

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
SILVERIANO BOTONA, NICOLAS BOTONA, JUNICA LINGATONG,
ALIAS “TIKI” (AT LARGE) AND SOFRONIO BOTONA,
ACCUSED-APPELLANTS.**

G.R. No. 115693. March 17, 1999

Ponente: PURISIMA, J.

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PURISIMA, J.:

In the case at bar, accused-appellants Silveriano Botona and Nicolas Botona seek the reversal of the judgment^[1] of Branch 31 of the Regional Trial Court in Dapa, Surigao del Norte, finding them guilty of the crime of murder. Accused Sofronio Botona chose not to appeal while Junica (Junior) Lingatong alias "Tiki" remains at large. The decretal portion of the judgment of conviction appealed from, reads:

"WHEREFORE, viewed in the light of the foregoing, the Court finds Silveriano Botona, Sofronio Botona, and Nicolas Botona guilty beyond reasonable doubt of the crime of murder as defined and penalized under Article 248 of the Revised Penal Code. Without any other modifying circumstances for consideration, all the aforementioned accused are sentenced to suffer an indivisible penalty of RECLUSION PERPETUA which is the medium period of the penalty imposable. Likewise, all said accused are jointly and severally ordered to pay the heirs of the victim, the following:

1. Fifty Thousand Pesos (P50,000) as indemnification for the death of the victim;
2. Five Thousand Pesos (P5,000.00) as reasonable reimbursement for burial and necessary expenses incurred; plus
3. Ten Thousand Pesos (P10,000.00) for moral and exemplary damages;

but without subsidiary imprisonment in case of insolvency, to suffer the necessary penalties imposed by law and to pay the cost.

With respect to Sofronio Botona, his recorded detention since April 25, 1990 or a total of three (3) years, eleven (11) months and two (2) days is deductible in full from the penalty imposed herein.

Pending arrest of Junior Lingatong, alias "Tiki", the records is temporarily archived.

SO ORDERED."^[2]

Filed on January 9, 1989 by Third Assistant Provincial Prosecutor Clarito P. Servillas, the Information indicting accused Silveriano Botona, Nicolas Botona, Junior Lingatong and Sofronio Botona, alleged:

"That on the 27th day of June, 1988 at or about 12:00 o'clock in the evening, in Barangay Bitoon, municipality of Del Carmen, Surigao del Norte, Philippines, and within the jurisdiction of this Honorable Court, said accused armed with long sharp pointed bolo and knife locally known as "sundangay", conspiring, confederating and mutually helping one another, with treachery and known premeditation and with intent to

kill, did then and there willfully, unlawfully, and feloniously attack and wound one BIENVENIDO OLIVER, thereby inflicting upon the latter mortal wounds, to wit:

1. Stab wound - 1 cm. above the thyroid cartilage 3 inches in diameter and penetrating through the esophagus and trachea to a point almost severing both;
2. Lacerated wound - 1 cm. below the stab wound 2 1/2 inches length - superficial;
3. Lacerated wound - 1 cm. below the wound described above - 2 inches length superficial;
4. Incised wound - left jaw - 3 1/2 inches across the left interior mandibular border - superficial;
5. Incised wound - left thumb - cutting the nail to a depth of 1 inch;
6. Superficial incised wound - dorsal aspect of forefinger 1/2 inch length.

which injuries caused the instantaneous death of said Bienvenido Oliver, consequently inflicting actual, moral and exemplary damages upon the heirs of the victim which they hereby demand in the total sum of P 30,000.00.

Contrary to law with the qualifying circumstance of alevosia and aggravating circumstance of evident premeditation."^[3]

On May 10, 1989, only the herein appellants and the other accused, Sofronio Botona, pleaded "Not Guilty". Accused Junica Lingatong alias "Tiki" was then and is still at large.^[4]

On August 28, 1992, after all the witnesses, namely Julieto Oliver, Arsenia Botona Vda. de Oliver, Dr. Douglas Subang, Silveriano Botona, Nicolas Botona, Bernandito Lubreo, Felix Comboy, Federico Antolin, Prudencio Leyros and Diosdado Oposa, had testified, the trial was terminated. However, on October 8, 1992, the case was re-opened to admit the testimony of Sofronio Botona, a detainee at the Provincial Rehabilitation and Detention Center in Surigao City. The trial Court noted the strained relations between Silveriano Botona, who was bonded, and his younger brother, Sofronio Botona (detainee), because the former did not attend to the problem on Sofronio's bond.^[5]

Accused Silveriano Botona and Sofronio Botona are brothers. The victim, Bienvenido Oliver, was their brother-in-law, being the husband of their full-blooded sister, Arsenia Botona-Oliver. Nicolas Botona is the son of Silveriano Botona while Junica (Junior) Lingatong "alias" Tiki is the cousin of the Botonas.

