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[G.R. No. L-37853. November 21, 1978]

THE PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **VICENTE CERCANO, ULEN CERCANO, JOSE CERCANO AND BERNARDINO LUMABAO, alias Eby,** *defendants,* **ULEN CERCANO and BERNARDINO LUMABAO *alias* Eby,** *defendants-appellants.*

SYLLABUS

1. **CRIMINAL LAW; CONSPIRACY; HOW ESTABLISHED.** — For a collective responsibility among the accused to be established it is not necessary or essential that there be a previous plan or agreement to commit the assault; it is sufficient that at the time of the aggression all the accused by their acts manifested common intent or desire to attack the victim, so that the act of one accused becomes the act of all.

2. **ID.; ID.; AGREEMENT NEED NOT BE IN WRITING OR EXPRESSLY MANIFESTED.** — While Article 8 of the Revised Penal Code apparently requires that for conspiracy to exist there must be an agreement concerning the commission of a felony, the requirement does not actually mean that the agreement be in writing or be expressly manifested it being sufficient that it can be implied from the acts of the conspirators or participants tending to show a common design to commit the crime. (Citing *Peo. vs. Clarit,* 3 SCRA 331)

3. **ID.; ID.; PROOF OF CONSPIRACY.** — Where the four accused, who were related to each other, respectively armed with a gun, knife, bolo and paddles, rode together in two bancas and headed towards the victims and almost simultaneously attacked the victim, this sequence of events shows a common purpose or design which justifies the finding that accused were guilty as co-principals under the principle of collective responsibility.

4. **ID.; QUALIFYING CIRCUMSTANCES; TREACHERY; WHEN NOT APPRECIATED.** — There is no treachery where the meeting between the accused and the victim was accidental and was not sought for, and the evidence does not show that the attack

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was sudden and unexpected insure its accomplishment without risk to the assailants.

5. ID.; MURDER; COMMITTED WHEN THERE IS ABUSE OF SUPERIOR STRENGH. — The killing is murder, notwithstanding the absence of treachery, where it is shown that the accused took advantage of their superior strength, as where four accused, armed with different weapons, assaulted their victim who was without means of defending himself against the concerted attack on his person.

6. ID.; ID.; QUALIFYING CIRCUMSTANCES; TAKING ADVANTAGE OF SUPERIOR STRENGTH; ABSENCE OF SPECIFIC WORDS OF THE REVISED PENAL CODE, NOT FATAL. — Where the information specifically states that the five accused "armed with a gun, a paddle and sharp pointed bolos, conspiring together and helping one another, "inflicted several wound on the victim which caused his death, such allegations would constitute the legal basis for a finding that the accused took advantage of their superior strength. What is essential is that the information contains a statement of facts which establish the qualifying circumstance "taking advantage of superior strength." The absence therefrom the specific words of the Penal Code is not fatal under the circumstances.

7. ID.; AGGRAVATING CIRCUMSTANCES; ABUSE OF SUPERIOR STRENGTH; WHEN MAY BE CONSIDERED AS QUALIFYING CIRCUMSTANCE. — "Abuse of superior strength," alleged in the information as an "aggravating circumstance," may justify a finding that the killing of the victim *was qualified by the use of superior strength.* What is essential is that it was alleged, and, having been alleged, it could be appreciated as a qualifying circumstance. Also, the fact that the information did not specifically mention or use the phrase "taking advantage of superior strength," its absence is cured by the narration of facts set forth in the information which compose precisely that particular qualifying circumstance. The use of the words "taking advantage of superior strength" without a statement of supporting facts would have been a mere conclusion.

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APPEARANCES OF COUNSEL

Geronimo O. Veneracion, Jr. (*Counsel de Oficio*) for appellants.
Solicitor General Felix Q. Antonio, Assistant Solicitor General Alicia V. Sempio-Diy and *Solicitor D. Aquino* for appellee.

