

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. WILFREDO ALARCON, EDDIE TOMPONG AND EDUARDO GUMAWA, ACCUSED.
EDDIE TOMPONG AND EDUARDO GUMAWA, ACCUSED-APPELLANTS.**

G.R. Nos. 133191-93. July 11, 2000

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PER CURIAM:

In the joint decision[1] of 26 January 1998, of the Regional Trial Court of Bugasong, Antique, Branch 64, in Criminal Case No. 5630, for rape with homicide, Criminal Case No. 5631, for rape, and Criminal Case No. 5632, for rape, accused Wilfredo Alarcon, Eddie Tompong, and Eduardo Gumawa, hereafter ALARCON, TOMPONG and GUMAWA, respectively, were found guilty beyond reasonable doubt of the crimes charged therein. The victim in these cases was Aisha Dava (hereafter AISHA). The decretal portion of the decision reads as follows:

In view thereof, this court finds the accused WILFREDO ALARCON, EDDIE TOMPONG AND EDUARDO GUMAWA, guilty beyond reasonable doubt as co-conspirators in three (3) crimes with their corresponding penalties, as follows:

1. Criminal Case No. 5630, for RAPE WITH HOMICIDE: EDDIE TOMPONG AND EDUARDO GUMAWA are sentenced to DEATH. WILFREDO ALARCON being a minor of 17 years old at the time of commission of the offense is sentenced to Reclusion Perpetua with the accessories imposed by law.

Accused are ordered to pay, jointly and solidarily, Lucia Dava, the offended party, the amount of P50,000 as indemnity for the death of Aisha Dava; P50,000 as exemplary damages and P150,000 as moral damages.

2. Criminal Case No. 5631, for RAPE, resulting to the death of Aisha Dava, committed by more than two (2) persons, aggravated by superior strength, EDDIE TOMPONG and EDUARDO GUMAWA are sentenced to Death; WILFREDO ALARCON is sentenced to Reclusion Perpetua with the accessories imposed by law.

Accused are ordered to pay the offended party, jointly and solidarily, the amount of P50,000 as exemplary damages and P100,000 as moral damages.

3. Criminal Case No. 5632, for RAPE, resulting to the death of Aisha Dava committed by more than two (2) persons, aggravated by superior strength, EDDIE TOMPONG and EDUARDO GUMAWA are sentenced to Death. WILFREDO ALARCON is sentenced to Reclusion Perpetua with the accessories imposed by law.

Accused are ordered to pay the offended party, jointly and solidarily, the amount of P50,000 as exemplary damages and P100,000 as moral damages.[2]

In the Information[3] in Criminal Case No. 5630, the crime of rape with homicide was allegedly committed in this manner:

That on or about May 26, 1995, in the Municipality of Bugasong, Province of Antique, Republic of the Philippines and within the jurisdiction of this Honorable Court, the above-named accused surprised one Aisha Dava who was alone at a tree-covered hillside, conspiring, confederating, mutually helping each other and one after the other, by means of force and intimidation, willfully, unlawfully and feloniously did lie and succeed in

having carnal knowledge of said Aisha Dava who was then only eleven (11) years old and by reason or on the occasion thereof, the accused willfully, unlawfully and feloniously stabbed and slashed the neck of the victim with a knife/scythe and killed her in the process.

Contrary to the provisions of Article 335 of the Revised Penal Code in relation to Article 249 of the same code and Republic Act 7659.[4]

The Informations[5] in Criminal Case No. 5631 and Criminal Case No. 5632 each charged the crime of rape and are similarly worded with the crime allegedly committed in this manner:

That on or about May 26, 1995, in the Municipality of Bugasong, Province of Antique, Republic of the Philippines and within the jurisdiction of this Honorable Court, the above-named accused being then armed with a knife/scythe surprised one Aisha Dava who was alone at a trees-covered [sic] hillside, conspiring, confederating and mutually helping each other and one after the other, by means of force and intimidation, willfully, unlawfully and feloniously did lie and succeed in having carnal knowledge of said Aisha Dava who was then only eleven (11) years old, against her will.

Contrary to the provisions of Article 335 of the Revised Penal Code and as amended by R.A. 7659.

Upon their arraignment ALARCON, TOMPONG and GUMAWA each pleaded not guilty. Joint trial on the merits ensued. The prosecution presented five witnesses, namely: Dr. Irma J. Adayon, Lucia Dava, Melita Cancer, Ostimiano Untalan and Amador Martinesio and rebuttal witness Pedro Enque.

