

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. REMELITO LUBREO AND LUCRESIO LUBREO, ACCUSED-APPELLANTS.

G.R. No. 74146. August 02, 1991

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

This is an appeal from the decision[1] of Branch 31 (Dapa, Surigao del Norte) of the Regional Trial Court, Tenth Judicial Region, in Criminal Case No. 239 for Murder, promulgated on 30 January 1986, finding the accused guilty of the crime of Murder, the dispositive portion of which reads as follows:

"WHEREFORE, viewed in the light of the foregoing, the Court finds Remelito Lubreo and Lucrecio Lubreo guilty beyond reasonable doubt of the crime of MURDER as defined and penalized under Art. 248 of the Revised Penal Code. With 'voluntary surrender' to Remelito Lubreo's credit, the Court sentences him to suffer an Indeterminate Penalty of TEN (10) YEARS and ONE (1) DAY of Prison Mayor maximum as minimum to SEVENTEEN (17) YEARS, FOUR (4) MONTHS and ONE (1) DAY of Reclusion Temporal maximum as maximum; while Lucrecio Lubreo, without any mitigating nor aggravating circumstance, is hereby sentenced to suffer the penalty of RECLUSION PERPETUA. Both accused are likewise ordered to indemnify jointly and severally the heirs of the victim, Mamerto Sanico, the sum of Twelve Thousand (P12,000.00) Pesos; plus Three Thousand Forty (P3,040.00) Pesos for actual and incidental expenses; and another Five Thousand (P5,000.00) Pesos for moral and exemplary damages, without subsidiary imprisonment in case of insolvency; to suffer the accessory penalties imposed by law; and to pay the costs.

The bolo surrendered by Remelito Lubreo which was used in the perpetration of the offense, is hereby ordered forfeited in favor of the government. x x x"

At 4:00 o'clock in the afternoon of 10 March 1976, the accused, Remelito Lubreo, voluntarily surrendered to the Police Station of District II, of the Municipality of Del Carmen, Surigao del Norte INP Command,[2] after killing one Mamerto Sanico at about 2:30 o'clock that same afternoon at the Provincial Road in Barangay Antipolo of said municipality. He was accompanied by the Barangay Captain of Antipolo, to whom he immediately surrendered after the incident.[3] He also surrendered the bolo he allegedly used in the killing.

On 11 March 1976, Remelito's sworn statement[4] was taken by Pfc. Altario Bonsorio of the Police Station. He claims therein that when he met Mamerto at the place above indicated and asked him if he slaughtered his (Remelito's) dog, Mamerto immediately drew his dagger and stabbed him, but he was not hit. Then, he drew his bolo and stabbed Mamerto several times until his dagger was thrown away. He left Mamerto believing him to be already dead.

Also on the same date, the sworn statement[5] of Lucrecio Lubreo, brother of Remelito, was taken by the same police officer. Lucrecio declares therein that he saw the fight between Remelito and Mamerto; he was 150 meters away from them.

On 23 March 1976, a complaint for Homicide, docketed as Criminal Case No. 2546,[6] was filed in the then

Municipal Court of Del Carmen, Surigao del Norte, charging Remelito Lubreo alone with the crime of Homicide in connection with the killing of Mamerto Sanico. Judge Leonor Gorgolon of said court conducted both the preliminary examination and the preliminary investigation. Thereafter, he forwarded the records of the case to the Office of the Provincial Fiscal.[7]

In the meantime however, the Office of the Provincial Fiscal of Surigao del Norte conducted its own preliminary investigation and, on the basis of the affidavits of Lucas Sanico, Epifanio Pangatungan, and Nenita Monter, which were subscribed and sworn to before Assistant Provincial Fiscal Pedro Azarcon on 17 March 1976,[8] filed on 13 April 1976 with Branch III of the then Court of First Instance (now Regional Trial Court) at Dapa, Surigao del Norte an Information for Murder against herein accused (hereinafter referred to as appellants) Remelito Lubreo and Lucesio Lubreo, which was docketed therein as Criminal Case No. 239.[9] The accusational portion of the Information reads as follows:

"That on or about the 10th day of March, 1976, at about 3:00 o'clock in the afternoon, more or less, in Barangay Antipolo, Municipality of Del Carmen, Surigao del Norte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accuseds (sic), with treachery and evident premeditation, and with intent to kill, each armed with bolos, conspiring, confederating and helping one another did then and there, willfully, unlawfully and feloniously attack from behind and hack, stab and wound one MAMERTO SANICO, thereby inflicting upon the latter multiple mortal wounds in the different parts of his body, thus resulting to his death to the damage and prejudice of the heirs of said MAMERTO SANICO in the amount of P12,000.00.

Contrary to law, with the qualifying circumstance of treachery and the aggravating circumstance of evident premeditation and superior strength."

x x x

On 26 September 1978, Acting 3rd Assistant Provincial Fiscal Antonio Paraguya, the prosecuting fiscal assigned to the aforesaid court, handed down a resolution wherein he adopted the findings of Assistant Provincial Fiscal Azarcon and disregarded the findings of Judge Gorgolon.[10]

Appellants entered a plea of not guilty when arraigned on 23 November 1978.

Trial on the merits was then conducted on various dates.

The prosecution presented Lucas Sanico, Nenita Monter, Epifanio Pangatungan, Dra. Leonora Gorgolon, and Imelda Sanico as its witnesses, while the defense presented Hilario Sumaylo, Montano Golindang, Restituto Plazo, Alejandro Cordita, Eduardo Blase, Pat. Sofronio Espaldon, Lucesio Lubreo, and Judge Leonor Gorgolon, who had by then already retired. Appellant Remelito Lubreo failed to attend the homestretch of the proceedings and to testify on his own behalf despite several notices and arrest orders issued against him. Instead, the defense, through the testimony of Judge Gorgolon, presented and offered Remelito's sworn statement (Exhs. "5" and "5-A") which was, together with the other exhibits for the defense, admitted in the Order of 29 August 1985.[11]

Promulgation was set for 27 September 1985; however, upon the request of the bondsmen for sufficient time to produce Remelito Lubreo, it was reset on 28 November 1985.

