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[G.R. No. L-30449. October 31, 1979]

THE PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **ANTONIO GARCIA *Y* CABARSE *alias* "TONY MANOK" and REYNALDO ARVISO *Y* REBELLEZA *alias* "RENE BISUGO,"** *defendants-appellants.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; CIRCUMSTANCES TO CONSIDER.— It is only judicious to take into consideration the natural manifestations of human conduct, when the physical senses are subdued by the psychological state of the individual. The alleged inconsistencies in Corazon's testimony — which the defense makes much of — are not irreconcilable with the physical facts. At the outset, it should not be overlooked that Corazon was testifying as an eyewitness to the traumatic incident by which her brother met a violent death at the hands of a mob. Naturally, Corazon can not be expected to deliver a testimony which passes microscopic scrutiny and scrupulous armchair analysis of the facts, conducted under circumstances far removed from the turbulence and emotional color of the event as it actually transpired. In times of stress, the human and is frequently overpowered by the ebb and flow of emotions in turmoil.

2. ID.; ID.; CONSPIRACY; TO ESTABLISH CONSPIRACY, IT IS NOT ESSENTIAL THAT THERE BE PROOF AS TO PREVIOUS AGREEMENT TO COMMIT A CRIME.— It is sufficient that the malefactors have acted in concept, pursuant to the same objective. It is well established that conspiracy may be inferred from the acts of the accused themselves, when such acts point to a joint purpose and design. A concerted assault upon the victim by the defendants may indicate conspiracy. Conspiracy exists if, at the time of the commission of the offense, the defendants had the same criminal purpose and were united in its execution. Those who are members of the band of malefactors by which a murder is committed and are present at the time and place of the commission of the crime.

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thus contributing by their presence to augment the power of the band and to aid in the successful realization of the crime, are guilty as principals even if they took no part in the material act of killing the deceased. To establish conspiracy, it is not essential that there be proof as to previous agreement to commit a crime. It is sufficient that the malefactors have acted in concert, pursuant to the same objective.

3. **ID.; ID.; ID.; NEED NOT BE ESTABLISHED BY DIRECT EVIDENCE OF ACTS CHARGED, BUT MAY AND GENERALLY MUST BE PROVEN BY A NUMBER OF INDEFINITE ACTS, CONDITIONS AND CIRCUMSTANCES WHICH VARY ACOCRDING TO THE PURPOSE TO BE ACCOMPLISHED.**— Conspiracy need not be established by direct evidence of acts charged, but may and generally must be proven by a number of indefinite acts, conditions and circumstances which vary according to the purpose to be accomplished. If it be proved that two or more persons aimed by their acts towards accomplishment of the same unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and cooperative, indicating a closeness of personal association and concurrence of sentiment, a conspiracy maybe inferred though no actual meeting among them to concert is proven. A conspiracy may be entered into after the commencement of overt acts leading to the consummation of the crime. Conspiracy implies concert of design and not participation in every detail of execution.

4. **CRIMINAL LAW; AGGRAVATING CIRCUMSTANCES; EVIDENT PREMEDITATION; WHEN NOT CONSIDERED.**— In the case of implied conspiracy, evident premeditation may not be appreciated, in the absence of proof as to how and when the plan to kill the victim was hatched or what time elapsed before it was carried out, so that it can not be determined if the accused had "sufficient time between its inception and its fulfillment dispassionately to consider and accept the consequences." There should be a showing that the accused had the opportunity for reflection and persisted in executing his criminal design.

5. **ID.; ID.; TREACHERY; WHEN NOT CONSIDERED.**— It is an elementary axiom that treachery can in no way be presumed but must be fully proven. Where the manner of the attack was not proven, the defendant should be given the benefit of the doubt, and the crime should be considered homicide only.

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6. **ID.; ID.; ABUSE OF AUTHORITY; WHEN CONSIDERED.**— Our jurisprudence is exemplified by the holding that where four persons attacked an unarmed victim but there was no proof as to how the attack commenced and treachery was not proven, the fact that there were four assailants would constitute abuse of superiority.

7. **ID.; ID.; ID.; WHEN CONSIDERED GENERIC AGGRAVATING.**— However, the information does not allege the qualifying circumstance of abuse of superiority; hence, this circumstance can only be treated as generic aggravating.