The trial court summarized the version of the prosecution, as testified on by witnesses Julieto Oliver, Arsenia Vda. de Oliver, and Dr. Douglas Subang, thus :

"JULIETO OLIVER, the victim's 16 year old son, a grade VI pupil, a resident of Barangay Sta. Fe, Dapa, Surigao del Norte said that he is the eldest among the five (5) children of Bienvenido Oliver (victim) and Arsenia Botona Oliver; that after their supper last June 26, 1988, he was directed by his mother to fetch his father at Bitoon Poblacion of which he complied; that he went directly to the house of his Uncle "Veriano" (accused) and saw his father playing cards called "bakarat" with a person whose name he did not know; that he saw his Uncle Veriano standing there only, his answers to further question were:

`Q - What did you tell your father x x?

A - I told him to go home but only replied- `wait for a while because we will just go home together'

Q - What did you do next if any?

A - I remained standing as he was busy playing "bakarat";

At about 11:00 o'clock that evening, they finally left the house of Silveriano Botona and along the highway, a person emerged from the roadside whom he recognized as accused Silveriano Botona who immediately hugged his father while he was stunned, said accused called for assistance and another set of (3) three persons also emerged, said persons he recognized as Nicolas Botona, Junior Lingatong and Sofronio Botona who all hugged his father also, note his answers further:

"Q - What happened after the three accused appeared or emerged?

A - The three of them hugged my father while Uncle Silveriano held the shoulder of father and pushed him to the ground;

Q - What happened next when your father was already on the ground?

A -I do not know anymore as I ran away xx x"

that he hid at the side of the ricefield about five (5) fathoms from where his fallen father was; that he proceeded under the house of Batoy Laplana, thence, saw the four (4) accused washed themselves in the pumpwell with Nicholas Botona pumping while the others washed themselves; that at 4:00 A. M. the following dawn , he saw his bloodied father on the road, thence he went home to their farm in Sitio Lobo and notified his mother that his father was already dead.

When cross-examined, he clarified that he saw the joint hugging of his father by the four (4) accused while he briefly watched at three (3) fathoms away from them; that all the accused were there in the house of his Uncle Veriano while his father was still playing cards; that when they started to go home, the four (4) accused were no longer seen by him; and hiked along the highway for the barangay road to their house at Lobo; that he clarified of no (sic) altercation/trouble that arose during the "bakarat" in his Uncle Veriano's house neither he knew of any grudge with any person with his father; that he authenticated his Affidavit dated July 4, 1988 taken by Pat. Carlos Sulima; that the contents therein were stated by him during the investigation in the presence of Wendelina Comon and his mother and signed by the MCTC Judge of Del Carmen in his presence after which they went home, his answers further were:

Q - And in your affidavit your said that you will just go ahead of him?

A - No, sir, he did not say that to me.

x-x-x-x-x-x-x-x-x-x-x-x-x-x-x-x

Q - Why did you sign your affidavit when this is not part of your statement?

A - Because I am innocent about it, sir;

Q - So you did not sleep in the house of Batoy Laplana?

A - No, sir, I did not;

x-x-x-x-x-x-x-x-x-x-x-x-x-x-x-x

`Q - In paragraph 3 which I will read - `Kinsa man di- ay ang nagpatay sa imong amahan, nasayud ka ba?' or translated "Who therefore killed your father, did you know them?"

A - He did not ask me sir, he only asked me Question No.4;

x-x-x-x-x-x-x-x-x-x-x-x-x-x-x-x

Court - Atty. Coro, please read Question No. 4?(sic)

Atty. Coro:

Q - 'Guinsa man nimo pagkasayud nga kini sila maoy nagpatay sa imong amahan and your answer is this' niadtong fetcha 27 bulan sa Hunyo, 1988 sa may alas 7:30 ang takna sa gabi kapin kun kulang, gisugo ako sa akong inahan sa pagpalupog kang Tatay (Bienvenido Oliver) na didto sa Barangay Bitoon, Del Carmen, Surigao del Norte ug sa akong pagki-abut didto sa Bitoon, ako dayon guisultihan si tatay na "itay, uli na tagpauli ikaw ni nanay'

X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X-X

A - That was asked and that was my answer, sir."

He denied that question and answer in no. 5 was not asked and answer was not his including question and answer no.6 and nos. 9 and 10; that the cadaver of his father was first brought to the Bitoon Hall and later to the ground floor of his Uncle Veriano's house

He clarified on redirect stage that it was Silveriano Botona who held the "sundangay" or small sharp-pointed bolo which was held by the left hand when his father was hugged; that the three other accused conspired in hugging his father; that the four accused did not condole neither did they join the burial of his father.

MRS. ARSENIA BOTONA VDA. DE OLIVER, 47 years old , widow of victim, housekeeper-farmer, finished only up to Grade I, a resident of Sta. Fe, Dapa, Surigao del Norte declared that she was in their farm in Sitio Lobo when her husband was stabbed and spent actually P50,000.00 for his death; that her late husband was a farmer and a tuba gatherer with 2- gallons produce daily at the price of P5.00 to P6.00 per gallon, their farm produce of root crops usually gives them an income of P15.00 to P25.00 per kerosene can; that the loss of her husband could not be valued as life is priceless.

When cross-examined, she revealed that the cadaver was not embalmed and the coffin was made by the carpenters hired and paid for their services upon the suggestion of Silveriano Botona; that she spent for nine (9) nightly prayers for food, viand and drinks a total of P900.00; that the body of her late husband was laid in state under the house of Silveriano Botona, her elder brother, her further answers were;

Q - During the lifetime of your husband Bienvenido Oliver, did he have any grudge with your brothers before the incident?

