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that petitioner submitted any evidence to support its conclusion. There is no showing as to whether private respondent, as overseer, can lay down management policies, or whether he can hire, fire, demote or promote or whether he can effectively recommend the foregoing courses of action. Indeed upon to this stage, petitioner does not define the powers and duties of an overseer in its company."[9]

WHEREFORE, this petition for *certiorari* is dismissed. The decision is immediately executory. No costs.

Antonio (Actg. Chairman), Aquino, Concepcion Jr., Santos, and *Abad Santos, JJ.*, concur.

Barredo, J., on official leave.

SECOND DIVISION

[G.R. No. L-31102. May 5, 1979]

THE PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **FELIPE DUEÑO,** ***alias*** **FELIPE CATALAN SOFRONIO DUEÑO and ANDRESITO BELONIO** ***alias*** **HAPON,** *defendants-appellants.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; WITNESSES; FACTS TO BE TAKEN INTO ACCOUNT IN ACCESSING THEIR CREDIBILITY. — Eyewitnesses to murder who, a few hours before the perpetration of the crime, have been the target themselves of the accused's attack, should be expected to take some risks — to the point perhaps of being illogical and reckless — identity and, if possible, frustrate any further attempts on

[9] Comment, 5-6.

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the part of the accused to assault and to try to kill them. This fact should be taken into account in assessing the credibility of their testimonies.

2. **ID.; ID.; MOTIVE, WHEN RELEVANT.** — Motive is relevant where identity of the persons caused of having committed the crime is in dispute, where there are no eyewitnesses, and where suspicion is likely to fall upon a number of persons.

3. **ID.; ID.; ALIBI; REQUISITE FOR THE DEFENSE TO PROSPER.** — Where alibi is interposed as a defense, it must not only be clearly shown that the accused was at some other place, but that it was also physically impossible for him to be at the scene of the crime at the time of its commission.

4. **CRIMINAL LAW; QUALIFYING CIRCUMSTANCES; ONLY ONE QUALIFYING CIRCUMSTANCE IS NECESSARY TO QUALIFY KILLING TO MURDER.** — Article 248 of the Revised Penal Code is clear that only one qualifying circumstance is necessary to qualify the offense as murder. Where the two qualifying circumstances of treachery and evident premeditation attended the commission of the offense, treachery sufficiently qualifies the killing to murder and evident premeditation should be considered as a generic circumstance only.

5. **ID.; ID.; EVIDENT PREMEDITATION CANNOT BE APPRECIATED IN ABERRATIO ICTUS.** — Jurisprudence is settled that evident premeditation cannot be appreciated in a case where, although the accused had planned the perpetration of the killing, the victim was different from the person whom the accused had originally intended to kill.

6. **ID.; AGGRAVATING CIRCUMSTANCES; NOCTURNITY; ABSORBED IN TREACHERY.** — Except in special cases, the circumstances of treachery and nocturnity always go together and are absorbed in the same offense and both may still be regarded as complementary to each other and are to be considered as one circumstance only, to quality the killing as murder. Nocturnity, like abuse of superiority, is absorbed in treachery because it forms part of the peculiar treacherous means and manner adopted to insure the execution of the crime.

7. **ID.; MURDER; IMPOSABLE PENALTY.** — Where is no mitigating or aggravating circumstance, the penalty of life imprisonment or reclusion perpetua is the proper penalty from murder as

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provided for in Article 248, in relation to Articles 64, paragraph 1, and 77 of the Revised Penal Code.

8. REMEDIAL LAW; CIVIL PROCEDURE; JUDGMENT ON APPEAL; BINDING ONLY UPON APPELLANT WHO PURSUES HIS APPEAL TO FINALITY. — A judgment of the Supreme Court in an appealed criminal case, affirming the assailed decision with the modification of raising the civil indemnity from ₱6,000 to ₱12,000, is binding only upon the accused who pursued his appeal to finality and not to his co-accused who withdrew their appeals, with the consent of the Court, after the case was submitted for decision. As regards the accused who withdrew their appeals, the judgment of the trial court is final and executory as to them.

