

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. ELBERTO TUBONGBANUA Y PAHILANGA, APPELLANT.

G.R. NO. 171271. August 31, 2006

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YNARES-SANTIAGO, J.:

Appellant Elberto Tubongbanua was charged with the crime of murder in an amended Information[1] that reads:

That on or about the 12[th] of February, 2001, in the Municipality of San Juan, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above named accused, with intent to kill and with evident premeditation, treachery, taking advantage of superior strength, did then and there willfully, unlawfully and feloniously attack, assault and stab Evelyn Kho y Sua on the different parts of her body with the use of a deadly weapon, thereby inflicting upon said Evelyn Kho y Sua stab wounds, which directly caused her death; that the act was committed inside the dwelling of Evelyn Kho y Sua and with insult or in disregard of the respect due to the offended party on account of his (sic) rank, age or sex.

CONTRARY TO LAW.

When arraigned, appellant pleaded not guilty and trial on the merits ensued.

The facts are as follows:

Accused was employed as a family driver by Atty. Evelyn Sua-Kho since 1998. The latter worked as the managing partner of the Lawyer's Advocate Circle, a law firm operated as a sole proprietorship, and located at 2302 Atlanta Center, 31 Anapolis St., Greenhills, San Juan, M.M. Accused was initially paid P6,000.00 a month as wages, aside from boarding, food, overtime and extra pay, which he received when he did extra driving and other work for Atty. Sua-Kho's family.

On February 12, 2001, at around 6:00 o'clock in the evening, the accused drove Atty. Sua Kho to her condominium unit at 1702 Platinum 2000, Anapolis St., Greenhills, San Jun M.M. After handing his employer's bag to Marissa Hiso, the housemaid, accused proceeded to the kitchen where he drank a glass of water. Also in the condominium unit were Atty. Sua-Kho's three year old daughter Issa and her nanny, Nelie Maglasang. After talking and playing with her daughter for a few minutes, Atty. Sua-Kho emerged from the bedroom to talk with the accused. Shortly thereafter, Marrisa heard her employer screaming, and she saw the accused stabbing her with their kitchen knife. She tried to stop the accused, shouting "Kuya Bert!", but the latter continued to stab Atty. Sua-Kho. Meanwhile, Nelie also heard her employer's screams, and locked herself with Issa in the master's bathroom. When she peeped-out from her hiding place, she saw Marissa, whom she signaled to go downstairs for help. The latter did so, and sought help from the security guard. Nellie, meanwhile called Atty. Sua-Kho's father, Marcelino Sua, and husband, Daniel Kho, on the bedroom phone.

When Marcelino Sua arrived, he saw Marissa and a security guard in front of the condominium unit. When they entered, they saw the bloodied and unmoving body of Atty. Sua-Kho sprawled on the floor. Marcelino then brought his daughter to the Cardinal Santos Memorial Hospital, where doctors tried to revive her, but failed. The accused, meanwhile, fled, using the victim's car. He was arrested soon afterwards in Calapan, Mindoro, while on his way to his home province.

Upon examination of the victim's body, Dr. Edgardo Rodriguez Vida found that she suffered eighteen (18) stab wounds and three (3) incise wounds aside from other minor injuries. The stab wounds on her chest were considered fatal as they affected both lungs, the main blood vessel of the heart and the heart itself. There were four stab wounds on the heart, one on the right lung and four on the left lung. According to the doctor, the wounds could have been caused by a sharp single-bladed object and that the incise wounds found on the left forearm, right wrist and left leg could have been inflicted while Atty. Sua-Kho tried to parry the blows.

Marian Aquino, legal secretary of the Lawyer's Advocate Circle, where the victim worked, related that prior to the killing of Atty. Sua-Kho, the accused had confided to her about his grudges against the victim, such as being given spoiled food, that his meals were being measured, that he worked long hours of the day and served many bosses. On February 11, 2001, accused spent the day at her boarding house where he told her he could no longer take the way Atty. Sua-Kho treated him. Later he said "nadedemonyo na ako" and that he would finish Atty. Sua-Kho. He would hit her at the back, very deep, and he would make sure that she would die. Then he would go to the province, his territory, where he could not be followed.

