

## **PEOPLE OF THE PHILIPPINES, APPELLEE, VS. CATALINO MELENDRES, JR., BERNARDINO KIRIT AND TEODULO KITAY, APPELLANTS.**

*G.R. No. 134940. April 30, 2003*

Ponente: AUSTRIA-MARTINEZ, J.

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### **AUSTRIA-MARTINEZ, J.:**

Before us is an appeal from the decision of the Regional Trial Court of Negros Oriental (Branch 44) finding accused-appellants Catalino Melendres, Jr., Bernardino Kirit and Teodulo Kitay guilty beyond reasonable doubt of double murder and imposing a penalty of “two (2) Reclusion Perpetua”.

On November 10, 1992, an Information was filed against Catalino Melendres, Jr., alias “Jun-Jun”, together with two John Does alleging:

That on or about July 23, 1992 at 9:00 o'clock in the evening, more or less purposely sought to better accomplish their criminal design, in Sitio Balatican, Barangay Casala-an, Siaton, Negros Oriental, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another, with intent to kill, treachery and abuse of superior strength, went up the house of one Pacifico Gualingco and once inside, did then and there, willfully, unlawfully and feloniously, assault, attack, hack and wound the brothers SYREL and EXOR, all surnamed BALASABAS, who were asleep in said house, with the use of long bolos with which said accused were then armed and provided, thus inflicting the following injuries, to wit:

On Syrel Balasabas:

- Hacking wound, neck cutting muscles, fascia and bones
- Hacking wound, shoulder, (L) 6 cm.
- Hacking wound, head (L), 10 cm.
- Disarticulation, small, ring and middle fingers, ®

On Exor Balasabas:

- Hacking wound, neck, cutting muscles, fascia and bones
- Hacking wound, head 16 cm., frontal to temporal area traversing ear (L) with skull FX 16 cm.
- Hacking wound, frontal area with skull FX

which injuries caused victims' death immediately thereafter.

Contrary to Article 248 of the Revised Penal Code.[1]

On May 3, 1993, Catalino was arraigned and pleaded not guilty to the crime charged against him.[2]

On June 30, 1993, the prosecution presented its first witness, Rodrigo Hungoy. He identified Bernardino Kirit and Teodulo Kitay, who were then present in the courtroom, as the two companions of Catalino who hacked Syrel and Exor Balasabas on the night of July 23, 1992. The prosecution then moved to amend the Information praying that the names of Bernardino Kirit and Teodulo Kitay be substituted for the two John Does named in the Information. The trial court granted the Motion and ordered the Office of the Provincial Fiscal to conduct a preliminary investigation with respect to Bernardino and Teodulo. On July 15, 1993, the 2<sup>nd</sup> Assistant Provincial Prosecutor submitted his Resolution dated July 13, 1993 finding that the two John Does in the original Information identified in open court by Rodrigo Hungoy are in fact Bernardino Kirit and Teodulo Kitay.[3] Thus, the RTC allowed the inclusion of appellants Bernardino and Teodulo as co-accused in the commission of the crime of double murder. Upon arraignment, they pleaded not guilty to the crime charged against them.

The facts established by the prosecution evidence are as follows:

In the evening of July 23, 1992, first cousins, Rodrigo Hungoy and Mardie Balasabas together with Mardie's brothers, Syrel and Exor, were resting inside the house of one Pacifico Gualingco at Sitio Balatican, Barangay Casalaan, Siaton, Negros Oriental. The four companions are cultivating the farmland owned by Pacifico and were staying at the house built on the middle of the farm. The house has two floors, the second floor being two and a half feet above the ground and accessible through a stair inside the "sala" of the house. Syrel and Exor were sleeping on the second floor while Rodrigo and Mardie were lying near the kitchen on the first floor. About 9:00 of the same evening, the barking of the dog awakened Rodrigo and Mardie. They peeped through the porch and looked at the front yard where they saw three persons in the yard who they did not immediately recognize because it was dark. The three persons proceeded to the upper portion of the house and pushed the main door which was not locked. Syrel and Exor remained asleep while Rodrigo and Mardie jumped out and hid at the back portion of the house which was not illuminated. They again peeped through a hole in the bamboo walling of the house which was already dilapidated. There, Rodrigo and Mardie recognized the faces of the three appellants because the room where Syrel and Exor were sleeping was illuminated by a "tingkaro", a kerosene lamp. The three went near Syrel and Exor. With the use of a bolo, Catalino and Bernardino proceeded to hack Syrel while Teodulo hacked Exor. After witnessing the hacking of Syrel and Exor, Rodrigo and Mardie went straight to the house of Rodrigo which is about 150 meters away from the house where the incident happened. Rodrigo went directly inside the house ahead of Mardie. Mardie, on the other hand, went to another house which is approximately ten meters away from Rodrigo's house, occupied by his parents. He informed Rodrigo's father and one Ricardo Palomar about the hacking of Syrel and Exor. Rodrigo's father then advised Mardie to go inside the house where Rodrigo was and to close the door.[4] The following morning Rodrigo and Mardie informed the latter's mother, Lita Balasabas about the incident that happened the previous night. Together with some relatives and neighbors they then went to the house where the incident occurred and found the dead bodies of Syrel and Exor. They placed the cadavers in coffins and brought them to the "poblacion" and had them autopsied. After securing the death certificates of her sons, Lita, together with other companions went to the police to report the incident. They then buried the bodies on the same day.[5]

