PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. DENNIS MAZO, ACCUSED-APPELLANT.

G.R. No. 136869. October 17, 2001

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

In an Information dated February 4, 1997, the Provincial Prosecutor of Romblon charged appellant Dennis Mazo before the Regional Trial Court (RTC) of killing one Rafael Morada, Jr., thus:

> That on or about the 10[th] day of January, 1997, at around 1:00 o'clock in the morning, in the Poblacion, municipality of Romblon, province of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the said accused, with intent to kill, did then and there, by means of treachery, willfully, unlawfully and feloniously attack, assault and strike with a knife, one RAFAEL MORADA, JR., inflicting upon the latter serious wounds in different parts of his body which resulted to his untimely death.
>
> Contrary to law.[1]

Arraigned on February 12, 1997, the accused pleaded not guilty to the above charges.[2]

The prosecution presented Rommel Abrenica, 19, who testified that at about 1:00 in the morning of January 10, 1997, he and the deceased, Rafael Morada, Jr., were having a drink in the "Rendezvous," located near the plaza in Barangay 1, in Poblacion, Romblon, Romblon. Earlier that evening, the two had gone to the "S & L Video" where each of them had two (2) bottles of beer. Rommel and Rafael stayed in the Rendezvous for around 30 minutes and consumed another two (2) bottles of beer each.

Before leaving the Rendezvous, an altercation between them and the accused Dennis Mazo occurred. Rommel's testimony regarding the altercation is sketchy but it appears that Rommel was jealous of the accused whose alleged girlfriend, a waitress at the Rendezvous, Rommel also fancied. On their way out, Rommel saw the accused Dennis Mazo, who was with Anthony Mortel, Gerry Moreno and Glenn Mazo. Rommel approached one of the girls in the bar. While talking to the girl, the accused approached them and said, "[O]h, what?" They responded by asking him, "[W]hat?" Rommel described the accused's attitude as "brave[,] as if he was threatening [them]."

Rafael purportedly also asked Rommel, "Ano ba talaga ang problema ng long hair na ito?" referring to the accused, who sported long hair. Anticipating trouble, Rommel got hold of a bottle of beer and hid it under the table.

Rommel and Rafael subsequently went upstairs the Rendezvous to look for another male companion, Joan Martinez. Failing to find Joan, the two went down and rode Rommel's motorcycle to Ilaya Street. As the two rode past Jim's Beta House, they passed the group of Dennis Mazo. Somebody called, "Pssst," and Rommel stopped the vehicle at Punzalan's Pharmacy. Rafael alighted and approached Dennis and his companions to ask who called them. Dennis and Rafael walked towards each other, Dennis holding his back pocket. Suddenly, Dennis, who

wielded a knife on his right hand, stabbed Rafael about eight inches below the left nipple.

During this time, Rommel remained seated on his motorcycle. He had turned his head, allowing him to witness the incident from a distance of about five (5) meters. A light from a post illuminated the scene.

Though wounded, Rafael was able to parry another of Dennis' thrusts and then run towards the municipal building. He held his left side with both hands as Dennis gave him chase. Rafael stumbled as he reached the H.E. Building fronting the Romblon West Central School, six (6) or seven (7) arms' length away. Rafael cushioned his fall with his hands and was able to roll on his back. He raised his feet and his hands to shield himself from Dennis' stabbing thrusts. Rafael cried, "Aray! Aray! Tama na! Tama na!" Thereafter, Dennis fled towards Ilaya Street.

Rafael managed to stand up despite his wounds. He walked towards the municipal building but fell again before reaching it. In his motorcycle, Rommel rode to where Rafael lay. Rommel held Dennis and tried to lift him but his friend was just too heavy. Rommel called for help. Subsequently, a certain Lalong and one Joseph Angcaco arrived. They rode the victim in the latter's tricycle and brought him to the hospital. Their efforts proved futile, however, for Rafael was already dead on arrival.

In court, Rommel identified Exhibit "D" as the same knife that the accused allegedly used in stabbing the deceased.[3]

Dr. Victorio F. Benedicto, the Municipal Health Officer of Romblon, Romblon conducted the autopsy on Rafael's remains. Dr. Benedicto listed five injuries on the victim's body, all of which could have been caused by a sharp, bladed instrument:

> - Stab wound, 3 cm. in length just below the xiphoid process directed internally, upward and to the left, with the forceps going all the way up to the handle.
>
> - Stab wound 5 cms. in legnth [sic] at the left lumbar area, directed medially penetrating the abdominal cavity with a loop of small intestines protruding
>
> - Stab wound ½cm in length 2cms. in depth back of left thigh
>
> - Stab wound through and through left calf medial 3[rd] entrance; 4cms. lateral aspect; exit 5cms., medial aspect
>
> - Stab wound through and through, right thigh entrance-3cms., posterior lateral aspect medial 3[rd]. Exit antero-lateral - 3cms.[4]

Dr. Benedicto concluded that the cause of the victim's death was "cardiac tamponade secondary to traumatic injury to the heart inflicted by injury No. 1." He could not tell, however, the order of the infliction of the injuries.[5]

SPO2 Jose Riva de la Cruz was the guard on duty when the accused was brought to the police station. SPO2 De la Cruz asked the accused why he was "surrendering." Dennis answered, "I stabbed Rabot Morada." The accused also told SPO2 de la Cruz that he used a kitchen knife in stabbing the victim. SPO2 de la Cruz asked him where the knife was. The accused replied, "I threw it in the creek at the back of the house of Noel Falcutilla."

