

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JONAHS JABIAN Y TARROSA AND JIMMY MAGARO Y GILLANG, ACCUSED-APPELLANTS.

G.R. Nos. 139213-14. April 04, 2001

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

Accused Jonahs Jabian y Tarrosa and his friend Jimmy Magaro y Gillang were charged with murder for the death of Jose Sammy Daza y Mangubat in a stabbing incident that occurred late in the evening of December 1, 1998. On the same occasion, Solomon Daza, Jr., brother of Jose Sammy, was stabbed by Jonahs as the latter was leaving the crime scene, Solomon sustaining an injury which would have been fatal had it not been seasonably attended to medically. Jonahs was charged also with frustrated murder.

The informations for murder against Jonahs Jabian and Jimmy Magaro, and for frustrated murder against Jonahs Jabian alone, respectively read as follows:

Crim. Case No. 19478

"That on or about the 1st day of December 1998, in the City of Bacolod, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, conspiring, confederating and mutually helping each other, without any justifiable cause or motive, being then armed with a fan knife (batangueño), with intent to kill and by means of treachery with evident premeditation, did then and there willfully, unlawfully and feloniously assault, attack and stab one Jose Sammy Daza y Mangubat, thereby inflicting upon the person of the latter (sic) stab wound which directly caused the death of said victim, to the damage and prejudice of the heirs of said Jose Sammy Daza y Mangubat.

That the crime was committed with the attendance of the aggravating circumstance of dwelling of the said victim Jose Sammy Daza y Mangubat.

Act contrary to law."^[1]

Crim. Case No. 19477:

"That on or about the 1st day of December 1998, in the City of Bacolod, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, without any justifiable cause or motive, being then armed with a fan knife (batangueño), with intent to kill, by means of treachery and evident premeditation, did then and there wilfully, unlawfully and feloniously assault, attack and stab with said bladed weapon one Solomon Daza, Jr. y Mangubat, thereby inflicting upon the person of the latter a stabbed (sic) wound, thus performing all the acts of execution which would have produced the crime of murder as a consequence but which nevertheless did not produce it by reason of some cause or accident independent of the will of said accused, that is, by the timely and able medical assistance rendered to said Solomon Daza, Jr. y Mangubat which prevented his death.

That the crime was committed with the attendance of the aggravating circumstance of dwelling of the said

victim.

Act contrary to law."^[2]

When arraigned on January 13, 1999, both accused Jonahs Jabian and Jimmy Magaro pleaded not guilty to the charge of murder, while Jonahs Jabian entered a negative plea to the charge of frustrated murder. Since the two incidents happened on the same occasion, a joint pre-trial conference and joint trial were conducted.

The prosecution's version is drawn from the testimonies of Joel Daza, a 12-year old brother of the victims, Ruel Lipalam, and Sally Daza (as rebuttal witness) who were all present at the crime scene, the attending physicians, and the police investigator. Both accused testified in their behalf.

The prosecution's version of the incident is stated in the appellee's consolidated brief as follows:

"At around 11:00 o'clock in the evening of December 1, 1998, Joel Daza, his sister Sally Daza and her suitor Ruel Lipalam were sitting and conversing at the upper steps of the stairway leading to the second floor of the two-storey house of the Daza family situated in Molave Extension, Barangay Villamonte, Bacolod City (p. 5, TSN, March 2, 1999). They were at the same time watching just three arms length away victim Jose Sammy Daza, Joel and Sally's brother and his friend Okie seated together drinking Tanduay, a local rum and playing "tong-its", a car game at the ground floor which serves as the dining room and store of the house (p. 14, TSN, February 22, 1999).

The peace of the night was shattered when at the precise moment, Jimmy Magaro suddenly appeared and entered the door, which is beside the stairway. Magaro who is tall and with a big physique, quickly approached and held the hands of the diminutive and unsuspecting hunchbacked Jose Sammy from behind. Jose Sammy stood up and struggled to free himself from Magaro's hold, shouting "let me go; let go of me, Jimmy" but to no avail. Maintaining his hold, Magaro was able to force Jose Sammy face the door (p. 13, TSN, March 2, 1999; p. 7, TSN, March 8, 1999).