APPEARANCES OF COUNSEL

Solicitor General Felix Q. Antonio for plaintiff-appellee.
R.B. Agrava for defendants-appellants.

D E C I S I O N

SANTOS, *J.*:

This is an appeal interposed on April 22, 1969 by the above named three defendants from a decision of the Court of First Instance of Capiz, 11th Judicial District, Roxas City, Hon. Judge Jose A. Aligaen, presiding, in Criminal Case No. 3771 for murder, finding them guilty as charged and imposing upon them the penalty of life imprisonment or *reclusion perpetua* with all accessory penalties and to pay, jointly and severally, the heirs of the victim the amount of Six Thousand Pesos (₱6,000.00).[1]

It appears that on November 27, 1963, the Provincial Fiscal of Capiz filed an Information for murder against the three accused thus —

"That on or about the 21st day of January, 1963, in the municipality of Maayon, province of Capiz, Philippines, and within the jurisdiction

[1] *Rollo*, p. 90; Decision.

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of this Honorable Court, the said accused, all armed with pistol, revolver and fighting bolo, conspiring, confederating and helping one another, with evident premeditation and treachery, did then and there wilfully, unlawfully and feloniously shoot and hit one Bernardo Demontaño, thereby inflicting upon the latter a "bullet wound passing through the body, entering the left costal arch mammary line and passing out of the right-mid-infra clavicular lines, which resulted in the instantaneous death of the said Bernardo Demontaño; that due to the death of the said Bernardo Demontaño and the consequent loss of his earning capacity, (the deceased having no permanent physical disability at the time of his death), his heirs have suffered damages in the sum of ₱8,000.00 in consonance with the provision of Article 2206 of the New Civil Code.

"Contrary to law."[2]

Upon arraignment on June 13, and July 25, 1964 all of the accused pleaded not guilty. At the trial, the prosecution presented its evidence — consisting of the testimonies of Dra. Teresa C. Andrada, Federico Dolfo, Roque Dellomos and Sgts. Ramon Espeleta and Fidel Soberano and Exhibit A — before Judge Ignacio Debuque.[3] Thereafter, the sala became vacant for four years. It was only in 1968 that the defense presented its evidence — consisting of the testimonies of Herminda del Rosario, Federico Bitoon and the three accused — before the Hon. Judge Jose Aligaen, who rendered judgment on March 24, 1969 convicting all the accused.[4]

The appeal was directed to the Court of Appeals, but, in view of the penalty involved, the records were forwarded to this Court on October 4, 1969.[5] On January 2, 1977, and May 8, 1978 — after the case had been submitted for decision on February 1, 1972 — appellants Felipe Dueño and Sofronio Dueño, respectively, withdrew their appeals. These withdrawals were

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[2] *Id.*, pp. 15-16.

[3] *Id.*, p. 63.

[4] *Ibid.*

[5] *Id.*, p. 1.

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allowed in resolutions dated January 2, 1977 and June 28, 1978.[6] Hence, only the appeal of accused-appellant Andresito Belonio is under review in this decision.

The evidence for the prosecution and the defense, as correctly synthesized by the Solicitor General in the People's brief[7] are as follow

"At about five thirty o'clock in the afternoon of January 21, 1963, while Roque Dellomos was on his way to the *hacienda* of the Central Azucarera del Pilar, at Maayon, Capiz, he met the three accused Felipe Dueño, Sofronio Dueño and Andresito Belonio near the house of Federico Dolfo (p. 101, t.s.n., Dec. 10, 1964, Dellomos). Upon seeing Roque Dellomos, Felipe Dueño fired a shot at Dellomos from a Caliber. 45 pistol he had at the time (p. 102, *Id*). Roque Dellomos immediately ran away and while running he heard a second shot fired from the gun of the said accused. (p. 106, *Id.*).