Atty. Joel Baguio, an associate at the Lawyer's Advocate Circle, also testified that before the killing, the accused told him of his grudges against Atty. Sua-Kho, like his being scolded for being late, and being called a thief, a killer, and ex-convict and other bad names. On February 12, 2001, the accused also told him not to get too close, as he might get involved in what was going to happen.

The accused, on the other hand, raised the defense of self-defense. Atty. Sua-Kho, he testified, didn't want her husband to know that she had been taking trips with a company guest, a certain Phillip Robinson, to Puerto Azul and Daranak Falls in Tanay. She warned the accused that something bad would happen to him if her husband would learn about it. In the evening of February 12, 2001, Atty. Sua-Kho urged accused to go to her father's house, because her husband Daniel Kho would be arriving. As she and the accused argued about Phillip Robinson, the former got a knife and stabbed him with it, catching him on the wrist. Accused managed to wrest control of the knife, and with it, stabbed Atty. Sua-Kho three or four times. After he stabbed her he was shocked and left the place using the victim's car. He fled to Mindoro where he allegedly surrendered to the police.[2]

On March 26, 2002, the Regional Trial Court of Pasig City, Branch 163, rendered judgment, the dispositive portion of which reads:

WHEREFORE, accused, Elberto Tubongbanua y Pahilanga, is found GUILTY beyond reasonable doubt of the crime of murder under Article 248 of the Revised Penal Code and is sentenced to suffer the severe penalty of death by lethal injection with all the accessory penalties provided by law and to pay the costs.

On the civil liability of the accused, he is ordered to pay the legal heirs of the victim actual, moral, nominal, exemplary and temperate damages in the respective sums of P298,202.25, P50,000.00, P200,000.00, P200,000.00 and P50,000.00. He is also ordered to pay the victim's heirs P50,000.00 for the loss of the victim's life, all with interest thereon at the legal rate of 6 percent per annum from this date until fully paid.

SO ORDERED.[3]

The case was elevated to this Court because the penalty imposed was death. However, pursuant to our ruling in *People v. Mateo*,[4] the case was transferred and referred to the Court of Appeals.[5]

On October 21, 2005, the Court of Appeals affirmed with modifications the decision of the trial court. The dispositive portion of the decision reads:

WHEREFORE, the Decision of the Regional Trial Court of Pasig City is hereby AFFIRMED with MODIFICATIONS, in that, the accused-appellant, having been found guilty beyond reasonable doubt of Murder, is hereby sentenced to Death. He is ordered to indemnify the heirs of the victim the following:

- (1) P50,000.00 as civil indemnity;
- (2) P50,000.00 as moral damages;
- (3) P298,202.25 as actual damages; and
- (4) P50,000.00 as exemplary damages

The awards of temperate and nominal damages are hereby DELETED.

Since the imposition of the death penalty in this case was affirmed, this Decision and the complete records of this case are hereby ordered TRANSMITTED to the Supreme Court on automatic review, immediately upon the promulgation of this Decision.

SO ORDERED.[6]

The Court of Appeals disregarded appellant's claim of self defense for lack of evidence and for being incredible considering the number and location of wounds sustained by the victim and his flight from the crime scene. It also noted that treachery did not attend the commission of the crime as there were no particulars as to how the killing began or executed.

However, the appellate court found that evident premeditation was adequately established which qualified the killing to murder. Likewise, it appreciated abuse of superior strength as an aggravating circumstance.

As regards the aggravating circumstances of dwelling and insult to the rank, sex and age of the victim, the Court of Appeals noted that these circumstances were included as amendments to the information after the presentation by the prosecution of its evidence. As such, the same should not be allowed because it will prejudice the rights of the appellant.

In a Resolution dated March 7, 2006, we required both parties to file supplemental briefs. The Office of the Solicitor General manifested that it will no longer be filing a supplemental brief. On the other hand, appellant insisted on his theory of self defense and prayed for his acquittal.

We agree with the findings of the trial court and the Court of Appeals that appellant's claim of self-defense is self-serving hence should not be given credence. In *Cabuslay v. People*,^[7] we ruled that:

One who invokes self defense admits responsibility for the killing. Accordingly, the burden of proof shifts to the accused who must then prove the justifying circumstance. He must show by clear and convincing evidence that he indeed acted in self-defense, or in defense of a relative or a stranger. With clear and convincing evidence, all the following elements of self defense must be established: (1) unlawful aggression on the part of the victim; (2) reasonable necessity of the means employed to prevent or repel it; and (3) lack of sufficient provocation on the part of the person claiming self defense.