The principal defense of appellants is alibi. In support thereof, six witnesses were presented, namely: Juan Pahayat, appellant Bernardino Kirit, Victoria Kirit, Ricardo Palomar, appellant Catalino Melendres, Jr., and Editha delos Santos.

Juan Pahayat testified as follows: From July 20, 1992 until July 25, 1992, he slept at the house of appellant Bernardino Kirit located at Baliw, Casalaan, Siaton, Negros Oriental because he was then helping Bernardino build a small house for the employer of the latter. Around 7:00 in the evening of July 23, 1992, he, together with appellants Bernardino and Teodulo, went to the house of appellant Catalino which is about 25 meters away from

the house of Bernardino. They cooked food for Catalino who was then sick with measles and was unable to take care of his young nephew and niece who were his only companions in the house. They stayed for three hours and left at 10:00 of the same evening. Sitio Balatican where the incident happened is about ten kilometers away from Sitio Baliw and there is no means of transportation. It would take about two hours to travel by foot to and from these places.[6]

Appellant Bernardino Kirit testified as follows: In the evening of July 23, 1992, he was inside his house at Baliw, Casalaan, Siaton, Negros Oriental. Around 7:00 of that evening, his neighbor, co-appellant Catalino, summoned for him. Catalino requested him to fetch his carabao and cow, to feed his pigs and to cook their food because he had fever. Bernardino, in turn, asked for the help of their neighbor, co-appellant Teodulo Kitay, to help him fetch and feed the animals. Bernardino finished cooking around 8:00 of the same evening. Thereafter, he served food to Catalino and his nephew and niece who were Catalino's companions in his house. Catalino further requested Bernardino to let the children sleep first before they leave the house. Bernardino acceded to Catalino's request and, together with Teodulo, left Catalino's house at 10:00 in the evening, after the children have gone to sleep. Sitio Baliw is about ten kilometers from Sitio Balatican. There is no means of transportation to and from those places and it would take more than two hours to travel by walking. Prior to June 30, 1993, when they were identified by prosecution witness Rodrigo Hungoy, he and co-appellant Teodulo Kitay already met prosecution witness Rodrigo Hungoy when Bernardino appeared as a witness for Catalino before the Municipal Trial Court of Siaton.[7]

Bernardino's wife, Victoria Kirit, testified as follows: Catalino Melendres is their neighbor, his house being about twenty-five meters away from theirs. On the night of July 23, 1992, Catalino asked for assistance from Bernardino. Bernardino, together with his co-appellant uncle, Teodulo Kitay, responded to Catalino's call for help and went to the house of the latter. Around twenty minutes after the two were gone, Victoria followed and also went to the house of Catalino. Upon arriving at the house of Catalino around 7:20 in the evening, she saw Bernardino cooking food while Teodulo was feeding the pigs. She also saw Catalino lying down because he had fever while his nephew and niece were sitting in a corner of the house. Victoria did not stay long and went home after ten minutes. It was around 10:00 of the same evening that her husband Bernardino arrived home.[8]

