Supreme Court E-Library

SECOND DIVISION

[G.R. No. L-32306. April 30, 1979]

THE PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **RUBICO SAGRE,** *defendant-appellant.*

SYLLABUS

1. **CRIMINAL LAW; JUSTIFYING CIRCUMSTANCES; DEFENSE OF RELATIVE; ELEMENTS.** — An accused may not be credited with the justifying circumstance of defense of relative (brother) where the evidence clearly shows that the provocation and unlawful aggression undoubtedly came from his brother and the means employed by him to repel the alleged "unlawful aggression of the deceased was not reasonably necessary under the circumstances."

2. **REMEDIAL LAW; EVIDENCE; CREDIBILITY; DEFENSE SHOULD SHOW WHY FACTS ESTABLISHED BY EVIDENCE IN THE TRIAL COURT SHOULD BE DISBELIEVED.** — The accused in a murder case cannot claim defense of relative and absence of treachery based solely on his version of the stabbing incident as testified to by his co-accused brother and another defense witness, which version is contrary to the facts established by evidence of record, if he has not shown why the trial court's findings-based on the consideration of the total evidence adduces-should be disbelieved.

3. **CRIMINAL LAW; QUALIFYING CIRCUMSTANCES; TREACHERY; WHEN APPRECIATED.** — There is murder qualified by treachery when it appears that the method of assault adopted by the aggressor was deliberately chosen with a special view to the accomplishment to the act without risk to the assailant from any defense that the party assailed may make.

4. **ID.; ID.; ID.; WHEN MAY BE APPRECIATED AGAINST ONLY ONE OF THE ACCUSED.** — While treachery, as a qualifying circumstance is a condition which should be considered against all persons participating or cooperating in the perpetration of the crime, where it (treachery) can only be imputed to one of the accused who inflicted the wound upon the deceased while the latter was struggling with the other defendant, although

Supreme Court E-Library

the two assailants helped each other in attacking the deceased, only the accused who inflicted the wound upon the deceased under treacherous circumstances may be found to have done so with treachery, since the evidence do not show that two assailants have conspired to take the victim's life.

5. **ID.; MITIGATING CIRCUMSTANCES; VOLUNTARY SURRENDER; MUST BE SPONTANEOUS.** — A surrender to be voluntary must be spontaneous, showing the intent of the accused to submit unconditionally to the authorities, either because he acknowledges his guilt, or because he wishes to save them the trouble and expense necessarily incurred in his search and capture. A surrender is not voluntary when forced by circumstances as when escape was impossible under the circumstances.

DECISION

SANTOS, *J.*:

Appeal by Rubico Sagre from the judgment of the Court of First Instance, Branch V, Iloilo, 11th Judicial District, Hon. Valerio V. Rovira, presiding, finding him and his brother Balbino Sagre guilty beyond reasonable doubt of murder defined and penalized in Article 248 and homicide defined and penalized in Article 249 of the Revised Penal Code, respectively, and sentencing them respectively to *reclusion perpetua* with all the accessory penalties provided for by law and imprisonment of not less than ten (10) years, eight (8) months of *prision mayor* as minimum, not more than fifteen (15) years, six (6) months and twenty (20) days of *reclusion temporal* as maximum with all the accessory penalties provided for by law and to jointly and severally indemnify the heirs of Ramon Adayon, Sr., the sum of ₱12,000 and the further sum of ₱54,000.00 for loss of income, plus the sum of ₱5,000.00 for moral damages, and to pay the costs. Balbino Sagre did not interpose any appeal from the judgment.[1]

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[1] Brief, Defendant-Appellant, Decision, pp. S & T.

