

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MARIO AQUINO Y MAKILAN AND ERNESTO GALLEG0 Y REMADA, ACCUSED-APPELLANTS.

G.R. No. 50523. September 29, 1983

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Automatic review of the judgment of the Circuit Criminal Court, 12th Judicial District, at Bacolod City, convicting Mario Aquino y Makilan and Ernesto Gallego y Remada of the crime of Robbery with Homicide, with the aggravating circumstance of nighttime or uninhabited place, and sentencing them to suffer capital punishment.

The Information against the accused-appellants charged them as follows:

"That on or about the 4th day of June, 1977, in the City of Bacolod, Philippines and within the jurisdiction of this Honorable Court, the herein accused, conspiring, confederating together and mutually helping one another with intent to gain and against the consent of the owner thereof and by means of violence, did, then and there wilfully, unlawfully and feloniously take, steal and carry away a wrist watch valued in the amount of ONE HUNDRED (P100.00) PESOS, Philippine Currency, belonging to one Bienvenido Laud, to the damage and prejudice of the said owner in the aforementioned amount; that on the occasion of the said robbery and for the purpose of enabling them to take, steal and carry away said wrist watch, the herein accused, with evident premeditation and with intent to kill, did, then and there wilfully, unlawfully and feloniously assault, attack, strike with stone and stab with a knife said Bienvenido Laud, thereby inflicting upon him the following wounds, to wit:

- Lacerated wound, stellate in shape, 1 in. in length and 1 cm. in depth at the parietal region, left.
- Lacerated wound, 1.3 in length and 1 cm. in depth at the parietal region, right.
- Lacerated wound, 1.2 in length and 1 cm. in depth at the lateral aspect, occipital region, left.
- Stab wound, 2-3/4 in. in length and penetrating at the chest, left, 3rd interspace entering the chest cage, puncturing the upper lobe, lung, left going downwards and passing out through middle lobe, with massive hemorrhage thereat.

Note: Apex of lung protruding from the wound.

- Stab wound, 1.2 in length and 2 in. in depth at the posterior axillary region, level of the angle of scapular, right.
- Incised wound, 1 1/2 in. in length and 1/2 in. in depth running across lateral aspect, middle thirds, forearm, right.
- Incised wound, 1 1/2 in. in length and 1 cm. in depth at the postero-medial aspect, wrist, right.
- Stab wound, 1 1/2 in. in length and 1 1/2 in. in depth (non-penetrating) at the infrascapular region, left,

running perpendicularly.

- Contusion with abrasion, 1/2 cm. by 2 in. length running across, lumbar region, left.
- Contusion with hematoma, 4 in. in square area at the upper left, abdominal quadrant.
- Incised wound, 3 in. in length running across upper lip, involving whole thickness thereof.
- Contusion with abrasion, 1/2 cm. by 4 in. in length running slantingly at the mid-sub costal region, right down to umbilicus.
- Contusion with abrasion, 1/2 cm. in width and 6 in. in length running slantingly at the chest, right from 2nd rib to 8th rib.
- Contusion with abrasion, 1/2 cm. by 3 in. in length running slantingly at the right, sub-costal region.
- Incised wound, 1/2 in. in length each, 2 in. on side by side at the posterior aspect, base of thumb, hand, left.
- Contusion with abrasion, 1/2 cm. in width, and 2 in. in length at the posterior aspect, upper thirds, arm, left.
- Contusion with abrasion, 1/2 cm. by 2 in. in length running across posterior aspect, lower thirds, arm left.
- Contusion with abrasion, 1/2 cm. by 1 1/2 in. in length and 1 cm. in depth at the sternoclavicular junction, left."[1]

Following is the Statement of Facts by the prosecution:

"Appellants Mario Aquino and Ernesto Gallego, and the deceased Bienvenido Laud, were all employees of the Hacienda Helvetia in Bacolod City.

"On the afternoon of June 4, 1977, which was payday in the Hacienda, appellants were at the canteen of Cesar Buenaflor drinking a bottle of Sy Hoc Tong wine.

"In the same place was Bienvenido Laud who was also drinking wine with another group.

"At about 8:00 o'clock in the evening, appellants left the canteen. According to them, they stopped at the house of Arturo Flores to watch a card game called 'Pusoy'. After thirty minutes, they left the place. About the same time Bienvenido Laud left the canteen and proceeded to his home. At a road junction, appellants saw Bienvenido Laud walking in front of them. Suddenly, appellant Ernesto Gallego picked up a stone and hit Bienvenido Laud on the head twice. On his part, appellant Mario Aquino grabbed the knife of Bienvenido Laud and stabbed the latter several times with it. As a result of the assault, Bienvenido Laud fell to the ground dead. Appellants carried him to a ditch and dumped him there. Appellant Mario Aquino took the watch of the deceased and sold it the following day to Alfredo de la Cruz for P9.00.

"The following day the body of Bienvenido Laud was discovered. It bore the following wounds and injuries (as enumerated in the Information).