Ricardo Palomar testified as follows: Around 5:00 in the afternoon of July 23, 1992 he was at Barangay Casala-an, Siaton, Negros Oriental, near the house of Loreta Balasabas, tending his carabao. There, he saw one Bebing Salit holding a bolo and sitting on a banana trunk near the house of Loreta. When the sun set, Ricardo brought his carabao to a pool near the house of Loreta, after which he went home to take supper. Around 9:00 in the evening of the same day, he went back to where his carabao was. He saw Bebing Salit going down the house of Loreta carrying a bunch of chickens in his left hand and a bolo in his right hand. Ricardo then took his carabao home. The following morning Ricardo learned that Syrel and Exor Balasabas were killed.[9]

Appellant Catalino Melendres, Jr. testified as follows: He knew Syrel but he was not acquainted with Exor; co-appellants Bernardino Kirit and Teodulo Kitay are his neighbors at Sitio Baliw, Barangay Casalaan, Siaton, Negros Oriental; Sitio Baliw is, more or less, ten kilometers away from Sitio Balatican; Sitio Balatican can be reached by foot or by riding on a horse or carabao but not through a motor vehicle. He claimed that at 9:00 in the evening of July 23, 1992, he was in his house at Sitio Baliw accompanied by his nephew and niece. He was then afflicted with chicken pox and had fever. Since he was sick, he requested his co-appellant Bernardino Kirit to prepare their food. Bernardino responded to his plea and went to his house around 7:00 in the evening. Aside from Bernardino, his other co-appellant Teodulo Kitay and Juan Pahayat also went to his house. Teodulo accompanied him and his nephew and niece Bernardino while Juan arrived an hour later. Juan did not stay long and went home an hour after arriving. On the other hand, both appellants Bernardino and Teodulo accompanied them until 10:00

in the evening.[10]

On February 27, 1998, the trial court rendered its Decision, the dispositive portion of which reads:

WHEREFORE, all the foregoing premises considered, judgment is hereby rendered:

- Declaring all the three (3) accused Catalino Melendres, Jr. alias 'Jun-Jun', Bernardino Kirit and Teodulo Kitay guilty beyond reasonable doubt of the crime of Double Murder of Syrel and Exor Balasabas and considering the presence of conspiracy, the Court hereby imposes the penalty of imprisonment for two (2) Reclusion Perpetua together with all the accessory penalties and to indemnify the heirs of the victims (Syrel and Exor Balasabas) the amount of Fifty Thousand Pesos, for each accused without subsidiary imprisonment in case of insolvency.

- In the service of their sentence, the above-named accused shall be credited with the full time of their preventive imprisonment in accordance with Article 29 of the Revised Penal Code as amended by Republic Act 6127, if the conditions prescribed therein have been complied.

SO ORDERED.

Hence, the instant appeal with the following Assignment of Errors:

I

THAT THE HONORABLE LOWER COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANTS GUILTY BEYOND REASONABLE DOUBT OF THE CRIME OF DOUBLE MURDER AS CHARGED IN THE INFORMATION.

II

THE HONORABLE LOWER COURT GRAVELY ERRED IN GIVING WEIGHT TO THE TESTIMONIES OF RODRIGO HUNGOY, FIRST COUSIN OF THE VICTIMS AND WHO APPEARED TO BE MENTALLY DERANGED AND MARDIE BALASABAS, BROTHER OF THE VICTIMS, AND WHOSE TESTIMONIES ARE ALL INCREDIBLE AND NOT WORTHY OF ANY CREDENCE AND BELIEF.

III

AND, THAT THE HONORABLE LOWER COURT GRAVELY ERRED IN NOT ACQUITTING ALL THE ACCUSED FOR INSUFFICIENCY OF EVIDENCE AND/OR AT LEAST ON THE HYPOTHESES OF REASONABLE DOUBT.

Appellants attribute error on the part of the trial court in giving weight and credence to the testimonies of prosecution witnesses Rodrigo Hungoy and Mardie Balasabas. The well-established rule is that, on the issue of credibility, the trial court is in a better position than the appellate court because the former had the full opportunity to observe directly the deportment and manner of testifying of the witness.[11] Thus, unless the trial court plainly overlooked certain facts of substance and value which, if considered, might affect the result of the case, its assessment on credibility must be respected.[12] In the present case, we find no reason to disturb the trial court's evaluation and assessment of the credibility of Rodrigo and Mardie, the same not being tainted by any arbitrariness or palpable error.