Supreme Court E-Library

On November 25, 1969, the provincial fiscal of Iloilo filed an information against the Sagre brothers charging them with murder as follows:

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That on or about October 31, 1969, in the municipality of Buenavista, Sub-province of Guimaras, Iloilo, Philippines and within jurisdiction of this Court, the above-named accused, conspiring, confederating and mutually helping one another, armed with a knife (plaminco) and a kitchen knife, and with a decided purpose to kill by means of treachery and evident premeditation, did then and there willfully, unlawfully and feloniously attack, assault and stab one RAMON ADAYON, SR., with the weapon with which they were provided, thereby inflicting upon the latter multiple stab wounds on the vital parts of the body which caused the immediate death of said Ramon Adayon, Sr.

CONTRARY TO LAW.[2]

Upon arraignment on December 10, 1969, the two defendants pleaded not guilty. At the trial, the prosecution presented in evidence the testimony of the following witnesses: (1) Dr. Edgardo G. Jabasa, Rural Health Physician Policeman (2) Sgt. Ruperto Zaragoza, (3) Lorenzo Arellano, (4) Oscar Penit, (5) Ramon Adayon, Jr., and (6) Araceli Adayon, together with the Medico-Legal Autopsy Report dated November 4, 1969 issued by Dr. Edgardo G. Jabasa (Exhibit "A"), the knife used by Balbino Sagre in stabbing Ramon Adayon (Exhibit "B") with its scabbard (Exhibit "B-1"), the knife used by Rubico Sagre (Exhibit "C"), the pants (Exhibit "D"), bolo (Exhibit "E"), shirt (Exhibit "F") and handkerchief (Exhibit "F-1"), pictures showing the cadaver of Ramon Adayon (Exhibits "C", "C-1", "C-2", "C-3" and "C-4"), a sketch of the crime scene (Exhibit "H") showing the relative positions of the Diamante Jumping Horse (Exhibit "H-1") and the Shooting Gallery (Exhibit "H-3"); and the hat of the deceased (Exhibit "I") and his slippers (Exhibits "J" and "J-1). In his defense, accused (1) Balbino Sagre, adduced in evidence the testimony of (2) Aurelio Sta. Ana and that of his own, while

[2] *Id., id.*, p. B.

Supreme Court E-Library

accused (1) Rubico Sagre adduced in evidence in his defense his own testimony and that of (2) Balbino Sagre and (3) Aurelio Sta. Ana, together with documentary evidence consisting of the affidavit of Oscar Penit (Exhibit "I").[3]

The evidence for the prosecution establishes, as correctly synthesized by the trial court, the following —

"(A)t about 9:00 o'clock in the evening of October 31, 1969, Ramon Adayon and his son Ramon Adayon, Jr. left their home in Barrio Rizal, Buenavista, Iloilo, for Barrio Sto. Rosario, of the same municipality. When they arrived in Sto Rosario, they joined the game of the Diamante Jumping Horse which happened to be there because of the barrio fiesta which had just been over. They won a prize consisting of a glass bowl. They continued playing. Then Balbino Sagre arrived, drunk and shouting, "Stop the game. Who is the bravest man in this group?" brushing aside people who happened to be on his way. The hand of Ramon Adayon, Sr., which held the glass bowl was hit and the bowl fell down and was broken. Ramon Adayon asked, "What are you doing, Benong?' Balbino Sagre boxed Ramon Adayon and then drew his knife (Exhibit "B") and stabbed Ramon Adayon who was hit on the chin. Ramon Adayon held the hand of Balbino Sagre which held the knife (Exhibit "B") and the two grappled for the possession of the knife. The people scampered. Ramon Adayon shouted, "Help, dispossess him of the knife." No one came to dispossess Balbino of his knife. Then all of a sudden Rubico Sagre, the brother of Balbino, appeared and stabbed Ramon Adayon at the back. Forthwith, Ramon Adayon relaxed his grasp of the hand of Balbino who immediately freed himself and right then and there stabbed Ramon Adayon on his side. Ramon Adayon fell to the ground. The two brothers immediately rode on him and continued stabbing Ramon Adayon. Sgt. of Police Ruperto Zaragoza who was in the house of Victor Ramos heard the commotion. He jumped down and ran towards the feria blowing his whistle. When Sgt. Zaragoza reached the place of the incident, he met Rubico Sagre with butcher's knife (Exhibit "C"). Sgt. Zaragoza got the knife from him and brought him by the side of the road and told him to stay there. He returned to the place of the incident where he saw Ramon Adayon laying on the ground and Balbino Sagre standing by and

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[3] *Id., id.*, pp. B-D.

