

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. PO3 GILDO B. PELOPERO PNP, ALIAS “EDONG,” PO3 ERWIN L. FERNANDEZ PNP, MAMERTO L. PELOPERO, ALIAS “MAMIE,” APPELLANTS.

G.R. No. 126119. October 15, 2003

Ponente: AZCUNA, J.

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AZCUNA, J.:

s is an appeal from the decision of the Regional Trial Court of Iloilo City, [1] in Criminal Case No. 44764, dated April 15, 1996, convicting appellants of murder.

On March 29, 1995, appellants PO3 Gildo B. Pelopero (Edong), PO3 Erwin L. Fernandez (Erwin), and Mamerto L. Pelopero (Mamie), together with SPO1 Orlando L. Pelopero and SPO1 Cresenciano N. Patriarca, were charged with Kidnapping with Murder under an information, which reads:

That on or about June 1, 1992, in the Municipality of Pototan, Province of Iloilo, Philippines, and within the jurisdiction of this Court, the above-named five (5) accused, conspiring, confederating and mutually helping one another, without any authority whatsoever, did then and there willfully, unlawfully and feloniously kidnap one NILO FAJARDO, alias "Bornil," by forcing him to board a police patrol car and [he] was brought to Brgy. Buenavista, Dueñas, Iloilo, where the above-named five accused, in pursuance of their conspiracy, with evident premeditation, treachery and/or abuse of superior strength and with decided purpose to kill, did then and there criminally attack, assault and strike several times with a piece of wood or other blunt object said Nilo Fajardo, alias "Bornil," thereby causing his death and [he] was thereafter buried in a well at Brgy. Calawinan, Dueñas, Iloilo.

CONTRARY TO LAW. [2]

Upon arraignment on April 18, 1995, appellants and their co-accused, assisted by their respective counsel, entered pleas of not guilty. [3] Trial thereafter ensued and the court a quo rendered the assailed decision convicting Edong, Erwin and Mamie of murder, while acquitting SPO1 Orlando L. Pelopero and SPO1 Cresenciano N. Patriarca. The dispositive portion of said decision states:

WHEREFORE, the Court hereby finds the accused PO3 GILDO PELOPERO alias "Edong," PO3 ERWIN FERNANDEZ and MAMERTO PELOPERO alias "Mamie" GUILTY beyond reasonable doubt of the crime of MURDER defined and penalized under Article 248 par. 1, of the Revised Penal Code and hereby sentences the said accused, each to suffer the penalty of RECLUSION PERPETUA and to indemnify, jointly and severally, the heirs of the deceased Nilo Fajardo alias "Bornil" the sum of P50,000.00 for his death, without subsidiary imprisonment in case of insolvency, together with the accessory penalties provided for by law and to pay the costs.

On reasonable doubt, the accused SPO1 ORLANDO L. PELOPERO alias "Andok" and SPO1 Cresenciano Patriarca alias "Nono" are hereby ACQUITTED of the offense charged and their immediate release from

detention is hereby ordered, unless they are held on other charge or charges.

SO ORDERED. [4]

The evidence of the prosecution consists mainly of the testimonies of eyewitnesses German Lorca, Jr., alias "Ana" (German) and Crispin Liza (Crispin), who were both admitted into the Witness Protection Program as state witnesses. [5] The court a quo summarized their testimonies as follows:

German Lorca, Jr., [6] testified that on June 1, 1992, at about 5:00 p.m., while conversing with Crispin in front of his house at Brgy. Buenavista, Dueñas, Iloilo, he heard a voice shouting "Pare Ana, dali anay diri" (Pare Ana, come here for a while). He recognized the voice to be that of Edong, whom he personally knew to be a policeman from Dueñas. When he and Crispin looked to the direction where the shout came from, they saw a police patrol jeep parked along the road.

The two approached the jeep and saw Edong standing beside Erwin, whom German likewise personally knew to be a policeman of Dueñas. In front of Edong and Erwin, a bloodied man was sitting on the ground with his hands tied up behind him. Three persons were inside the patrol jeep, namely, SPO1 Orlando Peloper, SPO1 Cresenciano Patriarca and Mamie, a Barangay Captain whom German had personally known for a long time.