"Appellants were apprehended by the police. They were interrogated and they gave written confessions which were marked during the trial as Exhibits C and D."[2]

The foregoing facts were gathered, not from any eyewitness' testimony, but from the respective extrajudicial confessions of the accused, the re-enactment of the crime by them, and the circumstantial evidence testified to by Alfredo de la Cruz, who purchased the watch in question; Bonifacio Malapitan, who was shown the watch soon after the incident; and Estelita Laud, widow of the deceased.

As translated from the local dialect, Mario Aquino's extrajudicial confession signed by him on June 7, 1977, reads

in full as follows:

"03. Q - Can you tell me why you are here today, 7 June 1977, at the Police Station, Bacolod City?

A - I am here today because I was apprehended together with Ernesto Gallego by the police authorities of Bacolod City for the crime of killing Bienvenido Laud at around 9:00 P.M. more or less 4 June 1977 at Hda. Helvitia, Bacolod City.

04. Q - Can you tell me all what you know about this incident which you are now telling me which happened at Hda. Helvitia, Ba-colod City, at around 9:00 P.M. more or less, June 4, 1977?

A - On June 4, 1977, at around 9:00 P.M. more or less, at Bacolod City, Ernesto Gallego and I were following Bienvenido Laud in going home, when suddenly Ernesto Gallego picked up a piece of stone and he struck Bienvenido Laud on the head two times. Because of this, Bienvenido Laud pulled a knife but I got the same from Bienvenido Laud.

05. Q - When you got the knife of Bienvenido Laud, what did you do with it?

A - The said knife was used by me in stabbing Bienvenido.

06. Q - Can you tell me also what you and Ernesto Gallego did next to Bienvenido Laud?

A - Ernesto Gallego and I carried him and dropped him in a ca-nal at Had. Helvitia, Bacolod City, near the place where Bienvenido Laud fell down and when Bienvenido Laud was in the canal I got his watch and the following day I sold the said watch to Alfredo de la Cruz at Burgos Street, Bacolod City, for the amount of P9.00 only.

07. Q - Can you tell me where is now the knife you used to stab Bienvenido Laud on June 4, 1977 at around 9:00 P.M.?

A - I left it at the side of Bienvenido Laud when we dropped him in the canal.

08. Q - I am showing to you this ROCAR watch, what can you tell about this?

A - That belongs to Bienvenido Laud which I took from his arm after he fell down and we have thrown him in the canal and which I sold to Alfredo de la Cruz for the amount of P9.00.

09. Q - Do you know the reason why Ernesto Gallego struck Bienvenido Laud that time?

A - I really did not know.

10. Q - Did somebody cajole you or threaten you so you can give a true statement in this investigation?

A - No one.

11. Q - Aside from this have you more to say in this investigation?

A - That is all."[3]

On the same date, Aquino swore to his Affidavit before Asst. City Fiscal Adriano L. Natu, who certified as follows:

"SUBSCRIBED AND SWORN TO before me this 7th day of June 1977 in the City of Bacolod, Philippines. This further certify that I have personally examined the affiant and I am satisfied that he voluntarily executed and fully understood the content of his Affidavit.

(Sgd.) ADRIANO L. NATU

Asst. City Fiscal

Bacolod City"

For his part, Ernesto Gallego narrated in his extrajudicial confession, which he thumbmarked on June 6, 1977:

"03. Q - Do you know BIENVENIDO LAUD?

A - Yes, an overseer of Hacienda Helvitia of Padoc Gonzaga.

04. Q - How about you, what is your work?

A - I work in the sugarcane fields

05. Q - Do you know MARIO AQUINO?

A - Yes, one of my friends and residing also at Hda. Helvitia.

07. Q - Do you know how Bienvenido Laud is, at the moment?

A - Yes, he is dead.

08. Q - What was the cause of his death?

A - He was struck on the head with a stone and was stabbed.

09. Q - Who struck him on the head with a stone and who stabbed him, if you know?

A - I was the one who struck him on the head with a stone.

10. Q - Are you not wrong in saying, nor I, that you were the one who struck him on the head with a stone? This will incriminate you, do you understand?

A - I was really the one who struck him on the head with a stone.

11. Q - Do you already know who stabbed Bienvenido Laud which caused his death?

A - Mario Aquino was the one who stabbed.

12. Q - At what time did this happen?

A - More or less 9:00 o'clock in the evening, 4 June 1977.

13. Q - Where did this happen?

A - On a road where there are sugarcane fields on both sides, Hda. Helvitia, Bo. Villamonte, Bacolod City.

14. Q - Which came first, the striking on the head with a stone or the stabbing of Bienvenido Laud?

A - The striking on the head with a stone by me.

15. Q - After you have struck Bienvenido's head with a stone what happened to him?

A - He fell down and Mario Aquino immediately got the knife which was being held by Bienvenido and stabbed Bienvenido.

16. Q - While Mario Aquino was stabbing Bienvenido, what did you do?

A - I was only standing and watching.