Claiming that very important matters were needed by it for clarification from the principal witnesses of the prosecution, the trial court issued an order on 30 August 1985 ordering that a "re-enactment" would be conducted at the scene of the incident on 7 September 1985[12] and directed witnesses Nenita Monter and Epifanio Pangatungan, among others, to be present thereat. At the "re-enactment", the trial court conducted an on-the-spot examination, under their previous oath, of witnesses Nenita Monter and Epifanio Pangatungan and appellant Lucesio Lubreo.

Remelito was subsequently arrested and committed to the Provincial Warden on 11 November 1985.[13] Thereafter, his counsel moved that he be allowed to testify, which the prosecuting fiscal opposed. However, the trial court in its Order of 28 November 1985 resolved to allow him to testify on 17, 18 and 19 December 1985. In the meantime, the promulgation was reset to 8 January 1986.[14] Remelito testified in his own behalf on 17 December 1985.

Due to the absence of the accused, occasioned by inclement weather, the promulgation on 8 January 1986 was reset to 30 January 1986.[15] It did take place on said date.

As stated in the exordium of this decision, the trial court found the appellants guilty of the crime of murder. In reaching that verdict, it relied on the prosecution's version of the incident, as borne out by the medical certificate testified upon by Dr. Leonora Gorgolon, and the testimonies of Nenita Monter and Epifanio Pangatungan, thus:

X X X

“The prosecution's version: while hiking that 3:00 o'clock in the afternoon, 10th day of March, 1976, from Barangay Tuburan towards Barangay Antipolo, Del Carmen, Surigao del Norte, Mamerto Sanico, the 23-year old victim met his tragic death due to the 20 injuries he sustained from the hands of the two (2) accused, the details of the injuries were reflected in the Medical Certificate, viz:

'Patient: Mamerto Sanico, 23-years old, male, married, residing in Tuburan, Del Carmen, Surigao del Norte.

Findings: MULTIPLE HACKED WOUNDS -

1. Stabbed wound, deep penetrating, 2.5 inches in length, located at the left 3rd rib parasternal line. Complete fracture of the 3rd rib upon probing with index finger.
2. Hacked wound, 10-inches, in length, deep, located below the right axilla extend towards the midline and ending at the right coastal cartilages. Complete fracture of the 5th rib upon probing with the index finger.
3. Hacked wound, 3 inches in length, extending from the side of the right nipple towards the anterior axillary line obliquely placed crossing the wound no. 2.
4. Hacked wound, deep, 5.5 inches in length, located at the left infrascapular area. Incomplete fracture of the 5th rib upon probing with index finger.
5. Hacked wound, deep, 3 inches in length at the medical side of the posterior mid-forearm.
6. Hacked wound, 3 inches in length at the medial side of the dorsum of the left hand.
7. Hacked wound, horizontal, 6 inches in length, deep with 1.5 inches wide, with visible and palpable cutting the scalp of the area.
8. Hacked wound, 2 inches in length, deep, at the left temporal region, cutting the scalp at that area.
9. Hacked wound, 6 inches in length, deep with palpable fracture of the left fronto-temporal region, also cutting the scalp at that area.
10. Hacked wound, 2 inches in length, deep located at the left zygomatic area.
11. Hacked wound, 7.5 inches in length, deep, located at the right temporo-zygomatic area.
12. Hacked wound, 7.5 inches in length, deep, located at the right temporo-orbital area, with palpable fracture of the right temporal bone.

13. Hacked wound, 3 inches in length, deep located at the right frontal bone with palpable fracture of the right frontal bone, cutting the scalp at that area.
14. Hacked wound, 3.5 inches in length of the right hand, disarticulating the 4 fingers at the proximal joint.
15. Hacked wound, 2 inches in length, disarticulating the right thumb at the middle third.
16. Hacked wound, 3 inches in length, deep located at the lateral side of the posterior aspect of the right wrist, with complete fracture of the ulna at the distal 3rd.
17. Hacked wound, 2.5 inches in length, located at the palmar side of the left middle finger.
18. Hacked wound, 3 inches in length, of the left hand, disarticulating the ring and little finger at the proximal joint.
19. Hacked wound, 3 inches in length, 2 cms. in depth, located at the medial aspect of the left hypothenar region.
20. Hacked wound, 3 inches in length, deep located at the medial side of the left wrist with complete fracture of the left ulna at the distal 3rd.

(SGD) LEONORA T. GORGOLON, M.D. Resident Physician'

x x x

Testimonial Evidence for the Prosecution

1. NENITA MONTER, x x x

Q Mrs. Nenita Monter, do you still remember where were you on March 10, 1976 at around 3:00 o'clock in the afternoon?

A I was (going) to Barangay Antipolo during that time;

Q Who were with you if any during that time when you were (going) to Barangay Antipolo?

A That Mamerto Sanico;

Q While you were going to Barangay Antipolo, Del Carmen, Surigao del Norte, Mamerto Sanico, what unusual incident transpired, if any?

A That was the very incident when Mamerto Sanico was hacked;

Q Who hacked Mamerto Sanico?

A That Remelito Lubreo;

x x x

Q How did Remelito Lubreo hacked (sic) Mamerto Sanico?

A (The witness demonstrated x x x stating that they met each other and upon meeting each other with two steps, x x x witness placed her right hand to the left side of her waist in order to unsheathe the bolo; and thereupon he hacked the same);

Q Was Mamerto Sanico hit upon being hacked by Remelito Lubreo?

A He was hit, sir;

Q In what part of his body was he hit?

A At his back. x x x;

Q Then, after Mamerto Sanico was hit, what happened next?

A (The witness again turn (sic) her body by facing obliquely and pointed to the other accused, Okingay (Lucesio Lubreo, added) who thereupon hacked x x x hitting him (witness pointed again to her forehead);

x x x

Q Then, after Okingay Lubreo hacked Mamerto Sanico hitting him on the forehead, what happened next?