Appellant's version of the stabbing incident does not inspire belief. His testimony that it was Atty. Sua-Kho who attacked him is uncorroborated and improbable. Appellant's alleged use of reasonable means to repel the aggression is also untenable considering the nature and number of wounds inflicted on the victim which demonstrate a determined effort to kill the victim and not just defend oneself.^[8] We note that the victim suffered 18 stab wounds which were all directed to her chest, heart and lungs. She also had incised wounds which were inflicted while she was parrying the blows coming from the appellant. In fact, appellant testified that Atty. Sua-Kho was running away from him but he still pursued her and inflicted the fatal wounds:

Q:

According to you, Atty. launched at you and you covered and cut on your left hand and that was the time you got the knife and what happened after that?

A: What I remember is that she went inside.

Q:

So, she run (sic) away from you, is that what you are saying?

A:

When I was hit and I was able to stab her, she ran towards the room.

Q:

So she was trying to avoid [you] after she stabbed you the first time?

A:

I do not know, what I know is that when I stabbed her, she went inside the room.

Q:

What part of the body did you hit her the first time?

A:

At the abdominal area, sir.

Q:

After that initial wound, Atty. Kho run (sic) towards the room, is that correct?

A:

What I remember, she run (sic), sir.[9]

Moreover, appellant's act of fleeing from the crime scene instead of reporting the incident to the police authorities is contrary to his proclaimed innocence but highly indicative of guilt and negate his claim of self defense.[10]

We agree with the Court of Appeals that the qualifying circumstance of treachery was not present. Treachery under paragraph 16 of Article 14 of the Revised Penal Code is defined as the deliberate employment of means, methods, or forms in the execution of a crime against persons which tend directly and specially to insure its execution, without risk to the offender arising from the defense which the intended victim might raise. For treachery to be present, two conditions must concur: (a) the employment of means of execution which would ensure the safety of the offender from defensive and retaliatory acts of the victim, giving the victim no opportunity to defend himself; and (b) the means, method and manner of the execution were deliberately and consciously adopted by the offender.[11] Treachery cannot be presumed; it must be proved by clear and convincing evidence or as conclusively as the killing itself.[12]

In the instant case, there is no proof on how the attack was commenced. Where no particulars are known as to the manner in which the aggression was made or how the act which resulted in the death of the victim began and developed, it can in no way be established from mere suppositions that the killing was perpetrated by treachery.[13]

We find however that evident premeditation and taking advantage of superior strength attended the killing.

Like any other circumstance that qualifies a killing as murder, evident premeditation must be established by clear and positive evidence;[14] that is, by proof beyond reasonable doubt.[15] The essence of premeditation is that the execution of the act was preceded by cool thought and reflections upon the resolution to carry out the criminal

intent during a space of time sufficient to arrive at a calm judgment. To be considered, the following elements must be proven: (1) the time when the accused decided to commit the crime; (2) an overt act manifestly indicating that he has clung to his determination; and (3) sufficient lapse of time between the decision and the execution, to allow the accused to reflect upon the consequences of his act.[16]

Prosecution witnesses Marian Aquino and Atty. Joel Baguio testified as to appellant's state of mind and predisposition to avenge the alleged maltreatment by the victim. Both witnesses testified on appellant's ill-plans against his employer the day prior to the crime. Absent evidence showing any reason or motive for the witnesses to falsely testify against the appellant, the logical conclusion is that no such improper motive exists and their testimonies should be accorded full faith and credit. Thus, the lower courts correctly concluded that evident premeditation attended the commission of the crime.

Appellant likewise took advantage of his superior strength to perpetuate the criminal act. He killed Atty. Sua-Kho by overpowering her and driving the murder weapon into her body several times, despite her attempts to parry the blows. He could not have executed the dastardly act without employing physical superiority over the victim. In *People v. Espina*, [17] we have ruled that an attack by a man with a deadly weapon upon an unarmed and defenseless woman constitutes the circumstance of abuse of that superiority which his sex and the weapon used in the act afforded him, and from which the woman was unable to defend herself.

