

PEOPLE OF THE PHILIPPINES, PLAINTIFF/APPELLEE, VS. JULITO MINDAC, LINO TRINIDAD AND CARLITO LAGURAS, DEFENDANTS/APPELLANTS.

G.R. No. 83030, December 14, 1992

Ponente: BIDIN, J.

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BIDIN, J.:

Appellants Julito Mindac, Lino Trinidad and Carlito Laguras were charged with the crime of murder before the Regional Trial Court of Dumaguete City, Branch XXX, in an information alleging:

"That on or about June 19, 1983 at 7:30 o'clock in the evening, more or less, at the National Highway at Zamboanguita, Negros Oriental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring and confederating with each other, with evident premeditation and intent to kill and abuse of superior strength, did then and there willfully, unlawfully and feloniously, waylaid, assault, attack, stab with the use of a hunting knife, strike with the use of an empty long neck bottle and whip with a belt, with which they were then armed and provided, one CIRILO "GLENN BOY" BOLISIG, inflicting upon the latter the following wounds, to wit:

1. Abrasions, tip of the nose and chin;
2. Stab wound, 1 3/4 inches x 6 inches, penetrating at the level of 5th intercostal space, left just below the left nipple.

which wounds caused victim's death immediately thereafter.

"Contrary to Article 248 of the Revised Penal Code" (Rollo, p. 6)

Accused/appellants entered a plea of not guilty upon arraignment. However, appellant Mindac assumed responsibility for the death of the victim Glenn Bolisig but raised self-defense in exculpation. The prosecution and the defense thereafter went to trial and adduced their respective evidence.

After trial, the court a quo rendered judgment as follows:

"WHEREFORE, the Court finds Accused Carlito Laguras, Julito Mindac and Lino Trinidad guilty beyond reasonable doubt of the crime of Murder charged in the Information, defined and penalized in Article 248 of the Revised Penal Code, and there being present in the commission of the crime the aggravating circumstance that the three Accused took advantage of their superior strength, they are hereby sentenced to suffer the penalty of Reclusion Perpetua with the accessory penalties provided by law, to indemnify the heirs of Cirilo Glenn "Boy" Bolisig in the amount of P 30,000.00 and to pay the costs.

"SO ORDERED" (Rollo, p. 37)

The trial court made the following findings of fact duly established by the testimonies of the prosecution witnesses, to wit:

"That in the evening of June 19, 1983, Cirilo "Glenn Boy" Bolisig (Glenn Bolisig for short) was walking along the highway of Zamboanguita, Negros Oriental on his way to Sitio Maglinte, about 500 meters from his father's house in the poblacion, to gather tuba and to feed his chickens. Following him about 5 fathoms away along the same highway was Pastor Cañete who was on his way home to Sitio Bayombong, 8 kilometers from the poblacion. When Glenn Bolisig was at the junction of the highway and San Antonio St., about 200 meters from his father's house and in the premises of a lighted portion of the road, he was accosted by the accused Julito Mindac, Lino Trinidad and Carlito Laguras who blocked his way. Then Carlito Laguras swung his belt, with the buckle at the free end, to beat Glenn Bolisig but the latter ducked. The swinging belt went wild and the buckle hit the face of Julito Mindac instead who was beside Carlito Laguras. Then Lino Trinidad beat Glenn Bolisig on the nape with an empty bottle causing the latter to stagger. He was caught by Lino Trinidad who said: "Finish him Tiyo." Thereupon, Julito Mindac stabbed Glenn Bolisig below his left nipple which caused the latter to fall to the ground. The three Accused stood looking down at Glenn Bolisig until they noticed a person walking down the highway towards them. They then ran away. Glenn Bolisig died where he fell. He was then 25 years old and still single. He sustained (1) abrasions on the tip of his nose and chin and (2) a stab wound, 1-3/4 inches by 6 inches, penetrating at the level of the 5th intercostal space left just below the left nipple (Medical Certificate, Exhibit "C"). His father spent P 4,000.00 for his burial and P 3,000.00 for his wake and the customary 9-days prayer. When his father went to the place where Glenn Bolisig was allegedly assaulted he found his son lying face down on a pool of his own blood in the middle of the highway (pictures, Exhibits "A" and "B"). When the police was notified about the incident, Pat. Epifras Pinili and Pat. Abejero went to the place of the incident and there they saw Glenn Bolisig lying dead on a pool of blood. Pat. Pinili thereupon prepared a rough sketch of the premises which he later transcribed on a clean copy (Exhibit "D")" (Decision, pp. 22-23; Rollo, p.7)