From a distance of about 5 meters, German saw Edong strike the bloodied victim at the back of his head with a piece of wood, causing the victim to fall to the ground. Edong then asked German of the location of the nearest well and the latter pointed to the ricefield. Meanwhile, Mamie while seated in the jeep, yelled: "You make it faster and bring him to the well." Edong took a bamboo pole from a nearby fence on which he and Erwin tied the victim's lifeless body. Edong and Erwin then ordered German and Crispin to carry the body to the well. Out of fear, they followed the orders of the policemen, who were armed at the time. It was at this point that German asked who the victim was, to which Edong replied, "Bornil Fajardo." Carrying both ends of the pole on their shoulders and while being followed by Edong and Erwin, German and Crispin walked to the well, which was about half a kilometer away.

When the four reached the well, they untied the victim from the pole and upon Edong's order, German, Crispin, and Erwin dropped the body, head first, into the well. The rope that was used to tie the victim was also thrown into the well. The four then covered the well with soil, using a spade which Erwin brought from the jeep. Thereafter, Edong warned German and Crispin not to tell anybody what had transpired or something would happen to them. The two policemen then returned to the jeep while German and Crispin went home.

German did not tell anyone about the incident, until sometime in November 1994, when he reported the incident to the office of the Philippine National Police Criminal Investigation Service (PNP-CIS) at Camp Delgado, Iloilo City.

The testimony of Crispin Liza [7] corroborated the narration of German. He also identified in court the picture of Nilo Fajardo alias "Bornil," as the victim whom he witnessed get murdered and whom he and German buried in the well out of fear of the policemen. Of the five accused, he was familiar only with the three appellants. Like German, he reported the incident only in November 1994, after the death of a distant relative, Regie Italia, a CIS agent. He kept silent for more than two years for fear of reprisal from the accused.

SPO3 Antonio Dollete, [8] investigator of the CIS command, witnessed the exhumation of the human skeletal remains from inside a well in Brgy. Calawinan, Dueñas, on November 12, 1994. He and the other members of his command also recovered a blue shirt, a pair of white shorts, underwear, and a plastic rope. The skeletal remains were placed in a carton, and submitted to the National Bureau of Investigation (NBI) for examination. He identified several pictures showing the exhumation and the items recovered from the well, the identification by

the victim's sister of the recovered clothes of her brother, and the examination of the recovered skeletal remains by Dr. Ricardo Jaboneta of the NBI. He also confirmed having taken the statements [9] of German and Crispin on November 21, 1994.

Dr. Ricardo Jaboneta, [10] the NBI Medico-legal Officer who conducted the osteological examination of the exhumed skeletal remains, testified to confirm his findings as indicated in his Official Report [11] dated December 5, 1994. In said report, he stated, among other things, that the skeletal remains belonged to a 25 to 30-year-old man who had been dead for approximately 1½ to 3 years. He also found a linear skull fracture behind the victim's ear, which could have been caused by a strong external force, such as a hard object striking the head. He thus opined that the cause of death could have been "traumatic shock secondary to linear skull fracture."

Elsa Fajardo Suay, [12] elder sister of the victim, confirmed the pictures taken of her when she identified the recovered blue shirt, white shorts and underwear of her brother. She testified that she resided with the victim and that she used to do his laundry, for which reason she was able to identify his clothes. She recalled seeing the victim wearing the said attire in the morning of June 1, 1992, when the latter left for his monthly report to the parole officer. It was the last time she saw her brother alive. She further stated that the victim was 27 years old on that day.

Ella Palmaira, [13] a Probation and Parole Officer, testified that the victim was granted conditional pardon on March 8, 1991. She last saw the victim in the morning of June 1, 1992, when he reported to her together with the other parolees. When the victim never reported again thereafter, she conducted a home visit in his residence. Unable to locate him, she reported the victim to the Board of Pardon and Parole for violation of his parole.

Pilar Patriarca, [14] a former parolee like the victim, testified that the last time she saw the victim was in the morning of June 1, 1992, when she and the victim reported at the same time to the probation officer in the municipal building of Pototan, Iloilo. Later, however, she partly recanted her testimony when she declared that she reported on June 2, and not on June 1, 1992.