Supreme Court E-Library

looking at the deceased. He placed Balbino Sagre under arrest and twisted his hand which held the knife (Exhibit "B") and as a consequence the knife fell to the ground. He did not mind the knife but brought Balbino Sagre with Rubico Sagre to the barrio police station. While on their way, they met Patrolman Gabinete and two PD soldiers — S/Sgt. Lampa and Sgt. Trimañez. He turned over the persons of Balbino Sagre and Rubico Sagre to them. He returned to the crime scene. The cadaver of Ramon Adayon was still there. He looked for the butcher's knife (Exhibit "B"). He found it and its scabbard (Exhibit "B-1"). Pictures were taken of the cadaver of Ramon Adayon (Exhibits "G", "G-1" to "G-4") and a sketch was made of the crime scene (Exhibit "H"). At 10:00 o'clock the following morning, November 1, Dr. Edgardo G. Jabasa, Rural Health Physician of Buenavista, Guimaras, Iloilo, conducted an autopsy on the cadaver of Ramon Adayon, and on November 4, 1969, he submitted his Medico-Legal Autopsy Report (Exhibit "A") with the following findings:

1. Stabbed wound back, left side 1-3/4 inches wide, penetrating about 48 ins. from the sole of left foot, about 1 inch to the left of the midvertebral line directed anteriorly and slightly inferiorly and to the left with severe injury to the descending aorta, and trachea and penetrating the upper segment of the lower lobe of the left lung and injuring the posterior rib.

2. Stabbed wound, right side back 3/4 inch wide, about (1) inch from the midvertebral line, and 45 inches from the sole of right foot penetrating directed anteriorly and slightly inferior involving the lower lobe of right lung.

3. Stabbed wound 3/4 inch wide 44 inches from sole of right foot mid-axillary line, 9th ICS penetrating directed horizontally, slightly anterior and medially, penetrating the right diaphragm, right lobe of the liver and transverse colon.

4. Stabbed wound, 3/4 inch wide, right scapular region, 2 inches deep, non penetrating involving the skin, subcut tissue, scapular muscle, and grazing scapular bone.

5. Stabbed wound, left submandibular region, 3/4 in. wide, and 1 in. deep, involving skin and subcutaneous tissue.

Body is in state of *rigor mortis*. Hemothorax — left 2000 cc. *Paleness of viceral organs. Heart and big blood vessels* almost empty."

Supreme Court E-Library

Cause of Death: Instantaneous death due to shock, due to internal hemorrhage, severe, secondary to stabbed wound injuring the descending aorta. (Exhibit "A").[4]

Accused, now lone appellante, Rubico Sagre interposed defense of a relative, *i.e.*, his brother, co-defendant Balbino Sagre. He adduced his testimony and that of Balbino Sagre and Aurelio Sta. Ana and Exhibit "1", Affidavit of Oscar Penit. His version of the stabbing incident and the alleged surrender follows:

In the evening of October 31, 1969, a week after the barrio fiesta, there were still various games of amusement in the Barrio of Sto. Rosario, Buenavista, Guimaras, Iloilo, among which were the jumping horse and shooting gallery (t.s.n. pp. 12-13, Tauro and Tauro). At about nine o'clock of that same evening in the same place, the accused Balbino Sagre, younger brother of the accused-appellant, went to the jumping horse stand owned by a certain Mrs. Diamante with the intention of requesting the persons working therein to announce the loss of his son Arnaldo. When the accused Balbino Sagre was about to enter the jumping horse stand, he accidentally slightly touched the bowl the deceased Ramon Adayon, Sr. was holding as his prize for winning a game causing the same to fall. When Balbino Sagre was already inside the jumping horse stand, he was called by the deceased to go out and the said accused went out of the jumping horse stand whereupon he was confronted by the deceased in an angry and challenging manner as to why he did not apologize for his act. The accused Balbino Sagre asked for an apology and explained to the deceased that his act of touching the bowl was unintentional and without malice, whereupon the deceased Ramon Adayon, Sr. struck him with the bowl. Fortunately, the accused Balbino Sagre was not hit. Then the deceased boxed the said accused but again the latter was not hit as he was able to step backwards (t.s.n., pp. 18-21, Equia).