A That was the very moment (I shouted) saying: 'you run'; and upon his reaching the distance of 3-fathoms, more or less, that was the very moment he fell down; (then) they ganged up by hacking one after the other; as if they were beating and hacking a snake;

Q x x x Was Mamerto Sanico hit by the hacking of Remelito Lubreo and Okingay (Lucesio) Lubreo?

A He was hit, sir;

Q In what part of his body?

A What I have seen (was at the back), the forehead, below the right and left armpit and the epigastric region also;

x x x

On Court's questioning, she persisted that Lucesio Lubreo, alias 'Okingay', was with Remelito Lubreo during the incident. Whether the accused and the victim was facing each other before the initial hacking blow was executed, during the same cross-examination, she said --

'ATTY. CORRO:

Q You also testified during the direct examination that before Remelito Lubreo hacked Mamerto Sanico x x x they were facing each other?

A He was through hacking already when Mamerto faced him.'

On Court's clarificatory questions, she amplified that Remelito Lubreo and Mamerto Sanico who were hiking at opposite directions had passed each other approximately two (2) steps before the initial hacking blow was executed by Remelito Lubreo. Whether the hacking blow was preceded by a conversation between them, she said -?

'Q According to you, this Mamerto and the accused knew each other; when they met in that afternoon, did you notice whether they have (sic) some conversation before the incident?

A No, Your Honor.'

Continuing, she said that although they (victim and witness) were all bound for Barangay Antipolo that fateful afternoon, the victim walked a little ahead of her; and that her shout of caution to the victim was almost simultaneous to the unsheathing (sic) of the bolo and hacking blow by Remelito Lubreo.

2. EPIFANIO PANGATUNGAN

. . . said that last March 10, 1976 at about 3:00 P.M., he was clearing grasses at his ricefield when he heard a shout for help from Nenita Monter. He went to the place of the incident, his portrayal of the incident that he saw is hereunder reproduced:

Q At the time when you saw this Remelito Lubreo and Okingay (Lucesio) Lubreo were hacking Mamerto

Sanico, what did you do?

A I ran towards them;

x x x

Q What about x x x Mamerto Sanico, at that time when this Remelito Lubreo was doing the act you demonstrated, what was his position?

A He was lying on the road;

Q What was the position of Mamerto Sanico who was lying on the road?

A He was lying face upward;

Q What about Lucesio Lubreo, what was he doing at the time when Remelito Lubreo was hacking Mamerto Sanico who was already lying on the ground?

A The same he was abetted (sic) in hacking x x x;

Q Do you know how many times Remelito Lubreo hacked Mamerto Sanico?

A Many times, it could not be counted;

Q How about Lucesio 'Okingay' Lubreo, how many times?

A He abetted in hacking as if they will come after the other in hacking his head and the neck;

After having witnessed the incident, he informed the parents of the victim of the fate of the victim. Finding the father of the victim stunned and helpless, he asked his relatives for assistance and they brought the victim to the crossing of the road in order to bring him to the hospital at Dapa. x x x"[16]

In respect to the qualifying circumstance of treachery and the aggravating circumstances of evident premeditation and superior strength, the trial court held:

"With respect to 'alevosia' as qualifying, 'evident premeditation' and 'superior strength' as generic circumstances, were such circumstances attendant to aggravate the imposable penalties? Again the burden to prove treachery is imposed on the prosecution, principally on the accounts of Nenita Monter and Epifanio Pangatungan. Both in the examinations in chief during the re-enactment, said witness persuasively convinced the court that what made the initial attack treacherous was the sudden hacking blow of Remelito Lubreo which head (sic) Mamerto Sanico at the back, said injury tallied squarely with the 'Injury No. 4. Hacked wound, deep, 5.5 inches in length located at the left infracapular area; incomplete fracture of the 5th rib upon probing with index finger.' Such conclusion finds support in the following cases, viz:

'A sudden and unexpected attack under circumstances which render the victim unable to defend himself by reason of the suddenness and severity of the attack constitute (sic) alevosia.' [People vs. Candado, 84 SCRA 508].

'Killing of the deceased by appellant without warning giving deceased no time for preparation, resistance or escape qualified the killing by treachery.' [People vs. Paya-an, 84 SCRA 393].

The existing jurisprudence as pronounced in many lines of cases mandates that 'superior strength' and 'evident premeditation' are absorbed in treachery. This is true as a treacherous felon in making preparatory plans naturally will include superiority in manpower as well as in the instruments to be used during the execution thereof."[17]

It further ruled that conspiracy was established because "the testimonies of Nenita Monter and Epifanio

Pangatungan corroboratively show that the accused had unity of purpose -- to kill the victim. x x x.”[18]

It discredited appellant Remelito Lubreo’s claim of self-defense and appellant Lucesio Lubreo’s defense of “alibi” saying, as regards the former, that:

“The self-defense posture is anchored on the allegation that Mamerto Sanico was the unlawful aggressor; that there was reasonable necessity in using the bolo by Remelito Lubreo in killing the victim; and that Remelito Lubreo did not make sufficient provocation to the victim; hence, justified. The crucial task is in determining whether the entire defense evidence is persuasively convincing as against that evidence for the prosecution.

The aforecited inconsistent testimonies, coupled by the recorded fact that Remelito Lubreo failed to post additional bail bond of Ten Thousand (P10,000.00) Pesos and that he had chosen to jump bail and failed to testify in the previously scheduled hearings, his whereabouts at that time was unknown, would lead any Court to disregard and disbelieve the self-defense theory. His actuations during the homestretch of the proceedings are synonymous with guilt. His having testified last December 17, 1985 did not change the facts which served as the basis of the decision.”[19]

With regard to the latter, the trial court said:

“As to ALIBI of Lucesio Lubreo, the onus probandum rests with the prosecution (sic). x x x

x x x

The positive declarations of Nenita Monter and Epifanio Pangatungan that one of the assailants was Lucesio Lubreo outweigh (sic) the defense of alibi, the jurisprudential support hereof reads --

‘Positive identification by witnesses that the accused are the perpetrators of the crime is more credible than denials and alibis of the accused which were not established by full, clear and satisfactory evidence. [People vs. Candado, 84 SCRA 508].