Right then and there, Jabian who entered the door trailing behind Magaro, immediately stabbed Jose Daza once with a knife at the lower left breast just below the nipple (p. 14, TSN, March 2, 1999). During the incident, Okie stepped aside in a corner and did not do anything (p. 5, TSN, March 8, 1999) while Lipalam was prevented by Sally Daza from going downstairs (Ibid, p. 8).

Immediately thereafter, Magaro ran out of the house followed by Jabian passing through the same door of the house they entered (ibid, p. 15). Jabian bumped his head on one for the posts of the house on his way out (p. 17, TSN, February 22, 1999).

Outside the house Jabian met Solomon Daza, Jr. who was walking and about to enter the door of the house (ibid, p. 19; p. 16, TSN, March 2, 1999). At that instant, Jabian stabbed Solomon Daza with a single blow of the same fan knife he used in hitting Jose Daza, at the left side of the abdomen (pp. 16-17, TSN, ibid). Both accused continued with the escape.

Jabian was arrested minutes later by the police (p. 36, TSN, March 8, 1999), while Magaro was arrested in the morning of the following day after visiting Jabian at the police station.

The brothers Jose and Solomon Daza were brought to the Doctor's Hospital of Bacolod City (p. 3, TSN, February 24, 2000). Jose Daza died. The cause of his death was cardio-respiratory arrest, shock, hemorrhage, severe internal ruptured heart and lung due to stab wound (p. 6, TSN, March 2, 1999). Solomon Daza, on the other hand, suffered a fatal stab wound in the left upper portion of the umbilicus. However, due to timely medical attendance, his impending death was prevented (pp. 20-22, TSN, February 24, 1999)."^[3]

The accused Jonahs Jabian claimed self-defense. His version of the stabbing incident is contained in his testimony as summarized in his appellant's brief as follows:

"As testified to by Jonahs Jabian, when he and Raymundo Baldava entered the carinderia of the Dazas, Jose Sammy Daza, Okie and Solomon Daza were already drinking long neck gin. He was invited by Okie to drink gin but he refused to do so because he had just eaten his supper. When he refused the invitation of Okie, the latter insulted him by saying, DAW SA TONTO KA (YOU ARE NAUGHTY). Okie then stood up and strangled him (Jabian) so he stepped backwards. Jose Sammy Daza held him. As he was being held by Jose Sammy Daza, Okie struck him with a bottle of gin (cuatro cantos) on the head. (ANNEX "B" EXCERPT FROM THE PS4 BLOTTER REPORT ENTRY NOS. 98-10011 PP. 0490 & ANNEX "C" MEDICAL CERTIFICATE OF JONAHS JABIAN DATED DECEMBER 3, 1998). Because of the pain, for a while, he lost his vision and he was able to embrace Jose Sammy Daza. As he was embracing Jose Sammy Daza, he was able to touch the fan knife on the back pocket of Jose Sammy Daza. He got hold of the fan knife and pushed Jose Sammy Daza forward with his left hand and then stabbed him in front. Then he faced Okie stabbed him on the right arm and ran towards the door. And as he was about to escape, Solomon blocked his way so he also stabbed Solomon (TSN of March 8, 1999, pp. 29-38)."[4]

For his part, Jimmy Magaro raised alibi as a defense. He claimed that he had been drinking in the evening of December 1, 1999 with his friends Jessie Ramos and Daniel Centeno, and when he was already drunk he was brought to the guardhouse in front of West Negros College and left there to sleep until 6:00 a.m. of the following day.

The court a quo found both accused guilty of murder in Criminal Case No. 19478, having acted in conspiracy with each other in the treacherous slaying of Jose Sammy Daza, and found Jonahs Jabian guilty of frustrated murder in Criminal Case No. 19477. The dispositive portion of the judgment reads as follows:

"WHEREFORE, finding both accused Jonahs Jabian y Tarrosa and Jimmy Magaro y Gillang GUILTY beyond reasonable doubt of Murder, as co-conspirators, in Criminal Case No. 19478, JUDGMENT is hereby rendered imposing upon each of them the penalty of RECLUSION PERPETUA, as well as the accessory penalty prescribed by law. They are also ordered to jointly pay the heirs of deceased Jose Sammy Daza; P50,000.00 as civil indemnity for his death; and P25,000.00 as moral damages. Costs against both of them.