Inasmuch as there was no more place to step back as behind the accused Balbino Sagre was already the jumping horse stand and the deceased made the motion of pulling something from his back pocket, the said accused dashed towards the deceased, hugged him and later

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[4] *Id., id.*, pp. D-1; see also Brief, Appellee, pp. 2-4.

Supreme Court E-Library

on grabbed from his back pocket what turned out to be a small knife (Exh. "B"). At this juncture, the deceased being bigger and stronger than the accused Balbino Sagre, pushed the latter against the wooden railing of the jumping horse stand causing the back of the accused to hit one of the threaded bolts joining the wooden railings and wounding him at the back which wound bled profusely. Because the accused Balbino Sagre was no match in strength against the deceased, the said accused, in order to free himself from the grasp of the deceased made a thrust of the knife he was holding and hit the deceased on the left chin. After this, they grappled for the knife (t.s.n., pp. 21-22; 24-25, Equia).

While the above incident was taking the people around scampered for safety. The music from the jumping horse stand stopped. At about this time, the accused-appellant Rubico Sagre was in his house about 100 meters away cutting "*kangkong*" leaves for his pigs. All of a sudden, he heard people running near his house and shouting that his younger brother Balbino Sagre and the deceased Ramon Adayon, Sr. were stabbing each other near the jumping horse gallery. Upon hearing this and remembering that his children were also in the scene of the incident, the accused-appellant proceeded thereto whereupon arrival he saw his younger brother Balbino Sagre bloody at the back grappling for the knife (Exh. "B") with the deceased with the sharp pointed edge of the knife already pointed very close to the neck of his younger brother and the deceased was pushing it, and believing that the life of his brother was already in imminent danger as with one push from the deceased who was very much bigger and stronger the knife would penetrate the throat of his brother and kill him, the accused-appellant rushed towards the deceased and stabbed him once only as may be evidenced by the Autopsy Report (Exhibit "A") and by the declaration of Dr. Edgardo Jabasa (t.s.n., pp. 5, 9, Tauro and Tauro). The accused-appellant did not know which part of the body of the deceased was hit because the latter was moving at the time the former stabbed him (t.s.n, pp. 46-49, Equia; pp. 70-71, Tauro and Tauro).[5]

The trial court disbelieved and discredited as "untenable" appellant's theory and the alleged surrender, thus —

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[5] Brief, Appellant, pp. 6-10.

Supreme Court E-Library

As regards accused Rubico Sagre, he claims that he stabbed Ramon Adayon, Sr. in defense of relative. He said he stabbed Ramon Adayon once when he saw him (Ramon Adayon) with a knife (Exhibit "A") very close to and about to hit the neck of his brother. This claim is untenable because according to Rubico Sagre he stabbed Ramon Adayon while he (Ramon) and Balbino Sagre were grappling for the possession of the knife (Exhibit "A"). Rubico also claimed that Ramon Adayon saw him when he (Rubico) stabbed Ramon. This is untenable. Rubico Sagre stabbed Ramon Adayon at the back (Wound No. 2, Exhibit "A") and even if Ramon Adayon saw Rubico before the latter stabbed Ramon, the deceased could not do anything - he was practically helpless. The Court holds that Rubico Sagre stabbed Ramon Adayon with treachery. He committed murder.

They claimed that they voluntarily surrendered to Sgt. Zaragoza immediately after the commission of the felony. This claim is untenable. According to Police Sgt. Zaragoza he arrested both accused, although they did not resist arrest.