When SPO3 Elizer Gene Mallen arrived at the police station, SPO2 de la Cruz instructed him to go to the back of Noel Falcutilla's house to recover the knife. SPO3 Mallen complied and soon returned with the weapon.

SPO2 de la Cruz showed the knife to the accused and asked him if that was the same knife used in the killing. The accused replied, "Yes, sir."

SPO2 de la Cruz admitted, however, that his questioning of the accused was made without the latter having the

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benefit of counsel.[6]

Gloria Morada, the deceased's sister, testified that her brother, a marine engineering graduate, was 23 when he was killed. She said that she spent P800.00 for the embalming of the body and another P8,000 for the coffin. The lot where he was buried cost P5,000 and the expenses for the nine-day wake amounted to P10,000.[7]

The accused interposed self-defense, claiming that it was the victim who initially possessed the knife and started the fight.

Dennis Mazo, 19, recalled that he, his brother Glenn, and friends Anthony Mortel and Jerry Moreno were at the Rendezvous on the evening of January 9, 1997. A girl standing by the door called to Dennis. Dennis approached her and the girl introduced herself as Mila. They shook hands and Dennis gave his name. The girl asked if he wanted a drink. Dennis declined but the girl insisted.

While Dennis and Mila conversed, Rafael and Rommel went down and headed towards them. Rommel was holding a bottle of beer. The two, especially Rafael, stared at him "badly." Rafael pointed to Dennis asking, what was the problem with "that long hair"?

Dennis approached Rafael and told him, "'[T]ol (brother), I don't have [a] problem [with you]." Rafael just stared at him. Rommel told Rafael, "[P]are, kinakaya ka lang yata."

As the situation grew tenser, Dennis' companions approached and tried to patch things up between the protagonists. Dennis' friends told him it would be better if they went home "because the two (2) would not respond." The group thus headed home.

The four were walking in front of Jim's Beta Shop when a speeding motorcycle driven by Rommel Abrenica passed by them and stopped in front of Punzalan's Pharmacy. Rafael alighted from the vehicle, drew something from his back pocket and walked towards Dennis.

At about a distance of one (1) meter from Dennis, Rafael, with knife in hand, delivered a thrust in the direction of Dennis' abdomen. Dennis, a student of the Yaw Yan Karate Club, Parañaque Chapter, managed to evade Rafael's thrust by sidestepping. He turned his body, held Rafael's arm with both hands, and pounded Rafael's arm with his right knee.

Rafael lost his grip on the knife, which fell on the ground to Dennis' right. Rafael stooped to pick up the knife but Dennis was there ahead of him. Dennis grabbed the knife from the ground and stabbed Rafael, hitting him in the right part of the abdomen. Dennis again stabbed Rafael and hit him this time on the left. Rafael exclaimed, "Ah, I am hit!" and fell on his back. Rafael raised his feet and kicked Dennis on the abdomen. Dennis reacted by stabbing Rafael on the foot.

Dennis' companions told him, "Let's go," and Dennis followed them home.[8]

The foregoing account was corroborated by Dennis' companions, Gerry Moreno[9] and Anthony Mortel,[10] in their respective testimonies.

Dennis rested at home until Senior Police Inspector Harry B. Mazo, then the Chief of the Romblon, Romblon Police Station and a distant relative of the accused, arrived. The Inspector asked Dennis whether he was involved in the stabbing incident. Dennis answered in the affirmative and told Inspector Mazo that he was going to surrender to him. Inspector Mazo approved, and said that he will fetch Dennis at 6:00 that morning.

As promised, Inspector Mazo picked up Dennis before going to work that day. Dennis was brought to the police headquarters where an investigation was conducted. Dennis said he told the police about the whole incident. He

pointed them to where he threw the knife, which the victim allegedly used in the attack.

Rafael further testified that he sustained an injury in his right forefinger as he parried Rafael's thrust. Dennis treated the injury with first aid by washing it and applying Merthiolate on the wound. Dennis later had the injury treated by Dr. Victorio Benedicto on January 17, 1997, seven days after the incident. It did not occur to Dennis to have the wound treated immediately after the infliction of the injury because he was still confused.[11]

Dr. Victorio Benedicto confirmed that he treated Dennis for the injury on his finger. In a medico-legal certificate dated January 17, 1997, Dr. Benedicto stated that he attended to Dennis for a "[h]ealed incised wound 1.5 cms. mid-portion, anterior aspect RT. index finger."[12]

The doctor said that the injury could have been caused by a kitchen knife, such as Exhibit "D," but that it could also have been sustained before or even after the January 10 incident.[13]

To prove the mitigating circumstance of voluntary surrender, the defense presented Senior Police Inspector Harry B. Mazo.