The evidence for the prosecution is faithfully summarized in the Appellees' Brief, as follows:

On May 26, 1995 at around 7:00 o'clock in the morning, accused Wilfredo Alarcon, 17 years of age, was proceeding to Sitio Casoy, Bagtason, Bugasong, Antique to gather firewood (pp. 3 to 4 & 15, tsn. May 8, 1997). On his way, he met "Lola Magang", the grandmother of the eleven [11] year old victim Aisha Dava (p. 5, tsn. May 8, 1997; Exh. B; pp. 5, 14, t7 & 18, tsn. June 14, 1996), carrying goods to be sold at the market in Valderrama (p. 5, tsn. May 8, 1997).

Upon reaching Sitio Casoy, Alarcon saw appellant Eddie Tompong, 42 years old, with her wife Gloria Tompong, and appellant Eduardo Gumawa gathering firewood and tying them in bundles (p. 6, tsn. May 8, 1997; p. 2, tsn. July 2, 1997). The victim was also there watching the group bundle the firewood (p. 6, tsn. May 8, 1997). As the victim watched, appellants Tompong and Gumawa were teasing her telling her that they will court her. The victim reacted by throwing pebbles at both appellants, and left the place saying that she will just look for the carabao she was tending (pp. 7-8, tsn. May 8, 1997).

After finishing her task, Gloria Tompong left, leaving appellants and Alarcon behind (p. 8, *ibid.*). Appellant Tompong approached Alarcon and said that they will follow the victim. Appellants and Alarcon then proceeded to the place where the victim was grazing her carabao (pp. 8-9, *id.*).

The victim saw them approaching and she stood up and looked at them (pp. 9-10, *id.*). Upon reaching the place where the victim was standing, appellant Tompong suddenly pushed Alarcon towards the victim causing them both to fall to the ground and roll together (p. 10, *id.*). As they rolled, the victim scratched the face of Alarcon to defend herself (pp. 22 to 23, tsn. July 15, 1997). But while the victim was lying flat on her back Tompong ran towards her and got the knife tucked on her waist. The victim shouted and cried as appellants and Alarcon ganged upon her (p. 11, tsn. May 8, 1997).

At that instant, prosecution eyewitness Melita Cancer heard the cry of the victim. Cancer was on her way home after coming from the victim's house which is situated at around 80 meters from the crime scene. She had gone there to collect money from the victim's mother Lucia Dava, but left after discovering that nobody was around. Hearing the victim's cry, Cancer looked around and saw, around 40 meters away, appellants Tompong and Gumawa, and their co-accused Alarcon, holding and undressing the victim. Cancer immediately fled the area

startled and afraid of what she saw (vide: pp. 2-6, tsn. June 6, 1996).

Another person, Ostimiano Untalan, 68 years old, a retired PC officer, saw the incident. He was on his way to the bamboo plantation of Mr. Salvador Dava in Sitio Sio, to inquire into the availability of bamboo poles he intended to buy. While walking along a pathway in Sitio Sio, Untalan heard the shouts of the victim (pp. 5-8, tsn. Sept. 18, 1996). Untalan felt afraid and took cover and concealed himself inside a thick "bungargar" bush around four [4] feet tall (pp. 8, 25, 51 & 52, *ibid.*). He saw three [3] malefactors about seven [7] meters away from him sexually molesting the victim (pp. 8-9 & 40, tsn. *Id.*). Untalan saw the victim lying flat on her back with both hands being held by one of the malefactors whose name he later learned to be Wilfredo Alarcon. The other malefactor, whose name he later learned to be Eddie Tompong, laid on top of the victim. And the third malefactor, whose name he later learned to be Eduardo Gumawa, was covering the victim's mouth. Untalan saw Tompong, Gumawa and Alarcon took turns in sexually abusing the victim for about half an hour. Thereafter, Alarcon struck the neck of the victim with a piece of wood and slashed further the throat and left cheek of the victim using a knife about six (6) or seven (7) inches long. Gumawa dragged the body of the victim towards the canal. Tompong and Alarcon followed and covered it with twigs of "bungargar". Gumawa told his companions that "they will separate and nobody will tell what happened". Untalan left his hiding place and went home five (5) minutes after the malefactors had fled (vide: pp. 9-16, 38-41, & 47-53, *id.*; see also pp. 11-16, tsn. May 8, 1997).