Appellants, for their part, all denied having anything to do with the death of the victim. They all claimed that the filing of the case against them was spawned by the death in October 1994 of a certain Regie Italia, a member of the PNP-CIS Command. They averred that the CIS suspected the Peloperos of involvement in Italia's murder, hence the present case was filed against them in retaliation. Each of them interposed the defense of alibi, and adopted all the evidence presented by each other.

PO3 Erwin Fernandez [15] testified that he was not on duty on June 1, 1992, and so he spent the entire day in his residence in Poblacion, Dueñas, 5 kilometers away from Brgy. Calawinan. To support his alibi, he presented documents issued by the Dueñas Police Station certifying that he was off-duty on said date.

He denied knowing either of the eyewitnesses. He alleged that his attempt in the past to serve a warrant of arrest on German must have motivated the latter to implicate him in this case.

He further averred that on November 20, 1994, he and Edong were ordered by their Chief to report to the PNP Provincial Command Headquarters at Sta. Barbara, Iloilo, where they were confronted by CIS members led by Col. Paronia, who slapped and accused them of killing CIS Agent Regie Italia.

PO3 Gildo Pelopero [16] testified that on June 1, 1992, he was on duty as a radio operator of PNP Dueñas from 8:00 a.m. to 8:00 a.m. the next day. He denied having left the vicinity of his workplace at any time throughout his shift. To support his defense of alibi, a fellow PNP officer from Dueñas testified to verify the submitted Personnel Detail Book, which indicated Edong's duty on the said date. Edong also presented two typewritten radio messages which he personally received while on duty, one received at 9:10 a.m. and the other at 11:00 a.m. He further

declared that Brgy. Calawinan is about five kilometers away from his workplace in Poblacion, and is accessible by passenger jeepneys.

In corroboration of Erwin's testimony, he testified that they were subjected to a tactical interrogation by the CIS led by Col. Paronia, who maltreated and accused them of killing CIS Agent Italia. He added that Col. Paronia repeatedly told him that he was unlucky that his name was Pelopero.

He, too, denied knowing any of the eyewitnesses. He alleged that he only knew German by name, as he recalls attempting to serve upon the latter a warrant of arrest sometime in 1988. He claims that his previous attempt to arrest German must have angered the latter, to the point of implicating him in this case.

Mamerto Pelopero, [17] then the Barangay Captain of Brgy. Purog, Dueñas, testified that on June 1, 1992, he spent most of his day at the Session Hall of Dueñas. As he was the president of the Association of Barangay Captains of Dueñas, he presided over the scheduled meeting for that day which started at 9:30 a.m. and ended at 3:00 p.m. After the meeting, he and some members stayed until past 6:00 p.m., discussing some of the priority projects of the association. He thereafter left for home at around 6:30 p.m. To support his alibi, a member of the association testified that Mamie indeed presided over the meeting from 9:30 a.m. until about 3:30 p.m. The minutes of the meeting showing Mamie's attendance was also submitted in evidence. Mamie further stated that it only takes 30 minutes aboard a passenger jeepney, or 20 minutes aboard a private vehicle, to go to Brgy. Calawinan from Poblacion.

He admitted knowing German, whom he met one time in the cockpit that he operated. German implicated him allegedly because he had previously assisted in effecting the former's arrest.

While acquitting SPO1 Orlando L. Pelopero and SPO1 Cresenciano N. Patriarca on reasonable doubt regarding their participation, the trial court found the three appellants guilty of murdering the victim. It upheld the positive identification made by the prosecution witnesses and rejected appellants' defense of alibi. It further found unconvincing the imputation of ill motive on the CIS officers and the eyewitnesses.

Hence the instant appeal.

Appellant Edong assigns the following as errors: [18]

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GIVING CREDENCE AND RELYING ON THE INCREDIBLE, INCONSISTENT AND CONFLICTING TESTIMONIES OF WITNESSES GERMAN LORCA, JR., AND CRISPIN LIZA.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED APPELLANT PO3 GILDO PELOPERO BEYOND REASONABLE DOUBT OF THE CRIME OF MURDER.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISREGARDING THE DEFENSE OF ALIBI DESPITE WEAKNESS OF PROSECUTION'S EVIDENCE.

