit 6) and the pistol taken from Salim Ali, as well as the empty carbine and buckshot shells. A subsequent ballistic examination in the General Headquarters of the Philippine Constabulary in Manila of these shells showed that twelve of the fifteen empty carbine shells were discharged from the carbine (Exhibit 4) while the empty buckshot shells were not discharged from the shotgun (Exhibit 6). It should, in this connection, be borne in mind, however, that there may have been other firearms besides Exhibits 4 and 6 in the three houses during the firing therefrom, which may have been carried away by the several men seen jumping down and running away during the exchange of fire.

According to the prosecution witnesses, the ten Moros besides Bulalakao included in the complaint accompanied the patrol, carried guns and took part in the assault upon the three houses by firing said guns, and that on the way back to the headquarters the patrol in order to render said guns useless removed their bolts. According to the defense, however, only Bulalakao accompanied the patrol as guide because it was not advisable to employ more than one guide or companion for fear of a leak in the presence and mission of said patrol, and that said Moros, all followers of Bulalakao may have later joined him when they were approaching the three houses but that they did not in any way take part in the firing, neither did they carry any guns.

In order to understand the motive behind these unfortunate killings it would be well to establish the relation between the central figure (Bulalakao Mamasalaya) and the deceased Datu Benito Mamasalawa, a well-to-do and respected citizen of his locality. They belonged to different warring factions between which there was a long standing feud. They had filed mutual accusations in court and, evidently, to eliminate the faction of Datu Benito Mamasalawa and to gain the upper hand and obtain undisputed authority and influence in the locality Bulalakao conceived and perfected a diabolical scheme; lured the Constabulary patrol to Sapalan and let Lieutenant Cabelin to believe that the three houses belonging to Datu Benito and his family were occupied by dissidents and bandits, and that it was necessary to destroy the occupants. There is ground to believe that the main if not the only reasons why the ten other Moros were included in the information was because they belonged to the Bulalakao faction and it is possible that when the patrol headed by Bulalakao reached the vicinity these relatives and followers of Bulalakao joined him. But there is no conclusive proof that they took any active part in the assault. These Moros must have known that the patrol was waging a campaign to confiscate unlicensed firearms and prosecute their possessors and it was not likely that if they had any firearms which in all probability were unlicensed, they would show them to the members of the patrol. The Solicitor General himself admits that there is no evidence to show that these Moros did any firing or that if they did so they fired upon the three houses and hit any of its occupants; and that their criminal liability must be based on a conspiracy with the patrol. We believe that the evidence against them is not satisfactory and we find their guilt not to have been established beyond reasonable doubt.

The case against Bulalakao Mamasalaya, however, is entirely different. As already stated, the moving spirit in the expedition or sending of the patrol was Bulalakao. He persuaded, convinced and induced the Constabulary officers not only Lieutenant Cabelin but also his superior officers Captain David and his adjutant Lieutenant Degamon to send the patrol and later to assault the three houses resulting in the killing of four of its occupants who proved to be innocent civilians. The Solicitor General in his brief aptly describes Bulalakao and his role in the following words:

"From what has been stated above, Bulalakao conclusively appears to be not only guilty, but the most guilty. The picture presented by the evidence is that of a sly and Machiavellian schemer who, by his reports of the

presence of bandits and thieves at barrio Sapalan, instigated the Constabulary into organizing and dispatching a strong patrol to that place. Coupled with the reports of the illegal possession of firearms by residents of the locality and with the circumstance that only recently a Constabulary patrol was ambushed somewhere in Koronadal (pp. 240, 245, 277, 284, t. s. n.), Bulalakao was able to play upon the fears of Lieutenant Cabelin and his men. Considering further the general state of peace and order in Cotabato as in most other Moro provinces, it was no doubt an easy matter for Bulalakao to make Lieutenant Cabelin believe that it was the better part of discretion to fire at the supposed stronghold of dangerous outlaws and annihilate them in a surprise attack, without taking chances "

Bulalakao also took a direct part in the assault. Talib Ali, a witness for the prosecution actually saw him shooting in the direction of the houses, together with the Constabulary soldiers. Bulalakao is clearly guilty as principal, not only by induction, but also by direct participation.