A - Yes, your Honor;

Q - What was the cause of that grudge?

A - (Regarding) our inherited land that when I tell my husband to go there, they do not want her husband to enter the land;

Q - Who among your brothers do not want your husband to occupy the land?

A - Silveriano and Sofronio."

That Silveriano and Sofronio did not condole nor help her even as the cadaver was at the ground floor of Silveriano's house - "they just passed by" including Nicholas, her nephew; that Silveriano warned her husband one time quote "don't plow that portion of the field because if you will plow, it is up to you." the reply of her husband was "we plow that portion to maintain ourselves and the children of our brother"; that Silveriano one time throusted (sic) a stab blow which did not hit her husband who kneeled in his presence, the incident happened in their old house; that she cried and pleaded with her brother Silveriano that time; that they (Olivers) occupied said portion of the land on instruction of her younger sister Elma but Silveriano wanted to possess/cultivate it that year; that said land is Elma's exclusive property because Elma bought said portion, their other brothers were also given their corresponding shares.

DR. DOUGLAS SUBANG, a resident physician of Surigao District Hospital, Dapa, Surigao del Norte said

that he examined the cadaver of the victim at the place of the incident, the Post Mortem was correspondingly authenticated by him; that the three (3) inches injury on the neck almost cut the esophagus and the trachea which was a fatal injury; the second injury was also above the neck but a superficial and not a fatal one; the third injury on the neck which also superficial; the fourth was at the left jaw which was also superficial and skin-deep; the fifth was at the left thumb; the sixth was at the back part of the hand; that the cause of death was due to massive hemorrhage due to stab wound on the neck; that a Certificate of Death was correspondingly issued, the said documents were marked as Exhibits "A" and "B".[6]

Accused-appellants Silveriano Botona and Nicolas Botona placed reliance on the defense of alibi. To reinforce their evidence, they called on Benedicto Lubreo, Felix Comboy, Federico Antolin, Prudencio Leyros and Diosdado Oposa to testify.

Accused Sofronio Botona, on the other hand, pointed to his brother Silveriano, and nephew Nicolas Botona as the perpetrators of the crime. He theorized upon his alleged non-involvement in the malefaction complained of.

Accused-appellant Silveriano Botona narrated that on June 27, 1988 there was gambling, playing of cards, in his house as it was the day before the eve of the fiesta of Bitoon.[7] The upper floor of his house had a living room and bedroom, while on its ground floor were the dining room and another bedroom.[8] On the evening of June 27, 1988, he was at home.[9] On the following day, June 28, 1988, he woke up at 5:00 a. m. to gather tuba. When he went home at about 8:00 o'clock in the morning, he noticed the cadaver of the victim in his house.[10] His sister, Arsenia, who is the wife of the victim, remarked "you will be next" to which remark he replied "jawa ra" or "the devil", after which he brought the tuba and scythe upstairs and later on, went down to ask his sister what happened but she did not answer.[11] According to him, he paid for the coffin "Because it was placed in my house, I have to spend for it." The deceased was buried at around 3:00 p.m. to 4:00 o'clock in the afternoon of the same day.[12] He stressed that if he was the one who killed the victim, he would not have allowed the cadaver of the victim to be brought to his house. Being the eldest in the family, he sometimes disciplined the victim and his sister because they were habitual drunkards,[13] witness explained.

On cross examination, the same accused-appellant declared that he stayed on the upper floor of his house after supper, and only peeped through its flooring to see if there were still people playing cards on the ground floor but he did not see Junior Lingatong thereat.[14]

Accused-appellant Nicolas Botona recounted that in 1988 he was residing at Barangay Bitoon in the house of his father Silveriano Botona. The victim, Bienvenido Oliver, was his uncle-in-law being the husband of his aunt, Arsenia Botona-Oliver. On June 27, 1988, at about 7:00 p.m., he was already asleep with his wife.[15] His father was then in their house as there were many gamblers on the ground floor. He and his wife woke up at about 6:00 o'clock the following morning and while taking breakfast, all of a sudden his aunt Arsenia, Roldan, Boboy, and Beto placed the remains of the victim on the ground floor of their house. He assisted in providing a bench on which to put the cadaver and he asked what happened to "Tito" but his "tita" Arsenia merely said "he is dead".[16] His father Silveriano was not yet in when the deceased was brought to their house but arrived a few minutes later. The spot where the victim died was approximately 50 meters away from the house of his father and 100 meters from the house of Sofronio Botona.[17] Witness also stated that the victim loved him,[18] and Junior Lingatong is his uncle being the son of his grandmother.[19]

Cross-examined, witness stressed that his wife was three (3) months on the family way and said "I was not able to come out of the room because I am greedy with sex because I am newly married".[20]

Bernandito Lubreo testified that on June 27, 1988, he went to visit Sofronio Botona in the latter's house in the Bitoon Poblacion, at around 7:00 p.m., to talk with him about their agreement to slaughter a carabao for the fiesta

and he stayed in the said house of Silveriano until 2:00 o'clock the following morning as there was a card game on the ground floor and he played cards from 9:00 o'clock to 2:00 o'clock the next morning[21]; that Silveriano was witnessing the game and when it ended at 2:00 o'clock, Silveriano Botona was still there;[22] witness recalled.