The testimonies of the defense witnesses, as summarized by the trial court are as follows:

"xxxx At about 6:30 in the evening of June 19, 1983, Glenn Bolisig had a heated argument with Julito Mindac in the poblacion of Zamboanguita, Negros Oriental during which he challenged Mindac to a fight to the death. The timely arrival of Pat. Joel Tugaoen of the Zamboanguita Police averted what could have been a bloody fight, and Glenn Bolisig went home upon the advice of Pat. Tugaoen. Later, while the three accused, in the company of Quio Cabus and Teofilo Catargo, were walking along the highway on their way home, they met Glenn Bolisig on the road, wearing maong pants but was bare from the waist up. When Julito Mindac and his companions came abreast of the deceased, the latter suddenly struck the former with a stone hitting him on the left cheek which bled. Then Glenn Bolisig pulled out an 11-inch knife and thrust it at Julito Mindac which the latter parried and wrested away. When Julito Mindac was able to get hold of the knife he thrust it at Glenn Bolisig's left chest. Upon being hit, Glenn Bolisig walked away but slumped to the ground after reaching a distance of one meter. Later, Julito Mindac and Lino Trinidad were brought to the office of the Chief of Police of Zamboanguita, Negros Oriental as suspects in the slaying of Glenn Bolisig." (Decision, pp. 3-4; Rollo, pp. 23-24)

Appellant Trinidad gave the same version of the incident except that according to him, the victim appeared from the banana plants and immediately struck appellant Mindac with a stone hitting Mindac on the left cheek. Mindac is Trinidad's uncle.

Teofilo Catargo, one of the witnesses presented by the defense, however, testified that the victim was holding the buckle of a belt with which he whipped Mindac and hit the latter on the right cheek. Thereafter, according to Catargo, Mindac covered his face with both hands and while in said act, Trinidad struck the victim with a bottle hitting the latter. The victim fell down. Then Mindac pulled a kitchen knife and stabbed the victim.

Sgt. Orlando Gono of the Philippine Constabulary testified that on his way to the house of appellant Mindac immediately after the incident, he met appellants Mindac and Trinidad who asked him to accompany them to the municipal hall because appellant Mindac was a suspect in the killing of the victim Bolisig.

Cpl. Andrew Elvinia, Station Commander of the Integrated National Police of Zamboanguita testified that the entries in the police blotter show that the victim had a string of criminal involvements. Pat. Andrew Abejero testified that two stones were recovered inside the victim's pockets.

Before the defense rested its case, Paulino Elnas, a prosecution witness, took the witness stand and recanted the testimony he gave as a prosecution witness saying that he was in his house at Calombuyan, Zamboanguita on the date when the victim was killed and therefore, he was not at the scene of the crime on that day and that it was prosecution witness Pastor Cañete who coached him what to state in his affidavit and how to testify in court. Pastor Cañete, however, died on March 10, 1985.

In this appeal, appellants assign the following errors:

I

"THE TRIAL COURT COMMITTED GRAVE ERROR AS IT OVERLOOKED, OR IGNORED CERTAIN SUBSTANTIAL FACTS AND VITAL CIRCUMSTANCES WHICH, HAD THEY BEEN PROPERLY CONSIDERED, WILL AFFECT THE RESULT OF THE CASE, SINCE THEY DEMONSTRATE THAT:

- a) IN FACT THE VICTIM WAS THE AGGRESSOR;
- b) THE FINDING OF THE LOWER COURT THAT THE ACCUSED WERE LAYING IN WAIT FOR THE VICTIM RESTS ON SPECULATIVE AND DOUBTFUL EVIDENCE; and
- c) THE FINDING OF THE LOWER COURT THAT THERE EXISTED CONSPIRACY AMONG THE ACCUSED TO KILL THE VICTIM IS UNFOUNDED.

II

"THE TRIAL COURT COMMITTED GRAVE ERROR IN HOLDING THAT THE QUALIFYING CIRCUMSTANCE OF ABUSE OF SUPERIOR STRENGTH ATTENDED THE KILLING OF THE DECEASED.

III

"THE TRIAL COURT COMMITTED GRAVE ERROR IN REJECTING THE AFFIDAVIT OF RECANTATION OF PROSECUTION WITNESS, PAULINO ELNAS.