We find, however, that the Court of Appeals erred in not allowing the amendments in the information regarding the aggravating circumstances of dwelling and insult or disregard of the respect due to rank, age or sex. Section 14, Rule 110 of the Rules of Court, [18] provides that an amendment after the plea of the accused is permitted only as to matters of form, provided leave of court is obtained and such amendment is not prejudicial to the rights of the accused. A substantial amendment is not permitted after the accused had already been arraigned. [19]

In *Teehankee, Jr. v. Madayag*, [20] we had the occasion to distinguish between substantial and formal amendments:

A substantial amendment consists of the recital of facts constituting the offense charged and determinative of the jurisdiction of the court. All other matters are merely of form. Thus, the following have been held to be merely formal amendments, viz.: (1) new allegations which relate only to the range of the penalty that the court might impose in the event of conviction; (2) an amendment which does not charge another offense different or distinct from that charged in the original one; (3) additional allegations which do not alter the prosecution's theory of the case so as to cause surprise to the accused and affect the form of defense he has or will assume; and (4) an amendment which does not adversely affect any substantial right of the accused, such as his right to invoke prescription.

The test as to whether an amendment is only of form and an accused is not prejudiced by such amendment is whether or not a defense under the information as it originally stood would be equally available after the amendment is made, and whether or not any evidence which the accused might have would be equally applicable to the information in one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance. [21]

Tested against these guidelines, the insertion of the aggravating circumstances of dwelling and insult or disregard of the respect due to rank, age, or sex of the victim is clearly a formal, not a substantial, amendment. These amendments do not have the effect of charging another offense different or distinct from the charge of murder as contained in the original information. They relate only to the range of the penalty that the court might impose in the event of conviction. The amendment did not adversely affect any substantial right of appellant. [22] Besides, appellant never objected to the presentation of evidence to prove the aggravating circumstances of dwelling and insult or in disregard of the respect due to the offended party on account of rank, age or sex. [23] Without any

objection by the defense, the defect is deemed waived.[24]

There is no dispute that Atty. Sua-Kho was killed in her home. Appellant could have killed her elsewhere but he decided to commit the crime at her home; thus we appreciate the aggravating circumstance of dwelling. However, it was not convincingly shown that appellant deliberately intended to offend or disregard the respect due to rank, age, or sex of Atty. Sua-Kho. The motive for the murder was his grudge against the victim and not because she was a lawyer and his employer. Neither did appellant take into consideration the age of Atty. Sua-Kho and the fact that she is a woman when he killed her.

Article 248 of the Revised Penal Code,[25] as amended by R.A. No. 7659,[26] prescribes the penalty of reclusion perpetua to death for the crime of murder. Considering the qualifying circumstance of evident premeditation and the aggravating circumstances of dwelling, and taking advantage of superior strength without any mitigating circumstance, the proper imposable penalty would have been death.[27]

However, in view of the enactment of Republic Act No. 9346 or the Act Prohibiting the Imposition of Death Penalty on June 24, 2006[28], the penalty that should be meted is reclusion perpetua, thus:

SECTION 1. The imposition of the penalty of death is hereby prohibited. Accordingly, Republic Act No. Eight Thousand One Hundred Seventy-Seven (R.A. No. 8177), otherwise known as the Act Designating Death by Lethal Injection is hereby repealed. Republic Act No. Seven Thousand Six Hundred Fifty-Nine (R.A. No. 7659), otherwise known as the Death Penalty Law and all other laws, executive orders and decrees insofar as they impose the death penalty are hereby repealed or amended accordingly.

SEC. 2. In lieu of the death penalty, the following shall be imposed:

- (a) the penalty of reclusion perpetua, when the law violated makes use of the nomenclature of the penalties of the Revised Penal Code; or
- (b) the penalty of life imprisonment, when the law violated does not make use of the nomenclature of the penalties of the Revised Penal Code.

Pursuant to the same law, appellant shall not be eligible for parole under Act No. 4103, otherwise known as the Indeterminate Sentence Law.