Defense of alibi is not considered credible in the case at bar because of the material contradictions in testimony between accused and his witnesses. [People vs. Pilonas, 84 SCRA 167].

Alibi is a feeble defense where accused's residence was only a short distance from the scene of the crime.’[20] [People vs. Sabater, 81 SCRA 564].”

On 14 February 1986, through new counsel, Atty. Ignacio P. Moleta, accused filed an Appearance and Notice of Appeal wherein they gave notice that they are appealing from the decision to the Intermediate Appellate Court.[21] On 20 February 1986, the trial court handed down an Order giving due course to the appeal and directing the Clerk of Court to forward all the records to the Intermediate Appellate Court.[22] However, on 14 April 1986, the Clerk of Court of the latter forwarded to this Court the records of the case for the reason that it was erroneously transmitted, it appearing that the penalty imposed upon accused is reclusion perpetua.[23]

Per the resolution of 23 June 1986,[24] We accepted the appeal.

On 24 November 1986, the Chief of the Criminal Cases Section of the Court of Appeals transmitted to this court a Motion For Withdrawal of Appeal, dated 26 July 1986, signed and thumbmarked by the appellants,[25] to which is attached a letter addressed to the Clerk of Court of the Intermediate Appellate Court, signed by the Appellants, informing the latter that they are withdrawing the appeal since they are no longer interested in pursuing it and that they are financially handicapped. Then, in a Joint Motion and Prayer,[26] dated 27 November 1986 and filed with this Court on 2 December 1986, appellants informed this Court that they have lost contact with their former lawyer; they are not satisfied with the judgment of conviction; and since they are poor and cannot afford to pay the services of counsel, they pray that an attorney de officio be appointed by the Court to assist them in their

appeal. Acting thereon, the Court, in its resolution of 5 January 1987, appointed Atty. Constantino B. de Jesus as counsel de officio for the appellants.[27]

After no less than twenty-seven extensions of time to file Appellants' Brief were granted by the Court, Atty. de Jesus eventually filed said Brief on 24 December 1987.[28]

The Office of the Solicitor General filed the Appellee's Brief on 22 March 1988.[29]

Appellants anchor their appeal on the following assigned errors:

"First Assignment of Error:

THE TRIAL COURT GRAVELY ERRED IN CONVICTING ACCUSED APPELLANT REMELITO LUBREO OF THE CRIME OF MURDER DESPITE THE ABSENCE OF EVIDENCE TO ESTABLISH BEYOND REASONABLE DOUBT THE QUALIFYING CIRCUMSTANCE OF TREACHERY.

Second Assignment of Error:

THE TRIAL COURT GRAVELY ERRED IN CONVICTING ACCUSED APPELLANT LUCRESIO LUBREO OF THE CRIME OF MURDER DESPITE THE ABSENCE OF EVIDENCE TO ESTABLISH BEYOND REASONABLE DOUBT HIS PARTICIPATION IN THE PERPETRATION OF THE SAID CRIME."

On the first assigned error, appellants maintain that treachery was not established and the conclusion of the trial court to the contrary, on account of the suddenness of the initial hacking blow, finds no support as it is based on the testimonies of Nenita Monter and Epifanio Pangatungan which could hardly be believed. They assert that the latter did not make any statement relating to the initial attack; in fact, he admitted that the fight was already in progress at the time it came to his attention, thus:

"Q While you were surveying, what unusual incident had you witnessed, if any?

A I heard the shout saying 'help' and when I glanced over it, I saw Mamerto was ganged up in hacking. [TSN, 28 August 1979, p. 11].

Q Now, that distance is quite near, will you please recall what you heard?

A I heard a shout, your Honor, 'please help, help Mamerto Sanico was hacked!

Q What did you do upon hearing that shout?

A When I turned my face towards there, I saw persons hacking one after the other." [TSN, 7 September 1985, pp. 11-12].

And, insofar as Nenita is concerned, she merely demonstrated the alleged hacking blow, thus:

"Q How did Remelito Lubreo hacked (sic) Mamerto Sanico?

A (The witness demonstrated right in the witness stand by pointing both her left and right hand upon stating that they met each other and upon meeting each with two steps. And again the witness demonstrated by holding, placing her right hand to the left side of her waist in order to unsheathe the bolo, and thereupon he hacked the same.)" (TSN, 6 December 1978, p. 5).

and, during the re-enactment:

"Q You walk again and demonstrate how the victim was hacked initially at this place; where the accused was before the initial hacking incident took place?

A (Witness walking towards Barangay Tuburan and while passing each other with the victim at a distance of about two (2) steps, she turned her back to the left and pulled the bolo; thence, hacked the victim at the back)."
[TSN, 7 September 1985, p. 5].