"In the evening of that day, January 21, 1963, at about past 9:00 o'clock just after Roque Dellomos and Bernardo Demontaño, a nephew of the former, had taken their supper at Dellomos house in Balighot, Maayon, Capiz, Bernardo Demontaño opened the door of the house preparatory to going down. (p. 113, t.s.n., Dec. 10, 1964, Dellomos). At that moment, Roque Dellomos, who was fixing the plates they use in eating heard a shot from a gun and at the same time heard his nephew Bernardo Demontaño fall from the stairs of the house (p. 113, *Id.*). Dellomos immediately got his flashlight and blew out the light from his lamp on the table where they ate. (*Id.*)

"He went towards the door where his nephew fell and focused his flashlight outside his house while his body was behind the *bayong* full of palay beside the door and peeped from a hole on their wall. (p. 112, t.s.n., Dec. 11, 1964, Dellomos). He saw the accused Felipe Dueño with a gun in hand which was fired but missed him. He also saw the two accused, named Sofronio Dueño with a gun in hand and accused Andresito Belonio with a bolo in hand. (p. 113, 114 and 117, t.s.n., Dec. 10, 1964, Dellomos).

"When the three accused left the house of Roque Dellomos, the latter verified what happened to his nephew Bernardo Demontaño

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[6] *Id.*, pp. 196, 213.

[7] *Id.*, p. 157.

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and he saw his dead body downstairs of his house just in line with the eves of the roof. (p. 129, t.s.n., Dec. 10, 1964, Dellomos).

"The next morning, Roque Dellomos reported the incident to the municipal authorities of Maayon, Capiz (p. 130, *Id.*); Dr. Teresa Capote-Andrada, the Rural Health Physician of Maayon examined the body of the deceased Bernardo Demontaño (p. 25, t.s.n., Aug. 7, 1964, Andrada) and found gun shot wounds which caused his death instantaneously. (Exh. "A").

"On that same night of January 21, 1963, one Federico Dolfo, a neighbor of Roque Dellomos, while the former was preparing the milk of his infant child in their house, he heard two gun shots from the direction of the house of Roque Dellomos. (p. 61, t.s.n., Nov. 4, 1964, Dolfo). Having been almost also a victim of the attack by the accused that same afternoon with Roque Dellomos, he thought that it might be the accused attacking Roque Dellomos, his neighbor, so he got his flashlight and his bolo and went down his house and hid himself from the banana plantations infront of his house near the barrio trail, (p. 61, t.s.n., Nov. 4, 1964, Dolfo). While thus hiding, he heard noises of persons passing the trail near him and when he saw persons running by that trail, which was about five meters from where he was, he lighted his flashlight and focused it on the persons running and recognized them to be accused Felipe Dueño, Sofronio Dueño and Andresito Belonio. (p. 64, t.s.n., Nov. 4, 1964, Dolfo).

"Appellants relied on alibi as their common defense.

"That on or about the same time that the crime for which they were convicted was committed, appellant Sofronio Dueño and Andresito Belonio were at the house of Herminea del Rosario at Barrio Guba, Pontevedra, Capiz (p. 238, t.s.n., July 12, 1968). Appellants tried to support their alibi with the testimony of Herminia del Rosario of Barrior Guba, Pontevedra, Capiz.

"Appellant Felipe Dueño alleged that at the time the crime was allegedly committed he was in Barrio Hipona, Pontevedra, Capiz, having slept in the evening of January 21, 1963 at the house of Federico Bito-on at Barrio Hipona, Pontevedra, Capiz. Federico Bito-on corroborated such testimony of the appellant. (p. 286, t.s.n., Sept. 17, 1968, Dueño)."

The trial Court — after considering the prosecution evidence and the *alibi* put up by the three accused — found as the