17. Q - How did you know that Bienvenido is already dead?

A - He was not moving anymore so we carried him to the canal. I was holding the two legs and Mario Aquino on both sides of the shoulders.

18. Q - What else did you see when Bienvenido was in the canal?

A - Mario stayed there, I cannot make out what more he did. At last, Mario went home and I also went home.

19. Q - When you reached home, did you remember what you did?

A - I went to the house of Bienvenido and asked for a match and I was given one by his wife. Then I went home and slept in my house.

20. Q - Did you say anything to Bienvenido's wife aside from asking for a match that night?

A - Yes, I inquired if Bienvenido has arrived.

21. Q - Why did you still inquire for you know that he is already dead and you left him there in the canal?

A - So that they won't be surprised with me and besides Bienvenido can no longer go home.

xxx xxxx xxx

25. Q - Did you and Mario Aquino talked about what you were going to do with Bienvenido?

A - No. It only happened that we were standing at the intersection of the road going to the house of Mario Aquino when we found out that Bienvenido was also coming. We came from the house of Flores because Mario played 'pusoy' and he also stopped when we started for home. We stood for a moment at the intersection and we saw Bienvenido coming. Bienvenido said, 'Peace. It is said that you are samaritanos' re-ferring this to Mario because Mario is a Samaritano. Mario boxed Bienvenido and I picked up a stone because Bienvenido was already holding a weapon. I threw a piece of stone at him and he was hit on the head. He fell down and Mario then grabbed or got the bolo and stabbed Bienvenido. I saw that Bienvenido was no longer moving so we carried him to the canal. Finally, we went home."[4]

Gallego, too, swore to his Affidavit before Asst. City Fiscal Natu, who prepared the following jurat and certification:

"SUBSCRIBED AND SWORN TO before me this 6th day of June, 1977. I certify that I had examined the affiant and I am convinced that he was apprised of his constitutional rights and that he gave his statement voluntarily.

(Sgd.) ADRIANO L. NATU

Asst. City Fiscal

Bacolod City"

Coming now to the testimonies of prosecution witnesses: Alfredo de la Cruz, a shoe repairer, confirmed that at around 8:00 A.M. of June 5, 1977, or the day after the commission of the crime, Mario Aquino sold to him a watch (Exhibit "C"), which he bought for P12.00 and later re-sold for P20.00 to another person. After knowing that it had been stolen, he retrieved the watch and surrendered it to the police. Actually, the watch was worth P100.00.

Bonifacio Malapitan, another hacienda laborer, also testified that in the evening of June 4, 1977, around 9:30 P.M., at a dancehall near their house, Mario Aquino showed him a watch allegedly "brought from Mindanao", but that he knew there and then that the watch belonged to the deceased because, as their foreman, the deceased used to time the laborers with that watch.[5]

The widow of the deceased, Estelita Laud, declared that when her husband left their house, he was wearing his watch, which she identified (Exhibit "C"); that when she saw her husband's dead body, the watch was no longer on him; that when her husband left the hacienda that afternoon he had P40.00, gave P20.00 to his wife and retained the other P20.00 in his pocket.[6]

In addition to the extrajudicial confessions, the records disclose that on June 8, 1977, or three days after their arrest, and after appellants had executed their extrajudicial confessions on June 6 and June 7, 1977, respectively, appellants staged a re-enactment of the offense at the crime scene in the presence of Fiscal Mariano Natu-el, Pat. Esperidion Estana, who was the investigating officer, Sgt. Becena, Jr. of the Homicide Section, and Detective Juanito de los Reyes. Patrolman Estana described the re-enactment as follows:

"FISCAL CHUA:

Q - Then, what happened?

WITNESS:

A - Upon reaching the junction, they pose (sic) for a while and waited for Bienvenido Laud who was following them, and when Bienvenido Laud was nearing them, they greeted him, and the latter answered, "paghidait" (peace) ang sa-maritano amo man lang ang malain (the samaritans are the only ones who are evil)

FISCAL CHUA:

What else happened upon say-ing those words.

WITNESS:

A - Bienvenido Laud pulled his knife from the scabbard and attempted to stab Ernesto Gallego, but Ernesto Gallego side-step and struck Bienvenido Laud with a stone hitting him on the back portion of his head, which renders Bienvenido Laud groggy and Mario Aquino grappled the knife took position (sic) of it and instantly stabbed Bienvenido Laud for several times, the victim fell to the ground unconscious, then they lifted the body of Bienvenido Laud and throw the body to the canal and Mario Aquino took the wrist watch of Bienvenido Laud."

It is to be noted that, as re-enacted, appellants had modified their earlier version of the occurrence, as set forth in their written confessions, by claiming that it was the deceased who had started the aggression by attempting to stab Gallego with a knife, after which the latter ducked and retaliated by throwing a stone at the victim. Except for this modification, the re-enactment corroborated the written confessions on substantial points.

The Investigation Report, dated June 8, 1977, submitted by Pat. Estana contained the modified version (Exhibit "F" or "5").