Now, we come to the case of Lieutenant Cabelin. There is no charge or claim that he acted deliberately and criminally in killing the four innocent civilians knowing that they were innocent. In good faith he believed that the three houses pointed out to him by Bulalakao were being occupied by bandits and lawless elements whom he was ordered to disperse, capture or destroy. The question is whether he incurred in negligence or reckless imprudence in ordering his men to fire upon the houses. As previously stated, the witnesses for the defense including Lieutenant Cabelin told the court under oath that the patrol was first fired upon from the three houses but in spite of this unprovoked fire he and his sergeant shouted and called out to the inmates of the houses not to fire because they (members of the patrol) were P. C. soldiers; and it was only when the firing persisted that he ordered his men to return the fire. Of course, the prosecution denies this claim. But even assuming as claimed by the prosecution that the patrol had not been first fired upon, and that Cabelin and his sergeant had not shouted or called out to the inmates of the houses to identify himself and his men, under the circumstances, we believe that the shooting was justified for having been done and effected under an honest mistake.

Let us coolly and dispassionately consider the facts as Cabelin thought them to be at the time, and while considering, try not to be influenced or affected, at least for the time being, by the tragic and unfortunate killings. If we are to accord full justice to appellant Cabelin, we should judge him not by the facts as they later turned out to be and as they now appear in the record. Rather, we should judge him by what he, at the time of the shooting, thought, and believed to be the facts, and the conditions obtaining at that time. (U. S. vs. Ah Chong, 15 Phil., 488.) The Solicitor General, the trial court, and every one agree that on March 29, 1949, conditions of peace and order in Cotabato particularly in the barrio of Sapalan, Dinaig, Cotabato, were very bad. The Solicitor General himself in his brief describes said condition as follows:

"Moroland has always been a dangerous assignment for constabulary officers, and peace and order conditions worsened there after liberation as in the rest of the country. At PC headquarters in Cotabato there was a confidential report from the Department of the Interior containing a long list of persons suspected of illegal possession of firearms, among whom was mentioned Datu Mamasalawa Benito (Exhibits 3 and 3-A, pp. 163-165, rec.). Only three days before March 27, 1949, a PC patrol was ambushed at Koronadal (pp. 240-245, 227, 284, t. s. n.)."

Speaking of the confidential report from the Department of the Interior mentioned by the Solicitor General, said report mentions the fact that there were several hundred loose firearms in the district such as carbines, rifles, automatic weapons and machine guns. Bulalakao Mamasalaya informed the Constabulary that there were armed bandits in the locality. Of course, we now know that his story was false, especially that referring to the houses of Datu Benito as being the hideout of well-armed bandits. Appellant Cabelin was not the only one deceived. The Provincial Commander and the Adjutant or Executive Officer also listened to and believed Bulalakao. And to show that the whole Cotabato Constabulary command implicitly believed Bulalakao's story and in the necessity of

immediate action to disperse or destroy said supposed armed bandits, on the very same day the patrol was organized; and it was not an ordinary or general one consisting of four or five soldiers under a corporal or sergeant, but one of sixteen soldiers, corporals and sergeants, armed not with ordinary guns like carbines with a short range, but with the longer range and deadly garand rifles, and to top the armament, there was carried a machine gun. The patrol was led by no less than a first lieutenant, appellant Cabelin. Before leaving his station he was warned to be careful, not to take unnecessary risks, and to pursue, annihilate and destroy said lawless elements. Lieutenant Cabelin considered and called his patrol not a general but a specific patrol, and said that he was on a critical mission. The patrol made a forced march and arrived in the vicinity of the house of Datu Benito in the early hours of March 29th, about a day and a half after leaving its station. The prosecution witnesses said that the attack on the three houses took place about six o'clock in the morning. It, however, is more logical and reasonable to believe that it was at about 4:30 dawn as claimed by the defense. The Solicitor General himself says that it was a surprise dawn attack. Naturally, it must have been made when it was still dark, when the patrol could not yet be seen as it approached the three houses. It is necessary to bear in mind all these facts and conditions as background, to show what Cabelin considered to be the nature and object of his patrol and mission, namely, to capture or destroy the armed bandits described by Bulalakao, and that to do so he had to act with dispatch and surprise the enemy, and not unduly expose the lives of his men.