IV

"THE TRIAL COURT COMMITTED GRAVE ERROR IN NOT ACQUITTING THE HEREIN APPELLANTS.

V

"ASSUMING ARGUENDO THAT MURDER IS COMMITTED, THE TRIAL COURT COMMITTED GRAVE ERROR IN REJECTING THE FACT OF VOLUNTARY SURRENDER OF APPELLANT JULITO MINDAC; AND IN IMPOSING THE PENALTY OF RECLUSION PERPETUA." (Brief for Appellants Mindac and Trinidad, pp. 2-3; Rollo, pp. 118-119)

VI

"THE LOWER COURT ERRED IN CONVICTING APPELLANT LAGURAS FOR CONSPIRACY WITH SELF-CONFESSED APPELLANT MINDAC AND APPELLANT TRINIDAD.

VII

"THE LOWER COURT ERRED IN REJECTING THE RETRACTED TESTIMONY OF WITNESS PAULINO ELNAS AND THAT OF DECEASED WITNESS PASTOR CAÑETE, CONTAINED IN EXHIBIT 6." (Appellant's Brief, p. 8; Rollo, p. 68)

Of the three appellants, only Mindac admitted the killing but raises the justifying circumstance of self-defense. Appellant Mindac, by pleading self-defense admits that he killed the victim and he is thus duty bound to prove the essential requisites of the justifying circumstance of self-defense. Well-settled is the rule that when the accused had admitted that he is the author of the death of the victim and his defense is anchored on self-defense, it is incumbent upon him to prove this justifying circumstance to the satisfaction of the court. This circumstance he has to prove by clear and convincing evidence, the onus probandi having shifted to him (*People vs. Lacao, Sr.*, 201 SCRA 317 [1991]). He must rely on the strength of his own evidence and not on the weakness of that of the prosecution for, even if the prosecution evidence is weak, it could not be disbelieved after the accused himself admitted the killing (*People vs. Arroyo*, 201 SCRA 616 [1991]; *People vs. Bausing*, 199 SCRA 355 [1991]).

In order that the plea of self-defense may be properly invoked, the following requisites must concur: (1) unlawful aggression; (2) reasonable necessity of the means employed to prevent or repel it; and (3) lack of sufficient provocation on the part of the person defending himself (Paragraph 1, Article 11, Revised Penal Code). It is elementary that the first requisite of self-defense is indispensable. There can be no self-defense unless it is proven that there has been unlawful aggression on the part of the person injured or killed by the accused. If there is no unlawful aggression, there is nothing to prevent or to repel. The second requisite of self-defense will have no basis (*People vs. Lacao, Sr.*, supra; *People vs. Arroyo*, supra; *Guevarra vs. Court of Appeals*, 187 SCRA 484 [1990]).

Reviewing the records, it is apparent that there was no unlawful aggression on the part of the victim.

Appellant Mindac contends that it was the deceased who was the aggressor. However, evidence for the defense shows conflicting versions as to how appellant Mindac was allegedly attacked by the victim, thus, creating serious doubt as to the truth of their assertions. The matter was noted by the trial court, as follows:

"The Court finds that the primal element of unlawful aggression has not been established with the requisite clarity, satisfactoriness and convincingness due to serious contradictions between the testimonies adduced to prove that element, to wit:

"(1) Isidro Responso and Teofilo Catargo testified that immediately before the incident, they saw Glenn Bolisig standing at the side of the highway, but Julito Mindac and Lino Trinidad testified that Glenn Bolisig suddenly came out from a banana plant.

"(2) Isidro Responso, Lino Trinidad and Julito Mindac testified that Glenn Bolisig used a stone in striking Julito Mindac on the face but Teofilo Catargo declared that Glenn Bolisig used a belt with the buckle at the loose end hitting Julito Mindac.

"(3) Isidro Responso and Julito Mindac testified that Glenn Bolisig pulled out a knife from his waistband which was wrested away and used by Julito Mindac to stab Glenn Bolisig, but Teofilo Catargo said that Julito Mindac pulled out a kitchen knife from his own waistband which he used in stabbing Glenn Bolisig.

"(4) Isidro Responso testified on direct examination that the stone used by Glenn Bolisig hit Julito Mindac on the

right face, but on cross-examination, he said the stone hit the left face." (Decision, pp. 6-7; Rollo, pp. 79-80).