Also, finding accused Jonahs Jabian y Tarrosa GUILTY beyond reasonable doubt of Frustrated Murder in Criminal Case No. 19477, he is hereby condemned to suffer imprisonment of EIGHT (8) YEARS and FIFTEEN (15) DAYS of prision mayor, as minimum of his sentence, to FOURTEEN (14) YEARS and FOUR (4) MONTHS, of reclusion temporal, as maximum, and the accessory penalty provided by law. Costs against him.

Both accused Jonahs Jabian and Jimmy Magaro being detained by reason of the present cases, the period of their preventive imprisonment shall be credited in their favor and shall be conducted from the service of their sentence, provided they have agreed in writing to abide by the same disciplinary rules imposed upon convicted prisoners pursuant to Article 29 of the Revised Penal Code."[5]

Both parties have appealed to this Court and filed separate briefs.

Jonahs Jabian interposes the following assignments of error in his brief:

"I

THE TESTIMONY OF PROSECUTION WITNESS JOEL DAZA WERE ALL FABRICATED FROM THE FERTILE MINDS OF JOEL DAZA AS EVIDENCED BY THE NUMEROUS INCONSISTENCIES.

II

TREACHERY HAS NOT ATTENDED THE COMMISSION OF THE CRIME OF MURDER AS FOUND BY THE HONORABLE JUDGE.

III

CONSPIRACY COULD NOT HAVE EXISTED BETWEEN JONAHS JABIAN AND JIMMY MAGARO IN THE CRIME OF MURDER.

IV

NO AGGRAVATING CIRCUMSTANCE OF TREACHERY EXISTS WHICH WOULD QUALIFY THE CRIME COMMITTED AGAINST SOLOMON DAZA, JR. AS FRUSTRATED MURDER.

V

SELF-DEFENSE AS MITIGATING CIRCUMSTANCE SHOULD HAVE BEEN APPRECIATED IN FAVOR OF JONAHS JABIAN."[6]

On the other hand, Jimmy Magaro's brief submits the following arguments to establish his "non-guilt":

"A

There are two major, un rebutted crucial facts in this case which, with all due respect, have not been properly appraised by the Honorable RTC: the fact, first, that Accused Jimmy Magaro went to the police station immediately the following morning after the incident subject matter of this case. The second, the Accused was drunk at the time that the alleged crime was committed, having been received by a security guard of a very nearby school to sleep there at the night that the incident happened just a few meters away.

B

MOREOVER, the Honorable RTC erred in not giving due credence to co-Accused Jonahs Jabian's testimony that Accused Jimmy Magaro was not his companion in stabbing the victim to death.

TAKEN ALTOGETHER, these facts were more than sufficient to establish reasonable doubt, if not outright non-guilt.

C

Or, in the alternative, granting arguendo that Accused indeed participated in the commission of the crime, the fact that he went to the police station the following day where he was easily apprehended should have been and should be considered as a mitigating circumstance analogous to voluntary surrender, and the fact that he was drunk, absent the showing of habituality or intentionality, should have been and should be considered as another mitigating circumstance, resulting in the lowering of the penalty imposed."[7]

After a careful review of the evidence, we resolve to affirm the decision of the trial court with modification.

Accused-appellant Jabian's brief assails the testimony of eye-witness Joel Daza, on the following grounds:

"(1)

Joel Daza could not have seen his brother Jose Sammy Daza and Okie at the lower level of the house because he was at the upper level when the incident accused;

(2)

Joel Daza testified that Magaro was already inside the house together with Lipalam at around 11:00 o'clock in the evening of the incident contrary to Joel Daza's statement that Magaro and Jabian entered the house together;

(3)

Joel Daza missed to mention that Sally Daza was sitting beside Lipalam and Joel Daza at the second level of the house at the time of the incident and at the same time Raymundo Baldava entered also the store;

(4)

Joel Daza was caught lying as to the date of the incident as happening on a Sunday when in fact it was on a Tuesday; and

(5)

Joel Daza testified that no exchange of words transpired between Jabian, Magaro, Jose Daza and Okie contrary to Lipalam's testimony that there were arguments heard downstairs coming from three persons during the incident."^[8]