Three [3] days thereafter, on May 29, 1995, the cadaver of the victim in the state of decomposition was found by the police in Sitio Sio (pp. 32-33, tsn. May 30, 1996; Exhs. C to C-7, Brown Envelope pasted on Folder I, Crim. Case No. 5630). An autopsy was performed by Dr. Irma J. Adayon, Rural Health Physician of Bugasong, Antique, at about 3:30 o'clock in the afternoon that same day (Exh. A, pp. 17-18, Folder I, Crim. Case No. 5630). The Autopsy Report dated May 30, 1995 prepared by Dr. Adayon disclosed the following findings:

1. General Appearance:

Dead; lying with his head and trunk slightly elevated from the rest of the body; supine position; both arms slightly flexed and perpendicular to the body; both thighs and knees flexed; knees separated from each other 40 cms. apart; wearing T-shirt stained with blood and rolled upward to the level just below the nipples; wearing panty and short pants stained with blood; short pants rolled upwards to the inguinal area.

2. Wound, 6 cms. long, gaping, neck, right, involving right sternocleidomastoid muscle, right common carotid artery and vein.

3. Wound, stabbed, 2.5 cms. long, gaping, left buccinator area, running mediolaterally, involving buccinator muscle thru and thru.

4. Labia majora and labia minora;

Medical borders not prominent because it is markedly covered by a swollen clitoris; gaping.

5. Clitoris:

Swollen and elevated by 2.5 cms.; 6.5 cms. long; 3 cms. wide; oblong in shape; presence of somewhat fresh blood in the superior third; wound in the inferior half.

5. Vaginal canal:

Presence of old mucuslike material in the opening, left, lower quadrant; edges irregular; rugosities not discint; admits one finger.

6. Fourchette:

Rounded base.

7. Hymen:

Not clearly identified because of the extremely swollen clitoris.

(Exh. A, [supra])

On May 30, 1995, at 8:00 o'clock in the morning, a certain Jose Pacete executed his sworn statement before the Chief of Police, Bugasong Police Station pointing to Tompong, Gumawa and Alarcon as the victim's assailants (pp. 6-9, Folder I, Crim. Case No. 5630). At 12:00 noon of the same day, a certain Margarita Pacete y Magbanua likewise appeared at said police station and executed his sworn statement pointing to the same culprits (pp. 10-13, Ibid). The following day, on May 31, 1995 at 4:25 p.m., a certain Luther Valenzuela went to the police station also attesting to the fact that he saw Tompong, Gumawa and Alarcon rape and kill the victim (pp. 4-5, id.). On June 5, 1995, prosecution eyewitness Melita Cancer also executed an affidavit also identifying appellants and Alarcon as the assailants (p. 3, Id.). These sworn statements supported the criminal complaint for rape and homicide filed against appellants and Alarcon (p. 1, id.).

On June 5, 1995, appellants and Alarcon were arrested and detained by the police (p. 20, id.)

Upon the other hand, ALARCON testified on his behalf. The witnesses presented for TOMPONG and GUMAWA were TOMPONG himself, Richard Bernabe and Edna Apolinario. The testimony of GUMAWA was dispensed with since it would only corroborate that of TOMPONG.