Cabelin and his men had no intention or desire whatsoever to harm Datu Benito and his relatives and neighbors. In fact, it is doubtful if the lieutenant and his men knew Datu Benito or that the three houses assaulted belonged to him and his relatives. Malice or criminal intent on their part was absent. It was not charged, not even insinuated by the prosecution. It was the first time, that Cabelin went to that place. From the time that the patrol left its station until it arrived at the place of the shooting, Bulalakao must have been telling and convincing the appellant that the three houses were occupied or even fortified by the well-armed desperate bandits that he had previously reported to the Commanding Officer and the Adjutant at headquarters. So, the patrol had only one main objective,—to pursue, annihilate and destroy said bandits. In order to accomplish his mission more easily and effectively, Cabelin decided to introduce the element of surprise. We must remember that he and his men, specially those in the left and right flanks and in the center where the machine gun was installed and where Cabelin was, were in an open field only 25 to 35 yards from the three houses. There were no trees or foxholes behind or in which to seek shelter. As already stated, assuming without admitting that he did not actually call out to the inmates of the houses to surrender, could he in justice be blamed for shooting without warning? We should not forget that he was in Moroland and dealing with what he believed to be well-armed desperate bandits. Any constabulary officer or soldier who had conducted or taken part in campaigns against Moro bandits and outlaws will tell us that said bandits are in many cases clever, treacherous and fierce; that a Moro armed with nothing but a kris or bolo, from a distance, of 25 yards or more could and would charge soldiers armed with guns, and that in some cases said Moro though riddled with bullets, except when he has been hit in the head or heart, somehow manages to reach his objective and inflict a few blows before he collapses and dies. The annals of the Philippine Constabulary are replete with bloody encounters with and ambushes by Moro outlaws, where many Constabulary soldiers and officers were killed. Before the war, said Moro bandits were provided only with a few guns, perhaps home-made paltiks and bolos. After liberation they had all kinds of deadly firearms, from simple carbines to automatic rifles and machine guns including hand grenades. Naturally, said bandits were more dangerous. What was Cabelin to do under the circumstances? He had to make a quick decision. He could wait until daylight in order to make a better observation and ascertain the real occupants of the houses, in which case if there were really bandits in the houses they could have made a get away and escaped to the surrounding woods or mountains; then his mission would have failed. Was he to parley and negotiate with the inmates of the houses whom he then believe to be bandits, and demand their peaceful surrender? That is what Lieutenant Alagar of sad and unhappy memory, whose story appears in our records, did. (People vs. Sakam, 61 Phil., 27.) In his (Alagar) endeavor to

avoid bloodshed, he agreed to a meeting and parleyed with a group of Moro recalcitrants, and at the request of the latter and to show his good faith he and his men laid down their arms; and the next instant he was set upon and attacked by the Moro group and more than one-half of his 23 men, including himself were slaughtered, he himself beheaded. Furthermore, as already stated, he (Cabelin) and his men were deployed in an open field and quite near the three houses. Supposing that he called out to the people or inmates of the three houses and shouted to them to come out and surrender peacefully, and said inmates were really bandits and instead of meekly giving themselves up, they raked and mowed him and his men with machine gun and automatic weapons fire, including hand grenades. If he survived and many of his men were killed, he would undoubtedly be court-martialed for his act of unnecessarily taking risks and exposing the lives of his soldiers. All these thoughts must have been racing through the mind of the appellant on that fateful morning. He is not new in the force. He was commissioned in the Constabulary in 1941 and was in Corregidor until that stronghold surrendered. Then in October 1942, he joined the guerrillas and was active in 652 the resistance movement until Liberation. He then rejoined the Army and later the Constabulary. While with the Army and the Constabulary he must have been instructed and indoctrinated in the ways of dealing with bandits, especially in Moroland. Moro bandits do not follow orthodox ways of fighting and dealing with Government officials or armed forces, and so Cabelin may have felt justified in utilizing unorthodox methods in dealing with the inmates of the houses whom he in good faith believed to be armed bandits. His only fault in this ease is in having allowed himself to be deceived and misled by Bulalakao. This is what the Solicitor General says on this point which tho already quoted, we repeat:

"From what has been stated above, Bulalakao conclusively appears to be not only guilty, but the most guilty. The picture presented by the evidence is that of a sly and Machiavellian schemer who, by his reports of the presence of bandits and thieves at barrio Sapalan, instigated the Constabulary into organizing and dispatching a strong patrol to that place. Coupled with the reports of the illegal possession of firearms by residents of the locality and with the circumstance that only recently a Constabulary patrol was ambushed somewhere in Koronadal (pp. 240, 245, 277, 284, t. s. n.), Bulalakao was able to play upon the fears of Lieutenant Cabelin and his men. Considering further the general state of peace and order in Cotabato as in most other Moro provinces, it was no doubt an easy matter for Bulalakao to make Lieutenant Cabelin believe that it was the better part of discretion to fire at the supposed stronghold of dangerous outlaws and annihilate them in a surprise attack, without chances."

The trial court in its turn says:

"Lieutenant Cabelin was misinformed and misled by Bulalakao Mamasalaya. An inexperienced officer in the customs and traditions of the Moros, he led his soldiers to commit an act which knowingly they would not have committed. Lieutenant Cabelin had miserably fallen a victim of moro intrigues." (Italics ours.)

But as already stated, Cabelin had no reason to doubt or distrust Bulalakao whom his own Commanding Officer and his adjutant had apparently implicitly believed, and whom they sent to act as guide and informant of the patrol.

The killing of the four Moros was, to be sure, due to a tragic mistake, but despite all the tragedy, it ceases not to be a mistake, and an honest one. How many tragedies due to an honest mistake have been committed? Are we to hold the authors thereof criminally responsible in every case? During the last war American pilots and artillery men have bombed and shelled places and buildings which they believed were occupied by the enemy but which turned out to be filled with innocent Filipino civilians, who were failed by the hundreds, all due to poor or erroneous intelligence. The bombing of the City of Baguio resulting in the death of hundreds of civilians, because American pilots thought that thousands of Japanese soldiers were in that city, when in fact Japanese soldiers were outside the city, and the shelling of the districts of Manila south of the Pasig river resulting in the killing of hundreds of innocent civilians, are tragedies to be regretted, but for which none of the authors had been held

accountable. They were committed then because of the experiences of the American Army in the past where they unsuspectingly approached seemingly abandoned or deserted buildings and structures or even those occupied by the enemy who simulated surrender, only to be met by murderous fire. Because of that sad experiences, they decided to take no chances, even at the risks of occasionally making tragic mistakes. The same consideration may well be extended to the members of our Armed Forces.

In our war against the organized dissidents, especially in Luzon, when the Army is informed and convinced by guides or informers, sometimes by surrendered Huks themselves, that a certain structure or shed in the woods or mountains is occupied by armed outlaws or dissidents, without approaching said buildings in order to ascertain by close inspection the occupants thereof and demanding their surrender, they are bombed from the air or shelled from a distance, this to protect our soldiers and officers from unexpected attacks or ambushes. Supposing that one of those buildings bombed or shelled and destroyed, turned out to be occupied by innocent civilians, would the courts hold criminally liable the Filipino pilots and artillery men and their commanders for bombing or shelling the building and killing innocent civilians, on the theory that what they should have done was to approach the building and ascertain the actual occupants thereof, even if in so doing they unnecessarily exposed their lives?

All these considerations we have taken into account in rendering verdict on the innocence or guilt of appellant Cabelin. Because, if we make a mistake by holding criminally responsible and sentencing to life imprisonment or death, a peace officer sent on a special or critical mission, who to accomplish his mission and at the same time protect and insure the lives of his men, had to act and acted under facts which he honestly and in good faith believed to be true, and under extraordinary conditions obtaining at the time, just because later the facts turned out to be different, we might tho without realizing, much less intending it, demoralize our Armed Forces specially their officers, to the extent that in the future, to avoid any possible criminal prosecution, they would be too slow, over-cautious, vacillating and irresolute to the point of utter inefficiency and importance.