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motive for the commission of the offense that the three accused were angry at Roque Dellomos and Federico Dolfo because the latter returned the stolen carabao to its owner in Malagit, Pontevedra. The stolen carabao was left by Felipe Dueño in the care of his father-in-law. The deceased Bernardo Demontaño was mistaken for Roque Dellomos. It further found that the three accused conspired in committing the offense, as shown "by the fact that in all incidents of their criminal adventure they were always together. Even in their gayest moment while drinking *tuba* in the house of their principal witness, Mrs. Herminda del Rosario, they were together." The defense of alibi was considered very weak, since "(t)he distance of the alleged hideouts of the three accused in the town of Pontevedra to the town of Maayon, the seat of the crime, is not very far. Maayon, was formerly a barrio of the town of Pontevedra and a good road now running vast sugarcane plantations, connects the two towns which are very accessible to each other by trucks, jeeps and automobiles. The crime took place at about nine o'clock in the evening. One can be catching fish or doing carpentry work in Pontevedra during daytime and commit murder in Maayon in the evening." After weighing the evidence, the trial Court found the three defendants — Felipe Dueño, Sofronio Dueño and Andresito Belonio — "guilty beyond reasonable doubt of the crime of murder with the qualifying circumstances of treachery and evident premeditation, with the aggravating circumstance of nighttime to facilitate its commission," and imposed "life imprisonment or *reclusion perpetua* with all necessary penalties attached to it; to pay jointly severally the heirs of Bernardo Demontaño the amount of six thousand (pesos) x x x with costs."[8]

Accused-appellants in this appeal seek the review and reversal of the decision alleging that the lower Court erred —

I . . . IN FINDING, ON THE BASIS OF THE INCREDIBLE TESTIMONIES OF DELLOMOS AND DOLFO, THAT APPELLANTS SHOT BERNARDO DEMONTAÑO IN THE EVENING OF JANUARY 21, 1963.

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[8] *Id.*, p. 90.

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II . . . IN FINDING THAT THERE WAS A SUFFICIENT MOTIVE FOR APPELLANTS TO COMMIT THE MURDER OF WHICH THEY STAND CHARGED.

III ...IN NOT GIVING CREDENCE TO APPELLANTS' DEFENSE OF ALIBI.[9]

Appellants' counsel[10] undertook with notable zeal a detailed and painstaking scrutiny of the testimonies of the prosecution witnesses and now argue in support of the assigned errors as follows:

1. On the alleged incredibility of the testimonies. That the declarations of Roque Dellomos and Federico Dolfo — who witnessed the incident in the afternoon and identified the defendants as the ones responsible for the death of the victim Bernardo Demontaño in the evening — "are so inherently improbable as not to be credible";[11] that Dellomos' act of extinguishing the kerosene lamp and immediately switching on his flashlight is illogical;[12] that Dellomos' testimony that he focused his flashlight for three (3) minutes runs counter to the natural reaction of a person who had just been fired upon;[13] that Dolfo's testimony that he recognized the three accused after focusing his flashlight on them is also incredible since he also admitted that he went behind some banana trees for his own safety;[14] that if Dolfo's testimony were true, appellants would have stopped to investigate the person who flashed the light on them.[15]

2. On the insufficiency of motive. That the motive as found by the trial court has no factual basis for "if it is true that

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[9] *Id.*, p. 59.

[10] Atty. Raoul B. Agrava, counsel *de oficio* represented the three appellants.

[11] *Rollo*, p. 75.

[12] *Id.*, p. 76.

[13] Id., p. 77.

[14] *Id.*, p. 78.

[15] *Id.*, p. 79.

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Felipe (Dueño) stole the carabao, he would not have kept it in Bo. Balighot, in the yard of his father-in-law, but would have brought it somewhere else.[16] And,

3. On the alibi. That it is unfortunate that the lower court rejected the alibi which was corroborated by witnesses who had no reason to lie.[17]

And now to consider the merits of the foregoing assigned errors and the arguments in support thereof.

1. Appellants' contention that the testimonies of the eyewitnesses Dellomos and Dolfo are inherently improbable as not to be credible has been successfully traversed by the Solicitor General.[18] For, Dolfo and Dellomos, having been the target of accused-appellants only a few hours earlier in the afternoon of the same day, may and should be expected to take some risk — to the point perhaps of being illogical and reckless — to identify and, if possible, frustrate any further attempts on the part of the three accused to assault and to try to kill them again. As the People's brief explains —

"There is nothing illogical in Dellomo's putting out their kerosene lamp upon hearing the first gunshot just outside his house and upon hearing his nephew *(Bernardo Demontaño, supplied) fall from their stairs. It could be stated that the thought that he almost lost his life to a gun from the three accused that same afternoon must have made him thought (sic, should be think) that he was again the target of said gun.* Putting out the light would conceal his identity and his whereabouts inside the house from anyone outside. The fact that he got his flashlight and focused a light from it outside the house from the door opening where his nephew fell and at the same time concealing his body with a sackfull of palay near the door and at the same time peeping from a hole away from the lighted flashlight he was holding *is not an unnatural thing to do for any person similarly*

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[16] *Id.*, p. 80.

