

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GREGORIO ESTRELLANES, JR. AND DIOSDADO MANOLO, ACCUSED, DIOSDADO MANOLO, ACCUSED-APPELLANT.

G.R. No. 111003. December 15, 1994

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

The appellant was convicted of murder by the Regional Trial Court (RTC) at Negros Oriental in Criminal Case No. 10246 and sentenced to suffer the penalty of reclusion perpetua and to indemnify the heirs of the victim, Arsenio Zerna, Jr., in the amount of P50,000.00.[1] The accusatory portion of the information under which he was tried reads as follows:

"That on 5 October 1991, at about past 11:00 o'clock in the evening, at North Poblacion, Jimalalud, Negros Oriental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring together and mutually helping each other, with intent to kill, with treachery and evident premeditation, did then and there wilfully, unlawfully and feloniously assault and shoot Arsenio Zerna, Jr., with the use of firearms, with which the said accused were then armed and provided, thereby hitting the said victim on the vital parts of the body, inflicting upon the latter serious injuries, which caused his death soon thereafter."[2]

In holding him liable for murder, the trial court took into account the qualifying circumstance of treachery but rejected the qualifying circumstance of evident premeditation. The appellant's co-accused, Gregorio Estrellanes, Jr., was acquitted on the ground of reasonable doubt.

Insisting upon his innocence, the appellant now comes before this Court. He pleads for his acquittal because the trial court seriously erred:

"I

X X X IN APPRECIATING THE BIAS AND UNCORROBORATED TESTIMONIES OF RENEBOY ZERNA AND IMELDA ZERNA. BIAS IN THE SENSE THAT RENEBOY ZERNA AND IMELDA ZERNA ARE THE YOUNGER BROTHER AND SISTER OF ARSENIO ZERNA, JR., THE VICTIM. THIS CONCLUSION IS BASED ON A SIMPLE SYLLOGISM THAT: ALL YOUNGER BROTHER AND SISTER ARE ALWAYS IN FAVOR OF THEIR OLDER BROTHER. RENEBOY ZERNA AND IMELDA ZERNA ARE THE YOUNGER BROTHER AND SISTER OF ARSENIO ZERNA, JR., THE VICTIM. THEREFORE, RENEBOY ZERNA AND IMELDA ZERNA, AS A WITNESS, ARE BIAS IN FAVOR OF THEIR OLDER BROTHER ARSENIO ZERNA, JR., THE VICTIM.

II

X X X WHEN IT CONCLUDED THAT THE ALLEGED MEETING-ALTERCATION BETWEEN DIOSDADO MANOLO AND RENEBOY ZERNA WHO WAS WITH ARSENIO ZERNA, JR. AT 8:00 O'CLOCK IN THE EVENING OF OCTOBER 5, 1991 HAS CREATED AN ILL MOTIVE ON DIOSDADO MANOLO, TO KILL ARSENIO ZERNA, JR. ON THAT SAME EVENING.

III

X X X WHEN IT CONCLUDED THAT THE BULLETS THAT KILLED ARSENIO ZERNA, JR. CAME FROM THE GUN CARRIED BY DIOSDADO MANOLO.

IV

X X X IN APPRECIATING THE TESTIMONIES OF RENEBOY ZERNA AND IMELDA ZERNA NOTWITHSTANDING THE FACT THAT THEIR TESTIMONIES WERE NOT ONLY BIAS AND UNCORROBORATED, BUT THE SAME WERE ALSO TOTALLY CONTROVERTED BY THE DEFENSE WITNESSES IN ITS MATERIAL POINT."^[3]

The facts established by the evidence for the prosecution, as summarized by the trial court, are as follows:

"According to Reneboy Zerna, at about 4:00 o'clock in the afternoon of October 5, 1991, he and his brother Arsenio Zerna, Jr. went to the poblacion of Jimalalud, Negros Oriental, for the purpose of meeting Arsenio's wife Nenita who was due to arrive from Dumaguete City with their son. By 8:00 o'clock in the evening, Nenita still did not arrive. So Reneboy and Arsenio decided to go home. While they were some 50 meters from where they came from and already about 50 meters away from their house they met Diosdado Manolo. Diosdado Manolo apparently was drunk because he was walking in a zigzag manner. Diosdado Manolo was carrying an armalite rifle. Diosdado Manolo said, 'Sen, where have you been? It is already nighttime.' Arsenio Zerna, Jr. answered, 'We were to meet my wife.' Then Diosdado Manolo said, 'My armalite will not recognize anybody even if he has been to Munti.' Arsenio Zerna, Jr. had been to Muntinglupa because he had killed a person. Diosdado Manolo cocked his armalite and Reneboy and Arsenio ran towards their house. After running a distance of about 20 fathoms they heard a shot, so they stopped. Arsenio Zerna, Jr. shouted, 'Shit Manolo you are not circumcised. You are just brave if you have a firearm.' And the two (2) proceeded to their house and upon arrival, they ate and they rested. At about 11:00 o'clock that same night, Nenita Zerna and Alexis, Arsenio and Nenita's son, arrived. Arsenio started blaming Nenita for the near accident he had with Diosdado Manolo and a quarrel ensued. Arsenio slapped Nenita who, upon being hit in the face went to the municipal building to report to the police. After an hour later, the dogs in the house barked. Reneboy got his two-battery flashlight and beamed the light to their surroundings. Reneboy saw Diosdado Manolo and Gregorio Estrellanes, Jr. some five (5) meters away from the house. Diosdado Manolo had a long firearm while Gregorio Estrellanes, Jr. had an M-14 rifle. Diosdado Manolo and Gregorio Estrellanes, Jr. got angry when the beam of flashlight shone on them. Then Diosdado Manolo shouted, 'Junior come down. The uncircumcized are here. If you will not come down we will shoot at your house. One ... two ... if you will not come down we will shoot.' Then a series of shots were fired. Felicitas Zerna, mother of Reneboy and Arsenio shouted, 'That's enough. I am hit.' Arsenio Zerna, Jr. meanwhile, tried to go down through the kitchen door but when he opened the door he was fired upon and he fell down dead, having been hit on the head and chest. Later, after the firing for about two (2) minutes had stopped, Reneboy and his brother Eugenio and sister Imelda brought their mother to the municipal building. There they told Nenita that her husband was already dead and they told the police that it was Diosdado Manolo and Gregorio Estrellanes, Jr. who killed Arsenio Zerna, Jr. Five (5) policemen went to the house of the Zernas together with Reneboy. There, the

policemen examined the body of the dead Arsenio. They also picked the empty shells around and returned to the municipal building some fifteen (15) minutes later.

Corroborating her brother Reneboy, Imelda Zerna, 20 years old, single, declared that about 11:00 o'clock that evening of October 5, 1991, her sister-in-law Nenita, the wife of her older brother Arsenio Zerna, Jr. arrived from Dumaguete City. A quarrel between Arsenio and his wife took place when Arsenio blamed Nenita for the near accident he had in trying to meet her at the poblacion. Nenita was slapped by Arsenio. Nenita went to the municipal building to report to the police. After Nenita was gone, the dogs in the house kept on barking. Imelda got a flashlight, opened the door of the kitchen and beamed the light around. She saw Diosdado Manolo and Gregorio Estrellanes, Jr. three (3) fathoms away in the yard pointing their firearms towards the house. Diosdado Manolo then shouted, 'Junior, come down. The uncircumcized are here.' Imelda said, 'Nong Dado, what is your purpose in coming here. It's already late.' Diosdado Manolo retorted, 'Shit, let your brother come down. One ... two ... and then they fired shots in the house. Imelda's mother, Felicitas, shouted, 'That's enough. I'm hit.' Arsenio Zerna went to the kitchen door to go down but was met by several shots and fell down. Imelda felt that her hand had become numb and it was then that she noticed that the forefinger of her left hand had been hit and blood was coming out. The firing lasted for about five (5) minutes and when it was quiet and believing that Diosdado Manolo and Gregorio Estrellanes, Jr. were no longer there, they (Reneboy, Imelda and Eugenio) brought their mother to the municipal building. Later, Imelda and her mother were brought to the Guihulngan Hospital. When they returned after a week at the hospital, Arsenio Zerna, Jr. was already buried.

