Republic of the Philippines
SUPREME COURT
Manila

En Banc

PEOPLE OF THE PHILIPPINES
Complainant-Appellee

Copy No._____

- versus –

G.R. No. 141660-64
AUTOMATIC REVIEW
(Crim. Case No. 96-66684
RTC of QC Branch 103,
ABADILLA MURDER CASE)

SPO2 CESAR FORTUNA, RAMESES DE JESUS, LENIDO LUMANOG, JOEL DE JESUS, and AUGUSTO SANTOS
Accused-Appellants

x----------x

BRIEF FOR ACCUSED-APPELLANTS

LENIDO LUMANOG AND AUGUSTO SANTOS

(AUTOMATIC REVIEW OF DEATH PENALTY)

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STATEMENT OF THE CASE

Nature of Action

This is an automatic review of the death penalty imposed on the five accused-appellants by the trial court in a criminal case for murder. Specifically, this is the Abadilla murder case: the ambush-shooting of former PC Metrocom Col. Rolando Abadilla on 13 June 1996 while he was in the driver's seat of hiscar caught in traffice along Katipunan Ave., Quezon City. The five accused-appellants - SPO2 Cesar Fortuna, Rameses de Jesus, Lenido Lumanog, Joel de Jesus, and Augusto Santos - have come to be known as the "Abadilla 5." This brief pertains to accused-appellants Lumanog and Santos but it supports the defenses and innocence of all five.

Summary of Proceedings

On 25 June 1996, the Information for murder was filed as Criminal Case No. Q-96-66684 in the Regional Trial Court (RTC) of Quezon City. It was initially raffled to Branch 86 under Judge Teodoro Bay. Actually, informations for theft (Q-96-66679) and illegal possession of firearms (Q-96-66680, Q-96-66682, & Q-96-66683) were also filed together with the one for murder. But since these other charges were dismissed in the trial court's Joint Decision on these five cases, we shall no longer discuss these other charges, except in so far as their dismissals also support the innocence of the accused-appellants for murder.

The previous day, 24 June 1996, the rounded-up suspects of the Abadilla murder were first brought out in public at a police press conference after several days when they were subjected to warrantless arrests, secret and incommunicado detention, intensive torture, and coerced confessions by their arresting officers. It was immediately after that press conference that the suspects were brought to the prosecutor's office for summary inquest. Also on that day, some of the wives of the presented suspects filed complaints for torture and other human rights violations with the Commission on Human Rights (CHR). This initiated a parallel proceeding to that of the Abadilla murder case.

On 10 July 1996, the Abadilla murder case was re-raffled to Branch 219 under Judge Jose Mendoza a week after Judge Bay inhibited himself. On 18 July, the accused were arraigned and pleaded "not guilty." Defense lawyers waived preliminary investigation in order to go straight to trial. The prosecution started its presentation of evidence on 1 August.

In the meantime, on 26 July 1996, the CHR issued its Resolution on the complaints of the Abadilla murder suspects and wives, finding that respondent police officers could have violated the visitorial rights and right to counsel of the suspects, including arbitrary detention of the latter, and forwarding the records of the case to the Department of Justice (DOJ). It is docketed there as I.S. No. 96-663 in August.

By April 1997, the prosecution in the Abadilla murder case rested its case with its Formal Offer of Evidence, anchored on the positive identification of the accused by eyewitness security guard Freddie Alejo. On 11 July, Judge Mendoza inhibited himself, and the case was subsequently re-raffled to Branch 103 under Judge Jaime Salazar, Jr. The latter therefore had not personally heard and observed any of the testimonies of the prosecution witnesses, including Alejo. On 14 August, the trial court dismissed the case as to accused Arturo Napolitano based on his demurrer to evidence.

On 10 December 1997, the several defense lawyers started presentation of evidence for each of the accused. Most of 1998 was devoted to presentation of evidence for the defense, with alibi and denial as the main defenses. On 23 April 1999, the defense rested its case with the filing of several formal offers of evidence, notably the one for accused Fortuna.

On 11 August 1999, the trial court of Judge Salazar promulgated his Joint Decision dated July 30, 1999 sentencing the "Abadilla 5" to death based mainly on their positive identification by eyewitness Alejo. It however acquitted accused Lorenzo delos Santos notwithstanding his identification by Alejo and his earlier signed confession,

saying his alibi was supported by a credible witness, unlike the one of his nephew and ally accused Santos.

On 25 August 1999, accused Lumanog filed a Motion for Reconsideration on grounds of insufficiency of evidence to prove guilt beyond reasonable doubt. Relatedly, accused Joel de Jesus filed a Motion for New Trial to present two new alibi witnesses. On 25 November, accused Lumanog filed a Supplement to the Motion for Reconsideration, critiquing the Joint Decision as regards respect for constitutional and human rights, and raising for the first time the Alex Boncayao Brigade (ABB) angle of defense for the first time, with prayer/motion to introduce additional evidence thereon.

On 19 January 2000, Fr. Roberto Reyes filed an urgent Independent Motion for Leave of Court to Present Vital Evidence in support of the ABB angle. A hearing on the motion was set for 26 January.

On 25 January 2000, the trial court denied accused Lumanog's Motion for Reconsideration, the Supplement thereto and other related pending manifestations and motions, as well as accused Joel de Jesus' Motion for New Trial.

At the 26 January hearing of Fr. Reyes' motion, the trial court denied it in open court, followed by an elaborated Order on 28 January.

On 11 February 2000, the records of the Abadilla murder case were transmitted to the Supreme Court for automatic review, docketed as G.R. No. 141660-64, the case at bar.

On 15 March 2000, four of the "Abadilla 5" led by petitioner Lenido Lumanog filed a Petition for Certiorari (Rule 65) in the Supreme Court, questioning respondent Judge Jaime Salazar, Jr.'s denial of his motion to present additional evidence on the ABB angle, and docketed as G.R. No. 142605. On 18 July, the Supreme Court consolidated this with the automatic review.

On 7 September 2001, the Supreme Court dismissed the Petition for Certiorari in G.R. No. 142065, ruling that there was no grave abuse of discretion. The Decision has since been published as Lumanog vs. Salazar, Jr. (364 SCRA 719).

On 26 April 2002, in the automatic review, accused-appellant Lenido Lumanog filed a Motion for New Trial and Related Relief with 21 exhibits and 21 annexes of proposed additional evidence mainly on the ABB angle. On 5 May, the Supreme Court summarily (without hearing and opposition) denied the Motion for New Trial. On 17 September, it again denied the same.

On 15 July 2003, the Supreme Court ordered several counsels for the accused-appellants to file their briefs for the automatic review. Several motions for extension of time to file the same were made and granted, with subsequent filing. Several briefs are now for the consideration of the Supreme Court in the instant automatic review of the death penalty in the Abadilla murder case, G.R. No. 141660-64.

In the meantime, the preliminary investigation of the complaints of the Abadilla murder suspects for torture and other human rights violations by their arresting police officers, I.S. No. 96-663, has remained pending without final resolution in the DOJ.

Appealed Judgment and Orders; Nature Thereof and of the Controversy

The appealed judgment and orders in the Abadilla murder case (Crim. Case No. Q-96-66684, RTC of Quezon City, Branch 103) are as follows, certified true photocopies of which are annexed to Copy No. 1 of this Brief):

Annex A - Joint Decision of July 30, 1999

This is the judgment of conviction, after full-blown trial, finding the five accused-appellants guilty of the murder of ex-Col. Rolando Abadilla and sentencing each to death.

Annex B - Order dated January 25, 2000

This is the Order denying all various pending motions after the promulgation of judgment of conviction, Annex A. The pending incidents refer mainly to accused Lenido Lumanog's Motion for Reconsideration dated August 25, 1999, the Supplement thereto

dated 25 November 1999, and several other related manifestations and motions mainly to present additional evidence on the ABB angle. They also include accused Joel de Jesus' Motion for New Trial dated August 31, 1999 to present to new alibi witnesses.

Annex C- Order dated January 26, 2000

This is the initial short Order given in open hearing denying Fr. Roberto Reyes' Urgent Independent Motion to Present Vital Evidence dated January 19, 2000 in support of the ABB angle.

Annex D - Order dated January 28, 2000

This is the long Order elaborating on the immediately preceding Order, Annex C.

The nature of the controversy has to do not only with the guilt or innocence of the accused-appellants based on the available evidence but also whether their constitutional and human rights were respected, from arrest up to conviction and even up to the reconsideration stage, when they sought a last chance to present additional evidence to prove their innocence. In addition, the death penalty itself imposed on the accused-appellants is under controversy here.

STATEMENT OF THE FACTS

The Abadilla Ambush-Killing

In the morning of June 13, 1996, Col. Rolando Abadilla left his residence driving his black Honda Accord. His wife, Mrs. Susan Abadilla, saw him off and minutes later, received a call from the colonel. Minutes later, another call came, this time from the husband's tailor. She was informed of an accident involving her husband. Proceeding to the Quirino Memorial Medical Center, Susan Abadilla found her husband already dead. (TSN, September 18, 1996, pp. 31-35).

The colonel drove along Katipunan Avenue heading southwards to Santolan. When his car got stalled in traffic, four (4) unidentified men approached his car and fired at the colonel. (Sworn Statement, Herbas, Espiritu)

Several witnesses saw the four unidentified gunmen proceed to a KIA Pride, asked the driver and passengers to get out and drove the KIA Pride towards J. P. Rizal. (Exh. _____, Sworn statements of Minella Alarcon and Merlito Herbas)

The Police Investigation

Police investigators SPO2 Willy Magundacan, SPO2 Gerry Daganta, PO1 Francisco and P/Insp Edward Villena proceeded to the crime scene and arrived at about 8:45 a.m. (TSN, September 7, 1996, pp. 13-14). The police investigators found the Honda Accord with plate number RNA 777 with the left door opened and found the bloodied body of the victim sprawled at the pavement. (p. 14.)

PO2 Gerry Daganta, PO1 Ronald Francisco and Cesar Espiritu, a civilian who was the first to approach the victim after the perpetrators had left, then brought the victim to Quirino Memorial Medical Hospital. (p. 15). Magundacan was left in the area to preserve the crime scene while Villena went back to the police station to get a camera. (*ibid*., p. 16).

PO2 Daganta went back to the crime scene and gathered the spent shells and slugs (p. 18) which were later secured by SPO1 Arlin Habitan (19). These slugs and spent shells were later on turned over to Officer Jurado at the police station 8 (104-105) and later on transmitted to Crime Lab for ballistic examination. (106-109).

Another set of police officers, this time from the CID-CPDC, Camp Crame proceeded to the hospital where the victim's body was brought. There were actually three teams that proceeded to the crime scene. The first team is composed of Officers Jurado, Gonzales and Gutierrez. The second team is composed of Officers Nicanor and Castillo and the third is composed of Officer Jaraza and the follow up team. (p. 60). Officer Jurado interviewed the persons who brought the victim to the hospital. (74)

While at the hospital, the CID-CPDC investigators monitored over their radio that an abandoned car was reported found at Aguinaldo St. in Proj. 4. (p. 73)

At about 10:00 a.m. that same morning (77) P/Insp. Rogelio Castillo together with Nicanor, found the abandoned KIA Pride with plate no. PTZ 401 (78) at Aguinaldo St., in Proj. 4 (76). They found the KIA Pride with blood stains in the right front and right rear door knobs.(80)

Castillo and Nicanor interviewed three or four persons who told them that four men "hurriedly alighted from the vehicle." (81) These informants described the suspects as 30-35 years old, almost the same age, one of them was about 5'7" or 5'8" in height and the other is smaller. (83) These police officers waited for crime lab technicians to arrive at the area. When Sr. Insp. Lily Corpuz (87), Remedios Dedicatoria (TSN, January 9, 1998, p. 31), and another crime lab technicians arrived, the two police officers, Castillo and Nicanor proceeded to the crime scene.

Castillo and Nicanor arrived at the crime scene shortly before 11:00 a.m. (p. 88) They no longer saw the car as it was already brought to the police station. (90). They interviewed three to four persons in the area and was told that four men shot at a man driving a black car. (92-93). After preparing a rough sketch of the area, the two police officers went to the police station 8. (100) where several witnesses were also brought for their statements.

Crime lab technicians lifted fingerprint samples from the two cars: the Honda Accord with Plate No. RNA 777 and the KIA Pride with Plate No. PTZ 401. These fingerprint samples were later compared with fingerprint samples from all the accused in this case.

The Honda Accord was then brought to the police station by PO1 Ronald Zamora and PO2 Daganta. (p. 31)

The CID-CPDC Camp Crame took over the investigation from the police officers. (p.32)

Witnesses Merlito Jerbas, Freddie Alejo, Minella Alarcon, Cesar Espiritu and Aurora Urbano were interviewed by the police officers and were brought to their headquarters in Camp Karingal where their formal statements were taken. (TSN, August 7, 1996 p. 117).

The Accused-Appellants

Lenido Lumanog and Rameses de Jesus

At around 7:00 in the evening of June 12, 1996, Lenido Lumanog together with Rameses de Jesus, Romeo Costibolo, Manny dela Rosa and Bonnie Mandalog left Fairview for Mabalacat, Pampanga arriving there at around 10:00 p.m. (TSN, August 20, 1998, pp. 5-6. March 9, 1999, p. 7, 11).

From 12:00 midnight until about 4:00 a.m. of the next day, the group were digging for treasure at the compound of the Tiglao Residence, in front of the Mabalacat Church. At. 4:00 a.m. until about 10:00 a.m. they slept inside the bodega in the same compound. Costibolo was the first to wake up and and he woke up all his companions, Lumanog, Rameses, Bobby and Boni. They then helped the Tiglao family for the celebration of the wedding anniversary until about 12:00 noon after which they joined in the celebration. At 6:00 p.m. they resumed their digging. (TSN, August 20, 1998, pp. 10-14; TSN, March 9, 1999, p. 12-17).

It was only on June 14, 1996 when Lumanog, Rameses de Jesus and Costibolo went back to Manila to get provisions arriving at 10:00 a.m. Bonnie and Manny were left at Mabalacat, Pampanga. (TSN, August 20, 1998, p. 15-17; March 9, 1999, p. 19). The three, Lumanog, de Jesus and Costibolo went back to Mabalacat on June 19, 1996.(TSN, August 20, 1998, p. 18)

On June 20, 1996, Lumanog, Costibolo and Rameses de Jesus, again went back to Fairview to visit Costibolo's son who was confined at the Fairview West View Polymedic. It was around 10:00 in the evening when they reached the place and it was there where police operatives arrested them without any warrant. (TSN, August 20, 1998, p. 21; TSN, March 9, 1999, pp. 20-24).

Augusto Santos

On June 13, 1996, Augusto Santos left their home in Fairview before 7:00 a.m. He fetched his brother-in-law, Jonas Ayhon, before they proceeded to the Fabella Hospital where Dorothy, Augusto's sister and Ayhon's wife, delivered a baby on June 11, 1996. The mother and child were to be discharged from the hospital that day.

Augusto Santos and Jonas Ayhon arrived at the Fabella Hospital at around 7:00 a.m. It was not until about 2:00 p.m. of that same day that Dorothy and her child were discharged. They then proceeded home.

The Arrests of the Accused

On June 19, 1996, at about 4:00 p.m. PARAC and CPDC operatives arrested Joel de Jesus (TSN, November 12, 1996, p. 28) after a stake-out which began at 2:00 p.m. that same day. Freddie Alejo was with the CPDC operatives where he was shown pictures of Alias Tabong before he was made to identify the person they arrested who turned out to be Joel de Jesus.

After the arrest, Joel de Jesus was turned over to the CID-CPDC for investigation (p. 30). On that same day, the CPDC investigators informed the team of Capt. Macanas through their superior Col. Baluyot, that Joel de Jesus "made some revelation (sic) with regard to his participation in the killing of ex-Col. Abadilla (p. 32-33). Capt. Macanas and the CID-CPDC then conducted joint follow-up operations where they brought Joel de Jesus along to "g[i]ve a hand in identifying his companions in the killing." (p. 33-34). Between 8:00 or 9:00 p.m. of June 19, 1996 (TSN, December 10, 1996, p. 21), the group was allegedly led by Joel de Jesus somewhere in Fairview along Ruby Street wherein his

other alleged companions namely Ram, Lorenzo delos Santos, Ogie, one Alias Cesar could be found, (TSN, November 12, 1996, p. 35) based on Joel de Jesus' purportedly volunteered information (TSN, December 10, 1996, p. 18). Joel led them to the house of Ram de Jesus but they did not find Ram there. Instead, Joel de Jesus pointed to Cesar Fortuna and the arresting team, immediately effected the arrest of the latter, minutes before midnight. (TSN, November 12, 1996, pp. 36-40). Past midnight that same evening, the operatives apprehended Lorenzo delos Santos. (TSN, _____) look for transcript.

The Torture of the Accused

Subsequent Events

While the case was pending, Fr. Robert Reyes received from a known ABB personality the wristwatch which was taken from the victim. This piece of evidence was sought to be introduced but the trial court denied the motion.

STATEMENT OF THE ISSUES

The issues are basically found in the Assignment of Errors. The issues of fact and law may be outlined as follows:

1. <u>Guilt or innocence of the accused-appellants based on the available evidence</u> -

This is mainly a factual or evidentiary matter covered by the discussion of the Argument regarding Assigned Errors II, III, IV, V, VIII, IX, X, XI & XII.

Assigned Errors II, III & IV relate to impugning the so-called positive identification by lone eyewitness for the prosecution Freddie Alejo on which the trial court anchored its judgment of conviction. Much prominence and space is therefore given to their discussion.

Assigned Error VIII relates to the improperly appreciated alibi defenses of accused Augusto Santos and Lenido Lumanog. Relevant to this is Assigned Error IX regarding the personal circumstances of the several accused and the circumstances of their arrest which belie both guilt and conspiracy.

Assigned Error X is particularly important because it relates to reliable physical evidence which supports the defenses and innocence of the accused.

Assigned Errors XI & XII relate to the Alex Boncayao Brigade (ABB) angle of true responsibility for the Abadilla murder, with the proposed additional evidence thereon being proferred by way of offer of proof in this very brief and for this automatic review.

2. <u>Respect for constitutional and human rights</u> -

This matter may be factual, legal or both, and is treated in Assigned Errors V, VI, VII and even XI & XII. Assigned Error V deals with the particular case of torture and coerced confessions of accused Joel de Jesus and Lorenzo delos Santos. Assigned Error VI deals more generally with the gross violations of the constitutional and human rights of the accused during their arrest, detention and custodial investigation. This also has exclusionary implications on some evidence.

Assigned Error VII deals with the trial court's own violations of the constitutional rights of accused Lenido Lumanog in the judgment of conviction itself. Assigned Errors XI & XII deal with the trial court's own violations after promulgation of judgment and during its reconsideration stage.

3. <u>Constitutionality of the death penalty</u> -

This legal issue is raised through Assigned Error I. The reason it is placed up front is explained in the relevant discussion of assigned Error I under the next part "Argument" which immediately follows.

ARGUMENTS

I. THE TRIAL COURT ERRED IN IMPOSING AN UNCONSTITUTIONAL PENALTY, THE DEATH PENALTY, AT LEAST FOR MURDER UNDER R.A. NO. 7659.

The trial court, in its appealed Joint Decision of July 30, 1999, found all accused-appellants GUILTY of MURDER "with the aggravating circumstances of treachery (absorbing abuse of superior strength) and evident premeditation," and sentenced each "to suffer the penalty of DEATH," but which, we submit, is an unconstitutional penalty. R.A. No. 7659, at least insofar as it classifies murder as a heinous crime and metes the death penalty therefor, is unconstitutional.

Conventional wisdom has been that "It is a well-established rule that a court should not pass upon a constitutional question and decide a law [or part of it] to be unconstitutional or invalid, unless such question is raised by the parties, and that when it is raised, if the record also presents some other ground upon which the court may rest its judgment, that course will be adopted and the constitutional question will be left for consideration until a case arises in which a decision upon such question will be unavoidable." (*Sotto vs. Comelec*, 76 Phil. 516, 522; *Lalican vs. Vergara*, 276 SCRA 518; *Co Chiong vs. Dinglasan*, 79 Phil. 122)

Thus, in *People vs. Pinca* (G.R. No. 129256, November 17, 1999), where the third issue was the constitutionality of the reimposition of the death penalty on the crime of murder, the Court did not find the resolution of this issue the very *lis mota* of the case. Similarly, in the earlier parricide case of *People vs. Malabago* (265 SCRA 198), the Court also ruled that "Death not being the *lis mota* of the instant case, the Court has to await for a more appropriate case to pass upon the constitutionality of R.A. No. 7659, as amended."

That has been the conventional wisdom. But there is a time also for unconventional wisdom. To quote by analogy the dissenting opinion of Mr. Justice

Santiago M. Kapunan in the *Balikatan* exercises case of *Lim vs. Executive Secretary* (G.R. No. 151445, April 11, 2002), "The issues raised are of transcendental importance… If the time is not ripe to challenge the continuing affront against the Constitution and the safety of the people, when is the right time? When the countryside has been devastated and numerous lives lost?" In like manner, how many more murder cases on automatic review and how many more lethal injection executions will it take before "a more appropriate case" comes along? RA 7659 has been in the statute books since 1993 or for 10 years already. What could be a more appropriate murder case than this celebrated Abadilla murder case?

In fact, murder rather than rape (the crime in the *Echegaray* cases) is a most appropriate case for a re-examination of the constitutionality of the death penalty (and the *Echegaray* rulings), in fact not just for murder but for all cases. The irony is not lost on us that a certain magistrate, Judge Fulco, once wrote: "…I can state that nothing gave me the sort of bad conscience I felt in the face of the kind of *administrative murder* that is called capital punishment."[1] (italics supplied) This Court *en banc* itself once said in similar terms: "The case at bar involves the imposition of the death penalty. With all our frailties, we are asked to play the role of an infallible God by exercising the divine right to give or take away life. We cannot err in the exercise of our judgment for our error will be irrevocable. Worse, our error can result in the worst of crimes – *murder by the judiciary*." (*People vs. Alicante*, G.R. No. 117487, December 12, 1995, italics supplied)

And what can be more transcendental than death, whether by murder or by execution? As early as the Emergency Power Cases (*Araneta vs. Dinglasan*, 84 Phil. 368; *Rodriguez vs. Gella*, 93 Phil. 603), the Court has allowed taxpayer's suits where serious constitutional issues are involved since, "the transcendental importance to the public of

[1] As quoted in Fr. Fausto B. Gomez, O.P., "The Death Penalty and Healthcare Professionals" (University of Sto. Tomas, Manila, February 7, 1997). Some arguments here are used in this brief.

these cases demands that they be settled promptly and definitely, brushing aside… technicalities of procedure."

The *Echegaray* cases, *People vs. Echegaray* (267 SCRA 682) [hereinafter, *Echegaray I*] and *Echegaray vs. Executive Secretary* (297 SCRA 754) [hereinafter *Echegaray II*], are not, and cannot be, the last word on the death penalty constitutionality issue. These are cases of mandatory death penalty, not discretionary death penalty like the case at bar. *Echegaray I* itself ruled (at pp. 722-23) that "As to other crimes in R.A. No. 7659 punished by reclusion perpetua to death [e.g. murder]… The proper time to determine their heinousness in contemplation of law, is when on automatic review, we are called to pass on a death sentence involving crimes punishable by reclusion perpetua to death under R.A. No. 7659, with the trial court meting out the death sentence in exercise of judicial discretion." We submit that it is not only heinousness of the crime that is to be determined in such case but also the constitutionality of the punishment.

But to quote further the guidance from *Echegaray I* (at p. 723): "Thus, construing R.A. No. 7659 in *pari materia* with the Revised Penal Code, death may be imposed when: (1) aggravating circumstances attend the commission of the crime as to make operative the provision of the Revised Penal Code regarding the imposition of the maximum penalty; and (2) other circumstances attend the commission of the crime which indubitably characterize the same as heinous in contemplation of R.A. No. 7659 that justify the imposition of death, albeit the imposable penalty is reclusion perpetua to death." (underscoring supplied) The two sets of circumstances must concur.

At this juncture, we have to seize the moment to point out that in the trial court's appealed judgment of conviction imposing five death sentences there is only discussion of the aggravating circumstances but no discussion, not even mention, of the key other circumstances like "heinousness" and "compelling reasons" that might justify the imposition of the death penalty. On this score alone, therefore, the death penalty should

be eliminated as an imposable penalty, if any there is to be, in the case at bar. We want to get this sword of Damocles, as it were, out of the way first before proceeding to show the innocence of the accused-appellants.

In a way, this reverses the order or sequence of the two-step process of decision-making or voting by the High Tribunal in capital cases: first the issue of the guilt of the accused, then the question on the imposition of the death sentence itself (*People vs. Purazo*, G.R. No. 133189, May 5, 2003).

We now proceed to argue the unconstitutionality of the death penalty not only in murder cases but in all cases, at least in the operative framework of the present death penalty law, RA 7659. As the separate (dissenting) opinion in *Echegaray I* already noted: "RA 7659 did not change the nature or the elements of the crimes stated in the Penal Code and in the special laws. It merely made the penalty more severe… RA 7659 itself merely selected some *existing* crimes for which it prescribed death as an applicable penalty… By merely reimposing capital punishment on the very same crimes which were already penalized with death prior to the charter's effectivity, Congress I submit has not fulfilled its specific and positive constitutional duty. If the Constitutional Commission intended merely to allow Congress to prescribe death for these same crimes, it would not have written Sec. 19 of Article III into the fundamental law. But the stubborn fact is it did."

The 1987 Constitution, Art. III, Sec. 19(1) reads: "Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to *reclusion perpetua*." Based on this provision, the Supreme Court itself recognized "the abolition of the death penalty" in *People vs. Masangkay* (155 SCRA 113), *People*

vs.Gavarra (155 SCRA 327), *People vs. Atencio* (156 SCRA 242), and *People vs. Intino* (L-69934, September 26, 1988).

It is true that, later on, the Supreme Court in *People vs. Munoz* (G.R. No. L-38969-70, February 9, 1989) said: "A reading of Section 19(1) of Article III will readily show that there is really nothing therein which expressly declares the abolition of the death penalty." No express abolition, or use of the word "abolition," but abolition nonetheless, as recognized in the aforecited Supreme Court decisions. In Munoz, to the word "abolition," the Supreme Court preferred to use words like "not impose" and "prohibition" in characterizing constitutional attitude toward the death penalty.[2]

The use of the word "reduced" rather than "commuted" in Section 19(1) reveals that the operative reality is that the death penalty no longer exists. More so when one co-relates Section 19(1) with Section 13 of Art. III: "All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties…" Indeed, in giving an exception to the right to bail, there is no mention in the Constitution of offenses punishable by death.. Recognizing *reclusion perpetua* as the highest penalty instead of death reveals an unmistakable intention to abolish the death penalty. Provisions of law should be construed or read, in relation to other provisions of the same law (*Jueco vs. Flores*, G.R. No. L-19325, February 28, 1964, affirmed in later cases).