As to the alleged mental derangement of Rodrigo, it is true that during his testimony in open court on December 15, 1993, he was uncooperative, defiant and even disrespectful to the court. The trial court even cited him for direct contempt and ordered his incarceration. However, it appeared from the order of the trial court that Rodrigo's defiance at that time was not a result of his alleged mental incapacity but because he was drunk. Moreover, while the prosecution admitted that Rodrigo has experienced "some mental shock sometime ago", no evidence was presented by the defense to impeach him on ground of incompetence. On the other hand, a review of the transcript of stenographic notes taken during the four days that Rodrigo testified and underwent

examination on the witness stand reveals that, except for the incident on December 15, 1993, he is responsive to the questions propounded and was able to convey sufficiently intelligent answers. Under Section 20, Rule 130 of the Revised Rules of Court, all persons who can perceive, and perceiving, can make known their perception to others, may be witnesses.

Appellants further assail the credibility of Mardie and Rodrigo, by putting the following in issue: First, they claim that if Rodrigo and Mardie were indeed present at the scene of the crime on the night of July 23, 1992, why did they not shout or do anything which could have prevented or stopped the assailants from killing Syrel and Exor. We have held that the workings of the human mind when placed under emotional stress are unpredictable and that people react differently.[13] There is no standard form of behavior when one is confronted by a shocking incident especially if the assailant is physically near.[14] In the present case, appellants expect that Rodrigo and Mardie should have done something to stop the assailants from attacking Syrel and Exor. However, considering the proximity of appellants to the place where Rodrigo and Mardie were hiding and since both of them were then unarmed and outnumbered, it is not unexpected, and in fact, it is consistent with the instinct of self-preservation, that they should remain silent for fear that if appellants discover their presence, they will also be attacked. This is confirmed by the testimony of Mardie, to wit:

**Q:**

Alright, now alarmed already because they are with weapons, did it not occur to you to also . . . to awaken your brothers considering the immediate peril of your life and their lives?

**A:**

I did not awake them because we were frightened.

**Q:**

You did not even as much as or in the least, shout on top of your voice while you were jumping considering that the others were your two brothers no less?

**A:**

We did not shout because we might be included.[15]

Second, appellants question the failure of Mardie to immediately inform her mother of the incident involving his brothers considering the nearness of their house to the house of Rodrigo where they went after witnessing the said incident. We agree with the observation of the Office of the Solicitor General (OSG) that after witnessing the brutal hacking of his brothers, Mardie must have already been gripped by fear that he chose to remain in the house of Rodrigo rather than immediately go home. Moreover, he was advised by his uncle to go inside their house and lock the doors. Young as he was, fifteen at that time, it was perfectly normal for him to follow the advise of his uncle.

Third, appellants claim that it was only after a month that Rodrigo and Mardie reported the killings to the police authorities. Such delay, appellants insists, casts grave and serious doubts on the veracity of their testimonies. Records show that the affidavits of Rodrigo and Mardie were taken on August 24, 1992 and August 25, 1992, respectively, or a month after the hacking incident. The apparent delay in reporting the incident was adequately explained by Rodrigo and Mardie. Mardie testified that he had verbally “related” the killings to the police the day after the said incident.[16] The police investigated him but his affidavit was not taken; instead, he was told to go back.[17] On the other hand, Rodrigo testified as follows:

**Q:**

According to the records of this case, your affidavit was taken on August 24, 1992. Are we to understand that, that was your first time to go to the police station of Siaton and report on what you allegedly saw on the night of July 23, 1992?

**A:**

In Siaton.

**Q:**

Yes. And that was your first time to report. Is that correct?

**A:**

Yes.

**Q:**

You have not reported to any police authorities from July 23, 1992 up to August 23, 1992, because according to your affidavit, your affidavit was taken only on August 24, 1992. Is that correct?

**A:**

How can I tell them they know already the incident.

**Q:**

How do you know that they know the incident?

**A:**

They attended the time of the burial.[18]

Hence, it is clear from the foregoing testimony of Rodrigo that he is of the belief that the police authorities already have actual knowledge of the killing because they attended the burial of Syrel and Exor. Hence, his ignorance of the necessity of immediately executing an affidavit before the police authorities regarding the incident that he witnessed on July 23, 1992 cannot be taken against him. Considering that he only finished sixth grade and that he is suffering from some form of mental deficiency, he cannot be faulted in believing that it is no longer necessary to make a formal report to the police authorities because they already have actual knowledge of the killing of Syrel and Exor. Delay in making a criminal accusation will not necessarily impair the credibility of a witness if such delay is satisfactorily explained.[19] In this case, we find the explanation of Mardie and Rodrigo to be satisfactory.