DR. ARACELI B. ABELLA, 61 years old, married, Municipal Health Officer of Tayasan, Negros Oriental, testified that on October 6, 1991, she was requested to conduct a post mortem examination in Jimalalud, Negros Oriental. She in fact performed the post mortem examination on the dead body of Arsenio Zerna, Jr. In connection with the said post mortem examination she issued a Post Mortem Certificate (Exh. 'A') and a Death Certificate (Exh. 'C'). As contained in the Post Mortem Certificate (Exh. 'A') her findings were as follows:

Post Mortem Findings

General conditions: Cadaver was lying down on supine position facing the west. Body was in a state of rigor mortis.

1. Wound (Entrance) 1¼ cm long x 3 cm wide oval middle parieto vertex portion of head right side.
- 2 Wound lacerated (exit) 10 cm long x 7 wide avulsion of scalp skull and brain tissue middle parieto - vertex portion of left side of head. (exit wound to No. 1)
3. Wound circular (entrance) ½ cm in diameter x 18½ cm deep upper sternal end chest.
4. Wound lacerated (exit to wound #3) 4½ cm long x 3 cm wide along the left midaxillary line at the level of the 5th intercostal space chest.
5. Contusion ½ cm in diameter "4 along the left sternal border of sternum at the level of the 3rd rib.
6. Contusion 6 cm long x 5½ wide around the left nipple chest.
7. Wound oval (entrance) 2 cm long x 1 cm wide x 3 cm deep mideal side middle 3rd thigh left with abrasion collar on ½ of size of wound on head side.
8. Wound oval (exit to wound #7) 3½ cm long x 1½ cm wide lateral side middle 3rd anterior aspect thigh left.
9. Wound (entrance) circular 1 cm in diameter x 7 cm deep middle 3rd thigh left.
10. Wound (exit to wound #9) oval 8 cm long x 3 3/4 cm wide middle 3rd lateral side thigh left with muscles and

tendon torn.

11. Wound (entrance) circular distal 3rd anterior aspect leg left.

12. Wound (exit to wound #11) lacerated 1 cm long x 3/4 cm wide lateral side and parallel to entrance wound distal 3rd leg left.

Cause of death: Shock secondary to Hemorrhage and damage of brain tissue.

FELICITAS ZERNA, 55 years old, the prosecution's last witness, aside from giving corroboration to the testimonies of Reneboy Zerna and Imelda Zerna with respect to the shooting of her house also testified that she was hit in the buttocks; that in connection with the death of her son Arsenio Zerna, Jr., she spent P5,000.00 for the wake and another P5,000.00 for the funeral expenses. She however had no receipts to show for the said expenses."^[4]

On the other hand, both the accused claimed that at the time the crime was allegedly committed they were in the house of Reynaldo Tuanda, the Municipal Mayor of Jimalalud, Negros Oriental. The trial court summarized the version of their testimony in this wise:

"ACCUSED GREGORIO ESTRELLANES, JR. and DIOSDADO MANOLO who both testified in their defense, practically gave the same testimony which is as follows: That on October 5, 1991, at about 6:00 in the evening, Gregorio Estrellanes, Jr. left his house to fetch Diosdado Manolo in order to report for duty at the mayor's house. Both of them are security men of the mayor. Gregorio Estrellanes had with him an M-14 rifle. Diosdado Manolo was already waiting when Gregorio Estrellanes, Jr. arrived. They then proceeded to the house of the mayor but when they were in front of the house of Andres Faburada, Andres approached them and asked them to accompany him to the municipal building so the incident where Arsenio Zerna, Jr. threatened to cut off his ear can be recorded in the police blotter. And so they accompanied Andres Faburada and when they arrived at the municipal building they told the guard, Pat. Aquias Balasabas about the request of Andres Faburada, after which they proceeded to the house of the mayor. At the mayor's house they asked the houseboy Paul Paculanag where the mayor was. They were told that the mayor was in Pulpontao at the house of Ross Magsipoc. So they went to the public market to get a motorized tricycle for Pulpontao but when none was available they took a pedicab in going to the house of Ross Magsipoc, one kilometer away. At the house of Ross Magsipoc they inquired for the mayor after which they went inside. Upon seeing the mayor they saluted and said that they were reporting for duty. The mayor told them to take their supper. After eating they seated themselves by the main door. When it was past 11:00 o'clock the mayor said that they will now go as he will be going to church the next day. And so they (Mayor Tuanda, Diosdado Manolo and Gregorio Estrellanes) rode in the jeep driven by Roberto Olivares and went to the mayor's house. Upon arrival, Roberto Olivares went to his house while the [three] (Mayor Tuanda, Gregorio Estrellanes, Jr. and Diosdado Manolo) went inside the house. They conversed for a while and when the mayor went inside his room, Gregorio Estrellanes, Jr. and Diosdado Manolo stayed at the sala. After a few minutes, they heard a volley of gunfire. The mayor came out of his room and asked what it was. They told him, 'Gunshots, sir.' 'Where?', the mayor asked. Diosdado Manolo answered, 'Not far from the municipal building.' The mayor then said, 'Position yourselves. The municipal building might be harassed.' Gregorio Estrellanes, Jr. position [sic] himself at the right front gate while Diosdado Manolo went to the gate near the kitchen. They stayed there until morning.

At about 5:00 o'clock in the morning of the next day, October 6, 1991, the wife of Arsenio Zerna, Jr., Nenita Zerna came and asked the mayor for help. The mayor asked Nenita what happened to her husband and Nenita said that her husband was shot. The mayor asked Nenita if she knew who shot her husband and Nenita answered, 'No.'

At 7:00 o'clock more or less that morning, after asking permission from the mayor, they went to their respective homes."[5]

Mayor Tuanda testified to corroborate the claim of alibi.

Confronted with the issue of whose version deserved faith and credit, and faced with the absence of a witness who actually saw the person who shot the victim, the trial court resolved in favor of the prosecution's version. It found sufficient circumstantial evidence that proved beyond reasonable doubt the guilt of the appellant. The circumstances it considered were the following:

"1. The chance meeting at the road in the poblacion of Jimalalud at about 8:00 o'clock in the evening by Reneboy Zerna and Arsenio Zerna, Jr. on the one hand and accused Diosdado Manolo on the other after the two decided to go home when Nenita Zerna, Arsenio's wife whom they were meeting at the poblacion did not arrive from Dumaguete City. When they met on the road, Diosdado Manolo who was carrying an armalite asked Arsenio Zerna, Jr., 'Sen, where have you been? It is already night time.' Arsenio answered, 'We were to meet my wife Nenita Zerna.' At that instant, Diosdado Manolo cocked his armalite and said, 'My armalite will not mind even though you came from Munti.' (Tsn-Dec. 14, 1992, pp. 8-10).

2. That Arsenio Zerna, Jr. indeed has been imprisoned in Muntinglupa for having killed somebody (Tsn-Dec. 14, 1992, p. 9).

3. That after Diosdado Manolo cocked his armalite, Reneboy and Arsenio ran towards their house but a shot rang out causing them to stop. At that moment, Arsenio Zerna, Jr. shouted, 'Shit on you Manolo, you are uncircumcised. You are just brave when you have a firearm.' (Tsn-Dec. 14, 1992, p. 10).