This rule of statutory, and constitutional, construction finds important application in this discussion of the constitutionality of the death penalty. The constitutional discussions in the majority opinions in the *Echegaray* cases were largely limited to or framed by Sec. 19(1) itself, particularly the issues of "cruel, degrading or inhuman punishment" and of "compelling reasons involving heinous crimes." We will not revisit

[2] This and some other arguments in this discussion are drawn from the Free Legal Assistance Group (FLAG) Position Paper on the Death Penalty submitted to the Senate Committee on Justice and Human Rights in July 2002 by its Secretary General Maria Socorro I. Diokno.

and belabor that discussion here. We instead raise other constitutional grounds (aside still from the aforecited Sec. 13 of Art. III) for the unconstitutionality of the death penalty.

The separate (dissenting) opinion in *Echegaray I* raises several other grounds for unconstitutionality which were never addressed in the majority opinion. These are found in the section "Other Constitutional Rights Militate Against RA 7659" in pp. 749-54. We need not repeat the discussion there. We will just add a bit to what it says about the pro-life and pro-human rights constitutional provisions: the right to life (Art. III, Sec. 1); values the dignity of every human person and guarantees full respect for human rights (Art. II, Sec. 11); prohibition against torture (Art. III, Sec. 12[2]); protection to the life of the mother and the unborn from the moment of conception (Art. II, Sec. 12): and the people's right to health, a balanced ecology and education (Art. II, Secs. 15, 16 & 17).

Take the core value of human dignity. As Father Fausto B. Gomez, O.P. said, "Granting for the sake of argument that capital punishment could be a deterrent to crime, it would still be against human dignity when it involves killing the offender: the human person. No human person can be made an object of exemplariness for others without thingifying him/her… The greatest dignity of the human person is being a child of God and a sister/brother of Christ, and in Christ of all other human beings. *If the human being, every person, is my sister/brother, how may I want her/his death?*"

We don't want or intend to go too deeply here into religion but the Constitution itself in its Preamble speaks of "imploring the aid of Almighty God." And "Christianity, as the religion of the great majority of the people, is a fact recognized by constitutional conventions, legislatures, and courts."[3] For the latter to draw transcendental guidance to be able to decide matters of transcendental importance is no violation of the separation of Church and State or of the non-establishment (of religion) clause.

[3] Vicente G. Sinco, *Philippine Political Law: Principles and Concepts* (Manila: Community Publishers, Inc., 11th ed., 1962) 678, citing US authorities.

FLAG for its part says "To protect the living, it is unnecessary for the state to end the life of another. In keeping with the value of human dignity, other means short of taking life ought to be enough. Perhaps then the way can be paved for the miracle of healing and transformation through the intervention of genuinely compassionate persons and their institutions, something that time and again has marked history and can continue to do so as triumphs of humanity."

The most basic and most important right to life is found in the very first provision of the Bill of Rights: "No person shall be deprived of *life*, liberty or property without *due process* of law, nor shall any person be denied the *equal protection* of the laws." (italics supplied) The right to life is thus tied up with the due process and equal protection clauses, the most important limitations on governmental power. We limit ourselves here to the need to look more deeply into the co-relation of the death penalty and equal protection of the law.

Actually, there was a hint of this in the latter part (pp. 751-54) of the discussion under "Other Constitutional Rights Militate Against RA 7659" in the separate (dissenting) opinion in *Echegaray I*. We refer here to the reference made to the "Profile of 165 Death Row Convicts" submitted by FLAG. In sum, the profile "demonstrates that RA 7659 has militated against the poor and powerless in society – those who cannot afford the legal services necessary in capital crimes, where extensive preparation, investigation, research and presentation are required." Also, at one point (p. 816) in the dissenting opinion of *Echegaray II* is found this relevant passage:

> *The dark reality of the death penalty is that who is executed and who is spared is often determined not only by the nature of the crime but also by their social background, their financial means or the political opinions of the defendants.* This is confirmed by the undefiled study made by Dr. Ricardo Zarco of the University of the Philippines, which showed that almost all the convicts put to death since 1947 came from the *lower socio-economic class*. Only three came from well-to-do families like the persons who committed rape against Maggie dela Riva.

These FLAG and Zarco studies were never addressed in the majority opinions of *Echegaray I* and *Echegaray II*, respectively. But neither did the dissenting opinions explicitly frame the findings in an argument invoking the equal protection clause. We do so now here, and also update the data. The significance of such data would not be lost on all those who read the quotation from the great Justice Oliver Wendell Holmes, Jr. in Mr. Justice Ramon C. Aquino's "Introductory Note" found (on p. ix) in every volume of the *Supreme Court Reports Annotated*: "The life of the law has not been logic; it has been experience." And this is the experience with the death penalty – in practice, it does not afford equal protection of the law for "the poor and powerless in society."

The aforementioned FLAG Position Paper on the Death Penalty includes a 60-page "Socio-Economic Profile of Death Inmates" current up to June 2002 and involving 989 inmates (compared to the earlier profile of 165). Here are the key highlights from the last part on Conclusions and Recommendations:

- The death penalty is **disproportionately meted against those who belong to the underprivileged sectors** of Philippine society – almost one-fifth are **absolutely poor**. Majority are unschooled and unlettered, having finished only elementary education. One third had worked in the agricultural sector – the sector that accounts for most of the poor in the country. Half speak Tagalog, the other half speak and understand the major Philippine languages. While one-half of the death inmate-respondents own their homes, most do not own the land upon which their homes are built. Most of these homes are built with wood, are without proper sanitation facilities (using the pail system of sanitation), are without access to piped water. One third of the death convicts have no access to electricity. Most death convicts had no means to employ the services of private counsel, and instead availed of government's free legal services through the Public Attorney's Office during trial.
- The death penalty is handed down mostly for the **crime of rape**, raising doubts of sentence proportionality. In the United States, for instance, the US Supreme Court **struck down the death penalty statutes covering the crime of rape, precisely because it held the death penalty is disproportionate, cruel and inhuman for the crime of rape.**

And so, all told, the constitutionality of the death penalty is to be reckoned not only on the basis of Sec. 19(1) of Art. III which specifically mentions its but also on the

basis of other provisions of the Bill of Rights and the Constitution, particularly those which are pro-life, pro-human rights and pro-poor. To quote Fr. Gomez again:

In this context, *how may one say that to defend human life we have to reimpose the death penalty for heinous crimes?* As Joaquin Ruiz-Jimenez, who was for a time the Defender of the People in Spain, said: "To proclaim the right to life and to maintain at the same time the death penalty is an essential contradiction." And he added: "If you want life, promote life and not death… *How may one be pro-life and pro-death penalty?*"

We submit that if the constitutional provisions relevant to the death penalty themselves give rise to conflicting interpretations on the status of the death penalty in the Constitution, then the pro-life, pro-human rights and pro-poor thrusts should prevail over whatever opening given to Congress to reimpose an abolished penalty "for compelling reasons involving heinous crimes." We ask the Court "to take a second look at" and reflect on the question again in the light of new perspectives" (following the spirit of *Munoz*) broader than those in the majority opinions in the *Echegaray* cases.

II. THE TRIAL COURT ERRED IN THIS CASE OF MURDER AND FIVE DEATH SENTENCES WITH ITS OVER-RELIANCE ON AND GIVING CREDENCE TO THE TESTIMONY OF THE LONE ALLEGED EYEWITNESS PRESENTED IN COURT, SECURITY GUARD FREDDIE ALEJO, FOR THE PROSECUTION WHICH IS CHARACTERIZED BY MATERIAL OMISSIONS, CONTRADICTIONS, UNRELIABILITY, INCREDIBILITY, AND DISCREPANCIES.

The trial court based the conviction of the five accused mainly on the "positive identification" made in open court by Freddie Alejo, the only eyewitness presented by the prosecution.

> "9. All in all, therefore, the court finds the accused Joel de Jesus, Rameses de Jesus, Cesar Fortuna, Lenido Lumanog and Augusto Santos have not produced enough evidence to overcome the strength of the evidence of positive identification adduced by the prosecution through its eyewitness SG Freddie Alejo." (Joint Decision, p. 29)

Positive identification alone, made by a witness whose credibility is tarnished by major inconsistencies between his sworn statement and his testimony in open court, is a shaky foundation upon which to base a conviction for a very serious crime of murder. More so if even with the identification made by the witness, there is still doubt as to whether the suspects seen by the witness are the same persons as the accused. The possibility of identifying all the perpetrators of the crime with certainty when the witness saw the suspects for the very first time and only for a brief moment under stressful and life-threatening circumstances is highly questionable.

This Court has in fact written about the dangers of unreliability in eyewitness testimony in *People vs. Teehankee, Jr*:

> "Identification testimony has at least three components. First, witnessing a crime, whether as a victim or a bystander, involves perception of an event actually occurring. Second, the witness must memorize details of the event. Third, the witness must be able to recall and communicate accurately. Dangers of unreliability in eyewitness testimony arise at each of these three stages, for whenever people attempt to acquire, retain, and retrieve information accurately, they are limited by normal human fallibilities and suggestive influences. (G.R. Nos. 111206-08, October 6, 1995)

The credibility of the lone eyewitness presented in open court in this case is not only suspect because of major inconsistencies and omissions which when summed up point to a faulty, if not, tainted recollection of the whole incident but also because of an apparent inability to capture the right words in describing the suspects and moreso, because of the suggestive influences surrounding the circumstances of his identification of the accused.

We thus assail the credibility of this lone eyewitness presented in open court on the following points:

A. The sworn statement of Freddie Alejo executed before SPO1 Edilberto S. Nicanor on June 13, 1996 at 1:55 p.m. or just about five hours after the shooting incident, omitted material details which omission greatly affects his credibility as a witness.

This court, in a line of decisions has ruled:

> "The general rule has always been that discrepancies between the statements of the witness in his affidavit and those he makes on the witness stand do not necessarily discredit him because it is a matter of judicial experience that an affidavit taken *ex parte* is almost always incomplete and often inaccurate. The exceptions thereto, which impair the credibility of the witness, are: (1) when the narration in the sworn statement substantially contradicts the testimony in court, or (2) when the omission in the affidavit refers to a very important detail of the incident that one relating the incident as an eyewitness cannot be expected to fail to mention. The point of inquiry is whether the contradictions are important and substantial…" (*People vs. Narvaez, et. al.*, G.R. NO. 140759, January 24, 2002; *People vs. Castillo*, 261 SCRA 493 citing *People vs. Calegan*, G.R. No. 93846, June 30, 1994, 233 SCRA 537).

Freddie Alejo's narration in the sworn statement is not only substantially contradicted by his testimony in open court but it also omitted a very important detail of the incident that one relating the incident as an eyewitness cannot be expected to fail to mention.

In his *salaysay* given before PO1 Nicanor on June 13, 1996, witness Freddie Alejo recalled having seen only four suspects at the crime scene. (Exh. L) In open court, however, he testified that there were six persons involved in the shooting. In his affidavit, there was no mention whatsoever of two persons walking to and fro in front of the guardhouse where he was stationed prior to the shooting incident yet he testified before the court that these two persons were walking to and fro in front of his guardhouse for more than an hour just before the shooting incident occurred. He further testified that both these two persons pointed their guns at him with one commanding him to get down from the guardhouse just after the other four suspects shot at the victim.

The question propounded to the witness by Prosecutor Chua Cheng:

> "When you reported for duty on June 13, 1996 at about 7:00 o'clock in the morning, was there anything unusual that you noticed while performing your duty as security guard?" (TSN, Testimony of Freddie Alejo – Direct, Hearing held on August 20, 1996, p. 15)

and the question asked by SPO1 Nicanor to witness Freddie Alejo at 1:55 p.m. or just five hours from the shooting incident in the morning of June 13, 1996:

> "Habang ikaw ay naka-duty bilang guwardiya sa 211 Katipunan Road, Quezon City, itong araw na ito, may napansin ka bang hindi pangkaraniwang pangyayari?" (Exh. L)

are similarly framed and to which the witness both answered in the positive. When asked however what the incident was, the witness gave different answers. In open court, he declared, "I saw two (2) men walking back and forth infront (sic) of my post, mam." (TSN, Testimony of Freddie Alejo – Direct, Hearing held on August 20, 1996, p. 15) but in his salaysay, he went straight to the shooting incident: "May binaril na sakay ng kotse sa harap ng puwesto ko sir." (Exh. L).

It would have been impossible for the witness not to remember the two men walking to and fro in front of his guardhouse just five hours after the incident if indeed he saw those two men for quite a long time as he testified:

> Pros. Chua Cheng:
>
> Q: For how long did you notice these 2 persons walking to and fro in that area?
>
> A: It was quite a long time from 7:30 in the morning to about past 8:00 o'clock in the morning, sir. (TSN, August 20, 1996, p.28).

On cross examination, he even insisted that he noticed these two men walking to and fro in front of his guardhouse for more than an hour.

> Atty Buted:
>
> Q: And while you were at the guard house you noticed 2 men walking to and fro infront of you, you stated that?
>
> A: Yes sir.
>
> Q: And you consider that unusual?
>
> A: Yes sir.
>
> Q: Why?
>
> A: Because I think these 2 persons are not just passers by they were walking to and fro. (sic)
>
> […]
>
> Q: Alright, then what, if any, did you do when you noticed that there was unusual movement by these 2 persons?
>
> A: I became alert sir.

[…]

Q: Did you confront these 2 men?

A: No sir.

Q: And since you consider it unusual and you are a security guard, why did you not confront these 2 men?

[…]

A: I can't do that sir because according to the law of security guards you cannot ask passers by or any person for that matter who haven't done anything unlawful.

Q: So, you were watching these 2 persons or 2 men all the time?

A: No sir, because they would pass my post and then the next time they would be in my sight.

[…]

Q: Alright, so you said that… about what time when you saw these 2 men?

A: From past 7:00 o'clock up to past 8:00 o'clock.

Q: So these 2 men were there for about an hour?

A: More than 1 hour sir. (TSN, August 21, 1996, pp. 19-25)

When asked on that same day "Ano ang itsura ng mga suspect?" he started with "Iyong tumutok sa akin ay naka-asul na t-shirt…" which means that among the persons he saw, he first recalled the one who pointed a gun at him. If indeed this person who pointed the gun at him was among the two persons he mentioned in open court as those who were walking to and fro in front of his guardhouse prior to the shooting incident, he would have easily recalled and related to the police officer that prior to the shooting incident he already noticed two men walking to and fro in front of his guardhouse. But he did not.

In his testimony in open court, he declared that the two men who were walking to and fro in front of his guardhouse prior to the shooting incident were the ones who pointed their guns at him after he saw four other suspects shoot at the victim.

Atty Buted:

Q: Let me call your attention to your testimony that one of the men you saw walking to and fro near the guard house pointed the gun at you, did you remember having stated that?

A: Yes sir.

Q: And what did this man ordered you?

A: "Baba" sir.

Q: Was it "baba" to ask you to go down or "dapa"?

A: When he first shouted at me it was "baba".

Q: So how many times he shouted at you?

A: Two times sir.

Q: The first time he shouted at you "baba", what did you do?

A: I did not go down sir.

Q: You did not obey?

A: No sir.

Q: Because you were not nervous and you were not scared?

A: Yes sir.

Q: When for the second time when he said "dapa", what did you do?

A: When he shouted at me "dapa" his companions faced me because of his loud voice.

Q: Whom do you mean companions?

A: The one that was at the right rear side, another one at the left rear side and another one was at the right front side.

Q: So that's all?

A: No sir there was another one, one of the 2 men who were earlier walking to and fro who was at the corner also faced me and pointed the gun at me.

[…]

Q: Alright, that man who was shouting "dapa" to you, was he not pointing a gun at you?

A: It was pointed at me sir.

Q: On that point of time when one of the 2 men shouted at you "dapa" there were actually 2 men pointing a gun at you?

A: Not yet sir.

Q: When did this second man point the gun at you?

A This man pointed his gun at me later only at the time when his 3 companions faced me.

Q: Let see, when the men who shouted at you "dapa" shouted at you you said the 3 men near the car faced you?

A: Yes sir.

Q: And at the time a gun was pointing at you by the man who first shouted at you "dapa"?

A: Yes sir.

Q: Now, then the second man pointed the gun at you one of the men who were walking to and fro?

A: Yes sir, he pointed his gun at me.

Q: When the second man pointed that gun at you, was it the first man who pointed the gun at you still?

A: Yes sir.

Q: So there were 2 men who were pointing a gun at you at the same time?

A: Yes sir, there were 2 guns pointed at me.

Atty. Azarcon: May we just put on record the one who said, "hindi po sila sabay".

Atty Buted:

Q: Now, when you said that because of the shout of the man who poked a gun at you, the 3 men near the car faced you?

A: Yes sir.

Q: And that is why you came to recognize their faces?

A: Yes sir.

Q: And for how long did they face you?

A: About less than a minute sir.

Q: And all the time the 2 men who were near the guard house were pointing their guns at you?

A: No sir, when the first man pointed his gun at me it was a little longer and when the second man pointed his gun at me "dumapa na po ako at sinubsob ko 'yong ulo ko sa baba."

Q: When you did that, you were inside the guard house?

A: Yes sir, I was inside the guard house.

Q: Now, when the 3 men near the car faced you, as you said, it was for about a minute or less than a minute?

[…]

A: Less than a minute sir. (TSN, August 21, 1996, pp. 74 – 84)

If in fact, the witness had seen these two men walking to and fro in front of the guardhouse where he was stationed prior to the shooting incident and he recognized these two men as the ones who pointed their guns at him, he would have easily concluded that these two other persons are part of the group which carried out the ambush of the victim. Then, he would have related to the police officers who conducted the investigation that he saw six men who carried out the ambush. But this witness categorically stated to the police investigators that there were only four (not six) men he saw shoot at the victim.

The acts attributed by the witness to the two men whom he referred to as those whom he saw walking to and fro in front of his guardhouse prior to the shooting incident are very vivid and detailed that he could not have failed to remember them when he executed his sworn statement on the very same day that the incident happened. This is exactly **"a very important detail of the incident that one relating the incident as an eyewitness cannot be expected to fail to mention"** which the court referred to in a line of decisions. (*People vs. Narvaez, et. al.*, G.R. NO. 140759, January 24, 2002; *People vs. Castillo*, 261 SCRA 493 citing *People vs. Calegan*, G.R. No. 93846, June 30, 1994, 233 SCRA 537).

Since the witness failed to mention these details when he narrated the events just five hours after the incident happened, it raises a very strong doubt that these details ever happened at all.

B. The sworn statement of Freddie Alejo and his testimony in open court contained material contradictions which undermine his credibility as a witness.

Major contradictions appear when the sworn statement of Freddie Alejo executed before SPO1 Edilberto Nicanor on July 13, 1996 is compared with his testimony in open court.

First, the two men walking to and fro in front of his guardhouse was never mentioned in the affidavit, yet this point was overly emphasized in his testimony.

Second, he mentioned only one person who pointed a gun at him and this person is among the four suspects he mentioned in his affidavit whereas he testified in open court that there were two persons, other than the four whom he saw around the victim's car, who each pointed a gun at him.

Third, in his affidavit, he readily admitted that he felt nervous and could not move when a gun was pointed at him, but in his testimony he related in open court that he was not nervous and that he saw all the suspects face him at the same time.

Freddie Alejo's sworn statement, taken just five hours after the incident, contain the following:

> "08. T – Habang ikaw ay naka-duty bilang guwardiya sa 211 Katipunan Road, Quezon City, itong araw na ito, may napansin ka bang hindi pangkaraniwang pangyayari?
>
> S – Mayroon Sir.
>
> 09. T – Ano iyon?
>
> S – May binaril na sakay ng kotse sa harap ng puwesto ko sir.
>
> 10. T – Anong oras ito nangyari?
>
> S – 8:40 ng umaga kanina sir, more or less (13 June 1996)
>
> 11. T – Sino ba itong binaril na tinutukoy mo, kung kilala mo?
>
> S – Isang hindi ko kilala na lalaki sir
>
> 12. T – Sino naman ang bumaril sa biktima na ito, kung kilala mo?

S – Apat na hindi kilalang lalaki sir na armado ng baril.

13. T – Anong klaseng baril ang armas ng mga ito?

S – Maiikli lang sir.

14. T – Ano naman ang dahilan, kung alam mo, bakit binaril ng apat na lalaki ang biktimang ito?

S – Hindi ko alam sir. Bigla na lang pinagbabaril ang biktima ng ma-traffic.

15. T – Ano pa ang nakita mo, kung mayroon pa?

S – Matapos barilin iyong biktima ay binuksan ng isang suspect ang pinto ng kotse, dinampot ang clutch bag, sinakal ang biktima, inilabas ng kotse at nang bagsak na sa kalsada ay binaril pa uli.

16. T – Ano ang sumunod na nangyari, kung mayroon?

S – Isa sa suspect na nasa tapat ko ay tinutukan ako ng kanyang baril at sinigawan ako ng "BABA!" Pinapababa niya ako sa guardhouse.

17. T – Ano ang ginawa mo, kung mayroon noong utusan ka na bumaba?

S – Dahil sa nerbiyos ko ay hindi ako nakagalaw. Dito ay sumigaw uli ang suspect ng "Baba. Walang makikialam." At sa takot ko ay dumapa ako sa guardhouse.

18. T – Ano pang sumunod na nangyari, kung mayroon?

S – Napakabilis po ng pangyayari noong bumangon ako sa pagkakadapa ilang segundo lang ay tigil na ang putukan at wala na rin ang mga suspect. Nakatakbo na sila.

19. T – Ano pa ang sumunod na nangyari, kung mayroon?

S - May dumating na MMDA at nag-traffic at hindi nagtagal ay may dumating nang mga pulis at dinala ang biktima (sa) ospital.

20. T – Kung makikita mo bang muli ang mga suspect, makikilala mo ba sila?

S – Maaari Sir.

21. T – Ano ang itsura ng mga suspect?

S – Iyong tumutok sa aking ay naka-asul na t-shirt, edad 30-35, 5'5" – 5'6" ang taas, katamtaman ang katawan, maikli ang buhok, kayumanggi. Ang baril niya ay tipong 45 o 9mm na pistola. Iyong sumakal sa biktima at nang-agaw ng clutch bag nito ay 25 – 30 ang edad, payat, mahaba ang buhok na nakatali, maitim, may taas na 5'5"

– 5'6", maiksi din ang baril niya at naka-puting polo. Iyong iba ay maaaring makilala ko kung makikita ko uli.

22. T – Ang sabi mo, pagbangon mo sa pagkakadapa sa guardhouse ay wala na ang mga suspect, may napansin ka bang sasakyan sa pagtakas nila matapos mabaril ang biktima?

S – Mabilis nga sir ang pangyayari. Wala na sila noong bangon ko na iyon. Wala din akong napansin kung may sasakyan man sila sa pagtakas." (Exhibit "L", "L-1", "L-2")

Scrutinizing his sworn statement, there was no mention whatsoever of two other men walking to and fro in front of his guardhouse. However, in open court, his testimony is filled with vivid details about the two men walking to and fro in front of the guardhouse before the incident. He also attributed the pointing of the guns to him to these two men whom he allegedly saw walking to and fro in front of his guardhouse for more than an hour prior to the shooting incident. (TSN, Testimony of Freddie Alejo, August 20, 1996, pp. 15, 28, 39, 40-41, 45-46, August 21, 1996, pp. 19, 20, 23-25, 74-82)

In his sworn statement, the witness was very categorical when he declared that he saw four men during the shooting incident. When asked on that same day of the incident, "Sino naman ang bumaril sa biktima na ito kung kilala mo?" he readily answered, "**Apat** na hindi kilalang lalaki sir na armado ng baril." He only mentioned four suspects. And continuing with his narration when asked (Question 16) "Ano pa ang sumunod na nangyari kung mayroon?" his answer was: "Isa sa suspect na nasa tapat ko ay tinutukan ako ng kanyang baril at sinigawan ako ng "BABA" Pinabababa niya ako sa guardhouse."

When he qualified his statement with the phrase "Isa sa suspect na nasa tapat ko" he could not have been referring to another person other than the "apat na hindi kilalang lalaki" he earlier referred to. Otherwise, if this person who pointed a gun at him were not among the four men, he would not have categorically declared that there were four men who perpetrated the shooting.

And when asked, "Ano ang ginawa mo, kung mayroon nuong (sic) utusan ka na bumaba?" he answered, "Dahil sa nerbiyos ko ay hindi ako nakagalaw. Dito ay sumigaw

uli ang suspect ng "BABA! … Walang makikialam." … at sa takot ko ay dumapa ako sa guardhouse."

The phrase "sumigaw uli ang suspect," in the answer to question # 17 means that the same person who earlier shouted at him shouted again when he did not heed the command the first time it was given.

When taken together with the phrase "Isa sa suspect na nasa tapat ko ay tinutukan ako ng kanyang baril at sinigawan ako" in the answer to question # 16 the phrase "sumigaw uli ang suspect" proves that the witness was referring to one and the same person who shouted "BABA!" for the first time and who repeated the same command "BABA!" and added "Walang makikialam," when he did not come down from the guardhouse.

Since the witness even qualified that the person who shouted at him was "isa sa suspect," he could not have been referring to another person other than the four suspects whom he saw around the victim's car. Otherwise, if the suspect who pointed a gun at him was not among the four he saw around the victim's car, he would have easily concluded that there were five persons who perpetrated the act. But just five hours after the shooting incident, this witness freely and spontaneously narrated to the investigating officer that he saw four men shoot at the victim.

It is also clear in his salaysay that when one of the suspects pointed a gun at him, he was nervous and could not move. In his own words, "Dahil sa nerbiyos ko ay hindi ako nakagalaw." During his cross examination, however, the witness declared, "When only one suspect was pointing a gun at me, I wasn't scared yet but when there were already two suspects pointing a gun at me, I went down because they might actually shoot me." (TSN, September 4, 1996, p. 22)

These discrepancies in the contents of the witness' affidavit and his testimony in open court are important and substantial. Increasing the number of suspects from four to six significantly contradicts a material point that the witness stated in his affidavit.