The contradictions in the testimonies of the defense witnesses cast serious doubt on the truth of appellant Mindac's assertion that the victim was the unlawful aggressor. Moreover, it is unlikely that the deceased, who was alone, would attack appellant Mindac who was in the company of three other persons. Thus, the version of the prosecution as to how the incident in question happened is more credible and trustworthy.

That there was conspiracy among the three appellants to kill the victim is borne out by the records.

Contrary to appellants' contention, the finding of the trial court of the existence of conspiracy among appellants is supported by evidence. Prosecution witness Pastor Cañete testified that he was following the victim while he was walking along the highway when the three appellants blocked the path of the deceased. Thus:

"Q. Now as you were following Glenn Bolisig that evening of June 19, 1983, can you recall if there was any incident you witnessed?

"A. Yes. There was.

"Q. Can you tell this Honorable Court what was the incident about?

"A. Yes. Lito Mindac, Linlin Trinidad and Lito Laguras were there ahead.

"Q. When you said they were there ahead, you mean they were ahead of you and Glenn Bolisig?

"A. Yes.

"Q. Now where did you see them, the three accused?

"A. At the southern direction, somewhere in the middle of the road.

"Q. What happened as you saw them, the three accused?

"A. They blocked the way of Glenn.

"Q. How did they block the way of Glenn?

"A. They blocked him in such a way that Glenn Bolisig was at the center.

"Q. And what was their formation, the three accused?

"A. They were standing beside each other (witness indicating to his right Carlito Laguras, Litong Mindac was at the middle and Linlin was at the other side) and their position was parallel from east to west." (TSN, March 19, 1984, pp. 10-11).

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"Q. And was Glenn Bolisig hit by the bottle which was struck by Linlin Trinidad?

"A. Yes, he was hit here (witness indicating his nape).

"Q. And what happened when Glenn Bolisig was hit at the nape?

"A. He slumped.

"Q. And was Glenn Bolisig able to touch the ground?

"A. No, his body did not touch the ground because Linlin Trinidad was able to hold him and said, "You finish him, Tio" (TSN, March 19, 1984, p. 15).

Defense witness Teofilo Catargo testified similarly:

"Q. And, is it not a fact that from the public market up to about another corner in front of the house of Susan Adanza, your group stopped?

"A. Yes, we did.

"Q. And when you said, you stopped, you were together with the same group of accused Julito Mindac, accused Lingling Trinidad and Tio Kabus?

"A. Yes.

"Q. And you stopped in the middle of the highway?

"A. No, on the side of the road.

"Q. You stopped on the road because your group noticed a person coming towards your direction?

"A. Yes.

"Q. And, as a matter of fact, one of your group recognized that the person walking was the late Glenn Bolisig?

"A. I was the one who recognized him.

"Q. As a matter of fact, you were the person who told the group that the person coming to your direction was the late Glenn Bolisig?

"A. Yes, that is right." (TSN, June 18, 1985, pp. 198-199).

The testimony of Teofilo Catargo that the appellants stopped when they noticed the victim approaching reveals the intention of the appellants to harm him. Earlier that evening, the victim had a heated discussion with one of the appellants. If they did not have any intention of punishing the victim, they should have continued on their way and ignored the presence of the victim.

The concerted manner of the attack shows conspiracy on the part of appellants to kill him.

It has been held that conspiracy requires concurrence of wills or unity of action or purpose, or common and joint purpose and design. Its manifestation could be shown by united and concerted action. Thus, a conspiracy need not be proved by direct evidence. It may be deduced from the mode and manner in which the offense was perpetrated. The conditions attending its commission and the acts executed may be indicative of the common design to accomplish a criminal purpose and objective. If there is a chain of circumstances to that effect, then conspiracy has been established (*People vs. Arroyo*, supra; *People vs. Taaca, et al.*, 178 SCRA 56 [1989]; *People vs. Lacao, Sr.*, supra).

Appellants next contend that the trial court erred in holding that the qualifying circumstance of abuse of superior strength attended the killing of the deceased. To support their contention, appellants presented evidence to show that no injury was found by the doctor on the nape of the victim where he was allegedly struck by appellant Trinidad with an empty bottle, and point out that the sketch (Exhibit "D") shows that the stabbing incident did not take place at the middle of the highway but rather on the left shoulder of the road.