Speaking of officers and men of the Philippine Constabulary, this High Tribunal thru Mr. Justice Abad Santos in the case of *People vs. Ancheta, et al.* (66 Phil., 638), in reversing a decision of the trial court convicting and sentencing to imprisonment two soldiers and their lieutenants, said:

"While it may appear to the mind of the average person that there was altogether excessive show of force on the part of the members of the constabulary involved in this case when they effected the arrest of the Sanson brothers and Salazar, we must bear in mind that we are dealing here with men who were trained to take no chances in an emergency and to uphold their authority by force of arms. And while we may not approve of their conduct in this particular instance, we must not allow such consideration to affect our judgment as to their guilt or innocence of the particular crime now imputed to them." (Italics ours.)

We therefore believe and hold Lieutenant Cabelin innocent.

In conclusion, we find that the guilt of the Moro civilians Pasukong Mamasalaya, Pasudol Mamasalaya, Buden Ebad, Palty Ebad, Kalim Tambis, Mampok Hadji Adil alias Tahil Kagui Adil, Aliodin Kusa, Abedin Moro, and Mua Zamboga has not been established beyond reasonable doubt. They are therefore hereby acquitted with costs de oficio. We find the appellant Mucio P. Cabelin not guilty of the charge and he is hereby acquitted with costs de oficio. We equally find Bulalakao Mamasalaya guilty of quadruple murder with the aggravating circumstances of evident premeditation, dwelling and abuse of superior strength, with no mitigating circumstance. Under the law, he deserves the death penalty; but for lack of the necessary number of votes to impose said penalty, he is hereby sentenced to reclusion perpetua, with the indemnity to the heirs of the persons killed, as provided in the decision appealed from and to pay proportionate costs. With these modifications, the decision of the trial court is hereby affirmed.

Feria, Pablo, Bengzon, Padilla, Jugo, and Labrador, JJ., concur.

DISSENTING

TUASON, J.,

I dissent in so far as the Court acquits Cabelin. In a moral sense, this defendant is more guilty than Bulalakao, considering his education, his training and wide experience in combat and discipline. It is seriously to be doubted if Bulalakao did any shooting at all. He did not appear to have any gun and it was hardly likely that he was given one by the constabulary who had no need for his help. In the confusion and excitement that ensued after the shooting started, the people in the houses could not very well have distinctly noted the movements and behavior of individual participants in the raid. The prosecution witnesses could easily have been mistaken on this point. I am inclined to believe they were.

The pivotal issue formulated by the defendants hinges on the truth of the assertions that the soldiers were fired upon and did nothing but retaliate; that when the smoke of fire had cleared a carbine and blank cartridges were found in Datu Benito's house, the carbine on the floor one meter from Benito's dead body; and that in one of the small houses a shotgun and "three of several, more or less 10 to 12, empty buckshot shells" were recovered. If this story were well founded, no one would deny that Cabelin is entitled to be absolved.

The court not only believes the above testimony but advances the theory that "there may have been ether firearms besides Exhibits 4 and 6 (the carbine and the shotgun) in the three houses during the firing therefrom, which may have been carried away by the several men seen jumping down and running away during the exchange of fire."

The writer is at a loss to reconcile this finding with the verdict of guilty against Bulalakao—for whom, in the opinion of the writer of the decision, life imprisonment is too light. For if the facts were as found by this court, Bulalakao did not mislead the constabulary and deserves to be thanked rather than condemned. Inconsistently, it also seems to me, the court brands this accused as "the moving spirit in the expedition * * * resulting in the killing of four of its occupants who proved to be innocent civilians," and quotes the following paragraph of the Solicitor General's brief which, in the words of the majority, "aptly describes Bulalakao and his role."