The claim of voluntary surrender is untenable. Police Sgt. Zaragoza testified categorically that he arrested Rubico Sagre with the weapon (Exhibit "C") in his hand, and after dispossessing him of the weapon and arresting him, he went to the place of the crime scene and there he saw Balbino Sagre standing and looking at the deceased while holding Exhibit "B". After twisting the hand of Balbino Sagre to force him to release the weapon, Sgt. Zaragoza arrested Balbino Sagre.

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The felony committed by Rubico Sagre as already said is murder defined in Article 248 of the Revised Penal Code with the qualifying circumstance of treachery. There are neither aggravating nor mitigating circumstances present in the commission of the felony which provides a penalty of *reclusion temporal* in its maximum period to death. Hence, the penalty prescribed by law shall be imposed in its medium period (subdivision 1, Article 64, The Revised Penal Code), of *reclusion perpetua*."[6]

Appellant appealed and now assails the judgment alleging that the trial Court erred —[7]

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[6] Brief, defendant-appellant, Decision, pp. N-Q.

[7] *Id., Id.*, pp. 11-12, & 23.

Supreme Court E-Library

(1) . . . in not acquitting the accused-appellant (Rubico Sagre) of the crime charged in the information on the ground of defense of relative.

(2) . . . in convicting the accused-appellant of murder charged in the information.

(3) . . . in not holding that the accused-appellant voluntarily surrendered to the proper authorities.

In support of the first and second assigned errors which appellant thru counsel *de parte*[8] argues jointly, he contends in connection with his claim of defense of his brother, Balbino, that all elements for such justifying circumstance are present in his case; that the provocation and unlawful aggression came from the victim, Ramon Adayon, Sr., now deceased, on the basis of the testimonies of Balbino Sagre and Aurelio Sta. Ana, another defense witness; and that the means employed by him was reasonably necessary as Ramon was much bigger and stronger than Balbino, and that he stabbed Ramon "with no other intention than that of saving the life of his brother."[9] Finally, he argues that even if his brother Balbino provoked the fight, his defense is still legitimate, because when the fight between Balbino and Ramon started at around 9:00 in the evening, he was not present and was in "honest belief" that his younger brother was a victim of aggression by Ramon Adayon, Sr.[10]

On the second assigned error, accused appellant argues that treachery does not exist in this instance since there is no evidence that he, prior to the moment of the killing, resolved to commit the crime or that the death of the victim was the result of meditation, calculation or reflection; that the prosecution utterly failed to prove that he deliberately and consciously planned to stab the deceased treacherously at the back.[11]

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[8] Atty. Alfonso V. Manayon of Bacolod City.

[9] Brief, Appellant, pp. 11-16.

[10] *Id., id.*, pp. 17-20.

[11] *Id., id.*, pp. 20-23.

Supreme Court E-Library

1. The claim of appellant that he is entitled to the justifying circumstances of defense of a brother is untenable and without merit. It is based solely upon his version of the stabbing incident which in turn is premised solely on his brother's and defense witness Sta. Ana's testimonies. But the same is contrary to the facts established by the evidence on record and as found by the trial court and he has not shown why the trial court's findings — based on the consideration of the total evidence adduced — should be disbelieved. As the People's Brief[12] explains by way of traverse of this first alleged error —

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x x x. Two eye-witnesses, Oscar Penit and Ramon Adayon, Jr. (son of the deceased), testified to the effect that when Balbino Sagre arrived at the Jumping Horse Stand at Barrio Sta. Rosario in the evening of Oct. 31, 1969, he said something like, "Stop the game, who is the bravest in this group?" And then, Balbino brushed aside Ramon Adayon, Sr., causing a 'prize' bowl that the latter was holding to fall to the ground where it broke into pieces. *At this juncture, Balbino drew a kitchen knife and thrust it upon Ramon, Sr. who was hit at the lower chin.* A commotion at the stand ensued while Ramon Sr. grabbed the hand of Balbino which was holding the knife as he shouted, 'Take away his knife.' but nobody came to help. *Just then, Rubico Sagre, the appellant, appeared from behind and stabbed Ramon, Sr. at the back. Balbino followed-up stabbing Ramon, Sr. at his right side, and then the latter fell to the ground sidewise. But as he fell, "they placed themselves on top (of Ramon, Sr.) and continued hacking him"* (pp. 40, 41, 43-46, t.s.n., Feb. 19, 1970, Tauro; pp. 50-52, t.s.n., March 12, 1970, Tauro).