On cross-examination, this witness disclosed that from 7:00 to 9:00 o'clock in the evening, he and Silveriano not only talked about the carabao to be slaughtered but also about the card games,[23] that there were many who played cards, one of whom was Sofronio Botona[24] and that was the last time he saw Silveriano, when they discussed about the carabao they were going to slaughter.[25]

Felix Comboy testified that on June 27, 1988, he was at the house of Silveriano Botona until 1:00 o'clock in the morning; that at around 10:00 o'clock in the evening, he was downstairs gambling[26] and for the entire duration of the card games, he was the banker[27]; that at around 12:00 o'clock midnight and 2:30 a.m., he went upstairs to prepare coffee, at which time, Silveriano was already sleeping[28]; that at 11:00 in the evening, he again went upstairs to prepare coffee, and noticed that Nicolas Botona was sleeping in his room[29] but did not notice the presence of Sofronio Botona that evening.[30]

Federico Antolin testified that at around 11:00 o'clock in the evening of June 27, 1988, he was at the house of Silveriano, gambling. Sofronio Botona was not with Silveriano Botona and Nicolas Botona because at around 11:30 that evening Silveriano and Nicolas Botona were already sleeping, when he went upstairs to eat;[31] witness added.

When asked by the trial court to identify Sofronio Botona from among those inside the court room, however, Federico Antolin failed to do so because according to him, he was only eight (8) years old when he last saw Sofronio.[32] Witness likewise declared that he went to court to testify on his own volition and he and Silveriano Botona just casually met inside the jeep he took in going to court.[33]

Sofronio Botona testified that Silveriano Botona is his older brother while Nicolas Botona is his nephew; that he knows Junior Lingatong because their parents are brothers and sisters while the deceased, Bienvenido Oliver, was the husband of his "Manding" Arsenia Botona-Oliver[34]; that at midnight of June 27, 1988, he went to the house of Silveriano Botona to witness the card games and while there, he was invited by Silveriano Botona to go somewhere and when they were already at the place he was invited to go to, he was asked by Silveriano to walk briskly as they were trying to catch up with somebody; that Nicolas Botona accompanied them[35]; that when he was invited by Silveriano, he did not know who they would try to overtake;[36] that upon knowing that it was Bienvenido Oliver, he stopped them from killing him[37]; that the victim's neck was cut by Silveriano and Nicolas Botona with a sharp-pointed bolo of Silveriano while Nicolas was holding the victim; that he was told to hold the victim but he ran away, instead, because he was threatened to be killed[38]; that Junior Lingatong was not there at the time the victim was killed[39]; that the son of his "Manding" was following them to the crime scene, at a distance of about 90 meters and while running away from Sofronio and Nicolas Botona, he met Julierto Oliver but said nothing to him[40]; that when Silveriano asked him to go with them, he saw no bolo or any weapon with Silveriano, his brother nor with Nicolas, his nephew, but he saw that the bolo used by his brother in killing Bienvenido Oliver was nine (9) inches long.[41]

The defense also put on the witness stand Prudencio Leyros and Diosdado Oposa who gave a different version of the incident under inquiry.

Prudencio Leyros testified that he was personally acquainted with all the accused but he did not know the victim, Bienvenido Oliver; that on June 27, 1988, he passed the night at the house of Lalo (Diosdado Oposa) a neighbor of his because he had no companion in their house; that at about midnight, while they were sleeping at the sala, he was awakened by a voice saying "Lalo, you wake up, we were (sic) here"; that when Diosdado Oposa opened the

door, he saw Charlito and Marcial Gultian and Diosdado Oposa asked Charlito and Marcial: "Tiyo, where did you come from"; that when the Gultians entered the house they sat on a bench and he noticed that their shirts were stained with blood; that when Diosdado Oposa asked them about the blood stains, they answered: "Keep quite, do not tell anybody we have killed somebody at Bitoon, still lying on the road" and showed them the bolos stained with blood;[42] that they did not report the matter to the police because the Gultians threatened to cut their necks if they would tell anybody about what happened; that Charlito Gultian is already dead and Marcial Gultian is still in Ezperanza, Del Carmen.[43]

Diosdado Oposa testified that prior to December, 1989, he was residing at Sitio Pangi Antipolo, Del Carmen, Surigao del Norte; that he personally knew the accused Botonas as well as Prudencio Leyros; that in the evening of June 27, 1988, Prudencio Leyros slept in their house because his family was in Surigao City at the time[44]; that at around 1:00 o'clock a.m., Marcial and Charlito Gultian called him from outside saying "Lalo, you wake up" and he saw them bloodstained including their bolos; the Gultians (who are his uncles) warned him and Prudencio Leyros not to reveal the killing incident "because they would be next"; that they conversed about no other topic[45]; that "they suddenly disappeared in the house" at around 2:00 o'clock at dawn and he did not know where they proceeded to; that they went back to sleep after the Gultians left[46] and it was only the following morning when he learned that the victim was Bienvenido Oliver.[47]