Testifying in open court that there were two persons who each pointed a gun at him materially contradicts his earlier statement that only one of the four suspects pointed a gun at him.

Making the court believe that he was not nervous and that the other suspects all faced him when one of the suspects pointed a gun and shouted at him when in his affidavit he related that he was nervous and could not move, is a material contradiction that goes directly into the possibility of correctly identifying the suspects.

His declaration in his affidavit that he was nervous and could not move is but a natural reaction to a startling and threatening situation. His testimony in open court, however, suggests that the witness was coached in an attempt to bolster his credibility and ability to identify the suspects despite the threat to his own life at that moment.

These discrepancies taken together all point out that the lone eyewitness presented in open court has added material details in his testimony in open court. These additions which directly and significantly contradicted his sworn statement gravely affected his credibility as a witness.

As this honorable court ruled in *People vs. Mandao*:

> "As a rule, testimonial evidence or oral testimony commands greater respect than a mere affidavit. Hence, discrepancies between the two do not necessarily discredit a witness. However, this principle finds no application in a case in which the latter directly and significantly contradicts material matters made in the former. Accordingly, when there is an omission in an affidavit concerning a very important detail that may well determine the culpability of the accused, that omission can affect the affiant's credibility." (G.R. No. 135048, December 3, 2002, citing *People v. Doinog*, 332 SCRA 336, May 31, 2000).

C. The witness' recollection of the appearance of the assailants is highly unreliable and raises serious doubts as to whether the suspects he saw are the same persons as the accused or as to whether the witness has made a positive identification at all.

The trial court committed a reversible error when it relied heavily on the "positive identification" of the lone eyewitness presented in open court in convicting all the accused for the crime of murder. The witness' recollection of the appearances of the assailants is highly unreliable that it is doubtful whether this particular witness had indeed made a positive identification of the suspects.

For the identification of suspects by the witness to be positive, it must be established that aside from having seen the suspects at the crime scene, the suspects left indelible or at least memorable marks in the memory of the witness that facilitate his recall of their appearances. For unlike other methods of establishing the presence of suspects at the crime scene, i.e. DNA testing, fingerprint identification, which establish the suspects' presence with scientific precision through a one-to-one correspondence of the samples taken from the crime scene and the samples taken from the person of the suspects, the process of cursorily pointing at the accused in open court and saying that these persons are the same ones whom the witness saw at the crime scene is fraught with dangers of mix-ups and mistaken identities.

It would have been different if several witnesses were presented and all are one in identifying the suspects as the perpetrators of the crime complained of. Yet, when only one eyewitness is presented in court, the prosecution must endeavor to establish with certainty that the persons whom the witness saw at the crime scene are the same persons as the accused. Such identification should involve a degree of certitude that rules out any possibility of a mix-up or mistaken identity and cannot be convincingly accomplished by simply asking the witness to point to the suspects in court without showing any reference which the witness used in identifying the suspects.

In most of the cases where this court upheld the conviction of the accused based on positive identification made by eyewitnesses, the suspect or suspects are either personally known or are already familiar to the witnesses beforehand. The witnesses,

because of their familiarity with the suspects, were able to recognize them at the time they commit the crime and can readily identify them at any given time.

However, such is not always the case. There are a lot of instances when witnesses do not personally know or are not even acquainted with the suspects whom they might have seen only for the first time.

In such instances the witness' recollection of the suspects should be subjected to a more rigorous test to rule out any mistake. It must not be enough that the witness cursorily point at the accused and tell the court that these are the persons he has seen commit the crime but all the circumstances that aid the witness in recalling with certainty the identity of the suspects must also be shown. Factors such as the distance of the witness from the suspects, the length of time that the witness has seen the suspects, the ability of the suspect to recall, the presence or absence of any distraction that could affect the witness' attention to the appearances of the suspects, all become relevant and must all point to a certainty of establishing the identity of the suspects. But more importantly, the witness must be able to recall and relate certain specific characteristics of the suspects that would establish a well-founded belief that the suspect could not have been any other person than the accused. While it might be too stringent a test to require that witnesses must be able to point certain characteristics unique to the suspects, or if not, at least several memorable characteristics that pertain to the suspects indicating a convincing reason why those characteristics stuck to the witness' mind, yet, it might be the only safeguard to rule out any possibility of a mix-up or mistaken identity. Besides, this would be in keeping with the rule in criminal prosecution that the guilt of the accused must be established beyond reasonable doubt.

This, in fact, has been crystallized by this Court when it adopted the totality of circumstances test in resolving the admissibility of and relying on out-of-court and in-court identification of suspects. This test was adopted by this Court in *People vs. Teehankee, Jr.* (G.R. Nos. 111206-08, October 6, 1995) and reiterated by in *People vs.*

Timon (G.R. Nos. 977841-42, November 12, 1997) and in *People vs. Arapok* (G.R. Nos. 134974, December 8, 2000) in this wise:

> "Out-of court identification is conducted by the police in various ways. It is done thru show-ups where the suspect alone is brought face to face with the witness for identification. It is done thru mug shots where photographs are shown to the witness to identify the suspect. It is also done thru line-ups where a witness identifies the suspect from a group of persons lined up for the purpose. Since corruption of *out-of-court* identification contaminates the integrity of *in-court* identification during the trial of the case, courts have fashioned out rules to assure its fairness and its compliance with the requirements of constitutional due process. In resolving the admissibility of and relying on out-of-court identification of suspects, courts have adopted the *totality of circumstances test* where they consider the following factors, *viz*: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and (6) the suggestiveness of the identification procedure."

Freddie Alejo made out-of-court identification of Joel de Jesus and Lorenzo delos Santos. He also made in-court identification of Joel de Jesus, Lorenzo delos Santos, Rameses de Jesus, Lenido Lumanog, Cesar Fortuna, and Augusto Santos. We assail both identification as inherently weak and which should not have been relied upon as basis for conviction of accused-appellants following the totality of circumstances test cited above.

The first time Freddie Alejo was made to identify Joel de Jesus was when the latter was arrested on June 19, 1996. The witness was first shown photos of Joel de Jesus and the police officers brought the witness along with them to identify Joel de Jesus in Fairview prior to the latter's arrest.

Freddie Alejo was again made to identify Joel de Jesus, this time together with Lorenzo delos Santos, allegedly in a police line-up conducted at the Criminal Investigation Division (CID) at Camp Karingal on June 21, 1996. Exhibit M, which is the additional statement of Freddie Alejo pointing to Joel de Jesus and Lorenzo delos Santos as those who pointed guns at him, contains the following:

> "Declarant at this instance positively identified the suspects during a police line-up composed of D/P Johnny

> Maybituin, D/P Alexander Dalayday, SPO2 Jorge Roxas, SPO1 Jaime Tumpalan, D/P Roger Roxas, PO1 Ernesto Barbareja, Joel de Jesus, SPO1 Rodolfo Madriaga, Lorenzo de los Santos and D/P Gene Rosete)."

These two separate out-of-court identification is not only characterized by suggestiveness as Freddie Alejo was brought along by police operatives specifically to pinpoint Joel de Jesus whose picture has already been shown to him prior to the identification but also by irregularities as the alleged police line-up was conducted with no other civilian individuals in the line-up except for Joel de Jesus and Lorenzo delos Santos whom the witness was asked to identify.

Since the alleged line-up was done in a police headquarters, necessarily, these police officers would be in their proper uniforms. How, then, can anyone be mistaken in singling out suspects in a police line-up when the other persons they are lined-up with are all police officers? Is this how our police officers understand a police line-up: that policemen be lined up with the suspects to be identified?

> "This Court has held in *People vs. Salguero* that this kind of identification, where the attention of the witness is directed to a lone suspect, is suggestive. Also, in *People vs. Niño*, this Court described this type of *out-of-court* identification as being "pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted their reliability as eye-witnesses."

Going now to the evidence on record, when asked about the appearance of the four persons he saw shot at the victim, Freddie Alejo answered:

> "Iyong tumutok sa akin ay naka-asul na t-shirt, edad 30-35, 5'5" – 5'6" ang taas, katamtaman ang katawan, maikli ang buhok, kayumanggi. Ang baril niya ay tipong 45 o 9 mm na pistola. Iyong sumakal sa biktima at nang-agaw ng clutch bag nito ay 25 – 30 ang edad, payat, mahaba ang buhok na nakatali, maitim, may taas na 5'5" – 5'6", maiksi din ang baril niya at naka-puting polo. Iyong iba ay maaaring makilala ko kung makikita ko uli." (Exhibit L-1)

The witness was only able to describe two of the four suspects when the police investigator took his sworn statement barely five hours after the incident occurred. With

the description given by the witness, it can be safely claimed, that the witness was only able to provide a basis for future identification of two of the four suspects.

This alone is already a clear indicator that this particular witness does not have much recollection of the appearances of the suspects. And naturally so. The swiftness with which the ambush was staged, the relative positions of the suspects in relation to the witness, and the concurrence of several startling events happening all at the same time would make it impossible for anyone to recall all the perpetrators. This was even compounded by the fact that the witness' life was also threatened at that time by the suspect who pointed a gun at him which necessarily focused the witness' attention to this particular suspect.

It would have been different if the witness knew the identities of the suspects all along. But in this case, the witness, having no previous association or acquaintance with the suspects, saw them for the first time when the shooting incident happened. What was stored in the memory of this witness were fleeting impressions of the appearances of the suspects that could have been easily erased and replaced with the numerous other new faces (including police investigators and bystanders) he encountered on that day that the incident occurred.

Based on the order by which the incident occurred as narrated by the witness in his sworn statement, it would have been natural for the witness to recall first the suspect who opened the car, took the clutch bag, choked the victim, took the victim out of the car and shot at the victim again because he did a lot of things that stuck to the witness mind. Yet, from among the four persons he saw shooting at the victim, he readily recalled the one who pointed a gun at him.

This is explainable as it is but natural for human memory to give more importance to events that has personal significance. The other suspects are not as significant to the witness as the suspect who pointed a gun at him because the three other suspects did not do anything that attaches personal significance to the life of the witness at that moment.

This particular suspect who pointed a gun at the witness attained a greater significance to the witness as this particular suspect put the witness' very life in danger.

So, if there was anyone whom the witness would strongly remember, it would have been this suspect whom he narrated in his sworn statement to have pointed a gun at him and twice yelled at him to come down from the guardhouse. But the testimony of the witness reveal that he cannot even place this suspect who pointed a gun at him as among the four he and other suspects saw around the victim's car.

Several witnesses, including Alejo, saw only four suspects surround the black Honda and shot at the victim. The person who pointed a gun at Freddie Alejo and who shouted to him twice must necessarily be among this four suspects. Yet, based on Freddie Alejo's testimony and his identification of the suspects made in open court, this person who pointed a gun at him, whom he identified as Joel de Jesus, was not among the four persons he saw around the victim's car. He named those he allegedly saw around the victim's car as Rameses de Jesus, Cesar Fortuna, Lenido Lumanog, and Augusto Santos.

This glaring inconsistency points that the memory of this witness is highly suspect to be able to recall with certainty the appearances of the assailants.

The in-court identification made by Freddie Alejo is likewise weak. Only two of the suspects were described by Freddie Alejo in his sworn statement. And both these descriptions given did not tie up with the physical appearances of the accused pinpointed as those earlier described. For the rest of the accused, no prior description was ever given by the witness.

Augusto Santos, Rameses de Jesus, and Cesar Fortuna were never described by the witness. Thus, the in-court identification of these accused utterly lacks basis for want of any prior description of the suspects upon which to anchor the identification made in open court. The witness was never made to identify these accused from the time of their arrest until the day that the in-court identification was made. Neither was there any attempt to have these accused identified by the other eyewitnesses who came forward to

the police investigators The in-court identification of these particular accused, therefore, is nothing but a mere cursory pointing to the accused which can never amount to a positive identification.

Interestingly significant is the fact that Freddie Alejo's description of the suspect given to the police investigator just five hours after the shooting incident did not match with the characteristics of the accused identified in open court as Lenido Lumanog.

He described the suspect who opened the car, took the clutch bag, grab the victim by the neck, drag the victim out of the car and shot at the victim when the latter was already sprawled at the pavement, as "Iyong sumakal sa biktima at nang-agaw ng clutch bag nito ay 25 – 30 ang edad, payat, mahaba ang buhok na nakatali, maitim, may taas na 5'5" – 5'6"." Such description did not match with the physical appearance of Lenido Lumanog, 40 years old, with short hair, and fair complexioned.

From the way the witness used maitim and kayumanggi in describing two of the suspects, he appears to have a good sense of telling the different hues of skin color. He described the person who pointed a gun and shouted at him to be kayumanggi while he described as maitim the suspect whom he said he saw open the car, took the victim's clutch bag, grab the victim by the neck, dragged the victim out of the car and shot at the victim when the latter was already sprawled on the pavement.

The difference in maitim and kayumanggi is readily understood by ordinary persons. Kayumanggi is lighter than maitim. And the witness himself used these words without coaching from anyone. These were the words he associated with the skin color of the persons he saw at the crime scene. If indeed it was Lenido Lumanog whom the witness saw near the left front side (driver's side) of the victim's car, he would not have used maitim in describing the suspect. Far from being just kayumanggi, Lenido Lumanog is fair-complexioned. If indeed Lenido Lumanog was the person whom the witness saw at the crime scene, to describe him as maitim would be to point to a mistake and flaw in the witness' perception and his ability to relate what he has observed. And this point goes

directly to recall and communicate accurately affecting his credibility as a witness whose testimony cannot be relied upon because his narration of his observations do not capture the facts he has observed.

Freddie Alejo described the suspect who pointed a gun at him in this manner: "Iyong tumutok sa aking ay naka-asul na t-shirt, edad 30-35, 5'5"-5'6" ang taas, katamtaman ang katawan, maikli ang buhok, kayumanggi." Since the witness was only able to give a description of one suspect who pointed a gun at him and yet in open court he testified that there were two suspects who separately pointed a gun at him, it is not clear as to whom among the two accused he pointed in court as those who pointed a gun at him would this description be used as a basis. If this would be used as a basis in tying up the appearance of Lorenzo delos Santos, then it would already be an utter mistake as Lorenzo was in fact acquitted by the trial court. If this would be used for Joel de Jesus, on the other hand, the same would also not tie up with the physical appearance of Joel de Jesus who was just 22 years old then and not 30-35 and who stands 5'9" and not 5'5"-5'6" as the witness had described.

Considering that the Judge who penned the decision in this instant case was not the Judge who observed the testimony of Freddie Alejo when he identified the accused in open court, there could have been no possibility that the level of certainty demonstrated by the witness at the identification was ever considered in coming up with the decision.

Clearly then, none of the accused who have been handed down the death penalty by the trial court was positively identified by witness Freddie Alejo applying the totality of circumstances test that this Court has devised.

The death sentence hanging over the heads of the five accused-appellants in this case and the big possibility that the actual killers of the late Col. Rolando Abadilla are still roaming freely necessitate revisiting what this Court has said in *People vs. Arapok*.

> "Once again we stress that the correct identification of the author of a crime should be the primal concern of criminal prosecution in any civilized legal system. Corollary to this is the actuality of the commission of the offense with the participation of the accused. All these must be proved by the State beyond

> reasonable doubt on the strength of its evidence and without solace from the weakness of the defense. Thus, even if the defense of the accused may be weak, the same is inconsequential if, in the first place, the prosecution failed to discharge the onus on his identity and culpability. The presumption of innocence dictates that it is for the people to demonstrate guilt and not for the accused to establish innocence." (*People vs. Arapok,* G.R. No. 134974, December 8, 2000).

Thus far, we have shown that the prosecution failed miserably in establishing that the accused-appellants are the same persons as those seen by the witness at the crime scene. We shall endeavor to show that the prosecution has likewise been unable to establish their culpability.

But at this juncture, it is well to point out that the question asked of Freddie Alejo when he was made to identify Joel de Jesus and Lorenzo delos Santos was: "Sa mga taong naririto ngayon sa loob ng upisinang ito, may makikilala ka ba sa kanila?" Such line of questioning does not even establish any connection between the identity of the persons identified with the commission of a crime.

D. The testimony of the witness in open court reveals incredible details that are contrary to human experience.

The witness did not see the assailants for a long time. If ever he saw them, it was only for a brief moment – "less than a minute," in the words of the witness himself.

If ever he would be able to recall who were in the vicinity during that time, it would be the two men whom the witness saw walking to and fro near his guardhouse. One of these men, Lorenzo delos Santos, was acquitted after convincing the lower court that he was not at the crime scene when the incident happened.

This point alone already casts a doubt as to the credibility of the lone eyewitness pre~~pre~~sented in court. This witness testified that he saw Lorenzo delos Santos and in fact, was emphatic in saying that he pointed a gun at him. But accused Lorenzo delos Santos was able to prove and in fact, convinced the court that he was not at the crime scene. If this witness' recollection and memory of the person whom he alleged to have been walking to and fro in front of the guardhouse where he was posted in the morning of July

13, 1996 cannot be trusted, if this witness can err on pointing to a person whom he allegedly saw for a longer period than the other witnesses whom he saw for only a brief moment, then there is more reason to doubt his credibility in accurately pinpointing the assailants whom he had seen only for the first time and for a very brief moment, under stressful and life-threatening circumstances.

The way the witness related how he saw the four men surrounding the car of the victim, not all of them were facing him directly, in fact, two were standing with their back towards the witness. The prosecution tried to establish that the perpetrators whom they numbered 2, 3 and 4 during the trial, faced the witness when they heard their companion, labeled number 5 shouted "Dapa!" to the witness.

When witness gave his narration of the incident during the police investigation, he said that he was nervous and dumbfounded when a gun was pointed at him that he could not move. (Question and Answer # 17, Exhibit L) During the trial, however, he said, he did not become nervous (TSN, Testimony of Freddie Alejo, September 4, 1996, pp. 20-22, 26) and made the court believe that he saw the other three perpetrators face him. (TSN, Testimony of Freddie, August 20, 1996, p. 45; August 21, 1996, p. 76; September 4, 1996, p. 27-28) This attempt by the witness to make it appear that he was not nervous to show that he was able to observe clearly and objectively the incident casts a doubt to his credibility considering that his spontaneous statement given before the police investigator voluntarily acknowledged his nervousness and fright during the shooting incident.

A person to whom a gun was pointed would normally focus his attention to the person who points the gun. This is the natural reaction to such a startling event as the fear that one might get shot at would make the person attentive to the one holding the gun. However, in his testimony in open court, the witness said that he looked at the three other perpetrators who faced him simultaneously. How can a person look at the faces of three different persons at three different locations at the same time? The physical impossibility

of this feat points to the incredibility of Alejo's testimony certain details of which run counter to human nature and experience.

As this Court has ruled in *People vs. Belaje* and reiterated in *People vs. Atadero*

> "Under the law on evidence, to be credible, testimonial evidence should not only come from the mouth of a credible witness, it should also be credible, reasonable, and in accord with human experience. It should be such that under the common experience and observation of mankind the testimony in question would lead to no other inference than its probability under the circumstances. This holds true especially in cases where there is no test by which to determine its veracity except its conformity to our knowledge, observation and experience." (*People vs. Belaje*, G.R. NO. 125331, November 23, 2000, 345 SCRA 604, citing *People vs. Atad*, 334 Phil. 235, 248 and *People vs. Manambit*, 338 Phil. 57, 91, reiterated in *People vs. Atadero, et. al.*, G.R. Nos. 135239-40, August 12, 2002).

The witness only saw the perpetrators for a brief moment. In fact, in his own words, he admitted this to the police investigator when he answered "mabilis ang mga pangyayari, sir." (Question and Answer #22, Exhibit L-2)

The swiftness by which the crime was committed and the physical impossibility of memorizing the faces of all the perpetrators of the crime whom the witness saw for the first time and only for a brief moment under life-threatening and stressful circumstances raise serious doubts as to whether the witness could accurately remember the identity of the perpetrators of the crime. The eyewitness' ability to correctly identify the perpetrators of the crime was seriously undermined when one of the accused, Lorenzo delos Santos, whom the witness allegedly saw for a longer period of time, was acquitted by the trial court after presenting evidence that he was not at the crime scene at all.

This raises a serious doubt as to whether the accused, who have been languishing in jail for more than seven years now, are the actual persons who were at the crime scene and who perpetrated the acts complained of. The fact that this lone eyewitness presented in open court has added material details in his testimony and whose recollection of the assailants is shady cast a serious and not just a reasonable doubt as to whether the accused whose lives hang in the balance with the imposition of the death penalty by the lower court are the actual authors of the crime complained of.

E. The discrepancy in Alejo's testimony and his sworn statement as to the number of suspects was never explained by the prosecution and has greatly eroded the credibility of the witness.

The witness actually saw four men at the crime scene. In fact, other witnesses also narrated in their sworn statements that they saw four men around the car of the victim. Increasing this number to six and testifying in such a way as to show concerted action among them to establish conspiracy among all the suspects go directly to the determination of the culpability of the accused. If the court would believe the testimony of the witness there is a great likelihood that it will be convicting six (now reduced to five when the lower court correctly acquitted one of the accused) men instead of four who actually perpetrated the act. This would mean convicting men who are otherwise innocent. This omission in the salaysay of the witness pertaining to a very material detail that goes directly to the determination of the culpability of the accused shows that the witness has, by his own account before the police investigator and his testimony before the court, destroyed his own credibility, even committing perjury in the process.

During the trial on August 22, 1996, Atty. Bagatsing, on cross-examination of witness Freddie Alejo, tried to clarify on the material discrepancy between the number of suspects that the witness declared in his sworn statement given to SPO1 Edilberto S. Nicanor. It is clear from the records that the prosecutors, instead of welcoming the opportunity for the clarification of the material discrepancy, tried their best to block the clarification.

> Atty. Bagatsing:
>
> Q: Now, Mr. Witness, in your sworn (sic) marked as Exhibit "L", which you gave to SPO1 Edilberto S. Nicanor, on June 13, 1996, on or about 1:55 p.m. which you testified to earlier, on cross by Atty. Buted, your attention was called with reference to question an answer in Number 16, and question and answer Number 17, in relation to question and answer in Number 18. Now, this is my question: In question Number 16, you were asked and I quote: "Ano pa ang sumunod na pangyayari kung mayroon?" Sagot: "Isa sa suspect na nasa tapat ko po ay tunutukan ako ng kanyang baril at sinigawan ako ng "dapa", pinapababa niya ako sa guardhouse." Question NO. 17, Tanong: Anong ginawa kung mayroon nang utusan ka na bumaba? Sagot: Dahil sa nerbiyos ko ay

hindi ako nakagalaw dito ay sumigaw uli ang suspect ng "baba" walang makikialam. Sa takot ko ay dumapa ako sa guardhouse." There were two questions asked of you, one was Question Number 16 and another one in Question Number 17, and the question asked of you in Number 16, which was read to you earlier, " Anong sumunod na pangyayari?" Sinigawan ako ng "baba", that was your answer. Now, can you tell us whether the order uttered by the person who told you to go down and the order asked you "baba" emanated from one and the same person?

Atty. Corpus:

The question, may we ask the cross examiner to simplify the question? Because the question is already kilometric.

Atty. Bagatsing

Q: Were the utterances and orders mentioned in Question and Answer Number 16 and Number 17, of your statement emanated and came from one and the same person?

Atty. Corpus

Already answered. If the question of the examiner…

Court

Witness may answer.

Witness

A: Yes, sir, one and the same person.

Atty. Bagatsing

Q: Now, during your direct-examination, you stated in open court, that other than the 4 suspects mentioned in your earlier testimony there were two other suspects whom you noticed walking to and fro in the guardpost where you were positioned, do you recall having stated that?

Atty. Corpus

Objection. Very misleading because the examiner mentioned that there were other 2 walking to and fro, so it means to say, the 4 were walking to and fro.

Court

He mentioned only two.

Atty. Bagatsing:

Q: You stated that there were two persons walking to and fro.

Atty Corpus

You said "other than the 4."

Atty. Bagatsing

Q: In front of the guardhouse.

Atty. Corpus

Not referring to the other 4?

Atty. Bagatsing

Q: Not referring to the other 4.

A: Yes sir.

Q: Did you include that statement in your sworn statement referred to as Exhibit "L"?

Fiscal Sotero

The best evidence is the document.

Atty. Bagatsing

Q: I am showing the document. Will you go over Exhibit "L" an tell us if there is any reference of that statement with respect to your allegation in your direct testimony that there were 2 persons walking to and fro in the guardhouse where you were posted at 7:00 o'clock on June 13, 1996?

Atty. Corpus

Even the time is very misleading. The witness said…

Court

Anyway, the best evidence is the document.

Atty. Bagatsing

Q: That is why I am giving him the document. If it is there, he can look for it. Is it there or is it not there? The question is very simple, Your Honor. If he can pinpoint any statement to that effect in his statement?

Atty. Corpus

But the question is not only objectional (sic) because of best evidence but also because it is misleading because the time frame used by the cross-examiner is different from what the witness said.

Atty. Bagatsing

> Your Honor, I don't claim to have a very good memory but sometimes I remember correctly, your Honor, that the witness testified that he noticed two persons walking to and fro on or about 8:00 o'clock in the morning.

Court

> Anyway, the best evidence is the document. I will sustain the objection. (TSN August 22, 1996, pp. 137 – 147)

Thus, the material discrepancy in the number of suspects as related to by witness Freddie Alejo in his sworn statement saying there were only four suspects and his testimony in open court declaring that there were six persons who perpetrated the crime was never fully explained by the prosecution. In fact, the prosecutors blocked all attempt of the defense counsel to clarify the discrepancy.

The number of suspects is a very important aspect of this case. Upon it hinges the number of persons who should be held responsible and who should suffer the corresponding penalty.

Thus the prosecution should have amply and sufficiently explained the addition of two more suspects in the crime by this witness. But they did not. This eroded heavily the witness' credibility and has cast aspersion as to the truth of the other points he testified to in open court. If this witness can add two more persons whom he never mentioned in his earlier declaration before the police investigators, there is a great likelihood that he has laced his testimony with other details that are contrary to what he has actually observed.

Any contradiction appearing in the sworn statement and the testimony of a witness in open court should be sufficiently explained by the prosecution to erase any doubt as to the veracity of the account forwarded by their witness. Failure to do so implies that the contradictions are a result of a laced testimony not worthy of credence in a criminal prosecution where lives and liberty of individuals are at stake.