[17] *Id.*, p. 81.

[18] The Solicitor General, now Associate Justice Felix Q. Antonio, assisted by Assistant Solicitor General Bernardo P. Pardo and Assistant Solicitor General Eufracio B. Cosio, filed the People's brief.

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situated. Instead of being an unnatural reaction of a person in such situation, as appellant asserts, it is but a natural instinct for anyone to investigate from who and where was the source of the gunfire (sic) taking safety precaution for himself from any possible harm as witness did when he hid his body behind a sackfull (bayong) of palay by their open door, if not to scare away those intruders who use the darkness of night as a means of attaining any evil purpose. On this point, witness Dellomos testified as follows:

xxx xxx xxx

"Q. And after that you flashed your flashlight directing to the opening of the door where Bernardo Demontaño passed, am I right?

A. Yes, sir.

Q. Now, when you flashed your flashlight to that opening of the door you saw Bernardo Demontaño on the ground, am I right?

A. *No, sir. The first person I saw was Felipe Dueño who was near the stairs and I was behind a big bayong of palay.*

Q. Where is that big *bayong* of palay where you were posted?

A. By the side of our table.

Q. How far is that *bayong* where you have posted yourself from the opening at the door where Bernardo Demontaño passed in going downstairs?

A. Very near. The distance of the *bayong* from the panel of the door is fifteen inches to my estimate.

Q. You do not answer my question. My question is, how far is that *bayong* where you were posted from the opening of the door where Bernardo Demontaño passed?

A. That is what I have told, fifteen inches.

Q. And that *bayong* where you have posted is at the side of the door, am I right?

A. Yes, sir.

Q. So since it is near the door it will obstruct the opening of the door, am I right?

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Fiscal DELFIN:

Your Honor, please, the question is already a conclusion of fact.

COURT:

Reform the question. What do you mean by that? You are using a future tense. This is all past.

Atty. CORDENILLO:

Q. When you flashed your light through the opening of the door you allegedly saw Felipe Dueño, am I right?

A. Yes, sir.

COURT:

Q. *Where was Felipe Dueño the first time you saw him after you have focused your flashlight?*

A. *On the side of our house because you know the wall of our house had a hole and the first time I focused my flashlight I saw him through the hole.*

Q. Where were you at that time when you first saw Felipe Dueño?

A. I was behind the *bayong* of palay and peeping when I focused my flashlight looking for the place where the shot came from.

Q. How far were you from Felipe Dueño when you saw him for the first time?

A. *About two or three brazas away because the elevation of my house to the ground is a little bit high because the rung of my stairs was six rungs.*

XXX XXX XXX

Q. While you were looking at Felipe Dueño where were his companions, how far were they from Felipe Dueño?

A. The companions were about two brazas away from him.

Q. What were they doing, what were his companions doing?

A. *Andresito was holding a revolver .38 caliber and aiming the revolver forward. The other one was holding fighting bolo hanging on his side.*

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Q. Were the two companions standing?

A. Yes, sir.

Q. They did not advance towards Felipe Dueño, is that right?

A. *No, sir, they did not go near Felipe Dueño, but they were holding their weapons.* (pp. 227-235, Transcript I)

"Such evidence clearly and positively proves that the accused herein were identified as the perpetrators of the crime, as the trial Court correctly found.

"In the absence of any showing that the court *a quo* disregarded a material fact which would damage the conclusion made, this finding must be upheld. (*People vs. Dorado, 30 SCRA 53. Accord: People vs. Ruben Ablaza*, 30 SCRA 173).

xxx xxx xxx

"Another point that appellant asserts in support of their arguments that the testimony of Roque Dellomos is improbable is the fact that said witness focused his lighted flashlight upon the accused for *three minutes*, more or less. It is argued that such fact runs counter to the natural reaction of a person who has just been fired upon.' (p. 18, Appellant's brief).