First, it is not required that there be a finding in the medical certificate to the effect that as a result of the blow inflicted by appellant Trinidad on the nape of the victim, he sustained injury thereat. On the other hand, the fact that appellant Trinidad struck the deceased on the nape was clearly and positively established not only by the testimony of prosecution witness Pastor Cañete but also by defense witness Teofilo Catargo. Thus:

Testimony of Pastor Cañete:

"Q. After Julito Mindac was hit by the belt used by accused Carlito Laguras, what happened next?

"A. Linlin Trinidad struck Glenn Bolisig with a bottle.

"Q. What kind of bottle was used by accused Linlin Trinidad in striking Glenn Bolisig?

"A. I was not able to see clearly what kind it was but it was a long bottle." (p. 14, TSN, March 19, 1984).

"Q. When you passed by them, did you see anything from the person of Linlin Trinidad?

"A. Yes.

"Q. What did you see from the person of Linlin Trinidad?

"A. A bottle.

"Q. And how did he carry the bottle?

"A. He was carrying it like this (witness demonstrating) using his right hand.

"Q. And what relation has the bottle to the bottle which he used in striking Glenn Bolisig?

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"A. That was the very bottle.

"Q. And was Glenn Bolisig hit by the bottle which was struck by Linlin Trinidad?

"A. Yes, he was hit here (witness indicating his nape).

"Q. And what happened when Glenn Bolisig was hit at the nape?

"A. He slumped." (TSN, p. 15, Ibid.).

On this score Teofilo Catargo, a defense witness testified as follows:

"Q. And while Mindac was covering his face with both his hands, what happened next?

"A. Linlin Trinidad struck Glenn Bolisig.

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"Q. And what kind of thing was whipped on Glenn Bolisig?

"A. A bottle.

"Q. And was Glenn Bolisig hit with the bottle?

"A. Yes, sir.

"Q. What happened to Glenn Bolisig after being hit by the bottle?

"A. He fell down." (TSN, March 4, 1985, pp. 166--167).

Second, while the sketch shows that blood stains were found on the left shoulder of the highway, this fact does not negate the finding of the trial court that the stabbing occurred in the middle of the highway. The testimonies of appellants Mindac and Trinidad reconcile the alleged discrepancy, thus:

Testimony of Appellant Trinidad:

"Q. After Glenn Bolisig was hit by his own knife by Julito Mindac, what happened to Glenn Bolisig?

"A. He walked away slowly and not far from the place, he fell." (TSN, August 24, 1987, p. 284).

Testimony of Appellant Mindac:

"Q. After stabbing Glenn Bolisig once, what happened to him?

"A. He went away and after which, he slumped.

"Q. How far from the place where you stabbed him to the place where he slumped?

"A. More than one (1) meter only. (TSN, September 2, 1987, p. 311)

On the matter of the three appellants taking advantage of their superior strength, the trial court correctly ruled:

"The evidence has further established the circumstance that the three accused took advantage of their superior strength, it having been shown that they stood in a line at the middle of the road in such a way as to prevent Glenn Bolisig from proceeding on his way. Then the initial assault by Carlito Laguras that put Glenn Bolisig momentarily off-guard thereby facilitating Lino Trinidad's assault with an empty bottle on the nape of Glenn Bolisig which in turn caused the latter to stagger, thereby ensuring the successful coup de grace to be delivered by Julito Mindac that wrote finish to Glenn Bolisig's life." (Decision, p. 16; Rollo, p. 89)

Abuse of superior strength attended the commission of the crime because the attackers cooperated in such a way as to secure advantage of their combined strength to perpetrate the crime with impunity (People vs. Baluyot, 170 SCRA 569 [1989]). It is considered whenever there is a notorious inequality of forces between the victim and the aggressors, assessing a superiority of strength notoriously advantageous for the aggressors which is selected or taken advantage of by them in the commission of the crime (People vs. Carpio, 191 SCRA 108 [1990]; People vs. Cantre, 186 SCRA 76 [1990]).

The trial court did not commit any error in rejecting the affidavit of recantation of prosecution witnesses, Paulino Elnas and Pastor Cañete.

After the prosecution had rested its case, two (2) of the prosecution witnesses, Pastor Cañete and Paulino Elnas, filed on June 24, 1984 a Joint Manifestation dated May 28, 1984 (Exhibit "6") stating that they were not present at the scene of the incident and that their testimonies were not true as they were merely coached on what to say (Rollo, p. 170).