F. Freddie Alejo's testimony might have been tainted because of the benefit given to him by the family of the victim.

The testimony of the only eyewitness presented in court is touted by the prosecution as free from any improper motive to falsely testify against the accused in this case and relies on this Court's ruling in *People vs. Platilla*, *People vs. Agunias*, and *People vs. Malazarte* that

> "Absent any evidence showing any reason or motive for a prosecution witness to perjure, the logical conclusion is that no such improper motive exists and his testimony is thus worthy of full faith and credit." (G.R. NO. 126123, March 9, 1999; 279 SCRA 52, 65; and 261 SCRA 482, respectively)

The lack of evidence of any improper motive on the part of the witness to falsely testify against the accused does not in itself render the whole testimony of such witness reliable. The contents of such testimony must be fully scrutinized as improper motive is not the only ground or the only factor to be considered in assessing the testimony of the witness.

The existence of motive to falsely testify against the accused is not the accused is not the only ground or factor that could discredit a witness. Equally deplorable is the motive to favor the prosecution through favors received by the witness.

Freddie Alejo was given housing accommodations by the victim's family. This was established when Merlito Herbas testified that Freddie Alejo was staying in the same compound where the victim's family provided them with housing accommodations. (TSN, Testimony of Merlito Herbas, February 20, 1998, p.67-69, 95-96)

In the instant case, the trial court discredited the testimony of the other security guard, Merlito Herbas, for as the trial court has said, he is a disgruntled witness after he did not receive the full amount of monthly salary and the coverage of the witness protection program promised by the victim's family.

However, the trial court failed to consider that Freddie Alejo, having been given housing accommodations and probably, similar benefits given to Herbas,

Thus, while indeed, Freddie Alejo might not have been moved by any motive to falsely testify against all the accused-appellants, yet he might have been moved by the

benefits he was receiving from the victim's family to confirm whatever the police or the prosecution suggest to him in order to win a conviction.

The motive to favor the prosecution so he could continue enjoying the benefits provided him by the victim's family has, in fact, colored Freddie Alejo's objectivity as a witness.

Because of the benefits accorded him by the victim's family, there is a great likelihood that Freddie Alejo would willingly and blindly agree to whatever the police and the prosecution would want him to say, including pointing to persons whom he did not actually see at the crime seen, as the case of Lorenzo delos Santos has evidently proved.

G. These discrepancies and incredibility in the testimony of the lone eyewitness presented in open court, including his bias brought about by the benefits he received from the victim's family warrant a reversal of the trial court's findings as to the credibility of the witness.

Absent any explanation for the discrepancies between Alejo's narration in his sworn statement and his testimony in open court, absent any corroborating evidence that the accused are the same persons seen by the witness at the crime scene, absent any showing that the witness knows the suspects too well as to be mistaken in ascertaining their identity in court, the trial court's findings as to the Freddie Alejo's credibility and its subsequent reliance on his testimony in convicting the accused should be reversed.

This Court has explained in *People vs. Dy and Garcia* why the trial court's findings must be respected.

> "The trial court's findings are accorded finality, unless there appears in the record some fact or circumstance of weight which the lower court may have overlooked, misunderstood or misappreciated and which, if properly considered, would alter the results of the case. Unless certain facts of substance and value were overlooked which, if considered, might affect the result of the case, its assessment must be respected for it had the opportunity to observe the conduct and demeanor of the witnesses while testifying and detect if they are lying." (G.R. Nos. 115236-37. January 29, 2002, citing *People vs. Alvarez*, G.R. Nos. 135552-53, June 21, 2001 and *People vs. Belga*, G.R. NO. 129769, January 19, 2001).

This explanation in according the trial court's findings with finality finds no application in this instant case because the Judge who penned the decision was not the same Judge who was able to observe the demeanor of this particular eyewitness when the testimony was presented in court. In such a case where the observations of the trial judge as to the demeanor of a witness was not considered in arriving at the conclusions about the credibility of the witness, there is no other way of testing the credibility of such witness save by scrutinizing the contents of his testimony.

We have shown, through a careful scrutiny of Freddie Alejo's testimony, that the trial court's findings on his credibility are arbitrary in that it relied heavily on the testimony even if there were contradictions and omissions that were never explained. We have also shown facts and circumstances of weight and influence that might have been overlooked (like the glaring discrepancy in the description of the suspects with the physical appearance of Lenido Lumanog), misunderstood (like the actual number of suspects that witness saw at the crime scene, also discussed as a separate assignment of error), or misapplied (like the concept of positive identification having been misapplied to the identification made by the witness in open court, which we assail as not a clear and positive identification at all) by the trial judge.

Add to this the bias that resulted from receiving housing accommodations and probably other benefits from the victim's family which the trial court failed to consider in assessing the credibility of Freddie Alejo.

All of these, when considered, will surely affect the result of the case warranting the setting aside of the trial court's findings as to the credibility of witness Freddie Alejo.

III. THE TRIAL COURT ERRED IN APPRECIATING ALEJO'S EARLY SWORN STATEMENT TO MEAN THAT THERE WERE FIVE, NOT FOUR, SUSPECTS HE SAW PERPETRATE THE CRIME.

While we have already touched upon the discrepancy in the number of suspects in assailing Freddie Alejo's credibility, the trial court's erroneous appreciation of the statement made by the witness calls for a separate assignment of error as it is an independent and separate error altogether that goes to the trial court's misappreciation of evidence that is totally different from the result it produced - eroding the credibility of the witness.

The trial court erroneously appreciated the sworn statement of Freddie Alejo when it declared "that he saw four (4) men armed with handguns shoot at a car while he was on guard duty at No. 211 Katipunan Avenue, Blue Ridge, Q.C. and that one (1) other male person poked his gun near where he was stationed, asked him to come down and ordered that no one must interfere." (Joint Decision, page 24) This erroneous appreciation results to an increase in the number of suspects from four to five.

It is very clear from the sworn statement of Freddie Alejo that he only saw four men who were involved in the shooting.

> 12. T – Sino naman ang bumaril sa biktima na ito, kung kilala mo?
>
> S – Apat na hindi kilalang lalaki sir na armado ng baril.
>
> […]
>
> 16. T – Ano ang sumunod na nangyari, kung mayroon?
>
> S – Isa sa suspect na nasa tapat ko ay tinutukan ako ng kanyang baril at sinigawan ako ng "BABA!" Pinapababa niya ako sa guardhouse.
>
> 17. T – Ano ang ginawa mo, kung mayroon noong utusan ka na bumaba?
>
> S – Dahil sa nerbiyos ko ay hindi ako nakagalaw. Dito ay sumigaw uli ang suspect ng "Baba. Walang makikialam." At sa takot ko ay dumapa ako sa guardhouse. (Exhibit "L-1")

When the affiant declared "Isa sa suspect na nasa tapat ko…" he was obviously referring to one of the "Apat na hindi kilalang lalaki," otherwise, he would have declared that there were more than four men who were involved in the killing of the victim. In

fact, the police investigators never bothered to clarify whether there were more than four persons who perpetrated the killing because the other witnesses who were investigated also referred to four men.

In the sworn statement of security guard Merlito Herbas executed at 11:40 of the same day that the incident happened, question 11 reads:

> 11. T – Sino naman ang bumaril sa taong ito, kung kilala mo?
>
> S – Apat po na hindi kilalang lalaki na armado ng tipong cal. 45 pistol.

Also, in the sworn statement of witness Cesar Espiritu given at 12:10 noon of the same day that the incident happened, question 06 reads:

> 06. T : Sino naman ang bumaril sa biktimang ito, kung kilala mo?
>
> S : Sa mga suspect ay apat na hindi kilalang mga lalaki, pero ang isa ay nakita ko na siyang bumabaril sa biktima sa loob ng kotse nito.

It is clear, then, that several witnesses in the shooting incident were one in saying that there were four men who perpetrated the crime.

This was even confirmed by P/Insp. Rogelio Castillo who was presented by the prosecution and who testified, among others, as to the contents of their referral letter when they forwarded the spent shells and slugs to the Crime Lab, saying, "The first paragraph of our referral letter are (sic) as follows: "This refers to the shooting incident under your investigation by your division committed on June 13, 1996 along Katipunan, Proj. 4, Quezon City wherein the deceased victim is one Rolando Abadilla and the suspect (sic) were about 4 unidentified male persons armed with firearm." (TSN, Testimony of P/Insp. Rogelio Castillo, August 7, 1996, pp. 108-109).

What is clearly stated in Freddie Alejo's statement is that it was one of the four suspects whom he saw surrounding the victim's car, and not another man as the court erroneously construed, who pointed a gun towards him and commanded him to come

down from the guard house and that this very same suspect had to repeat the command after he did not move the first time it was given.

It was thus an error for the trial court to have appreciated Alejo's sworn statement as saying "that he saw four (4) men armed with handguns shoot at a car while he was on guard duty at No. 211 Katipunan Avenue, Blue Ridge, Q.C. and that one (1) other male person poked his gun near where he was stationed, asked him to come down and ordered that no one must interfere" as this would, in effect, increase the number of suspects to five.

IV. THE TRIAL COURT ERRED WHEN IT RULED THAT "IT DOES APPEAR FROM THE RECORD THAT BOTH SECURITY GUARDS, WHOSE PRESENCE IN THE VICINITY OF THE CRIME SCENE CANNOT BE DOUBTED, CONFIRMED THAT JOEL DE JESUS WAS ONE OF THE PERPETRATORS OF THE KILLING OF ROLANDO ABADILLA," AND FAILED TO PROPERLY APPRECIATE THE TESTIMONY OF THE OTHER SECURITY GUARD EYEWITNESS, MERLITO HERBAS, WHICH BELIES THAT OF ALEJO.

While it appears on the record that the presence of the two security guards in the vicinity of the crime scene cannot be doubted, the presence of Joel de Jesus and the confirmation of the two security guards about Joel de Jesus' participation in the killing of Rolando Abadilla are highly doubtful.

The court should not have only ascertained whether the confirmation of the two guards that Joel de Jesus was one of the perpetrators of the crime appear on the record, but, more importantly, it should have ascertained whether such confirmations are reliable, free from any doubt, and whether it establishes with moral certainty that Joel de Jesus was indeed present at the crime scene.

For if Joel de Jesus was indeed at the crime scene, how come he is not among those whom the witness identified in open court as the four persons shooting at the victim

whom the witness referred to in his sworn statement given to police investigators just five hours after the incident?

There were only four suspects seen by all the eyewitnesses who were investigated by the police. These four suspects must necessarily be those who were seen by all the witnesses around the victim's car: one at the driver's side (front left); another near the passenger's side (front right), another at the rear right side of the car and the fourth at the car's rear left side. For Joel de Jesus to be at the crime scene, he must be among these four suspects around the car.

Freddie Alejo, in open court, pointed to Rameses de Jesus, Cesar Fortuna, Lenido Lumanog and Augusto Santos as those whom he allegedly saw around the victim's car. This alone, already points to the fact that Joel de Jesus was not among those who were seen at the crime scene on the very day the crime was perpetrated.

Add to this the fact that the two men allegedly walking to and fro in front of the guardhouse where Alejo was stationed were just added belatedly in Alejo's testimony and were never touched upon in his earlier salaysay.

Comparing his testimony in open court and his earlier sworn statement, the reliability of the sworn statement is greater considering that it was given just five hours before the incident happened. In the words of the trial court itself,

> The shooting incident at bench took place around 8:40 in the morning. By 9:00 a.m., policemen were already swarming in the crime scene interviewing likely witnesses including SG Alejo. In the process SG Alejo must have been repeatedly telling (alone of with others) various persons – police and civilian alike – his observations on what happened that morning. The typewriter recording at 1:55 noon of SG Alejo's salaysay is but the culmination of a long process of oral interviews and conversation so that the results thereof can be put in systematic order. Additionally, at that period in time, SG Alejo's recollection is still very recent and fresh and he appears to be solely in touch with police investigators who came to know of the ambush that same morning. His court testimony, therefore, given at a much later date (August 1996) after the arrest of Lorenzo delos Santos wherein SG Alejo narrated that there were two (2) men loitering about near his post and that one after the other those two men barked at or ordered him is weakened by what he had earlier told police investigators disclosing that only one (1) person shouted orders to him. In view of this, the court finds the alibi of Lorenzo to have been correspondingly

> strengthened as to put in doubt the prosecution's case against this particular accused. (Joint Decision, p. 30)

Thus the trial court correctly held that Freddie Alejo's testimony given at a later date is weakened by what he had earlier told police investigators.

This ruling by the trial court and its acquittal of Lorenzo delos Santos lead to the conclusion that the testimony of the witness pertaining to the two men whom the witness referred to as walking to and fro near his guardhouse for more than an hour prior to the shooting incident is really not worthy of credence. In fact, the trial court correctly ruled that "His court testimony, therefore, given at a much later date (August 1996) after the arrest of Lorenzo delos Santos wherein SG Alejo narrated that there were two (2) men loitering about near his post and that one after the other those two men barked at or ordered him is weakened by what he had earlier told police investigators disclosing that only one (1) person shouted orders to him." The court, however, failed to go further as it should have gone on to say that this one person who shouted orders at him was among the four suspects who shot at the victim as this is necessitated by the various accounts given to the police officers that there were only four men seen at the crime scene.

The trial court likewise ruled that Merlito Herbas also confirmed Joel de Jesus' presence at the crime scene and relied on Herbas' sworn statement where he pointed to Joel de Jesus as one of those he saw at the crime scene. However, SG Merlito Herbas has openly declared in court that Major Rodolfo made him identify Joel de Jesus. He recanted this identification saying that he was just forced to say that Joel was among the suspects. (TSN, Testimony of Merlito Herbas, March 27, 1998, p. 23, May 27, 1998, pp. 4-6).

Moreover, security guard Merlito Herbas categorically declared in open court that all accused in this case were not the suspects he saw at the crime scene when the victim was ambushed. (TSN, Testimony of Merlito Herbas, March 29, 1998, pp 18-18, 25).

From all the foregoing, the confirmation made by the two witnesses as to Joel de Jesus' presence in the crime scene cannot be said to have been done independently, free

from any suggestion and with certainty. This raises a doubt as to whether Joel de Jesus was indeed at the crime scene. For if he was indeed in the crime scene and was among those who perpetrated the crime, he should have been one of the four suspects situated around the victim's car. Yet, in the testimony of the lone eyewitness presented in open court, Joel de Jesus was not among the four who were around the victim's car. The doubt is even greater since another eyewitness who was not presented by the prosecution but was presented by defense testified that he did not see any of the accused at the crime scene.

The prosecution's over reliance to a single eyewitness when there were other eyewitnesses who came forward during the investigation and who expressed their willingness to testify raises suspicion as to the reliability of the eyewitness presented in court.

It is the prosecution's duty to prove the guilt of the accused beyond reasonable doubt. It is their duty to present the other eyewitnesses to make sure that no mistake in identification of the accused is committed to the prejudice of innocent individuals. Yet, the prosecution never bothered to corroborate Alejo's testimony and identification with the other eyewitnesses.

Such attitude of the prosecution in not presenting the other eyewitnesses calls for the operation of Rule 131 Sec 3(e) of the Revised Rules of Court which states that:

> "The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:
>
> (3) That evidence willfully suppressed would be adverse if produced."

In fact, if Merlito Herbas' testimony is any indication, there is a great likelihood that the other eyewitnesses would also testify that the accused are not those they saw at the crime scene.

The trial court, in ruling that the presence of Joel de Jesus at the crime scene does appear on the record, relied on the identification made by Freddie Alejo and Merlito Herbas identifying Joel de Jesus in a police line-up.

We have already assailed the manner in which police investigators made Freddie Alejo identify Joel de Jesus as it was through a show-up where the witness was shown pictures of Joel de Jesus and was brought to Fairview to identify Joel just before police officers effected the latter's arrest.

Likewise, the identification made by Herbas was not freely executed as it was done not only with police interference but with direct suggestion and prodding by Major Rodolfo to point to a particular person.

In both instances, therefore, the identification of Joel de Jesus was not an independent identification made by the witness but were suggested by the police officers. Herbas testified that he identified Joel de Jesus on the suggestion of Major Rodolfo who pointed Joel de Jesus to him. (TSN, Testimony of Merlito Herbas, March 27, 1998, pp. 22-23, May 27, 1998, pp. 4-6).

But the court dismissed Herbas' testimony saying that Herbas appears to be a disgruntled witness whose need for job and money did color his perception and attitude. The trial court noted that Herbas, together with Alejo, were offered sanctuary by the family of the victim. But despite this notice and admittance of the fact that Freddie Alejo was likewise given free living quarters in a compound owned by the victim's family, the trial court failed to consider this as a factor that could likewise color Freddie Alejo's perception and attitude.

Thus, while the trial court viewed Herbas as an interested witness it failed to see Alejo in same way. Both security guards were housed in the Libis compound of the Abadilla family after the incident. But the Court prefers to dwell on Herbas' apparent disgruntledness about the Abadilla family's promises of salary and witness protection – that this "did color his perception and attitude" (p. 25, fourth to eighth paragraphs).

Presumably, Alejo was not disgruntled and was happy with the Abadilla family's arrangements for him. Would that not also color his perception and attitude? Were the Court's "eyes wide shut" to this and other inconsistencies, contradictions and discrepancies as regards Alejo? Such unequal treatment is also violative of the equal protection clause.

Thus, Freddie Alejo, who was given certain benefits by the family of the victim could have simply agreed to confirm what the police and prosecution would ask him to confirm even if the same would be contrary to what he has seen so that he could continue receiving the benefits given him.

This could have explained why this witness added two more persons among the suspects when he was so categorical in saying that there were just four men he saw as the malefactors.

All these point to one thing: Joel de Jesus was never at the crime scene at all. And in the same way that (Lorenzo delos Santos), whom Alejo allegedly saw walking to and fro in the vicinity for more than an hour, together with Lorenzo delos Santos, before the shooting incident happened, was correctly acquitted by the trial court, Joel de Jesus must, of necessity and being similarly situated as Lorenzo delos Santos, in that they were just both added to the number of actual suspects seen at the crime scene, should have been acquitted as well.

And all this point to another thing: that the confessions extracted from Joel de Jesus, aside from being inadmissible in evidence because they were uncounselled and coerced confessions, were not true accounts of what transpired at the crime scene but were forced upon him by the police investigators who tortured him into admitting his participation in the crime and into pointing to other persons as his cohorts.

IV. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE TORTURED AND COERCED EXTRA-JUDICIAL CONFESSIONS OF ACCUSED JOEL DE JESUS AND LORENZO DELOS SANTOS WHICH SHOULD HAVE BEEN EXCLUDED.

A. **The confessions of Joel de Jesus and Lorenzo delos Santos bear all the marks of inadmissibility that the Constitution speaks of in the Bill of Rights.**

In *People vs. Muleta*, the Court reiterated its ruling in *People vs. Santos* (283 SCRA 443), that "A confession is not admissible unless the prosecution satisfactorily shows that it was obtained within the limits imposed by the 1987 Constitution." (309 SCRA 148, 161).

Sec. 12 of the 1987 Constitution provides in part:

> "(1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel."
>
> (2) No torture, force, violence, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, *incommunicado*, or other similar forms of detention are prohibited.
>
> (3) Any confession or admission in violation of this or section 17 hereof shall be inadmissible in evidence against him."

Far from showing satisfactorily that the confessions offered in evidence were obtained within the limits imposed by the 1987 Constitution, the prosecution failed miserably to prove that the Constitutional safeguards were met when the alleged confessions of Joel de Jesus and Lorenzo delos Santos were taken.

The prosecution failed to show that the Constitutional guarantees of affording suspects with competent and independent counsels of their own choice, the safeguards against self-incrimination, and the proscription against use of force, torture, violence and coercion were met when their alleged extra-judicial confessions were taken.

What is shown in the records of this case is that all these safeguards enshrined in the Constitution, expounded by the statutes and repeatedly elucidated by this Honorable Court were flagrantly violated in the instant case.

1. The suspects were not afforded competent and independent counsel of their own choice.

Joel de Jesus and Lorenzo delos Santos were not provided with competent and independent counsel of their own choice when they allegedly executed their extra-judicial confessions. Instead, the police officers engaged the services of counsels who have been their favorite choice in many cases where suspects allegedly confess their commission of, or their participation in the commission of, crimes. In most of these cases where these counsels were engaged by the police officers to assist the suspects in executing their extra-judicial confessions, such suspects would later recant their alleged confessions because these were extracted from them through torture, force, violence, intimidation and coercion.

Neither Joel de Jesus nor Lorenzo delos Santos were allowed to talk with any of their relatives. And instead of allowing them to talk with a lawyer of their own choice, the police officers brought them to lawyers who were chosen not by the suspects but by the police officers.

The following documents, alleged extra-judicial confessions of Joel de Jesus and Lorenzo delos Santos, were all taken without the proper assistance of competent and independent counsel:

1. The seven-page alleged extra-judicial confession dated July 20 1996, purportedly taken at the IBP Office with the assistance of Atty. Confesor B. Sansano (Exhibit E to E-6);

2. The additional salaysay of Joel de Jesus allegedly given before SPO2 Edilberto Nicanor at the CID, PNP, Camp Karingal, on June 21, 1996, at 9:30 a.m. (Exhibit N);

3. Additional salaysay of Joel de Jesus before SPO1 Edilberto G. Nicanor at the IBP Office, on June 21, 1996 at 5:00 p.m. in front of Atty. Florimond C. Rous; and

4. Salaysay of Lorenzo delos Santos given to SPO2 Pio L. Tarala at the IBP Office at 3:10 p.m. on June 21, 1996 in front of Atty. Florimond C. Rous.

We now take the documents one by one:

a. Joel de Jesus' extra-judicial confession dated July 21, 1996 (Exhibit E to E-6) is inadmissible in evidence.

The portion in the sworn statement where Joel de Jesus was supposed to have been apprised of his Constitutional rights reads as follows:

> T: Ikaw JOEL DE JESUS ay nasa ilalim ng pagsisiyasat kaugnay sa kasong patayan na iyong kinasasangkutan. Bago ko ipagpatuloy ang pagtatanong ay nais kong malaman mo ang iyong mga karapatan sa ilalim ng ating bagong saligang batas dito sa Pilipinas, na gaya ng mga sumusunod:
>
> 1. Ikaw ay may karapatang magsawalang kibo o huwag sumagot sa mga itatanong sa iyo, naiintindihan mo ba naman ito?
> Sagot: Opo.
>
> 2. Ikaw ay may karapatang kumuha ng sariling abogado na pili mo para makatulong mo sa pagsisiyasat na ito at kung wala kang makuha ay bibigyan ka ng isa ng ating Pamahalaan, ito ba naman ay nauuunawaan mo?
> Sagot: Opo.
>
> 3. Na anumang sasabihin mo sa pagsisiyasat na ito ay maaring (sic) gamitin laban o panig sa iyo sa alin mang Hukuman dito sa Pilipinas, ito ba naman ay naiintindihan mo?
> Sagot: Opo.
>
> 4. Matapos kong maipaliwanag sa iyo at malaman mo ang iyong mga karapatan sa ilalim ng ating saligang batas dito sa Pilipinas ay magbibigay ka pa rin iyong malaya at kusang loob na salaysay? (sic)
> Sagot: Opo.

Even if it appears that the suspect was asked whether he understands his right to be assisted by a lawyer of his own choice. But he was never asked whether he has a lawyer whom he chooses to assist him during the custodial investigation. This was confirmed by SPO2 Jose A. Garcia in his testimony. (TSN, October 1, 1996, p. 89) It is one thing to be apprised of one's rights and it is another to be asked whether one is exercising such right. It is clear that Joel de Jesus was never given the chance to exercise his right to choose the lawyer he wants to assist him during the custodial investigation. Making a suspect understand his right to be assisted by a lawyer of his own choice is altogether different from allowing the suspect to exercise such right.

It is only when a suspect says that he does not have a lawyer that one should be provided him by the government. In this case, the police officers simply forced upon Joel de Jesus the services of Atty. Confesor B. Sansano. Thus it was the police and not Joel de Jesus who engaged the services of this counsel.

SPO2 Jose Garcia, Jr., the police investigator presented by the prosecution, confirmed through his testimony that he did not ask Joel de Jesus whether he had any lawyer of his own choice. (TSN, October 1, 1996, p. 89-90) Instead, the police officers only had Atty. Confesor B. Sansano in mind. It was they who brought the suspect to the IBP Office. And in fact, even at the IBP office, where there was a lady lawyer when they arrived together with Atty. Florimond Rous, these police officers never bothered to check the possibility of letting Joel de Jesus confer with the lady lawyer but instead waited for Atty. Sansano to arrive. (TSN, Testimony of P/Insp. Rogelio Castillo, August 15, 1996, pp. 132-139).

The testimony of P/Insp. Rogelio Castillo is also very revealing about the choice of counsel. When asked whether he is aware of R.A. 7438, he answered that "As far as the provision of the law is concerned, I did comply and I did my part because I secured the services of counsel." (TSN, August 15, 1996, p. 46). It is therefore clear that it was the police officers who secured the counsel for the accused. Police officers are not supposed to secure the services of counsel for the accused. This alone, is again an indicator that the counsel who assisted the suspect when he purportedly executed his extra-judicial confession was never the counsel of choice by the suspect. In *People vs. Deniega*, the Court pronounced:

> Ideally, therefore, a lawyer engaged for an individual facing custodial investigation (if the latter could not afford one) "should be engaged by the accused (himself), or by the latter's relative or person authorized by him to engage an attorney or by the court, upon proper petition of the accused or person authorized by the accused to file such petition." Lawyers engaged by the police, whatever testimonials are given as proof of their probity and supposed independence, are generally suspect, as in many areas, the relationship between lawyers and

> law enforcement authorities can be symbiotic. (*People vs. Deniega*, 251 SCRA 627, ___)

If indeed Atty. Sansano conferred with Joel de Jesus before taking the statement, he did so for only about 5 minutes (TSN, September 25, 1996, p. 126-128). In *People vs. Suela*, this Court, in holding that the extra-judicial confession therein of Edgardo Batocan was obtained in violation of his constitutional rights, pronounced, "This appellant did not finish first year high school. Yet, Atty. Rous, who is touted by the prosecution as a competent and independent counsel, interviewed Batocan – before the latter gave his confession – for only around "five minutes."" (373 SCRA 163, 182-183). This is not enough time to apprise a suspect of his constitutional rights and afford him a meaningful understanding of the consequences of his waiver of those rights. As this Court has said:

> The right to be informed of one's constitutional rights during custodial investigation refers to an *effective* communication between the investigating officer and the suspected individual, with the purpose of making the latter understand these rights. Understanding would mean that the information transmitted was effectively received and comprehended. Hence, the Constitution does not merely require the investigation officers to "inform" the person under investigation; rather, it requires that the latter be "*informed.*" (*People vs. Muleta*, 309 SCRA 148, 162).