Fourth, appellants point out the alleged inconsistency in the testimonies of Rodrigo and Mardie as to whether or not they witnessed the crime through a hole in the wall of the house where they were sleeping or through the side of the house which has no wall. Again, this was adequately explained by Mardie, as follows:

**Q**

You remember having testified during the preliminary investigation conducted by the Honorable Trial Court of Siaton?

**A:**

Yes.

**Q:**

And you were asked questions by the Court?

**A:**

Yes.

**Q:**

You were asked this question. I am reading page 3, Your Honor of the transcript of the proceedings in the preliminary investigation conducted on August 25, 1992, quote: 'Do you mean to say Mr. Balasabas that the house has no wall that you can immediately see what's happening inside the house?' Answer: 'There were three sides of the house with wallings while the other side has no wall' So, are we agreed to that, that according to your testimony one side of the house was without any wall?

**A:**

There is one side that the wall is not completed.

**ATTY. DICEN:**

**Q:**

You said that one side of the house has an incomplete walling, are you therefore telling this Honorable Court that when you declared before the municipal trial court that the other side has no walling at all, you were telling a lie because you are telling the truth now?

**A:**

What I mean is that, the three sides of the house has complete wallings, while the other side, the remaining one, has walling but it is not complete. So, I said only that there was no walling.[20]

Discrepancies and inconsistencies in the testimonies of witnesses referring to minor details, and not in actuality touching upon the central fact of the crime, do not impair their credibility.[21] In the present case, granting that there were inconsistencies in the testimonies of Rodrigo and Mardie, the same may be considered only as minor discrepancies that do not affect their credibility. In fact, minor inconsistencies in the testimonies of witnesses bolster rather than weaken their credibility as they erase any suspicion that their testimonies have been rehearsed.[22] What is important is that both Rodrigo and Mardie were consistent in positively identifying the three appellants as the persons who hacked Syrel and Exor.

Appellants interpose the defense of alibi. For the defense of alibi to prosper, appellants must not only prove their presence at another place at the time of the commission of the offense, but they must also demonstrate that it would be physically impossible for them to be at the locus criminis at the time of the commission of the crime.[23]

In the present case, the inconsistencies in the testimonies of defense witnesses make appellants' alibi highly dubious. The crime of double murder was committed on July 23, 1992 at 9:00 in the evening. Aside from the self-serving testimonies of Bernardino and Catalino, the only persons who can attest to the presence of the

appellants in the house of Catalino between 7:00 and 10:00 in the evening of July 23, 1992 are Victoria Kirit and Juan Pahayat. Victoria testified that while she was inside the house of Catalino, the only persons present were the three appellants and the nephew and niece of Catalino.[24] She never mentioned the presence of Juan Pahayat. Likewise, although Bernardino named Teodulo as one of his companions in helping Catalino, he never mentioned Juan. Yet, both Catalino and Juan testified that the latter was present at the house of Catalino on the night of July 23, 1992.[25] Catalino even claimed that Juan and Victoria were able to talk to each other.[26] Moreover, Juan testified that he went to the house of Catalino together with Bernardino and Teodulo.[27] They arrived at 7:00 in the evening, helped out in cooking food for Catalino, and left at 10:00 of the same evening.[28] However, Catalino claimed that only Bernardino and Teodulo went to his house around 7:00 in the evening and that Juan arrived an hour later.[29] He further testified that Juan stayed only until 9:00 while Bernardino and Teodulo left at 10:00.[30]

Time and again, we have held that alibi must be supported by the most convincing evidence since it is an inherently weak defense which can easily be fabricated.[31] In the instant case, the inconsistencies in the respective testimonies of Bernardino and Victoria vis-à-vis the testimonies of Catalino and Juan are not minor discrepancies because they militate against the claim of the defense that Juan was at the house of Catalino and saw him until 10:00 in the evening of July 23, 1992. Because of these inconsistencies, we find it difficult to believe that Juan was indeed present in the house of Catalino on the above-mentioned date.