Senior Police Inspector Mazo was at home on January 10, 1997, at about 3:30 in the morning when somebody knocked on his door. He opened it and found Violy Mazo and Jane Muros, the grandmother and cousin of the accused, respectively. They informed the Inspector that Dennis was involved in the stabbing incident that occurred earlier. Senior Police Inspector Mazo inquired where Dennis was. According to the women, they could not ascertain their relative's whereabouts. Senior Police Inspector Mazo told the two that if Dennis was afraid, he could surrender to him. He then accompanied Violeta and Jane back to their residence.

Arriving at Dennis Mazo's residence, the Inspector was informed by Catalino Mazo, Dennis' grandfather, that Dennis was already sleeping. Catalino woke Dennis, who told the Inspector that he was afraid of the victims' relatives. Considering that it was already early morning, and in order to give Dennis time to rest, the Inspector told Dennis that it would be better that Dennis surrender to him later that morning. Dennis acceded to the Inspector's suggestion.

Later, Inspector Mazo picked up Dennis at the latter's residence before heading to the police station. Without question, Dennis rode with the Inspector to the station where he was locked up in the investigation room.

Senior Police Inspector Mazo inquired from Dennis what happened earlier that morning. Dennis narrated that while he was having a drink in the Rendezvous Shopping Center with a friend, Rommel Abrenica stared at him angrily. Dennis said that Rommel felt jealous towards him because of a girl. Upon the advice of Dennis' younger brother, Dennis and his friends went home.

On their way home, a motorcycle chased their group and stopped near them. Dennis heard Rommel tell Rafael to alight the vehicle and say, "Banatan mo na." The victim alighted and attacked Dennis with a knife. Dennis, in self-defense, was able to stab Rafael, who ran towards the church.

Senior Police Inspector Mazo asked him the whereabouts of the knife. Dennis revealed that the knife was thrown in the creek, near the residence of one Mr. Falcutilla.[14]

On rebuttal, the prosecution again presented Rommel Abrenica[15] and SPO2 de la Cruz,[16] who both affirmed their earlier testimonies. The prosecution also offered for the first time the testimony of Adrian "Dianne" Yap, 20, a make-up artist.

It was fiesta time and Adrian and his friends were having a stroll at around midnight of January 10, 1997 to look for men. The group ended up in the church belfry, where the men were supposed to hang out. Adrian's companions were Ronnie Manzo, Alexander "Sandra" Montojo, Arnel "Gretchen" Rocha, John-john "Nene"

Mutia, Erning Galanao and Lope Gregorio. Like his friends, Adrian is gay.

Adrian later left his companions at the side of the belfry and the church and saw Dennis and Rafael running from Jim's Video to the Romblon West Central School. Light emanating from the Daily Bread Bakery enabled Adrian to witness the incident.

As Dennis chased Rafael, the latter fell in front of the school by the gate. Rafael crawled on his back to the other side of the street towards the front of the H.E. Building. Dennis crouched forward and executed downward thrusts with his right hand, as if with a knife. As Rafael finally reached the front of the H.E. Building, he shouted, "Ayaw, pare, aray!" Rafael raised his hands and legs. Rafael was kicking, as if defending himself.

Rommel Abrenica then headed towards the municipal building in his motorcycle. Upon seeing Rommel, Dennis ran towards Ilaya Street. Rafael, on the other hand, followed Rommel. Rafael fell on his belly near the front of the municipal building and Rommel went to him.

Adrian followed Rafael to the municipal building. As Rommel turned Rafael's body, Adrian got a glimpse of Rafael's intestines.[17]

Another rebuttal witness, Louel Manzo, observed that Exhibit "D," the knife that was allegedly used in the stabbing of Rafael Morada, looked familiar. According to Louel, he and Dennis had an altercation two days before the stabbing and Dennis had chased him with a knife.

Louel narrated that on January 8, 1997, at around 3:00 p.m., he was with Reagan Manzano, Joal Madeja and Loreto Relano. While on his way home from the plaza after watching basketball, an altercation between him and Dennis Mazo's friend, Bongbong Moaje, broke out. Dennis challenged Louel to fight with Bongbong. Louel, however, told Dennis that fighting was not the solution to the dispute. Dennis told Louel to wait for him, and went home. When Dennis returned, he chased Louel with a knife. Louel fell and Dennis stopped only when Louel fell.

Louel then went home, got his airgun and proceeded to Dennis' house, intending to scare him. Dennis, who was holding a knife, told him that they should fight with knives instead. Louel in turn challenged him to a fistfight but Dennis did not accept his challenge.[18]

On November 26, 1998, the Romblon RTC rendered judgment convicting the accused of Murder and sentencing him to suffer the penalty of reclusion perpetua. The dispositive portion of the decision reads:

> WHEREFORE, this Court finds the accused DENNIS MAZO GUILTY beyond reasonable doubt of the crime of Murder and hereby sentences him to suffer the penalty of reclusion perpetua with the accessory penalties of the law and to pay the costs.
>
> The accused is ORDERED to pay the heirs of the victim the following sums: P50,000.00 as indemnity for the death of Rafael Morada, Jr. and P50,000.00 as moral damages; and to pay Ms. Gloria Morada the sum of P23,800.00 as actual damages, all without subsidiary imprisonment in case of insolvency.
>
> The bail bond of the accused is ORDERED CANCELLED and said accused is ORDERED confined in jail.
>
> The preventive imprisonment the accused had undergone, if any, shall be credited in his favor to its full extent pursuant to Article 29 of the Revised Penal Code, as amended.
>
> SO ORDERED.[19]