"From what has been stated above, Bulalakao conclusively appears to be not only guilty, but the moat guilty. The picture presented by the evidence is that of a sly and Machiavellian schemer who, by it is reports of the presence of bandits and thieves at barrio Sapalan, instigated the Constabulary into organizing and dispatching a strong patrol to that place. Coupled with the reports of the illegal possession of firearms ty residents of the locality and with the circumstance that only recently a Constabulary patrol was ambushed somewhere in Koronadal (pp. 240, 245, 277, 284, t. s. n.), Bulalakao was able to play upon the fears of Lieutenant Cabelin and his men. Considering further the general state of peace and order in Cotabato as in most other Moro provinces, it was no doubt an easy matter for Bulalakao to make Lieutenant Cabelin believe that it was the better part of discretion to fire at the supposed stronghold of dangerous outlaws and annihilate them in a surprise attack, without chances."

Neither can one understand how Datu Benito could have been "an innocent civilian" if he had harbored outlaws, kept a big supply of firearms and ammunition on his premises, and rained bullets at law-enforcement officers who had come on a mission of peace and made no provocation.

However, a careful and conscientious appraisal of the record fails to reveal any plausible ground for believing that the inmates of the houses had shot at the patrol, or that the empty cartridges exhibited in court by the defendants had been picked up inside or in the vicinity of those houses.

The material evidence is entirely testimonial and its value wholly depends on the witnesses' veracity.

It is well to bear in mind at the outset that matters of credibility are primarily for the determination of the trial court and that the trial judge's findings will not be disturbed in the absence of any showing that circumstances of weight and influence have been overlooked or misinterpreted. It is also a general rule that where, in cases of this kind, the killing is admitted, the burden of proof is on the defendants to establish justification or excuse for the killing. Are there material circumstances which His Honor failed to take into consideration in the evaluation of the evidence? Collateral facts which will hardly be denied or are plainly proven tend to corroborate the prosecution's version of the shooting.

It is a fact not open to serious dispute that Datu Mamasalawa Benito was a property owner, lived in a good house, had a son studying law and a daughter studying medicine both in Manila, the daughter being married to "the Congressman's secretary." One of his children was attending school in the provincial capital and others in Dinaig. He was the first cousin of the incumbent mayor of Dinaig and of Attorney Duma Sinsuat who was later to be appointed provincial governor of Cotabato. Governor Sinsuat described Datu Benito as "one of the most peaceful men we know."

A man of Datu Benito's economic and social position and responsibility was hardly one likely to be an outlaw or harbor malefactors in his place. Not having any criminal record (save, perhaps, for the possession of two unlicensed guns) or any reason to dread or resent the appearance of constabulary soldiers, we have to share the trial judge's finding that Mamasalawa Benito did not resist Cabelin's patrol or adopt any defiant attitude. Even if he had disliked peace officers and had a bent of mind to be rebellious, he could not have been so reckless as to expose his wife and young daughter as well as himself to certain retaliation and almost certain death in an unequal armed clash. Without doubt he had only two guns, or one, as the defendants would make the court believe, when he was killed.

With respect to the people in the two small houses, no concrete proof has been presented to show that they were other than law-abiding and harmless citizens. One of them was Datu Benito's son and the rest were his tenants or relatives. There is no specific evidence which would give cause even for suspicion that any of them were cattle rustlers, bandits or dissidents. The only one among them, Salim Ali, whom the constabulary arrested after the shooting, was released, nothing apparently having been found or could be pinned against him. He was seized when, with his wife and children, he emerged from a hiding place where they had sought shelter from the constabulary fire. This man had a revolver but he had a license for it.

The testimony that lights were flashed in the direction of the deployed soldiers and that Badtuden shouted from the rear of the patrol as if giving a warning, is highly unconvincing. How Badtuden was arrested or what he was doing when he was seized is not revealed by the records. But Badtuden was a stranger to Mamasalawa Benito's place and was released after being investigated in Cotabato. That he was in the courthouse on one of the days of the trial, subpoenaed by the defense, speaks well of his innocence of any wrongdoing in connection with the case.

The testimony that eight men jumped from the houses in Mamasahwa Benito's compound has no other basis than the defendant's words; upon the rule above stated, we can not upset the lower court's refusal to believe this, testimony. If the constabulary saw people escape, it is possible that these were Datu Benito's wife when she came down the house with her wounded daughter; Tasil Landing who rushed from one of the small houses and hid under the grass; Talib Sali who was out when the firing broke out to get his carabao from where it was fettered; and Salim Ali and his wife and children when they scampered out of their house for shelter behind a dike or pilapil.