Regarding damages, when death occurs due to a crime, the following may be recovered: (1) civil indemnity ex delicto for the death of the victim; (2) actual or compensatory damages; (3) moral damages; (4) exemplary damages; (5) attorney's fees and expenses of litigation, and (6) interest, in proper cases.[29]

We affirm the monetary awards granted by the Court of Appeals but modify the amount of actual damages and exemplary damages.

The award for civil indemnity is mandatory and is granted to the heirs of the victim without need of proof other than the commission of the crime. Hence, based on recent jurisprudence, the award of civil indemnity ex delicto of P75,000.00 for the heirs Atty. Sua-Kho is in order.

Actual or compensatory damages are those awarded in order to compensate a party for an injury or loss he suffered. They arise out of a sense of natural justice and are aimed at repairing the wrong done.[30] To be recoverable, actual and compensatory damages must be duly proved with reasonable degree of certainty.[31] In the present case, the award of actual damages of P298,210.25[32] is correct, considering that the said amount has been duly proven.

The Court of Appeals correctly awarded moral damages in the amount of P50,000.00 in view of the violent death of the victim and the resultant grief of her family.

Article 2230 of the Civil Code specifically states that exemplary damages may be imposed when the crime was committed with one or more aggravating circumstances, as in this case. Moreover, as an example and deterrent to future similar transgressions, the Court finds that an award of P25,000.00 for exemplary damages is proper.

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. CR HC No. 01366, is AFFIRMED with MODIFICATION. Appellant Elberto Tubongbanua y Pahilanga is found GUILTY beyond reasonable doubt of MURDER as defined in Article 248 of the Revised Penal Code, as amended by Republic Act No. 7659, qualified by evident premeditation and with the attendant aggravating circumstances of taking advantage of superior strength and dwelling, with no mitigating circumstances. The proper imposable penalty would have been death. However, pursuant to Republic Act No. 9346, appellant is sentenced to suffer the penalty of Reclusion Perpetua without possibility of parole. The appellant is ORDERED to pay the heirs of Atty. Evelyn Sua-Kho, the amounts of P75,000.00 as civil indemnity; P298,210.25 as actual damages; 50,000.00 as moral damages; and P25,000.00 as exemplary damages; all with interest at the legal rate of six percent (6%) per annum from this date until fully paid.

SO ORDERED.

Puno, Quisumbing, Sandoval-Gutierrez, Carpio, Austria-Martinez, Carpio Morales, Callejo, Sr., Azcuna, Chico-Nazario, Garcia and Velasco, Jr., JJ., concur.

Panganiban, C.J., concurs & also joins J. Tinga's Opinion.

Corona, J., on leave.

Tinga, J., Please see concurring opinion.

[1] Records, pp. 230-231.

[2] CA rollo, pp. 91-92.

[3] Records, p. 283. Penned by Judge Leili Suarez Acebo.

[4] G.R. Nos. 147678-87, July 7, 2004, 433 SCRA 640.

[5] CA rollo, p. 87.

[6] Id. at 99-100. Penned by Associate Justice Rodrigo V. Cosico and concurred in by Associate Justices Regalado E. Maambong and Lucenito N. Tagle.

[7] G.R. No. 129875, September 30, 2005, 471 SCRA 241, 256.

[8] *People v. Galvez*, 424 Phil. 743, 755 (2002).

[9] TSN, February 5, 2002, p. 41.

[10] *People v. Pansensoy*, 437 Phil. 499, 518 (2002). See also *People v. Atadero*, 435 Phil. 888, 904 (2002).

[11] *People v. Malabago*, 333 Phil. 20, 34 (1996).

[12] *People v. Simon*, G.R. No. 56925, May 21, 1992, 209 SCRA 148, 162.

[13] *People v. Devaras*, G.R. No. 48009, February 3, 1992, 205 SCRA 676, 693-694.

[14] *People v. Manes*, 362 Phil. 569, 579 (1999).

[15] *People v. Derilo*, 338 Phil. 350, 375 (1997).

[16] *People v. Herida*, G.R. No. 127158, March 5, 2001, 353 SCRA 650, 658.

[17] 383 Phil. 656, 668 (2000).

[18] Rules of Court, Rule 110, Sec. 14: Amendment or substitution.