4. That at about 12:00 o'clock that night, because the dogs were barking, Reneboy Zerna got his flashlight and beamed it on the surroundings of their house and saw Diosdado Manolo and Gregorio Estrellanes three fathoms away more or less, pointing their guns, an armalite and an M-14 rifle towards the Zerna house and because the light of the flashlight shone on them, they got angry. (Tsn-Dec. 14, 1992, pp. 13-14).

5. That after Reneboy Zerna turned off his flashlight, Diosdado Manolo shouted, 'Junior, come down because the uncircumcized are here. If you will not come down we will fire into your house. One ... two ... if you will not come down we will fire shots at your house. (Tsn-Dec. 14, 1992, pp. 14-15).

6. That at that same moment of the barking of the dogs Imelda Zerna also got a flashlight, opened the door of the kitchen and beamed the light around and saw Diosdado Manolo and Gregorio Estrellanes, Jr. three fathoms away pointing their guns toward the house. Then Diosdado Manolo shouted, 'Junior, come down. We whom you called the uncircumcized are here.' Imelda Zerna then said, 'Nong Dado, what is your purpose in coming here since it is already late in the evening?' Diosdado Manolo answered, 'Shit! Let your brother come down. One ... two ... and then shots were fired into the house. Felicitas Zerna was hit in the buttocks and Imelda Zerna was hit on the forefinger of the left hand. (Tsn-Jan. 7, 1993, pp. 8-10).

7. That Arsenio Zerna, Jr. tried to go out through the kitchen door but was met by several shots and he fell down dead. (Tsn-Dec. 14, 1992, p. 15; Jan. 7, 1993, p. 9)."[6]

Regarding the alibi, the trial court declared that it could not prevail over the positive identification of the accused by prosecution witnesses Reneboy Zerna and Imelda Zerna. Its disquisitions on this point read as follows:

"The Court finds it hard to believe that Reneboy Zerna and Imelda Zerna were mistaken or could have been mistaken when they testified that they saw the accused just three fathoms away from their house that night when they were illuminated though briefly by their flashlights. In the first place, both Reneboy and Imelda know the