Siphon Balonsing's testimony that she herself went up the house to fetch her husband's guns and handed them to

Lieutenant Cabelin in the yard is not by any means incredible. This bit of evidence appears to have been given in her examination-in-chief, when this detail did not seem to have much, if any, importance. Before the defendants testified it was quite immaterial to the prosecution how Cabelin got hold of the guns—whether he himself picked them up or whether they were delivered to him by Datu Benito's widow. If there had been necessity to lie in this respect, the witness could just as well and as easily have denied that the guns belonged to her husband. Parenthetically, Siphon Balonsing's admission of her husband's ownership of the carbine and shotgun would seem to attest to a clear conscience.

With reference to the empty cartridges which are said to have been found in Datu Benito's house in one of the small houses, the trial judge insinuated that they belonged to the defendants. He said: "Without the least intention of doubting his (Cabelin's) integrity, could it not be possible that to cover up the error committed by him and his soldiers, the 12 shells found in that laboratory examination to have been discharged within the chamber of carbine, Exhibit 4, were actually fired by Lieutenant Cabelin himself or by any of his co-accused while the gun was in their possession? Philippine Constabulary soldiers are using carbines, and for that reason, they have carbine ammunition." His Honor could have mentioned the fact that, according to Cabelin, he "saw plenty of carbine cartridges" but "picked up only 15," and that of around 10 or 12 shotgun cartridges he came upon, he took only three.

Space forbids detailed discussion of the voluminous records and of all the points raised in the briefs. It suffices to say, in addition to the foregoing observations, that the prosecution's evidence with regard to the shooting does not reveal, in our opinion, flaws grave enough to render the said evidence untrustworthy.

The majority decision says: "Even assuming as claimed by the prosecution that the patrol had not been first fired upon, and that Cabelin and his sergeant had not shouted or called out to the inmates of the houses to identify himself and his men, under the circumstances, we believe that the shooting was justified for having been done and effected under an honest mistake."

This is going farther than the defendants themselves dare concede. As stated, the defendants planted their plea for acquittal on the theory that in the three houses lived malefactors with guns and ammunitions, just as Bulalakao had informed the constabulary, and that those occupants were the first to open fire. In their briefs they emphasize that "The patrol was strong. They had control of the situation up to the moment of the firing," implying that there would have been no necessity for the soldiers to shoot if the command to surrender had not been answered with volleys of fire. So essential to the defense was such proof that efforts were marshalled by the accused to make a case on this score. The majority decision quotes defendant's testimony to the effect that Cabelin instructed his men not to shoot unless attacked, testimony which, to my mind, is further realization that without a showing of having been fired upon, the defense would have little or nothing to stand on.

The Court has taken a one-sided view of the right of police officers to shoot and kill, completely ignoring the plight of helpless and peaceful citizens whom the police are paid and sworn to protect. As in a police state where human life counts for little, the court would sanction and give encouragement to ruthless and indiscriminate slaughter on the slightest suspicion of defiance to the authorities, or what is worse, on the mere honest belief that the people to be shot down are outlaws.

But fortunately we are not living under a totalitarian government, and the law and decent respect for human life set a limit to how far anyone can go to sacrifice it. The limit is "extreme necessity" not "honest mistake." And this limit is applied not only to innocent persons but to criminals themselves.

In *U. S. vs. Ocampo* (10, Phil., 97), the court laid down this rule:

"In the performance of his functions an agent of the authorities is not authorized to use force, except in an

extreme case when he is attacked, or is the subject of active resistance, and finds no other means to comply with his duty or cause himself to be respected and obeyed by the offender."

In *People vs. Lagata* [*] (46 Off. Gaz., 4275), the court said:

"There is no question that the escape of Labong scared appellant, according to him, because of the experience of other guards who were dismissed from office or even prosecuted because of prisoners who had escaped under their custody, and that it was his duty to fire against the prisoners if he wanted to be exempt from any responsibility. Even if appellant sincerely believed, although erroneously, that in firing the shots he acted in the performance of his official duty, the circumstances of the case show that there was no necessity for him to fire directly against the prisoners, so as to seriously wound one of them and kill instantaneously another. While custodians of prisoners should take care to avoid the latter's escape, only absolute necessity would authorize them to fire against them. Theirs is the burden of proof as to such necessity. The summary liquidation of prisoners, under flimsy pretexts of attempts of escape, which has been and is being practiced in dictatorial systems of government has always been and is shocking to the universal conscience of humanity."