During the ocular inspection conducted on May 16, 1991, Juliato Oliver pointed to the Court where one of the accused stood and where the others were seated[48] while his father was playing "bakarat" in the house of Silveriano Botona. At the scene of the crime, Juliato Botona demonstrated[49], with the sheriff acting as his father, how the accused ganged-up on his father; that while his father was walking ahead of him, Silveriano Botona, with a weapon in hand, suddenly went out from behind a tree beside the road and immediately hugged his father; that the three others also went out from behind the same tree when Silveriano shouted "tabang" (or help). The court noted that during that fateful night when Bienvenido Oliver was killed, the moon was bright as it was only three days before full moon in the June 1988 calendar.[50] Juliato Oliver also pointed to the ricefield where he hid for not more than a minute, which was six-arms length away from where he left his father.[51] Proceeding to the vacant house of a certain Batoy Laplana, where Juliato Oliver hid for about three hours, he squatted on the ground to show how he hid in fear. Seven-arms length from where he was hiding, he pointed to the spot where he saw the three accused washed themselves at the pumpwell while Nicolas Botona was pumping the well.[52]

As to why Arsenia Botona Oliver brought the body of the deceased to the house of Silveriano, knowing that the latter was one of those who killed her husband, she said, "because they were the ones who killed him and they will be the one also to bury the dead." [53]

After evaluating what is on record, the trial court found the evidence for the prosecution enough to convict. It concluded that the accused conspired to kill the victim, appreciated the qualifying circumstance of treachery but ruled that the aggravating circumstance of evident premeditation was absorbed by treachery.

Accused-appellants contend that:

- THE LOWER COURT ERRED IN NOT HOLDING THAT SINCE THE CONSPIRACY WAS NOT INDEPENDENTLY PROVEN BY THE PROSECUTION AMONG THE ACCUSED SILVERIANO BOTONA, NICOLAS BOTONA, JUNIOR LINGATONG and SOFRONIO BOTONA AND HIS SON, NICOLAS BOTONA SHOULD HAVE BEEN ACQUITTED;
- THE LOWER COURT ERRED IN NOT HOLDING THAT THE TESTIMONIES OF BERNANDITO LUBREO, PRUDENCIO LUBREO, PRUDENCIO LEYROS AND DIOSDADO OPOSA CREATED UNMISTAKABLY GRAVE DOUBT AS TO THE CRIMINAL AUTHORSHIP OR LIABILITY OF ALL THE ACCUSED AND THEREFORE THE PROSECUTION HAS NOT PROVEN THE GUILT OF ALL

THE ACCUSED BEYOND REASONABLE DOUBT.

- THE LOWER COURT ERRED IN CONVICTING ALL THE ACCUSED THERE BEING NOT AN IOTA OF EVIDENCE SHOWN THAT AN "ACT" WAS COMMITTED BY APPELLANTS SILVERIANO BOTONA AND NICOLAS BOTONA THAT THEY PERSONALLY CAUSED THE SIX (6) MORTAL WOUNDS WHICH ALLEGEDLY CAUSED THE DEATH OF THE VICTIM.

Let us tackle first the third assigned error. Appellants claim that there is no evidence to show an "act" of participation in the actual killing of the deceased.

The contention is untenable. That Julierto Oliver did not witness the actual killing of his father is of no moment. Well-settled is the rule that direct evidence of the commission of the crime is not the only matrix wherefrom a trial court may draw its conclusion and finding of guilt.[54]

In the absence of direct evidence, circumstantial evidence may be resorted to. Circumstantial evidence suffices to convict, if:

- a) there is more than one circumstance;
- b) the facts from where the inferences are derived are proven; and
- c) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt.[55]

In *People vs. Aaron Bionat*[56], the Court upheld the conviction of the accused notwithstanding the absence of an eyewitness. In the said case, the accused was positively identified as one of the persons who hog-tied and took away the victim, threatening to shoot the witness if she would cry or shout. The next day, the victim was found dead with stab wounds.

A judgment of conviction based on circumstantial evidence can be sustained only when the circumstances proved form an unbroken chain which leads to a fair and reasonable conclusion pointing to the accused, to the exclusion of all others, as the culprit. The circumstances proved must be consistent with each other, consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with any other hypothesis except that of guilt.[57]

In the case under consideration, the prosecution established the following chain of circumstances:

- 1) The motive of the killing as testified on by Arsenia Botona, bereaved wife of the deceased, - that her own brothers Silveriano and Sofronio Botona begrudged them, especially her late husband, because of their inherited land which was plowed by the victim;[58]
- 2) that on another occasion, Silveriano Botona stabbed her husband but was unhurt because her husband knelt before him;[59]
- 3) That on June 27, 1988, after eating supper, Julierto Botona, as instructed by his mother, went to Bitoon Poblacion to fetch his father, Bienvenido Oliver, whom he found playing cards called "bakarat" in the house of his Uncle "Veriano" (Silveriano); and that he was told by his father to "Wait for a while as we will just go home together";[60]
- 4) that all the accused were there in the house of Silveriano while the deceased was still playing cards; that when the deceased and Julierto Oliver went home, the four accused were no longer seen by Julierto;[61]
- 5) that it was at about 11:00 o'clock that evening, when Julierto Oliver and the deceased left the house of Silveriano Botona;[62]
- 6) that on their way home, the deceased, Bienvenido Oliver, was walking ahead of Julierto; that a person

suddenly emerged from the roadside whom Juliето Oliver recognized as accused Silveriano Botona; that Silveriano Botona immediately hugged his father; that said accused called for assistance and another set of three (3) accused also emerged; that these persons were identified by Juliето Oliver to be Nicolas Botona, Junior Lingatong, and Sofronio Botona who all hugged his father;[63]