accused well. Reneboy knows accused Gregorio Estrellanes, Jr. because he is the security of Mayor Reynaldo Tuanda, and accused Diosdado Manolo, because he is their neighbor at North Poblacion, Jimalalud, their houses just being 50 fathoms away from each other. (Tsn-Dec. 14, 1992, p. 5). Imelda Zerna on the other hand knows Gregorio Estrellanes, Jr. since she was yet a child and knows that Gregorio Estrellanes, Jr. is a security man of the mayor and a member of the CAFGU. As for Diosdado Manolo, Imelda Zerna knows him because they are neighbors since she was 14 years old and that it was her father who introduced him to their employer. (Tsn-Jan. 7, 1993, p. 6). In the second place, the distance the accused were to them (Reneboy and Imelda) at the time they saw them being illuminated by their flashlights was only three fathoms and being well acquainted with the accused, the possibility of their being mistaken is practically nil. In the third place, both Reneboy and Imelda could not have missed identifying Diosdado Manolo even if it was dark and the accused were just fleetingly illumined by the flashlight because Diosdado Manolo uttered several statements. When Diosdado Manolo called out, 'Junior, come down because the uncircumcized are here', there could not have been any other person who could have said that except Diosdado Manolo because earlier that night Arsenio Zerna, Jr. had shouted at Diosdado Manolo, 'Shit on you Manolo, you are uncircumcized and you are just brave when you have a firearm.' Reneboy Zerna was with Arsenio Zerna, Jr. when the latter said that to Diosdado Manolo. Aside from that, there was also an exchange of statements between Imelda Zerna and Diosdado Manolo with Imelda clearly calling out the name of Diosdado Manolo by saying, 'Nong Dado, what is your purpose in coming here since it is already late in the evening?' and Diosdado Manolo answered, 'Shit, let your brother come down.' It cannot be said therefore that Diosdado Manolo was not positively identified. The accused, having been positively identified, their alibi therefore, would be unavailing. Moreover, there was no evidence presented to show improper motive on the part of Reneboy and Imelda in pointing to and naming the accused as the persons they saw near their house immediately before their brother was shot dead. The jurisprudence is to the effect that 'Alibi is unavailing once the accused is positively identified by one without motive to charge falsely said accused especially with a grave offense that could bring death by execution on the culprit (People vs. Estante, Jr., 92 SCRA 122; People vs. Cabeltes, 91 SCRA 208; People vs. Artieda, 90 SCRA 145).' 'The fact that Reneboy Zerna and Imelda Zerna are brother and sister respectively of the deceased Arsenio Zerna, Jr. is not proof sufficient to disregard their testimony nor render the same less worthy of credit. The absence of evidence as to improper motive actuating them to point to the accused as the persons responsible for the death of their brother tends to sustain the conclusion that no improper motive existed and that their testimony are worthy of full faith and credit. (People vs. Castillo, L-32864, March 8, 1989). Moreover, the accused failed to establish that it was physically impossible for them to be at the scene of the crime. 'For the defense of alibi to prosper, it is not enough to prove that the accused was somewhere when the crime was committed but that he must likewise demonstrate that it was physically impossible for him to have been at the scene of the crime (People vs. Coronado, 145 SCRA 250; People vs. Pielago, 140 SCRA 418; People vs. Catipon, 139 SCRA 192; People vs. De las Pinas, 141 SCRA 379). In our case, Mayor Tuanda, in whose house the accused were said to be at the time the crime was committed, testified that his house is just 300 meters away from the house of the Zernas where the crime took place. Such a distance does not preclude the possibility that they were present at the scene of the crime and at the time the crime was committed, slipped back into the house without the mayor being the wiser. Thus, in several cases, like in People vs. Dereje, 56 SCRA 554, People vs. Tamani, 55 SCRA 153, where the accused testified that he was 2 kilometers from the scene of the crime at the time of its commission, or in People vs. Manangan, 59 SCRA 31, where the distance was 8 kilometers but can be traversed by walking in 1½ hours, or in People vs. Corpin, 31 SCRA 354, where the distance was 1½ kilometers, the alibi was not believed.' [7]

A juxtaposition of the assigned errors to the above findings of facts and conclusions of the trial court brings out without any difficulty the lack of merit of this appeal.

At the heart of the appellant's assigned errors is the credibility of the witnesses. Long settled in criminal jurisprudence is the rule that when the issue is one of credibility of witnesses, appellate courts will generally not disturb the findings of the trial court, considering that the latter is in a better position to decide the question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial, unless it has plainly overlooked certain facts of substance and value that, if considered, might affect the result of the case.[8] In the instant case, the defense miserably failed to point out any fact or any circumstance which the trial court failed to appreciate and which would have changed the result if it were considered.

The relationship of prosecution witnesses Reneboy Zerna and Imelda Zerna to the victim neither disqualified them as witnesses, nor weakened their competency or credibility. No evidence was offered to show that they did not have the qualifications of or were disqualified as witnesses under Sections 20 and 21, Rule 130 of the Rules of Court. It is settled that the relationship of the key witness to the victim does not necessarily disqualify him for being biased and interested.[9] A son[10] or a wife[11] is not incompetent to testify simply because of his or her relationship to the victim. In other words, the relationship of the witnesses to the victim does not per se affect their credibility.[12] Their testimony must be evaluated and assessed according to its own merit and if not otherwise offset by more credible evidence on record or any other revealed intrinsic defect should be given credit.[13]

As earlier stated, the trial court's finding regarding their credibility deserves full respect. No ill-motive has been shown by the appellant for Reneboy and Imelda to implicate him and his co-accused in the killing of their brother. It would be unnatural for them as relatives of the victim and who themselves seek justice to commit the injustice by imputing the crime on innocent persons and not on those who were actually responsible therefor.[14] It is settled that where there is no evidence, and nothing to indicate that the principal witness for the prosecution was actuated by improper motive, the presumption is that he was not so actuated and his testimony is entitled to full faith and credit.[15]