Hence, the only person who could confirm the presence of the appellants in the house of Catalino is Victoria, wife of appellant Bernardino. Victoria testified that she arrived at the house of Catalino around 7:20 in the evening[32] and went home after ten minutes.[33] It was only at 10:00 of the same evening that she again saw her husband, Bernardino, when the latter went home.[34]

On the other hand, appellants Catalino and Bernardino testified that they, together with Teodulo, were at Catalino's house from 7:00 until 10:00 in the evening. But no other competent evidence was presented to support their allegations. Thus, the attempt of the defense witnesses to concoct alibi for the appellants is much too obvious to ignore. We have held that alibi becomes less plausible when it is invoked or sought to be crafted by accused themselves and their immediate relatives.[35]

Furthermore, Catalino, Bernardino and Juan testified that the distance between Sitio Balatican and Sitio Baliw is approximately ten kilometers.[36] This distance can be traversed by hiking in about 2 to 3 hours.[37] However, Catalino testified that coming from Sitio Baliw, Sitio Balatican may also be reached by riding on a carabao or horse[38], that the road between Sitio Baliw and Sitio Balatican cannot be negotiated by means of a motor vehicle. No evidence was presented to negate the possibility that appellants may have traveled by horse from Sitio Baliw to Sitio Balatican. A distance of ten kilometers which can be traversed by foot in 2 to 3 hours can easily be negotiated in less than an hour when one rides a horse. Hence, for failure to account for their whereabouts between the hours of 7:30 and 10:00 in the evening of July 23, 1992, and for their failure to demonstrate by clear and convincing evidence that it would be physically impossible for them to be present at the scene of the crime when it was committed, appellants' alibi must fail. Weak as it is, alibi becomes all the more ineffectual when the accused fails to demonstrate that it was physically impossible for him to be at the crime scene at the time it was committed.[39]

Appellants' defense of alibi is negated in the face of the positive identification made by prosecution witnesses Rodrigo and Mardie. Well settled is the rule that positive identification of the accused made by an eyewitness prevails over the defense of alibi.[40]

In *People vs. Hamton*[41], we held that:

Conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. The agreement need not be proven by direct evidence; it may be inferred from the conduct of the parties before, during and after the commission of the offense pointing to a joint purpose and design, concerted action and community of interest. Indeed, jurisprudence consistently tells us that conspiracy may be deduced from the mode and manner in which the offense was perpetrated.

In the instant case, the prosecution was able to prove conspiracy by establishing that the three appellants together approached, entered the house, and immediately went up the second floor where the victims were sleeping. Simultaneously, Bernardino and Catalino hacked Syrel while Teodulo hacked Exor. The synchronized acts of the three appellants indubitably point to the conclusion that they are moved by a common design, which is to kill the victims. Even the location of the wounds inflicted on the victims, all on the heads, necks and shoulders are mute but strong physical evidence of their deliberate and concerted efforts to kill the victims, as in fact, they did.

An appeal in a criminal case throws the whole case wide open for review; and the appellate court can correct error, though unassigned, that may be found in the appealed judgment.[42]

After a careful examination of the records of the case, we find that the trial court erred in not taking into consideration the aggravating circumstances of treachery and dwelling that attended the killing of Syrel and Exor. In the fairly recent case of *People vs. Delim*[43], we held as follows:

Qualifying circumstances such as treachery and abuse of superior strength must be alleged and proved clearly and conclusively as the crime itself. Mere conjectures, suppositions or presumptions are utterly insufficient and cannot produce the effect of qualifying the crime. As this Court held: 'No matter how truthful these suppositions or presumptions may seem, they must not and cannot produce the effect of aggravating the condition of defendant. Article 14, paragraph 16 of the Revised Penal code provides that there is treachery when the offender commits any of the crimes against the person, employing means, methods or forms in the execution thereof which tend directly and especially to insure its execution, without risk to himself arising from the defense which the offended party might make. For treachery to be appreciated as a qualifying circumstance, the prosecution is burdened to prove the following elements: (a) the employment of means or execution which gives the person attacked no opportunity to defend himself or retaliate; (b) the means of execution is deliberately or consciously adopted.

In the present case, the prosecution has proven beyond reasonable doubt that the appellants' means of killing the victims was deliberately or consciously adopted. Syrel and Exor were sleeping when the appellants attacked them. There is treachery when appellants, who knew exactly where to find the victims, immediately proceeded to the second floor of the house where Syrel and Exor were sleeping at 10:00 in the evening and hacked the two victims to death while they were sleeping.