DECISION

MUÑOZ PALMA, *J.*:

In a single Information dated October 31, 1972 filed with the Court of First Instance of Cagayan, Vicente Cercano, Ulen Cercano, Jose Cercano and Bernardino Lumabao *alias* "Eby" were charged with "Murder with frustrated murder" alleged to have been committed as follows:

"That on or about July 10, 1972, in the Municipality of Pamplona, Province of Cagayan, and within the jurisdiction of this Honorable Court, the said accused Vicente Cercano, Ulen Cercano, Jose Cercano and Bernardino Lumabao *alias* Eby, together with one John Doe, who is still unidentified and not yet apprehended, armed with a gun, a paddle and sharp pointed bolos, conspiring together and helping one another, with intent to kill, with treachery and with evident premeditation, did then and there wilfully, unlawfully and feloniously assault, attack, club, fire and stab Regino Bautista and Renato Mallabo, inflicting upon Regino Bautista several wounds on his body which caused his death and inflicting a wound on the body of Renato Mallabo.

"That the accused had performed all the acts of execution, which would have produced the crime of Murder, as a consequence on the person of Renato Mallabo, but which nevertheless, did not produce it by reason of causes independent of their own will.

"CONTRARY TO LAW." (p. 33, CFI record).

All the above-named accused pleaded "not guilty."

After trial, His Honor Judge Arnold A. Savella, Sr. rendered judgment on September 19, 1973, the dispositive portion of which reads:

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"WHEREFORE, the Court finds the accused Vicente Cercano, Ulen Cercano, Jose Cercano and Bernardino Lumabao *alias* Eby, guilty beyond reasonable doubt of the Crime of Murder with Frustrated Murder, defined and penalized under Article 248 of the Revised Penal Code in connection with Article 8 of the same Code.

"To the accused Vicente Cercano, crediting in his favor one mitigating circumstance, that of voluntary surrender which is offset by one aggravating circumstance, that of concealing the effects of the crime, he is hereby sentenced to the penalty of *RECLUSION PERPETUA*. To the accused Ulen Cercano, Jose Cercano and Bernardino Lumabao, there being no mitigating circumstance to be credited in their favor and with one aggravating circumstance that of concealing the effects of the crime, the Court has no other alternative than to impose the maximum penalty. Jose Cercano, Ulen Cercano and Bernardino Lumabao *alias* Eby are therefore sentenced to the maximum penalty of DEATH.

"All the accused are hereby sentenced to jointly and solidarily indemnify the heirs of the victim Regino Bautista in the sum of ₱30,000.00 as moral damages, and ₱12,000.00 for the loss of the life of Regino Bautista.

"All the accused Vicente Cercano, Ulen Cercano, Jose Cercano and Bernardino Lumabao alias Eby are also found by this court guilty beyond reasonable doubt of the crime of Frustrated Murder. Again, to Vicente Cercano in whose favor the mitigating circumstance of voluntary surrender has been considered, which is offset by one aggravating circumstance, he is hereby sentenced to suffer the penalty of 6 years and 1 day of *prision mayor* as minimum, to 12 years and 1 day *reclusion temporal* as maximum. On the part of the other accused Ulen Cercano, Jose Cercano and Bernardino Lumabao *alias* Eby, in whose favor no mitigating circumstance could be credited, but one aggravating circumstance can be appreciated, are hereby sentenced to undergo a prison term ranging 10 years and 1 day of *prision mayor* as minimum, to 17 years, 4 months and 1 day of *reclusion temporal* as maximum; to indemnify the offended party, Renato Mallabo the sum of ₱700.00 the corresponding expresses for medical treatment, and the further sum of ₱4,000.00 representing his actual loss on account of his failure to discharge his former occupation and another ₱10,000.00 as moral damages, without subsidiary imprisonment in case of insolvency taking into consideration the nature of the principal penalty imposed, and for all the accused to pay the costs jointly and severally." (p. 134-136, *ibid.*).

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The accused did not appeal from the judgment in the *frustrated murder charge*. No appeal likewise was made by *Vicente Cercano* from his sentence of *reclusion perpetua* in the *murder case*.

On November 26, 1973, the case was elevated to Us on automatic review of the death penalty imposed on the other three accused, namely, Ulen Cercano, Jose Cercano and Bernardino Lumabao. On December 3, 1973, Jose Cercano died in the New Bilibid Prisons in Muntinlupa, Rizal of "cardiac failure"[1] and, on July 25, 1974, the court dismissed the case as against him insofar as his criminal liability was concerned.[2]

This decision, therefore, refers to the two remaining appellants, Ulen Cercano and Bernardino *alias* "Eby" Lumabao.