Besides, her testimony is not credible as it is replete with improbabilities and material inconsistencies. Thus, for one, if Lucesio Lubreo were indeed present and one in intent with his brother Remelito, he would not have simply stood by and watched; he would have either immediately helped his brother or would have done something to keep Nenita from shouting for help and attracting attention. Then, it is surprising why, instead of going home immediately after the incident and to tell her husband about it, she went to friends and relatives in the next town; moreover, it took her more than seven (7) days before she executed an affidavit attesting to the incident. Finally:

"x x x her testimony is replete with inconsistent statements, which necessarily taint and discredit the whole. After all, she positively testified on direct examination that accused-appellant Lucesio Lubreo hacked the victim on the forehead, causing the latter to fall (T.S.N., p. 6, 6 December 1978). In the same manner, she asserted that Lucesio Lubreo started hacking the victim only AFTER the latter had fallen (T.S.N., p. 7, 7 September 1985). Moreover, on re-enactment, she assuredly claimed that it was accused-appellant Remelito Lubreo who hacked the victim the (sic) forehead, causing the latter to fall (T.S.N., p. 6, 7 September 1985). Also, her initial statement referred to meeting accused-appellant Remelito Lubreo ONLY (T.S.N., p. 4, 6 December 1978; T.S.N., p. 4, 7 September 1985), a statement which she later refuted by insisting on the presence and participation of accused-appellant Lucesio Lubreo (T.S.N., p. 6, 6 December 1978; T.S.N., pp. 7-8, 7 September 1985). For another, she claimed that the victim fell after the second blow (T.S.N., p. 6, 6 December 1978), but she again refuted this statement later by claiming that the victim even managed to run a few paces before he fell (T.S.N., p. 7, 7 September 1985). Then she claimed that she shouted as soon as she saw accused-appellant Remelito Lubreo drawing his bolo (T.S.N., p. 4, 6 December 1978), but she (sic) again amended this when she claimed that she started shouting only after he had fallen (T.S.N., p. 5, 7 September 1985)."

All these improbabilities and material inconsistencies serve to cast doubts on the credibility of Nenita.

Appellants then conclude that the crime of murder was not committed; at the most, Remelito Lubreo could only be guilty of Homicide, mitigated by his voluntary surrender.

On the second assigned error, appellants likewise focused on the incredibility of the testimonies of Nenita Monter and Epifanio Pangatungan. They allege that the latter committed falsehoods when he claimed that he himself, together with a certain Tirso Rudela, brought the victim to the hospital, when it was actually Alejandro Cordita and Tirso who did so; and when he asserted in his earlier testimony that he was in his own rice plantation in Barangay Antipolo when he heard the shout for help, although, as he admitted on cross-examination during the "re-enactment", he does not own any rice plantation.

They further characterize as incredible the story of Epifanio that the victim's parents, contrary to parents' natural instinct, preferred not to aid their son when his life was already hanging in the balance and instead asked another person to help and take care of him and his claim that both appellants ran toward Barangay Tuburan upon seeing him when, as testified by Alejandro Cordita, he met them in Antipolo.

Appellants finally argue that if indeed Lucesio Lubreo was a participant in the killing and that he and Remelito each used a bolo, two bolos should have been presented in evidence. Yet, only one was produced and offered in evidence. No corpus delicti was established as against him.

Appellants then pray for judgment:

"(1) ACQUITTING accused-appellant Lucesio Lubreo of the crime of MURDER; and

(2) CONVICTING accused-appellant Remelito Lubreo of the lesser crime of HOMICIDE, mitigated by voluntary surrender."

These assigned errors and arguments were squarely met in the Brief for the Appellee.

Appellee submits that the trial court did not err in convicting the appellants. The issues raised by the appellants involve credibility of witnesses and it is well established that findings of facts of the trial court should not be disturbed unless there are facts or circumstances of substance which were overlooked by it which, when considered, would alter the judgment of conviction.[30] There is no showing in this case that the trial court overlooked some facts of substance which, when considered, would affect its findings. Its judgment was not based on mere persuasive evidence but on sufficient proof, for purposes of creating moral certainty, from the testimony of Nenita Monter, an eyewitness to the crime, regarding the treacherous acts of appellants. Appellee further argues that the inconsistencies or contradictions in the testimonies of Nenita Monter and Epifanio Pangatungan, capitalized on by appellants, are merely on minor points and do not affect the effectiveness of their positive testimonies and identification of appellants.

As regards treachery, Appellee contends:

"Appellants' claim that treachery cannot be appreciated against them is negated by the fact that the victim was unable to prepare himself for defense, the attack being sudden and unexpected and launched from behind (pp. 5-6, tsn, December 6, 1979); the victim was hacked continually even after he fell to the ground (pp. 14-17, tsn, August 28, 1979); the initial blow was fatal (Exhibits A and A-1); and the victim suffered 20 hack wounds, all of which were fatal (Id.). There is alevosia when the attack is sudden and unexpected, under circumstances which render the victim unable to defend himself by reason of the suddenness and severity of the attack (People vs. Candado, 84 SCRA 508). Treachery exists when the offender employ means which tend directly and specifically to insure the execution of the offense, without risk to himself arising from the defense which the offended party might make (Article 14, par. 16, Revised Penal Code). The killing of the deceased without warning, giving him no time for preparation, resistance or escape, qualifies the killing to murder (People vs. Paya-an, 84 SCRA 353)."[31]

We shall now resolve the assigned errors.

1. Under the first assigned error, appellant Lucresio Lubreo admits that he committed a crime in the killing of Mamerto Sanico but maintains that the crime committed was simple homicide since the qualifying circumstance of treachery was not established. He has completely abandoned his theory of self-defense. And rightly so. It would have been futile to hold on to it for his own testimony and those of his witnesses miserably failed to prove the elements of self-defense. The nature and locations of the nineteen hack and one (1) stab wounds inflicted on the victim[32] and the fact that the bolo (sundangay) of the victim was inside its scabbard when seen by defense witness Alejandro Cordita[33] negate and belie such claim.