8. **ID.; ID.; NOCTURNITY; TWO TESTS FOR NOCTURNITY AS AN AGGRAVATING CIRCUMSTANCE.**— There are two tests for nocturnity as an aggravating circumstance: the *objective test* under which nocturnity is aggravating because it facilitates the commission of the offense; and the *subjective test*, under which nocturnity is aggravating because it was purposely sought by the offender. These two tests should be applied in the alternative.

9. **ID.; ID.; ID.; CONSIDERED IN CASE AT BAR.**— A group of men were engaged in a drinking spree, in the course of which one of them fled, chased by seven others. The criminal assault on the victim at 3:00 a.m. was invited by nocturnal cover, which handicapped the view of eyewitnesses and encouraged impunity by persuading the malefactors that it would be difficult to determine their identity because of the darkness and the relative scarcity of people in the streets. These circumstances combine to pass the objective test, and we find that nocturnity is aggravating because it facilitated the commission of the offense. Nocturnity enticed those with the lust to kill to follow their impulses with the false courage born out of the belief that they could not be readily identified.

10. **ID.; HOMICIDE; COMMITTED WHEN NO QUALIFYING CIRCUMSTANCE WAS PROVED.**— The information alleges that the crime of murder was attended by the two qualifying circumstances of treachery and evident premeditation. Neither of these qualifying circumstances was proved; hence, the killing can not be qualified into murder, and constitutes instead the crime of homicide, which is punished by *reclusion temporal*.

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APPEARANCES OF COUNSEL

Solicitor General Felix Q. Antonio, Assistant Solicitor General Crispin V. Bautista and *Solicitor Adolfo J. Diaz* for plaintiff-appellee.

Wenceslao B. Trinidad for defendants-appellants.

D E C I S I O N

ABAD SANTOS, *J.*:

This is an appeal from the decision of April 17, 1969 by the Circuit Criminal Court at Pasig, Rizal, which found the accused guilty of murder and sentenced them to the death penalty.

The legal verdict hinges on the testimony of the lone eyewitness for the prosecution, Mrs. Corazon Dioquino Paterno, sister of the deceased, Apolonio Dioquino, Jr. She testified that at the time of the incident, she resided at Ventanilla Street, Pasay City. She lived at Pasay City for about five months before moving to another dwelling at Timog Avenue, Quezon City. While residing at Pasay City, she conceived a child and during this period, it was not unusual for her, accompanied by her husband, to step out of the house in the wee hours of the morning. They set out on these irregular walks about five times.

During her residence at Pasay City, her brother Apolonio visited her family for about twenty times. Sometimes her brother would stay instead at their parents' house at Muntinlupa, Rizal. He usually spent his weekends in his residence at Bo. Balubad, Porac, Pampanga. Apolonio and her husband were very close to each other; whenever Apolonio paid them a visit, he usually slept in the house and sought their help on various problems.

Before the incident which gave rise to this case, Corazon's husband informed her that he saw Apolonio engaged in a drinking spree with his gang in front of an establishment known as Bill's Place at M. de la Cruz Street, Pasay City. In her sworn statement before the Pasay City Police executed on November 3,1968, Corazon surmised that her husband must have been painting the town red in ("nag good time") in that same place. Upon

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learning this information from her husband, Corazon obtained permission to leave the house at 3:00 a.m. so she could fetch her brother. At that time, she had not been aware that Apolonio was in Pasay City; she had been of the belief that he was with his family in Pampanga. She went to fetch him because she wanted him to escape the untoward influence of his gang. In explaining the rationale for her noctural mission, she employed in her sworn statement the following language: "*Dahil itong si Junior ay meron na kaming nabalitaan na naaakay ng barkada niya sa paggawa ng hindi mabuti.*"

On her way, as she rounded the corner of P.C. Santos Street, Corazon saw her brother fleeing a group of about seven persons, including the two accused, Antonio Garcia and Reynaldo Arviso. She recognized the two accused because they were former gangmates of her brother; in fact, she knew them before the incident by their *aliases* of "Tony Manok" and "Rene Bisugo," respectively.

