

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. HILARIO REBAMONTAN ALIAS “AYONG,” ACCUSED-APPELLANT.***G.R. No. 125318. April 13, 1999*

Ponente: PANGANIBAN, J.

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It is an elementary rule in criminal law that where two indivisible penalties are prescribed for an offense and there are neither mitigating nor aggravating circumstances in the commission of the crime, the lesser penalty shall be applied. Article 248 of the Revised Penal Code, as amended, prescribes the penalty range of "reclusion perpetua to death" for murder. There being no generic aggravating circumstance present in the case at bar, the trial court erroneously imposed the death penalty upon the appellant.

**The Case**

Before us for automatic review is the February 8, 1996 Decision[1] of the Regional Trial Court, Branch I[2] of Borongan, Eastern Samar, finding Hilario Rebamontan alias "Ayong" guilty of murder beyond reasonable doubt, for which it sentenced him to death.

The Information[3] dated May 25, 1994, signed by Second Assistant Provincial Prosecutor Rosendo C. Tejero Jr., charged accused-appellant as follows:

"That on April 22, 1994, at about 6:00 o'clock in the evening, at Barangay No. 3, Poblacion San Julian, Eastern Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill and with evident premeditation and treachery, did then and there willfully, unlawfully and feloniously attack, assault, stab and wound PEDRO CAGRADO, JR., with the use of [a] sharp bladed weapon (Depang), which the accused provided himself for the purpose, thereby inflicting injuries upon the latter, which injuries caused the death of Pedro Cagrado, Jr., to the damage and prejudice of the heirs of the victim."

Upon his arraignment on July 18, 1994, accused-appellant, assisted by counsel, pleaded not guilty to the above charge.[4] After trial in due course, the court a quo found him guilty and sentenced him thus:[5]

"WHEREFORE, IN VIEW OF THE FOREGOING FACTS AND CIRCUMSTANCES, Accused HILARIO REBAMONTAN is hereby found guilty of the crime of murder defined and penalized by Section 6, of R.A. No. 7659, otherwise known as 'An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code, and for other purposes.' Accordingly, Accused HILARIO REBAMONTAN is hereby sentenced to suffer the maximum penalty of [d]eath and to indemnify the heirs of PEDRO CAGRADO, JR. the sum of FIFTY THOUSAND (P50,000.00) PESOS, for his death and to pay the cost.

xxx xxx xxx"

xxx xxx xxx"

**The Facts**

### Version of the Prosecution

The solicitor general presents the antecedent facts as follows:[6]

"Around 6:00 in the evening of April 22, 1994, Lucas Calinaya and his neighbors, Maria Nena Aguilar, Raul Mendova and Julia Balbaboco were conversing at the corner of Jacinto and Mabini Street[s], Poblacion, San Julian, Eastern Samar (tsn, November 29, 1994, p. 3; tsn, January 18, 1995, p. 4). About thirty (30) meters away was a basketball court (tsn, November 29, 1994, p. 5). While his attention was towards the direction of the basketball court, Lucas suddenly saw appellant stabbing Pedro Cagrado, Jr. with a small sharp bolo, locally known as 'depang' (tsn, November 29, 1994, p. 3). Appellant was initially positioned behind Pedro, but when the former was about to thrust the bolo, the latter turned around and was hit in the right chest just below his right nipple (ibid., p. 4; tsn, January 18, 1995, pp. 21-22). Pedro was not able to parry the thrust because he was not aware that appellant intended to injure him (tsn, January 18, 1995, pp. 22-23). Appellant used his left hand in stabbing Pedro (tsn, November 29, 1994, p. 4; tsn, August 8, 1995, p. 4).

"Oozing with blood, Pedro ran towards the direction of Lucas and company (tsn, November 29, 1994, pp. 4-5; tsn, January 18, 1995, p. 17; tsn, August 8, 1995, pp. 4-5). Appellant gave chase (tsn, August 8, 1995, p. 4). As Pedro reached the house fence of Lucas, he fell and died (tsn, January 18, 1995, p. 8; tsn, August 8, 1995, p.5). Thereupon, appellant stopped and headed towards the direction of Barangay 3, Campalao, San Julian, Eastern Samar (tsn, January 18, 1995, p. 17). Lucas then frightfully went inside his house (ibid.).