We agree with the trial court and the Appellee that treachery attended the killing of the victim. There is treachery when the offender commits any of the crimes against the person employing means, methods, or forms in the execution, without risk to himself arising from the defense which the offended party might make.[34]

Treachery cannot be presumed; it must be proved by clear and convincing evidence, or as conclusively as the killing itself.[35] In order that it may be appreciated, it is necessary to prove the manner in which the victim was attacked. Where there is no proof to establish the manner in which crime was committed, it cannot be insisted that treachery was present.[36] Where no particulars are known as to the manner in which an 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, drawn from circumstances prior to the very moment of aggression, that the accused

perpetrated the killing with treachery.[37] It cannot be simply deduced from presumption.[38]

We have time and again held that the suddenness of an attack is not, of itself, enough to constitute treachery when the method of killing does not positively show that the assailant thereby knowingly intended to ensure the accomplishment of his purpose without risk to himself from any defense which the victim might put up.[39]

But there is treachery when a victim is attacked by an accused without warning and his back turned to his assailant,[40] or when the attack is sudden and unexpected and without the slightest provocation on the part of the victim,[41] or is sudden and unexpected that the victim was unable to defend himself, thus insuring the execution of the criminal act without risk to the assailant.[42]

In the instant case, appellant Remelito Lubreo, after having made two steps behind the victim suddenly and unexpectedly, with the use of a bolo, hacked the deceased at his back causing "Injury No. 4 Hacked (sic) wound, deep, 5.5 inches in length, located at the left infracapular area; incomplete fracture of the 5th rib upon probing with index finger." [43] When the victim faced Remelito, he was again hacked at the forehead.[44] Remelito denied having hit Mamerto at the back; according to him, all the injuries he inflicted were frontal,[45] which he delivered successively after Mamerto allegedly got his dagger from his net bag and stabbed him;[46] he also admitted having hacked Mamerto at the base of his forehead.[47] According to him, he alone inflicted the injuries on Mamerto and that his brother Lucresio was not with him.[48] Yet, he made no attempt whatsoever to explain the aforesaid "Injury No. 4" at the back of Mamerto. This was a clever attempt to cast doubt on the presence of treachery. But, having admitted the infliction of all the injuries, his deliberate silence on "Injury No. 4" strengthens the version of Nenita. We are convinced beyond moral certainty that, as testified by Nenita, appellant Remelito hacked Mamerto on his back suddenly and unexpectedly. Remelito's claim that Mamerto stabbed him with a dagger before he moved allegedly in self-defense is belied by the unrebutted testimony of his own witness, Alejandro Cordita, that the bolo (sundangay) -- not a dagger -- of Mamerto was inside the scabbard.[49] And, as testified by Lucresio, his own brother and co-accused, the victim used no weapon at all; he parried the hacking with his hands.[50] It was definitely unexpected because he first made two steps toward the opposite direction after meeting Mamerto before he suddenly unsheathed his bolo and hacked Mamerto at his back. There is nothing in the evidence to show that at any time before the initial hacking, Mamerto suspected that Remelito would do any evil act. In short, Mamerto was completely unprepared for the attack and taking into account the subsequent successive wounds, there is no doubt at all that the attack was carried out in a manner which precluded any risk of defense or retaliation which could have come from the victim. It was only the shout of Nenita which may have warned him of it -- but it came too late, as he was already hit at the back.[51]

The effort of the appellants to discredit Nenita by testimonies of witnesses to the effect that she was not at the scene of the crime and therefore could not have witnessed the killing of Mamerto[52] was a belated attempt to becloud the devastating effect of her testimony. But as correctly noted by the court, appellants, in their respective sworn statements, admitted the presence of Nenita as a witness to the incident. In his sworn statement taken on 11 March 1976,[53] a day after the incident, appellant Remelito made the following answer:

"4. Q Who witnessed your fight?

A The ones who witnessed, sir, Nita Monter who was ahead of him whom I also met first and her distance from us was 40 meters, more or less, Locresio (sic) M. Lubreo who was at a distance of 150 meters, more or less, to the place where we were fighting, and Romeo Tessado, Tita Tessado, Cely Argana and Mede Argana for they were all at Barangay Antipolo."

In his sworn statement,[54] also taken on 11 March 1976, appellant Lucresio Lubreo made the following significant revelations:

"5. Q Who else saw when they were fighting?

A. Romeo Tesado, x x x there was a woman, Neta (sic) Monter, who also saw who was the companion of Mamerto B. Sanico and near to them and who was the one who was shouting for help because there were persons fighting. x x x"

With treachery having been shown beyond any shadow of doubt, Remelito Lubreo must be held guilty for the crime of Murder, with the mitigating circumstance of voluntary surrender to be appreciated in his favor.

2. An accused is presumed innocent until the contrary is proved. This presumption is solemnly guaranteed by the Bill of Rights.[55] The contrary requires proof beyond reasonable doubt, or that degree of proof which produces conviction in an unprejudiced mind.[56] Short of this, it is not only the right of the accused to be freed; it is, even more, the constitutional duty of the court to acquit him.[57] Necessarily, the evidence for the prosecution must stand or fall on its own merits; it cannot be allowed to draw strength from nor can conviction be sustained on the weakness of the evidence for the defense. The burden of proof is upon the prosecution and until such burden is sufficiently discharged, the accused continues to enjoy the presumption of innocence.[58]

In the instant case, the lower court convicted Lucesio Lubreo on the basis of its conclusion that he was positively identified by witnesses Nenita Monter and Epifanio Pangatungan as one of the assailants, and that, therefore, his defense of alibi would not prosper.

As We view it, alibi is not, in reality, the defense of Lucesio. It is more of a denial. The trial court has apparently confused one with the other. Lucesio was in the vicinity of the locus delicti. As a matter of fact, he is number 1 in the list of witnesses for the prosecution in the complaint for homicide against Remelito Lubreo before the Municipal Court of Del Carmen, Surigao del Norte.[59] He admitted his presence at the place of the incident because of the shout for help and he saw the fight between Remelito and the victim.[60] At the hearing of 7 September 1985, conducted at the scene of the crime, which the court considered as a re-enactment, Lucesio also testified and, upon questioning by the court, specifically pointed to the place where he was at the time watching Remelito hack the victim; he was not able, however, to count the number of times Remelito hacked the victim as he did it "fast"; then the victim fell and Remelito hacked him again on the forehead.[61]

Even if it were so and that it were weak, it did not relieve the prosecution of its burden to prove the guilt of Lucesio beyond reasonable doubt. Alibi need not even be inquired into where the evidence for the prosecution is weak. And the rule that alibi must be satisfactorily proven was never intended to change or alter the burden of proof in criminal cases.[62]

We find it difficult to agree with the trial court on its verdict against appellant Lucesio Lubreo. As to him, it had to rely solely on the testimonies of Nenita Monter and Epifanio Pangatungan.