The above arguments are not convincing. The alleged flaws or imperfections in the recounting of the stabbing incident which Joel witnessed together with his sister Sally and the latter's suitor Lipalam, at a distance of just three arms length away from the place where his brother Jose was stabbed, are not of substantial consequence. Such minor inconsistencies in the narration do not detract from the essence of Joel's testimony that he actually saw the two accused suddenly appear at their place, after which Jimmy Magaro held the hands of the diminutive Jose Sammy from behind, and Jabian immediately stabbed Jose Sammy with a knife at the lower left breast just below the nipple. He also witnessed the subsequent stabbing of Solomon at the left side of the abdomen by Jabian with the same fan knife that was used in stabbing Jose Sammy, as Jabian was escaping from the scene. Joel's testimony was corroborated by Sally Daza and Ruel Lipalam both of whom also saw clearly the stabbing, and gave a uniform and consistent account of the incident in court.

Accused-appellant Jabian's attempt to discredit Joel's testimony by asserting that the upper level of the Daza's house is the bedroom from which place it was inconceivable that Joel could have witnessed what transpired downstairs between Jose Sammy and the accused-appellant Jabian, is unconvincing. Joel, Ruel and Sally uniformly testified that they were sitting at the upper part of the staircase leading to the second floor when they saw the two accused-appellants enter the ground floor where the victim Jose Sonny was playing "tong-its" with his friend Okie, and was suddenly assaulted by the two accused-appellants. The staircase was beside the door downstairs and was around three arms length away from the door near which Jose Sammy and Okie were playing cards.^[9] The view of the three witnesses was unobstructed.^[10]

As regards the alleged inconsistency in the testimony of Joel that Jimmy Magaro was already watching the card game before the arrival of Jonahs Jabian and yet he saw Jimmy Magaro and Jonahs Jabian arrive together, the twelve-year old witness clarified that Magaro was "able to get out of the store and later re-entered together with Jabian".^[11] Also, whether Joel correctly or incorrectly recalled that the incident happened on a Sunday, or on a Tuesday, and whether he failed to mention the presence of Raymundo Baldava, which her sister Sally acknowledged in her testimony, these statements refer to matters that are of no serious consequence that would necessarily erode the credibility of an eyewitness' account. In like manner, Joel's failure to recall hearing an exchange of words transpiring between the co-accused and the victim during the incident contrary to Lipalam's testimony, does not impair the veracity of Joel's narration, which together with the testimony of the two other witnesses present at the crime scene, were described by the court as having been given in a "clear, candid, convincing and forthright manner, free from major contradiction and consistency and prevarication." This observation of the trial court should be respected, there being nothing in the record to derogate from the same.

Anent the presence of treachery as a circumstance that qualifies the killing to murder, we affirm the trial court's finding that the killing was attended by treachery judged by the manner with which the attack was carried out. Jose Sammy was attacked and stabbed without provocation and was thus totally unaware of the impending attack,

and had nary an opportunity to repel the aggression or defend himself. Jose Sammy was a hunchback and he was stabbed in the chest by Jabian while his hands were held at the back by Magaro, indicating not only the presence of treachery, because his physical condition and the suddenness of the aggression did not allow him to repel the impending attack, but also the existence of a conspiracy between the two accused-appellants as evidenced by their having acted in cooperation and concert with each other to carry out a common criminal purpose and design to kill Jose Sammy. We quote with approval the trial court's ratiocination.

"Here in the case at bar, it was clearly and persuasively demonstrated by prosecution witnesses that when accused Magaro entered the ground floor of the Daza residence, doubling as a store, he instantly approached Jose Sammy who was unarmed and focused in a card game with Oke and, and accused Magaro firmly held both Jose Sammy's hands at the victim's back. The victim's futile effort to extricate himself was no match to Magaro's height, strength and build, which were excessive for the diminutive hunchback. Thus held still to face accused Jabian, who was treading on the heels of Magaro in entering the house, Jabian delivered the death blow with a fanknife in the chest of Jose Sammy. After their victim was hit with a deadly thrust of Jabian, Magaro released his grip on Jose Sammy and the duo fled together towards the door. Meeting on the way to their escape Solomon Daza, Jr., Jabian lost no time in also stabbing him in the belly, perhaps mistaking said other victim to succor his brother Jose Sammy. They then proceeded to pursue their joint flight.