7) that Silveriano Botona was holding the "sundangay" or small sharp-pointed bolo when he hugged Bienvenido Oliver;[64] that Juliето Oliver noticed the weapon because "it sparked through the light";[65] that it was only three days before fullmoon at that time;[66]

8) that Juliето Oliver saw his Uncle Silveriano hold the shoulder of his father and push him to the ground;[67]

9) that Juliето Oliver did not witness what happened next because he ran away;[68]

10) that Juliето Oliver hid for "about or more than one minute"[69] in the ricefield six - arms length away from where his father has fallen; that he proceeded under the house of Batoy Laplana where he hid for about three hours;[70]

11) that after a while, Juliето Oliver saw, from where he was hiding, the four accused in the pumpwell of the next house with Nicolas Botona pumping while the others were washing themselves;[71] and

12) that at about 4:00 a. m. the following dawn, Juliето Oliver went back to the place where he left his father and found him dead in the same spot where the four (4) accused intercepted his father; that he proceeded to their farm in Sitio Lobo and notified his mother that his father was already dead.[72]

From the aforementioned circumstances, it is decisively clear that the accused were identified by Juliето Oliver as the persons last seen with the victim on June 27, 1988, at around 11:00 p. m. and at 4:00 o'clock in the morning of the next day, the lifeless victim was found on the same spot where his deceased father was attacked by the four (4) accused. From the treacherous design in accosting the deceased, a land dispute as background motive, a previous attempt to take the life of the victim, and the other antecedent facts and circumstances aforesated, no conclusion can be drawn other than the guilt of appellants.

All told, the circumstantial evidence for the prosecution surmounted the constitutional presumption of innocence.

The gamut of evidence upon which the trial court based its judgment of conviction came mainly from the testimony of prosecution witness Juliето Oliver. It is thus imperative to delve into and scrutinize very well the credibility of said witness.

Worthy to be cited with approval is the following observation below on this vital witness for the People:

"x x x the court finds his demeanor during the hearings and during the ocular inspection far from being coached and fabricated, hence, worthy of belief."[73]

Expounding on the issue of credibility of a witness, what the court said in the case of *People vs. Soberano*[74] comes to the fore, to wit:

"The constant rule in our jurisdiction is that this Court will accord great respect to the factual conclusions drawn by the trial court, particularly on the matter of credibility of a witness since the trial judge had the opportunity-which is denied to appellate courts - to observe the behavior and demeanor of witnesses while testifying. The trial judge is thus able to form at first hand a judgment as to whether particular witnesses were telling the truth or not."

A scrutiny of the candid and unwavering testimony of Juliето Oliver during the trial and ocular inspection shows beyond cavil the correctness and reliability of the findings and conclusion arrived at by the trial court.

As regards the affidavit of Juliето Oliver executed on July 4, 1988, which was not offered in evidence, the court,

in disregarding the inconsistencies theorized upon by the defense, ruled that subject inconsistencies are minor and were fully explained by Julieto Oliver on the witness stand.

Understandably, the lower court must have been aware that discrepancies between the affidavit of a witness and his testimony in court do not necessarily discredit him because it is a matter of judicial notice and experience that affidavits taken ex parte are almost always incomplete and often inaccurate.[75]

In their attempt to impugn the prosecution's theory of conspiracy, appellants asseverate that it was impossible for conspiracy to have been hatched in the absence of proof to show how the murder weapon got into the picture. In so claiming, appellants relied on the testimony of Sofronio Botona that when he was invited by Silveriano to go with him, he saw no bolo or any weapon brought by his brother, nor by Nicolas, his nephew.[76] Appellants would like to impress upon the court that the murder weapon is indispensable to the existence of conspiracy.

Whether or not Sofronio saw the murder weapon is neither important nor decisive. The belated testimony of Sofronio who was not in good terms with Silveriano Botona because of the former's problem on his bond was never made the basis of the theory of conspiracy. It may have on some points corroborated the testimony of Julieto Oliver but lapses in the testimony of Sofronio do not in any way affect the untarnished and straightforward testimony of Julieto Oliver that he saw Silveriano holding the weapon when the latter and the three other accused ganged-up on his father.