ALARCON, 19 years old, single and resident of Sitio Sio, Bagtason, Bugasong, Antique, testified that at around seven o'clock in the morning of 26 May 1995 he went to Sitio Casoy in Barangay Bagtason to gather firewood. He met Lola Magang on the way. Upon reaching Sitio Casoy he saw TOMPONG, GUMAWA, Gloria Tompong and AISHA. The first three were bundling firewood while AISHA was watching them. TOMPONG and GUMAWA were teasing AISHA telling her they would court her. AISHA threw pebbles at the two while ALARCON and Gloria Tompong remained silent. After bundling the firewood, Gloria went home. After she left, TOMPONG and GUMAWA kept on teasing AISHA, but the latter grew weary of their teasing and left them to look for her carabao. After AISHA left, TOMPONG and GUMAWA approached ALARCON and told him to go with them to follow AISHA. He refused but TOMPONG pushed him. He fell on the root of a santol tree and he was leaning on it when GUMAWA approached him. GUMAWA pointed a bolo at him and threatened him that if he did not go with them, GUMAWA would hack him. Scared, ALARCON went with TOMPONG and GUMAWA to follow AISHA. Upon finding AISHA, TOMPONG pushed ALARCON toward her. ALARCON fell on AISHA, and both fell to the ground. TOMPONG then ran towards them and got the knife tucked in AISHA's waist. TOMPONG covered AISHA's mouth while ALARCON rose to run away, but GUMAWA held him and pointed the bolo at him. GUMAWA instructed him to hold the hands of AISHA. ALARCON could not refuse because the bolo was still pointed at him, and TOMPONG also pointed his bolo at ALARCON's neck while covering AISHA's mouth. ALARCON was thus forced to hold both of AISHA's hands. GUMAWA held AISHA's feet and removed her shorts while she was lying on her back. TOMPONG told GUMAWA that he (TOMPONG) would go first. ALARCON understood this to mean TOMPONG would be the first to have sex with AISHA. TOMPONG spread the legs of AISHA, and inserted his finger then his organ into her vagina. TOMPONG got AISHA's shorts and wiped her sexual organ with it. ALARCON saw blood on AISHA's vagina when TOMPONG wiped it. Then GUMAWA took his turn to rape AISHA. While GUMAWA was raping AISHA, TOMPONG was pointing his bolo at ALARCON and after GUMAWA finished raping AISHA, TOMPONG faced ALARCON and told him to take his turn, but ALARCON cried and said that he would not do it. Because he did not, TOMPONG told GUMAWA: "We cannot do otherwise." GUMAWA then took a piece of wood beside him and struck the neck of AISHA, put on her shorts and pulled her towards a hole near some

shrubs. GUMAWA warned ALARCON not to tell anybody about what happened. TOMPONG then slashed AISHA's neck with the knife he took from her waist and dropped the knife beside AISHA's body. TOMPONG approached ALARCON and told him not to tell anybody about the incident and, if he was caught, to just admit it. GUMAWA and TOMPONG each promised to pay ALARCON P500 if the latter admitted to the crime.[6]

ALARCON further testified that he was arrested without a warrant by Quioyo, a policeman, the following Monday, 29 May 1995. He was brought to the Municipal Building where after one night he implicated his co-accused. He told AISHA'S uncle that it was TOMPONG and GUMAWA who killed AISHA. He was made to sign some papers, but he did not know what he signed.[7]

Richard Bernabe, first witness for TOMPONG and GUMAWA, declared that at around noon of 26 May 1995, his neighbor ALARCON went to his house to ask for help as he had raped a child. ALARCON confessed to him that he did it alone. He accompanied ALARCON to the place of the incident and there he saw the dead body of AISHA. On their way back, he again asked ALARCON who his companions were in raping AISHA. ALARCON replied that he was alone. He also admitted that he killed AISHA by slashing her head. ALARCON spent the night at Bernabe's house. Bernabe then reported ALARCON's confession to his father, who then later narrated the incident to Gloria Tompong, TOMPONG's wife, at the time of the apprehension of GUMAWA and TOMPONG. Richard Bernabe further declared that GUMAWA and TOMPONG told him that they were leaving Sitio Sio on 26 May 1995 to work at Apgahan, Patnongon, Antique. He did not see the two at Sitio Sio from 26 May to 28 May 1995.[8]

Edna Apolinario, the second witness for TOMPONG and GUMAWA, testified that on 22 May 1995, TOMPONG, GUMAWA and her husband began the construction of her house in Apgahan, Patnongon, Antique. TOMPONG and GUMAWA worked continuously from 22 May up to 27 May 1995. At six o'clock in the morning of 28 May 1995, the two went home. She expected them to come back the following Monday as the house was not yet finished but then she heard over the radio that the two were arrested by police. As laborers, TOMPONG and GUMAWA worked the whole day, from 7:30 in the morning to about 4:30 or 5:00 in the afternoon, and slept in her old house adjacent to the one being constructed.[9]

Accused TOMPONG testified that he was 42 years old, married, a carpenter and resident of Sitio Sio, Bagtason, Bugasong, Antique. In May 1995, he and GUMAWA worked as carpenters in the construction of the house of Edna Apolinario. The two left Bagtason for Apgahan, Patnongon, Antique, on 21 May 1995 at 7:30 a.m. Before he left Bagtason, he met Richard Bernabe and informed the latter that he was going to Apgahan to work on the house of Edna Apolinario. He and GUMAWA began working on the house of Edna on 22 May 1995. Their work schedule was from 7:30 to 11:00 a.m. and 1:00 to 5:00 p.m. everyday. They spent the nights at the old house of Edna. They worked for six days, and went home to Bagtason on the morning of 28 May 1995. On 26 May 1995, when the crimes in question were allegedly committed, he and GUMAWA were working on Edna's house and they never left the site.[10]