However, on July 20, 1984, Pastor Cañete and Paulino Elnas again filed a Retraction of their Manifestation stating that they signed the manifestation because of fear of appellant Mindac's relatives and the impression that the same was about their non-appearance in court.

Only Paulino Elnas affirmed the Joint Manifestation dated May 28, 1984 and the Affidavit of Retraction dated February 3, 1987 (Record, p.563) as Pastor Cañete died sometime in 1985.

The trial court rejected the Affidavit of Retraction of Paulino Elnas and the Joint Manifestation of Elnas and Cañete as mere afterthought to save the appellants.

The records reveal that these two (2) prosecution witnesses changed their position for at least three (3) times. The first time, they said that they were not present at the scene of the incident. The second time, they said that what they stated while they were on the witness stand were true. On the third instance, Elnas said that he was not present at the scene of the crime and was merely coached on what to declare by the deceased Cañete. Obviously these prosecution witnesses are making a mockery of the judicial proceeding and should not be allowed to shift from one version to another, depending on their whims and caprices.

Aside from the fact that the testimonies of these recanting witnesses for the prosecution both on direct and cross examination were very detailed, clear and straightforward and there was nothing to show that they were merely fabricated, the testimony of Cañete which refers to the very commission of the crime cannot be affected by such retractions because he was never placed on the witness stand before he died. An affidavit is hearsay unless the affiant is presented on the witness stand (*People vs. Villeza*, 127 SCRA 349 [1984]). Besides, affidavits taken ex-parte are generally considered inferior to the testimony given in open court (*People vs. Riego*, 189 SCRA 445 [1990]; *People vs. Loveria*, 187 SCRA 47 [1990]).

On the other hand, the testimony of Elnas even if rejected, cannot detract from the findings of guilt of appellant which is amply established by other evidence.

Be that as it may, this Court looks with disfavor upon retraction of testimonies previously given in court. The rationale for the rule is obvious. It would be a dangerous rule to reject the testimony taken before the court of justice simply because the witness who has given it, later on changed his mind for one reason or another, otherwise, it will make a solemn trial a mockery and place the investigation at the mercy of unscrupulous witnesses. Because affidavits of retraction can easily be secured from poor and ignorant witnesses, usually for monetary consideration, retracting testimony is exceedingly unreliable (*People vs. Mangulabnan*, 200 SCRA 611 [1991]; *De Guzman vs. Intermediate Appellate Court*, 184 SCRA 128 [1990]; *People vs. Clamor* 198 SCRA 642 [1991]). There is always the probability that it may later be repudiated. Thus, where a witness testified for the prosecution and retracts his or her testimony and subsequently testified for the defense, the test to decide which testimony to believe is one of comparison coupled with the application of the general rules of evidence. The mere fact that a witness says that what he had declared is false and that what he now says is true, is not sufficient ground for concluding that the previous testimony is false. No such reasoning has ever crystallized into a rule of credulity. The rule is that a witness may be impeached by a previous contradictory statement (Section 13, Rule 132, Rules of Court); not that a previous testimony is presumed to be false merely because a witness now says that the same is false. The jurisprudence has always been otherwise, i.e., that the contradictory testimony given subsequently does not necessarily discredit the previous testimony if the contradictions are satisfactorily explained (*Reano vs. Court of Appeals*, 165 SCRA 525 [1988]).

The court also finds that the participation of the accused/appellants in the commission of the crime was established beyond reasonable doubt.

Appellant Laguras interposed the defense of alibi and presented evidence to the effect that he was not present when the incident took place. However, the testimonies of the prosecution witnesses and even certain defense witnesses show otherwise. Thus, Pastor Cañete declared that appellants Laguras, Trinidad and Mindac blocked the path of the victim Bolisig while he was walking along the highway. (TSN, March 19, 1984, p. 11). Paulino Elnas also testified that he saw appellants Laguras, Trinidad and Mindac at the junction of San Antonio Street and the national highway (TSN, March 20, 1984, p. 64). Appellant Mindac stated that his companion at that time were appellants Laguras and Trinidad, and Catargo (TSN, October 5, 1987, p. 316). Appellant Trinidad declared that his companions were appellants Mindac and Laguras, Catargo and Cabus (TSN, August 24, 1987, p. 281). Thus, appellant Laguras cannot truthfully deny his presence at the time of the incident.

