

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ROMEO BELARO, DEFENDANT-APPELLANT.

G.R. No. 99869. May 26, 1999

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

Accused Romeo Belaro appeals from the Decision of the Regional Trial Court (RTC) of Naga City[1] convicting him of Murder.

Appellant was charged in an information stating:

That on or about 8:00 o'clock [sic] in the evening of November 2, 1989 at Barangay Sibobo, Municipality of Calabanga, Province of Camarines Sur, Philippines and within the jurisdiction of this Honorable Court, the above-named accused with evident premeditation and treachery and while armed with M-16, armalite rifle did then and there wilfully, unlawfully and feloniously shoot with said firearms one Salvador Pastor y Salientes hitting the different parts of his body thereby causing his instantaneous death;

That the commission of this crime was attended with the aggravating circumstance of nighttime to better accomplish the commission of the offense.

ACTS CONTRARY TO LAW.[2]

Upon arraignment, appellant pleaded not guilty to the above charge. Trial ensued thereafter.

The prosecution's version is synthesized by the Solicitor General, thus:

The only eyewitness for the offense charged, Myrna Azur Pastor ['Myrna'], widow of the deceased Salvador S. Pastor, testified that on 2 November 1989, at approximately 8:10 o'clock [sic] in the evening, she was inside her residence at Sibobo, Calabanga, Camarines Sur, when someone from outside called "Ma" and "Pa", summoning her attention.

Since her husband was already reclined on the bed momentarily savoring a local drama aired on the radio, Myrna raced down the stairs to answer the call.

When Myrna opened the front door, she was surprised to see the caller as their long-time family acquaintance, appellant Romeo Belaro, posing outside the door and armed with the armalite that he usually carries. Appellant appeared to be drunk. Since the armalite's nozzle was ominously pointed at the door, Myrna felt an onrush of fear and instinctively shut the door. Thereafter, she raced towards their bedroom and told her husband about appellant.

This time, the deceased descended to see appellant while he toted his youngest child.

However, the moment the front door was opened, Myrna was simply surprised when her deceased husband tossed to her the child and shoved her aside.

Thereafter, a volley of shots from an M-16 rifle rang through the air. The deceased was directly hit as he

toppled on the floor. Then again, another series of gunfire emitted.

This time, appellant scampered away. Five (5) other unidentified men appeared to have ran away with him. Meanwhile, all that Myrna could do was cry and shout for help.

As Myrna went out of the house to register her shout for help x x x her father, Benedicto Azur, who lived within the vicinity, answered her distress call.

Upon reaching her daughter's house, Benedicto Azur saw deceased bathed in his own blood. Upon inquiry, Myrna could only utter that it was appellant who was responsible for her husband's death. Agitated, Myrna and her four (4) children were transferred to Benedicto Azur's house for solace.[3]

The accused's defense consisted of alibi and denial. Appellant, a member of the Civilian Armed Forces Geographical Unit (CAFGU) since June 7, 1989,[4] claimed that he was asleep at the CAFGU detachment center at the time of the incident in question. Following is his account of the events on that fateful day:

Appellant was at the detachment center at around 9:00 in the morning of November 2, 1989.[5] A little after nine, appellant asked permission from their Assistant Detachment Commander, Sgt. Esmeraldo Ravara, if he could buy medicine for his sick child.[6] Appellant thereafter left for Barangay Sibobo, wearing a T-shirt, maong pants and slippers.[7] Appellant carried with him his armalite, which had a crack at the right side and a hole on the left, but did not have a sling.[8]

Appellant arrived in Barangay Sibobo at around 10:00 that same morning.[9] He then went to his aunt to buy fish and saw his cousins who invited him to "a drinking spree."[10] Appellant accepted their invitation and drank with them until 3:00 in the afternoon.[11] He went home thereafter.[12]

Upon arriving at his house in Cabanbanan, Calabanga, Camarines Sur, appellant took his lunch and then went to laid down to rest.[13] Appellant got up at around 5:30 in the afternoon and informed his wife that he was going to report back to the detachment center,[14] which was approximately 100 meters from their house.[15]