A complaint or information may be amended, in form or in substance, without leave of court, at any time before the accused enters his plea. After the plea and during the trial, a formal amendment may only be made with leave of court and when it can be done without causing prejudice to the rights of the accused.

However, any amendment before plea, which downgrades the nature of the offense charged in or excludes any accused from the complaint or information, can be made only upon motion by the prosecutor, with notice to the offended party and with leave of court. The court shall state its reasons in resolving the motion and copies of its order shall be furnished all parties, especially the offended party.

If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with Section 19, Rule 119, provided the accused would not be placed in double jeopardy. The court may require the witnesses to give bail for their appearance at the trial.

[19] *People v. Degamo*, 450 Phil. 159, 171 (2003).

[20] G.R. No. 103102, March 6, 1992, 207 SCRA 134, 142.

[21] *People v. Degamo*, *supra* at 172.

[22] *Id.*

[23] Records, pp. 225-226.

[24] *People v. Degamo*, *supra* at 173.

[25] REVISED PENAL CODE, Art. 248. Murder. - Any person who, not falling within the provisions of Article 246 shall kill another, shall be guilty of murder and shall be punished by reclusion perpetua to death if committed with any of the following attendant circumstances:

- With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity.
- In consideration of a price, reward or promise.
- By means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a railroad, fall of an airship, or by means of motor vehicles, or with the use of any other means involving great waste and ruin.
- On occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic or other public calamity.
- With evident premeditation.
- With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.[26]

An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code, as amended, other Special Penal Laws, and for other Purposes.

[27] See REVISED PENAL CODE, Arts. 63 and 248.

[28] Article 2 of the Civil Code provides that laws shall take effect after 15 days following the completion of their publication either in the Official Gazette, or in a newspaper of general circulation in the Philippines, unless it is otherwise provided. On the other hand, Section 5 of R.A. No. 9346 specifically provides that the Act will take effect immediately after its publication in two national newspapers of general circulation. R.A. No. 9346 was published in Malaya and Manila Times, two national newspapers of general circulation on June 29, 2006. Accordingly, R.A. No. 9346 took effect on June 30, 2006.

[29] *Nueva España v. People*, G.R. No. 163351, June 21, 2005, 460 SCRA 547, 555.

[30] *Villafuerte v. Court of Appeals*, G.R. No. 134239, May 26, 2005, 459 SCRA 58, 69.

[31] *LBC Express, Inc. v. Ado*, G.R. No. 161760, August 25, 2005, 468 SCRA 216, 225.

[32] The Regional Trial Court of Pasig City, Branch 163 and the Court of Appeals had a total of P298,202.25 as actual damages. This amount is comprised of P25,438.25, representing the hospital bill; and P272,772.00, representing the price of the casket and funeral services for Atty. Evelyn Sua-Kho. The total of these two amounts is P298,210.25, not P298,202.25.

CONCURRING OPINION TINGA, J.:

I fully join the ponencia. In addition, I offer this concurring statement to explain my views on the effect of Rep. Act No. 9346, the recent law which prohibited the imposition of the death penalty, on existing and future sentences.

Rep. Act No. 9346 in prohibiting the imposition of the death penalty in Section 1 thereof has repealed Rep. Act No. 8177, Rep. Act No. 7659 and all other laws, executive orders and decrees insofar as they imposed the death penalty. As a consequence, the Court may no longer affirm the death sentences imposed by the lower courts or itself impose the death penalty.

The implications of Sections 2 and 3 of Rep. Act No. 9346 bear further explanation. Said sections read in full:

Sec. 2. In lieu of the death penalty, the following shall be imposed:

(a) the penalty of reclusion perpetua when the law violated makes use of the nomenclature of the penalties of the Revised Penal Code; or

(b) the penalty of life imprisonment, when the law violated does not make use of the nomenclature of the penalties of the Revised Penal Code.