The aggravating circumstance of dwelling is also present in the instant case. Under Article 14, paragraph 3 of the Revised Penal Code, dwelling is aggravating if the crime is committed in the dwelling of the offended party and the latter has not given provocation. As contemplated under the law, dwelling may mean temporary dwelling.[44] Moreover, dwelling may be aggravating even though the victim was not the owner of the house where the crime was committed.[45] In the present case, it is not disputed that the house owned by Pacifico Gualingco where Syrel and Exor were killed was used by the victims as dwelling.[46]

As to the element of provocation, the evidence of the prosecution has sufficiently established that no provocation, which is sufficient and immediate to the commission of the crime, was given by either or both of the victims.

However, the aggravating circumstances of abuse of superior strength and nighttime need not be appreciated as these are already absorbed by treachery.[47]

At the time when the crime was committed in 1992, murder was punishable by reclusion temporal maximum to death.[48] The presence of an aggravating circumstance would have called for the imposition of the maximum penalty, which is death. However, the imposition of the death penalty was then proscribed by Article III, Section 19 (1) of the 1987 Constitution[49], which reduced death penalties to reclusion perpetua. It was only on December 31, 1993 that R.A. 7659, the law which provides for the reimposition of the death penalty for certain heinous crimes, took effect.[50] Thus, considering that the crime was committed on July 23, 1992 or prior to the effectivity of R.A. 7659,[51] the death penalty may not be imposed in the present case. Accordingly, the penalty next higher in degree, which is reclusion perpetua, for each count of murder, was correctly imposed by the trial court.

Although damages to the heirs of the deceased victims are not alleged in the Information, it is a settled rule that damages may be awarded.[52]

There are two sets of heirs in the present case – those of the deceased Syrel Balasabas and those of the deceased Exor Balasabas. Consequently, appellants should be ordered to pay each set of heirs the amount of P50,000.00 as civil indemnity for the death of each of the victims.

In view of the testimony of Lita Balasabas that she suffered mental anguish for the death of her sons, Syrel and Exor, we find that the award of moral damages in the amount of P100,000.00 (P50,000.00 for the death of each set of heirs of the victims) is proper and in accordance with prevailing jurisprudence.[53]

As to actual damages, while Lita Balasabas testified that they incurred burial and other expenses resulting from the death of Syrel and Exor, no competent evidence was presented to prove her claim.[54] Under Article 2199 of the Civil Code, a party is entitled to compensation only for such pecuniary loss suffered by him as he has duly proved. However, under Article 2224 of the same Code, temperate damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty. In the present case, the heirs of Syrel and Exor Balasabas clearly incurred funeral and burial expenses. Hence, we find that an award of P50,000.00 or (P25,000.00, for the death of each set of heirs of the victims) by way of temperate damages is justified.[55]

WHEREFORE, the decision of the Regional Trial Court of Negros Oriental (Branch 44) finding Catalino Melendres, Jr., Bernardino Kirit and Teodulo Kitay guilty of the crime of MURDER beyond reasonable doubt, imposing the penalty of reclusion perpetua on two counts, is AFFIRMED with MODIFICATION to the effect that appellants are ordered to pay the heirs of Syrel Balasabas and the heirs of Exor Balasabas the sum P100,000.00 (P50,000.00 for each set of heirs) as civil indemnity P100,000.00, as moral damages (P50,000.00 for each set of heirs) and P50,000.00 as temperate damages (P25,000.00 for each set of heirs).

### **SO ORDERED.**

Bellosillo, (Chairman), Quisumbing, and Callejo, Sr., JJ., concur.

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[1] Records, p. 1.

[2] Id., p. 44.

[3] Id., pp. 58 and 64.

[4] Id., p. 31.

[5] Testimony of Rodrigo Huangoy, TSN, June 30, 1993, pp. 14 to 30; December 14, 1993, pp. 42 to 46.

Testimony of Marlice Balasabas, TSN, December 20, 1993, pp. 13 to 35; Testimony of Lita Balasabas, January 14, 1994, pp. 12 to 18.

[6] TSN, October 13, 1995.

[7] TSN, December 20, 1995.

[8] TSN, October 22, 1996.

[9] TSN, December 13, 1996.

[10] Testimony of Catalino Melendres, Jr., TSN, April 11, 1997.

[11] *People vs. Hernandez*, 368 SCRA 247, 257 (2001).

[12] *People vs. Tipay*, 329 SCRA 52, 60 (2000).

[13] *People vs. Alfeche*, 294 SCRA 352, 374 (1998).