Back at the barracks, appellant cooked noodles for snacks.[16] His Assistant Detachment Commander, Sgt. Ravara, then invited appellant and the other men for a drink.[17] Cafgu Garison, Rogelio Salientes, Renato Quieros, Roberto dela Cruz, appellant and Aproniano Mallo, the Barangay Captain of Cabanbanan, Calabanga, Camarines Sur, obliged.[18] Appellant had three shots of gin. Feeling the effects of the alcohol, appellant took leave from Sgt. Ravara to retire for the night.[19] Appellant then laid down on his bed about four (4) meters away from where the drinking was taking place, and slept.[20] He woke up at around seven o'clock the next morning[21] only to learn from Sgt. Ravara that Salvador Pastor was shot dead the night before.[22] The Sergeant warned him not to go to Sibobo as he was the suspect in the killing.[23] Appellant replied that "if that [was] the case, [he] will not go there anymore because the relative[s] [of] Salvador Pastor might harm [him]."[24] Later, appellant did go to the Calabanga police station accompanied by his detachment commander.[25]

Appellant's alibi was corroborated by Rogelio Salientes[26] and Eustaquio Aquino,[27] both CAFGU members, Aproniano Mallo,[28] the Barangay Captain of Cabanbanan, Calabanga, Camarines Sur, and Sgt. Ravara.[29]

Appellant further alleged that although his rifle had a crack and a hole in it,[30] the same did not have any sling or epoxy since the time of its issuance to him in June 1989.[31] Hence, prosecution witness Myrna Pastor could not have seen the sling and the epoxy in the armalite rifle on or before November 2, 1989. He also claimed that Myrna could not have seen him in uniform and barefoot at the same time since their regulations required them to wear combat or rubber shoes when in uniform.[32] He denied that he was not envious of the victim's good fortune as he had a better means of livelihood.[33]

The defense likewise attempted to pin the victim's death on the New People's Army (NPA). According to Sgt. Ernesto Austero, the deceased was an "asset" who reported the activities of the NPA to him.[34] Sgt. Austero testified that in a patrol conducted in May 1990, the military discovered a ballot box containing supposedly subversive documents including a list of persons wanted by the NPA.[35] Among the names allegedly in said list[36] was that of the deceased Salvador Pastor who was described therein as "DID, informer, holdupper." [37]

In a "Judgment" dated December 14, 1990, the RTC found appellant guilty beyond reasonable doubt as follows:

WHEREFORE, premises considered, judgment is hereby rendered declaring that accused ROMEO BELARO is guilty beyond reasonable doubt of the crime of Murder as defined and penalized under Article 248 of the Revised Penal Code without any aggravating or mitigating circumstance and, he is hereby sentenced to reclusion perpetua, to indemnify the heirs of Salvador Pastor y Salientes represented by Myrna Azur-Pastor, the sum of P50,000.00 as damages as well as to reimburse Benedicto Azur for the funeral expenses incurred in the burial of the deceased in the sum of P8,421.00 without subsidiary imprisonment in case of insolvency; and, to pay the costs of this suit.

Accused is entitled to full credit for the entire period of his detention from February 5, 1990.

SO ORDERED.[38]

Appellant now questions his conviction, contending that:

- The accused was denied the right to trial by an impartial and neutral judge;
- The trial court erred when it did not give credence to the testimonies of the witnesses for the accused;
- The trial court erred when it convicted, rather than, acquitted the accused.
- Assuming the accused is guilty, the trial court erred when it concluded that the crime committed was murder qualified with treachery, and not plain and simple homicide.
- Assuming further that the accused is guilty of homicide or murder, the trial court erred in not considering in his favor the mitigating circumstances of drunkenness and illiteracy; and
- Assuming the accused is guilty, the trial court erred in imposing the penalty of reclusion perpetua.[39]

Appellant submits that the trial court had prejudged his witnesses' credibility even before the trial started. This prejudgment supposedly manifested itself in the following portion of the court's decision:

Neither can the Court give credence to the claim of the accused that at the time the victim was shot he was sleeping in their detachment barracks after having drank gin upon the alleged invitation of the Assistant Detachment Commander, Sgt. Esmeraldo Ravara (TSN August 29, 1990, pp. 24-26) notwithstanding the corroborative testimonies of CAFGU member Rogelio Salientes (TSN August 17, 1990, pp. 24-29); Barangay Captain Aproniano Mallo of Cabanbanan, Calabanga, Camarines Sur (TSN August 17, 1990, pp. 6-9); CAFGU Eustaquio Aquino (August 17, 1990, pp. 36-41) and Sergeant Esmeraldo Ravara, (TSN, August 16, 1990, pp. 36-41) as said witnesses, except Barangay Captain Aproniano Mallo, are either members of the military, or at least affiliated with it as CAFGU members, who cannot be free of bias influenced as they are by the spirit of comradeship existing among them. The bias of said defense witnesses was apparent to the Court when almost all of them were present during the trial of this case even at the time when the prosecution was still presenting evidence and there was no need for them to be in court. Even the 7th CAA Co'y Commander, a 2nd Lt. Arnel B. Escobal made representations with the Court praying for the transfer of the accused from the custody of the Provincial Warden at Tinangis Penal Farm, Tinangis, Pili, Camarines Sur to the detention cell at the 7th CAA Camarines Sur Constabulary/Integrated National Police Command at Concepcion Grande, Naga City (Ex Parte Motion to Transfer Custody of the Detention Prisoner dated March 8, 1990, page 24, record) which however

was denied by the Court in view of the escape of a CAFGU member who also sought and was granted transfer of detention from Tinangis Penal Farm to the PC Headquarters, Concepcion Grande, Naga City and the Provincial Command has not accounted for his whereabouts even up to now (Order of the Court dated March 13, 1990, page 25, record).[40]

Appellant argues that the trial judge's prejudice calls for a remand to the trial court for re-trial.

We discern no prejudice on the part of the trial judge. A judge enjoys the presumption of regularity in the performance of his functions.[41] Accordingly, we construe the above statements of the trial judge not as manifestations of bias but as mere observations that the judge later took into account in the rendition of judgment. The statements do not necessarily mean that the judge had prejudged the accused, only that he factored his earlier observations when he prepared the decision of conviction. Indeed, judges should be observant in the goings-on in the courtroom, taking note of every relevant detail that may prove to be of weight when the judges prepare their decision. The judge's observations should form part of his decision. Such practice should be commended rather than condemned for it achieves two purposes. The first is compliance with due process for it informs the parties of the bases of the court's decision. Thus, the Constitution[42] requires that "[n]o decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based." Second, in case of conviction and appeal, the reviewing court or courts would know and appreciate how the trial judge arrived at his conclusions.

Moreover, the attendance of the witnesses and the motions for the transfer of the accused are not per se indicative of bias. This was not lost on the trial judge who made the statements merely to support his conclusion that most of the defense witnesses, who were themselves CAFGU members, "cannot be free from bias" in view of the camaraderie between them and the accused. Later in the text of the decision, the judge also noted the demeanor of these witnesses during their examination and found their deportment to be inconsistent with that of a truthful witness. The decision of the court should be read as a whole and the above-quoted statements should be read in the light of the other parts of the decision.

In any event, the testimonies of these witnesses corroborating appellant's alibi cannot outweigh positive identification by the victim's widow of appellant as her husband's assailant.[43]

This brings us to appellant's second and third assigned errors. Appellant contends that the trial court should have given credence to the testimonies of the defense witnesses corroborating appellant's alibi, especially that of Rogelio Salientes and Barangay Captain Aproniano Mallo, who are both related to the victim. Salientes is allegedly a cousin of Salvador Pastor while Mallo is the husband of another cousin of the victim.[44] As stated earlier, however, these testimonies cannot prevail over the positive identification of the accused by the victim's bereaved wife. We sustain the assessment of the trial court regarding the credibility of Myrna Pastor, such assessment being consistent with the evidence and the rules governing the same. Thus, the trial court held that:

(1) Myrna Pastor was not impelled by any improper motive.

While it may be true that the wife of the victim is the sole eyewitness to the commission of the offense, her relationship to the victim does not, by itself, impair her credibility (People vs. Paras, G.R. No. 61773, January 31, 1987, 147 SCRA 594; People vs. Bautista, G.R. No. 69123, January 30, 1987, 147 SCRA 500; and People vs. Segueria, G.R. No. 58574, October 12, 1987, 154 SCRA 656), especially because there is no showing of improper motive on the part of said witness for testifying against the accused. Her relationship to the victim does not render her clear, direct and positive testimony less worthy of full faith and credit. On the contrary, her natural interest in securing the conviction of the guilty party would deter her from implicating persons other than the culprit, for otherwise, the latter would thereby gain immunity (People vs. Radomes, 141 SCRA 548; People vs. Gavino Aguinaldo, G.R. No. 75816, September 26, 1988, Paras, J.).[45]

(2) The scene of the crime enjoyed sufficient lighting for her to identify the accused.