Unfortunately, however, while it is true that when she first testified on 6 December 1978, she categorically declared on direct examination that it was Lucesio who hacked the victim on the forehead and that when the victim fell down, both he and Remelito ganged up on him and hacked him as if they were beating and hacking a snake,[63] which she reinforced by demonstrating; yet, during the "re-enactment", she was candid enough to inform the court that Lucesio was just standing by; she could not remember as to who actually hacked the victim on the forehead and she does not know if Lucesio helped in hacking the victim after the latter fell to the ground. Here are her answers to the questions of the trial court during such re-enactment:

"Q Now, what happened to Mamerto Sanico when the initial hacking blow transpired while you were at a distance at the back of the victim?

A Then upon hitting at his back, he was able to face Remelito Lubreo and he was again hacked at the forehead.

Q Who hacked him at his forehead?

A While Mamerto Sanico was hit by the hacking blow at his back I was already shouting saying please help because there was (sic) a person being hit and he was the same person who hacked him at the forehead.

Q You mean to tell the court that the same Remelito Lubreo hacked the victim at the forehead?

A I cannot remember clearly as to who was the person who hit him by a hacking blow at the forehead because I was already running towards Antipolo and I saw when the hacking blow was made hitting him at the forehead.

Q You mean to tell the Court you did not see the victim (sic) who hacked at the forehead?

A No more, your Honor.

x x x

Q Will you please demonstrate where Lucresio Lubreo was when the first hacking blow was inflicted?

A He was only here, your Honor (witness stand (sic) at a place on the road).

Q Was Lucresio Lubreo having a bolo that time?

A He had with him a bolo.

Q When the first hacking blow and the successive hacking blows were inflicted, will you please tell the court what did Lucresio Lubreo do the first time that he participated against the victim?

A He kept on standing here your Honor.

Q Lucresio Lubreo was standing even after the first hacking blow and the successive blows were inflicted to Mamerto Sanico?

A I do not know, your Honor, whether he had helped at the time when that victim fell down.

x x x

Q When the victim fell, where was Lucresio Lubreo?

A He was here helping in hacking.

Q Now you mean to tell the court that Lucresio Lubreo only helped in hacking when the victim already fell?

A Yes, your Honor.

Q Before the victim fell, Lucresio Lubreo did not participate in hacking the victim is this correct?

A That elder brother of his was the one yet hacking."[64]

From Nenita's own version, the participation of Lucresio is at once enveloped in serious doubt. It is worse in the case of Epifanio Pangatungan. Even from the testimony of Nenita, his presence at or near the scene of the crime and his witnessing the incident is equally placed in serious doubt. According to Nenita, during the incident, she kept on shouting for help, "but nobody came or responded for (sic) help"[65] and when she was already hiding after the hacking incident, she saw persons who passed by and glanced at the victim but she did not know or recognize them.[66] Yet, Epifanio alleges that after hearing the shout for help of Nenita, he glanced and saw Mamerto Sanico being ganged up and hacked by Remelito and Lucresio while Lucresio "abetted in hacking as if they will come one after the other in hacking his mind (sic) and the neck."[67] As to what "abetted in hacking" means was never elaborated by him. He could not specify the part of the body of Mamerto which was hit by

Lucesio. Then, he ran towards the house of Mamerto's parents to inform them of what happened; thereafter, he returned with his relative, Tirso Rudela, to the place where Mamerto was, brought him to the crossing, loaded him on a passenger jeepney and brought him to the hospital.[68]

The fact, however, remains that it was Alejandro Cordita with Montano Golindang, Dario Sumaylo and Ricardo Gallope who came to the aid of Mamerto Sanico. They placed him on a hammock, brought him to the crossing, put him on board a truck and brought him to the hospital.[69] During the re-enactment, Epifanio had to eat back his solemn words when he had to admit that when he returned to the scene of the crime, the body of Mamerto was no longer there.[70]

Then again, caught in the wings of his fancy and imagination, he claimed that he could even recognize the bolo which appellants used, and when asked about a bolo marked as Exhibit "A" (Exh. "A-1" is the scabbard), he answered on cross-examination:

"I have seen that as it is only being handed (sic) by their hands."

x x x

I only knew there and identified the same when they ran away as it is only being held by their hands."[71]

clearly implying that both appellants had it in their possession, which is of course untrue because that bolo was the one surrendered by Remelito which he admits to be his.

There is evidently insufficient evidence to show the actual participation of Lucesio Lubreo in the killing of Mamerto. There being no evidence of conspiracy, he cannot be held for the acts of his co-appellant.

We shall now determine the penalty for appellant Remelito Lubreo. In view of the abolition of the death penalty,[72] the penalty for Murder is now deemed to be reclusion temporal in its maximum period to reclusion perpetua,[73] whose entire duration is 17 years, 4 months and 1 day to reclusion perpetua. Its minimum period is 17 years, 4 months and 1 day to 18 years and 8 months. The medium period is from 18 years, 8 months and 1 day to 20 years. The maximum period is reclusion perpetua.[74]

Appreciating in his favor the mitigating circumstance of voluntary surrender, the minimum period should then be imposed following the rule prescribed in paragraph 2 of Article 64 of the Revised Penal Code.

Since he is now entitled to the benefits of the Indeterminate Sentence Law, he may be sentenced to a penalty whose minimum is within the range of the penalty next lower in degree and whose maximum is the minimum of the aforesaid imposable penalty under Article 248 of the Revised Penal Code.

The penalty next lower in degree is prision mayor maximum to reclusion temporal medium.[75]

The penalty then imposed by the trial court on Remelito Lubreo of Ten (10) years and one (1) day of prision mayor maximum as minimum to Seventeen (17) years, four (4) months and one (1) day of reclusion temporal maximum as maximum is correct. Consistent with the latest rulings of this Court, the indemnity should, however, be increased to P50,000.00.[76] The prosecution has not established the basis for moral and exemplary damages. Accordingly, the award therefor should be disallowed.