TOMPONG further declared that in the morning of 29 May 1995, he and GUMAWA were apprehended by policemen in Bugasong and brought to the Municipal Building of Bugasong. They were released that night at eight o'clock but were re-arrested on 30 May 1995. They were told that they had committed the crime of rape and they had been detained from that date until the time he testified. He denied raping AISHA, forcing ALARCON to have sexual intercourse with AISHA, and meeting ALARCON in the morning of 26 May 1995.[11]

The prosecution presented Pedro Engue as rebuttal witness. He testified that he had resided in Sitio Sio for the last five years and TOMPONG is his neighbor. TOMPONG's usual work was selling firewood which he gathered from the land owned by the Davas. Engue did not know whether TOMPONG had ever constructed a house in

Sitio Sio for other people. He added though that GUMAWA is also a firewood gatherer in Sitio Sio.[12]

ALARCON was recalled to rebut the testimony of Richard Bernabe and TOMPONG. ALARCON denied that he asked anybody for help or to accompany him to bury AISHA at Sitio Casoy at around 12:00 noon of 26 May 1995. He admitted seeing Richard Bernabe on 26 May 1995 at his house chopping firewood but he did not talk to him. He contradicted TOMPONG's claim that he, TOMPONG and GUMAWA were in Patnongon on said date. On the contrary, ALARCON maintained that the two were at Sitio Sio gathering and bundling firewood. ALARCON also declared that TOMPONG and GUMAWA are not carpenters. He likewise admitted that the scratches on his face on 26 May 1995 were caused by AISHA's nails when the girl tried to push him away after TOMPONG pushed him towards her.[13]

After evaluating all the evidence before it, the trial court found the theory of TOMPONG and GUMAWA hard to believe. It disregarded the defense of alibi interposed by them in the face of the positive identification by prosecution witnesses Ostimiano Untalan, Melita Cancer and ALARCON, their co-accused. The trial court also believed it was not impossible for TOMPONG and GUMAWA to be at the scene of the crimes at the time of their commission. It explained that "Apgahan to Ibaures is only seventeen (17) kilometers in distance. Ibaures to Barangay Bagtason is four (4) kilometers and Bagtason to Sitio Sio is only one (1) kilometer away. There are jeepneys plying along this route including motorized tricycles. From Apgahan, Ilaures could be reached in thirty (30) minutes and five minutes from Ilaures to Bagtason."

Accordingly, it rendered the appealed judgment earlier quoted.

The judgment against TOMPONG and GUMAWA is before us on automatic review pursuant to Article 47 of the Revised Penal Code, as amended by Section 22 of R.A. No. 7659. ALARCON did not appeal from the judgment. A notice of appeal should have been filed pursuant to Section 3, Rule 122 of the Rules of Court. As to him, the decision has become final.

This decision then treats only of the review of the judgment against TOMPONG and GUMAWA.

We quote verbatim the assignment of errors in the Appellants' Brief:

- THE LOWER COURT ERRED IN BASING ITS DECISION ON THE CONTRADICTORY AND OUT OF THIS WORLD TESTIMONIES OF THE TWO (2) ALLEGED EYE WITNESS, MELITA CANCER AND OSTIMIANO UNTALAN AND OTHER PROSECUTION WITNESSES.
- THE LOWER COURT ERRED IN DISREGARDING THE DEFENSE OF THE ACCUSED EDDIE TOMPONG AND EDUARDO GUMAWA OF ALIBI.

TOMPONG and GUMAWA find incredible Melita Cancer's failure to do anything to help the victim who was only 10-1/2 years old and the daughter of her good friend, secure help for the girl, and report the incident immediately upon arriving home. They also found the testimony of Ostimiano Untalan improbable and contradictory. Finally, they fault the trial court for not giving any weight to their defense of alibi.