The denials of the accused that he did not shoot and kill the victim cannot prevail over the clear, direct and positive identification by the sole eyewitness, Myrna Azur-Pastor, that it was the accused whom she saw that fatal night with an armalite rifle aimed, fired and shot to death her husband as she was near him when he shot her husband and even smelled the liquor coming from the body of the accused (TSN, July 19, 1990, pp. 50-51) and that she was able to identify the accused as she held a lighted lamp when she opened the door; besides, there was also light coming from the house of her uncle which was just a few meters from their house (TSN July 20, 1990, page 9; *People vs. Datuya*, 154 SCRA 410; *People vs. Dava*, 149 SCRA 582; *People vs. Melgar*, G.R. No. 75268, January 29, 1988).[46]

(3) She was well acquainted with the accused and therefore could not have been mistaken as to his identity.

Furthermore, there is no possibility that she could have been mistaken in the identity of the accused for, apart from being at the scene of the crime, she also knew the accused very well as in the past the latter would go to the house of the former to ask for fish. In fact, the accused also admitted having known the victim and his wife since childhood (TSN, August 29, 1990, page 11).[47]

(4) She was able to see and identify appellant's weapon.

The armalite rifle itself which was identified by Myrna Azur-Pastor to have been used in shooting to death her husband was brought to court and the description of said rifle by her tallied with the rifle itself as it had a crack and the hole on it was filled up with an epoxy resin (Exhibits 'E' and 'E-1' or Exhibits '2' and '2-A'; TSN July 20, 1990, pp. 2 to 4).

Even the evidence for the accused show that the subject armalite rifle was the same rifle issued to accused by C2C Danilo Orquita, the CO Supply Sergeant, under a Memorandum Receipt dated June 5, 1989 (Exhibit 'A' or Exhibit '1') which was taken by T/Sgt. Ernesto Austero, the Detachment Commander of the accused at Cabanbanan, Calabanga, Camarines Sur, from the accused himself on July 8, 1990 (Exhibit '3') and turned over to T/Sgt. Jose Sanchez and later back to C2C Danilo Orquita who finally delivered said weapon to the court to be utilized as evidence (TSN August 9, 1990, pages 8 to 11; Exhibit 'E' or Exhibit '2').[48]

(5) Her statements right after the occurrence of the crime constituted part of the *res gestae*.

Undoubtedly, the statement of Myrna Azur-Pastor that it was Romeo Belaro who shot and killed her husband when asked by her father as to who killed her husband upon arriving at her house seeing her crying and trembling just immediately after the shooting may be considered as part of the *res gestae* and the testimonies of Myrna Azur-Pastor and her father Benedicto Azur on said fact are admissible in evidence. This is so because 'all that is required for the admissibility of a given statement as part of the *res gestae* is that it is made under the influence of a startling event witnessed by the person who made the declaration before she had time to think and make-up a story, or to concoct or contrive a falsehood, or to fabricate an account, and without any undue influence in obtaining it, aside from referring to the event in question or its immediate attending circumstances' (Section 36, Rule 130, Revised Rules of Court; *People vs. Ner*, G.R. No. L-25504, July 31, 1969, 28 SCRA 1151, 1161-1162; *People vs. Abboc*, G.R. No. L-28327, September 14, 1973, 53 SCRA 54, 61; *People vs. Berame*, G.R. No. L-27606, July 30, 1976, 72 SCRA 184, 190; and *Gaspar Medios vs. C.A. and the People of the Philippines*, G.R. No. 79570, January 31, 1989, Cortes, J.).[49]

(6) Her testimony was corroborated by other evidence, namely, (a) the necropsy report, (b) the shells and bullet found at the scene of the crime, and (c) the paraffin tests conducted on appellant.

Aside from the testimony of the victim's wife that her husband was shot with an armalite rifle, the Necropsy Report (Exhibit 'B') indicates that Salvador Salientes Pastor died of gunshot wounds at Sibobo, Calabanga, Camarines Sur on November 2, 1989 at about 8:10 o'clock in the evening. There were seven gunshot wounds found in various parts of his body and, specifically, the cause of death was severe hemorrhage, internal and

external, secondary to gunshot wounds multiple, necks, chin and chest (Exhibits `C' to `C-2'). This substantiates the testimony of the widow of the victim as to the cause of death of her husband.