At the start, We state that in the brief filed for the People by the Office of the Solicitor General it is recommended that in view of the absence of conspiracy, the herein appellants be adjudged guilty not of murder but only of *slight physical injuries* inflicted on the deceased Regino Bautista without any attendant mitigating or aggravating circumstance.[3] Counsel *de oficio*, Atty. Geronimo O. Veneracion, Jr. in turn pleads for appellants' acquittal of the charge.[4]

We are constrained to disagree with the Solicitor General, as well as, with the defense counsel.

The principal witness for the prosecution was Renato Mallabo, the victim in the frustrated murder charge, and from his testimony the following facts are duly established:

In the evening of July 10, 1973, Renato Mallabo and Regino Bautista went to the Cabaggan River in Cafagu, Pamplona, to catch fish and they settled about 14 meters from a portion

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[1] p. 51, *rollo*.

[2] p. 81, *ibid*.

[3] p. 28 of Brief at p. 79, *ibid*.

[4] Appellants' brief, p. 63, *ibid*.

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enclosed by a fence and indicated by signboards to be the private property of one Carlo Aquino. After the two had cast their fishing net two bancas appeared headed for the direction where Mallabo and Bautista were fishing. The two bancas "sandwiched" the banca of Bautista. In one banca were accused Ulen and Jose Cercano and on the other were Vicente Cercano, Eby Lumabao and a third person whose identity is undetermined. As all the five persons closed in, Ulen Cercano fired a shot. Ulen, Vicente and Jose Cercano and Eby Lumabao then started assaulting Regino Bautista. Ulen and Eby clubbed Bautista with paddles while Vicente and Jose stabbed him with bolos. Bautista fell into the water but was lifted back into the banca where the was again stabbed by Vicente Cercano. Thereafter, Ulen fired at Mallabo but missed and Mallabo raised his hands and pleaded that he be spared, but nevertheless Vicente stabbed him at the base of the neck, Mallabo fell prostrate in the banca and pretended to be dead. The victims were then brought in their banca to the opposite side of the river and were left in a thickly covered *nipa* swamp.[5]

Another witness for the prosecution, Patrolman Virgilio Suarez, in turn testified as follows:

At about 8:30 in the evening of July 10, 1972, he (Pat. Suarez) was on duty at the Pamplona Municipal Building. In the course of his duty, Vicente and Jose Cercano arrived and reported that they had killed Regino Bautista and wounded Renato Mallabo, and the two turned over a knife or sharp-pointed bolo marked by the prosecution as its Exhibit "B". Suarez reported the matter to the chief of police and in the company of some of the relatives of Mallabo, he and the chief of police went to the scene of the crime where they found the banca with the wounded Mallabo and the body of the victim, Bautista. Mallabo was taken to the police station where he gave his statements Exhibits "H" & "H-1" after which he was brought to the hospital while the body of Bautista was taken to the latter's home.[6]

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[5] tsn, Sept. 18, 1973, Vol. I, pp. 19-28; Vol. II, pp. 3-25.

[6] tsn, Sept. 17, 1973, pp. 30-38.

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Acting Chief of Police Alejandro Laragan corroborated the foregoing testimony of Pat. Suarez.[7]

The other witness was Dr. Isidro Acang, Municipal Health Officer, who conducted a post-mortem examination on the cadaver of Regino Bautista early the following morning. Dr. Acang prepared a written report of his *post-mortem* findings which showed that the deceased sustained the following injuries:

"*POSTMORTEM FINDINGS*

Body in a recumbent position. Palaness marked and generalized. *Rigor Mortis* marked and generalized. Presence of reddish mottlings at the dependent portion of the body which does not disappear upon pressure or change of position.

1. Contusion, mastoid region, left.
2. Contused-lacerated wound, occipital region, left.
3. Stab wound, thru & thru, measuring 3-1/2 x 1 inch, chest level of the 6th rib, 1 cm. to the right of the sternal line, directed from left to right and a little downwards.
4. Stab wound, penetrating, 1 x 1/8 inch, level of the 6th intercostal space, along the anterior Axillary line, left, directed from below upwards and to the right.
5. Incised wound, measuring 2 x 1/2 inch, level of the 10th rib, along the mid-Axillary line, left.
6. Stab wound, measuring 1/2 x 1/8 x 3 inches, middle third, posterior aspect, arm, left, directed from below upwards and anteriorly.
7. Stab wound, measuring 1 x 1/8 x 2 inches, middle 3rd, medial aspect, arm, left.
8. Incised wound, measuring 3 x 1 inch, Middle third, postero-medial aspect, forearm, left.
9. Contused wound, Scapular region, left.