During the trial Mario Aquino injected another twist when he testified that he found the watch "in between the place where the fight ensued and the body of the deceased",[7] contrary to what he declared in his confession that he got the watch while the dead body of the victim was still in the canal.

More precisely, then, the version of the incident from the defense point of view is as follows:

"x x x On the way(home) they passed by the house of Flores where Mario Aquino played 'pusoy'. After the game was over they proceeded home and upon reaching the junction where their ways would part, they stopped because Gallego noticed a man following them whom he recog-nized as the deceased. Gallego asked Aquino to wait for Laud so that he (Gallego) could go home together with Laud, his neighbor whose house is only 3 houses away from him. When Laud noticed that he was drunk and said to them 'Peace, the samaritanos themselves are bad'. This has reference to Mario Aquino who is a samaritano (a person who has taken a course

on religious reformation). Whereupon Laud took his knife and stabbed Gallego but the latter was able to duck. Gallego thereupon picked up a stone and hit Laud with it. Laud tried to stab Aquino also but the latter succeeded in wresting the knife from him. Aquino stabbed Laud with it several times, and they grappled for its possession on the process falling to the ground. When Aquino sensed that Laud was dead, he dragged his body to the ditch and requested Gallego to help him. Later he found the watch on the ground between the place where the fight ensued and the canal where the body was thrown." [8]

The Trial Court gave more credence to appellants' extra-judicial confessions, which it found to have been voluntarily given, concluded that the crime committed is Robbery with Homicide, and sentenced appellants thus:

"WHEREFORE, in view of the foregoing, the Court finds both accused MARIO AQUINO Y MAKILAN and ERNESIO GALLEO Y REMADA GUILTY beyond a reasonable doubt as principals by direct participation of the offense of robbery with homicide as charged, by robbing one Bienvenido Laud; and by reason or on occasion thereof, killing said Bienvenido Laud on the night of June 4, 1977, in Hda. Helvetia, Bacolod City, Philippines, the place and offense within the jurisdiction of this Court. Considering that there is no mitigating circumstance, but there is an aggravating circumstance of the offense committed at nighttime or in an uninhabited place, and in accordance with the provisions of paragraph 1, Article 294, in relation to Article 63, of the Revised Penal Code, the Court sentences both accused Mario Aquino y Makilan and Ernesto Gallego y Remada to suffer the maximum penalty provided for by law which is Death, to be executed by the Director of prisons at the manner, time and place provided for by law; to indemnify the heirs of deceased Bienvenido Laud the amount of P12,000.00, and to pay the costs.

x x x x x "[9]

As assignment of errors, the defense alleges:

"I

The Trial Court erred in finding that the extra-judicial confessions of the accused were voluntary and in convicting them of the crime of robbery with homicide on the basis thereof although they do not amount to an admission of the commission of such crime.

"II

The Trial Court erred in not finding that the offenses committed were two separate crimes of homicide with the privileged mitigating circumstance of incomplete self-defense and theft and with Mario Aquino alone as the perpetrator.

"III

The Trial Court erred in appreciating against the accused the aggravating circumstance of nighttime or uninhabited place.

"IV

The Trial Court erred in not appreciating in favor of the accused the mitigating circumstance of intoxication."

Upon review of the evidence, we find that the grounds relied upon by the defense for overthrowing their confessions do not stand on solid footing. Maltreatment has not been substantiated. Appellants failed to complain to the Fiscal who had sworn them. Appellants showed no mark of violence on their bodies nor did they submit to medical examination. Neither did they institute any criminal or administrative action against the policemen who

allegedly maltreated them (People vs. Mada-i Santalani, 93 SCRA 315 (1979).

The voluntariness of the confessions was certified to by the Fiscal as the swearing officer. The written confessions themselves disclose that before appellants were interrogated by police investigators, they were advised of their constitutional rights to silence and to counsel. Gallego's declaration in his statement is pertinent:

"10. Q - Are you not wrong in saying, that you were the one who s-truck him on the head with a stone? This will incrimi-nate you, do you understand?

A - I was really the one who s-truck him on the head with a stone."

In a similar vein, Aquino stated:

"10. Q - Did somebody cajole you or threaten you so you can give a true statement in this investigation?

A - No one."

Additionally, Pat. Esperidion Estana, who was also uti-lized by the defense as its witness, declared:

"Fiscal Chua:

Q - Now, you said that you were present when the investigation of the two accused is being conducted which resulted to the confession of the crime, do you know what procedure did the investigating group adopted before the execution of this extrajudicial con-fession?

A - Before making their affidavits, they were apprised of their constitutional rights.

Q - What are those.

A - According to Section 20, Article 4, they have the right to remain silent, they have the right to have a counsel of their own choice, and that, the statement that they will give may be used against them or in favor of them in any court or tribunal within the Republic of the Philippines, and no force, threat, intimidation or violence will be used against them that will vitiate their free well.

Q - After they admitted or confessed, what else did you do with the two accused?

A - The taking of the affidavit was conducted.

Q - After it was made and signed, what happened?

A - After it was made and signed, They were brought to the office of the Fiscal.

x x x x x x

Court:

Q - Did you explain to them these rights of the accused in the dialect?