"On cross-examination, witness Dellomos testified as follows:

"Atty. CORDENILLO:

Q. We are sure now Mr. Dellomos, that you allegedly saw Felipe Dueño below your house through a hole at the wall of your house, but not through the opening of the door of our house, am I right?

A. Yes, sir.

Q. And where did you let the light of your flashlight pass through, through the opening of the door, or through the hole of the wall of your house?

A. I focused my flashlight on the stairway, but because of the illumination of the light I saw Felipe Dueño through the hole of the wall of the house.

Q. How long was it from the first shot to the time when you focused the light of your flashlight through the door?

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A. Immediately after hearing the shot I took hold of my flashlight and focused my flashlight because I was surprised that Bernardo Demontaño had fallen.

Q. Shall we say five minutes?

A. *Perhaps about a minute. That is only an estimate because I had to stand yet and get the flashlight.*

Q. How long have you focused the light of your flashlight through the door?

A. No, sir, I did not expose my flashlight out of the door, but I just put the inner part of my flashlight in the opening of the door but the rays of the light has spread up to the wall of the house. (pp. 124-126, t.s.n.)[19]

xxx xxx xxx

"*Again appellant assails the testimony of witness Federico Dolfo as not worthy of credit and as unnatural.* His testimony is that while hiding among the banana plantation in front of his house near the barrio trail, he lighted (sic) his flashlight and focused the same upon the running persons whom he recognized to be the accused. (pp. 64, t.s.n., Nov. 4, 1964, Roque). Admittedly, this testimony is in corroboration to that of Dellomos as regards the identity of the accused. *Appellants ask: If the aim of Dolfo in going down his house was for his own safety, what purpose would there be to flash his light upon them while passing*? (p. 20, Appellant's brief). *Contrary to appellants assertion of falsity, such act of lighting on the running persons by witness was but a natural and instinctive act of anyone under such situation. He was not sure that the gun shots he heard were from the accused. x x x The fact that the accused did not stop to investigate who was lighting on them and did not fire on him is but a lucky stroke of fate.*"[20]

2. The position of the Solicitor General on the second assigned error, is also well taken. Thus —

"It is respectfully submitted that the identity of the accused as the perpetrators of the crime was clearly established by the evidence

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[19] Brief for Appellee, pp. 6-11.

[20] *Id.*, pp. 12-13.

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in the instant case and it being so we submit that the question of motive is not important (*People vs. Bautista*, 30 SCRA 558).

xxx xxx xxx

"Motive is relevant where the identity of the persons accused of having committed the crime is in dispute, where there are no eyewitness, and where suspicion is likely to fall upon a number of persons *(People vs. Portugueza,* L-22604, July 31, 1967). In the case at bar, the identity of the accused was positively proved by eyewitnesses, so motive is irrelevant."[21]

3. And finally, on the alibi, the People's brief correctly justifies the lower court's finding and conclusion. Thus —

"The trial court did not err in rejecting alibi as appellants defense. The evidence does not show that it was inherently impossible for the appellants to be at the scene of the crime on that fatal evening. It must be clearly shown not only that the accused was at some other place but as well that it was physically impossible for him to be at the scene of the crime at the time of its commission. (*People vs. Marquez*, L-24373-74, Nov. 28, 1969).

"The trial court stated:

"The distance of the alleged hideouts of the three accused in the town of Maayon, (Capiz) the seat of the crime is not very far. Maayon was formerly a barrio of the town of Pontevedra and a good road now running between vast sugarcane plantations, connects the two towns which are very accessible to each other by trucks, jeeps and automobiles. The crime took place about nine o'clock in the evening. One can be catching fish or doing carpentry work in Pontevedra during daytime and commit murder in Maayon in the evening." (p. 253, Rec.).

By way of resume then. The evidence for the prosecution establish that in the afternoon of January 21, 1963, the three accused-appellants fired upon Roque Dellomos and Federico Dolfo but missed them; and that in the evening of the same day, the three again were identified as the assailants who fired upon and killed Bernardo Demontaño who was mistaken for Roque Dellomos and/or Federico Dolfo. It also appears that

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[21] *Id.*, pp. 13-14.