Appellant maintains that the killing of Rafael Morada, Jr., was done in self-defense, a justifying circumstance,[20] or at least constituted incomplete self-defense, a privileged mitigating circumstance.[21] Appellant also argues that the prosecution failed to prove the attendance of the qualifying circumstance of treachery.[22] Finally, he

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faults the trial court for failing to appreciate the mitigating circumstance of voluntary surrender in his favor.[23]

Where the accused owns up to the killing of the victim, the burden of evidence shifts to him and he must show by clear and convincing proof that he indeed acted in self-defense.[24] To meet this burden, appellant has offered his testimony as well as that of Anthony Mortel and Gerry Moreno, his companions on the night of the incident.

These testimonies, however, are belied by the testimony of Rommel Abrenica, who testified that it was appellant who was the aggressor.

Appellant brands Abrenica's testimony as unreliable, the witness having consumed four (4) bottles on the night of the incident, two (2) while at the S & L Video and another two (2) at the Rendezvous. Nevertheless, it must be pointed out that the four (4) bottles were far from his threshold of seven (7). Moreover, these were consumed over a protracted period of two and a half (2½) hours thus lessening the likelihood that his senses would be impaired by the intake of alcohol.

Appellant also questions Abrenica's opportunity to witness the stabbing:

> x x x on cross-examination, he admitted he could not get a good picture of the incident considering he never alighted from his motorcycle and merely turned his head to observe the incident (Rommel Abrenica, on cross, id., p. 43). Because of the difficulty of his position, he could not see the incident (Rommel Abrenica, on clarification by the trial court, id., p. 59). He could not see what was in the hands of the accused (Rommel Abrenica, on cross, id., p. 51). He cannot be positive that the victim was not the one carrying the knife (Rommel Abrenica, on cross, id., pp. 51 and 53). He did not, at that time, ask the victim if he was carrying a knife (id., p. 45); he only assumed the victim had no knife with him because he had never before seen him with one in the past (id., p. 45). Significantly, he only looked at the victim and the accused for "a while" (id., p. 55).[25]

The Court finds these points rather inconsequential. It is true that Abrenica admitted that he never alighted from his motorcycle and merely turned his head to observe the showdown between appellant and the victim but there was never an admission that he could not get a good picture of the incident.

As to whether the witness' position enabled him to accurately observe the incident, the Court notes that defense counsel's questions to Abrenica were phrased in the negative and assumed facts that had not been admitted, thereby tending to yield answers that may be interpreted one way or the other. To illustrate:

> ATTY. FRADEJAS Continuing:
>
> Q - And considering your [sic] difficulty of your position, you could not see whether Dennis Mazo was able to hold the hand of Rafael Morada, Jr., correct?
>
> A - No, sir.[26]

"No, sir," in appellant's view, means that the difficulty of Abrenica's position prevented him from seeing appellant hold the victim's hands. Yet "No, sir," could also mean that, no, the witness did not see such act take place since, consistent with his testimony and contrary to appellant and his witness' version, appellant's holding of the victim's hands did not take place at all. The same duplicitous interpretations may be attached to the next question:

> Q - You could not also see whether Rafael Morada, Jr. was able to move his hand from his left side going to the right side because his back was facing towards your back?
>
> A - I did not see.[27]

As well as to this:

> Q - And you will agree with me that because of your [sic] difficulty of position at the distance of one (1) meter from Rafael Morada, Jr. to that of Dennis Mazo you could not see what was in the hands of Dennis Mazo, correct?
>
> A - Yes, sir.[28]

"Yes, sir," my position made it difficult to see what was in Dennis Mazo's hands, or, "Yes, sir," I was able to see despite the difficulty of my position?

The Court finds the testimony of Abrenica worthy of belief not only because it is replete with details but is also corroborated in part by the testimony of Adrian Yap. Yap, like Abrenica, testified that appellant chased the deceased to the H.E. Building, rebutting appellant's and his witnesses' account. Notably, appellant, Moreno and Mortel did not mention any chase taking place.

Appellant, though, likewise assails Yap's trustworthiness, whose appearance as a rebuttal witness, it is claimed, is most "irregular and improper" since he should have testified during the prosecution's presentation of its evidence-in-chief.[29]

This argument loses its value in the face of the defense's failure to object to the offer of the witness' testimony or to move for such testimony to be struck off the record when the impropriety thereof became apparent. In any case, "[e]vidence offered in rebuttal is not automatically excluded just because it would have been more properly admitted in the case in chief. Whether evidence could have been more properly admitted in the case in chief is not a test of admissibility of evidence in rebuttal. Thus, the fact that testimony might have been useful and usable in the case in chief does not necessarily preclude its use in rebuttal."[30]

Appellant also doubts Yap's presence during the stabbing incident since the same is uncorroborated by other evidence:

> 44. Curiously, while claiming to be an eyewitness who later made a statement to the Philippine National Police (PNP), Yap admitted he did not execute any affidavit (id., p. 9). On clarification by the trial court, he said his statement in writing was taken by the PNP (id., p. 27) and that the same was in the custody of Senior State Prosecutor Francisco Benedicto Jr. (id., p. 28). However, the prosecution did not produce anything (whether documentary or testimonial) that would corroborate Yap's allegation that he was an eyewitness. If ever, it suppressed the alleged written statement of Yap and therefore it should be presumed to be adverse to the prosecution's case had it been produced (Rule 131, Secs. 3, e, Rules of Court). Yap's testimony is remarkable for being uncorroborated, which is anomalous under the circumstances.
>
> 45. Chief prosecution witness Abrenica, whom Yap claimed he saw overtake the victim as the latter struggled to get to the municipal hall, never even mentioned that he saw Yap. Neither in his lengthy testimonies on the prosecution's evidence-in-chief (Rommel Abrenica, 04 March 1997 TSN, pp. 4 to 63 and 07 July 1997 TSN, pp. 1-7) nor in the rebuttal evidence (Rommel Abrenica, 20 January 1991 TSN, pp. 1-29) did he hint seeing Yap. The persons Abrenica claimed he saw near the municipal hall were Joseph Angcaco and a certain Lalong who helped him bring the victim to the hospital (Rommel Abrenica on direct, 04 March 1997 TSN, p. 17). Yap is conspicuously absent in Abrenica's testimony. xxx[31]

The Court finds no reason to doubt Yap's presence at the scene of the crime for, like Abrenica's testimony, Yap's account is fraught with details, which could be possible only if he was actually present when the killing occurred. Moreover, the trial court described Yap as a "most spontaneous" witness, and appellate courts usually accord great weight to the trial court's assessment of a witness' credibility, having been in a better position to observe his demeanor.[32] Further, the defense failed to establish any motive for Yap to testify falsely against appellant. Indeed, Yap testified against appellant, despite his admiration for him:

Q - Now you said that you saw the accused Dennis Mazo and you pointed to him when you were asked to in the courtroom, how long have you known Dennis Mazo?
A - Before Dennis Mazo was going to Joey Argawanon.

Q - Who is that Joey Argawanon?
A - Former President of the Gay Society in Romblon.

Q - You met Dennis Mazo in the place of Joey Argawanon?
A - No, sir. I came to know because he was one of the dancers of [sic] Joey['s] show.

Q - How do you size-up Dennis Mazo, is he macho?
A - Yes sir, guwapo.

Q - You like him?
A - Of course I am a gay I would like him because he is handsome.

Q - Did you ever wanted him to be a partner?
A - No, sir.

Q - You never approach[ed] him and offered yourself to him as your partner?
A - No, sir.

Q - But you said that you admired him, macho, guwapo and a good dances [sic] right?
A - Yes, sir.

Q - Are you attracted to your same sex meaning the males?
A - Yes, sir.

Q - You were attracted to Dennis Mazo?
A - Yes, sir.

Q - And you sincerely wanted to be with him at one time or another because you admire him to be macho, guwapo?
A - I am shytupe [sic] I cannot tell.

Q - You cannot tell us but within your heart you were craving or you desire Dennis Mazo to be your partner one time or another in your life?
A - Yes, sir.

Q - But you never had the chance to be with Dennis Mazo?
A - None, sir.

Q - And you rebelled within you yourself to be with Dennis Mazo?
A - No.

Q - Right now, do you still admire Dennis Mazo for his handsomeness or being a macho guy?
A - Yes, sir.

Q - Are you aware that right now the Honorable Placido C. Marquez of the RTC of Romblon is prepared to decide on the liberty of the life of Dennis Mazo whom you admire?
A - Yes, sir.

COURT:

Q - Why despite that awareness on your part is testifying practically against him, why?
A - Of course the one one [sic] is looking for justice and besides I saw it and I am telling the truth what is the

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> truth that Dennis I saw him chasing Rapot who fell in front of the gate of the Romblon West Central School; then Rapot crawling going in front of the H.E. begging "don't pare, ouch!" of course I saw their circumstances that Rapot was in hard situation and who would not pitty [sic] the other side who is now dead![33]

The failure of the prosecution to offer in evidence the affidavit allegedly executed by Yap after the killing does not give rise to the presumption that evidence willfully suppressed would be adverse if produced.[34] Such presumption is not applicable when the omitted evidence is at the disposal of both parties, because it would have the same weight against the one as against the other party.[35] In People vs. Padiernos,[36] the Court rejected a similar claim by the accused, thus:

> xxx Nor do we find merit in the contention that the non-presentation of the written statement of this witness to the police which she allegedly did not sign, gave rise to the presumption that it "contained declarations disastrous to the prosecution case." The presumption that suppressed evidence is unfavorable does not apply where the evidence was at the disposal of both the defense and the prosecution. In the case at bar, the alleged statement of prosecution witness Letty Basa was in the possession of the police authorities. Hence, the defense could have requested the lower court below to issue a subpoena requiring the police to produce such statement, but as the defense failed to do that, they cannot now argue that said statement if produced would have been adverse to the prosecution.