Appellant Erwin for his part submits that: [19]

I.

THE TRIAL COURT ERRED IN HOLDING THAT THE TESTIMONIES OF MAIN PROSECUTION WITNESSES GERMAN LORCA, JR., AND CRISPIN LIZA ARE ENTITLED TO FULL FAITH AND CREDIT.

II.

ASSUMING, ARGUENDO, THAT THE TESTIMONIES OF THE MAIN WITNESSES FOR THE PROSECUTION ARE ENTITLED TO FULL FAITH AND CREDIT, THE TRIAL COURT ERRED IN NOT FINDING THAT ACCUSED-APPELLANT ERWIN FERNANDEZ CAN, AT MOST, BE HELD LIABLE ONLY AS AN ACCESSORY AFTER THE FACT TO MURDER COMMITTED WITHOUT THE ATTENDANCE OF THE GENERIC AGGRAVATING CIRCUMSTANCE OF CRUELTY.

And, lastly, appellant Mamie [20] avers that:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN RELYING ON THE INCREDIBLE, UNBELIEVABLE, INCONSISTENT AND CONFLICTING TESTIMONIES OF GERMAN LORCA, JR., AND CRISPIN LIZA.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ITS FINDING THAT ACCUSED-APPELLANT MAMERTO PELOPERO WAS A PRINCIPAL BY INDUCEMENT AND A CO-CONSPIRATOR IN THE KILLING OF NILO FAJARDO ALIAS "BORNIL."

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED-APPELLANT MAMERTO PELOPERO BEYOND REASONABLE DOUBT FOR THE CRIME OF MURDER.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DISREGARDING THE DEFENSE OF ALIBI/DENIAL DESPITE WEAKNESS OF PROSECUTION'S EVIDENCE.

Consolidating the foregoing, the Court is called upon to determine whether or not the trial court was correct in finding the evidence of the prosecution sufficient to prove appellants' guilt beyond reasonable doubt, and in rejecting appellants' respective defense of alibi.

The resolution of this appeal hinges on the credibility of the prosecution's witnesses, particularly, the eyewitnesses. Appellants seek to discredit the testimonies of German and Crispin, whom they claim to be unreliable and untrustworthy.

Appellants make much of the fact that it took German and Crispin more than two years to report the crime to the authorities. They claim that such delay has impaired the two witnesses' credibility. They likewise question Crispin's explanation that the latter feared reprisal from appellants by pointing out his testimony where he

admitted never having met any of appellants after June 1, 1992.

Indeed more than two years had elapsed before German and Crispin reported the crime to the authorities. The Court, however, takes judicial notice of the natural reticence of most people to get involved in a criminal case. [21] It is understandable for the witnesses to fear for their safety, especially in this case which implicated a barangay captain and four policemen in the area where the witnesses resided. The involvement of these authorities expectedly caused the witnesses' apprehension and distrust of the police. These factors, and the fact of the witnesses' fear of being implicated for their participation in the burial of the victim, adequately justify the delay in reporting, notwithstanding their non-interaction with appellants after the incident.

In a further attempt to cast doubt on the eyewitnesses' testimonies, appellants aver that German and Crispin were impelled by an ill motive to concoct the case against them. Edong and Erwin recounted that they once attempted to serve a warrant of arrest against German, while Mamie claimed having coordinated with the other barangay captains to assist in the service of said warrant. Given German's grudge against them, appellants allege that German and Crispin allowed themselves to be used by the CIS to implicate them in this case. They add that the CIS had suspected the Peloperos of killing CIS Agent Italia, who was ambushed just a month before the case was initiated against them.

The court a quo ably disposed of these arguments, as follows:

The court, however, finds this imputation of motive on the part of the CIS woefully unconvincing. For, if the CIS wanted to concoct a case against the accused, why not directly charge them with the killing of CIS member Regie Italia, utilizing as witnesses for the said purpose German Lorca, Jr., and Crispin Liza? After all, according to the accused, the CIS people already had in mind the Peloperos as the ones responsible for the killing of Italia. Why resort then to another incident involving another victim, Bornil Fajardo?