Corazon saw that the chase was led by the two accused, with Antonio carrying a long sharp instrument. Later, in the course of giving her sworn statement before the Pasay City police on November 3, 1968, Corazon positively identified Antonio and Reynaldo, who were then at the office of the General Investigation Section, Secret Service Division, Pasay City Police Department. She also stated that if she saw the other members of the group again, perhaps she could likewise identify them. At the trial, Corazon likewise pointed out the two accused. During the incident, she exerted efforts to identify the other group members, taking care to conceal herself as she did so. She heard a gunshot which caused her to seek cover.

When she ventured to look from where she was hiding, about 20 meters away, she saw the group catch up with her brother and maltreat him. Some beat him with pieces of wood, while others boxed him. Immediately afterwards, the group scampered away in different directions. Antonio was left behind. He was sitting astride the prostrate figure of Apolonio, stabbing the latter in the back with his long knife. Corazon was not able to

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observe where Antonio later fled, for she could hardly bear to witness the scene.

When Corazon mustered the courage to approach her brother, she saw that he was bathed in a pool of his own blood. The incident threw her in a state of nervous confusion, and she resolved to report the incident to her younger sister, who lived at Lakandula Street, Pasay City. Her sister in turn decided to break the news to their father at Muntinlupa.

Subsequently, Corazon learned that the police authorities were searching for her brother's gangmates for having killed him. She also learned that the suspects were in hiding. On the same day — October 19, 1968 — accompanied by her family, she went at 2:00 p.m. to the Police Department to inquire about her brother's corpse. They were directed to the Funeraria Popular, where an autopsy was held. Sometime later, on November 1, 1968, she transferred residence to Quezon City.

Dr. Mariano Cueva, Jr. testified that he conducted a *post-mortem* examination on the cadaver of the decedent Apolonio, and that he prepared the corresponding Necropsy Report. Dr. Cueva found that the deceased suffered 22 stab wounds in the different portions of his hips; in the front portion of the chest and neck; in the back portion of the torso; and in the right hand. He testified that the wounds sustained by the deceased brought about a massive hemorrhage which caused death. He also testified that it is possible that the instrument marked as Exhibit "B" could have been used in inflicting the multiple stab wounds sustained by the deceased, except the stab wounds on the neck.

Both the accused took refuge in the defense of alibi. Antonio Garcia claimed that at that time of the incident — starting with the chase and ending with the victim's death — in the morning of October 19, 1968, he was at a place called Pacita's Canteen which adjoins Bill's Place at M. de la Cruz Street. Reynaldo Arviso claimed that in the evening of the preceding night (October 18, 1968) he went on a drinking spree with his friends at Pacita's Canteen. He went home at 10:30 p.m. and slept up to 7:00

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a.m. of October 19, 1968. From 7:00 a.m. of that day, he performed his duties as a bus conductor by calling for passengers near Pacita's Canteen.

The trial court pinpointed the issue as revolving around the identity of the persons who participated in the killing of the deceased. It banked on the testimony of the witness, Corazon Dioquino, who positively identified the accused as participants in the attack. Noting that "the defense did not even attempt to present any evil motive on the part of the witness," the court concluded that "the two accused took part in the perpetuation of the crime charged." It gave short shrift to the defense of alibi presented by the two accused, noting that, by their own admission, the two accused were residents of the vicinity of the crime.

In respect of the circumstances attending the crime it said:

> But considering the aggravating circumstances of nighttime; superior strength; and treachery, which three aggravating circumstances had been sufficiently established by the prosecution, the same cannot be offset by said voluntary surrender to a person in authority of his agent, plus the uncontested fact that deceased, Apolonio Dioquino, Jr. suffered no less than 22 stab wounds; convincing evidence of the apparent criminal perversity of the accused, the court, therefore, has no alternative but to impose the supreme penalty.

And rendered judgment as follows:

> "IN VIEW OF THE FOREGOING, the Court finds the accused, Antonio Garcia *y* Cabarse and Reynaldo Arviso *y* Rebelleza, GUILTY, beyond reasonable doubt, of the crime of Murder under Article 248, of the Revised Penal Code, as charged under Article 248, of the Revised Penal Code, as charged in the information, and considering the aggravating circumstances surrounding the commission of the crime, each one of them is hereby sentenced to suffer the penalty of DEATH.
>
> The two accused are further ordered to indemnify the heirs of the deceased, Apolonio Dioquino, Jr. in the amount of TWELVE THOUSAND (₱12,000.00) PESOS, jointly and severally; and to pay their proportionate share of the costs."