As regards Abrenica's failure to mention Yap's presence in his testimony, it must be noted that the questions propounded by the prosecution related to the identity of the persons who came to the victim's succor, not those who were present at the scene.

> Q: When he had fallen, what did you do?
> A: I held him and cuddled him.
>
> Q: And what did you do with him?
> A: I was about to lift him but he was too heavy.
>
> Q: So, what did you do?
> A: I asked for help.
>
> Q: Did anyone answer your call for help?
> A: Not yet.
>
> Q: What about later?
> A: Somebody helped me.
>
> Q: Who helped you?
> A: Lalong.
>
> Q: Do you know his complete name?
> A: His name is Lalong.
>
> Q: Who else helped you?
> A: Joseph Angcaco.
>
> Q: And what was done with Rafael Morada, Jr. when the two (2) came?
> A: Joseph Angcaco had a tricycle.
>
> Q: And what was done with Rafael Morada Jr. since, Joseph Angcaco had a tricycle?
> A: We brought him to the hospital"[37]

Yap never claimed to have helped Abrenica or the victim.

Next, appellant describes Yap's testimony as "incredible" because:

> xxx He admitted he did not observe any commotion before the alleged chase (id., p. 13). This is surprising because the church belfry (where Rap was allegedly positioned) was only 15-20 meters from Punzalan's Pharmacy where the stabbing occurred (id., pp. 12-13) and there was alight [sic] at the Jem's Beta Show and Daily Bread Bakery. Moreover, the moon was bright. Yap also did not see any knife (id., 24-26). [On the contrary, he said accused was on top of the victim with his hand making a repeated thrust "like he was punching" (id., p. 26)]. In fact, he only concluded that accused stabbed the victim because he saw the latter's intestines as the body was turned over by Abrenica (id., p. 25)]. After the incident, Yap never told Abrenica of what he saw (id., p. 28). He did not, during that night, make any report to the police (id., p. 33). None of the seven (7) gay companions, who also allegedly heard the commotion, corroborated his testimony even though they were also alleged to be eyewitness to the chase and the fight (id., pp. 25 and 26). Yap said he and another gay, Ronnie Manzo, followed the victim and Abrenica to the municipal building and were only two (2) meters from them (id., pp. 25-26). But Abrenica never claimed having seen them. Neither did Lalong and Joseph Angcaco, who helped bring the victim to the hospital, testify to corroborate Yap's testimony. Neither did the gay Ronnie Manzo take the witness stand, whether during the presentation of the evidence-in-chief or the rebuttal. The non-production of a corroborative witness, without any explanation given why he was not so produced, weakens the testimony of the witness who named that corroborating witness in his testimony (Pp. v. Abonales, 60 OG 179, 182-183).[38]

The Court is not persuaded by these arguments.

First, that Adrian did not see any commotion before the chase is easily explainable. Adrian recounted that he was in the belfry with his companions but later detached himself from the group and went out because he had no male companion.[39] Thus, it is possible that the pre-chase commotion occurred while Adrian was in the belfry and only chanced upon the chase when he went out.

Second, that Adrian did not see any knife in appellant's hands did not render his testimony incredible. (On the contrary, his candor in admitting so boosts rather than diminishes his credibility for if his testimony were fabricated he could easily have testified that he saw the knife.) As appellant himself pointed out, Adrian witnessed the incident from a distance of 15-20 meters. The stabbing occurred in the wee hours of the morning. These circumstances naturally prevented Adrian from seeing the attack in detail, although they were sufficient for him to work out a general depiction of the tragic event. Consequently, Adrian was able to demonstrate how appellant crouched as he thrusted his right hand downwards, at the same time moving forward.[40]

Finally, the prosecution has discretion to decide on who to call as witness during trial. Its failure to present Ronnie Manzo or any of Adrian's companions does not give rise to the presumption that "evidence willfully suppressed would be adverse if produced" since the evidence was merely corroborative or cumulative and was not proven to be willfully suppressed.[41] Like the affidavit Adrian executed, which was not offered by the prosecution in evidence, appellant could have subpoenaed Adrian's companions to testify in his behalf if he believed that their testimonies were vital to his defense.[42]

Appellant himself provides additional ground for the Court to reject his plea of self-defense. Appellant's claim that he sustained an injury in his finger during the confrontation is simply too contrived to deserve any credence. We sustain the trial court's finding in this regard:

> The accused claimed that he wrested the knife (Exh. D) from the deceased when the latter stabbed him and that he was injured in his right forefinger because his right forefinger slid when he parried the blow or thrust. (Dennis Mazo, tsn, on direct examination, September 9, 1997, p. 39). These claims should be rejected. As demonstrated by the accused himself, he allegedly made a side step to his right side while the victim was approaching and delivering a forward thrust on him with his right hand holding the knife; he took hold with his