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[7] tsn. Sept. 18, 1973, Vol. I, pp. 2-9.

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CAUSE OF DEATH:

HEMORRHAGE, Internal, severe secondary to stab wounds." (Exhibit "A", p. 2, CFI record).

Dr. Acang testified that contusion no. 1 was on the left side of the head of the victim at the back of the ear, and it was probable that the victim was hit from behind by a blunt instrument such as a boat paddle; contusion no. 2 located at the left occipital region was also inflicted from behind, and could have been caused by a boat paddle; stab wound no. 3 on the chest which penetrated the lungs was inflicted while the assailant was in front of the victim and could have been caused by a sharp-pointed instrument such as Exhibit "B"; stab wound no. 4 penetrated the heart and the same was inflicted by the assailant while facing the victim; incised wound no. 5 was on the level of the tenth rib, left side of the body of the victim; stab wounds nos. 6 and 7 were on the middle third left arm, and incised wound no. 8 was on the left forearm, all of which could have been caused by a sharp-pointed instrument and inflicted while the victim was raising his left arm; and contused wound no. 9 found on the left scapular region could have been inflicted on the victim with a paddle from behind.[8]

The defense gave a substantially different account of the incident.

Assuming sole participation in the occurrence, Vicente Cercano testified to the following effect:

On that particular night of July 10, he (Vicente) left his house and set out for the Cabanggan River to guard a fishpond belonging to Carlo Aquino and on his way, he picked up his cousin Eby Lumabao to keep watch with him; while they were in the river, Bautista and Mallabo entered the enclosure of the fishpond, threw in their fishing nets, and started fishing; Vicente and Eby approached the two and asked who sent them to fish in that place but got no reply; the two accused then asked for the fishing net but Bautista and Mallabo refused to lift the same;

[8] tsn. June 28, 1973, pp. 5-17.

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Vicente and Eby then retreated with the warning that the owner of the fishpond would be informed of the matter; at this point, Mallabo started attacking Vicente with a club and to protect himself Vicente stabbed Mallabo who fell down by the prow of the banca; glancing at his side, Vicente saw Bautista about to hack him with a bolo and so he rushed towards Bautista and stabbed the latter several times with a knife; Vicente then saw Mallabo about to pounce on him again and as Vicente prepared for a second encounter with Mallabo, Eby took hold of Vicente and tried to pacify him even to the extent of hitting the latter with the paddle but missed and the paddle hit instead the edge of the banca and it was broken into two pieces; at this juncture, a banca passed by and without knowing who were the persons in the banca, Eby shouted for help and it turned out that they were Vicente's uncles, Ulen and Jose Cercano who upon seeing the happening divested Vicente of the knife and advised the latter to surrender; Vicente and Jose went to the municipal building where Vicente surrendered himself, as well as the knife used by him, to the authorities.[9]

The other accused, disclaiming liability, declared substantially along the same lines testified to by Vicente Cercano.

1. We find the foregoing narration of the defense incredible bordering on the ridiculous. The trial Judge was justified in disbelieving the testimonies of the herein appellants with accused Vicente Cercano taking upon himself the sole responsibility for the death of Regino Bautista.

It is quite obvious that Vicente was being made the "fall guy" (a term used in the criminal world) for the benefit of his co-accused, more particularly, his uncles, Ulen and Jose Cercano, and cousin Eby Lumabao. In fact there are circumstances which belie Vicente's story. First, the nine (9) wounds of different nature and location sustained by Regino Bautista show that they were inflicted by more than one person and that more than one kind of weapons or instruments were used in the assault. Second, Vicente Cercano and Eby Lumabao surrendered to

[9] tsn, Sept. 18, 1973, Vol. III, pp. 4-12.

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the police that very same night of the happening and *the two* admitted their participation in the killing of Regino Bautista. Third, the verbal admissions of Vicente Cercano and Eby Lumabao were confirmed in the written statements given by them to Sgt. L.B. Lazo and Sgt. B.S. Tagudin of the Philippine Constabulary on September 6, 1972, marked respectively as Exhibits "E" and "F".

2. The able counsel *de oficio* discredits the testimony of Renato Mallabo and states that the latter could not have seen the incidents narrated by him because he was wounded ahead of Regino Bautista and it was dark on that particular night.