In his testimony, Medico-Legal Officer, Dr. Belindo Tordilla declared that an M-16 armalite rifle could have caused all the gunshot wounds in the body of the victim as the bullets did not enter the body at right angle and the exit wounds were bigger; that one gun could have caused said wounds; and, that the assailant could have shot the victim at a distance of about five meters only (TSN July 18, 1990, p. 59) which testimony jibes with that of the sole eyewitness that the accused shot her husband with an armalite rifle from only a short distance (TSN July 19, 1990, pp. 27 to 31).

That an armalite rifle was in fact used in shooting the victim is further shown by the 26 empty shells and 1 live bullet (Exhibits `G' to `G-27') which were recovered a day after the incident, by Benedicto Azur, father of the wife of the victim, just at the front door of the house where the shooting took place which shells and bullet he turned over to Pat. Leopoldo Bico of the Police Department of Calabanga, Camarines Sur (TSN July 20, 1990, pp. 59 to 63).[50]

x x x

The paraffin test conducted by NBI Forensic Chemist Julieta Coranes-Flores on the left and right hands of the accused shows that his right hand was found positive with specks located as follows:

- One (1) speck, distal third, second metacarpal,
- One (1) speck, proximal third, middle phalange, index finger,
- One (1) speck, proximal third, proximal phalange, ring finger (Chemistry Report No. C-89-1428, Exhibits `H' to `H-7'),

Which findings also establish the fact that the accused at the time of the taking of the test on November 3, 1989, had recently fired a gun with his right hand (TSN August 3, 1990, pp. 23 to 29).

Although the shells of the bullets that felled the victim (Exhibits `G' to `G-27') and the armalite rifle were brought to the NBI Office at Naga City, no ballistic examination was undertaken as the local NBI Office has no facilities for it which fact this Court takes judicial notice of. Nevertheless, a ballistic examination is not indispensable in this case and even if another weapon was in fact actually used in killing the victim, still the accused cannot escape criminal liability therefor as he was positively identified by the prosecutor eyewitness, Myrna Azur-Pastor, as the one who shot to death her husband.[51]

(7) Myrna Pastor's demeanor while on the witness stand is consistent with her testimony.

The Court noted during the trial that while the witnesses for the prosecution, particularly the sole eyewitness and her father who gave her assistance immediately after the victim was shot, testified in a very natural and normal way expressing their shock, fright, anguish, anger and indignation as they related what they actually saw and heard in a straightforward manner xxx.[52]

In contrast, the trial court observed that the defense witnesses were:

xxx fidgety, evasive and could not even look directly at the cross-examiner especially when testifying on the defense of alibi which the accused put up.[53]

The trial court's appraisal of the credibility of witnesses deserves utmost respect since said court had the opportunity to observe their demeanor during the trial.[54]

The positive identification of the accused was not the only basis for the rejection by the trial court of appellant's alibi. Alibi, as a defense, is inherently weak.[55] The accused must prove not only that he was not present at the scene of the crime but also that it was physically impossible for him to have been present at the time the offense

was committed.[56] The defense failed to discharge this burden. The trial court correctly ruled that:

Here, the requisites of time and place were not strictly met as the evidence of the accused itself show that Barangay Sibobo, Calabanga, Camarines Sur, where the crime was supposedly committed is only about 5 kilometers from the detachment barracks at Cabanbanan, Calabanga, Camarines Sur, where the accused was supposedly staying and a concrete road connects both barangays so that one can easily take a jeep and reach the place in about 15 minutes or hike for an hour (TSN August 29, 1990, pp. 58 to 59). Hence, the accused was not able to show that he was at some other place for such period of time as to preclude or render impossible his presence at the place where the crime was committed at the time of its commission (People vs. Rizal Idnay, G.R. No. L-48269, August 15, 1988, Melencio-Herrera J.). Moreover, alibi as a defense is inherently weak for it is easy to fabricate (Edwin Reano, et al., vs. C.A. and People of the Philippines, G.R. No. 60992, September 21, 1988, Cortes J.).[57]

Considering the foregoing circumstances, we rule that the trial court did not err in convicting appellant. Proof of his guilt was established beyond reasonable doubt.