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> two (2) hands the right hand of the deceased and with his right knee raised forward, he pounded the right hand of the victim against his right knee and the deceased lost his grip on the knife and it fell on the ground (Dennis Mazo, on direct examination, supra, pp. 30-32). He was ahead in getting the knife; automatically after the knife fell, he got it (supra, p. 32). This same scene showing how the accused allegedly parried the thrust of the knife by the deceased was described and demonstrated by defense witness Anthony Mortel (Anthony Mortel, tsn, on direct examination, July 8, 1997, p. 12). The same is true with the description and demonstration by another defense witness, Gerry Moreno (Gerry Moreno, tsn, on direct examination, Sept. 8, 1997, pp. 16-17).
>
> The strong, clear and convincing evidence testified to by the accused himself and his own two (2) witnesses, and even demonstrated by them in Court, as shown above, would show that there was no such parrying of the thrust or blow with the knife (Exh. D) by the deceased which could have injured the right forefinger (right index finger) of the accused. This finds support in the utter lack of corroboration by his relative, the Chief of Police of Romblon Harry B. Mazo, who brought him that same early morning of the incident to the investigation room of their police headquarters and who testified as a defense witness. The same is true with another defense witness, SPO2 Jose dela Cruz, who was the one to whom Senior Police Inspector Mazo turned over the accused early that same morning of the incident and who accomplished the temporary and permanent police blotters after making inquiries from the accused which permanent police blotter (Exhs. 1 and 1-A) made no mention also of such injury allegedly sustained by the accused. Both police officers made no mention at all in their Court testimonies about this vital injury during the stabbing incident. Likewise, it would appear that his medical consultation with the nearby Dr. Victorio F. Benedicto only on July 17, 1997 and who inspected his already healed incised wound or scar (Exh. 2) was an afterthought. Moreover, from the testimony of Dr. Benedicto this wound could have been sustained possibly by the accused on January 12 or 13, 1997 (Dr. Victorio F. Benedicto, tsn, on additional cross examination, Oct. 17, 1997, p. 22) or possibly incurred about on January 10, 1997 (supra, on additional question by the defense counsel, p. 23). Either way, this testimony does not help the accused in clearly and convincingly proving that he sustained this healed wound during the incident especially in the context of other testimonial and documentary evidence including his own and those of his other defense witnesses.[43]

Thus, rather than strengthening his plea of self-defense, appellant's allegation that he suffered an injury during the purported scuffle diminishes his claim to the justifying circumstance.

As appellant failed to prove by clear and convincing evidence that the deceased was the unlawful aggressor, his claim of incomplete self-defense must also fail. Unlawful aggression is an indispensable requisite for this privileged mitigating circumstance to be appreciated.[44]

Nevertheless, we agree with appellant that treachery did not attend the commission of the crime. 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 specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[45] Its essence lies in the attack which comes without warning, and is swift, deliberate and unexpected, and affords the hapless, unarmed and unsuspecting victim no chance to resist or to escape.[46]

Here, the trial court found that treachery was present both at the initial and final stages of the attack. First, the victim approached appellant unarmed without any inkling that he would be stabbed by appellant. It bears noting, however, that an altercation in the Rendezvous had just recently ensued between appellant on the one hand and the victim and Rommel Abrenica on the other. There was an exchange of words with the victim mocking appellant's long hair. In their subsequent encounter, the victim by his lonesome audaciously approached appellant and his three companions. It cannot be said, therefore, that the victim had not been forewarned of the danger he faced when he approached appellant. There could be no treachery when the victim was placed on guard, such as when a heated argument preceded the attack, or when the victim was standing face to face with his assailants and

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the initial assault could not have been unforeseen.[47] Moreover-

> In treachery, the mode of attack must be consciously adopted. This means that the accused must make some preparation to kill the deceased in such a manner as to insure the execution of the crime or to make it impossible or hard for the person attacked to defend himself or retaliate. The mode of attack, therefore, must be planned by the offender, and must not spring from the unexpected turn of events.[48]

The meeting between appellant's group and the victim was merely by chance and it could not be said that the mode of attack could have been planned. A killing done at the spur of the moment is not treacherous.[49]

The trial court also held that there was treachery when appellant continued to stab the victim when the latter fell and was crawling on his back. This conclusion is erroneous. It is true that appellant took advantage of the victim's unfortunate fall to finish him off but there is no showing that appellant had consciously adopted, prepared or planned to use the victim's sudden, hapless position to his advantage. As treachery is absent, and as there appears to be no other circumstance to qualify the killing to Murder, appellant can be convicted only of Homicide.[50]

Finally, appellant submits that voluntary surrender should have been appreciated in his favor, a submission with which the Solicitor General agrees.

For voluntary surrender to be appreciated as a mitigating circumstance, the following requisites must concur: (1) the offender had not been actually arrested; (2) the offender surrendered himself to a person in authority; and (3) the surrender was voluntary.[51] To be voluntary, the surrender must be spontaneous and deliberate, that is, there must be an intent to submit oneself unconditionally to the authorities.[52] The surrender must be considered as an acknowledgment of his guilt or an intention to save the authorities the trouble and expense that his search and capture would require.[53]

The trial court held that there was no voluntary surrender, reasoning that the surrender was worked out only because Senior Police Inspector Mazo accidentally found appellant when he accompanied the latter's relatives back to their house. It did not occur to the trial court, though, that appellant could have escaped right after that meeting but he did not. Instead, he submitted himself unconditionally later that morning when Senior Police Insp. Mazo came for him. By doing so, appellant manifested his intention to save the authorities the trouble of conducting a manhunt for him.