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In their Brief, the accused contended that the lower court erred: in not considering nighttime and superior strength as absorbed in treachery: in finding nighttime as an aggravating circumstance despite absolute absence of evidence that nighttime was purposely sought to insure the execution of the crime; in finding superior strength as an aggravating circumstance despite absence of evidence to sustain such a finding; in finding treachery as an aggravating circumstance despite absence of evidence to that effect; in not stating the qualifying circumstance of the alleged crime; in holding that the accused Reynaldo Arviso stabbed and hit the victim when there is no evidence as to the participation of the said accused Arviso in the execution of the alleged crime; and in failing to consider the material inconsistencies, prejudice and other circumstances in the uncorroborated testimony of the only eyewitness, rendering said testimony not worthy of belief.

The assignment of errors by the accused is anchored on their attempt to discredit the lone eyewitness for the prosecution, a function which, if successfully undertaken, would totally obliterate the nexus between the accused and the crime. The defense vigorously maintained that the testimony of the only eyewitness is a fabrication, and that she was in fact absent from the scene which she described in both her sworn statement and in her testimony at the trial.

The defense asserted that Corazon Dioquino's testimony was riddled by material inconsistencies. The defense sought to capitalize on the discrepancy of a sketch made by Corazon and the sketch made by Pasay City Electrical Engineer Jaime Arriola. Corazon's sketch shows Juan Sumulong Elementary School to be right in front of P.C. Santos Street; while Arriola's sketch shows that the school is about 135 meters from the corner of the street. The defense contended that the discrepancy was a deliberate falsehood on the part of the witness.

Corazon testified that she was near the corner of P.C. Santos Street when she saw her brother under chase in front of the school, and that she met the group in front of the school in a matter of five seconds, more or less. The defense assailed her

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testimony on this point as incredible on the ground that the distance between the point where she saw her brother being chased, up to the point where she met them, is 135 meters, and no human being can cover that distance in five seconds. Moreover, Corazon testified that she was 20 meters away from the place where the accused caught up with her brother. Again, the defense criticized her testimony in this respect by pointing out that the true distance is 175 meters.

The defense insisted that Corazon's sketch of the locale of the crime (Exhibit "1") constitutes "the high point of falsity of her testimony." The defense sought to substantiate this claim by arguing that from her sketch, it appears that she never crossed paths with her brother or his pursuers. The witness testified that she saw her brother at the point which is four to five meters from the corner of P.C. Santos Street. Yet she also testified that she saw the incident from 20 meters. The witness claimed she hid after hearing the shot at a point which is 170 meters from the scene of the crime. The defense argued that she could not have covered the distance in such a short time, and that this belies her claim that she was only 20 meters from the scene of the crime. The defense pointed out that Arriola's sketch (Exhibit "2") shows that the school is 135 meters from the scene of the crime, and the point where the witness claimed she viewed the crime is 170 meters from the scene of the crime, thus giving the lie to her claim that she was 20 meters away.

The alleged inconsistencies in Corazon's testimony — which the defense makes much of — are not irreconcilable with the physical facts. At the outset, it should not be overlooked that Corazon was testifying as an eyewitness to the traumatic incident by which her brother met a violent death at the hands of a mob. Naturally, Corazon can not be expected to deliver a testimony which passes microscopic scrutiny and scrupulous armchair analysis of the facts, conducted under circumstances far removed from the turbulence and emotional color of the event as it actually transpired. *Al contrario*, if Corazon's testimony were meticulously accurate with respect to distance covered and the time taken to negotiate it, an impartial observer

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would wonder whether such exactitude were not the product of previous rehearsal, if not of fabrication. In times of stress, the human and is frequently overpowered by the ebb and flow of emotions in turmoil; and it is only judicious to take into consideration the natural manifestations of human conduct, when the physical senses are subdued by the psychological state of the individual.