And in a later case, *People vs. Oanis* [*] (1 Off. Gaz., Rep. No. 6, p. 668), the above rule was reiterated in the following language:

"* * * There are two requisites in order that the circumstance may be taken as a justifying one: (a) that the offender acted in the performance of a duty or in the lawful exercise of a right; and (b) that the injury or offense committed be the necessary consequence of the due performance of such duty or the lawful exercise of such right or office. In the instant case, only the first requisite is present—appellants have acted in the performance of a duty. The second requisite is wanting—that the crime by them committed be the necessary consequence of a due performance of their duty. Their duty was to arrest Balagtas, or to get him dead or alive if resistance is offered by him and they are overpowered. But through impatience or over anxiety or in their desire to take no chances, they have exceeded in the fulfillment of such duty by killing the person whom they believed to be Balagtas without any resistance from him and without making any previous inquiry as to his identity."

Turning to American authorities, it has been held that the fact that the defendant was at the time of the offense engaged in the performance of military duty would not affect his criminal responsibility if in such performance of military duty he exceeded his authority or was culpably negligent in suppressing riots. (Winthrop's *Military Law and Precedents*, pp. 892-895.) Mr. Winthrop said that "the general rule of proceeding of troops so employed, whether regular or militia, and which the courts would, it is believed, approve and ratify, should simply, be—First. To present themselves forthwith at the front with such an appearance and manifestation of arms and discipline and authority as to overawe and restrain the law-less assemblage before them; Second. If overt acts of violence and obstruction are persisted in, to disperse the actors with the bayonet; Third. To fire upon them where the bayonet proves ineffectual." (Ibid.)

This court can not justify the course of action pursued by the constabulary in this case by comparing it to the conduct of military operations. Obviously, there is no parallel between an all-out war and a police or peace mission to arrest cattle thieves or outlaws at a place where there were not the slightest manifestation of belligerence. In the present case, moreover, there did not seem to be reasonable danger, let alone extreme danger, of an ambush, strategically situated at a safe distance, well hidden by plants or grass, adequate in number and well armed, the patrol was in no apparent hazard of bodily injuries or being surprised. "The patrol was strong. They had control of the situation up to the moment of the firing."

Under these circumstances it seems obvious, as it should have been obvious to Cabelin himself, that the tragic mistake could have been avoided with a little care or diligence. He was not confronted with a sudden or expected emergency. He could easily have afforded to ascertain for himself the veracity of Bulalakao's information without

seriously jeopardizing his and his men's lives by watching the movements of the people in and around the houses or giving them warning and opportunity to surrender, as the defendants attempted but failed to prove. Instead he ordered an assault with an intensity and concentration of deadly fire calculated or apt to annihilate every human being in the houses which, as Cabelin must have guessed, contained women and children. The intensity of fire can be judged by the testimony of Sergeant Manuel Alvarez of the municipal police of Dinaig, who swore that he had gathered 124 empty cartridges in various places along Sapalan River and irrigation ditches, where the constabulary's three flanks presumably had been located, and by Constabulary Lieutenants Degamon's statement that these cartridges could have been discharged from Garand rifles or machine guns with which the soldiers were provided.

There could have been no possibility of mistaking the houses for hideouts of desperate people ready to kill. The structures were not "cottas" or strongholds but ordinary houses located in the midst of a clearing, barely one day's walk from the "poblacion", as the Solicitor General points out. Datu Benito's wife was pounding rice in the yard who was visible to, or with little patience and observation could have been seen by, the assailants.

In the light of all the facts, the incident was nothing short of an utter, flagrant, reckless and wanton disregard for the safety and rights of defenseless and harmless people.

Judgment affirmed with modifications.

[*]83 Phil., 150

[*]74 Phil., 257

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