From the above narration of facts, the provocation and unlawful aggression undoubtedly came from Balbino Sagre. It is argued, however, that even if Balbino provoked the fight, Rubico's defense of a relative is still legitimate because when the fight between Balbino and the deceased started at bout nine o'clock in the evening, the accused-appellant was not even in the scene of the incident. Appellant's contention is, therefore, 'honest belief' that Balbino, his

[12] Per Solicitor General now Justice Felix Q. Antonio, assisted by Acting Assistant Solicitor General Rosario A. de Leon and Solicitor Guillermo Nakar, Jr.

Supreme Court E-Library

younger brother, was a 'victim of aggression of the deceased' (pp. 17-19, Appellant's Brief).

We find appellant's contention hard to believe. It is admitted by the defense that when Rubico Sagre arrived at the scene of the scuffle, he saw Balbino holding a kitchen knife, although appellant claims to have seen Ramon Adayon, Sr. pushing the hand of Balbino (which was holding the knife) towards the neck of the latter (p. 47, t.s.n, April 1, 1970, Equia). *But from the defense's own admission, the one holding the knife was Balbino and Adayon had no weapon at all, it was easier to infer that Balbino was the aggressor.* Granting that Rubico's brother was then in danger because the knife he (Balbino) was holding was being pressed towards his throat, *the question arises as to the reasonable necessity of the means employed to repel the deceased' 'unlawfully aggression.'* Rubico first testified that he stabbed Ramon Adayon, Sr. 'in the course of his grabbing with Balbino,' and he altered his reply by saying that he stabbed Adayon when they were 'face to face with each other' and while Ramon Sr. and his (appellant's) brother 'were both holding their hands and the knife was very, very close to the neck of Balbino' (pp. 48, 50, 51, t.s.n., *supra*). *At such time, under the circumstances alleged by the defense, Rubico could very well have helped his brother subdue Adayon without the use of any weapon, and thus avert the danger that allegedly threatened Balbino.* Assuming that the passion of the moment overwhelmed Rubico, the use of his knife against Adayon in order to help his brother certainly did not justify stabbing Adayon with a fatal thrust (stab wound no. 1, Exhibit "A", p. 4, t.s.n. Jan. 26, 1970, Tauro). That the first thrust of the knife by Rubico must have been the fatal one is substantiated by the fact that from his testimony, he stated that after he stabbed Adayon, the latter released the hand of Balbino Sagre from his grip, whereupon, while Ramon Adayon, Sr., fell, Balbino also stabbed Ramon (p. 48, t.s.n., April 1, 1970, Eguia). It is interesting to note that the accused Rubico Sagre was unable (or hesitated) to reveal the part of Adayon's body which he hit with his knife, and that his testimony discloses a laborious attempt to make it appear that there was no treachery when Rubico stabbed Adayon. But the evidence on record does not suggest this trend of thought. It cannot be true, as contended by the Sagre brothers, that they each delivered only one thrust of their knives upon Adayon, because the medical report (Exh. "A") showed that a total of five (5) stab wounds were sustained by the deceased. This, in the face of the undisputed fact that only the Sagre brothers had fought with Ramon Adayon, Sr. and that immediately after the struggle between

Supreme Court E-Library

them, a policeman, a Sgt. Zaragoza, arrived and caused the former to be brought to the police headquarters (p. 14, t.s.n., Feb. 6, 1970, Tauro).[13]