Corazon was a resident of Pasay City for only about five months. She testified that she is not familiar with the streets along M. de la Cruz Street. Moreover, Corazon did not categorically testify that she covered the distance of 135 meters in five seconds. More accurately, she testified that she walked for a period of from five to ten seconds, more or less. Put in this way, the period was sufficient to allow her to negotiate the distance. Moreover, Corazon did not stay rooted to one spot while the incident was taking place, but surreptitiously edged her way up to Magtibay Street, which is closer to the place of the killing.

The defense also claims that the delay which Corazon allowed to transpire, before reporting the crime to the authorities and giving her sworn statement (on November 3, 1968), is indicative of fabrication. The killing took place before dawn of October 19, 1968. In the afternoon of the same day, Corazon and her family went to the Police Department to inquire about the remains of her brother. Corazon already knew that the police were taking steps to round up the killers. She incurred no fault in waiting until the culprits were arrested before confronting them and giving her statement. It would have been the better part of legal procedure if she had given her statement earlier; but since she was only a 22-year old housekeeper at that time, she can not be held to a higher standard of discretion.

The defense further contends that the failure to present Corazon's husband in court indicates that Corazon was not actually at the scene of the crime at 3:00 o'clock in the morning. If the defense felt that the husband had a contribution to make in the cause of truth, there was nothing which prevented them from compelling his process by summons. This they failed to

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do; and their omission should not be taken to reflect adversely on the prosecution, who evidently believed that the husband's testimony was unnecessary.

Finally, the defense claims that it was unnatural for Corazon, after viewing her brother's body, to proceed to her sister's house one kilometer away, instead of returning to her own house, which was just a block or so away. It is not unnatural for a witness to a gruesome event, to choose to confer with a person bound to her by ties of consanguinity, even if such a conference necessitates that she traverse a longer distance. The exercise of judgment, on the spot, should not be gauged by reason applied in hindsight with a metrical yardstick.

The next major burden which the defense undertook to assume was to contend that the accused Reynaldo Arviso is innocent because there is no evidence as to his participation in the execution of the crime. It is claimed that there is absolute absence of evidence to show that Reynaldo was a direct participant and that the only evidence against him is that he was seen pursuing the victim. However, the finding of Reynaldo's guilt stems, not from his direct participation in the criminal execution, but from his participation in the conspiracy to kill the deceased. His participation in the conspiracy is supported by Corazon's testimony that he and Antonio were the leaders of the pack following closely at the heels of the victim.

It is well established that conspiracy may be inferred from the acts of the accused themselves, when such acts point to a joint purpose and design. A concerted assault upon the victim by the defendants may indicate conspiracy. (*PP v. Monroy & Idica*, L-11177, Oct. 30, 1958, 104 Phil. 759). Conspiracy exists if, at the time of the commission of the offense, the defendants had the same criminal purpose and were united in its execution. (*PP v. Datu Dima Binahasing*, L-4837, April 28, 1956, 98 Phil. 902). Those who are members of the band of malefactors by which a murder is committed and are present at the time and place of the commission of the crime, thus contributing by their presence to augment the power of the band and to aid in the successful realization of the crime, are guilty as principals

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even if they took no part in the material act of killing the deceased. (*US v. Abelinde*, No. 945, Dec. 10, 1902, 1 Phil. 568; *People v. Carunungan*, L-13283, Sept. 30, 1960, 109 Phil. 534). To establish conspiracy, it is not essential that there be proof as to previous agreement to commit a crime. It is sufficient that the malefactors have acted in concert, pursuant to the same objective. (*PP vs. San Luis*, L-2365, May 29, 1950, 86 Phil. 485).

Conspiracy need not be established by direct evidence of acts charged, but may and generally must be proven by a number of indefinite acts, conditions and circumstances which vary according to the purpose to be accomplished. If it be proved that two or more persons aimed by their acts towards accomplishment of the same unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and cooperative, indicating a closeness of personal association and concurrence of sentiment, a conspiracy maybe inferred though no actual meeting among them to concert is proven (*PP v. Colman*, L-6652-54, Feb. 28, 1958, 103 Phil. 6). A conspiracy may be entered into after the commencement of overt acts leading to the consummation of the crime. (*PP v. Barredo*, L-2728, Dec. 29, 1950, 87 Phil. 800). Conspiracy implies concert of design and not participation in every detail of execution. (*PP v. Carbonel*, L-24177, March 15, 1926, 48 Phil. 868; *PP v. Danan*, L-1766, March 31, 1949, 83 Phil. 252).