Sec. 3. Persons convicted of offenses punished with reclusion perpetua, or whose sentences will be reduced to reclusion perpetua, by reason of this Act, shall not be eligible for parole under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

Section 2 provides the new penalty imposable by trial courts for crimes which were previously punishable by death. Thus, with the effectivity of Rep. Act No. 9346, a Regional Trial Court that finds the accused guilty of qualified rape may no longer impose the death sentence on him but must impose instead the penalty of reclusion perpetua. There are special penal statutes that do not utilize the nomenclatures of penalties in the Revised Penal Code. If the accused is found guilty of violating such a statute, under which the imposable penalty was death, the accused should now instead be sentenced to life imprisonment.[1]

Section 2 likewise affects death sentences, whether or not already affirmed by this Court. As Justice Callejo, Sr. points out in his ponencia in *People v. Quiachon*[2], Article 22 of the Revised Penal Code mandates that "[p]enal

laws shall have a retroactive effect insofar as they favor the persons guilty of a felony, who is not a habitual criminal... although at the time of the publication of such laws, a final sentence has been pronounced and the convict is serving the same." [3] Persons previously convicted by final judgment to death should enjoy the beneficial retroactive effect of Rep. Act No. 9346 which is reduction of the death penalty to either life imprisonment or reclusion perpetua, as the case may be. The conclusion is confirmed by Section 3 of the law, which makes reference to "persons whose sentences will be reduced to reclusion perpetua, by reason of this Act."

Nonetheless, the beneficial effects of Section 3 of the law do not extend to the availability of parole. In fact, Section 3 explicitly qualifies, to the detriment of an accused, that "[p]ersons convicted of offenses punished with reclusion perpetua, or whose sentences will be reduced to reclusion perpetua... shall not be eligible for parole" under the Indeterminate Sentence Law.

There is no doubt that the accused herein falls within the contemplation of Section 3, as he is a person who would have been sentenced to death if not for Rep. Act No. 9346. While his sentence is reduced to reclusion perpetua, he is also denied the benefit of parole under the Indeterminate Sentence Law. This consequence, which is quite evident on the face of Section 3 itself, is bolstered by the explanation offered for Section 3 during the Senate deliberations on Rep. Act No. 9346:

Senator Drilon: Mr. President, on the same page, between lines 12 and 13, insert a new SECTION 3, which will now read as follows:

SEC. 3 PERSONS CONVICTED OF OFFENSES PUNISHED WITH RECLUSION PERPETUA, OR WHOSE SENTENCES WERE REDUCED TO RECLUSION PERPETUA BY A REASON OF THIS ACT, SHALL NOT BE ELIGIBLE FOR PAROLE UNDER ACT 4103 OR THE INDETERMINATE SENTENCE LAW.

The reason, for this, Mr. President, is that under the Indeterminate Sentence Law, only persons convicted of offenses punishable by death or life imprisonment are not entitled to be released from confinement on parole that is provided under Section 2 of Act No. 41063. The law, however, Act No. 4103, did not mention reclusion perpetua as a penalty for which one is disqualified from availing himself of the benefits under the Indeterminate Sentence Law. The amendment that we have proposed will clearly disqualify those who are convicted of reclusion perpetua or whose penalties were reduced to reclusion perpetua by virtue of this Act from availing themselves of the benefits of the Indeterminate Law. [4]

No constitutional sanctities will be offended if persons previously sentenced to death, or persons sentenced to reclusion perpetua, are denied the benefit of parole conformably to Section 3 of Rep. Act No. 9346. As to persons previously sentenced to death, it should be remembered that at the time of the commission of the crime, the penalty attached to the crime was death. To their benefit, Rep. Act No. 9346 reduced the penalty attached to the crime to reclusion perpetua. Yet such persons cannot claim the benefit of parole on the basis of the ex post facto clause of the Constitution, since an ex post facto law is one which, among others, "changes punishment, and inflicts a greater punishment than the law annexed to the crime when committed." [5] Rep. Act No. 9346 had the effect of "inflicting" a lighter punishment, not a greater punishment, than what the law annexed to the crime when committed.

For the same reason, there should be no question that no benefit of parole entitles persons who, after the effectivity of Rep. Act No. 9346, commit crimes punishable by reclusion perpetua either under the particular law involved itself or by operation of Rep. Act No. 9346.