We agree with the trial court that the guilt of the appellant was proved beyond reasonable doubt by circumstantial evidence. Under the Rules of Court,[16] circumstantial evidence would be sufficient for conviction if the following concur: (a) there is more than one circumstance; (b) the facts from which the inferences are derived are proved; and (c) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt. Or, as jurisprudentially formulated, a judgment of conviction based on circumstantial evidence can be upheld only if the circumstances proved constitute an unbroken chain which leads to one fair and reasonable conclusion which points to the accused, to the exclusion of all others, as the guilty person; i.e., the circumstances proved must be consistent with each other and consistent with the hypothesis that the accused is guilty.[17]

The seven circumstances enumerated by the trial court, which we earlier quoted and which we adopt for being fully supported by the evidence, easily constitute such an unbroken chain which leads to no other conclusion than that the appellant had the motive to shoot the victim and that he did in fact shoot the victim, inflicting upon the latter fatal gunshot wounds. The disquisitions of the trial court on this point ring with impeccability.

Even granting for the sake of argument that it was his co-accused, Gregorio Estrellanes, Jr., who fired the shots, the appellant would still be liable because it is clear that there was a conspiracy between the two accused. Accordingly, the act of one is the act of all.[18] Fortunately for Estrellanes, he was acquitted by the trial court.

In view of the positive identification of the appellant, his defense of alibi is unavailing. Alibi is a weak defense for it is easy to concoct and fabricate. It cannot prevail over and is worthless in the face of positive identification by credible witnesses that the accused perpetrated the crime.[19]

We do not, however, agree with the finding of the trial court that treachery attended the killing of Arsenio. For treachery to be present, two conditions must concur: (a) the employment of means of execution that gives the

person attacked no opportunity to defend himself or retaliate, and (b) the means of execution was deliberately or consciously adopted.[20]

No evidence was presented to show that the appellant deliberately used his firearm and shot the victim from a distance in order to deprive the latter of the opportunity to defend himself. The mere fact that the victim had no weapon with which he could have defended himself is not sufficient to prove the existence of the first element in treachery, for settled is the rule that treachery cannot be presumed; it must be proved by clear and convincing evidence or as conclusively as the killing itself.[21]

Moreover, we have said that a sudden and unexpected attack, without the slightest provocation on the part of the one attacked is the essence of treachery.[22] In this case, however, the presence of treachery is negated by the fact that a warning was first given by the accused to the victim, Arsenio. Manolo shouted that he was going to shoot the house if Arsenio did not go out of it, and immediately thereafter, he and Estrellanes did shoot at the house. The interval between the warning and the shooting of the house and the actual shooting of Arsenio might have been short, but a warning was nevertheless given. The attack on Arsenio cannot be characterized as sudden and unexpected. Elsewise stated, there is no treachery if the victim was forewarned of the attack by the assailant.

In *People vs. Manzano*,[23] this Court rejected the claim of treachery because the malefactors gave the victim an ominous warning of their presence and heralded their entry into his house by firing two gunshots at the ground. In *People vs. Cunanan*,[24] this Court ruled that since the assailants announced their presence at the scene of the crime with shouts and gunshots, their mode of attack offset whatever deception might have arisen from their disguise and negated the existence of treachery since the element of surprise was absent.

As to the qualifying circumstance of evident premeditation, we affirm the trial court's finding that it was not present in the commission of the crime. The prosecution did not even attempt to prove the three elements necessary before evident premeditation may be appreciated as a qualifying aggravating circumstance, namely: (a) the time when the accused determined to commit the crime, (b) an act manifestly indicating that the accused has clung to his determination, and (c) a sufficient lapse of time between such a determination and execution to allow him to reflect upon the consequences of his act.[25] In the absence of any circumstance qualifying the killing to murder, only homicide was committed by the accused.