By the same token, if German Lorca, Jr., has an axe to grind, so to speak, against the accused barangay captain and policemen of Dueñas...why did he not just implicate them to the ambush-slay of Regie Italia? Parenthetically, it is quite illogical for German Lorca, Jr., to come out in the open and testify against the accused if he is wanted for cattle-rustling or for any crime for that matter. Note that there is no record of any case or any warrant of arrest against German Lorca, Jr., presented in court. Moreover, there is another witness in the person of Crispin Liza who has identified the three accused. No improper motive has been shown as to why this witness should testify falsely against them. [22]

Moreover, the Court notes that Edong declared that the alleged attempt to arrest German happened way back in 1988, six years before the witness reported the crime to the authorities. Appellants' attempt to impute ill motive on German based on this alleged incident, which occurred too long ago, fails to convince.

Appellants also seek to discredit the eyewitnesses' testimony by pointing out the trial court's finding of inconsistency in the description of the jeep they allegedly used. Appellants harp on the fact that, contrary to Crispin's testimony that the patrol jeep had the word "Pototan" on its hood, it was proven by defense witnesses that the Dueñas Police Station did not have such a jeep as described.

The aforesaid contradiction does not render Crispin's entire testimony incredible or barren of probative weight, as it refers only to a minor matter that does not touch upon the elements of the crime committed. Inconsistencies in the testimony of witnesses when referring only to minor details and collateral matters do not affect the substance of their declaration, their veracity, or the weight of their testimony. [23] It must be borne in mind that human memory is not as unerring as a photograph and that a person's sense of observation is impaired by many factors. [24] It is significant to add that the witnesses in this case are testifying on an incident that happened more than three years ago.

As found by the trial court, said discrepancy at best only served to weaken the identification of SPO1 Cresenciano Patriarca and SPO1 Orlando Pelopero who were seen only while seated inside said vehicle. It cannot stand to benefit appellants herein, who, unlike the two acquitted policemen, did something more than just sit inside the vehicle. In a resolution, the lower court clarified that, "xxx the fact that the Pototan PNP has no Ford Fiera jeep in its Police Force, does not necessarily exclude the presence of a jeep and of the accused at the scene of the crime. The finding of the [c]ourt simply means that another jeep was used by the accused in carrying out their common criminal objective." [25]

Therefore, this minor discrepancy notwithstanding, the rest of Crispin's eyewitness account remains credible.

The veracity of the eyewitnesses' testimonies is further bolstered by the fact that their accounts coincided with the physical evidence at hand. Based on the report of German and Crispin, the skeletal remains of a man whose descriptions matched that of the victim were exhumed from inside the well they had pointed to. Dr. Jaboneta's findings, particularly on the skull fracture indicating the probable cause of death as a strike at the victim's head by a hard object, and on the length of time that the victim could have been dead, dovetailed with the eyewitnesses' testimonies. The eyewitnesses' description of the victim and identification in court of the latter's picture to establish his identity, also drew support from the testimonies of Dr. Jaboneta and Elsa Fajardo Suay, the victim's sister who identified the clothes recovered from the well.

Moreover, the Court puts emphasis on the court a quo's observation that the two witnesses testified in a clear and straightforward manner. [26] Case law has it that the findings of fact of the trial court, its calibration of the collective testimonies of the witnesses, its assessment of the probative weight of the evidence of the parties as well as its conclusions anchored on said findings are accorded by the appellate court high respect, if not conclusive effect, because of the unique advantage of the trial court of observing at close range the conduct, demeanor and deportment of the witnesses as they testified, unless the trial court ignored, misunderstood, or misinterpreted cogent facts and circumstances of substance which if considered would alter the outcome of the case. [27] After carefully reviewing the records of this case, the Court finds no cogent reason to overrule the court a quo's ruling on the credibility of the two eyewitnesses.

Appellants next question the sufficiency of the evidence to prove the finding of conspiracy. They aver that the evidence lacked the required overt acts to establish appellants' conspiracy in killing the victim.