For conspiracy to exist, proof of an actual planning of the perpetration of the crime is not a condition precedent. Time and again, this court ruled that it is sufficient that at the time of the commission of the offense, the accused had the same purpose and were united in its execution. Direct evidence of a previous actual agreement to commit a crime is not necessary. It may be deduced from the mode and manner in which the offense was perpetrated or inferred from the acts of the accused evincing a joint or common purpose and design, concerted action and community of interest.[77]

In the case under scrutiny, the act of Silveriano Botona who suddenly appeared from the roadside, hugging the victim with the murder weapon in his hand, was complemented by the act of the three other accused ganging-up on the defenseless victim, when Silveriano called for their reinforcement. Verily, at the precise moment of execution of the crime, the accused acted in concert to accomplish a common objective - to take the life of Bienvenido Oliver.

This court is truly convinced of the findings by the trial court that conspiracy attended the perpetration of the crime. Consequently, the act of one is the act of all regardless of the degree of participation of each.[78] All the accused in the case are therefore equally liable for the death of Bienvenido Oliver.

There is treachery when the offender commits any of the crimes against person, employing means and methods or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[79] In appreciating the qualifying circumstance of treachery, the trial court ruled that: "The evidence of the people through Julieto Oliver was clear and unwavering - that the attack was sudden and unexpected where the victim was unable to defend himself. They all ganged-up the victim and thereafter pushed said victim to the ground."

Thus, the court a quo properly considered the qualifying circumstance of treachery, as the attack on the deceased was sudden, catching him unaware and giving him no opportunity to defend himself.[80]

Telling on the matter of aggravating circumstance of evident premeditation are the observations by the Solicitor General, to wit:

"Finally it was an error for the trial court to hold that evident premeditation is absorbed in treachery (RTC

Decision, p. 61). It is the direct proof of conspiracy that presupposes the existence of evident premeditation (People vs. Timbang, 74 PHIL 295 [1943]); however, when conspiracy is only implied as in the case at bar, evident premeditation may not be appreciated, in the absence of proof as to how and when the plan to kill the victim was hatched or what had elapsed before it was carried out (People vs. Custudio, 97 PHIL 698, 704 [1995]); The Revised Penal Code, Reyes, Vol. 1, 1993 Edition)"[81]

The court adopts the aforesaid observations by the Solicitor General. Considering that the conspiracy in the present case is merely implied, evident premeditation must be clearly established, the elements of which are as follows:

- 1) the time when the accused decided to commit the crime;
- 2) an overt act manifestly indicating that the accused had clung to his determination to commit the crime;
- 3) a sufficient lapse of time between the decision to commit the crime and the execution thereof to allow the accused to reflect on the consequences of his act.[82]

Absent reliable substantiation of the aforestated elements, evident premeditation can not aggravate the criminal liability of the accused. As no attempt was made to prove the requirements of evident premeditation[83], the same cannot be appreciated.

Appellants interposed alibi, the weakest of defenses. The court has patiently reiterated the requisites for alibi to prosper, that is, the accused was not at the locus delicti when the offense was committed and it was physically impossible for him to be at the scene of the crime at the approximate time of its commission.[84]

The trial court found that the distance from the house of Silveriano Botona to the scene of the crime was only less than a kilometer and all the accused could hike such distance in less than thirty (30) minutes. Such being the case, the requirement of physical impossibility was not satisfied to exculpate appellants from the murder of the victim. Moreover, the accused were positively identified by Julieta Oliver as the persons who ganged-up his father at the scene of the crime. Against the said positive identification, alibi can not prevail.[85]

Anent the testimonies of Bernandito Lubreo, Prudencio Leyros, and Diosdado Oposa, not an iota of doubt was engendered by their testimonies on the culpability of the accused. That such testimonies remain unrebutted is of no moment. Nowhere in the testimony of Bernandino Lubreo can be detected any statement that points to the culpability of the alleged perpetrators, Marcial and Nicholas Gultian. Contrary to the claim[86] of appellants, the testimony of Bernandino Lubreo did not show the guilt of the Gultians.

There is merit in the Comment by the prosecutor that the testimonies of Prudencio Leyros and Diosdado Oposa appear contrary to ordinary human events. It should be noted that ordinarily, under the circumstances, nobody would wake up another for the sole purpose of telling the latter that they killed somebody, with a threat to kill the person so apprised if the matter told would be revealed to others.

Verily, the Gultians had nothing to gain by telling anybody about the crime. On the contrary, they would just risk its discovery.

WHEREFORE, the appeal under consideration is hereby DISMISSED and the appealed decision, dated April 27, 1994, of the Regional Trial Court, Branch 31, Dapa, Surigao del Norte, in Criminal Case No. 115693 AFFIRMED, with the modification that the award of P10,000.00 for moral and exemplary damages is deleted for want of legal and factual basis. Costs against the appellants.

SO ORDERED

Romero (Chairman), Vitug, Panganiban, and Gonzaga-Reyes, JJ., concur.

[1] Original Record (O. R.) , pp. 88 - 125.

[2] O. R. , pp. 124 - 125.

[3] O. R. pp. 1-2.

[4] Order; O. R., p. 22.

[5] Judgment; Orig. Record, p. 89.

[6] Judgment; O. R., pp. 88 - 95.

[7] Tsn., O. R. pp. 434 - 435.

[8]Tsn; O. R. p. 438.

[9] Tsn; O. R. p. 434.

[10] Id., p. 436 - 438.