A - Yes, Sir.

Q - So the confessions are in the dialect?

A - Yes, Sir.

Q - With English translation?

A - Yes, Sir.

Q - For example, in the dialect, for purposes of clarification, will you demonstrate how you said to the accused

their rights, 'to remain silent'?

A - 'May derecho ikaw nga indi magsabat sa mga pamangkot kon nahibalu-on mo nga ang imo pagsabat mahimo nga maka-palain sa imo sa ulihi.' (You have the right to remain silent if you think that what you are going to answer would incriminate you later).

Q - And you explained to him that, by saying that you have the right to remain silent?

A - Yes, Sir.

Q - And at the first instance, if the accused would not answer you or would refuse to give answer, you will not insist on questioning them?

A - Yes, sir.

Q - But what was their answer in this particular question?

A - They will give a voluntary statement, because they want only to tell the truth?

Q - What about you, you mean to say that despite the admonition, they still insists on giving their statement?

A - Yes, Sir.

Q - What about this right to have a counsel of their own choice, did you inform them of their rights that they could secure a counsel of their own choice, if they want?

A - Yes, Sir. We informed them that they have the right to have a counsel of their own choice, if they want they could secure a counsel, and if they don't have money, we will help them look for a counsel, for the government will give them one, free of charge.

Q - And what was their answer?

A - There is no need, for we will only tell the truth.

Q - Did you tell them that there are several lawyers, and if they want, you will make steps in order that they will be given one counsel de oficio?

A - Yes, Sir.

Q - And that, if they could not afford to have a lawyer, the government will provide one for them, in order to assist them during the investigation of this case?

A - Yes, Sir.

Q - And what was the answer of the accused?

A - They will...they told us that they will submit themselves for investigation, even though there is no lawyer to assist them, because they were only telling the truth.

Q - Did you explain to them, in a very layman's language that it would be better to have a counsel because what you are going to say here will be significant, and it is better for you to have a lawyer who will guide you during the investigation?

A - Yes, but they insisted that there is no need for they are only going to tell the truth.[10]

Indeed, the facts and details in appellants' respective confessions attest to their voluntariness for those could have been known and given only by them.

The variance in the two confessions as to who started the fight, with Gallego claiming that Aquino started it when

he (Aquino) boxed the deceased, while Aquino said that it started when Gallego hit the deceased with a stone, underscores the fact that each appellant was trying to exculpate himself from criminal responsibility, thereby additionally attesting to the voluntariness of their respective confessions.[11]

Of note also is the fact that when the extrajudicial confessions (Exhibits "D" and "E") were offered in evidence, the defense interposed no objection.[12]

We agree with appellants, however, and as admitted and recommended by the Solicitor General, that the offense committed is not the special complex crime of Robbery with Homicide, but two separate crimes of Homicide and Theft (vide, *People vs. Elizaga*, 86 Phil. 364 [1950]).

For Robbery with Homicide to exist, homicide must be committed by reason or on occasion of the robbery[13], meaning that the homicide must be committed in the course or because of the robbery. Robbery and Homicide are separate offenses when the homicide was not committed "on the occasion" or "by reason" of the robbery.[14] In the cases of *People vs. Elizaga*, 86 Phil. 364 (1950) and *People vs. Glore*, 87 Phil. 739 (1950) where the victims were killed, not for the purpose of committing robbery, and the idea of taking the money and other personal property of the victims was conceived by the culprits only after the killing, it was held that the culprits committed two separate crimes of Homicide or Murder (qualified by abuse of superior strength) and Theft.[15] It is true that in *People vs. Hernandez*, 46 Phil. 48 (1924), it was held that killing first the victim and then afterwards taking the money from the body of the deceased is Robbery with Homicide. However, an intent to commit robbery must precede the taking of human life in Robbery with Homicide. The offender must have the intent to take personal property before the killing.[16] Similarly, the case of *U.S. vs. Baguioa, et al.*, 4 Phil. 110 (1905) held that it must be conclusively shown that the homicide was committed for the purpose of robbing the victim.

"When the case does not show conclusively on its merits that the homicide was committed for the purpose of robbing the victims, a mere presumption of such fact is not sufficient to sustain a conviction for the complex crime of robbery with murder."

In the case at bar, it is far from conclusive that the deceased was killed for the purpose of committing robbery. Appellants had no thought of robbery prior to the killing. What provoked Aquino into boxing the deceased and stabbing him afterwards was the deceased's remark regarding "samaritanos". Thus, Gallego had narrated in his Statement:

"25. Q - Did you and Mario Aquino talked about what you were going to do with Bienvenido?

A - No. It only happened that we were standing at the intersection of the road going to the house of Mario Aquino when we found out that Bienvenido was also coming. We came from the house of Flores because Mario played 'pusoy' and he also stopped when we started for home. We stood for a moment at the intersection and we saw Bienvenido coming. Bienvenido said, 'Peace. It is said that you are samaritanos' referring this to Mario because Mario is a Samaritano. Mario boxed Bienvenido and I picked up a stone because Bienvenido was already holding a weapon. I threw a piece of stone at him and he was hit on the head. He fell down and Mario then grabbed or got the bolo and stabbed Bienvenido. I saw that Bienvenido was no longer moving so we carried him to the canal. Finally, we went home."