Examining the evidence, We find no valid grounds for not believing Renato Mallabo. This witness had no cause or reason for testifying falsely against and implicating the four accused. Mallabo was not at all related to the deceased Regino Bautista; the two were simply neighbors.[10] In fact, the herein appellant Ulen Cercano is a brother-in-law of Renato Mallabo.[11] Renato also stressed in his answer to the questions propounded by the trial judge that he had no misunderstanding at all with any of the accused.[12] We cannot overlook the observations of His Honor that Renato was reluctant at first to testify during the trial of this case presumably because of his relationship to appellant Ulen Cercano, and that he had to be arrested for his appearance in court, the judge noting that the accused were using "power and influence" to defeat the ends of justice.[13]

Thus, although the incident occurred at night, Mallabo could see what the accused did to Regino Bautista because the place was lighted by the flashlight which Ulen used at that time. Moreover, all the accused were known and familiar to Mallabo, hence, the latter could not have been mistaken in identifying the assailants of Bautista.

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[10] tsn, Sept. 18, 1973, Vol. II, p. 4.

[11] tsn, *ibid.*, pp. 16-17.

[12] tsn, *ibid.*, p. 17.

[13] pp. 26-27, CFI decision at pp. 129-130, CFI record.

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It is also not true as claimed by the defense counsel that Mallabo was wounded ahead of Regino Bautista and therefore could not have witnessed the "clubbing and stabbing" of the latter. Mallabo positively declared that after Ulen Cercano fired the first shot, all the four accused "clubbed" and stabbed Regino Bautista; that Vicente Cercano had a knife, Jose Cercano was armed with a bolo, Ulen had a gun, and both the latter and Eby Lumabao used a paddle in the assault; and that it was only after Bautista fell into the water and was lifted back to the banca, that he (Mallabo) was shot by Ulen and stabbed by Vicente Cercano.[14] Thus, Mallabo had all the opportunity to see how Bautista was attacked by the accused.

3. A common argument of the defense counsel and the Solicitor General is that *conspiracy has not been established.* The Solicitor General maintains that the testimony of Renato Mallabo does not show that all the four accused conspired to kill the victim Bautista, that each is liable only for his own acts, and all that the herein appellants inflicted were contusions amounting to slight physical injuries.[15]

We agree that there is no evidence to show a previous plan to kill Regino Bautista. The whole incident happened because the accused came upon Bautista and Mallabo fishing within or near the fishpond enclosure of Carlo Aquino which was under the care of Vicente Cercano.

But for a collective responsibility among the herein accused to be established, it is *not necessary* or essential that there be a *previous plan* or agreement to commit the assault; it is sufficient *that at the time of the aggression* all the accused by their acts manifested a common intent or desire to attack Bautista and Mallabo, so that the act of one accused became the act of all.

In *People v. Clarit, et al.,* 1961, this Court reiterated its earlier ruling in 1953 that while Article 8 of the Revised Penal

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[14] See footnote 5, *supra.*

[15] pp. 18-19, 26-27 of People's Brief.

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Code apparently requires that for conspiracy to exist there must be an agreement concerning the commission of a felony, that requirement does not actually mean that the agreement be in writing or be expressly manifested it being sufficient that it can be implied from the acts of the conspirators or participants tending to show a common design to commit the crime.[16]

In *People v. Castro, et al.*, 1964, this Court found the presence of conspiracy among the three accused who were charged with double murder of the Mayor of municipality of Cabugao, Ilocos Sur, and his wife, and held *inter alia* that while there was no direct evidence that a previous agreement was had among the three accused, however, their concerted action in going armed and together to their victim's house, and while one stayed as a lookout the other two entered and shot the mayor and his wife, leaving again together afterwards, admits of no other rational explanation but a conspiracy among them for which they are all liable for the crime charged as co-principals.[17]

In the early case of *People v. Mandagay, et al.*, 1923, wherein the two accused were charged with murder, this court held that both are co-principals by direct participation for although the intervention of one consisted merely in having struck a cut on the forearm of the offended party after the latter received from the other accused a cut on the neck, the presence of the former in the house where the crime was committed and his own aggression perpetrated on the person of the victim almost simultaneously with that committed by the other defendant, sufficiently show that he was not ignorant of the design to take the life of the deceased and therefore he is also responsible for the death as principal by direct cooperation.[18]

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[16] 3 SCRA 331, per Alejo Labrador, *J.*, citing *People v. Ging San, et al.*, L-4287, Dec. 29, 1953.