Appellant next questions the appreciation of treachery by the trial court, which circumstance qualified the killing to Murder.[58] Appellant submits that there is no treachery since the attack was frontal and the deceased was forewarned by his wife of the danger that appellant allegedly posed.[59]

There is treachery when the offender commits any of the crimes against the person, employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[60] The essence of treachery is a swift and unexpected attack on the unarmed victim without the slightest provocation on the part of the victim.[61] Thus, this Court has ruled that even a frontal attack can be treacherous when it is sudden and unexpected and the victim is unarmed.[62]

Treachery may also be appreciated even when the victim is warned of danger to his person if the execution of the attack made it impossible for the victim to defend himself or to retaliate.[63] In the present case, however, the victim did not even have sufficient warning of the danger that lay ahead, the attack against him sudden and unexpected.

The victim's widow, Myrna Pastor, narrated the events from the moment appellant came calling at their door:

Q What did the one calling say?

A Ma and Pa.

Q When you heard that voice from the outside calling Ma and Pa, what did your husband do?

A My husband told me to go down the stairs and open the door.

Q Do you know why your husband ordered you to open the door, do you know who was outside?

xxx

A I do not know him, sir.

ATTY. GENERAL

Q When you open the door what did you see?

A I saw Romeo Belaro.

xxx

Q What was Romeo Belaro doing?

A He was standing near the door with an armalite.

Q How was he carrying the armalite?

INTERPRETER

Witness demonstrated before the court the position of Romeo Belaro while he was carrying the firearm with her two hands holding the rifle.

ATTY. GENERAL

Where was the nozzle of the armalite carried by Belaro pointed when you saw him?

xxx

A Towards the door.

ATTY. GENERAL

Q What did you do when you saw Belaro standing near you pointing his rifle towards the door?[64]

Thus, Myrna could not have known that appellant was about to kill her husband. She did not have a clue as to appellant's murderous intentions. Appellant did not utter a word that would have put her on alert. Though appellant was pointing his rifle at the door and his breath reeked of alcohol, these circumstances did not necessarily mean that he was going to kill Salvador Pastor. Accordingly, Myrna could not have warned her husband of appellant's impending attack. Her testimony shows that she did not, in fact convey any warning to her husband, telling him only that "Romeo Belaro was there."

ATTY. GENERAL

Q What did you do when you saw Belaro standing near you pointing his rifle towards the door?

A I closed the door because I was afraid and went up the house to my husband and told him that Romeo Belaro was there.

xxx

Q What did your husband do?

A He stood up and go down the house.

Q What about you, what did you also do?

A I was just following, sir.

Q

What did your husband do next as he came down from your bedroom?

A When he went down from the bedroom he opened the door and when he saw Romeo Belaro he gave me the child and pushed me aside.

Q What happened after that?

A He was shot.[65]

That the victim was unaware of appellant's intentions was evident from the fact that, as the Office of the Solicitor General astutely observes,[66] he even carried their youngest child with him when he opened the door for

appellant. Thereafter, Salvador tossed the child to his wife and pushed her aside. Only seconds lapsed until Salvador Pastor was killed, felled by bullets from appellant's rifle. No doubt, the killing was treacherous, the offense-murder.

Appellant next faults the trial court for failing to appreciate two alternative circumstances to mitigate his liability.

Alternative circumstances are those which must be taken into consideration as aggravating or mitigating according to the nature and effects of the crime and the other conditions attending its commission. They are the relationship, intoxication, and the degree of instruction and education of the offender.[67] Appellant invokes the last two circumstances in his favor.

People v. Buenaflor[68] provides a succinct summary of the rules in the appreciation of intoxication:

The ordinary rule is that intoxication may be considered either as aggravating or as mitigating, depending upon the circumstances attending the commission of the crime. Intoxication has the effect of decreasing the penalty, if the intoxication is not habitual or subsequent to the plan to commit the contemplated crime; upon the other hand, when intoxication is habitual or intentional, it is considered as an aggravating circumstance. The person pleading intoxication must present proof that he had taken a quantity of alcoholic beverage, prior to the commission of the crime, sufficient to produce the effect of blurring his reason; and at the same time, he must prove that not only was intoxication not habitual but also that his imbibing the alcoholic drink was not intended to fortify his resolve to commit the crime.