The thought of taking the deceased's wrist watch was conceived only after the killing and throwing of the victim in the canal, as Aquino had confessed, or if his testimony in open Court is to be believed, he had found it between the place where the fight ensued and the canal where the body was thrown. On this point, Aquino's confession reads:

"06. Q - Can you tell me also what you and Ernesto Gallego did next to Bienvenido.

A - Ernesto Gallego and I carried him and dropped him in a canal at Hda. Helvitia, Bacolod City near the place where Bienvenido Laud fell down and when Bienvenido Laud was in the canal I got his watch and the following day I sold the said watch to Alfredo de la Cruz at Burgos Street, Bacolod City, for the amount of P9,00 only.

x x x x x x x x x x

08. Q - I am showing to you this Rocar watch, what can you tell about this?

A - That belongs to Bienvenido which I took from his arm after he fell down and we have thrown him in the canal and which I sold to Alfredo de la Cruz for the amount of P9.00."

Upon the foregoing circumstances, it has to be held that appellants committed two separate crimes of Homicide and Theft, the latter being included in the Robbery charge. We find absent herein that direct relation and intimate connection between the robbery and the killing, the criterion laid down in *People vs. Hernandez*, 46 Phil. 48 (1924) for the complex crime of Robbery with Homicide.

We reject the defense contention that only Aquino was the culprit. It was not only Aquino but also Gallego who attacked the deceased. Gallego picked up a stone and hit the deceased with it. Aquino then grabbed the victim's knife and stabbed the latter several times with that weapon. The victim fell to the ground dead. Both appellants carried the victim to a canal and dumped his body there. Gallego stood by while Aquino deprived the deceased of his watch. Gallego was with Aquino when the latter sold the watch to Alfredo de la Cruz the next morning (Exhibit "F" or "3"). Appellants' concerted acts clearly demonstrated that they were of one mind, imbued with the same purpose and objective, thereby establishing conspiracy.[17] And when conspiracy exists, the act of one is that act of the other and they are equally liable.[18]

Neither is the mitigating circumstance of incomplete self-defense available to appellants, as they attempted to show in their re-enacted version. According to Aquino's confession, they "were following Bienvenido Laud in going home, when suddenly Gallego picked up a piece of stone and he struck Bienvenido Laud two times. Because of this, Bienvenido Laud pulled a knife but I got the same from Bienvenido Laud", Gallego's version in his confession also states that "Mario boxed Bienvenido and I picked up a stone because Bienvenido was already holding a weapon." In other words, aggression originated from either appellant but not from the deceased. The latter may have put up a fight but, as the Trial Court had pointed out "if the deceased was able to put up any resistance at all, it was just an automatic response to the instinct of self-preservation, by way of vain self-defense".[19] As between appellants' confessions and the re-enacted version, we give the former fuller faith and credence, having been closer in point of time to the occurrence itself when the accused had no time to concoct anything contrary to the real facts that occurred. The element of unlawful aggression on the part of the deceased, so indispensable in incomplete self-defense, being absent, this mitigating circumstance cannot be appreciated in appellants' favor.

Appellants also claim the mitigating circumstance of in-toxication. The evidence does not disclose, however, that they were in that state at the time of the killing.

"ATTY. MANLAPAO:

At the time of the incident, this stabbing incident of Bienvenido Laud, were you and Gallego drunk?

WITNESS:

No, Sir, we were not so drunk.

COURT:

You had drunk, but you were not that drunk?

WITNESS:

Yes, sir."[20]

"FISCAL CHUA:

So that, you were not drunk during the night of the incident for you drank, the three of you one bottle of siyoktong?

WITNESS:

Yes, madam.

FISCAL CHUA:

As a matter of fact, you were not drunk because you were able to play 'pusoy' on your way home, in the house of Flores?

WITNESS:

Yes, madam."[21]

The Trial Court appreciated against the accused the aggravating circumstances of nighttime and uninhabited place. We rule otherwise. In order that nighttime may be considered an aggravating circumstance, it must be specially sought. Absent any such showing, the fact that the crime was committed at night will not suffice to sustain "nocturnidad".[22] Nighttime is not specially sought for when the notion to commit the crime was conceived only shortly before its commission.[23] In the case at bar, appellants and the deceased merely chanced upon one another on their way home in the evening of June 4, 1977.