The rule is that conspiracy may be proved by direct or circumstantial evidence. [28] In the absence of direct proof thereof, as in the present case, it may be deduced from the mode, method, and manner by which the offense was perpetrated, or inferred from the acts of the accused themselves, when such acts point to a joint purpose and design, concerted action, and community of interest. As appellants correctly argue, it is necessary that a conspirator should have performed some overt act as a direct or indirect contribution in the execution of the crime planned to be committed. [29] The Court emphasizes, however, that said overt act may consist of active participation in the actual commission of the crime itself, or it may consist of moral assistance to his co-conspirators by being present at the commission of the crime, or by exerting moral ascendancy over the other co-conspirators. [30]

In the case at bar, the court a quo found the following circumstances showing appellants' joint purpose and design in the execution of the crime:

1)

The accused were at the crime scene together with the victim who was then bleeding and with both hands tied;

2)

PO3 Gildo Pelopero, in the presence of his co-accused, struck the victim with a piece of wood, hitting him on the head and causing him to fall on the ground;

3)

Mamerto Pelopero shouted to PO3 Gildo Pelopero and PO3 Erwin Pelopero to hurry up and bring the victim to the well;

4)

PO3 Gildo Pelopero and PO3 Erwin Fernandez, with the help of witnesses German Lorca, Jr. and Crispin Liza, tied the victim to a bamboo pole and carried him to the well where he was dumped and buried. [31]

In addition to the foregoing, as shown from the records, a spade which was used to bury the victim was brought by appellants to the crime scene. Right after the victim was struck dead, Erwin, without any instruction from the group, brought it out from the vehicle and carried it to the well. After covering the well, Edong and Erwin simultaneously left the crime scene and returned to the patrol vehicle where Mamie waited.

Clearly, the foregoing acts show unanimity in design, intent, and execution of the attack on the part of appellants. They performed specific acts with closeness and coordination as unmistakably to indicate a common purpose and design to bring about the death of the victim. Conspiracy among appellants was thus established with moral certainty. All the conspirators are therefore answerable as co-principals regardless of their degree of participation, for in the contemplation of the law, the act of one becomes the act of all. It matters not who among the accused inflicted the fatal blow on the victim. [32]

In a desperate attempt at acquittal, appellants contend that the trial court erred in not giving credence and probative weight to their defenses of alibi.

Jurisprudence has it that the defense of alibi is one of the weakest of defenses in criminal prosecution because the same is easy to concoct through relatives, friends and even those not related to the offender. [33] For alibi to prosper, it is not enough for appellants to prove that they were somewhere else when the crime was committed. They must also prove that they could not have been physically present at the scene of the crime or its immediate vicinity at the time of its commission. [34]

In the case at bar, all three appellants alleged that they were in the Poblacion of Dueñas the whole day of June 1, 1992. Mamie claimed that he was in a meeting in the Session Hall of the Municipal Building. Edong declared that he was on duty as radio operator in the police station, while Erwin claimed that he was home the whole day. It is to be noted, however, that as testified to by the defense, the distance between the Poblacion of Dueñas and Brgy. Calawinan is about 5 kilometers and that it is negotiable in 30 minutes aboard a passenger jeepney, or even in 20 minutes if a private vehicle is used. Under these circumstances, therefore, the required physical impossibility of being present at the crime scene has not been properly demonstrated by appellants. Their defense of alibi, therefore, cannot prosper.

Moreover, we find appellants' alibis unsupported by reliable and independent evidence. Mamie's supporting evidence, particularly the minutes of the meeting and the corroborating testimony of a colleague, could easily be fabricated. Equally unconvincing are the alibis of Erwin and Edong, as they are likewise bereft of unbiased proof. Edong submitted copies of the messages he allegedly received while on duty, which notably were received at 9:10 a.m. and 11:00 a.m., much earlier than the time of the commission of the crime. The certification issued by his coworker attesting to his duty on June 1, 1992, aside from being easily fabricated, does not suffice to prove the impossibility of his leaving his workplace in the afternoon of that day.

The positive identification of appellants by the eyewitnesses further weakens appellants' defenses of alibi. Both eyewitnesses had a good look at Erwin and Edong. From a distance of less than five meters, they actually witnessed Edong strike the victim while Erwin stood by. They walked with the two appellants towards the well, where they all buried the victim. In addition, appellants were familiar to Crispin and German, the latter having personally known the two policemen since the time they joined the police force. The identification of Edong and Erwin as participants in the crime was therefore well established.