The penalty provided by law for homicide is reclusion temporal.[26] No mitigating or aggravating circumstances attended the commission of the crime. Reclusion temporal would then be imposed in its medium period pursuant to Article 64(1) of the Revised Penal Code.

The appellant is entitled to the benefits of the Indeterminate Sentence Law. He could then be sentenced to an indeterminate penalty whose minimum would be within the range of prision mayor and whose maximum should be within the range of reclusion temporal in its medium period.

WHEREFORE, judgment is hereby rendered MODIFYING the judgment appealed from as to the qualification of the crime committed and the penalty imposed. As modified, appellant DIOSDADO MANOLO is hereby found guilty beyond reasonable doubt of the lesser crime of HOMICIDE, and is sentenced to suffer an indeterminate penalty ranging from eight (8) years and one (1) day of prision mayor as minimum to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal as maximum, with the accessories thereof. In all other respects, the judgment appealed from stands.

The appellant shall be credited with the time of his preventive imprisonment in accordance with Article 29 of the Revised Penal Code, as amended.

No pronouncement as to costs.

SO ORDERED.

Padilla, (Chairman), Bellosillo, Quiason, and Kapunan, JJ., concur.

[1] Original Records (OR), 149-162; Rollo, 18-31. Per Judge Temistocles B. Diez. The decision, dated 15 July 1993, was promulgated on 21 July 1993.

[2] Rollo, 5.

[3] Appellant's Brief, Rollo, 53-54.

[4] OR, 150-152; Rollo, 19-21.

[5] OR, 155; Rollo, 24.

[6] OR, 156-157; Rollo, 25-26.

[7] OR, 158-159; Rollo, 27-28.

[8] People vs. Pascual, 208 SCRA 393 [1992]; People vs. Simon, 209 SCRA 148 [1992]; People vs. Garcia, 209 SCRA 164 [1992]; People vs. Francisco, 213 SCRA 746 [1992]; People vs. Florida, 214 SCRA 227 [1992]; People vs. Matrimonio, 215 SCRA 613 [1992].

[9] People vs. Legaspi, 151 SCRA 670 [1987].

[10] People vs. Atencio, 156 SCRA 242 [1987]; People vs. Javier, 182 SCRA 830 [1990].

[11] People vs. Salazar, 58 SCRA 467 [1974]; People vs. dela Cruz, 207 SCRA 632 [1992].

[12] People vs. Claudio, 216 SCRA 647 [1992]; People vs. Viente, 225 SCRA 361 [1993].

[13] People vs. Atencio, supra at note 10.

[14] People vs. Gapasin, G.R. No. 73489, 25 April 1994; People vs. Espinoza, 228 SCRA 143 [1994]; People vs. Viente, supra at note 12.

[15] People vs. Simon, supra at note 8.

[16] Section 4, Rule 133.

[17] People vs. Tiozon, 198 SCRA 368 [1991].

[18] People vs. Degoma, 209 SCRA 266 [1992]; People vs. Rostata, 218 SCRA 657 [1993]; People vs. Liquiran, 228 SCRA 62 [1993].

[19] People vs. Lee, 204 SCRA 900 [1991]; People vs. Buka, 205 SCRA 567 [1992]; People vs. Casinillo, 213 SCRA 777 [1992]; People vs. Florida, supra at note 8.

[20] People vs. dela Cruz, supra at note 11; People vs. Garcia, supra at note 8; People vs. Ybeas, 213 SCRA 793 [1992].

[21] People vs. Simon, supra at note 8.

[22] People vs. Jacolo, 216 SCRA 631 [1992].

[23] 58 SCRA 250 [1974].

[24] 75 SCRA 15 [1977].

[25] *People vs. Narit*, 197 SCRA 334 [1991]; *People vs. Barba*, 203 SCRA 436 [1991]; *People vs. Buka*, *supra* at note 19.

[26] Article 249, Revised Penal Code.

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