When a group of seven men, more or less, give chase to a single unarmed individual running for his life, and they overtake him and inflict wounds on his body by means of shooting, stabbing, and hitting with pieces of wood, there is conspiracy to kill; and it does not detract from their status as conspirators that there is no evidence of previous agreement, it being sufficient that their wills have concurred and they labored to achieve the same end.

The defense submits that the failure of the lower court to specify the qualifying circumstance in the crime of murder is violative of the Constitution and the Rules of Court. We find no such infirmity. Since the principle concerned is readily

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understood from the facts, the conclusion and the penalty imposed, an express specification of the statute or exposition of the law is not necessary." (*People vs. Silo*, L-7916, May 25, 1956, 99 Phil. 216). In the absence of a specification by the trial court, the defense surmised that the qualifying circumstance in this case is evident premeditation; but the defense argued that evident premeditation was not shown. We agree. Under normal conditions, conspiracy generally presupposes premeditation. But in the case of implied conspiracy, evident premeditation may not be appreciated, in the absence of proof as to how and when the plan to kill the victim was hatched or what time elapsed before it was carried out, so that it can not be determined if the accused had "sufficient time between its inception and its fulfillment dispassionately to consider and accept the consequences." There should be a showing that the accused had the opportunity for reflection and persisted in executing his criminal design. (*PP v. Custodio*, L-7442, October 24, 1955, 97 Phil. 698; *PP v. Mendoza and Sinu-ag*, L-4146 and L-4147, March 28, 1952, 91 Phil. 58; *PP v. Yturiaga*, L-2816, May 31, 1950, 86 Phil. 534; *PP v. Lozada*, No. 46998, Nov. 16, 1940, 70 Phil. 525; *PP v. Upao Moro*, L-6771, May 28, 1957, 101 Phil. 1226; *PP v. Sakam*, No. 41566, Dec. 7, 1934, 61 Phil. 27; *PP v. Peralta*, L-19069, Oct. 29, 1968, 25 SCRA 759; *PP v. Pareja*, L-21937, Nov. 29, 1969, 30 SCRA 693).

Even in the absence of evident premeditation, the crime of murder in this case might still be qualified by treachery, which is alleged in the information. But the defense argued that treachery was not present. We are so convinced. It is an elementary axiom that treachery can in no way be presumed but must be fully proven. (*US v. Asilo*, No. 1957, Jan. 30, 1905, 4 Phil. 175; *US v. Arciga*, No. 1129, April 6, 1903, 2 Phil. 110; *PP v. Durante*, No. 31101, Aug. 23, 1929, 53 Phil. 363; *PP v. Pelago*, L-24884, Aug. 31, 1968, 24 SCRA 1027). Where the manner of the attack was not proven, the defendant should be given the benefit of the doubt, and the crime should be considered homicide only. (Carpio, 83 Phil. 509; Amansec, 80 Phil. 424).

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In *People vs. Metran* (L-4205, July 27, 1951, 89 Phil. 543), the aggravating circumstances of aid of armed men, abuse of superiority, and nocturnity, were considered as constituting treachery, which qualified the crime as murder, since there was no direct evidence as to the manner of the attack. However, in this case we believe that the correct qualifying circumstance is not treachery, but abuse of superiority. Here we are confronted with a helpless victim killed by assailants superior to him in arms and in numbers. But the attack was not sudden nor unexpected, and the element of surprise was lacking. The victim could have made a defense; hence, the assault involved some risk to the assailants. There being no showing when the intent to kill was formed, it can not be said that treachery has been proven. We believe the correct rule is found in *People vs. Proceso Bustos* (No. 17763, July 23, 1923, 45 Phil. 9), where *alevosia* was not appreciated because it was deemed included in abuse of superiority.