In the Brief for the Plaintiff-Appellee filed on 26 January 2000, the Office of the Solicitor General debunks the claims of TOMPONG and GUMAWA and urges us to affirm the challenged judgment, except as to the civil liabilities which, pursuant to our rulings in *People vs. Victor*,^[14] *People v. Robles*,^[15] and *People v. Maglente*,^[16] should be modified: the civil indemnity in Criminal Case No. 5630 should be increased from P50,000 to P100,000, and in each of Criminal Case No. 5631 and Criminal Case No. 5632, civil indemnity of P75,000 and moral damages of P50,000 should be awarded but the exemplary damages should be vacated.

After a thorough review of the evidence on record, we affirm the judgment of conviction of accused-appellants

TOMPONG and GUMAWA.

Once again, as is often the case in appeals from convictions in criminal cases, at the core of this petition is the credibility of eyewitnesses. The trial court found worthy of belief the accounts of Melita Cancer, Ostimiano Untalan and co-accused ALARCON. We can do no less. Appellate courts accord the highest respect to the trial court's assessment of the testimonies of eyewitnesses by the trial court because of its unequaled opportunity to observe on the stand their demeanor and manner of testifying and to detect whether they are telling the truth or not.[17] This rule admits of exceptions, such as when the evaluation was reached arbitrarily or when the trial court overlooked, misunderstood, or misapplied some facts or circumstances of weight and substance which could affect the result of the case.[18] None of the exceptions obtains in these cases.

TOMPONG and GUMAWA capitalize on Melita Cancer's running away, not attempting to secure help for AISHA, and not telling anybody what she had witnessed, as attributes of the falsity of her testimony.

We do not agree. As clearly and candidly explained by Melita Cancer she was afraid when she saw what was happening. As for not telling anybody, this was adequately explained when she testified:

Q:

You did not tell anybody about the incident which you have witnessed?

A:

No, sir.

Q:

Why?

A:

I was frightened so my mind was empty, sir.

Q:

What was the reason why you are afraid?

A:

I cannot understand why I was afraid of what I know, sir.

Q:

Afraid of what?

A:

I cannot understand my mind why I was afraid.

Q:

Up to now are you afraid?

A:

I am afraid, sir.[19]

There is no accounting for the varied reactions an eyewitness might have relative to what he might be seeing. There is no standard form of human behavioral response when one is confronted with a strange, startling or frightful experience.[20] Fear has been known to render some people immobile, if not useless, in some life-and-death situations.[21] At any rate, Melita Cancer firmly attested to the following: GUMAWA held the thighs of AISHA, TOMPONG removed AISHA's panty and ALARCON held AISHA's hands.

TOMPONG and GUMAWA impute the same lack of credibility on Ostimiano Untalan for his failure to report the matter to the police and for inconsistencies in his testimony. But Untalan explained his lapse thus:

Q:

Now since you are interested in this case you did not volunteer to any policeman in Bugasong, Antique telling them to take your affidavit in order that you will be believed upon during the trial of this case?

A:

No, I just went to Salvador Dava, Sir.

Q:

When was that when you went to Salvador Dava?

A:

Three (3) months after the incident in the month of September, 1995, Sir.

ATTY. SALVANI (Cont'd.)

In other words you kept it for yourself about this incident and the only person whom you revealed this incident for the first time is Salvador Dava three (3) months after the incident?

A:

Yes, Sir, because I was afraid that they might go against me, Sir.[22]

It is not uncommon for a witness to a crime to show some reluctance about getting involved in a criminal case, and in fact the natural reticence of most people to get involved is of judicial notice.[23] It is understandable for a witness to fear for his safety especially when townmates are involved in the commission of the crime.[24] Moreso in Untalan's circumstances: he is old and disabled.

Neither is there merit to the alleged inconsistency that Untalan made it appear that only TOMPONG and GUMAWA had sexual intercourse with AISHA, while ALARCON merely stood and hit AISHA with a piece of wood, yet under examination by the court, he testified that three persons raped AISHA. Untalan never did categorically state that ALARCON did not rape AISHA. Accused- appellants failed to elevate this supposed inconsistency to the level sufficient to strip the witness of credibility.[25] In any case, Untalan was unswerving in his identification of TOMPONG and GUMAWA as the perpetrators of the rape and killing of AISHA. What is vital is his testimony that he saw the victim being raped and killed. We find no contradiction or hesitancy in Untalan's detailed account of the rape and killing which conforms with the medical findings of Dr. Irma Adayon.