Mamie, on the other hand, questions Crispin's testimony identifying him as one of the conspirators. He draws emphasis on a portion of the aforesaid testimony, where Crispin faltered upon being asked about Mamie's alleged utterance ordering the other two appellants to hurry up in bringing the victim to the well. Said portion is quoted as follows:

Q.

And am I correct to say, Mr. Liza, that since you have not heard any of the voices of the three, Andok Pelopero, Mamie Pelopero, and Patriarca before June 1, 1992, you are not certain whose voice that was saying, "dali-a ninyo na"?

A.

I am not so certain whose voice that was.

Court: (To the witness)

Q.

Why is it that during your direct testimony, you said that you heard that voice coming from Mamie Pelopero? And now, you are telling the Court that you are not so certain? Which is correct now?

A.

The voice was that of Mamie but I am not so sure whether it was his. [35]

Upon redirect examination, Crispin clarified his aforecited statement, as follows:

Q.

Now, in the cross examination of Atty. Bedona, you were asked by Atty. Bedona a question about the voice you heard which according to you [was] that of Mamerto Pelopero telling you to hurry up and in the same question, you answered, you are not sure if the voice was that of Mamerto Pelopero. Which is correct now?

xxx xxx xxx

A.

When we arrived in the house of German Lorca I asked German Lorca whose voice that was.

Q.

And what did German Lorca tell you?

A.

He said [that] it was the voice of Mamerto Pelopero. [36]

It is therefore clear that at the time of the utterance, he was unable to recognize the voice, considering that he did not know Mamie personally. He was only able to verify, through German, who was well-acquainted with said

appellant. Assuming that Crispin's account failed to establish the identification of Mamie, German's categorical declaration of said appellant's presence and utterance sufficiently proved the latter's participation. It is to be noted that German testified that he had personally known Mamie since childhood and had even worked for the latter for a time. He was thus able easily to recognize Mamie's voice upon hearing the aforementioned utterance. The testimony of a single eyewitness, if positive and credible, is sufficient to support a conviction. [37]

The court a quo correctly determined the crime committed as murder, and not kidnapping with murder, since the elements of kidnapping were not established. Treachery was present, as evidence showed that the victim was suddenly struck at the back of his head with a piece of wood while seated on the ground and while his hands were bound by a rope. The finding of the mitigating circumstance of voluntary surrender, as borne out by the records, [38] is likewise sustained.

We, however, take exception to the lower court's appreciation of the attendance of cruelty as an aggravating circumstance. The court a quo relied on evidence showing that the victim was bloody before he was killed, and that he was hogtied to a bamboo pole and dropped to a well. We are not convinced that cruelty was sufficiently shown on the basis of this finding alone. Cruelty cannot be appreciated in the absence of any showing that appellants, for their pleasure and satisfaction, caused the victim to suffer slowly and painfully and inflicted on him unnecessary physical and moral pain. [39] Besides, even granting that cruelty did attend the commission of the crime, it cannot be appreciated against appellants since it was not alleged in the information as mandated by Section 8, Rule 110 of the Revised Rules of Criminal Procedure. Although the crime was committed before said rule took effect, the new rule has been applied retroactively, being favorable to the accused. [40]

As the crime was committed prior to the effectivity of Republic Act No. 7659, the appropriate penalty under Article 248 of the Revised Penal Code prior to its amendment is reclusion temporal in its maximum period to death. [41] Considering the presence of one mitigating circumstance of voluntary surrender, without any aggravating circumstance, the penalty imposable on appellants should be the minimum period, which is reclusion temporal in the maximum period. Hence, applying the Indeterminate Sentence Law, the maximum penalty is anywhere within the maximum period of reclusion temporal, while the minimum penalty is anywhere within one degree lower thereto. [42]

With respect to the civil liability of appellants, an award of additional damages is in order. Despite the lack of evidence therefor, temperate damages in the amount of P25,000 are awarded for the burial expenses incurred by the victim's heirs. [43] The presence of the qualifying circumstance of treachery in the killing of the victim justifies the grant of P25,000 as exemplary damages. [44] Finally, in line with current jurisprudence, the award of civil indemnity in the amount of P50,000 is sustained. [45]