[17] 11 SCRA 699.

[18] 46 Phil. 838, citing a decision of the Supreme Court of Spain, April 16, 1977. See also *People v. Yu, et al.*, per Aquino, *J.*, 1977, 80 SCRA 382; *People v. Aleta, et al.*, 1976, 72 SCRA 542, among others.

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And in a very recent decision, *People v. Cagod, et al.*, 1978, this Court ruled *inter alia* that the acts of the two accused therein evinced a concerted effort and community of design to liquidate the victim. Their relationship as brothers-in-law, their being together at the scene of the crime, their leaving it at the same time, and other circumstances attending were *indicia* of a conspiracy to kill.[19]

We can see a parallelism between the *Cagod* case and this one before Us. The accused are related to each other — Vicente is a nephew of Ulen and Jose Cercano and a cousin of appellant Lumabao; the four, armed with a gun, knife, bolo, and paddles respectively, rode together in two bancas and headed towards Bautista and Mallabo and almost simultaneously attacked Bautista; when Bautista fell overboard his body was pulled back to the banca and he was again stabbed by Vicente; then appellant Ulen Cercano shot but missed Mallabo who was pleading to be spared after which the latter was stabbed on the neck by Vicente; afterwards all the accused brought the two victims to the opposite side of the river and abandoned them in their banca in a thickly-covered *nipa* swamp. This sequence of events clearly shows a common purpose or design which justifies the finding of the trial court that appellants are guilty as co-principals for the death of Regino Bautista under the principle of collective responsibility.

4. The next point to be considered is the nature of the crime committed and the penalty to be imposed. The trial court adjudged the appellants guilty of murder on the ground that although there was no evident premeditation the killing was committed with treachery.

Both the People and the *de oficio* counsel, Atty. Veneracion, submit that *alevosia* did not attend the assault.

According to the defense:

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[19] 81 SCRA 110, 118, per Aquino, J., Second Division.

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"1. treachery cannot be presumed but must be proved conclusively as the offense itself;

"2. the evidence in this case does not clearly show that the deceased was attacked from behind;

"3. in the absence of a determination which of the several wounds suffered by the deceased was inflicted first, then it is possible that the wounds at his back had been inflicted in the course of his fight with the four accused;

"4. treachery cannot be considered if the victim was forewarned or placed on guard." (p. 24, People's brief).

The Solicitor General in turn states:

"In the present case, the record bears out the fact that the two victims herein (Regino Bautista and Renato Mallabo) had noticed the approaching bancas of the four accused and when still about four meters away, accused Ulen Cercano fired a shot, which could have been just a warning shot since there is no testimony that the shot was aimed at Bautista and Mallabo (pp. 5, 7-8, 12, 13, t.s.n., Sept. 18, 1973, afternoon). Clearly, then, the victims had been forewarned of an impending attack against them by the four accused and were not, therefore, without a chance to meet or evade the assault. It is only if the victims were caught completely unaware and deprived of any chance to ward off the assault would it be proper to consider the existence of *alevosia* (*People v. Torejas*, L-29935, Jan. 31, 1972, 43, SCRA 158, 167). Under the circumstances, and considering that treachery should be proven as fully as the crime itself (*People v. Ardisa*, L-29351, Jan. 23, 1974, 55 SCRA 245), undersigned counsel cannot subscribe to the trial court's finding that the four accused assaulted their two victims in a treacherous manner." (p. 25, *ibid.*).

We agree that treachery is not present. The meeting between the accused and the victims at the fishpond coral of Aquino who by the way is a nephew-in-law of the municipal mayor of Pamplona, was accidental; it was not sought for. Moreover, the evidence does not show that the attack was sudden and unexpected to insure its accomplishment without risk to the assailants.

Notwithstanding the absence of treachery, We hold that the offense committed is murder for the reason that in assaulting

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and eventually killing Regino Bautista the accused took advantage of their superior strength. They were four, armed with different weapons, as against Regino Bautista who was without means of defending himself against the concerted attacks on his person. The testimony of the medical officer that the wounds on the left arm and forearm could have been inflicted while the deceased was raising or holding up his arm reveals a futile attempt of the victim to ward off the attack of his assailants who were too many for him.