Lastly, TOMPONG and GUMAWA controvert ALARCON's admission in court that they raped the victim. They

point out that ALARCON's admission that he sustained scratches on his face from AISHA is proof that he was the one who attacked her and he was acting alone, as he supposedly confessed to Richard Bernabe. They are clutching at straws. We note that ALARCON testified that he sustained scratches on his face as a result of his being pushed by TOMPONG towards AISHA. Even without considering the testimony of ALARCON there were two other credible witnesses to the episode. These witnesses identified TOMPONG and GUMAWA, as well as ALARCON, as the perpetrators of the crimes. The record being bereft of any evidence that the prosecution witnesses were motivated by ill considerations and intent, their testimony must be accorded full probative value.[26]

Let us now address the defense of alibi put up by TOMPONG and GUMAWA. They claim that they could not have raped AISHA since they were working that day in Apgahan constructing the house of Edna Apolinario. To establish alibi, an accused must show that he was at some other place for such a period of time that it was impossible for him to have been at the place where the crime was committed at the time of its commission.[27] The trial court, after noting the distance between Apgahan to Sitio Sio in Barangay Bagtason where the crimes were committed, held that it was not physically impossible for TOMPONG and GUMAWA to be present in Bagtason at the commission of the offenses. The burden of proving alibi lies with TOMPONG and GUMAWA and they have failed to discharge this burden. Justifiably, courts have always looked upon the defense of alibi with suspicion and have received the same with caution, not only because it is inherently weak and unreliable but also because of its easy fabrication.[28] It cannot prevail over, and is worthless in the face of, positive identification by credible witnesses that the accused perpetrated the crime.[29] In light of the positive identification of TOMPONG and GUMAWA by credible eyewitnesses Melita Cancer and Ostimiano Untalan, as well as the testimony of their co-accused ALARCON, their defense of alibi cannot be given any weight. As for Richard Bernabe's assertion that TOMPONG told him they would be working in Apgahan, the same has little value as Bernabe did not actually see for himself that TOMPONG and GUMAWA were indeed in Apgahan working on the morning of 26 May 1995.

We are convinced beyond any doubt that TOMPONG, GUMAWA and ALARCON each raped AISHA. Since the facts adduced prove beyond doubt that they conspired and mutually helped each other in committing the rapes, each should be held criminally liable for these rapes. Since AISHA was killed on the occasion thereof, each should be liable for three complex crimes of rape with homicide.

Article 335 of the Revised Penal Code, as amended by R.A. No. 7659, provides, *inter alia*:

when by reason or on the occasion of the rape, homicide is committed, the penalty shall be death.

Fortunately for TOMPONG and GUMAWA it was only in Criminal Case No. 5630 that they were charged with ALARCON with the crime of rape with homicide. They were charged only with rape in Criminal Case Nos. 5631 and 5632. The trial court imposed on them in each of such cases the penalty of death because the crime in each case was "committed by more than two (2) persons, aggravated by superior strength." We do not agree with the trial court on this issue. While it may be true that Article 335 of the Revised Penal Code, as amended by R.A. No. 7659 provides, *inter alia*, that:

whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death.

and that the presence of an aggravating circumstance would justify the imposition of the graver penalty of death, the fact of commission "by two or more persons," which partake of the nature of a qualifying circumstance, was not alleged in the information in Criminal Cases Nos. 5631 and 5632. The mere fact that three were accused therein did not amount to a specification of the qualifying circumstance in question and was insufficient for the purpose of complying with the constitutional requirement that the accused be informed of the nature and cause of the accusation against them.[30]

Also, abuse of superior strength as a generic aggravating circumstance, which may be appreciated against the accused even if not alleged, was not proven in this case. Mere superiority in number is not enough, there must be proof of deliberate intent to take advantage of superior strength.[31]

It follows then that in Criminal Cases Nos. 5631 and 5632, there being no evidence of any modifying circumstance, the penalty to be imposed pursuant to Article 63 of the Revised Penal Code, is reclusion perpetua, the lesser of the penalties prescribed by Article 335 of the Revised Penal Code as amended by R.A. No. 7659.

As regards the imposition of the death penalty in Criminal Case No. 5630, four Members of the Court have continued to maintain their view that R.A. No. 7659 is unconstitutional insofar as it prescribes the death penalty. Nevertheless, they submit to the ruling of the majority that this law is constitutional and that the death penalty was lawfully imposed in this case.

As to the damages awarded, modifications thereof are in order. In Criminal Case No. 5630 for rape with homicide, the indemnity should be increased from P50,000 to P100,000,[32] while the moral damages and exemplary damages should be reduced from P150,000 to P50,000 and from P50,000 to P25,000,33[33] respectively.