"Meanwhile, Nina Cagrado, Pedro's cousin, informed SPO4 Nandino Doligon, a neighbor, about the incident (tsn, November 27, 1995, p. 37). SPO4 Nandino immediately responded and went to the scene of the incident (ibid., p. 38). He was informed by the people around that appellant was on Lakandula Street, Poblacion, San Julian, Eastern Samar (ibid., pp. 38-39). SPO4 Nandino proceeded there but did not see appellant (ibid., p. 44). Nonetheless, appellant was subsequently arrested on Burgos Street and brought to the municipal police station by SPO4 Nandino (ibid., pp. 40-41).

"On the following day, post-mortem examination of the cadaver of Pedro Cagrado was conducted by Dr. Andy Gimpaya, a medico-legal expert. His Post-Mortem Examination Report revealed that the cause of death was severe hemorrhage in the thoracic cavity due to stab wound 1-1/2 inches penetrating, mid axillary line between 6 to 7 intercostal space with complete fracture of the 7th rib (tsn, July 20, 1995, pp. 2-3)."

### Version of the Defense

On the other hand, accused-appellant narrates the incidents in the following manner:[7]

"xxx [O]n April 22, 1994, [appellant] went to the public market of San Julian, Eastern Samar to sell fish. He left the market at about 6:00 o'clock in the evening and walked towards home. On his way, he met Pedro Cagrado together with Rolando Sabulao. That when Pedro Cagrado, Jr. got near him, the former stabbed him, but he was not hit. Pedro Cagrado, Jr. told him xxx 'Pagpinaca-opay-opay nim, pagpinakasiga-siganim,' in English, 'You are boastful and [a] toughie.' Then, Pedro Cagrado, Jr. stabbed him for the second time which also did not hit him[;] he then drew his 'depang' or sharp weapon used by him in slicing fish at the market, and stabbed Pedro Cagrado, Jr., hitting him. He surrendered to the police authorities after the incident. That Pedro Cagrado, Jr., had [a] grudge against him because one time Pedro Cagrado, Jr., asked permission to drink in his house which he did not grant. (TSN, October 25, 1995, pp. 18-23)."

### Ruling of the Trial Court

In its Judgment, the court a quo took into account the accused-appellant's admission of "having killed Pedro Cagrado [Jr.] in self-defense." This admission, the trial court stated, shifted to the appellant the burden of proving the justifying circumstance mentioned.

Evaluating the evidence proffered by the defense, the trial court held:[8]

"xxx [A]ccused testified that it was the victim Pedro Cagrado, Jr. who unlawfully attacked him on his way

home from the public market. The court is surprised that [the] accused did not even suffer a scratch as a result of the stabbing blows of the victim, assuming accused[']s allegation to be true. The defense has clearly failed to prove by convincing evidence that it was the victim who was the unlawful aggressor.

"xxx This court believes the prosecution that [the] victim was unarmed and if indeed he was armed, [the] accused should have recovered the weapon used by the victim in stabbing him and presented it as evidence to bolster his theory of self-defense."

As to the attendance of the qualifying circumstances of treachery and evident premeditation, the trial court ruled:[9]

"In this case, the attack delivered by the accused to the victim was sudden and Pedro Cagrado, Jr. did not expect that Hilario Rebamontan would attack him. The deceased did not have the slightest suspicion that he would be assaulted. xxx There is therefore the presence of treachery in the killing of Pedro Cagrado, Jr. There is treachery when the offender commits any of the crimes against person[s,] employing means, methods or forms of execution thereof which tend directly and specially to insure its execution xxx without risk to himself arising from the defense which the offended party might take. In this case, the attack was sudden and the victim did not expect [that] the accused [would] end his life [o]n that fateful day.

xxx xxx xxx

"The prosecution alleged evident premeditation as a qualifying circumstance. However, the case is bereft of any indication that accused prepared and planned to kill Pedro Cagrado, Jr. previous to the fatal stabbing. Time and again it has been held by the Supreme Court that evident premeditation cannot be appreciated to qualify a killing to murder in the absence of direct evidence of the planning and preparation to kill when the plan was conceived."

The trial judge refused to credit the appellant with the mitigating circumstance of voluntary surrender, viz.: [10]

"The accused alleged voluntary surrender as a mitigating circumstance. In order that voluntary surrender as a mitigating circumstance be appreciated, it is necessary that it be spontaneous and be made in such a manner that it shows that intent of the accused to surrender unconditionally to the authorities, either because he acknowledge[s] his guilt or he wishes to save the trouble and expenses necessarily incurred in his search xxx. In this case Hilario Rebamontan was picked up by Police Officer Four Nandino Doligon after the latter inquired from eyewitnesses on the same day xxx Pedro Cagrado, Jr. was killed by the accused. The fact alone that Hilario Rebamontan did not resist arrest but peacefully went with the police officer does not mean that he voluntarily surrendered."