[11] Id., pp. 438 - 439.

[12] Id., p. 440.

[13] Id., p. id. 442.

[14] Tsn; O. R., p. 446.

[15] Id., pp. 449 - 450.

[16] Id. pp. 452 - 453.

[17] Id., p. 456.

[18] Id., p. 457.

[19] Id., p. 458.

[20] Id., p. 463.

[21] Id., pp. 368 - 369.

[22] Id., p. 370.

[23] Id., p.379.

[24] Id., p. 382.

[25] Id., p. 383.

[26] Id., p. 554.

[27] Id., p. 555.

[28] Id., p. 558.

[29] Ibid.

[30] Tsn; O. R. , p. 556.

[31] Id., p. 576 - 578.

[32] Id., pp. 579 - 580.

[33] Id., p. 593.

[34] Id., pp. 513 - 514.

[35] Id., pp. 514 - 515.

[36] Id., p. 524.

[37] Id., p. 525.

[38] Id., p. 517 - 518.

[39] Id., p. 519.

[40] Id., p. 521.

[41] Id., p. 533 - 534.

[42] Id., p. 392 - 396.

[43] Id., p. 401 - 402.

[44] Id., pp. 412 - 413.

[45] Id., pp. 413 - 414.

[46] Id., p. 415.

[47] Id., p. 422.

[48] Tsn.; Ocular Inspection; O. R. p. 475.

[49] Id., p. 481 - 482.

[50] Id., p. 473.

[51] Id., p. 483.

[52] Id., p. 488.

[53] Id., pp. 493 - 494.

[54] People vs. Danao 253 SCRA 146, p. 150 - 151 , citing: People vs. Delisa 229 SCRA 35; People vs. Merza, 238 SCRA 283.

[55] Sec. 4, Rule 133, Rules of Court.

[56] 278 SCRA 454.

[57] Supra, p. 467, citing : People vs. Alvero, Jr., 224 SCRA 16, p. 27. (1993); People vs. De la Cruz 229 SCRA 754, 764-765 (1994); People vs. Tabao 240 SCRA 758, 770-771 (1995); People vs. Lagao, G.R. 118457, April 8,

1997 at 11.

[58] Judgment; O. R. , pp. 115 - 116

[59] Id., p. 116.

[60] Id., p. 89.

[61] Id., p. 91.

[62] Id., p. 90

[63] Id., p. 90.

[64] Id., p. 92.

[65] Id., p. 117.

[66] Id., p. 118.

[67] Id., p. 90.

[68] Ibid.

[69]Tsn; O. R. , p. 483.

[70] Judgment; O. R., p. 90.

[71] Ibid.

[72] Ibid.

[73] Judgment; O. R., p.118.

[74] 244 SCRA 467, pp. 476, citing: People vs. Roldan 224 SCRA 536 (1993); People vs. Gerones 193 SCRA 263 (1991); People vs. Natan 193 SCRA 355 (1991); People vs. Umali, 193 SCRA 493; Concepcion vs. Court of Appeals 193 SCRA 586 (1991); People vs. Martinada , 194 SCRA 36 (1991); People vs. Arenas 198 SCRA 172 (1991).

[75] People vs. Abreneca 252 SCRA 54 p. 61, citing: People vs. Calegan 233 SCRA 537 (1994).

[76] Judgment; O. R., p. 104.

[77] People vs. Aaron Bionat 278 SCRA 454, P. 468, citing: People vs. Hubilla 252 SCRA 471; People vs. Landicho 258 SCRA 1 (1996)

[78] People vs. Sumalpong, et al., G. R. No. 124705, 284 SCRA 264, p. 488 [January 20, 1998], citing : People vs. Mallari, 241 SCRA 113; People vs. Solon 244 SCRA 554; People vs. Tatum, Sr. 250 SCRA 313 .

[79] Par. 16, Article 14, Revised Penal Code.

[80] People vs. Paynor 261 SCRA 615, p. 628.

[81] Brief for the Appelle (Rollo, p. 200), at p. 17.

[82] People vs. Timblor G. R. No. 118939 285 SCRA 64, p. 78 [January 27, 1998], citing: People vs. Rodencio Narca, et al., supra; People vs. Deopante G.R. No. 102772, October 30, 1996; People vs. Cabodoc, G.R. No. 118320, October 15, 1996; People vs. Danilo Layno, et al., G. R. No. 110833, November 21, 1996.

[83] *People vs. Cruz* 262 SCRA 237, p. 244.

[84] *People vs. Batulan* 253 SCRA 52, p. 64, citing: *People vs. Kipte* 42 SCRA 198 [1971]; *People vs. Macayan* 126 SCRA 322 [1983]; *People vs. Saguban* 231 SCRA 744 [1994]; *People vs. Cabreros* 244 SCRA 362 [1995].

[85] *People vs. Porras* 255 SCRA 514 P. 525, citing: *People vs. Miranday* 242 SCRA 620 [1995]; *People vs. Claudio* 216 SCRA 647 [1992]; *People vs. Yadao* 216 SCRA 1 [1992]; *People vs. Cabuang* 217 SCRA 675 [1993].

[86] Appellants' Brief; Rollo, p. 89.

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