A person found in conspiracy with the actual perpetrator of the crime by performing specific acts with such closeness and coordination as the one who executed the criminal act is equally guilty as the other. (People vs. Matubis, et al., G.R. No. 109774, March 27, 1998).

Quite obviously, the conspiracy between Jabian and Magaro was manifested by the manner with which the attack was carried out, giving Jose Sammy no chance to defend himself or to escape from the aggressors since he was steadfastly held immobile by Magaro in order to be stabbed by Jabian. The killing was thus qualified by treachery. Then attacked and stabbed without provocation, the victim was deliberately deprived of any opportunity to extricate himself from the hold of Magaro or defend himself from the imminent death blow of Jabian, since his physical condition and the suddenness of the aggression could not allow him to. In the similar case of People vs. Apongan, G.R. No. 112360, April 4, 1997, the Supreme Court treachantly said: 'In the case at bench, the victim was innocently walking and totally unaware of the impending attack upon her by the persons she was about to meet ahead. To ensure the success of their criminal design, one of the assailants held the victim's arms while the other viciously stabbed her. x x x The suddenness of such savage attack, without the slightest provocation from the victim who was unarmed had nary an opportunity to repel the aggression or defend himself, ineluctably qualifies the crime with alevosia.'"[12]

Accused-appellant Jabian's suggestion that an argument between the parties preceded the slaying as testified to by Ruel Lipalam, coupled with the fact that the attack was frontal, as shown by location of the wound, and that therefore the killing as of Jose Sammy was not sudden or unexpected as to negate a finding of treachery, cannot be sustained. There is treachery when the offender commits any of the crimes against person, employing means, methods or forms in the execution thereof which tend to directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[13] Thus, it has been held that the fact that the attack was preceded by a fight, or even when the victim was forewarned of danger to his person[14] does not negate treachery. In this case, accused-appellant Jimmy Magaro held both arms of the victim behind his back, effectively rendering the latter incapable of defending himself while the other accused stabbed him in the chest. As correctly pointed out by the trial court, the victim was "a virtual sitting duck when stabbed by Jabian because he was handclasped by Magaro in order to be so stabbed, without any risk whatsoever to the two accused arising from any useful defense which Jose Sammy might make."[15] Indeed, "what contributed to the inability of the victim xxx to escape or defend himself from the attack were his small and fragile frame and his being a hunchback."[16]

We also find no cogent basis for disturbing the trial court's conclusion rejecting Jabian's claim of self-defense. By his admission that he killed his victim, he assumed the burden of proof to establish his plea of self-defense by credible, clear and convincing evidence. Jabian's version was uncorroborated and was not credible. Thus, the trial court correctly observed:

"On this score, for self-defense to prosper, it must be positively shown that there was a previous unlawful and unprovoked attack that placed the life of the accused in danger and forced him to inflict more or less severe wounds upon his assailant, employing therefor reasonable means to resist said attack (People vs. Sambulan, supra; People vs. Obzanar, 265 SCRA 547; People vs. Balamban, 264 SCRA 619). Jabian's sole testimony tried to demonstrate that he accompanied his friend Raymundo Baldava inside the Daza store to use the pay phone. Inside, he was invited by Oke to drink gin but since he refused Oke was slighted and stood up to strangle Jabian who stepped back. Then Jose Sammy held accused while Oke struck Jabian with a gin bottle; causing Jabian to lose his vision and embrace Jose Sammy. While hugging Jose Sammy, Jabian incidentally touched the fanknife placed in the former's back pocket, pulled the same and pushed Jose Sammy away with his left and stabbed the victim once. Then he faced Oke and stabbed him too at the right arm and ran towards the door. As Solomon Daza, Jr. blocked the door, Jabian stabbed him also at the abdomen and dashed away.