Disbelieving accused-appellant's plea of self-defense and appreciating the qualifying circumstance of treachery, the trial court convicted Rebamontan of murder and sentenced him to death.

Hence, this Court's automatic review of the case. [11]

#### Issues

In his Brief, [12] accused-appellant abandons his self-defense theory and simply assails the trial court's (1) appreciation of treachery, (2) disregard of voluntary surrender, and (3) imposition of the death penalty. Thus, he submits:

### "I

THE TRIAL COURT ERRED IN APPRECIATING THE QUALIFYING CIRCUMSTANCE OF TREACHERY IN CONVICTING ACCUSED-APPELLANT OF THE CRIME OF MURDER.

### II

THE TRIAL COURT ERRED IN IMPOSING THE EXTREME PENALTY OF DEATH ON ACCUSED-APPELLANT AND IN NOT TAKING INTO CONSIDERATION THE MITIGATING CIRCUMSTANCE OF VOLUNTARY SURRENDER."

#### The Court's Ruling

The Court finds no generic aggravating circumstance in the commission of the murder. Therefore, the penalty should be reclusion perpetua, not death.

#### First Issue: Treachery

Citing the prosecution witnesses themselves, appellant contends that there was no treachery, because he and his victim were facing each other when the stabbing took place. Hence, the attack could not have been sudden and unexpected.

The solicitor general, on the other hand, admits that the stabbing itself was frontal, but counters that the attack commenced from behind the victim, who was unaware of appellant's criminal design. Had the victim not turned around at that particular moment, his back would surely have been stabbed. He had absolutely no opportunity to parry the blow. These circumstances, according to the government counsel, "demonstrate the treacherous nature of the assault."

There is treachery when the offender commits any of the crimes against persons, employing means, methods or forms in the execution thereof, which tend directly and specially to ensure its execution, without risk to himself arising from the defense which the offended party might make. The essence of treachery is the swiftness and the unexpectedness of the attack upon the unsuspecting and unarmed victim, who does not give the slightest provocation.[13]

Two conditions must concur: (1) the malefactor employs such means, method or manner of execution that ensures his or her safety from the defensive or retaliatory act of the victim; and (2) such means, method or form of execution is consciously and deliberately adopted by the accused.[14] We find both conditions present in the case at bar.

The following is the graphic testimony of Eyewitness Lucas Calinaya as to what he witnessed on the fateful day Victim Cagrado Jr. was stabbed by accused-appellant:[15]

"Q:

You stated in your affidavit executed before the Hon. Crisanto B. Afable that you were about 40 meters [from] the place where Pedro Cagrado, Jr. was allege[d]ly stabbed by Hilario Rebamontan, is that correct?

A: Yes, sir.

Q:

Can you demonstrate to the Hon. Court, how far is the distance of 40 meters? [(JA distance of 30 to 35 meters as pointed to by the witness.)]

Q: Was there any object that obstructed you from seeing the two (2)?

A: None, because that is a municipal road.

xxx xxx xxx

Q: Let's go back to the stabbing, how many times was he stabbed by Hilario Rebamontan?

A: Once.

Q: Did you hear any noise between the two (2) while you were with the group?

A: I did not hear of any noise between the two (2).

xxx xxx xxx

Q:

Because you know the assailant Hilario Rebamontan and also the victim, will you please tell the court, when Hilario Rebamontan was about to stab the victim Pedro Cagrado, Jr. in your honest observation, was the victim Pedro Cagrado, Jr. aware that he was going to be stabbed by Hilario Rebamontan?

A:

To my observation the victim [did] not know that he was going to be stabbed by Hilario.

xxx xxx xxx

Q:

Now in your personal observation because you are not a relative of the aggrieve[d] party and your interest is to tell the truth, will you please tell the court, why did you make the conclusion or opinion that the victim Pedro Cagrado, Jr. was not aware that he was going to be stabbed by the herein assailant?

A:

This respondent Hilario Rebamontan just came from the sari-sari store of one Sinoy Robiene, and he passed by in front of the victim Pedro Cagrado, Jr., then when he was at the back of Pedro Cagrado, Jr. and at the moment Pedro was turning and facing him[,] immediately Hilario delivered [the] stabbing blow.