We find that abuse of superiority attended the offense, following a long line of cases which made this finding on parallel facts. Our jurisprudence is exemplified by the holding that where four persons attacked an unarmed victim but there was no proof as to how the attack commenced and treachery was not proven, the fact that there were four assailants would constitute abuse of superiority. (*People vs. Lasada*, No. 6742, Jan. 26, 1912, 21 Phil. 287; *US v. Bañagale*, No. 7870, Jan. 10, 1913, 24 Phil. 69). However, the information does not allege the qualifying circumstance of abuse of superiority; hence, this circumstance can only be treated as generic aggravating. (*People v. Acusar*, L-1798, Dec. 29, 1948, 82 Phil. 490; *People v. Beje*, L-8245, July 19, 1956, 99 Phil. 1052; *People v. Bautista*, L-23303, May 20, 1969, 28 SCRA 184).

The offense took place at 3:00 o'clock in the morning. It may therefore be said that it was committed at night, which covers the period from sunset to sunrise, according to the New Civil Code, Article 13. Is this basis for finding that nocturnity is aggravating? The Revised Penal Code, Article 14, provides that it is an aggravating circumstance when the crime is

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committed in the nighttime, whenever nocturnity may facilitate the commission of the offense. There are two tests for nocturnity as an aggravating circumstance: the *objective test*, under which nocturnity is aggravating because it facilitates the commission of the offense; and the *subjective test*, under which nocturnity is aggravating because it was purposely sought by the offender. These two tests should be applied in the alternative.

In this case, the subjective test is not passed because there is no showing that the accused purposely sought the cover of nighttime. Next, we proceed and apply the objective test, to determine whether nocturnity facilitated the killing of the victim. A group of men were engaged in a drinking spree, in the course of which one of them fled, chased by seven others. The criminal assault on the victim at 3:00 a.m. was invited by nocturnal cover, which handicapped the view of eyewitnesses and encouraged impunity by persuading the malefactors that it would be difficult to determine their identity because of the darkness and the relative scarcity of people in the streets. These circumstances combine to pass the objective test, and we find that nocturnity is aggravating because it facilitated the commission of the offense. Nocturnity enticed those with the lust to kill to follow their impulses with the false courage born out of the belief that they could not be readily identified.

The information alleges that the crime of murder was attended by the two qualifying circumstances of treachery and evident premeditation. Neither of these qualifying circumstances was proved; hence, the killing can not be qualified into murder, and constitutes instead the crime of homicide, which is punished by *reclusion temporal*. It is not controverted that the accused voluntarily surrendered to the authorities; they are therefore entitled to the mitigating circumstance of voluntary surrender. This lone mitigating circumstance, offset by the two generic aggravating circumstances of abuse of superiority and nocturnity, produces the result that in the crime of homicide, one aggravating circumstance remains.

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WHEREFORE, the judgment of the court *a quo* is hereby modified in that the two accused, Antonio Garcia *y* Cabarse and Reynaldo Arviso *y* Rebelleza, are sentenced to undergo an indeterminate imprisonment of 10 years as minimum to 18 years as maximum, but in all other respects affirmed.

SO ORDERED.

Fernando (C.J.), Barredo, Makasiar, Antonio, Aquino, Concepcion Jr, Santos, Fernandez, Guerrero, De Castro, and *Melencio-Herrera, JJ.*, concur.

Teehankee, J., took no part.

SECOND DIVISION

[G.R. Nos. 50550-52. October 31, 1979]

CHEE KIONG YAM, AMPANG MAH, ANITA YAM, JOSE Y.C. YAM AND RICHARD YAM, *petitioners, vs.* **HON. NABDAR J. MALIK, Municipal Judge of Jolo, Sulu (Branch 1), THE PEOPLE OF THE PHILIPPINES, ROSALINDA AMIN, TAN CHU KAO, and LT. COL. AGOSTO SAJOR,** *respondents.*

SYLLABUS

1. **CRIMINAL LAW; ESTAFA; NOT COMMITTED IN CASE AT BAR.**— In order that a person can be convicted under Article 315 of the Revised Penal Code, it must be proven that he has the obligation to deliver or return the same money, goods or personal property that he received. Petitioners had no such obligation to return the same money, *i.e.*, the bills or coins, which they received from private respondents. This is so because as clearly stated in criminal complaints, the related civil