For one, Baldava was not presented, or refused, to substantiate the claim of accused Jabian of having acted in self-defense. While Baldava's presence at the Daza store was admitted by prosecution witness Sally Daza Lipalam, the phone call he made was earlier or prior to the joint entry of accused Magaro and Jabian. During the actual incident, Baldava had already left the place. Second, even if he assume a gratia argumenti that Oke attempted to strangle Jabian, it was impossible or foolhardy for Jose Sammy who was physically handicapped to hold, contain and control Jabian who was taller, heavier and sturdier because a light push, elbow, kick or fist blow would have easily freed Jabian from Jose Sammy. Jabian even alleged that he just pushed Jose Sammy away when he touched and pulled the fanknife from the back pocket of the petite hunchback. Third, considering the mark advantage of Jabian over Jose Sammy in height and build, accused, if he was indeed attacked by Oke, could have easily used Jose Sammy as shield, for it was not the latter, if we have to accept the version purveyed by said accused, who was the aggressor but Oke. Fourth, the fanknife, if it was really owned by the victim, was not used by him against Jabian such that there was no necessity for him to repel or prevent an imagined aggression from the victim who was incapable of staging one on account of his physical condition. Fifth, the knife was also admittedly used by Jabian in stabbing his second victim Solomon Daza, Jr., and the weapon was kept by him to indicate his ownership thereof since the same was not presented in evidence. Sixth, after pulling the fanknife, Jabian quite comfortably opened or unfolded it, for it is publicly known that a balisong (fan knife) is encased with a safety clip, in its own handle or scabbard, demonstrating that he was familiar with the features of the fatal weapon since he owned the same. Seventh, Jabian's Exhibit "1" (excerpt of Police Blotter entry) showed that after he was arrested that very night, he confessed and admitted the killing but never claimed having been injured or acted in self-defense. Eighth, the same police blotter entry (also Exh. "1"-Magaro) states that as of time of the recording of the events, prosecution witnesses Ruel Lipalam and Joel Daza identified both accused Jonahs Jabian and Jimmy Magaro as together and companions during the stabbing incident. Ninth, the police blotter entry (Exh. "1"-Jabian) to the effect that Jabian was struck with a gin bottle by Oke, was recorded only on "03 1410_ Dec. 98," meaning on December 3, 1998 at 2:10 o'clock in the afternoon, or about two days after the tragic incident, when the accused had enough time to fashion, conceive and concoct the claim of self-defense out of the injury Jabian sustained in banging his head against the door jamb. And tenth, Jabian's Medical Certificate (Exh. "2"-Jabian) is also dated December 3, 1998, showing that he submitted himself for medical examination only two days after the incident." [17]

The existence of conspiracy between the two accused-appellants was duly established. This was proven by the manner in which the attack was carried out, i.e., the two accused-appellants acted in concert in the commission of

the offense, manifesting a common purpose or design and unity in its execution. Although Jabian denied that Magaro was not present at that time of the incident, and claimed that he was even visited by Magaro in the jail following the slaying, this cannot prevail over the positive identification made by the three prosecution witnesses who were present at the crime scene, and who by the admission of the accused were his friends and could not have been impelled by any improper motive to falsely implicate the accused.

For his part, Jimmy Magaro's appeal focuses on the alleged erroneous rejection of his defense of alibi, i.e., that he was then asleep at the guardhouse of West Negros College, which was bolstered by Jabian's disclaimer that Magaro was present at the crime scene. The trial court justified its rejection of alibi, pointing out that Magaro went to the guardhouse to sleep long after the crime was committed. Considering that his boarding house was just at the back of the Daza residence, he deliberately slept in the guardhouse "in order to feign a perfect alibi." [18] Settled is the rule that alibi as a defense is inherently weak and cannot prevail over the clear and positive identification made by the witnesses present at the locus criminis. More important, the crime scene was merely sixty meters away from the guardhouse and such a short distance does not preclude the physical impossibility for the accused to have been at the place where the victim was attacked.

Accused-appellant Magaro next posits that the fact that he visited his co-accused Jabian in the jail on the day following the slaying incident is an indication of his innocence, as human experience teaches that "no man who is truly guilty of any offense would be visiting his alleged co-principal in jail right the next day." [19] The argument is not tenable. Although flight may be an indication of guilt, there is no case law holding that non-flight is conclusive proof of innocence. [20] Magaro's alternative prayer that his visit in jail should at least be appreciated as a mitigating circumstance of voluntary surrender must likewise fail. By his own admission, he went to the jail to visit Jabian, and his visit may by no means be considered voluntary surrender. He went to the jail without the least intention to surrender his person to the police authorities or a person in authority.