[14] *People vs. Alquizalas*, 305 SCRA 367, 374 (1999).

[15] TSN, December 20, 1993, pp. 72-73.

[16] Testimony of Mardie Balasabas, TSN, December 21, 1993, p. 15.

[17] *Id.*, pp. 15-16.

[18] TSN, December 16, 1992, p. 34.

[19] *People vs. Abendan*, 360 SCRA 106, 123 (2001).

[20] TSN, December 21, 1993, pp. 6-8.

[21] *People vs. Magno*, September 25, 1998; *People vs. Uy*, 338 SCRA 232, 245 (2000).

[22] *Salvatierra, Sr. vs. People*, 364 SCRA 173, 186 (2001).

[23] *People vs. Mercado*, 367 SCRA 252, 261 (2001).

[24] *Id.*, p. 22.

[25] Testimony of Catalino Melendres, Jr., TSN, April 11, 1997, p. 18; Testimony of Juan Pahayat, TSN, October 13, 1995, p. 13.

[26] Testimony of Catalino Melendres, Jr., *supra*, p. 46.

[27] Testimony of Juan Pahayat, *supra*, pp. 13, 30-31.

[28] *Id.*, p. 16.

[29] Testimony of Juan Pahayat, *supra*, pp. 18-19.

[30] *Id.*, p. 43.

[31] *People vs. Makilang*, 368 SCRA 155, 167 (2001); *People vs. Lobitania*, G.R. No. 142380, September 5, 2002; *People vs. Libnao*, G.R. No. 136860, January 20, 2003.

[32] TSN, October 22, 1996, pp. 15, 21-22.

[33] *Id.*, pp. 25-26.

[34] Ibid.

[35] *People vs. Patawaran*, 274 SCRA 130, 144 (1997); *People vs. Cortez*, 348 SCRA 663, 669 (2000); *People vs. Peleras*, 365 SCRA 220, 235 (2001); *People vs. Legaspi*, 331 SCRA 95, 113 (2000).

[36] Testimony of Juan Pahayat, TSN, October 13, 1995, p. 7; Testimony of Bernardino Kirit, TSN, December 20, 1995, pp. 20-21; Testimony of Catalino Melendres, Jr., TSN, April 11, 1997, p. 11.

[37] Ibid.

[38] Ibid.

[39] *People vs. Muyco*, 331 SCRA 192, 199 (2000); *Legaspi case*, supra.

[40] *People vs. Llanita*, 364 SCRA 505, 517 (2001); *Legaspi case*, supra.

[41] G.R. Nos. 134823-25, January 14, 2003.

[42] *People vs. Court of Appeals*, 308 SCRA 687, 703 (1999); *People vs. Calayca*, 301 SCRA 192, 205-206 (1999).

[43] G.R. No. 142773, January 28, 2003.

[44] *People vs. Badilla*, 185 SCRA 554, 570 (1990); *People vs. Sto. Tomas*, 138 SCRA 206, 219 (1985).

[45] *People vs. Parazo*, 272 SCRA 512, 523 (1997); *People vs. Badilla*, supra.

[46] Testimony of Rodrigo Hungoy, TSN, June 30, 1993, pp. 15-16.

[47] *People vs. De Vera*, 312 SCRA 640, 669 (1999). *People vs. Bardon*, 165 SCRA 416, 426 (1988)

[48] Article 248, Revised Penal Code.

[49] “Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall the death penalty be imposed, unless, for compelling reasons involving heinous Crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.”

[50] *People vs. Unarce*, 272 SCRA 321, 323 (1997); *People vs. Midmotod*, 283 SCRA 395, 405-406 (1997).

[51] *People vs. Flores*, 252 SCRA 31, 42 (1996); *People vs. Abrenica*, 252 SCRA 54, 63 (1996); *People vs. Midmotod*, supra.

[52] *People vs. Ballenas*, 330 SCRA 519, 538 (2000); *People vs. Orosa*, 83 Phil. 633, 636 (1949).

[53] *People vs. Salva*, G.R. No. 132351, January 10, 2002; *Angcaco vs. People*, G.R. No. 146664, February 28, 2002; *People vs. Casitas, Jr.*, G.R. No. 137404, February 14, 2003.

[54] Testimony of Lita Balasabas, TSN, July 27, 1994, pp. 5 and 8-9.

[55] *People vs. Alcodia*, G.R. No. 134121, March 6, 2003.

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