In order to prosper, alibi must be so convincing as to preclude any doubt that the accused could not have been physically present at the place of the crime or its vicinity at the time of the commission (*People vs. Lacao, Sr.*, supra). In the presence of clear and positive testimony of credible witnesses, alibi is unavailing (*People vs. Arroyo*, supra; *People vs. Peñones*, 200 SCRA 624 [1991]). Indeed, alibi is the weakest defense an accused can concoct (*People vs. Santito, Jr.*, 201 SCRA 87 [1991]).

With respect to appellant Trinidad, his guilt has also been established by the required quantum of proof for conviction. Prosecution witness Cañete testified that he saw appellant Trinidad hit the victim on the nape after the victim had evaded the belt of appellant Laguras. Because of the blow, the victim began to slump to the ground but was caught on the arms by appellant Trinidad. When appellant Trinidad uttered, "Finish him, Tiyo", appellant Mindac stabbed the victim. The act of appellant Trinidad of holding the deceased insured the killing of the latter by appellant Mindac. Prosecution witness Elnas testified that he saw appellant Trinidad holding an empty bottle after the incident. Defense witness Teofilo Catargo corroborated the testimony of the prosecution witnesses with his testimony that he saw appellant Trinidad placing a bottle inside one of his pockets while they were still at the store of Aurora Alabado. The bottle appellant Trinidad pocketed was the same bottle which he used in striking the deceased.

On the other hand, appellant Mindac admits killing the deceased, but claims he did so in self-defense. He alleged that the deceased attacked him and struck him with a stone which hit his left cheek, causing it to bleed. Then the deceased allegedly tried to stab him, but he was able to wrest the knife from the deceased. He then allegedly used the knife to stab the deceased.

Appellant Mindac presented a medical certificate (Exhibit "8") which attests that he sustained contusion and hematoma on the left cheek. According to appellant Mindac, the contusion and hematoma were caused by the deceased by striking him with a stone the size of a man's fist.

The trial court rejected this allegation saying thus:

"If a stone was in fact used and the blow delivered 'strongly', the resulting injury would not have been as slight as what Julito Mindac actually sustained, considering that beneath the skin of the cheek is a cheekbone. A strong blow with a stone against the cheekbone with the skin in between would naturally cause a wound or breakage of the skin, not merely a contusion. That injury, therefore, is more likely the result of the belt buckle that hit accused Julito Mindac when accused Carlito Laguras swung it at Glenn Bolisig but which missed the latter who ducked to avoid the swinging belt." (Rollo, p. 85; Decision, p.12).

Appellant Mindac contends that the lower court erred in not believing his testimony that he voluntarily surrendered to the police authorities of Zamboanguita, Negros Oriental. The fact that such surrender was not recorded in the Police Blotter of Zamboanguita is allegedly not enough basis for the trial court to conclude that the surrender did not occur.

A careful scrutiny of the testimony of Sgt. Orlando Gono, the person in authority to whom appellant Mindac allegedly surrendered, negates appellant Mindac's contention.

The fact that appellant Mindac asked Sgt. Gono to accompany him to the municipal building because he was a suspect in the killing of the deceased is not tantamount to voluntary surrender. His act does not show a desire on his part to own responsibility for the killing of the deceased. While he admitted his participation in the killing of the deceased, he claimed self-defense which he was unable to prove.

In a similar case, where appellant did not actually surrender to the police but merely informed the police headquarters about the incident, the mitigating circumstance of voluntary surrender was not considered in favor of the accused because it was not shown that there was a spontaneous acknowledgment by him of his guilt, or that he wished to save the authorities from the trouble and expenses incurred in his capture (People vs. Alegarbes, Jr., 154 SCRA 125 [1987]; Guevarra vs. Court of Appeals, supra; People vs. Salvilla, 184 SCRA 671 [1990]).

Since murder is punishable by reclusion temporal in its maximum period to death (Art. 248, Revised Penal Code), and there is no generic aggravating or mitigating circumstance attending the commission of the offense, the

applicable penalty should be in its medium period which is reclusion perpetua (Art. 64 [1], RPC; People vs. Muñoz, 170 SCRA 107 [1989]; People vs. Deslata, 192 SCRA 644 [1990]).

WHEREFORE, the appealed judgment is AFFIRMED, with the modification as to the indemnification for the death of the victim which is hereby increased from P 30,000.00 to P50,000.00.

Costs against appellants.

SO ORDERED.

Gutierrez, Jr., (Chairman), Davide, Jr., Romero, and Melo, JJ., concur.

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