Q:

Now, you said that the herein respondent just came from the sari-sari store of Sinoy Robiene[;] was he already bringing with him his alleged weapon that was used in stabbing the victim?

A:

I did not notice that the respondent was bringing with him already that dipang.

Q: What was your approximate distance to the alleged incident?

A: Approximately 40 meters.

Q:

So [from] that distance you can not actually see the weapon that was used by the accused in stabbing the victim, could I get it from you, Mr. Witness?

A: It was clear[,] even [to] the one playing basketball it [was] clear.

Q:

Now, could I take it from you that when the respondent delivered or stabbed the victim, the victim was already facing xxx the assailant?

A: Yes, the victim was already facing the assailant when he was stabbed.

Q:

In your personal observation, Mr. Calinaya[,] was the stabbing blow delivered by the respondent Hilario Rebamontan sudden?

A: Yes, sir[,] that was sudden.

Q:

In your personal observation when you saw the incident, did Pedro Cagrado, Jr. parry the stabbing blow of Rebamontan?

A:

The victim did not parry.

Q:

Why is it that the victim was unable to parry the stabbing blow of Hilario Rebamontan?

A:

The victim [did] not know that he was going to be stabbed."

Clearly, Cagrado Jr. had nary an inkling that a death blow was looming on him. Rebamontan inconspicuously walked first in front of him, without any manifestation of his criminal plan. Only when the assailant got behind the unsuspecting victim did he commit his murderous act. Obviously, such a wily scheme of assault was deliberately adopted to ensure its success and to give no chance to the victim to elude it, much less to retaliate. The fact that Cagrado Jr. was facing him at the same moment as the latter's attack did not erase its treacherous nature. Even if the assault were frontal, the fact that it was sudden or totally unexpected, thus giving the victim no opportunity at all to defend himself or to retaliate, definitely points to the presence of treachery.[16]

### Second Issue: Voluntary Surrender

For voluntary surrender to be considered a mitigating circumstance, the following requisites must concur: (1) the offender has not actually been arrested; (2) the offender surrenders to a person in authority or to the latter's agent; and (3) the surrender is voluntary.[17]

In the instant case, Police Officer Nandino Doligon relates how the authorities took appellant into custody:[18]

"Q So when you arrived [at] the scene you were only, you only saw the victim, is that correct?

A. There were many people there.

Q. And then after that what did you do?

A.

I asked the people who stabbed Junior, meaning Pedro Cagrado, even if I was told already by Niña Cagrado. Then they informed me that it was Hilario Rebamontan and when I asked [where was] Hilario Rebamontan[,] they answered pointing to Lakandula Street, poblacion, San Julian, Eastern Samar.

xxx xxx xxx

ATTY. MOSCARE:

Q. Is that to the direction of the municipality?

A. Going north.

Q. And what did you do when you were informed?

A.

I went there to that Lakandula Street. When I reached Lakandula Street[,] Hilario Rebamontan was not there and [when] I asked information if they saw Ayong, the people pointed to Burgos Street also in the poblacion of San Julian, Eastern Samar.

xxx xxx xxx

COURT:

Is that Burgos Street going to the municipal hall of San Julian?

A.

To the direction of the National highway but when I saw Hilario Rebamontan he was already [i]n the direction

going to the north.

Q. What did you do when you saw him?

A.

I got near him about 10 meters away then I turned towards the direction [of] the highway and I called him saying, 'Paniya,' as we [were] friends[;] I called him twice. When he looked at me he at once got near me.

Q. What did he inform you when he came near you?

A. I first told him[,] according to the information of the people you stabbed Junior, is that so?

Q. What was his response?

A. He answered, yes, I was the one who stabbed Pedro Cagrado.

Q.

And then you brought him to the municipality?

PROSECUTOR:

I think he is cross-examining the witness.

A. First I got the weapon which was tucked [in] his waist.

ATTY. MOSCARE:

Q. Did you inform him that you [were] arresting him?

A. Yes, sir.

Q. What was the information you relayed to him?

A. I said, 'Paniya,' I am arresting you.

Q. What was his action or response to you when you said, you were arresting him?

A.

Why is it that it is you.