Aside from failing to effectively inform Joel de Jesus of his constitutional rights, Atty. Sansano, if indeed he was present during the alleged taking of the extra-judicial confession, failed to protect the rights of the accused, not only at the inception of the formal investigation but also during its progress and until the suspect was made to sign the document. That a person under custodial investigation must be properly and effectively assisted by a competent and independent counsel was explained fully by this Court when it wrote:

> "Conditions vary at every stage of the process of custodial investigation. What may satisfy constitutional requirements of voluntariness at the investigation's onset may not be sufficient as the investigation goes on. There would be denial of the right to the assistance of competent and independent counsel if the investigation or […] during the process of signing. The competent and independent lawyer so engaged should be present from the beginning to end, i.e., at all stages of the interview, counseling or advising caution

> reasonably at every turn of the investigation, and stopping the interrogation once in a while either to give advice to the accused that he may either continue, choose to remain silent or terminate the interview." (*People vs. Deniega*, 251 SCRA 627, 638)

The prosecution tried to show the court that the assisting counsel was present all throughout the investigation until the confessant signed the document transcribing the latter's alleged confession. Yet a very glaring proof tells the court that this was not so. The investigation ended at 5:55 p.m. as appearing in the document itself (Exhibit E-6) and as confirmed by SPO2 Garcia twice on cross-examination (TSN, September 25, 1996, p. 76, October 1, 1996, pp. 33-34) but the signature of Joel de Jesus was affixed at 5:00 p.m., (Exh. E-6-5 and E-6-6) a physical impossibility since the document could not have been signed before the taking of the statement was even finished.

That the document was signed even before it was finished does not only point to an impossibility, but indicates a serious irregularity in the taking of the statement. It means that the affiant was not given any chance to read the statement before he signed it. It also means that the affiant was not given proper advice by counsel before he was made to sign the document.

The length of time that Joel and Atty. Sansano conferred prior to the alleged taking of the confession and the discrepancy between the time that the investigation allegedly ended and the time it was signed point out that the assisting counsel, if indeed he assisted the suspect at the time the confession was purportedly taken, rendered a meaningless assistance in the light of what this Court has ruled in *People vs. Deniega* as follows:

> The desired role of counsel in the process of custodial investigation is rendered meaningless if the lawyer merely gives perfunctory advice as opposed to a meaningful advocacy of the rights of the person undergoing questioning. If the advice given is so cursory as to be useless, voluntariness is impaired. If the lawyer's role is reduced to being that of a mere witness to the signing of a pre-prepared document albeit indicating therein compliance with the accused's constitutional rights, the constitutional standard guaranteed by Article III, Section 12(1) is not met. The process above-described fulfills the prophylactic purpose of the constitutional provision by avoiding "the

> pernicious practice of extorting false or coerced admissions or confession from the lips of the person undergoing interrogation for the commission of the offense" and ensuring that the accused's waiver of his right to self-incrimination during the investigation is an informed one in all aspects. (*People vs. Deniega,* 251 SCRA 627, 638-639)

b. The additional salaysay of Joel de Jesus allegedly given before SPO2 Edilberto Nicanor at the CID, PNP, Camp Karingal, on June 21, 1996, at 9:30 a.m. (Exhibit N)

This additional statement allegedly taken from Joel de Jesus on June 21, 1996, at 9:30 a.m. at the CID Office, CPDC, Camp Karingal, Quezon City, was taken totally without the assistance of a lawyer.

While it states in a note that "Affiant was duly apprised of his Constitutional rights," such note does not meet the requirements of a meaningful understanding that should be afforded an accused before any statement is taken from him.

c. The alleged additional salaysay of Joel de Jesus before SPO1 Edilberto G. Nicanor at the IBP Office, on June 21, 1996 at 5:00 p.m. in front of Atty. Florimond C. Rous

The alleged additional confession of Joel de Jesus purportedly taken by DPO1 Edilberto S. Nicanor at the IBP Office of Quezon City on June 21, 1996 merely stated "(AFFIANT WAS DULY APPRISED OF HIS CONSTITUTIONAL RIGHTS)."

This cursory and summary apprisal cannot suffice and does not meet the strict requirements in informing an individual of his Constitutional rights before any statement is taken from him. In fact, the document itself does not show that all the rights of the accused were sufficiently explained to the accused and he was made to think about the repercussions of giving a voluntary confession.

While Atty. Florimond C. Rous might have been present when this alleged statement was taken, this counsel failed to competently assist the accused to ensure that the latter's rights are amply protected and that his decision to give a confession before the police officers is an informed and intelligent one.

A glaring fact also points that the accused was simply asked to sign the additional statement. It was allegedly started at 5:00 p.m. but Joel de Jesus was also made to sign the document at 5:00 p.m. This means that the statement was already prepared when accused was brought to the IBP Office to have the document signed.

d. The extra-judicial confession allegedly executed by Lorenzo delos Santos is likewise inadmissible in evidence.

The extra-judicial confession of Lorenzo delos Santos was taken from him without the assistance of a competent counsel. The prosecution presented Atty. Florimond Rous to bolster their claim that the statement was voluntarily given and that counsel was present when it was taken.

However, the testimony of Atty. Rous indicates that he not render a meaningful assistance to the accused. On cross examination, he testified:

> Q: Did you not bother to ask Mr. Delos Santos when was he apprehended?
> A: No sir.
> Q. Did you not bother to ask the police investigators accompanying him when did they apprehend Mr. Delos Santos?
> A: No, sir.
> Q: It did not concern you?
> A: I don't know, sir. (TSN, October 15, 1996, p. 70)

This is very revealing of the attitude that counsel has over the whole thing. He does not even know whether the circumstances of arrest or the personal circumstances of the accused are important. (TSN, October 15, 1996, p. 61)

Atty. Rous also testified that it was the police officer who propounded the basis questions to the accused.

> Q: What, if any, did the police do before taking down the main statement?
> A: Well, the basic questions regarding constitutional right to silence, and to counsel, and if he was asked if he had his own counsel and if he did not have his own counsel he will be provided with one and he was asked if he wanted me to be his counsel and he answered "yes" and so those were the preliminary questions propounded to the accused.

While Atty. Rous was present, he did not even bother to explain to the accused, before the alleged statement was taken, about the nature of those rights and the consequences of waiving them. Instead, Atty. Rous left everything to the police officer.

There was also no showing that Lorenzo delos Santos was ably assisted by Atty. Rous as the interrogation progressed. He was just within hearing distance but he never bothered to confer with Lorenzo regarding the specific answers he was then giving and advising him as to their effects, counseling him that he still has the option to remain silent and change his mind about giving any confession. Instead, Atty. Rous just let the interrogation proceed without rendering any able assistance to the accused.

Even before Lorenzo delos Santos signed the statement, what Atty. Rous did was merely ask the accused whether he was willing to sign the same.

> Q: How about you, what did you do after delos Santos read his statement?
> A: After he read the questions and answers, I asked him if these were the questions and answers that were given to him and the answers that he gave and he said these were the questions and these were the answers given. Then I asked him if he was willing to sign the statement and if he was willing to sign it freely and without pressure and he said he was willing to sign the statement without any pressure or force, sir. (ibid. pp. 28-29)

Atty Rous never bothered to check again with the accused whether he understands all the consequences of his waiver of his constitutional rights before signing the statement.

Moreover, Atty. Rous, while appearing confident with his answers during the direct examination, appeared tentative, unsure and unable to remember the details during cross-examination. He started his answers with "I think" for twelve times (*ibid.*, pp. 52, 63, 69 (2x), 72, 79 (2x), 95, 100, 102, 130, & 142) and with "I don't recall" twenty-two times (*ibid.*, pp. 57, 58, 60, 61, 64 (2x), 67, 68, 84, 96 (2x), 101, 129, 138, 140, 142, 146 (2x), 15, 159, 162, & 164). He also answered "I guess so" (*ibid.*, p. 65) and "I think so" (*ibid.*, pp. 66, 68) twice each and "I don't know" (*ibid.*, p. 67) and "I don't remember" (*ibid.*, p. 136) once each.

Atty. Rous, on a lot of occasions during cross-examination, tried to dodge the questions by answering "I cannot recall." And when he is confronted with conflicting statements based on documents he allegedly signed, he would give a lame excuse that he is already 48 years old and that his memory is already short. (TSN, Testimony of Atty. Florimond Rous, pp. 58, 115)

Atty, Rous does not even recall the name of the investigator who brought the affiant (*ibid.,* p. 67) even if the name of the investigator was already mentioned. (*ibid.,* p. 68).

He even candidly admitted, "As I said again I don't recall vividly any more what transpired during that time and during that day." (ibid., p. 66). Pressed for explanation, the good counsel just gave old age as a convenient excuse saying, "Well, I am 48 years old, sir, and it's expected that my memory would already fall short." (ibid., p. 58).

All these indicate the lack of competence of the counsel provided by the police officers to Lorenzo delos Santos when the latter allegedly executed his sworn statement.

Lorenzo delos Santos was able to prove that he was not at all at the crime scene, proving that the statement allegedly taken from him were just forced upon him by the police. He was just asked to sign the alleged confession without him having read the same and that the document was brought to Atty. Rous. (TSN, December 9, 1998, pp 18-20).

When the trial court acquitted Lorenzo delos Santos because he was able to prove that he was not at the crime scene, such acquittal rendered his extra-judicial confession pertaining to the crime ineffective. Giving credence to such extra-judicial confession and at the same time acquitting the particular accused who gave the extra-judicial confession on the ground of evidence presented that he was not at the crime scene would be rendering contradictory rulings.

2. In two separate cases, this Court has previously noted the incompetence of counsels whom the police investigators sought to assist the suspects in

this case when the latter allegedly executed their extra-judicial confessions.

We are duty bound to raise to this Court's attention, and it might also interest the Court to note, that in the cases of *People vs. Deniega* and *People vs. Suela* where the extra-judicial confessions of the accused were not admitted in evidence, all the accused complained of torture and violence by the police investigators who extracted said confessions from them. But more interestingly, in both cases, Atty. Confesor B. Sansano and Atty Florimond Rous were the counsels who assisted the confessants.

In fact, the incompetence of both Atty. Sansano and Atty. Rous to serve as assisting counsels for the suspects brought to their office was already noted by this Court in these cases. In *People vs. Deniega*, the Court wrote:

> A thorough reading of the transcripts of the testimonies of the two lawyers, Atty. Sansano and Atty. Rous, indicates that they appeared less as agents of the accused during the alleged investigation than they were agents of the police authorities. In the case before us, it was the police authorities who brought the accused, handcuffed, to the IBP headquarters where the services of the lawyers were supposedly "engaged." No details of the actual assistance rendered during the interrogation process were furnished or alleged during the entire testimony of the lawyers in open court. The bulk of the lawyers' oral testimonies merely gave the trial court assurance that they supposedly explained to the appellants their constitutional rights, that the signatures present were their signatures and those of the accused, and that the accused agreed to having the lawyers assist them during the process of custodial investigation. (*People vs. Deniega*, 251 SCRA 627, 635)

In *People vs. Suela*, the Court again had the opportunity to comment on Atty. Sansano's lack of proper understanding of his role as counsel for a suspect during a custodial investigation.

> "Evidently, Atty. Sansano did not understand the exact nature of appellants' rights to counsel and to remain silent during their custodial investigations. He viewed a refusal to answer as an obstruction in the investigation. This shows that he was incapable or unwilling to advise appellants that remaining silent was a right they could freely exercise without fear of any untoward consequence. As counsel, he could have stopped his clients from answering the propounded questions and advised them of their right to remain silent, if they preferred to do so. That the process of investigation could have been "obstructed"

> should not have concerned him because his duty was to his clients and not to the prosecution or to the police investigators."
>
> "Moreover, when he interviewed appellants, he did not even bother to find out the gist of their proposed statements in order to be able to inform them properly of the nature and consequences of their extra-judicial confessions. Clearly and sadly, appellants were not accorded competent and independent counsel whom they could rely on to look after their interests." (*People vs. Suela*, 373 SCRA 163, 185)

How then, can Joel de Jesus and Lorenzo delos Santos have been assured of an able and competent assistance from these counsels who have been proven to protect not the interest of the suspects brought before them for legal assistance but that of the prosecution or police investigators?

3. The suspects were held *incommunicado*, tortured and forced to admit to a crime they did not commit.

Both Joel de Jesus and Lorenzo delos Santos were forced to confess to the crime and to implicate their co-accused through the use of torture, force, violence, coercion and intimidation which vitiated their free will in signing the confessions presented by the prosecution in court. They were also detained in secret places and were held *incommunicado* by preventing them from making any contact with any other person during their confinement while their confessions were being extracted from them.

All these prove that the confessions offered by the prosecution also fail the test of voluntariness this Court speaks of in *People vs. Muleta*. (op.cit.)

> "If the extra-judicial confession satisfies these constitutional standards, it is subsequently tested for voluntariness, *i.e.*, if it was given freely – without coercion, intimidation, inducement, or false promises; and credibility, *i.e.*, if it was consistent with the normal experience of mankind."
>
> "A confession that meets all the foregoing requisites constitutes evidence of a high order because no person of normal mind will knowingly and deliberately confess to be the perpetrator of a crime unless prompted by truth and conscience. Otherwise, it is disregarded in accordance with the cold objectivity of the exclusionary rule." (*ibid*. p. 161-162)

The use of torture and violence to the persons of Joel de Jesus and Lorenzo delos Santos rendered their confessions involuntary which calls for the operation of the exclusionary rule to these documents.

In fact, it was not only Joel de Jesus and Lorenzo delos Santos who were tortured and held incommunicado, but all the other accused in this case were similarly treated by their captors.

All the accused in this case, together with their wives, filed their complaint before the Commission on Human Rights. Their case also caught the attention of Amnesty International which has come up with a special report about their plight.

The accused presented evidence of compulsion, violence, and actual physical injuries inflicted upon their persons. They instituted administrative action against the police officers who subjected them to torture. They were examined by a reputable physician whose findings were submitted before the trial court, the Commission on Human Rights and the Department of Justice.

All these rule out any iota of doubt that all the accused in this case were indeed tortured and forced into admitting their alleged participation in the crime.

Thus, voluntariness of the confessions of Joel de Jesus and Lorenzo delos Santos cannot be presumed. As this Court has ruled:

> The standing rule is that "where the defendants did not present evidence of compulsion, or duress nor violence on their person; where they failed to complain to the officer who administered their oaths; where they did not institute any criminal or administrative action against their alleged intimidators for maltreatment; where there appeared to be no marks of violence on their bodies; and where they did not have themselves examined by a reputable physician to buttress their claim," all these will be considered as indicating voluntariness. Indeed, extra-judicial confessions are presumed to be voluntary, and, in the absence of conclusive evidence showing that the declarant's consent in executing the same has been vitiated, the confession will be sustained. (*People vs. Gerrico Vallejo*, G.R. No. 144656, May 9, 2002).

The exact opposite of this ruling now calls application in the instant case. The confessions submitted by the prosecution and admitted in evidence by the trial court should be rendered inadmissible as they should have never been admitted at all.

B. The contents of the alleged extra-judicial confessions, inconsistencies in the testimonies of prosecution witnesses and the positive assertions of the accused that they were not, in fact, subjected to a custodial interrogation proper at the IBP Office in Quezon City Hall Compound, raise serious doubts as to whether such purported interrogations actually happened.

While the prosecution tried to show that the custodial investigation was purportedly conducted in the IBP Office of Quezon City in the presence of counsel, a lot of indicators point that this is not so.

1. The contents of the alleged extra-judicial confessions contain clear indicators that these were not the result of a face-to-face question and answer interrogation.

Again we take the documents one by one to show this Court the glaring indicators that these alleged extra-judicial confessions were not a result of a face-to-face investigation but were already prepared by the police officers and were presented to the accused who were forced and intimidated into signing the same.

a. Joel de Jesus' extra-judicial confession. (Exh. E to E-6)

If, indeed, Atty Confesor B. Sansano was present during the time when the suspect was being apprised of his constitutional rights in his supposed extra-judicial confession, how come that he was never asked whether he is willing to accept Atty. Sansano as a lawyer provided by the government in the absence of a lawyer of his own choice. The prosecution tried to establish this through the testimony of SPO2 Garcia, however, this was not borne in the purported sworn statement of Joel de Jesus. And the best evidence is the document itself.

The way the question and answer was transcribed points that this has been prepared somewhere else and was only brought to the office of the IBP for the signing.

The following questions and answers in the sworn statement allegedly given by Joel de Jesus in the sworn statement he purported executed at the IBP office in front of

Atty. Sansano contain very glaring indicators that will engender a well-founded belief that these statements were not a recorded face-to-face question and answer between a police investigator and a suspect. For if these are indeed a result of a face-to-face questioning, the natural flow would be to ask a particular fact, one at a time.

> T: Ano naman ang iyong pangalan, edad, at iba (sic) bagay ukol sa iyong tunay na pagkatao?
> S: Ikaw JOEL DE JESUS y VALDEZ, alias "TABONG", 22 taong gulang, may-asawa, tricycle driver, tubong Banga Caves, Camarines Sur at nakatira sa No. 49 Ruby St., Bgy. Fairview, Quezon City.

The use of "Ikaw" instead of "ako," while it might have been a typographical error, is a serious slip which points that it was another person and not Joel de Jesus who supplied and related the facts written. A person who is asked his name would simply give his name without his alias. And it would be unnatural for a person to reveal his address, and in this instance, his provincial and city addresses, without being specifically asked about them. "Iba pang bagay tungkol sa iyong pagkatao" is too general a formulation to elicit an address from a person.

> T: May kilala ka bang isang tricycle driver na nagngangalang "TABONG" na taga-Fairview?
> S: Ako po iyon sir.
>
> T: Kaninong motor naman ang ginagamit mo sa pamamasada?
> S: Sa Ate ko po (Rosalinda de Jesus)
>
> T: Anong klaseng motor ito?
> S: KAWASAKI Plate No. PJ-4478.

These other supposed answers also give out other details not called for by the question. When asked about the type of motorcycle, the natural answer would only be Kawasaki. But here it appears that the witness volunteered the Plate Number. It would have been believable if the questioning went in such a way as to elicit these data one at a time for that is the natural flow of a custodial interrogation. And it goes against the natural attitude of persons, especially those being interrogated, to answer only what is being asked or to even withhold information.

b. Joel de Jesus additional salaysay (Exh N)

Atty. Florimond Rous testified that he assisted Joel de Jesus when the latter executed an additional extra-judicial confession pointing to Lorenzo delos Santos. The document itself contain a passage saying, "Iyan pong lalaking iyan na nakasuot ng puting t-shirt at naka-maong na pantalon, iyan po si Lorenzo (affiant pointing and referring to Lorenzo delos Santos…)."

In his testimony, however, Atty. Florimond Rous said that Lorenzo delos Santos had already left his office when investigators brought in Joel de Jesus for the execution of the alleged additional statement. (TSN, Testimony of Atty. Florimond Rous, October 15, 1996, pp. 99-115).

How can Joel de Jesus then point to Lorenzo delos Santos when the latter was no longer at the office of Atty. Florimond Rous when the alleged identification was made?

Even without pointing to the other irregularities showing that the suspect was not ably assisted by Atty. Rous, the fact alone that the person being identified was not in the same room where the identification allegedly took place is enough to discredit the whole sworn statement allegedly taken from Joel de Jesus.

And as we will show in the discussion of the testimony of Atty. Florimond Rous when we assail the admissibility of the alleged extra-judicial confession of Lorenzo delos Santos, such testimony of a lawyer touted by the prosecution as a competent counsel is filled with statements claiming that he can not recall the details of the events that transpired in his office when the alleged statements were purportedly taken.

c. Joel de Jesus additional salaysay dated June 21, 1996, 9:30 a.m.

The line-up allegedly included SPO2 Jose Garcia, Jr., PO1 Florencio Escobido, D/P Alexander Dalay, Rameses de Jesus, SPO2 Cesar Fortuna, SPO1 Jorge Manabat, Lenido Lumanog, D/P Roger Roxas, PO2 Romeo Costibolo and PO1 Elmer Monsalve.

The identification was alleged to have been conducted inside the CID Office and necessarily all the police officers were in their duty uniforms and only the other accused were in civilian clothing. How can this be a proper police line-up when the persons

presented to the one who is supposed to identify suspects are the suspects themselves and no one else.

In fact, the way the question was formulated, "sa mga taong naririto ngayon sa opisinang ito, sino sa kanila ang makikilala mo?" was not even a proper formulation to identify suspects and link them to the commission of the crime.

This shows that this particular document, aside from being inadmissible for having been taken without the assistance of any lawyer at all, is also of no probative value as it does not meaningfully link the accused to the commission of the crime.

It is also mind boggling why the police never bothered to have the accused identified by any of the witnesses who came forward and expressed their willingness to testify just after the incident occurred. Not even Freddie Alejo, the eyewitness presented in court, was made to identify the accused in a police line-up.

Alejo was only made to identify Joel de Jesus and Lorenzo delos Santos. The identification of Joel de Jesus is even doubtful as it have been the result of suggestion from the police because Alejo was shown pictures of Joel de Jesus which was compared to the cartographic sketches made through the description made by Alejo.

It is equally suspicious why the prosecution never bothered to present the cartographic sketches as evidence of the basis for the arrests of the accused.

The irregularity in the procedure by which the police conducted the case investigation, especially in not tapping the eyewitnesses who came forward and were willing to testify, in identifying the suspects in a police line-up, raises serious suspicion that these eyewitnesses would not have pointed to the accused in this case as the actual perpetrators of the crime.

2. The testimonies of prosecution witnesses did not tie up on material points with each other and with the documentary evidence regarding the alleged taking of the extra-judicial confessions at the IBP Office in Quezon City Hall of Justice.

Testimonies of the witnesses presented by the prosecution, notably P/Insp. Rogelio Castillo and SPO2 Jose Garcia, Jr. do not tie up on material details pertaining to the alleged taking of Joel de Jesus' purported extra-judicial confessions.

Rogelio Castillo said that they went to the City Hall Compound at around 1:00 p.m. on June 20, 1996 to look for a lawyer who could assist Joel de Jesus in the execution of the latter's extra-judicial confession. Castillo testified that his men scouted for lawyers and he was left at the lobby. (TSN, August 15, 1996, p. 130). SPO2 Jose Garcia, on the other hand, testified that when they arrived at the City Hall, it was Lt. Rogelio Castillo and another investigator who went to the second floor to look for a lawyer. (TSN, September 25, 1996, pp. 63-66). And that he, together with Joel de Jesus and SPO1 Nicanor was left at the lobby. (*ibid.*, p. 76).

These witnesses also testified that they arrived at the City Hall Compound at about 1:00 p.m. (TSN, August 15, 1996, p. 129), that they had to scout for lawyers for about 15-20 minutes according to Castillo (TSN, August 15, 1996, p. 130) while according to Garcia it took them about 25-30 minutes to look for a lawyer (TSN, September 25, pp. 64-65), that when they arrived at the IBP Office, Atty. Confesor Sansano was not yet around so they had to wait for another 5-7 minutes according to Garcia (TSN, October 1, 1996, p. 46) while according to Castillo they had to wait for about 15-20 minutes (TSN, August 15, 1996, p. 135), that Atty. Sansano talked with Joel de Jesus for about five minutes according to Garcia (September 25, 1996, p. 127) while Castillo testified that Atty. Sansano conferred with Joel for about 30 minutes (TSN, August 15, 1996, p. 149).

Comparing the testimonies of Castillo and Garcia as to the time elapsed for each of the significant details they testified to we get the following:

Event	Time Elapsed	
	Castillo	Garcia
Scouting for a lawyer	15 – 20 min.	25 – 30 min.
Waiting for Atty. Sansano to arrive	15 – 20 min.	5 – 7 min.
Atty. Sansano's conference with Joel de Jesus	30 min.	5 min.

TOTAL TIME ELAPSED from their arrival at City Hall to start of taking Joel de Jesus' statement.	1 hour to 1 hour and 10 minutes	35 to 42 minutes

The document evidencing the alleged extra-judicial confession of Joel de Jesus states that the statement was taken from 1:10 p.m. Taking the time frame according to the two witnesses, it would have been impossible to start the taking of Joel's statement at 1:10 p.m.

If we use Castillo's testimony, the probable start of taking Joel's statement would have been 2:00 or 2:10 p.m. while if we use Garcia's testimony, it should have started at 1:35 or 1:42 p.m. This is nowhere near the 1:10 p.m. written on the heading of Joel de Jesus' statement in question.

We have also pointed out earlier that the taking of the statement was allegedly finished at 5:55 p.m. as appearing in the document itself and as confirmed by the police officers. Yet, Joel de Jesus signed the document at exactly 5:00 p.m. How can this happen that a document was signed 55 minutes prior to its completion?

Such inconsistencies indicate falsity in the assertions being forwarded by the prosecution that the purported taking of the extra-judicial confessions of Joel de Jesus and Lorenzo delos Santos allegedly at the IBP Office in Quezon City Hall ever really happened.

3. Certain facts presented by the prosecution itself establish that Joel de Jesus was interrogated by the police investigators right after his arrest, without the assistance of counsel, and indicate that the alleged interrogation of Joel de Jesus at the IBP Office did not actually take place.

Moreover, certain facts advanced by the prosecution itself support the testimonies of Joel de Jesus and Lorenzo delos Santos that their Constitutional rights to remain silent and to have competent and independent counsels were violated.

Police Sr. Inspector Jose B. Macanas, witness for the prosecution, testified as to the particulars of the arrest of Joel de Jesus, Cesar Fortuna and Lorenzo delos Santos.

Capt. Macanas testified that Joel's arrest was effected by the PARAC and CPDC operatives at about 4:00 p.m. on June 19, 1996 (TSN, November 12, 1996, p. 28) after a stake-out which began at 2:00 p.m. that same day. Freddie Alejo was with the CPDC operatives where he was shown pictures of Alias Tabong before he was made to identify the person they arrested who turned out to be Joel de Jesus.