Appellant failed to introduce evidence to support the presence of this mitigating circumstance. He cannot be entitled to this mitigating circumstance merely on the declaration of the prosecution witness that appellant was drunk.[69] Even if we consider Myrna Pastor's testimony that appellant reeked of alcohol, this does not warrant a conclusion that the degree of intoxication affected his mental faculties. Appellant also did not prove that such intoxication was not habitual or intentional. This he failed to do, for the reason that appellant's defense was that of alibi.[70]

Neither can appellant's alleged lack of instruction be appreciated in his favor. Illiteracy alone will not constitute such circumstance; it must be accompanied by lack of sufficient intelligence and knowledge of the full significance of one's act.[71] Thus, it is the trial court, rather than the appellate court, to find and consider the circumstance of lack of instruction.[72] The said court was in a better position to gauge appellant's level of intelligence from his appearance, demeanor and manner of answering questions.[73] In this case, the trial court did not make any findings as to the degree of instruction of appellant. Indeed, the alleged presence of this circumstance is being raised for the first time here. That alternative circumstance cannot be considered in fixing the penalty to be imposed on appellant on appeal.

Moreover, lack of instruction should be proved directly and positively;[74] it cannot be based on mere deduction or inference.[75] There is no such proof in this case. On the contrary, appellant, being a CAGU member, is presumed to have received some degree of instruction and training.

Finally, there is jurisprudence holding that the accused's lack of instruction cannot be considered mitigating in homicide or murder. The reason is that one does not have to be educated or intelligent to be able to know that it is unlawful to take the life of another person even if it is to redress a wrong committed against him.[76]

Appellant's last assigned error regarding the proper penalty is premised on the absence of treachery and the presence of intoxication and lack of instruction. As shown earlier, however, the qualifying circumstance of treachery is present, in the alternative circumstances of intoxication and lack of instruction are absent. At the time of the commission of the offense, the penalty prescribed by Article 248 of the Revised Penal Code for Murder was reclusion temporal in its maximum period to death.[77] In the absence of either aggravating or mitigating

circumstances, the penalty prescribed by law in its medium period shall be imposed,[78] in this case, reclusion perpetua.[79]

It may be stated, in this connection, that appellant had filed an "Urgent Motion to Withdraw Appeal," which was indorsed by the Department of Justice to the Court under date February 4, 1999. As a rule, the withdrawal of an appeal before the filing of the appellee's brief is allowed and granted.[80] However, after a case has been submitted to the court for decision, the appellant cannot, at his election, withdraw the appeal.[81] In the case at bar, appellant filed his notice of withdrawal after the appellee had submitted its brief dated January 2, 1997 and after the case had been submitted for decision on May 4, 1997.[82] The Court is not inclined to grant the motion to withdraw appeal and, hence, denies the same.

WHEREFORE, the Decision of the Regional Trial Court of Naga City, Branch 27, convicting herein Appellant of Murder and sentencing him to reclusion perpetua, is AFFIRMED.

SO ORDERED.

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

[1] Branch 27, presided by Judge Roberto C. Rañola.

[2] Records, p. 1.

[3] Rollo, p. 141-143. Citations omitted.

[4] TSN, August 29, 1990.

[5] Id., at 14.

[6] Id., at 15.

[7] Id., at 17.

[8] Ibid.

[9] Id., at 15.

[10] Ibid.

[11] Id., at 19.

[12] Ibid.

[13] Id., at 20.

[14] Ibid.

[15] Id., at 21.

[16] Ibid.

[17] Ibid.

[18] Id., at 23.

[19] Id., at 24.