The aggravating circumstance of uninhabited place can neither be appreciated. Although there is testimony to the effect that the crime was committed in a secluded place where people rarely pass, the fact remains that it is the usual road going to the residences of Aquino and the deceased, at the junction where it met with another road going to the residence of Aquino. It is not apparent from the evidence that the accused selected the place of the commission of the crime either to obtain their object without interference or to secure them-selves against detection and punishment.[24]

Summing up, we find that appellants were not deprived of their constitutional rights during the custodial investigation; that their extrajudicial confessions were given voluntarily; and that on the basis of their admissions, their re-enactment of the crime, and the testimonies of prosecution witnesses, their guilt has been established beyond reasonable doubt. The characterization of the crime, however, is not Robbery with Homicide, as concluded by the Trial Court, but the separate crimes of Homicide and Theft. As their commission was not attended by any modifying circumstance, the penalties are imposable in their medium degree.

WHEREFORE, modifying the judgment under review, the accused-appellants are hereby sentenced as follows: For the crime of Homicide, they are each sentenced to eight (8) years and one (1) day of prision mayor, as minimum, to fourteen (14) years, eight (8) months and one (1) day of reclusion temporal, as maximum; and for the crime of Theft, they are each sentenced to a straight penalty of four (4) months. They are further sentenced to pay the heirs of the deceased, jointly and severally, an indemnification of P12,000.00 for the crime of Homicide, and P100.00 for the crime of Theft.

Costs against accused-appellants Mario Aquino y Makilan and Ernesto Gallego y Remade.

SO ORDERED.

Guerrero, Plana, Escolin, Relova, and Gutierrez, Jr., JJ., concur.

Fernando, C.J., in the result, concurs with the separate opinion of J. Teehankee and J. Makasiar.

Teehankee, J., concurs with the separate opinion of J. Makasiars' brief opinion.

Aquino, J., see dissent.

Concepcion, J., reserved his vote.

Abad Santos, J., in the result.

De Castro, J., on sick leave.

[1] pp. 1-2, Original Record.

[2] Appellee's Brief, pp.1-4.

[3] Exhibit "D", pp. 108-109, Original Record.

[4] Exhibit "E", pp. 110-112, Original Record.

[5] T.s.n., October 17, 1977, pp. 3, 9.

[6] T.s.n., February 2, 1978, pp. 21-22.

[7] T.s.n., September 15, 1978, p. 3.

[8] p. 9, Appellant's Brief.

[9] Decision, p. 101, Original Record.

[10] T.s.n., pp. February 28, 1978, pp. 122; 123; 130-132.

[11] *People vs. Palencia*, 71 SCRA 679 (1976); *People vs. Madai Santalani*, 93 SCRA 315 (1979).

[12] T.s.n., February 28, 1978, pp. 20-21.

[13] Article 294(1), Revised Penal Code.

[14] *People vs. Atanacio, et al.*, 110 Phil. 1032.

[15] Luis B. Reyes, *Criminal Law*, Book Two, Eleventh Edition, p. 594.

[16] *U.S. vs. Villorente and Bislig*, 30 Phil. 59 (1915).

[17] *People vs. Geronimo*, 53 SCRA 246 (1973).

[18] *People vs. Manzano*, 58 SCRA 251 (1974).

[19] p. 8, Decision.

[20] T.s.n., September 14, 1978, pp. 24-25.

[21] T.s.n., September 15, 1978, pp. 5-6.

[22] *People vs. Boyles*, 11 SCRA 89 (1964); *People vs. Morales*, 113 SCRA 683 (1982); *People vs. Lagtu*, 108 SCRA 84 (1981); *People vs. Capillas*, 108 SCRA 173 (1981); *People vs. Coderes*, 104 SCRA 255 (1981).

[23] *People vs. Pardo*, 79 Phil. 568-580 (1947).

[24] People vs. Capillas, 108 SCRA 173 (1981).

People vs Aquino y Makilan : L-50523 : September 29, 1983 : J. Aquino : En Banc : Dissenting Opinion 6 pt 6 pt 0 3 MicrosoftInternetExplorer4 st1:*{behavior:url(#ieooui) } /* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-parent:""; mso-padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin:0in; mso-para-margin-bottom:.0001pt; mso-pagination:widow-orphan; font-size:10.0pt; font-family:"Times New Roman";}

DISSENTING OPINION

AQUINO, J.:

I dissent. The two accused committed robbery with homicide. The Solicitor General's office was not justified in separating the crimes committed and characterizing them as homicide and theft. If separated, the killing should be characterized as murder, as the initial attack (the stoning) was treacherous and was aggravated by manifest abuse of superiority.

The taking of the watch supplied the motive for the killing. The victim's wife in her testimony hinted that a small amount of money must also have been taken from the victim since he had twenty pesos in his pocket when he left the house. After his death, his pocket was pulled out and empty.

It is settled that the robbery might be committed after the killing. "El homicidio ha de resultar con motivo u ocasion del robo. Basta que entre aquel y este exista una relacion meranente ocasional. No se requiere que el homicidio se cometa como medio de ejecucion del robo, ni que el culpable tenga intencion de matar, el delito existe segun constante jurisprudencia, aun cuando no concurra animo homicida, incluso si la muerte sobreviniere por mero accidente siempre que el homicidio se produzca con motivo o con ocasion del robo, siendo indiferente que la muerte sea anterior, coetanea o posterior a este." (2 Cuello Calon, Derecho Penal, 12th Ed., 1967, p. 798).