The rest of Capt Macanas' testimony establish the following:

1. just after Joel de Jesus was arrested, he was turned over to the CID-CPDC for investigation (p. 30);

2. on that same day, the CPDC investigators informed the team of Capt. Macanas through their superior Col. Baluyot, that Joel de Jesus "made some revelation (sic) with regard to his participation in the killing of ex-Col. Abadilla (p. 32-33);

3. Capt. Macanas and the CID-CPDC conducted joint follow-up operations where they brought Joel de Jesus along to "g[i]ve a hand in identifying his companions in the killing." (p. 33-34);

4. Between 8:00 or 9:00 p.m. of June 19, 1996 (TSN, December 10, 1996, p. 21), the group was allegedly led by Joel de Jesus somewhere in Fairview along Ruby Street wherein his other alleged companions namely Ram, Lorenzo delos Santos, Ogie, one Alias Cesar could be found, (TSN, November 12, 1996, p. 35) based on Joel de Jesus' purportedly volunteered information (TSN, December 10, 1996, p. 18);

5. Joel led them to the house of Ram de Jesus but they did not find Ram there. Instead, Joel de Jesus pointed to Cesar Fortuna and the arresting team, immediately effected the arrest of the latter, minutes before midnight. (TSN, November 12, 1996, pp. 36-40);

6. Past midnight that same evening, the operatives apprehended Lorenzo delos Santos. (TSN, _____) look for transcript.

This chain of events leading to the arrest of Cesar Fortuna and Lorenzo delos Santos establish that Joel de Jesus was interrogated by the police operatives just hours after his arrest on June 19, 1996. Based on information extracted from Joel de Jesus, without informing him of his Constitutional rights and without the assistance of counsel, the police operatives established the names of the other accused in this case.

From the foregoing account of Capt. Macanas, it is clear that Joel de Jesus was already subjected to police questioning and interrogation on June 19, 1996, just after he

was arrested. Such interrogation was conducted upon the person of Joel de Jesus without the assistance of any counsel. In fact, this corroborates the assertion made by Joel de Jesus that he was asked a lot of questions after he was tortured into admitting his participation in the crime. Such interrogation made by police officers without any assistance from a competent counsel reeks of utter disregard of the suspect's Constitutional rights.

And taking into account that Joel de Jesus was arrested not just by a single police officers but by joint operatives from the PARAC and the CPDC, the pressure that police investigators were into in solving the ambush-slay of a well-known military personnel, we are reminded of this Court's description of custodial investigations in *People vs. Deniega*:

> "In fine, the likelihood for compulsion is forcefully apparent in every custodial investigation. A person compelled under the circumstances obtaining in every custodial investigation is surrounded by psychologically hostile forces and the threat of physical violence so that the information extracted is hardly voluntary. In the oftentimes highly intimidating setting of a police investigation, the potential for suggestion is strong." (*People vs. Deniega,* 251 SCRA 627, 641)

Yet, the prosecution tried to convince the court through documentary and testimonial evidence that Joel de Jesus executed his extra-judicial confession on June 20, 1996 at the office of the IBP Quezon City Chapter properly, orderly and with the assistance of Atty. Confesor B. Sansano.

If, indeed, the extra-judicial confession of Joel de Jesus was regularly taken only between 1:10 and 5:55 p.m. of June 20, 1996, with the assistance of a competent counsel and without any force, violence, intimidation, threat or torture, how come that the police operatives were already able to ascertain the names of the other accused in this case and had, in fact, arrested Cesar Fortuna and Lorenzo delos Santos on the midnight of June 19, 1996?

The fact is, as Joel de Jesus related before the court, that he was tortured and forced to admit his participation in the ambush slay of the late Col. Rolando Abadilla,

and was also forced to implicate the other accused in this case. Joel de Jesus was interrogated without the assistance of counsel on June 19, 1996, the results of which were the transcribed and typewritten sinumpaang salaysay (Exh. E to E-6) allegedly taken from Joel on June 20, 1996 at the IBP Office.

This also bolsters the testimony of Joel de Jesus that the statement he was made to sign before Atty. Sansano was already prepared even before they went to the Quezon City Hall of Justice and that he was not interrogated in said office but in the safehouse where he was kept and tortured.

B. The foregoing tell-tale indicators of the flagrant violations of the Constitutional safeguards against involuntary and uncounselled confessions calls for the application of the exclusionary rule to these documents containing the alleged extra-judicial confession of Joel de Jesus and Lorenzo delos Santos.

Again we turn to *People vs. Deniega* where this Court pronounced:

> Every so often, courts are confronted with the difficult task of taking a hard look into the sufficiency of extra-judicial confession extracted by law enforcement authorities as the sole basis for convicting accused individuals. In cases of crimes notable for their brutality and ruthlessness, the impulse to find the culprits at any cost occasionally tempts these agencies to take shortcuts and disregard constitutional and legal safeguards intended to bring about a reasonable assurance that only the guilty are punished. Our courts, in the process of establishing guilt beyond reasonable doubt, play a central role in bringing about this assurance by determining whether or not the evidence gathered by law enforcement agencies scrupulously meets exacting standards fixed by the Constitution. If the standards are not met, the Constitution provides the corresponding remedy by providing a strict exclusionary rule, i.e, that "[a]ny confession or admission obtained in violation of (Article III, Section 12(1)0 … hereof shall be inadmissible in evidence. (*People vs. Deniega*, 251 SCRA 627, 641-642)

Surely, the exacting standards fixed by the Constitution were not met in the instant case. There is no other remedy than to invoke the exclusionary rule with regards to the extra-judicial confessions erroneously admitted by the trial court.

VI. THE TRIAL COURT ERRED IN GIVING SCANT ATTENTION TO THE GROSS VIOLATIONS OF CONSTITUTIONAL AND HUMAN RIGHTS OF THE ACCUSED PERTAINING TO THEIR ARREST, DETENTION AND CUSTODIAL INVESTIGATION,

AND CONSEQUENTLY, IN FAILING TO GRANT THEM "RADICAL RELIEF" FOR SUCH GROSS VIOLATIONS.

The trial court's erroneous admitting in evidence of the coerced and tortured extra-judicial confessions of accused Joel de Jesus and Lorenzo delos Santos, as just discussed, is only the tip of the iceberg of the trial court's weak commitment, low regard and poor appreciation of constitutional and human rights of arrested, detained and accused persons.

This is exemplified by the fact that the trial court's appealed 32-page Joint Decision of July 30, 1999 (Annex A) gives only four short paragraphs (in pp. 26-27) to a discussion of the tortured saga of Joel de Jesus from whom no less than three extra-judicial confessions were extracted. Contrast this with the extensive discussion of this matter in four pages (pp. 912-16 of the RTC record) of the Memorandum for accused SPO2 Cesar Fortuna dated July 14, 1999.

And it was not only Joel de Jesus and Lorenzo delos Santos among the seven original accused or six remaining accused who suffered "the works:" warrantless arrests,[4] violation of the Miranda rule,[5] arbitrary detention,[6] secret detention,[7] torture,[8] uncounselled statements,[9] coerced confessions,[10] as this and the other appellants' briefs will show.

Even more telling than these briefs are the physical, photographic, medical and expert evidences to that effect (see esp. accused Fortuna's Exhibits 5 to 9, 58, 61 to 66, 79 and 82 under his Formal Offer of Evidence dated April 19, 1999). Only one with "eyes wide shut" will fail to see the "third degree" (if there was a higher degree number,

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[4] Constitution (Const.), Art. III, Sec. 2; and Rules of Court, Rule 113, Sec. 5.
[5] Const., Art. III, Sec. 12(1).
[6] *Universal Declaration of Human Rights* (UDHR), Art. 9; *International Covenant of Civil and Political Rights* (ICCPR), Art. 9(1); and Revised Penal Code (RPC), Art. 124.
[7] Const., Art. III, Sec. 12(2).
[8] Const., Art. III, Sec. 12(2); UDHR, Art. 5; and ICCPR, Art. 7.
[9] Const., Art. III, Sec. 12(1) & (3).
[10] Const., Art. III, Sec. 12(2) & (3).

we would use it) from which the accused "graduated" from what was literally a four-day (instead of four-year) University of *Hard Knocks*.

The accused and their relatives filed, at the first opportunity, complaints for torture and other human rights violations (e.g. as unlawful arrest, arbitrary detention, physical injuries, etc.) against the arresting and detaining police officers before the Commission on Human Rights (CHR) (see e.g. accused Fortuna's Exhs. 65 & 66). The After-Mission Report of the CHR Special Investigators dated 27 June 1996 (Annex 5 of Exh. L of accused-appellant Lenido Lumanog's "Motion for New Trial and Related Relief" dated 26 April 2002), made this finding, among others:

> The sworn statements/affidavits and medical findings of the abovenamed [Abadilla murder] suspects indicate warrantless arrests, denial of visitation rights, and probability of torture.
>
> X X X
>
> Based on the circumstances and evidence gathered, there was sufficient basis to warrant a prima facie case of human rights violations against the probable respondents.

The Resolution of the CHR itself dated 26 July 1996 (accused Fortuna's Exh. 79) disposed of the complaints thus:

> Premises considered, the Commission finds prima facie evidence that respondents could have violated Republic Act No. 7438, otherwise known as the Law on Custodial Investigation, particularly on visitorial rights and the right to counsel, including the law on arbitrary detention. This Commission, therefore, RESOLVES, as it is hereby resolved, to forward this Resolution together with the records of this case to Honorable Teofisto T. Guingona, Jr., Secretary of Justice… to file the appropriate criminal and/or administrative actions against the person or persons responsible of violating the human rights of the suspects as the evidence may warrant.

In the Department of Justice (DOJ), accused Joel de Jesus also filed on 12 September 1996 criminal charges against 19 identified and about 10 unidentified persons, mostly police officers, for illegal arrest (RPC, Art. 269), arbitrary detention (RPC, Art. 269), delay in the delivery of persons arrested to the proper judicial authority (RPC, Art. 125), grave threats (RPC, Art. 282), grave coercion (RPC, Art. 286), incriminatory machinations (RPC, Art. 363), falsifications (RPC, Arts. 171 & 172), violation of the

rights of persons arrested, detained or under custodial investigation (RA 7438, Sec. 4-a & b), and violation of the Anti-Graft and Corrupt Practices Act, RA 3019, Sec. 3-a & e).

But since then, September 1996, up to the present, October 2003, or *seven years*, the Abadilla murder suspects' complaints for various human rights violations or the corresponding criminal charges have remained *pending on preliminary investigation in the DOJ*, without it filing the appropriate criminal actions in court. In the meantime, on July/August 1999, or in three years, five of them (thus "Abadilla 5") were convicted and sentenced to death in the criminal case at bar. One wonders what happened to the constitutional guarantees not only of speedy disposition of cases under the Constitution's Art. III, Sec. 16 but also the more fundamental equal protection of the law under the Constitution's Art. III, Sec. 1.

It was this *long delay in the termination of the preliminary investigation* of the Abadilla murder suspects' complaints for torture and other human rights violations which, among others, became the subject in October 2000 of an Amnesty International special report "The Rolando Abadilla murder inquiry – an urgent need for effective investigation of torture" (available at the AI website "www.amnesty.org"). This matter is not just a matter which is of public knowledge and therefore of judicial notice (Rule 129, Sec. 2) but a matter of *international* public knowledge, which the Court actually took direct judicial notice of by way of its Resolution dated 4 July 2001 referring to the NBI for appropriate action a DOJ 1st Indorsement dated 4 April 2001 regarding "three sacks containing 23,619 letters from different [foreign] persons relative to their requests for a full, independent and impartial investigation into the alleged complaint of torture suffered by the five prisoners," the herein "Abadilla 5."

The AI report had this thoughtful thing to say, among others, in their and others' regard about the death penalty and torture:

> Five suspects in the Abadilla case have been sentenced to death. While Amnesty International is unequivocally opposed to the death penalty in every case around the world, the organization's concerns in the Philippines are deepened by the fact that the suspects' testimonies in this case mirror allegations

> of pre-trial torture recounted by other prisoners on death row in the National Penitentiary at Muntinlupa.
>
> If torture takes place and confessions are coerced, how can the right to a fair trial be upheld and the risk of judicial error reduced? The risk of executing an innocent person who may have already suffered torture is real.

More recently, on the occasion of International Human Rights Day (December 10) 2002, the *Philippine Daily Inquirer* published an award-winning unprecedented five-day (Dec. 10-14) special report on the "Abadilla 5: Story straight out of martial law pages," including on "Torture forced three to 'confess'" (PDI, 12/11/02, pp. 1, 18). [Incidentally, this PDI special report is the subject of the Abadilla family's Motion to Cite in Contempt dated December 19, 2002.] The PDI special report won the Excellence in Specialized Reporting Award from the Society of Publishers in Asia 2003 Editorial Excellence Awards **and** second prize in the Jaime V. Ongpin Awards for Excellence in Journalism for investigative reports in 2002. One does not win prestigious journalistic excellence awards for telling lies.

If the truth about the torture of the "Abadilla 5" is not forthcoming from the criminal justice system, especially its long pending preliminary investigation at the DOJ, then the truth must out from other sources to set them free. The criminal justice system is not the only way to ferret out the truth. It may be found through, among others, divine revelation, modern technologies, psychological methodologies, human rights monitoring, and investigative journalism.

The trial court's Joint Decision dismissed all the physical, photographic, medical and expert evidences of gross violations of constitutional and human rights by way of this facile and specious reasoning: "While Joel [de Jesus] claimed that his confessions were taken with the use of violence, the fact is Joel admitted that he was brought to the IBP Quezon City Chapter inside the Q.C. Hall of Justice for said confessions (except the second one were a *police line-up* was formed) and to the city *Fiscal's offices* also located

in the Hall of Justice, on the 4th floor." (Joint Decision, p. 26, last paragraph, italics mine).

So what if Joel was brought to the IBP Quezon City Chapter office (which was done under close police escort and with a police-prepared statement)? Was that enough to meet the required degree (if we may use this term again) of "competent and independent counsel preferably of his own choice"[11] and "adequate legal assistance"[12]?

According to jurisprudence, the right to counsel attaches upon police identification or line-up of suspects (*U.S. vs. Wade*, 388 U.S. 218; and *People vs. Usman Hassan*, 157 SCRA 261). And that the following are *not* deemed independent counsel: PAO lawyers,[13] police lawyers,[14] *and prosecutors*.[15] The right to counsel refers not to pro-forma and perfunctory counsel but to "effective and vigilant counsel" (*People vs. Lucero*, 244 SCRA 425; and *People vs. Bacamante*, 248 SCRA 47). And this covers not only the moment of signing a police-prepared statement but more importantly the prior period of custodial investigation and tactical interrogation – "from the time the confessant answers the first question asked by the investigating officer until the signing of the extra-judicial confession." For violation of this right to *effective and vigilant* counsel in one case, the confession obtained *despite assistance of counsel* was excluded by the Supreme Court and the accused was ACQUITTED (*People vs. Bacamante*, 248 SCRA 47).

Violations of similar constitutional rights were likewise a ground for acquittal or dismissal in other cases. In one case, the *long delay in the termination of the preliminary investigation* was found to be violative of the constitutional rights of the accused to procedural due process and to speedy disposition of cases, the latter under the Constitution's Art. III, Sec. 16. Accordingly, the case was DISMISSED by the Supreme Court, as a matter of radical relief:

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[11] Const., Art. III, Sec. 12(1).
[12] Const., Art. III, Sec. 11.
[13] *People vs. Olvis* (154 SCRA 513).
[14] *People vs. Labuac* (G.R. No. 80764, September 28, 1992).

In a number of cases, this Court has not hesitated to grant the so-called "radical relief" and to spare the accused from undergoing the rigors and expense of a full-blown trial where it is clear that he has been deprived of due process of law or other constitutionally guaranteed rights.[16]

With more reason should radical relief be granted in the case at bar where there have been multiple violations of constitutional rights of the accused from their warrantless (stated otherwise, unwarranted) arrests up to in the judgment of conviction itself, as will be shown in the discussion of the next Assignment of Error VII.

Part of that radical relief must be the application of several exclusionary rules in order to exclude inadmissible evidence pursuant to the Constitution's Art. III, Secs. 3(2) and 12(3), in order to remove the "fruit of the poisonous tree"[17] – but in the case at bar, it is not just one "fruit" and not just one "tree" because of multiple violations of constitutional rights. And so, we have come to a point where the realm of human rights overlaps with the realm of evidence, both its admissibility and its appreciation.

In accused Lenido Lumanog's "Supplement to the Motion for Reconsideration" dated 25 November 1999, he specifically prayed, among others, that the case against all the accused "be dismissed as radical relief for gross violations of their constitutional rights." But this was denied by the trial court in its appealed Order of January 25, 2000 (Annex B), which stated (in p. 6) among its reasons for such denial: "The argument on alleged weak commitment, low regard and poor appreciation of human rights of the accused by this court is better addressed to the Commission on Human Rights or to the Supreme Court, lest this court be accused of another perceived violation of such rights in considering such argument as purely baseless."

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[15] *People vs. Viduya* (189 SCRA 403).
[16] *Tatad vs. Sandiganbayan* (159 SCRA 70), citing *Salonga vs. Cruz Pano* (134 SCRA 438), *Mean vs. Argel* (115 SCRA 256), *Yap vs. Lutero* (105 Phil. 3007) and *People vs. Zulueta* (89 Phil. 880).
[17] See the instructive discussion of this concept in the death penalty case of *People vs. Alicando* (251 SCRA 293).

Rather than face squarely this human rights issue with the importance it deserves (Const., Art. II, Sec. 11: "The State values the dignity of every human person and guarantees full respect for human rights."), the trial court takes the path of least resistance and passes the buck to the CHR or to the SC, even showing a cavalier attitude in the process. The courts are supposed to be the last bulwark of constitutional and human rights but the trial court in the case at bar *was not equal to this task.*[18]

VII. THE TRIAL COURT ERRED WHEN IT LEFT ACCUSED LENIDO LUMANOG OUT IN THE DECISION'S RECOUNTING OF THE RESPECTIVE INDIVIDUAL DEFENSES OF THE SIX REMAINING ACCUSED, AND RULED THAT LUMANOG'S NOT TESTIFYING BEFORE THE COURT JUSTIFIES AN INFERENCE THAT HE IS NOT INNOCENT AND MAY BE REGARDED AS A QUASI-CONFESSION.

The first indication of the trial court's bias or unfairness against accused Lenido Lumanog in its appealed Joint Decision of July 30, 1999 (Annex A) is that he was left out in its presentation of the respective individual defenses of the accused (pp. 7-16). Only he (among the six remaining accused) was left out. Even his sidekick co-accused Rameses de Jesus was given the benefit of such a presentation (pp. 10-12). In fine, the defense he presented through counsel was effectively not heard by the trial court. This leaving out was a violation of his constitutional right to procedural due process (Constitution, Art. III, Sec. 1 and 14[1]) and particularly his right to be heard by counsel (Const., Art. III, Sec. 14[2]; also *International Covenant on Civil and Political Rights*, Art. 14[3][d]); and Rules of Court, Rule 115, Sec. 1[c]).

The "explanation" for that leaving out is found later in the appealed Joint Decision – a further indication of the trial court's bias or unfairness against accused

[18] Following Constitutional Commissioner Fr. Joaquin G. Bernas, S.J.'s statement during CONCOM deliberations on July 18, 1986 regarding the abolition of the death penalty, "I grant that the judges will have difficulty, but I suppose that the judges will be equal to their tasks," as quoted in the death penalty case of *People vs. Munoz* (G.R. No. L-38969-70, February 9, 1989).

Lumanog – when it takes his non-testifying as a point against him (p. 29, fifth paragraph):

> In addition, and this is with respect to accused Lumanog only, said accused did not testify despite the specific accusation and evidence implication him to the Murder at bench. Such silence, pursuant to the ruling in People vs. Dolmendo (296 SCRA 371, Sept. 25, 1998) justifies an inference that the accused is not innocent and may be regarded as a quasi-confession.

Co-related with our first point, the trial court apparently thought that, because he did not testify, his defense was not substantial enough to present along with those of the other accused who all testified. But even worse, the trial court took it against him "as a quasi-confession."

To support this "inference," the trial court cites *People vs. Delmendo* (not Dolmendo, 296 SCRA 371). But this Second Division ruling is of doubtful constitutionality, and the Court sitting *en banc* should set things right and reverse that *Delmendo* doctrine, in accordance with the Const., Art. VIII, Sec. 4(3). It clearly offends against the constitutional right to remain silent (Const., Art. III, Sec. 12[1]). Against the implementing rule of criminal procedure which specifically provides that "His silence shall not *in any manner* prejudice him." (Rules of Court, Rule 115, Sec. 1[d], italics supplied) And against other Supreme Court rulings as recapitulated in *People vs. Arciaga, et al.* (G.R. No. L-38179, June 16, 1980):

> No inference of guilt may also be drawn against an accused upon his failure to make a statement of any sort. The neglect or refusal of the accused to be a witness shall not in any manner prejudice or be used against him. Most importantly, both under the 1935 and 1973 Constitutions, an accused has the right to remain silent. Such silence cannot be used as presumption of his guilt. Only recently, in *People vs. Gargoles*, 83 SCRA 282, this Court held, citing *People vs. Esmundo*, 27 Phil. 554, that an accused has the right to decline to testify at the trial without having any inference of guilt drawn from his failure to go on the witness stand. We likewise held therein that a verdict of conviction on the basis solely or mainly, of the failure or refusal of the accused to take the witness stand to deny the charges against him is a judicial heresy which cannot be countenanced. Moreover, the foregoing is in consonance with the rule that an accused should be convicted on the strength of the evidence

> presented by the prosecution and not on the weakness of his defense.

Relevant also are the constitutional rights against self-incrimination (Const., Art. III, Sec. 17; also ICCPR, Art. 14[3][g]; and Rules of Court, Rule 115, Sec. 1[e]) and the presumption of innocence (Const., Art. III, Sec. 14[2]; also *Universal Declaration of Human Rights*, Art. 11; ICCPR, Art. 15[2]; and Rules of Court, Rule 115, Sec. 1[a]). In fact the latter presumption is the basis for the rule "chiseled in our jurisprudence… that the onus is on the prosecution to prove the guilt of the accused beyond reasonable doubt." (*People vs. Lucero*, 244 SCRA 425, at 435) It is a more paramount constitutional presumption compared to ordinary presumptions like the *presumptio hominis* that a young Filipina will not charge a person with rape if it is not true. (*People vs. Godoy*, 250 SCRA 676).

It bears noting that, perhaps in like manner that accused Lumanog did not testify, neither also did he (unlike some of his co-accused) sign any extra-judicial confession incriminating himself and others under severe duress, including torture. Silence can also be a measure of strength, integrity and self-confidence.

Beyond the doubtful constitutionality of the *Delmendo* doctrine invoked by the trial court in its appealed Joint Decision, particularly against accused Lumanog, is his life now at stake because he exercised his constitutional right to remain silent. It is no wonder, therefore, that accused-appellant Lumanog in paragraph 2 of his Affidavit dated 22 April 2002 (Exh. L) appended to his "Motion for New Trial and Related Relief" dated 26 April 2002, in this automatic review before the Supreme Court, said:

> In the judgment of conviction promulgated on August 11, 1999 by Judge Jaime N. Salazar, Jr. of the Regional Trial Court of Quezon City Branch 103 in Crim. Case No. 96-66684, my not testifying during the trial was taken against me as "an inference that the accused is not innocent and may be regarded as a quasi-confession" (Joint Decision dated July 30, 1999, page 29), contrary to the constitutional rights of an accused to remain silent, against self-incrimination and to presumption of innocence. My not testifying during the trial was a judgment call by my then defense counsel based on his assessment of the relative balance between the evidence for the prosecution and for the defense. Well, I have nothing to lose now but my life and I

> fully intend to fight for it in the Supreme Court, including by now asserting my constitutional right to be heard not only by counsel but also *by myself*. In other words, before it is too late, I wish to take the witness stand to proffer all possible legal defenses to prove my innocence of a crime I did not commit for the simple reason that I was doing something else in another place at the time and, more importantly, that another group was the one truly responsible for it.

As can be gleaned from his Affidavit, accused-appellant Lumanog would have testified in the event of new trial on the Alex Boncayao Brigade (ABB) angle, particularly his non-involvement in this Leftist rebel group and in the Sparrow unit-style ambush-killing of Abadilla, on his being treasure-hunting in Mabalacat, Pampanga at that time, on his associations with persons of military and police background as a security agency branch manager, Guardians Brotherhood chapter president and candidate for councilor in Quezon City, and on his ordeal of torture, incommunicado detention and other gross human rights violations as a suspect in the Abadilla murder.

Unfortunately, the said Motion for New Trial was erroneously denied by the faultily premised Resolutions dated 28 May 2002 and 17 September 2002 in this automatic review.

VIII. THE TRIAL COURT ERRED WHEN IT DISREGARDED, BASED ON MERE CONJECTURES, THE ALIBI DEFENSES OF ACCUSED AUGUSTO SANTOS AND LENIDO LUMANOG.

A. The trial court's reasoning in not giving credence to the defense of Augusto Santos was not based on any evidence but on mere conjectures.

In brushing aside the defense of Augusto Santos, the trial court wrote:

> 8. As to Augusto Santos, the court likewise finds his alibi substantially deficient in these respects.
>
> (a) jurisprudence dictates that an alibi buttressed by an accused's relatives is highly suspect. In the case at bench, Augusto's alibi is supported only by his brother-in-law.
>
> (b) said brother-in-law, Jonas Ayhon, did produce a birth certificate from Fabella Hospital that his child was born on June 11, 1996 and was discharged on June 13, 1996. However, the court finds it significant that according to Augusto he resides in Fairview, Q.C., while Jonas stated that in 1996 his family resided in Buendia which, as far as this court knows is in Makati

> (now a city in Metro Manila) and Jonas testified that he and Augusto came from Jonas' house in Buendia to go to Fabella Hospital in Sta. Cruz, Manila at 7:00 in the morning.
>
> These two places (Fairview, Q.C. and Buendia, Makati) are separated by long distances and the traffic jam in both is terrible. How on earth Augusto will proceed first to Buendia, Makati before 7:00 in the morning to fetch Jonas when Augusto as well as Jonas could have more reasonably and easily gone straight separately to Fabella Hospital in Sta. Cruz, Manila (behind the Central Market) is largely amazing.
>
> (c) moreover, the court has not been cited to any special reason why Augusto's presence (considering that he is from Fairview, Q.C., while Jonas is from Buendia, Makati) at Fabella Hospital to help fetch Jonas' wife and new-born baby is necessary. In our family life, it is usually the womenfolk who are expected to help fetch a woman who has just delivered in a hospital. Yet, here, it appears that not one woman from either the family of Jonas or his wife Dorothy came over to help fetch Dorothy from the hospital. How come this is so is not reflected in the evidence.