WHEREFORE, judgment is hereby rendered:

- 1) AFFIRMING the decision appealed from insofar as accused-appellant REMELITO LUBREO is concerned, with the modification consisting in the increase of the indemnity from P12,000.00 to P50,000.00, and the elimination of the award for moral and exemplary damages, but

2) REVERSING the same insofar as accused-appellant LUCRESIO LUBREO is concerned, who is hereby ACQUITTED and whose immediate release from detention is hereby ordered.

With costs de officio.

SO ORDERED.

Fernan, C.J., Gutierrez, Jr., Feliciano, and Bidin, JJ., concur.

- [1] Rollo, 31-80.
- [2] Exh. "1".
- [3] Exh. "5".
- [4] Exh. "5", which is in the dialect, and "5-C" (the English translation thereof).
- [5] Exh. "4", in the dialect, and Exh. "4-A" (the English translation thereof).
- [6] Exh. "3".
- [7] TSN-Tesado, 10 July 1985, 6.
- [8] Original records, 3-8.
- [9] Id., 1-2.
- [10] Original records, 30-31.
- [11] Original records, 122.
- [12] Id., 123.
- [13] Id., 126.
- [14] Original records, 128-129.
- [15] Order of 8 January 1986; Id., 131.
- [16] Judgment of trial court, 1-11; Rollo, 31-41.
- [17] Judgment of trial court, 77-78.
- [18] Judgment of trial court, 76.
- [19] Id., 72.
- [20] Judgment of trial court, 43-46; Rollo, 73-76.
- [21] Original records, 182.
- [22] Id., 183.
- [23] Rollo, 1.
- [24] Rollo, 82.
- [25] Id., 88-89.

- [26] Id., 92.
- [27] Id., 93.
- [28] Id., 130, et seq.
- [29] Rollo, 136, et seq.
- [30] Citing *People vs. Renegado*, 57 SCRA 275; and *People vs. Bernudez*, 57 SCRA 629.
- [31] Rollo, 147-149.
- [32] *People vs. Marciales*, 166 SCRA 436 and *People vs. Batas*, 176 SCRA 46.
- [33] TSN-Tesado, 7 November 1983, 19-20.
- [34] Article 14, par. 16, Revised Penal Code; *People vs. Manzanares*, 177 SCRA 427; *People vs. Villapando*, 178 SCRA 343.
- [35] *People vs. Manalo*, 148 SCRA 98; *People vs. Gaddi*, 170 SCRA 549.
- [36] AQUINO, Ramon, C., *The Revised Penal Code*, vol. 1, 1987 ed., 388.
- [37] *U.S. vs. Perdon*, 4 Phil. 141; *People vs. Ablao*, 183 SCRA 658.
- [38] *People vs. Diaz*, 167 SCRA 239.
- [39] *People vs. Caldito, et al.*, 182 SCRA 66; *People vs. Sabanal*, 172 SCRA 430; *People vs. Malazzab*, 160 SCRA 123; *People vs. Marciales*, supra.; *People vs. Bongo*, 55 SCRA 547; *People vs. Satone*, 74 SCRA 106; *People vs. Cabiling*, 74 SCRA 185.
- [40] *People vs. Rellon*, 167 SCRA 75; *People vs. Tachado*, 170 SCRA 611.
- [41] *People vs. Rey*, 172 SCRA 149.
- [42] *People vs. Maravilla*, 167 SCRA 645.
- [43] Exhs. "A" and "A-1".
- [44] TSN-Tesado, 7 September 1985, 5.
- [45] TSN-Sollosa, 17 December 1985, 10-11.
- [46] Ibid., 7-8.
- [47] Ibid., 10.
- [48] TSN-Sollosa, 17 December 1985, 17.
- [49] TSN-Tesado, 7 November 1983, 15-20.
- [50] Ibid., 7 September 1985, 29-30.
- [51] Op. cit., 6 December 1978, 20.
- [52] Testimonies of Hilario Sumaylo, Restituto Blazo, and Montano Colindang.
- [53] Exhs. "5" and "5-A" (English translation); emphasis supplied.
- [54] Exhs. "4" and "4-A" (English translation); emphasis supplied.

- [55] Sec. 14(2), Article III, 1987 Constitution.
- [56] Sec. 2, Rule 133, Rules of Court.
- [57] *People vs. Maisug*, 27 SCRA 742.
- [58] *People vs. Baderes*, 153 SCRA 253.
- [59] Exh. "3".
- [60] TSN-Sollosa, 13 February 1985, 7-11.
- [61] TSN-Tesado, 7 September 1985, 27-28.
- [62] *People vs. Mendoza*, 174 SCRA 432; *People vs. Salguero*, G.R. No. 89117, 19 June 1991.
- [63] TSN-Sollosa, 6 December 1978, 6-7.
- [64] TSN-Tesado, 7 September 1985, 5-8.
- [65] TSN-Sollosa, 6 December 1978, 7 and 26.
- [66] *Ibid.*, 26.
- [67] TSN-Tesado, 28 August 1979, 16-17.
- [68] *Ibid.*, 19-21.
- [69] TSN-Tesado, 7 November 1983, 5-7.
- [70] *Ibid.*, 7 September 1985, 15.
- [71] *Ibid.*, 30-31.
- [72] Section 19(1) of Article III of the 1987 Constitution.
- [73] The penalty prescribed in Article 248 of the Revised Penal Code is reclusion temporal in its maximum period to death. *People vs. Abagon*, 161 SCRA 197; *People vs. Nolasco*, 163 SCRA 623; and *People vs. Alpetche*, 168 SCRA 670.
- [74] AQUINO, loc. cit., vol. III, 1988 ed., 628.
- [75] *Ibid.*
- [76] *People vs. Sison*, 189 SCRA 643; *People vs. Sazon*, 189 SCRA 700.

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