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2. The claim under the second assigned error that the homicide was not qualified by treachery is also without merit. Thus, again, as the People's Brief explains, there is murder qualified by treachery when it appears that the method of assault adopted by the aggressor was deliberately chosen with a special view to the accomplishment of the act without risk to the assailant from any defense that the party assailed may make — which was the case of herein appellant. Thus —

When Rubico stabbed Ramon Adayon, Sr., the indications are that he hit the latter at the back (the fatal wound), considering that at that time Rubico arrived while his brother and the deceased were still struggling, and Rubico had an easier altho mobile target. With the least danger to himself, it was not unnatural for him to have struck Ramon Sr. at the back. *It has been held that there is murder qualified by treachery when it appears that the method of assault adopted by the aggressor was deliberately chosen with a special view to the accomplishment of the act without risk to the assailant from any defense that the party assailed may make* (*People vs. Calinawan*, 83 Phil. 647; *People vs. Tumaob*, 83 Phil. 738; *People vs. Abalos*, 84 Phil. 771). It is worth mentioning that during the struggle between Balbino Sagre and Ramon Adayon, Sr. Rubico Sagre appeared from behind all of a sudden and stabbed Adayon at the back (pp. 38, 44, t.s.n, Feb. 6, 1970, Tauro). This belies the accused's (Rubico) contention that when he stabbed Ramon, Sr., the latter was facing both the Sagre brothers (p. 50, t.s.n., April 1, 1970). *Even then, Rubico's own admission that 'Both Balbino and Ramon were running far from me, and in the course of their running from me, I hit him.' (p. 51, t.s.n., supra), lend credence to the theory of the prosecution that treachery was used by Rubico because he had to approach Adayon when he stabbed the latter, and when he did, Adayon was helplessly unknowing of his intentions, and even if he were, Adayon would not have threatened Rubico with any injury, for, he had no weapon with him.* There was, therefore, completely no risk to Rubico's life when he stabbed Adayon, as compared to the inverse situation

[13] Brief, Appellee, pp. 5-8.

Supreme Court E-Library

as against the deceased whose body was on the other hand exposed to the peril of Rubico's knife. The fact that it does not appear that Adayon had even tried to repel the attack by Rubico, the more underscores his helplessness or lack of awareness to the treacherous intrusion of Rubico.

Furthermore discrediting the defense version is that fact that two prosecution witnesses (Penit and Ramon Adayon, Jr.) testified having seen the deceased still being attacked by the Sagre brothers after he fell to the ground. This then explains the other wounds on the body of the deceased. The timely arrival of Sgt. Zaragoza prevented the two from inflicting further injury on Ramon Adayon, Sr. as his testimony showed that when he came upon the scene, Balbino who was bending over the body of the deceased 'was still in the act of stabbing with his fist closed.' (p. 22, t.s.n, Feb. 6, 1970, Tauro), while the appellant Rubico had just turned his back from the dead body 'maybe with the intention to escape . . .' (p. 23, t.s.n, *supra*). It must be noted that while Sgt. Zaragoza rushed to the scene, he was continuously blowing his whistle (p. 13, t.s.n., *supra*), and this could have warned the appellant who, upon Zaragoza's arrival, was in the act of running away.[14]

The finding and resolution of the trial court that under the information charging them for murder, Balbino is guilty only of homicide and Rubico of murder — where both Sagre brothers assaulted a common victim, Ramon Adayon, Sr. — is not unprecedented. Thus, in 1930, this Court, speaking through Mr. Justice Romualdez[15] held — in a similar case where two persons were charged with murder for the death of another — that while treachery, as a qualifying circumstance, is a condition which should be considered against all persons participating or cooperating in the perpetration of the crime, where it (treachery) can only be imputed to one of the accused who inflicted the wound upon the deceased while the latter was struggling with the other defendant, although the two assailants helped each other in attacking the deceased, *only the accused who inflicted the wound upon the deceased under treacherous circumstance*

[14] Brief, Appellee, pp. 9-11.

[15] *People v. Esteban Carandang, et al.*, G.R. No. L-32039, February 26, 1930, 54 Phil. Reports 503.