Indeed, this court, on numerous occasions, has ruled that "an alibi buttressed by an accused's relatives is highly suspect." Alibi which appears to be an afterthought, a flimsy attempt to place the accused in another place when in fact such accused was indeed at the crime scene can easily be detected. While such an alibi is highly suspect, there are also instances when factual circumstances reveal that the alibi presented is reliable and truthful even if they are presented by the accused's relatives.

For indeed, there are instances when there would be no one else who could be presented in court other than the accused's relatives. The fact alone that the defense of alibi is buttressed by a relative, while it renders the testimony suspect, does not instantaneously and automatically discredit the testimony given. It is not the relationship per se of the witness with the accused that renders the testimony suspect, rather, it should be the content and the nature of the story related in court that makes it suspect of having been concocted to get a relative off the hook.

In this case, Jonas Ayhon's testimony that his wife Dorothy gave birth and was confined at the Fabella Hospital where he and accused Augusto Santos fetched them on

June 13, 1996 is supported by documentary evidence, the birth certificate of the child which shows the date of birth and the date of discharge from the hospital.

The evidence presented corroborates Augusto Santos' claim that he was with his brother-in-law between 7:00 in the morning until 2:00 o'clock in the afternoon on June 13, 1996 which was the precise time that the complained crime happened. The corroborating evidence, especially the birth certificate, cannot be easily concocted nor fabricated.

Just because Augusto Santos lives in Fairview and Jonas Ayhon lives in Makati does not make it impossible for these two men to have come from Jonas house in Buendia to go to Fabella Hospital in Sta. Cruz, Manila at 7:00 in the morning. No factual or legal basis can justify the trial court's saying, "How on earth Augusto will proceed first to Buendia, Makati before 7:00 in the morning to fetch Jonas when Augusto as well as Jonas could have more reasonably and easily gone straight separately to Fabella Hospital in Sta. Cruz, Manila (behind the Central Market) is largely amazing." (sic)

The fact that Augusto Santos had to come from Fairview and had to be in Buendia at 7:00 in the morning of June 13, 1996 means that Augusto had to leave Fairview earlier than 7:00 a.m. Augusto's presence at the Fabella Hospital from the time they arrive there in the morning until 2:00 p.m. effectively rules out any possibility that Augusto Santos could have been at Katipunan when the crime complained of happened.

The trial court also ruled that the necessity of Augusto's presence in the hospital together with his brother-in-law to fetch her sister and her new-born baby should have been explained and reflected in evidence because in the words of the decision, "In our family life, it is usually the womenfolk who are expected to help fetch a woman who has just delivered in a hospital. Yet, here, it appears that not one woman from either the family of Jonas or his wife Dorothy came over to help fetch Dorothy from the hospital."

Just because there were no other women who went with Jonas and Augusto to fetch Dorothy and her child from the hospital does not render this fact untrue. While the

conjectures of the trial court that "it is usually the womenfolk who are expected to help fetch a woman who has just delivered in a hospital," could be accepted as a general observation yet, this would not be true in all circumstances. For folks of simple means, a man would be more helpful than a woman in carrying all the things that the mother and child used while confined in the hospital. And especially when there are no other people to help out, it no longer matters whether one is accompanied by a man or a woman for it is not the gender of the helper that matters but the assistance he/she can render.

While the evidence is bereft of any explanation why it was Augusto who went with Jonas to fetch the mother and daughter, this fact, alone, does not render untrue the fact that Augusto was with Jonas on the exact hour and date that the complained crime happened. Instead, this bolsters the fact that it was Augusto alone, himself and not anybody else, who went with Jonas to fetch his wife and child from the hospital. This effectively ruled out the possibility that there could have been another person who went with Jonas and that Augusto was not needed in fetching Dorothy and the child from the hospital.

Absent any strong proof to place Augusto Santos at the crime scene and to attribute to him the acts complained of, the alibi presented by accused Augusto Santos that he was at the Fabella Hospital together with his brother-in-law from about 7:00 in the morning until about 2:00 in the afternoon to fetch his sister Dorothy and her new-born baby who was discharged from the hospital on June 13, 1996, the same day that the complained crime of murder happened, should have been given credence.

B. The trial court disregarded the alibi presented by Lenido Lumanog based on mere conjectures.

> (b) both claimed that they had to start the diggings midnight of June 12, 1996 so no one will know or hear about it, but at the same time they asserted that June 13, 1996 was a partying day in the very household and compound where they were supposed to be digging for gold secretly. In the province, the bisperas of a grand celebration is a day and evening of preparations for the next day – the party proper. The bisperas is characterized by the presence of many people – old and young alike – out to help in the preparations or to ogle around and

> of male persons drinking liquor and beer. The bisperas in a rural setting is a truly-people-crowded night. The "secret theory" of Rameses and Costibolo is thus difficult to dig. (Joint Decision, p. 27)

In debunking the alibi presented by accused Lenido Lumanog and Rameses de Jesus that they were in Pampanga at the time when the late Col. Rolando Abadilla was ambushed, the trial court pronounced that the "secret-theory" of the accused is difficult to dig. The trial court reasoned out that "the bisperas in a rural setting is a truly people-crowded night" and as such it would have been impossible for the accused to be digging for gold, as what they are advancing in their defense because the presence of a lot of people. This reasoning by the trial court is not supported by any evidence but is rather based on mere conjectures.

While it may be a tradition among rural folks to observe the bisperas of an occasion, yet this is not always the case. It normally depends, first and foremost, on the nature and grandness of the celebration and the means of the celebrants. Fiestas and weddings would normally include the bisperas in the celebration but not wedding anniversaries which, oftentimes, just involve immediate family members.

It was thus error for the trial court to anchor its disregarding of Lumanog's and Rameses de Jesus' alibi on this basis.

From the testimony of Costobolo and Rameses de Jesus, they helped in the cooking when they woke up at 10:00 a.m. of June 13, 1996. That the food were cooked just in time for lunch indicate that the wedding anniversary celebration was just a small one and therefore, disproving the trial court's unsupported objection that there might have been a lot of people in the vicinity where the accused were secretly digging for gold from midnight until the wee hours of June 13, 1996.

In assailing the defense presented by Lumanog the trial court reasoned out:

> c) Rameses and Costibolo executed sworn statements before the attorneys of the Human Rights Commission several days after their arrest complaining of torture, and yet, they never revealed anything about their alleged activities – gold-digging – on June 12 and 13, 1996 and subsequent days. By June 26, 1996 they would have known what the police authorities were blaming

> them for and yet, there was absolute silence on their part of the defense they now poise upon this court. (Joint Decision, p. 27).

Why should the trial court discredit the defense raised by the accused through the testimonies of Rameses and Costibolo because of the latter's failure to mention said line of defense to the lawyers of the Commission of Human Rights?

In the first place, when the CHR lawyers took the sworn statements of the accused, they were investigating the torture and other possible human rights violations committed against the accused by the police. These lawyers were not concerned about the defense of the accused in the murder case filed against the latter. Naturally, the questions would focus on the circumstances surrounding their arrests and how their rights were violated by the police officers.

It is then absurd and unthinkable why the trial court expected the accused to raise their defenses before the lawyers of the CHR whose main concern was to investigate possible human rights violations against the persons of the accused.

It might have also escaped the notice of the trial court that on June 26, 1996, all the accused were still reeling from the torture they suffered in the hands of the police that they were not in their normal state of mind at that time.

In fact, on June 26, 1996 when the CHR doctor examined the accused, the doctor noticed hesitancy on the part of Lumanog to talk. In his testimony, Dr. Jesse Rey T. Cruel said:

> It is visible but it was not complained of. In fact, during that time he was very… parang ayaw niyang magsabi sa akin nang (sic) nangyari sa kanya. Ayaw niyang magtapat kung ano talaga ang nangyari sa kanya. Para bang walang tiwala sa akin o mga imbestigador. Nagdadalawang-isip siya kung magsasabi sir.
>
> So we said we come from Commission of Human Rights. We are ordered to investigate the violations committed to him while on detention.
>
> And little by little, slowly, he began to tell what happened to him. (TSN, December 11, 1997, pp. 188-189).

What is evident in the doctor's observation about the accused is the hesitation and the lack of trust to the persons conducting the investigation for human rights violations.

Such hesitation is a possible result of fear after what they have gone through in the hands of the police. It is also evident that the accused were made to understand that the CHR personnel were there to investigate the possible human rights violations against the accused. Given this premise, how then can these accused be expected to relate their stories constituting their defense in the murder case when the same were not called for at that time?

Thus, the trial court's appreciation of the failure of the accused to relate their defenses to the CHR lawyers as basis for disregarding such defense is misplaced.

C. The defense of alibi presented by the accused in this case gains significance with the weakness of the prosecution's evidence that does not concretely pin down the suspects as the ones who committed the crime.

There are a lot of instances, as in this case, that alibi and denial are the only defenses available to the accused. For how else would the accused counter the accusations that they were the ones who committed the crime than by denying their participation in it and by presenting in court their whereabouts to prove that they were not at the crime scene.

The defense of alibi cannot be given credence and is greatly weakened when there is a strong evidence of positive identification that establishes with moral certainty the presence of the accused at the crime scene and evidence establishing the culpability of the accused to the crime complained of.

Positive identification gains more credibility when the witness has all along known the suspects personally and he saw them commit a crime. In such situations, there is less likelihood that the witness would be mistaken in ascertaining the identity of the suspects. However, when the witness does not have any previous association with the suspects and more so when the witness only saw the suspects for the very first time at that moment when they were committing a crime, there is always a possibility that the witness might not be able to accurately ascertain the identity of the suspects. Especially

so when the witness only saw the suspects for a very brief moment and under highly stressful conditions.

The possibility of accurately identifying the suspects in this case is even made more difficult as the witness would be recalling four different suspects. As the records have shown, the witness was only able to describe two of the four suspects just five hours after the incident happened. (Question and Answer # 21, Exhibit L-1)

The only link given by the prosecution establishing Augusto Santos' participation in the commission of the crime is the identification made by Freddie Alejo in open court. Such identification as we have earlier discussed is unreliable and does not establish with moral certainty that it was indeed Augusto Santos whom Freddie Alejo saw as one of the four men surrounding the victim's car.

Not even the proferred extra-judicial confessions of Joel de Jesus and Lorenzo delos Santos, though they are inadmissible in evidence for having been obtained thru unconstitutional means, point to Augusto Santos as being at the crime scene. The only mention made in the sworn statement of Joel de Jesus is that of a certain Ogie who was with Lorenzo when they allegedly fetched Joel from his place in Fairview. But this certainly did not place Augusto Santos at Katipunan where the crime took place.

Similarly, for Lenido Lumanog, the only evidence establishing his presence at the crime scene is Freddie Alejo's in-court identification which we have already shown to be short of meeting the totality of circumstances test. Both the alleged extra-judicial confessions of Joel de Jesus and Lorenzo delos Santos cannot be used in evidence for having been obtained through unconstitutional means. As this Court has held in *People vs. Repe* in disregarding the extra-judicial confessions of two co-accused against the other accused,

> While it is true that the trial court observed that appellants' extrajudicial confessions are interlocking and replete with minor details that could have been known only to the appellants, and hence indicate that they were voluntarily given, still, one cannot be unmindful of the equally-settled rule that even if the confessions of the accused is "gospel truth", if it was made without the assistance of counsel, it is inadmissible in

> evidence regardless of the absence of coercion or even if it had been voluntarily given. (175 SCRA 422, 432).

With no other evidence linking the accused to the crime except the questionable in-court identification and inconsistent, albeit tainted, testimony of Freddie Alejo, there is no strong basis for pinning culpability to these accused-appellants.

In such an instance, their defense of alibi gains credibility and should be looked into by the court. This Court has, in a number of cases, given credence to alibi as summed up and enumerated in *People vs. Gregorio*, (G.R. NO. L-35390, June 29, 1982):

> Where the evidence of the prosecution is weak and betrays lack of concreteness on the question on whether or not the defendant is the author of the crime charged, alibi as a defense assumes importance. (*People vs. Bulawin,* 29 SCRA 710).
>
> Where the identification of the accused as the author of the crime is unreliable, his defense of alibi assumes importance and may be given credence. (*People vs. Cunanan,* 19 SCRA 769).
>
> Although alibi is the weakest defense that an accused can avail of, it acquired commensurate strength where no positive and proper identification has been sarisfactorily made by witnesses of the offender's identity. (*People vs. Baquiran,* 20 SCRA 451)

Also, in another case, this Court ruled:

> …where the evidence for the prosecution against the accused as author of a crime charged is weak, doubtful, unconvincing, unreliable or unsatisfactory, the defense of alibi assumes importance and acquires commensurate strength, and therefore, may be given credence. (*People vs. Tabayoyong, et. al.,* G.R. No. L-31084, May 29, 1981 citing *People vs. Cunanan, et. al.* 19 SCRA 769, 783; *People vs. Bulawin*, 29 SCRA 710, 721-722; *People vs. Cruz*, 32 SCRA 451, 460-461; *People vs. Basuel*, 47 SCRA 207, 222-223; *People vs. Beltran*, 61 SCRA 246, 255-256; *People vs. Salas, et. al*, 66 SCRA 126, 132-133; *People vs. Lim and Lim,* 80 SCRA 496). Indeed, we must "emphasize the fact that courts should not at once look with disfavor at the defense of alibi… When an accused puts up the defense of alibi, the court should not at once have a mental prejudice against him. For, taken in the light of all the evidence on record, it may be sufficient to acquit him. (*People vs. Villacorte, et. al.,* 55 SCRA 640, 655).

Given the foregoing, we invoke the oft-repeated formulation that in criminal prosecution, the prosecution must rely on the strength of its own evidence, and not on the

weakness of defense, to establish the guilt of the accused. As we likewise implore the doctrine that the guilt of the accused must be proven beyond reasonable doubt.

IX. THE TRIAL COURT ERRED IN FAILING TO APPRECIATE AND CO-RELATE THE PERSONAL CIRCUMSTANCES OF THE SEVERAL ACCUSED AND THE CIRCUMSTANCES OF THEIR ARREST WHICH SHOW AS UNLIKELY BOTH GUILT AND CONSPIRACY, BELYING THE TRIAL COURT'S FINDINGS TO THAT EFFECT.

This is indeed a classic case of rounding up the usual suspects, this time disparate and motley group of unlikely conspirators – no mastermind, no motive, and no capability for a political assassination (and for some of the accused, no knowledge even of Abadilla). There were even serious inter-personal rifts involving criminal charges and counter-charges between accused Joel de Jesus on one hand and Lorenzo delos Santos and Augusto Santos on the other. How then, can this motley group of quarrelling individuals agree to come together and carry out the killing of Abadilla?

This also goes against the ruling on evident premeditation which apparently has just been presumed by the trial court. How can there be evident premeditation among individuals who have deep animosities between them even hailing each other to court?

Absent such evident premeditation, the imposition of death penalty by the trial court goes against an earlier death penalty case for murder where the Supreme Court modified the penalty by reducing the RTC's death sentence to *reclusion perpetua* because the killing, although qualified by treachery, was not attended by evident premeditation or any other aggravating (as well as mitigating) circumstance.[19]

In light of the weak and unreliable evidence linking the accused to the actual commission of the crime as the identity of the suspects were not sufficiently established and no strong link was ever presented to tie up and pin the identity of all the accused with

[19] *People vs. Saliling* (294 SCRA 185).

those of the suspects seen at the crime scene, the question of motive gains significance and comes to the fore in this instant case.

The question of motive gains even more importance when viewed from the light that the prosecution touts Freddie Alejo's testimony as free from any motive to falsely testify against all the accused.

For while the prosecution is harping on the failure of defense to prove any improper motive on the part of their lone eyewitness to testify falsely against all the accused, the prosecution fails to see and realize that it is them which failed to advance any evidence that would prove any motive on the part of all the accused to kill the late Col. Rolando Abadilla.

"Generally, proof of motive is not necessary to pin a crime on the accused if the commission of the crime has been proven and the evidence of identification is convincing." (*People vs. Alviar*, No. L-32276, September 12, 1974, 59 SCRA 136, 160). In this case, the evidence of identification, far from being convincing, is actually doubtful, weak, and might have been colored to favor the prosecution so that the witness who was receiving benefits from the victim's family could continue receiving those benefits.

In such an instance, the court, in order to arrive at a verdict of conviction, should have considered whether motive was established by the prosecution to aid in nailing and pinning down the accused with moral certainty as the ones who actually committed the crime.

X. THE TRIAL COURT ERRED WHEN IT OVERLOOKED OR FAILED TO GIVE MORE WEIGHT TO PHYSICAL EVIDENCE, PARTICULARLY THE EXCULPATORY BALLISTICS AND DACTYLOSCOPY EVIDENCE, WITH

ACCOMPANYING EXPERT TESTIMONY PRESENTED BY THE DEFENSE.

It is quite ironic that the prosecution, which has the burden of proving the guilt of the accused, never presented in court the physical evidence gathered from the crime scene. This attitude of the prosecution towards the physical evidence is revealing in that it raises the presumption that such evidence is withheld because it would be adverse to their cause.

Relying heavily on the testimony of a single eyewitness, when there were other eyewitnesses present at the crime scene who came forward to the police investigators and expressed their willingness to testify (TSN, Testimony of P/Insp. Rogelio Castillo, August 7, 1996, pp. 116-118), plus the physical evidence gathered from the crime scene speaks volume about the prosecution's fear that if these other evidences were presented in court, they would not be able to pin down the accused as the ones who did the crime.

Irony upon irony, the trial court, whose duty it was to ascertain with moral certainty the guilt of the accused, simply disregarded the physical evidence presented by the defense but relied instead on the shaky testimony of the lone eyewitness presented before it.

In a major case like this of murder and eventually five death sentences, the trial court should have been more careful about anchoring conviction on the testimony of *one* witness (considering there were so many others around during the incident), and should have been more desiring and discerning of better evidence. Physical evidence, for one, is more reliable because it basically speaks for itself (*res ipsa loquitor*) – it cannot be coached what to say; neither can it lose or change its memory. Coupled with expert evidence, then such evidence is as good as it gets.

In the case at bar, the closest to this were the ballistics examination reports of PNP Crime Laboratory ballistics expert Reynaldo de Guzman and the relevant bullet slugs and spent bullet shells. But this is mentioned only "in passing" in one short

paragraph (fourth paragraph, p. 14) of the appealed Joint Decision of July 30, 1999 (Annex A). The trial court actually prefaces the said paragraph with the phrase "In passing."

Even then, the trial court sorely missed the more important point or conclusion about the ballistics examinations. It focused on the two handguns brought by accused SPO2 Cesar Fortuna to gunsmith Dante Montevirgen and the finding that "the bullets and bullet shells found in the crime scene at bench (sic) did not come from any of said firearms" which turned out to belong to two of Fortuna's fellow police officers (Joint Decision, p. 14, second to fourth paragraphs) Incidentally, one of these firearms had been positively, but it turned out later mistakenly, identified by Rolando Abadilla, Jr. during the June 26, 1999 press conference as the firearm his father was carrying at the time of his murder.

The trial court completely missed the conclusions of several ballistics reports that the fired bullets and cartridge cases in the Abadilla murder "were fired from one and the same firearm" in the killings of Leonardo Ty, Nestor Encarnacion and Suseso de Dios, as shown by accused Cesar Fortuna's Exhs. 2-4, 71-75 and derivative exhibits under his Formal Offer of Evidence dated April 19, 1999.

The trial court also failed to note and pursue the relevant angle on this indicated in accused Fortuna's formal offer of Exh. 71, which was stated in p.12 (RTC record, p. 96 of one folder) as follows:

> Exh. 71 - Memorandum dated June 24, 1996 requesting ballistics examination of the submitted specimen firearm to determine if the same was used in the ambush in the killing of several personalities *by members of the ABB.* (italics supplied)
>
> (Purpose) – Offered to prove the propriety and regularity of the ballistics examination conducted by the witness on the subject firearm suspected to be the one used in the ambush of several personalities *by members of the ABB.* Likewise offered as part of the testimony of the witness [de Guzman]. (italics supplied)

Parenthetically, it must be noted that, despite the implications of the ballistics evidence, the accused were never charged or even investigated for the killings of Ty,

Encarnacion and de Dios. Their "role" it seems was only to be charged for the Abadilla murder. As for the ABB angle of this murder, this is important as additional evidence to establish the innocence of all the accused, none of whom are ABB members. We shall discuss this more extensively under the last two assignment of errors. For now, we deal mainly with the probative value of the ballistics evidence, including vis-à-vis the so-called positive identification by the lone security guard eyewitness for the prosecution, Freddie Alejo.

The prosecution had characterized the ballistics reports in the case at bar as "inconclusive and cannot exculpate the accused from liability, considering they were positively identified by Alejo…" (Opposition dated October 25, 1999, p. 6). The trial court for its part, in its appealed Order of January 25, 2000 (Annex B, p. 8) stated: "In considering the testimony of expert witness Firearm Examiner Reynaldo de Guzman, this court found no sufficient reason to render as incompetent and incredible the testimony of the eyewitness by the alleged finding or conclusion that the bullets and cartridge cases in the Abadilla murder match those in killings with a link to the ABB." Note the trial court's bias or weak appreciation of ballistics evidence by referring to the ballistics finding or conclusion as merely "alleged" when in fact it was the *actual* finding or conclusion. It, therefore, becomes necessary to rebut these with authorities.

All courts, including the Supreme Court no less, are familiar with the experience stated in *Salomon vs. IAC* (185 SCRA 352, 361-62), to the effect that "witnesses may forget or exaggerate what they really know, saw, heard or did; they may be biased and therefore tell only half-truths to mislead the court or favor one party to the prejudice of the other." This is why the Supreme Court directs that trial courts should not ignore physical evidence because "physical evidence is of the highest order. It speaks more eloquently than a hundred witnesses" (*People vs. Bardaje*, 99 SCRA 399).

We now quote from two authoritative books on ballistics, one foreign and one local, from the library of PNP Crime Laboratory Firearms Identification Division Chief Reynaldo Dimalanta de Guzman.

From the classic textbook by Hatcher ("one of the truly great Firearms men of all time"), Jury and Weller:

> The place of the Firearms Identification Expert is now firmly established in this country and abroad. His work has become routine in police investigation. His evidence is accepted without question in courts. Science has come to the aid of Justice to an astonishing degree. Dramatic cases of the apprehension and conviction of criminals by firearms evidence are more frequent than the public realizes. However, those who have given their minds and so much of their lives to the development of this science take *even more satisfaction from the cases where they have prevented he trial and conviction of innocent men for crimes they did not commit.*[20] (italics supplied)

From the definitive local textbook by the long-time former Chief of Ballistics of the NBI:

> THE FINAL IDENTIFICATION OF A FATAL GUN IS, AS IN ALL FIELDS OF IDENTIFICATION, BASED NOT ON A FEW MARKINGS, BUT ON A PATTERN OF MARKINGS OR A COMBINATION OF THESE MARKINGS... Some of their characteristics are given at "birth" (the tool markings) and others develop during its lifetime. However, the combination of these two will be evidenced in the markings it will imprint on bullets and cartridge cases when fired. *These markings are the "signature" of this particular gun and no other.* If the God in all His infinite Greatness did not see fit to make any two things absolutely identical, how can we then as ordinary people hope to attempt to do so?[21] (italics supplied)

With this backdrop from foreign and local ballistics experts, it should suffice for now to cite one outstanding firearms identification case in the Philippines, the Supreme Court *per curiam* decision in the Timbol brothers case[22] where it referred to "certain elementary principles of ballistics" and used the word "*conclusively*" several times to describe the results of the ballistics examination therein .

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[20] Major General Julian S. Hatcher, Lieutenant Colonel Frank J. Jury and Jac Weller, *Firearms Investigation Identification and Evidence* (1957) 1.
[21] Domingo R. Del Rosario, *Forensic Ballistics* (3rd ed, 1996) 68.
[22] *People vs. Timbol* (G.R. No. 47471-47473, 1943), reprinted in *The Lawyers Journal*, March 31, 1946, p. 109.

XI. THE TRIAL COURT ERRED IN DENYING LENIDO LUMANOG AND OTHER ACCUSED A LAST CHANCE, WHILE THE JUDGMENT OF CONVICTION WITH DEATH SENTENCES WAS STILL UNDER RECONSIDERATION, TO INTRODUCE ADDITIONAL EVIDENCE ON THE HITHERTO UNDEVELOPED ALEX BONCAYAO BRIGADE (A.B.B.) ANGLE OF TRUE RESPONSIBILITY FOR THE ABADILLA AMBUSH-KILLING, CONTRARY TO THE SUPREME COURT'S GUIDANCE IN DEATH PENALTY CASES.

XII. THE TRIAL COURT ERRED IN DENYING FR. ROBERTO REYES' "URGENT INDEPENDENT MOTION FOR LEAVE OF COURT TO PRESENT VITAL EVIDENCE" ALSO ON THE A.B.B. ANGLE, AN ANGLE WHICH PROVES THE INNOCENCE OF ALL THE ACCUSED.

We shall discuss these two assignment of errors together since they both involve the ABB angle and they both pertain to motions and proceedings after the trial and judgment of conviction but while this was still in the reconsideration stage. Assignment of Error XI involves the appealed Order dated January 25, 2000 (Annex B), while Assignment of Error XII involves the appealed Orders of January 26 & 28, 2000 (Annexes C & D, respectively).

At first glance, this would appear to involve the same issue/s raised in the companion certiorari case of G.R. No. 142065 (*Lumanog vs. Salazar*, Jr., 363 SCRA 719) which was consolidated with the case at bar. But that involved a petition mainly for certiorari (Rule 65) where the main cause of action was respondent trial judge's *grave abuse of jurisdiction* amounting to lack or excess of jurisdiction in denying the petitioners led by accused Lenido Lumanog a last opportunity to prove their innocence by way of introducing additional evidence on the hitherto untouched but plausible ABB angle. In fine, the certiorari case dealt with an *error of jurisdiction*. On the other hand, herein Assignment of Errors XI & XIII deal with *errors of judgment, even without grave abuse of discretion.* The certiorari decision is final and is not the subject of herein appeal/automatic review. The subject of the latter are the above-mentioned Orders of the trial court. We have to be clear about these distinctions.