In each of Criminal Cases nos. 5631 and 5630, there should be an award of P50,000 as indemnity, while the award of moral and exemplary damages should be reduced from P100,000 to P50,000, and from P50,000 to P25,000, respectively.

WHEREFORE, in view of all the foregoing, judgment is hereby rendered affirming the decision of the Regional Trial Court of Bugasong, Antique, Branch 34, finding accused-appellants EDDIE TOMPONG and EDUARDO GUMAWA guilty beyond reasonable doubt as principal of the crimes of rape with homicide in Criminal Case No. 5630, rape in Criminal Case No. 5631 and rape in Criminal Case No. 5632, and

1)

IMPOSING upon each of them the penalty of death in Criminal Case No. 5630, but modifying the damages awarded by increasing the civil indemnity from P50,000 to P100,000 and reducing the awards of moral damages from P 150,000 to P50,000 and exemplary damages from P50,000 to P25,000;

2)

IMPOSING upon each of them in Criminal Case No. 5631 and Criminal Case No. 5632 the penalty of reclusion perpetua, thereby modifying the sentence of death imposed by the trial court, and modifying further the awards of damages in each of said cases by ordering each of them to pay P50,000 as indemnity, and reducing the awards of moral damages from P100,000 to P50,000 and of exemplary damages from P50,000 to P25,000.

Costs de oficio.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Purisima, Pardo, Buena, Gonzaga-Reyes, Ynares-Santiago, and De Leon, Jr., JJ., concur.

[1] Original Record (OR), 113-170; Rollo, 22-79. Per Judge Rafael O. Penuela.

[2] OR, 78.

[3] Id., 27.

[4] Rollo, 27.

[5] Id., 8, 9.

[6] TSN, 8 May 1997, 3-17.

[7] Id., 42-44.

[8] TSN, 8 May 1997, 4-13.

[9] TSN, 1 July 1997, 4-8.

[10] TSN, 2 July 1997, 3-11.

[11] Id., 12-32.

[12] TSN, 15 July 1997, 3-5.

[13] TSN, 15 July 1997, 15-24.

[14] G.R. No. 127903, 9 July 1998.

[15] G.R. No. 124300, 25 March 1999.

[16] G.R. No. 124559-66, 30 April 1999.

[17] *People v. Albarico*, 238 SCRA 203, 212 (1994); *People v. Lorenzo*, 240 SCRA 624, 635 (1995); *People v. Magalong*, 244 SCRA 117, 122 (1995); *People v. De Leon*, 245 SCRA 538, 545 (1995)

[18] *People v. Albarico*, supra note 17; *People v. Pidia*, 249 SCRA 687, 696 (1995); *People v. Quijada*, 259 SCRA 191, 212-213 (1996)

[19] TSN, 6 June 1996, 8.

[20] *People v. Dones*, 254 SCRA 696 (1996); See *People v. Malunes*, 247 SCRA 317, 325-326 (1995); *People v. Gomez*, 251 SCRA 455, 468-469 (1995)

[21] *People v. Galas*, 262 SCRA 381, 392-393 (1996)

[22] TSN, 18 September 1996, 44-45.

[23] *People v. Rubio*, 257 SCRA 528, 534 (1996)

[24] *People v. Castillo*, 261 SCRA 493, 501 (1996)

[25] *People v. Cristobal*, 252 SCRA 507, 516-517 (1996)

[26] *People v. Merza*, 238 SCRA 283, 288 (1994); *People v. Lorenzo*, 240 SCRA 624, 636 (1995); *People v. Hubilla, Jr.*, 252 SCRA 471, 478-479 (1996)

[27] *People v. Diño*, 160 SCRA 197, 208 (1988)

[28] *People v. Cortes*, 226 SCRA 91, 100 (1993)

[29] *People v. Estrellanas, Jr.*, 239 SCRA 235, 248 (1994); *People v. Bracamonte*, 257 SCRA 489 (1996)

[30] Sec. 14(2), Article III, Constitution.

[31] *People v. Castor*, 216 SCRA 410 (1992)

[32] *People v. Tahop*, G.R. No. 125330, 29 September 1999, 9, citing *People v. Robles*, 305 SCRA 273 (1999)

[33] See *People v. Matrimonio*, 215 SCRA 613, 633 (1992)

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