How about those persons who, prior to the effectivity of Rep. Act No. 9346, commit crimes punishable by reclusion perpetua or life imprisonment? At first blush, these persons would enjoy the benefit of parole by virtue

of the ex post facto clause regardless whether they were charged, tried or convicted prior to or subsequent to the effectivity of Rep. Act No. 9346. As stated earlier, a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime, when committed, is an ex post facto law. Should Rep. Act No. 9346 operate to deny those sentenced to reclusion perpetua eligibility for parole, even if they committed their crimes prior to the effectivity of said law, it could be concluded that the ex post facto clause was violated. However, that is more apparent than real.

A closer scrutiny of the Indeterminate Sentence Law, the law which grants eligibility for parole, reveals that even prior to Rep. Act No. 9346 those convicted to reclusion perpetua were not entitled to parole in the first place.

This conclusion is not immediately obvious on the face of the Indeterminate Sentence Law. Section 2 thereof explicitly states that the law "shall not apply to persons convicted of offenses punished with death penalty or life-imprisonment", with no reference to persons convicted to "reclusion perpetua." Nonetheless, the Court has consistently held that the Indeterminate Sentence Law does not apply to persons convicted to reclusion perpetua. A recent restatement of the rule can be found in *People v. Enriquez*[6]:

[R]eclusion perpetua is the only penalty that can be imposed against the appellants. As correctly argued by the Solicitor General, Act No. 4103, otherwise known as the Indeterminate Sentence Law, cannot be applied in the case of appellants considering the proscription in Sec. 2 thereof, viz:

This Act shall not apply to persons convicted of offenses punished with death penalty or life-imprisonment ...

Indeed, in *People v. Asturias*,^[7] *Serrano v. Court of Appeals*^[8], *People v. Lampaza*^[9] and *People v. Tan*^[10], to name a few cases, we in effect equated the penalty of reclusion perpetua as synonymous to life-imprisonment for purposes of the Indeterminate Sentence Law, and ruled that the latter law does not apply to persons convicted of offenses punishable with the said penalty. Consequently, we affirm the Court of Appeals in not applying the Indeterminate Sentence Law, and in imposing upon appellants the penalty of reclusion perpetua instead.^[11]

Parole is extended only to those convicted of divisible penalties. Reclusion perpetua is an indivisible penalty, with no minimum or maximum period. Under Section 5 of the Indeterminate Sentence Law, it is after "any prisoner shall have served the minimum penalty imposed on him," that the Board of Indeterminate Sentence may consider whether such prisoner may be granted parole.^[12] There being no "minimum penalty" imposable on those convicted to reclusion perpetua, it follows that even prior to the enactment of Rep. Act No. 9346, persons sentenced by final judgment to reclusion perpetua could not have availed of parole under the Indeterminate Sentence Law.

This being the case, the explicit qualification under Rep. Act No. 9346 that convicts sentenced to reclusion perpetua do not enjoy the benefit of parole does not constitute an increase in the penalty for crimes punishable by reclusion perpetua, since eligibility for parole was unavailing for such convicts even before Rep. Act No. 9346 was enacted. The qualification under Section 3 of Rep. Act No. 9346 did not amend the penalty of reclusion perpetua, but instead clarified a fact already existing in the state of law before the statute was passed — that those sentenced to reclusion perpetua were not and can not be eligible for parole.

[1] See *People v. Baguio*, G.R. No. 76585, 30 April 1991, 196 SCRA 459, 468-469, for an extended distinction between "reclusion perpetua" and "life imprisonment."

[2] G.R. No. 170236.

[3] See Article 22, Revised Penal Code.

[4] Transcript of Senate Proceedings, 6 June 2006, p. 149.

[5] See e.g., *Tan v. Barrios*, G.R. Nos. 85481-82, 18 October 1990, 190 SCRA 686, 703. This oft-repeated formulation of the ex post facto doctrine originates from the U.S. Supreme Court's 1798 pronouncement in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which enacts the following test for ex post facto laws: "1st.. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Id.*, at 390, emphasis supplied.

[6] G.R. No. 158797, 29 July 2005, 465 SCRA 407.

[7] Cited as 134 SCRA 405 (1985).

[8] Cited as 247 SCRA 203 (1995).

[9] Cited as 319 SCRA 112 (1999).

[10] Cited as 359 SCRA 283 (2001).

[11] *People v. Enriquez*, *supra* note 6, at 418.

[12] See Section 5, Act No. 4103, as amended.

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