The penalty for homicide is reclusion temporal.[54] In view of the presence of one mitigating circumstance, the same must be imposed in its minimum period.[55] Under the Indeterminate Sentence Law:[56]

> SECTION 1. x x x in imposing a prison sentence for an offense punishable by the Revised Penal Code, or its amendments, the court shall sentence the accused to an indeterminate sentence the maximum term of which shall be that which, in view of the attending circumstances, could be imposed under the rules of the said Code, and the minimum of which shall be within the range of the period next lower to that prescribed by the Code for the offense x x x.

Accordingly, appellant is sentenced to suffer imprisonment for a minimum term of eight (8) years and one (1) day of prision mayor to a maximum term of fourteen (14) years of reclusion temporal in its minimum period.

WHEREFORE, the decision of the Regional Trial Court of Romblon is MODIFIED insofar as it convicts appellant Dennis Mazo of Murder and imposes upon him the penalty of reclusion perpetua. Judgment is hereby rendered finding appellant GUILTY of Homicide and sentencing him to suffer the penalty of imprisonment for eight (8) years and one (1) day of prision mayor as minimum to fourteen (14) years of reclusion temporal in its minimum period as maximum.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Puno, Pardo, and Ynares-Santiago, JJ., concur.

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[1] Records, p. 2.

[2] Id., at 5.

[3] TSN, March 4, 1997, pp. 4-63; TSN, July 7, 1997, pp. 2-21.

[4] Exhibit "A," Records, p. 31.

[5] TSN, March 3, 1997, pp. 6-28.

[6] TSN, April 10, 1997, pp. 8-18; TSN, April 11, 1997, pp. 4-13.

[7] TSN, April 10, 1997, pp. 18-24.

[8] TSN, September 9, 1997, pp. 25-56; TSN, November 12, 1997, pp. 2-6.

[9] TSN, September 8, 1997, pp. 6-45.

[10] TSN, August 8, 1997, pp. 3-26.

[11] TSN, September 9, 1997, pp. 25-56; TSN, November 12, 1997, pp. 2-6.

[12] Exhibit "2," Records, p. 79.

[13] TSN, October 17, 1997, pp. 7-24.

[14] TSN, September 9, 1997, pp. 3-23.

[15] TSN, January 20, 1998, pp. 3-28.

[16] TSN, November 12, 1997, pp. 7-21.

[17] TSN, June 25, 1998, pp. 3-38.

[18] TSN, July 22, 1998, pp. 3-29.

[19] Records, p. 177.

[20] REVISED PENAL CODE, ARTICLE 11. 1.

[21] Id., ART. 13. 1.

[22] Id., ART. 14. 16.

[23] Id., ART. 13. 7.

[24] People vs. Gaspar, 318 SCRA 649 (1999); People vs. Tomolin, 311 SCRA 498 (1999); People vs. Bitoon, Sr., 309 SCRA 209 (1999); People vs. Real, 308 SCRA 244 (1999); People vs. Santillana, 308 SCRA 104 (1999).

[25] Rollo, p. 76. Emphasis by appellant.

[26] TSN, March 4, 1997, p. 59.

[27] Ibid.

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[28] Id., at 51.

[29] Citing People vs. Camalog, 169 SCRA 816 (1989).

[30] 75 Am Jur 2d, Trial § 375. Citations omitted.

[31] Rollo, pp. 85-86.

[32] People vs. Villanueva, 302 SCRA 380 (1999); People vs. Mahinay, 302 SCRA 455 (1999); People vs. Jimenez, 302 SCRA 607 (1999).

[33] TSN, June 25, 1998, pp. 14-17.

[34] RULES OF COURT, RULE 131, SEC. 3 (e).

[35] U.S. vs. Dinola, 37 Phil. 797 (1918).

[36] 69 SCRA 485 (1976).

[37] TSN, March 4, 1997, p. 17.

[38] TSN, March 4, 1997, p. 17.

[39] TSN, June 25, 1998, pp. 11-12.

[40] Id., at 7.

[41] People vs. Tejero, 308 SCRA 660 (1999); People vs. Barellano, 319 SCRA 567 (1999); People vs. Mallari, 310 SCRA 621 (1999).

[42] People vs. Cayaan, 183 SCRA 445 (1999).

[43] Records, pp. 170-171. Underscoring by the trial court.

[44] People vs. Antonio, 305 SCRA 414 (1999).

[45] REVISED PENAL CODE, ART. 14. 1.

[46] People vs. Santillana, supra.

[47] People vs. Salvador, 279 SCRA 164 (1997).

[48] People vs. Santillana, supra. Emphasis supplied.

[49] People vs. Salvador, supra.

[50] REVISED PENAL CODE, ART. 249.

[51] People vs. More, 321 SCRA 538 (1999); People vs. Arizala, 317 SCRA 244 (1999); People vs. Aquino, 314 SCRA 543 (1999).

[52] People vs. Real, 308 SCRA 244 (1999); People vs. Rebamontan, 305 SCRA (1999).

[53] People vs. Santillana, supra.

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[54] REVISED PENAL CODE, ART. 249.

[55] Id., ART. 64. 2.

[56] ACT No. 4103, AS AMENDED.

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