On the other hand, we find tenable Magaro's plea that drunkenness should be appreciated in his favor as a mitigating circumstance. He was very drunk past midnight, when he was left at the guardhouse of West Negros College, where he was allowed to sleep until the following morning. The security guard on duty, Rommel Inorino, confirmed Magaro's state of intoxication. [21] In the absence of proof that the drunkenness was habitual or delinquent, i.e., subsequent to the plan to commit the crime or related to the intention to kill, it is presumed to be non-habitual or unintentional, and should be appreciated in his favor. Unfortunately, the presence of a mitigating circumstance will not cause a reduction of the penalty because the penalty for murder is reclusion perpetua to death, [22] and the only imposable penalty is the lesser penalty of reclusion perpetua pursuant to Article 63 of the Revised Penal Code which reads, insofar as pertinent:

"In all cases in which the law prescribes a penalty composed of two indivisible penalties the following rules shall be observed in the application thereof:

x x x

3. When the commission of the act is attended by some mitigating circumstance and there is no aggravating circumstance, the lesser penalty shall be applied."

With respect to Criminal Case No. 19477, we agree with the Solicitor General that the crime committed is only frustrated homicide. Based on the testimony of Joel Daza and Ruel Lipalam, there was no proof that Jabian deliberately planned to stab Solomon Daza, Jr. Both witnesses saw Jabian stab Solomon Daza as the latter was about to enter the door of the house for the purpose of washing himself, immediately after Jose Daza had been stabbed and the two accused were in the act of escaping, thus indicating that there was only a chance encounter between Jabian and Solomon Daza, Jr. Such accidental encounter is not consistent with a finding of treachery and

therefore the stabbing should merely constitute frustrated homicide, which is punishable by prision mayor.

WHEREFORE, the decision appealed from is AFFIRMED with MODIFICATION. It is AFFIRMED insofar as Jonahs Jabian y Tarrosa and Jimmy Magaro y Gillang are found guilty beyond reasonable doubt of Murder, as co-conspirators, in Criminal Case No. 19478, and are sentenced to suffer the penalty of reclusion perpetua, as well as the accessory penalties prescribed by law.

With respect to Criminal Case No. 19477, Jonahs Jabian y Tarrosa is find guilty beyond reasonable doubt of frustrated homicide and sentenced to suffer the penalty of 8 years and 1 day to 10 years of prision mayor.

The rest of the judgment pertaining to the civil liability, and the crediting of the period of preventive imprisonment in favor of the accused as ordered by the trial court is AFFIRMED.

SO ORDERED.

Melo, (Chairman), Vitug, Panganiban, and Sandoval-Gutierrez, JJ., concur.

[1] Rollo, p. 88.

[2] Rollo, p. 89.

[3] Rollo, pp. 166-168.

[4] Rollo, p. 108.

[5] Rollo, pp. 181-182.

[6] Rollo, p. 164.

[7] Rollo, p. 165.

[8] Rollo, pp. 168-169.

[9] TSN, February 22, 1999, p. 22; TSN, March 2, 1999, pp. 5-6; TSN, April 12, 1999, pp. 20-22; TSN, March 8, 1999, p. 12.

[10] TSN, March 8, 1999, p. 4; TSN, April 12, 1999, pp. 20-22.

[11] TSN, February 22, 1999, p. 23.

[12] Rollo, pp. 134-135.

[13] Art. 14, par. 16, Revised Penal Code.

[14] People vs. Timblor, 285 SCRA 64; People vs. Ombrog, 268 SCRA 93; People vs. Tobias, 267 SCRA 229.

[15] Rollo, p. 137.

[16] Ibid.

[17] Rollo, pp. 140-141.

[18] Rollo, p. 142.

[19] Rollo, p. 89.

[20] People vs. Enciso, 223 SCRA 675.

[21] TSN, March 17, 1999.

[22] Art. 248, Revised Penal Code, as amended by R.A. 7659.

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