WHEREFORE, the decision of the Regional Trial Court of Iloilo City, Branch 26, in Criminal Case No. 44764, is **AFFIRMED** with **MODIFICATIONS**. PO3 Gildo B. Peloperio alias "Edong," PO3 Erwin L. Fernandez, and Mamerto Peloperio alias "Mamie" are found **GUILTY** beyond reasonable doubt of Murder, and are sentenced to suffer the penalty of imprisonment consisting of an indeterminate sentence ranging from twelve years of prison mayor as **MINIMUM**, to twenty years of reclusion temporal as **MAXIMUM**, and to indemnify, jointly and severally, the heirs of the victim in the amounts of P50,000 as civil indemnity, P25,000 as temperate damages, and P25,000 as exemplary damages. Costs de oficio.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Vitug, and Carpio, JJ., concur.

Ynares-Santiago, J., on leave.

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- [1] Branch 26.
- [2] Rollo, p. 1.
- [3] Certificate of Arraignment, Records, p. 306; Order, Records, p. 285.
- [4] Rollo, p. 68.
- [5] Records, pp. 406-409.
- [6] TSN, May 12, 1995, pp. 11-107; TSN, June 1, 1995, pp. 4-19.
- [7] TSN, June 1, 1995, pp. 20-88; TSN, June 2, 1995, pp. 3-42.
- [8] TSN, June 5, 1995, pp. 5-78.
- [9] Records, pp. 20-23.
- [10] TSN, June 8, 1995, pp. 3-44.
- [11] Records, pp. 351-352.
- [12] TSN, June 2, 1995, pp. 43-64.
- [13] TSN, August 7, 1995, pp. 8-51.
- [14] TSN, June 5, 1995, pp. 79-89; October 17, 1995, pp. 2-12.
- [15] TSN, December 1, 1995, pp. 22-49.
- [16] TSN, December 5, 1995, pp. 3-66.
- [17] TSN, January 10, 1996, pp. 3-15.
- [18] Appellant Edong's brief, Rollo, p. 245.
- [19] Appellant Erwin's brief, Rollo p. 109.
- [20] Appellant Mamie's brief, Rollo p. 163.
- [21] *People v. Caraig*, G.R. Nos. 116224-27, March 28, 2003; *People v. Cabrera, Jr.*, G.R. No. 138266, April 30, 2003.
- [22] Rollo, p. 61.
- [23] *People v. Cabrera, Jr.*, *supra*, note 21.
- [24] *People v. Delim*, G.R. No. 142773, January 28, 2003.
- [25] Records, p. 652.
- [26] *Id.*, at 651.
- [27] *People v. Sibonga*, G.R. No. 95901, June 16, 2003.
- [28] *People v. Baldogo*, G.R. No. 128106-07, January 24, 2003; *People v. Caraig*, *supra*, note 21.
- [29] *People v. Esponilla*, G.R. No. 122766, June 20, 2003.

[30] Ibid.

[31] Records, p. 652.

[32] People v. Abut, G.R. No. 137601, April 24, 2003.

[33] People v. Delim, *supra*, note 24.

[34] People v. Colonia, G.R. No. 138541, June 12, 2003.

[35] TSN, June 1, 1995, p. 60.

[36] TSN, June 2, 1995, p. 36.

[37] People v. Cabrera, Jr., *supra*, note 21.

[38] Records, pp. 60 & 164.

[39] People v. Alban, 245 SCRA 549 (1995).

[40] People v. Sibonga, *supra*, note 27; People v. Ibañez, G.R. Nos. 133923-24, July 30, 2003.

[41] People v. Alfon, G.R. No. 126028, March 14, 2003.

[42] People v. Ibañez, *supra*, note 40.

[43] People v. Astudillo, G.R. No. 141518, April 29, 2003, citing People v. Abrazaldo, G.R. No. 124392, February 7, 2003.

[44] People v. Alfon, *supra*, note 41.

[45] People v. Caratao, G.R. No. 126281, June 10, 2003.

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