The prosecution's case is based on the confessions of the accused, Exhibits D and E, which are in the Visayan dialect and which would be inadmissible in evidence if they had not been translated. The translations on pages 108 to 113 of the record should have been marked as exhibits also and presented in evidence.

According to the opening statements of the confessions, Aquino, 35, and Gallego, 41, waived their rights under section 20, Article IV of the Constitution to remain silent and to have counsel, a waiver which was strengthened by their reenactment of the crime.

"A defendant may waive effectuation of his rights to remain silent and to be assisted by counsel at a custodial police interrogation, provided the waiver is made voluntarily, knowingly and intelligently" (Miranda vs. Arizon, 16 L. Ed. 2nd 694).

The accused pleaded self-defense. That cannot be given credence in the light of their confessions and their reenactment of the crime.

The victim, Bienvenido C. Laud, 52, who sustained eighteen (18) wounds, seven of which were incised and stab wounds, was the foreman of the accused.

The trial court appreciated desoblado and nocturnity as aggravating circumstances. That is why the death penalty was imposed. In its opinion, the "manifest criminal perversity and depravity" of both accused justify the imposition of the supreme penalty.

I vote for the affirmance of the lower court's judgment.

People vs Aquino : L-50523 : September 29, 1983 : J. Makasiar : En Banc : Concurring and Dissenting Opinion 6 pt 6 pt 0 3 MicrosoftInternetExplorer4 /* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-parent:""; mso-padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin:0in; mso-para-margin-bottom:.0001pt; mso-pagination:widow-orphan; font-size:10.0pt; font-family:"Times New Roman";}

CONCURRING AND DISSENTING OPINION

MAKASIAR, J.:

I concur in the result.

I dissent with respect to the admissibility of the extra-judicial confessions of appellants Mario Aquino and Ernesto Gallego; because they were executed without the assistance of counsel and without first informing them of their rights to remain silent, to counsel, and to be warned that their statements may be used against them in court, during their custodial investigation, which rights can only be waived knowingly and intelligently by them.

It should be noted that the extra-judicial confession of Mario Aquino was obviously taken down by a police officer in the police station, and thereafter he swore to the same before Assistant City Fiscal Adriano L. Natu. Before taking down his extra-judicial confession, appellant Aquino was not informed of his right to remain silent and to counsel, and he was never warned that his statement will be taken against him in the court of law. It was only in the penultimate question No. 10 that he was asked whether he was cajoled and threatened into giving such statement, which certainly is not sufficient compliance with the constitutional requirement. Assistant City Fiscal Natu in the jurat merely certified "that I had personally examined the affiant and I am satisfied that he voluntarily executed and fully understood the contents of his affidavit." This confirms the fact that the affidavit was not taken before him, and such jurat does not even state that he explained to the accused his aforesaid constitutional rights before swearing to the same.

The same observation applies to the extra-judicial confession of appellant Ernesto Gallego who also gave his statement before a police officer in the police station without the presence of counsel of his choice or de officio, and thereafter he was brought before Assistant City Fiscal Natu to swear thereto. The jurat merely states that Assistant City Fiscal Natu certified, "That I had examined the affiant and I am convinced that he was apprised of his constitutional rights and that he gave his statement voluntarily," which does not even show that he waived his rights to remain silent and to counsel.

But at the trial, appellants admitted killing the victim, claiming self-defense which is refuted by the physical facts and the testimony of the other state witnesses, hence there was no need to utilize their extra-judicial confessions.

People vs Aquino : L-50523 : September 29, 1983 : J. Teehankee : En Banc : Separate Concurring Opinion 6 pt 6 pt 0 3 MicrosoftInternetExplorer4 /* Style Definitions */ table.MsoNormalTable {mso-style-name:"Table Normal"; mso-tstyle-rowband-size:0; mso-tstyle-colband-size:0; mso-style-noshow:yes; mso-style-parent:""; mso-padding-alt:0in 5.4pt 0in 5.4pt; mso-para-margin:0in; mso-para-margin-bottom:.0001pt; mso-pagination:widow-orphan; font-size:10.0pt; font-family:"Times New Roman";}

SEPARATE CONCURRING OPINION

TEEHANKEE, J.:

I concur with the separate opinion of Justice Makasiar. The extrajudicial confessions of the accused-appellants are clearly inadmissible, having been obtained in violation of their basic constitutional rights to silence and to counsel. The procedural safeguards to ensure that these rights are respected and that any alleged waiver thereof is made voluntarily, knowingly and intelligently are set forth by the Chief Justice for the Court in *People vs. Caguioa*, 95 SCRA 2 (1980). The ex post facto certifications issued by the fiscal stating his conviction that the accused were duly apprised of their constitutional rights are patently inadmissible. As held in the latest case of *Morales vs. Enrile*, G.R. No. 61016, April 26, 1983, "the right to counsel may be waived but the waiver shall not be valid unless made with the assistance of counsel."

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