Q. What was your response when he said that?

A. I got his left hand and placed the handcuffs.

Q. Then you brought him immediately to the municipal headquarters?

A. Yes, sir."

It is clear from the above circumstances that it was the police officer who went looking for accused-appellant immediately after obtaining information from eyewitnesses as to who had perpetrated the crime. The mere fact that he did not resist his arrest or deny his criminal act cannot be equated with voluntary surrender. His arrest was already imminent. To be voluntary, a surrender must be spontaneous and deliberate; that is, there must be an intent to submit oneself unconditionally to the authorities.[19]

#### Third Issue: Proper Penalty

Even if the killing was qualified with treachery, without the attendance of any other aggravating circumstance, the death penalty cannot be imposed upon the appellant. In murder, the imposition of death is not automatic. The law prescribes the penalty range of "reclusion perpetua to death." [20] It is an elementary rule in criminal law that where two indivisible penalties are prescribed for an offense, and there are neither mitigating nor aggravating circumstances in the commission of the crime, the lesser penalty shall be applied. [21] The solicitor general is correct in asserting that the trial court erred in imposing the death sentence upon appellant. [22]

WHEREFORE, the assailed Decision is hereby **AFFIRMED**, with the **MODIFICATION** that appellant is sentenced to reclusion perpetua, instead of death. No pronouncement as to costs.

#### **SO ORDERED.**

Davide, Jr., C.J., Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Quisumbing, Purisima, Pardo, Buena, Gonzaga-Reyes, and Ynares-Santiago, JJ., concur.

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[1] Captioned "Sentence," not "Decision."

[2] Presided by Judge Celso F. Lorenzo Sr.

[3] Rollo, p. 10.

[4] Certificate of Arraignment; records, p. 35.

[5] "Sentence," p. 6; Rollo, p. 71.

[6] Brief for the Appellee, pp. 3-6, signed by Solicitor General Ricardo P. Galvez, Assistant Solicitor General Amy C. Lazaro-Javier and Associate Solicitor Jay Angelo N. Anastacio; Rollo, pp. 101-104.

[7] Brief for Accused-Appellant, pp. 4-5, signed by Atty. Pedro B. Baguilat Jr. of the Public Attorneys Office; Rollo, pp. 57-58.

[8] Assailed Decision, pp. 4-5; Rollo, pp. 69-70.

[9] Ibid.

[10] Ibid., p. 5.

[11] This case was deemed submitted for resolution upon issuance by this Court of its February 23, 1999 Resolution dispensing with the filing of a reply brief, per appellant's Manifestation dated January 29, 1999, stating that he did not intend to file such brief.

[12] Rollo, pp. 54-64.

[13] *People v. Pallarco*, GR No. 119971, March 26, 1998; *People v. Molina*, GR Nos. 115835-36, July 22, 1998; *People v. Sumalpong*, 284 SCRA 464, January 20, 1998; *People v. Navarro*, GR No. 129566, October 7, 1998; *People v. Dela Cruz*, GR Nos. 109619-23, June 26, 1998; *People v. Ombrog*, 268 SCRA 93, February 12, 1997; *People v. Baydo*, 273 SCRA 526, June 17, 1997; *People v. Cayabyab*, 274 SCRA 387, June 19, 1997.

[14] *People v. Sumalpong*, *ibid.*; *People v. Dela Cruz*, *ibid.*

[15] TSN, January 18, 1995, pp. 6, 10, 20-23.

[16] *People v. Tampon*, 258 SCRA 115, July 5, 1996; *People v. De Manuel*, 263 SCRA 49, October 9, 1996; *People v. Dinglasan*, 267 SCRA 26, January 28, 1997; *People v. Dansal*, 275 SCRA 549, July 17, 1997; *People v. Chavez*, 278 SCRA 230, August 21, 1997; *People v. Real*, 242 SCRA 671, March 24, 1995; *People v. Saliling*, 249 SCRA 189, October 10, 1995.

[17] *People v. Sumalpong*, *supra*, p. 488; *People v. Medina*, 286 SCRA 44, February 6, 1998.

[18] TSN (SPO4 Nandino Doligon), November 27, 1995, pp. 38-40.

[19] *People v. Acaya*, 163 SCRA 768, 775, July 29, 1988; *People v. Camahalan*, 241 SCRA 558, 572, February 22, 1995.

[20] Art. 248, Revised Penal Code as amended by §6, RA 7659.

[21] Art. 63, Revised Penal Code.

[22] Appellee's Brief, p. 13; rollo, p. 111.

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