Art. 248 of the Revised Penal Code, paragraph 1, provides:

"Art. 248. Murder. — Any person who, not falling within the provisions of article 246 shall kill another, shall be guilty of murder and shall be punished by *reclusion temporal* in its maximum period to death, if committed with any of the following attendant circumstances:

1. With treachery, *taking advantage of superior strength*, with the aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity." (italics supplied)

Any of the above circumstances is sufficient to qualify the offense to murder.

The Information filed here specifically states that the "accused Vicente Cercano, Ulen Cercano, Jose Cercano and Bernardino Lumabo *alias* Eby, together with one John Doe, who is still unidentified and not yet apprehended, *armed with a gun, a paddle and sharp pointed bolos, conspiring together and helping one another,* with intent to kill, with treachery and with evident premeditation, did then and there wilfully, unlawfully and feloniously assault, attack, club, fire and stab Regino Bautista and Renato Mallabo, inflicting upon Regino Bautista several wounds on his body which caused his death . . ." (italics supplied) These allegations which are borne out by the evidence constitute the legal basis for a finding that the accused-appellants took advantage of their superior strength in attacking Regino Bautista.[20]

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[20] *People v. Cunanan*, 1977, 75 SCRA 15.

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On this point, what is *essential is that the Information contains a statement of facts* which establish the qualifying circumstance "taking advantage of superior strength"; the absence therefrom of the specific words of the Penal Code is not fatal under the circumstances.

In *People v. Cagod* which was mentioned earlier, "abuse of superior strength" was alleged in the Information as an *aggravating* circumstance, nonetheless, the Court found the allegations in the Information sufficient to justify a finding that the killing of the victim was *qualified by the use of superior strength.*

The Court said:

"The killing is murder because of the presence of abuse of superior strength (*People v. Zabala Lusanta,* 86 Phil. 251, 258). Although from the viewpoint of the prosecution, the killing may be regarded also as treacherous (as concluded by the trial court), treachery, which was not alleged in the information, cannot be separately appreciated as a generic aggravating circumstance. It is merged with abuse of superiority.

"The Acting Solicitor General, although finding that there was abuse of superiority, recommends that the appellants should be convicted of homicide only. He assumes that evident premeditation, which was not proven, was the only qualifying circumstance alleged in the information.

"*That is a wrong assumption. It was alleged in the first paragraph of the information that the* two accused, with evident premeditation, with *intent to kill and each armed with a dagger and a bolo, did wilfully attack and stab Eliezer Castro.*

"Then in the second paragraph it was alleged that 'in the commission of the above crime, there existed one aggravating circumstance in the sense that the accused took advantage of superiority of strength.'

"*The manner in which abuse of superiority was alleged in the information is sufficient to qualify the killing as murder. What is essential is that it was alleged, and, having been alleged, it could be appreciated as a qualifying circumstance.*" (*supra*, p. 118; italics supplied).

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In this case now before the Court, the Information did not specifically mention or use the phrase "Taking advantage of superior strength," but its absence is cured by the narration of facts set forth in the Information which compose precisely that particular qualifying circumstance. The use of the words "taking advantage of superior strength" without a statement of supporting facts would have been a mere conclusion.

One last point is on the ruling of the trial court that "the concealment of the effects of the crime" is an aggravating circumstance to be taken against the accused. The Solicitor General correctly argues that there is no such aggravating circumstance under Articles 14 and 15 of the Revised Penal Code.

Considering that there is no mitigating nor aggravating circumstance present, the proper penalty to be imposed is *reclusion perpetua* which is the medium period of the penalty for murder.

IN VIEW OF THE ABOVE CONSIDERATIONS, We affirm the judgment of the trial court holding the appellants Ulen Cercano and Bernardino Lumabao *alias* Eby guilty of MURDER. We reduce however the penalty from death to *reclusion perpetua*. In all other respects the decision under review stands.

Decision mofidied.

SO ORDERED.

Fernando, Teehankee, Barredo, Makasiar, Santos, Fernandez, and *Guerrero, JJ.,* concur.

Castro, C.J., concurs in the result.

Antonio,[*] *Concepcion Jr.* and *Aquino, JJ.*, took no part.

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[*] Justice Felix Q. Antonio was then the Solicitor General who represented the plaintiff-appellee.