Supreme Court E-Library

may be found to have done so with treachery, since the evidence do not show that the two assailants have conspired to take the victim's life.

Prescinding from the foregoing discussions, the defense of relative invoked by appellant is not applicable for it lacks the essential elements of a clear unlawful aggression on the part of the deceased and reasonable necessity of means employed by appellant Rubico Sagre;[16] and since it is further established by the record that treachery attended the stabbing of Ramon Adayon, Sr., the accused-appellant committed upon the person of the deceased the crime of murder.[17]

3. In support of the third assigned error, appellant argues that he voluntarily surrendered to the proper authorities; that accused-appellant and his younger brother, Balbino, capitulated to Sgt. Zaragoza of the Buenavista Police Department; and that they did not offer any resistance nor did they try to escape.[18]

This argument is obviously without merit. The person to whom they surrendered, as the people's brief observes, is Sgt. Ruperto Zaragoza of the Police Force of Buenavista, Guimaras, Iloilo. He was a witness for the prosecution and his narration of the manner he placed appellant and his brother under arrest does not support the claim of the appellant. The Solicitor General continues thus —

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On the contrary, he (Sgt. Zaragoza) testified that he stopped Rubico Sagre from running, arrested the latter, and dispossessed him of the knife he was holding (Exh. "C"). Seeing then that Balbino who was bending over the body of Ramon Adayon, Sr., and in the act of stabbing the latter, Sgt. Zaragoza ordered Rubico to stand by the side of the road, and he proceeded to where Balbino was. *Immediately, he approached Balbino, took hold of his hand (which was holding a knife) and twisted it causing the knife (Exh. "B")*

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[16] Article 11(2), Revised Penal Code.

[17] Article 248, *id.*

[18] Brief, Appellant, pp. 23-28.

Supreme Court E-Library

to drop (pp. 13, 20-24, t.s.n., Feb. 6, 1970, Tauro). What the appellant is insisting on as voluntary surrender is the lack of resistance offered by the accused Sagre brothers when Sgt. Zaragoza arrested them. But as this policeman testified, "It was already impossible for Balbino (and Rubico) to resist because I already arrested him' (p. 24, t.s.n., *supra*). The actuations of the Sagre brothers as seen by this witness do not at all support the version of the defense which attempted to show that, after each of them had stabbed Ramon Adayon, Sr., Rubico immediately told his brother Balbino to surrender to the said policeman, and they both surrendered (pp. 48-49, t.s.n., April 1, 1970, Eguia). If they did surrender voluntarily, it would not have been necessary anymore for Sgt. Zaragoza to stop and arrest each of them from what they were doing at the time — Rubico, from running away; and Balbino, from further stabbing Ramon Adayon, Sr. — and to dispossess them of the knives they were caught with.

A surrender to be voluntary must be spontaneous, showing the intent of the accused to submit himself unconditionally to the authorities, either because he acknowledges his guilt, or because he wishes to save them the trouble and expense necessarily incurred in his search and capture. However, a surrender is not voluntary when forced by circumstances as when escape was impossible under the circumstances (Revised Penal Code, Luis B. Reyes, 1958 Rev. Ed., Book One, p. 179). This was in fact the situation of the Sagre brothers at the time. Under the circumstances, the appellant cannot be credited with the mitigating circumstance of voluntary surrender under Article 13, paragraph 7, of the Revised Penal Code.[19]

IN VIEW OF ALL THE FOREGOING, THE JUDGMENT APPEALED FROM IS HEREBY AFFIRMED *IN TOTO* WITH COSTS AGAINST APPELLANT.

SO ORDERED.

Fernando (Chairman), Barredo, Aquino, and *Concepcion, Jr., JJ.*, concur.

*Antonio,** *J.*, took no part.

Abad Santos, J., on leave.

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[19] Brief, Appellee, pp. 11-13.

* Justice Felix Q. Antonio filed the People's Brief as the Solicitor General.