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their defense of alibi was not worthy of credence. The guilt of the three accused-appellants, therefore, has been established and proved beyond reasonable doubt.

In specific regard to the circumstances attendant in the commission of the offense, Article 248 of the Revised Penal Code is clear that only one qualifying circumstance is necessary to qualify the offense as murder. In the present case, the trial court found that the two qualifying circumstances — treachery and evident premeditation — attended the commission of the offense and utilized both conjointly to qualify it to murder. This is error. As treachery sufficiently qualifies the killing to murder — evident premeditation having been also alleged in the information and proved, should be considered as a generic aggravating circumstance only.[22] However, jurisprudence is settled that evident premeditation cannot be appreciated in a case where, although the accused had planned the perpetration of the killing, the victim was different from the person whom the accused had originally intended to kill.[23] Thus, in the *Mabug-at case*,[24] We said that "(e)ven when there is sufficient proof of premeditation x x x, it cannot be considered as a qualifying circumstance x x x, because the person whom the accused intended to kill was not Perfecta Buralo, who was hit by the bullets, but her aunt Juana Buralo." In the case at bar, it was Roque Dellomos who accused-appellants intended to kill, but it was his nephew, Bernardo Demontaño, instead, who was shot at and hit and instantaneously died.

With respect to nighttime, the rule in *People v. Magsilang*[25] that except in special cases, the circumstances of treachery and nocturnity "always go together and are absorbed in the same offense" and that both "may well be regarded as complementing

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[22] See Aquino, *The Revised Penal Code*, Vol. 1, 1976 ed., p. 341, citing cases.

[23] *Ibid.*, citing *People vs. Mabug-at*, 51 Phil. 967 (1926) and *People v. Guevarra*, L-24371, April 16, 1968, 23 SCRA 58; see also *People vs. Guillen*, 85 Phil. 307, 318-319 (1950) and *People v. Umali*, 96 Phil. 185, 201 (1954).

[24] *Supra*, p. 970.

[25] 82 Phil. 217, 275-276 (1948).

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each other and (are) to be considered as one circumstance only, to qualify the killing as murder,"[26] applies in this case. Nocturnity, like abuse of superiority is absorbed in treachery because it forms part of the peculiar treacherous means and manner adopted to insure the execution of the crime. It facilitates the treacherous character of the attack. As an element of treachery, it would not be just to use it again as an aggravating circumstance.[27] Accordingly, nighttime, like evident premeditation, cannot be separately appreciated in the instant case.

There being no mitigating or aggravating circumstance, the penalty of life imprisonment or *reclusion perpetua* is the proper penalty in accordance with Art. 248, in relation to Articles 64, par. 1, and 77 of the Revised Penal Code.

The civil indemnity to the heirs of the deceased, however, should be raised from ₱6,000.00 to ₱12,000.00. The trial court's decision should accordingly be modified.[28]

As noted earlier, accused-appellants Felipe Dueño and Sofronio Dueño had withdrawn their appeals, and the decision of the trial court already became final and executory as to them. This decision is binding as to the third accused-appellant, Andresito Belonio, who pursued his appeal.

WHEREFORE, *with the modification that the indemnity to* be paid to the heirs of the deceased should be raised from ₱6,000.00 to ₱12,000.00 without subsidiary imprisonment in case of insolvency, the decision appealed from is hereby AFFIRMED. No cost.

SO ORDERED.

Aquino (Actg. Chairman), Concepcion Jr., Abad Santos, and *De Castro, JJ.*, concur.

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[26] Citing *U.S. v. Salgado*, 11 Phil. 56 (1908).

[27] See Aquino, *supra*, Vol. 1, 1961 ed., p. 305, citing cases.

[28] *People v. De Leon*, L-28480-1, Sept. 30, 1971, 41 SCRA 120; *People v. Abboc*, L-28327, 53 SCRA 54; *People v. Cardena*, L-29090, April 29, 1974, 56 SCRA 631.