- [20] *Id.*, at 25.
- [21] *Ibid.*
- [22] *Id.*, at 26.
- [23] *Ibid.*
- [24] *Id.*, at 27.
- [25] *Ibid.*
- [26] TSN, August 17, 1990.
- [27] *Ibid.*
- [28] *Ibid.*
- [29] TSN, August 16, 1990.
- [30] TSN, August, 29, 1990, p. 39.
- [31] *Id.*, at 40.
- [32] *Id.*, at 42-43.
- [33] *Id.*, at 40.
- [34] TSN, August 10, 1990, p. 14.
- [35] *Id.*, at 19.
- [36] Exhibit "5."
- [37] Exhibit "5-B."
- [38] Rollo, p. 40.
- [39] *Id.*, at 115.
- [40] *Id.*, at 36-37. Underscoring supplied.
- [41] Section 3, Rule 131, Rules of Court.
- [42] Section 14, Article VIII.
- [43] *People vs. Midtomod*, 283 SCRA 395 (1997); *People vs. Balad*, 274 SCRA 695 (1997); *People vs. Patawaran*, 274 SCRA 130 (1997); *People vs. Salcedo*, 273 SCRA 473 (1997).
- [44] Rollo, p. 118.
- [45] *Id.*, at 32-33.
- [46] *Id.*, at 33.
- [47] *Id.*, at 32.
- [48] *Id.*, at 33-34.
- [49] *Id.*, at 35.

[50] Id., at 33.

[51] Id., at 34.

[52] Id., at 38.

[53] Ibid.

[54] People vs. Tañedo, 266 SCRA 534 (1997).

[55] People vs. Marollano, 276 SCRA 84 (1997).

[56] People vs. Zamora, 278 SCRA 60 (1997); People vs. Balderas, 276 SCRA 470 (1997); People vs. Patawaran, supra, note 43.

[57] Rollo, pp. 31-32.

[58] Before its amendment by Republic Act No. 7659, which took effect on December 31, 1993 (People vs. Derilo, 271 SCRA 633 [1997]), Article 248 of the Revised Penal Code read as follows:

ART. 248. Murder.--Any person who, not falling within the provisions of Article 246 shall kill another, shall be guilty of murder and shall be punished by reclusion temporal in its maximum period to death if committed with any of the following attendant circumstances:

1. with treachery, x x x.

[59] Rollo, pp. 122-123.

[60] Article 14 (16), Revised Penal Code.

[61] People v. Lascota, 275 SCRA 591 (1997); People v. Quinao, 269 SCRA 495 (1997); People v. Ombrog, 268 SCRA 93 (1997).

[62] People v. Chavez, 278 SCRA 230 (1997); People v. Dansal, 275 SCRA 549 (1997); People v. Tampon, 258 SCRA 115 (1996).

[63] People v. Landicho, 258 SCRA 1 (1996).

[64] TSN, July 19, 1990, pp. 18-21.

[65] Id., at 23-24. (Underscoring supplied.)

[66] Rollo, p. 156.

[67] Article 15, Revised Penal Code.

[68] 211 SCRA 492 (1992).

[69] People v. Ventura, 208 SCRA 55 (1992).

[70] Ibid.

[71] People v. Verges, 105 SCRA 744 (1981); People v. Rizal, 103 SCRA 282 (1981); People v. Retania y Rodelas, 95 SCRA 201 (1980); People v. Abanes, 73 SCRA 44 (1976); People v. Rodrigo, 16 SCRA 467 (1966); People v. Tengyao, 8 SCRA 476 (1961).

[72] People v. Garcia, 105 SCRA 325 (1981); People v. Casillar, 30 SCRA 352 (1969).

[73] *People v. Manuel*, 29 SCRA 337 (1969).

[74] *People v. Macatanda*, 109 SCRA 35 (1981).

[75] *People v. Retania y Robles*, 95 SCRA 201 (1980); *People v. Mongado*, 28 SCRA 642 (1969).

[76] *People v. Lapaz*, 171 SCRA 539 (1989).

[77] See note 58.

[78] Article 64, Revised Penal Code.

[79] See *People v. Sator*, 268 SCRA 136 (1997).

[80] *People v. Mendoza*, 49 O.G. No. 7, 2740 (1953).

[81] *United States v. Sotto*, 38 Phil. 666 (1918).

[82] In ordinary appeals, when no hearing on the merits of the main case is held, a case is deemed submitted for judgment upon the filing of the last pleading, brief, or memorandum required by the Rules or by the court itself, or the expiration of the period of its filing (§1, Rule 51, Rules of Court). After the People submitted their brief, this Court, in a Resolution dated March 10, 1997, required appellant "to file a reply brief within thirty (30) days from notice hereof if he so desires." Records show that appellant's counsel received said Resolution on April 3, 1997. However, appellant's counsel did not file a reply brief and the case was deemed submitted on May 4, 1997, upon the lapse of the 30-day period.

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