In fact, in the certiorari Decision of September 7, 2001 in G.R. No. 142605, the petition was dismissed because, among others:

> The instant petition for certiorari under Rule 65 of the Rules of Court filed by the petitioners on March 15, 2000 is improper as *the subject orders of respondent trial judge may be questioned only in the main case, that is, in Criminal Case No. Q-96-66684 which is already before the Supreme Court, as of February 11, 2001, on automatic review* because of the death penalty imposed by the trial court on the petitioners-accused for the killing of Col. Abadilla. (364 SCRA 719, at 724, italics supplied)
>
> X X X
>
> Finally, the petitioners' allegation of bias and partiality on the part of respondent judge can be taken up and discussed by the herein petitioners in their brief to be filed in G.R. Nos. 141660-64 pending before this Court relative to the automatic review of the Joint Decision of the trial court in Criminal Case No. Q-96-66684. (364 SCRA 719, at 726, italics supplied)

We are thus now questioning the subject orders of the trial court in the herein main case on automatic review. In the trial court's subject Order dated January 25, 2000, the *only direct ground* it could give for the denial of accused Lumanog's motion/s (e.g. his Manifestation and Motion dated 15 December 1999) to introduce additional evidence on the ABB angle was stated as follows (in p. 6):

> The transference of responsibility to the ABB for the ambush-slay of the victim is based on alleged news reports. Said news reports are hearsay and not admissible in evidence. The requisites on the applicability of the rule on declaration against interest, as an exception to the hearsay rule, were not convincingly shown before this court as being present in such alleged press statements by the ABB.

While the records do not indicate that accused were ABB operatives, the same records do not bear that they are not…

The records will bear out that the ABB angle was *not merely* "based on alleged news reports." This is belied by the outlined and indicated pieces of evidence on the ABB angle in accused Lumanog's "Memorandum on Nature of Proposed Additional Evidence" dated 12 January 2000 in the RTC:

a) Evidence linking the *ballistic match* between the Abadilla, Leonardo Ty and Suseso de Dios killings (already part of the record) with the *ABB angle in the Ty and de Dios killings*. For example, the ABB angle in the Ty killings is shown by police investigation reports (Annexes 1 & 2 of the said Memorandum)

b) *Written statements from and media interviews with ABB leaders* claiming or reiterating responsibility for the Abadilla killing. For example, the RPA-ABB statement of December 26,1999 (Annex 4 of the said Memorandum). Also, the June 27, 1996 interview with the ABB head Sergio Romero by then SkyCable news manager David Celdran featured in the banner headline story of the July 2, 1996 issue of *Philippine Daily Inquirer* (Annex 6 of the said Memorandum).

c) *AFP and PNP intelligence material* showing the ABB angle in the Abadilla and Ty killings, such as material that was basis for the Philippine Army Commanding General's Press Statement in October 1997 (Annex 3 of accused Lumanog's "Supplement to the Motion for Reconsideration" dated 25 November 1999 in the RTC) and the Inquirer's report on the PNP Intelligence Group's arrest of the alleged leader of the ABB team responsible for the Abadilla killing (Annex 1 of accused Lumanog's "Addendum to Supplement" dated 13 December 1999 in the RTC).

In fact, at that time, January 2000, various additional pieces of evidence were still unfolding and coming out, as later developments would show. It is really not just news reports or even AFP/PNP intelligence materials that is available as evidence or prospective evidence of the ABB angle, as shown by the following:

1. ballistics evidence showing a match between the Abadilla killing and other acknowledged ABB killings (e.g. those of Leonardo Ty and of Suseso de Dios)

2. the ABB's own early media statements and interviews in 1996 claiming responsibility (including the June 27, 1996 interview of ABB head Sergio Romero by then Skycable News Manager David Celdran wherein Romero reiterated ABB responsibility for the Abadilla killing and exonerated the accused)

3. the RPA-ABB's statement of 26 December 1999 reiterating responsibility

4. the coursing in January 2000 by an unidentified ABB personality to Fr. Roberto Reyes of the Omega watch taken by the ABB hit squad from their victim Col. Abadilla and reaffirming ABB responsibility

5. the National Amnesty Commission resolution dated 27 May 1999 in favor of former ABB operative Wilfredo Batongbakal indicating the ABB plan or intention to kill Col. Abadilla which partly resulted in the mistaken killing of Suseso de Dios outside the La Vista gate (where Abadilla would pass coming from his Loyola Grand Villas residence)

6. the Sinumpaang Salaysay of Wilfredo Batongbakal dated 25 February 1997 (given to ISAFP shortly after his capture) to the same effect

7. several police investigation reports showing the ABB angle in the Abadilla, Ty and de Dios killings (and possibly in still unavailable police and military intelligence reports)

Relevant to all these is the Supreme Court Decision in the case of the ambush-killing of U.S. Col. James N. Rowe, *People vs. Continente and Itaas* (G.R. Nos. 100801-02, August 25, 2000) where for the first time there is judicial notice of the ABB. In the case at bar, one of the indications of the ABB angle submitted was the Philippine Army Commanding General's Press Statement in October 1997 attributing to the ABB both the Rowe and Abadilla killings, among others (see Annex 3 of the accused Lumanog's "Supplement to the Motion for Reconsideration" dated 25 November 1999 in the RTC).

As for the news reports, these are not entirely worthless as "hearsay evidence". These can also be considered as basis for "judicial notice of matters which are of public knowledge" (Rules of Court, Rule 129, Sec. 2). And as leads to secure witnesses and other evidence, including by a compulsory process. For example, the news report featuring the June 27, 1996 interview of ABB head Sergio Romero by then Skycable News Manager David Celdran wherein Romero reiterated ABB responsibility for the Abadilla killing and exonerated the accused (Annex 6 of the abovesaid Memorandum) was a lead for the subpoena, if necessary, of Celdran to testify thereon if introduction of additional evidence were to be allowed.

At this juncture, we have to make reference to the Supreme Court *en banc* Decision of March 2, 2001 in *Estrada vs. Desierto, et al.* (G.R. Nos. 146710-15) and *Estrada vs. Macapagal-Arroyo* (G.R. No. 146738) upholding the constitutionality of the assumption to office of the new President, Gloria Macapagal-Arroyo. Of 135 footnotes in the Decision, 40 (30 percent) were taken from the *Philippine Daily Inquirer*, 12 (9 percent) from the *Philippine Star*, 2 (1 percent) from the *Manila Bulletin*, and 1 (0.7 percent) from the *Manila Standard*. No less than the Supreme Court has relied on newspapers when the life of the nation was at stake. (In the case at bar, it is the lives of five men at stake.)

It turns out that the trial court itself actually relies on news reports, as shown in another passage of the appealed Order dated January 25, 2000 (p. 4, second par.): "…as surely as she have (sic) seen on t.v., as she claimed, and also on the morning papers the faces of all the accused…" In an earlier passage (p. 3, fifth par.), the trial court referred to " the time when the ambush-slay of the victim as well as the arrest of the then suspects (including Joel) was the talk of the town." And that was because of news reports and other media coverage. The trial court is, therefore, estopped from denigrating news reports as "hearsay and not admissible in evidence."

Media interviews where interviewees freely, voluntarily and spontaneously make admissions or confessions are admissible in evidence, as ruled in the recent death penalty case of Pablito Andan (*People vs. Andan*, 269 SCRA 95; see also *People vs. Vizcarra*, 115 SCRA 743). If such evidence can be admitted against the declarant to the point of making him liable by death penalty, with more reason can such evidence be admitted to save innocent accused from the death penalty.

Such declarations against penal interest have also been considered exceptions to the hearsay rule and thus admissible to exculpate the accused. The best exposition on this is Philippine jurisprudence was in a decision by the great Justice Malcolm:

Any man outside of a court and unhampered by the pressure of technical procedure, unreasoned rules of evidence, and cumulative authority, would say that if a man deliberately acknowledged himself to be the perpetrator of a crime and exonerated the person charged with the crime, *and there was other evidence indicative of the truthfulness of the statement*, the accused man should not be permitted to go to prison or to the electric chair to expiate a crime he never committed. Shall judges trained and experienced in the law display less discerning common sense than the layman and allow precedent to overcome truth.[23] (italics supplied)

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[23] ***People vs. Toledo and Holgado*** (51 Phils. 825, 839) which has a number of other passages relevant to the case at bar, including quoted paragraphs from Professor Gilmore's classic Book on Evidence. See also *People vs. Surio* (56 Phil. 774) and *People vs. Caparas* (102 Phil. 787).

In the case at bar, there was other evidence indicative of the truthfulness of the ABB's repeated and consistent claims of responsibility for the Abadilla killing, such as those already outlined above. Any fair and impartial tribunal would not have missed it. But the trial court had its "*eyes wide shut.*"

It allowed "technical procedure, unreasoned rules of evidence… to overcome the truth" when it ruled that "The requisites on the applicability of the rule on declaration against interest, as an exception to the hearsay rule, were not convincingly shown before this court as being present in such alleged press statements of the ABB." The January 26, 2000 hearing, revealed that the trial court was referring to the requirement of "unable to testify", i.e. ABB leaders or spokespersons were not *unable* but only *unwilling* to testify. (TSN, 1/26/03, 14-16)

But the reason of *unwillingness* is practically tantamount to *inability* in the face of what may be likened to the justifying circumstance of "avoidance of greater evil" (Revised Penal Code, Art. 11[4]) – in this case an ABB leader or member who takes the witness stand to claim command or direct responsibility for the murder of Col. Abadilla faces the very real risk of lethal retaliation from friends and supporters of the late Colonel, as well as that of arrest, detention, prosecution, conviction, imprisonment and execution under the criminal justice system. It is a matter of self-preservation, considered a supreme law of necessity. If "avoidance of greater evil" can justify an act which would otherwise be felony, including grave ones, then with more reason can it justify the omission of not taking the witness stand.

The trial court then reversed the proper order of things when it stated "While the records do not indicate that accused were ABB operatives, the same records do not bear that they are not." The trial court imposed on the accused the burden of proving that they were not ABB operatives! In the first place, the accused were not charged with a political offense such as rebellion, which would have favored them. But the truth of the matter is that they were/are not rebels.

For example, at the time of their arrests in June 1996, accused Fortuna was an SPO2 with the PNP Traffic Management Command (see his Exhs. 81 & 83) while accused Lumanog was a businessman with several enterprises in Fairview, Quezon City, including a security agency, with the usual police and military links (see the separate Affidavits of spouses Marilou Tiglao-Lumanog and Lenido Lumanog, Exhs. K & L, attached to accused-appellant Lenido Lumanog's "Motion for New Trial and Related Relief" dated 26 April 2002 in this automatic review). At any rate, the trial court itself admits that "the records do not indicate that accused were ABB operatives." Coupled with additional evidence on the ABB angle in the Abadilla killing, this should lead to the acquittal of the accused on *at least* reasonable doubt.

Speaking of burden of proof, the defense does not have the burden of proving the guilt beyond reasonable doubt of the ABB for the Abadilla killing. That is the job of the prosecution. As it is, they have shirked from their sworn duty to prosecute "all persons who appear to be responsible for the offense involved" (Rules of Court, Rule 110, Sec. 2). It has taken the defense to ferret out the ABB angle. But the defense does this not to go after anybody but rather to save the innocent accused. The defense knows with moral certainty that the accused are innocent beyond reasonable doubt. But its burden is only to establish reasonable doubt about their guilt to entitle them to an acquittal (Rules of Court, Rule 133, Sec. 2). The proposed additional evidence on the ABB angle serves this purpose and is sufficient in itself to tilt the balance against the trial court's finding five accused guilty beyond reasonable doubt on the basis of their "positive identification" by one security guard "eye witness".

The latest marshalling of proposed additional evidence on the ABB angle in the case at bar is found in accused-appellant Lenido Lumanog's "Motion for New Trial and Related Relief" dated 26 April 2002 with 10 pages of argument and discussion plus 21 exhibits and 21 annexes submitted during this automatic review stage in accordance with the Revised Rules of Criminal Procedure, Rule 124, Sec. 14 in relation to Rule 125, Sec.

1, which is *hereby incorporated and made an integral part of this appellants' brief by reference*. The said Motion notes "The persistency and consistency of the ABB angle in the Abadilla murder over the past six [now seven] years starting with the first claim of responsibility up to the more recent reiterations and pieces of evidence…"

The said Motion also points out which of the proposed additional evidence on the ABB angle are "undoubtedly newly-discovered," i.e. after the trial court's appealed Joint Decision of July 30, 1999, and those which are "not necessarily newly-discovered in the strict sense" but can be seen in a new light when co-related with other evidence even if also not strictly newly-discovered. The best example of this in the case at bar is the ballistics evidence (e.g. accused SPO2 Cesar Fortuna's Exhs. 2, 3, 74 & 75 under his Formal Offer of Evidence dated April 19, 1999) which were already part of the evidence presented during the trial but their connection with the ABB angle was not yet seen by and in the trial court at that time.

As for the undoubtedly newly-discovered (i.e. post-trial) evidence on the ABB angle, the best example is object evidence: the Omega wrist watch (Exh. A[Motion]) taken from the slain Col. Abadilla by his ambushers and turned over by an ABB personality to Fr. Roberto Reyes on 5 January 2000, as narrated in his Affidavit (Exh. A of the abovesaid Motion for New Trial). The wrist watch, described as "Omega gold-plated wrist watch 1377" and "De Ville Quartz" (TSN, 1/26/00, pp.23, 25-26) *matches* the description of the wrist watch in the very first page of the appealed Joint Decision of July 30, 1999 quoting the Information charging all the accused (except Augusto Santos) for theft of the pistol, wrist watch and wallet taken from the slain Abadilla.

But when Fr. Reyes made an "Urgent Independent Motion for Leave of Court to Present Vital Evidence" dated January 19, 2000 assisted by his own counsel, the trial court at the hearing of this motion on January 26, 2000 issued this appealed Order of the same date in open court denying the motion for these reasons:

> …that this Motion has been filed belatedly and the court believes that from the discussion earlier made that

> this testimony will be purely hearsay and which is not admissible, and not falling anymore under any one of the exceptions to the rule on hearsay evidence and that the Father has to course what he came to know to any one of the defense counsels or the prosecution to present his evidence rather than go directly to this court.

As for belatedness, it was not Fr. Reyes who was belated but the ABB personality who approached him on 5 January 2000. Perhaps the call of conscience comes late for some persons. But this belatedness should not prejudice the petitioners-death convicts by resorting to technicalities to suppress the truth which could save innocent lives. Anyway the judgment of conviction was not yet final and was still in the reconsideration stage with the trial court.

As for hearsay, granting without admitting that Fr. Reyes' proposed testimony on what the ABB personality said to him was hearsay, still there would be other aspects of his proposed testimony that would *not* be hearsay:

> 1. the fact that an ABB personality approached him, talked with him, and turned over a wrist watch
>
> 2. the fact that he knew this person to be a "publicly known" ABB personality from media exposure
>
> 3. the fact of the wrist watch, an object "that speaks already," as the trial judge himself put it during the hearing (TSN, 1/26/00, p.25)

Indeed, *res ipsa loquitor*. So, where is the hearsay?

And as for proper coursing/channeling, this is important for the orderly administration of justice but, in a death penalty situation, is this more important than truth, justice and saving innocent lives?

In Fr. Reyes' Urgent Independent Motion (p.2, par. 14), he explains that "He seeks to do this independently and impartially to help the Court in arriving at the truth. He also seeks to do this as a witness of God, and not for any side, whether defense or prosecution." What is so wrong or objectionable about that? While Fr. Reyes' presentation would benefit the accused, the latter should not be prejudiced as appearing to be the source of the wrist-watch (thus, self-incrimination) if he were to be presented as a

defense witness. As for the prosecution, its track record in refusing to even consider the ABB angle (dismissing it without thinking) and in being content to stick with their hard-earned legal victory of conviction of five innocent fall guys does not inspire confidence.

Must evidence always be presented through one side which is necessarily partisan? What about the non-partisan side of truth and justice which the Court is supposed to represent? Why can't a civic-spirited citizen who has come upon some vital evidence go directly to the Court, with the assistance of independent counsel who is also an officer of the Court for the orderly administration of justice?

Under present rules, "Experienced and impartial attorneys may be invited by the Court to appear as *amici curiae* to help in the disposition of issues submitted to it" (Rules of Court, Rule 138, Sec. 36). Can there not be other non-lawyer "friends of the Court" to help it in arriving at the truth?

But the trial judge apparently did not consider Fr. Reyes as a "friend of the Court," as can be gleaned from its appealed follow-up Order dated January 28, 2000 (Annex D). This Order is notable not so much for its elaboration of the reasons given in its first Order dated January 26, 2000 (Annex C) denying Fr. Reyes' Urgent Independent Motion as it is for its passion against the Catholic Church and a personal hostility against Fr. Reyes, even copy furnishing various religious leaders and groups who have had no participation at all in the case, just so as to discredit Fr. Reyes in the religious community.

Fr. Reyes never had a real chance with his Urgent Independent Motion to Present Vital Evidence. Aside from the trial judge's personal hostility against him, his Urgent Independent Motion heard on January 26, 2000 was *already preempted* the previous day by the appealed Order dated January 25, 2000 (Annex B) which denied all pending motions from several accused, including that seeking to introduce additional evidence on the ABB angle – which was what Fr. Reyes' vital evidence was all about. He had to be denied for the trial court to be consistent, even if it was consistency in error.

The gravest error of the trial court in denying accused Lumanog and Fr.Reyes a chance to present additional/vital evidence on the ABB angle of true responsibility for the Abadilla murder is its disregard of the Supreme Court's guidance of liberality in death penalty situations like the case at bar. It is time that we recapitulate this guidance, some of which was pointed to the trial court to no avail:

1. The ruling in *People vs. Del Mundo* (262 SCRA 266, at 273):

> Furthermore, the penalty imposed on accused-appellant is death. Here is a situation where a rigid application of the rules must bow to the overriding goal of courts of justice to render justice to *secure to every individual all possible legal means to prove his innocence* of a crime of which he is charged.
>
> The *rule for granting a motion for new trial*, among others, should be *liberally construed* to assist the parties in obtaining a just and speedy determination of their rights. Court litigations are primarily for the *search for truth*, and a *liberal interpretation* of the rules by which both parties are given the *fullest opportunity to adduce proofs* is the *best way to ferret out such truth*. The dispensation of justice and vindication of legitimate grievances should not be barred by technicalities. (italics supplied)

2. And the ruling in *People vs. Marivic Genosa* (G.R. No. 135981, September 29, 2000, at pp. 11, 14):

> Accused persons facing the possible death penalty must be given *fair opportunities to proffer all defenses possible that could save them from capital punishment.…*
>
> Thus, consistent with the principle of due process, a *partial reopening of the case is apropos, so as to allow the defense the opportunity to present expert evidence* consistent with our foregoing disquisition, as well as the prosecution the opportunity to cross examine and refute the same. (italics supplied)

3. Then, there is the Decision in *People vs. Ernesto Ebias* (G.R. No. 127130, October 12, 2000) with some *parallelisms to the case at bar* like the confession made by another person that it was he who really committed the murder, in relation to issues of newly discovered evidence and new trial as against earlier positive indentification during the trial. There is also citation (in p. 17 of *Ebias*) of the ruling in *People vs. Del Mundo*. The important point or principle in *Ebias* is that "We cannot *in good conscience* convict

accused-appellant and impose upon him the death penalty *when evidence which would possibly exonerate him may be presented by him in a new trial*." (italics supplied) The case was "reopened" and remanded for the purpose of allowing the defense to present testimony of the confessing person subject to rebuttal by the prosecution.

4. Still another Decision to consider is that in *People vs. Gallo* (315 SCRA 461) where the Supreme Court reiterated its "authority to suspend the execution of a final judgment or cause the modification thereof as and *when it becomes imperative in the higher interest of justice or when supervening events warrant it.*" (italics supplied) With more reason when judgment is not yet final like in the case at bar. Interestingly, in *Gallo,* the Court agreed with the OSG in its stand to join accused-appellant in praying for a modification of the sentence from death to *reclusion perpetua*.

5. There is the case of *People vs. Alipayo* (324 SCRA 447, at 465) where the Supreme Court itself admitted in evidence the birth certificate attached to the motion for reconsideration of one accused Jellie Lipa after the Court's decision affirming the convictions, which proved his minority, even "while this issue was never raised below," thus saving him from lethal injection. In the case at bar, the ABB angle was raised during the reconsideration stage in the RTC, and there is yet no Supreme Court decision of affirmation. In other words, with more reason should the instant Petition have been granted.

6. In *People vs. Villaruel* (261 SCRA 386), the mitigating circumstance of minority was also appreciated in favor of the accused even as "This point has not been raised either by the prosecution or the defense. But we consider it because an appeal in a criminal case opens it up for review on any question, including one not raised by the parties." In the case at bar, the defense did raise the ABB angle but respondent judge suppressed it. Again, with more reason should the instant Petition have been granted.

7. Depriving the herein death convicts of a last chance to prove their innocence by presenting evidence on the ABB angle was/would be tantamount to "depriv(ing) the accused of a full and fair trial," applying by analogy the rulings regarding depriving accused of a medical examination for deaf-muteness, as discussed in *People vs. Parazo* (G.R. No. 121176, July 8, 1999) citing *People vs. Crisologo* (150 SCRA 656), and regarding depriving accused of a mental examination, as discussed in *People vs. Estrada* (G.R. No. 130487, June 19, 2000). *Parazo* resulted in a re-trial while *Estrada* resulted in a remand "for further proceedings," which is among the relief prayed for in the instant Petition.

The foregoing very good rulings are all for very good reason: *our courts, the Supreme Court included, cannot afford to commit any mistake in sentencing an individual to death.* Thus, cases involving the death penalty should be treated with less reliance on technical rules, such as in the cases recapitulated. *The herein accused-appellants invoke the equal protection that was given the accused in all those cases*, something which the former have not enjoyed so far.

In ending our long discussion of arguments on the assignment of errors, we note that there is, however, a *consuelo de bobo* of sorts in the appealed Order of January 26, 2000 (Annex C), namely, its last sentence:

> At any rate, as earlier stated, let this Urgent Motion for Leave of Court of Fr. Reyes be attached to the record as well as the TSN today be attached to the record to be considered as stated by Atty. Bagatsing [counsel for Fortuna] and Atty. Santos [counsel for Lumanog] *as part of the offer of proof of the defense*. (italics supplied)

And going to the said TSN (1/26/00, pp. 8-9), one finds the trial court's admission as offer of proof certain evidentiary documents on the ABB angle proferred by Atty. Bagatsing. These are covered, added to and explained in his "Supplemental To The Oral Manifestation of Accused Fortuna" dated February 10, 2000.

Still on the said TSN (1/26/00, pp. 20-21), after questioning (but not placing on the witness stand) Fr. Reyes and his counsel, the trial court said**:**

> All I can probably do is like what I did with the case of the documents offered by Atty. Bagatsing and Atty. Santos. We can attach your real evidence [the Omega watch] to the record as well as this Motion for Leave of Court.
>
> *We will just see whether what the Supreme Court will do with this.* I am not the one who promulgated the rules of court, only the Supreme Court. I am not the source of this (sic) rules, I am just a trial judge. (italics supplied)

[Defense counsels then adopted the offer of proof of Fr. Reyes through counsel.]

The trial judge was not equal to his task and so passed the buck to the Supreme Court. The buck stops here, and we can only hope and pray that the justices will be equal to their tasks.

We submit that all the proposed additional evidence on the ABB angle, as marshalled in accused-appellant Lumanog's "Motion for New Trial and Related Relief" dated 26 April 1999, and earlier incorporated herein and made an integral part hereof by reference, *be likewise all considered part of the offer of proof of the defense*. Take note that the prosecution (OSG and private prosecutor) never interposed any opposition to the said Motion for New Trial nor to accused-appellant Lumanog's "Urgent Motion for Reconsideration of 17 September 2002 Resolution" dated 14 October 2002 seeking reconsideration of the denial of new trial.

Speaking of *consuelo de bobo*, this was precisely the trial court's mode in its appealed Joint Decision of July 30, 1999 when it dismissed the first four minor charges of theft and illegal possession of firearms before convicting the "Abadilla 5" for the main charge of murder and imposing the death penalty. But those first four dismissals may turn out to be more than just *consuelo de bobo* when given a good look.

Take especially the dismissal of the theft charge (Crim. Case No. Q-96-66679) which is closely tied to the murder charge (Crim. Case No. Q-96-66684). It was the murder of Abadilla which made possible the theft of his pistol, wrist watch and wallet in the same ambush incident. In fine, the murderers were also the thieves. Note that both murder and theft charges were *conspiracy* charges. But Augusto Santos, while included among the conspirators charged with murder, was *not* included among the conspirators

charged with theft. This belies the conspiracy theory in the judgment of conviction for murder. On the other hand, if we must be consistent and logical about conspiracy, then the dismissal of the theft conspiracy case should also mean the dismissal of the murder conspiracy case because, as we said, the murderers were also the thieves. And therefore the turn-over of Abadilla's stolen Omega gold-plated wrist-watch by an ABB personality to Fr. Reyes shows not only who were the thieves but also who were the murderers.

Then take the dismissals of the three illegal possession of firearms cases against Lorenzo delos Santos (Crim. Case No. Q-96-66680), SPO2 Cesar Fortuna (Crim. Case No. Q-96-66682), and Rameses de Jesus (Crim. Case No. Q-96-66683). In any case, none of the three cal. .38 revolvers recovered as "illegally possessed firearms" from these three accused were used for the murder of Abadilla, as ballistics evidence shows that cal. .45 and 9 mm. pistols were used. Neither were any of the three recovered cal. .38 cal. revolvers the pistol stolen from the slain Abadilla which was a cal. .45 pistol. All told, these dismissals and facts should even reinforce and strengthen the defenses and innocence of all the accused-appellants.

In the end, the defense should not be begrudged the proffer of all defenses possible for acquittal of all the accused-appellants not just on reasonable doubt of guilt but on proof of *innocence beyond reasonable doubt*.

RELIEF

WHEREFORE, in view of all the foregoing, it is respectfully prayed that:

a) the appealed Joint Decision of July 30, 1999 (Annex A) and Orders dated January 24, 26 and 28, 2000 (Annexes B, C & D, respectively) in Crim. Case No. 96-66679 to 84, RTC Branch 103, Quezon City, finding accused-appellants Lenido Lumanog, Augusto Santos and three others guilty of the murder of ex-Col. Rolando Abadilla and sentencing them to death, and denying reconsideration, new trial and other relief, be SET ASIDE AND REVERSED and ALL accused-appellants be ACQUITTED;

b) the death penalty, at least for murder under R.A. No. 7659, be declared UNCONSITUTIONAL; and

c) such further, incidental and other relief as may be just and equitable be granted to ALL accused-appellants, including radical relief for the gross violations of their constitutional and human rights.

Quezon City, 1 October 2003.

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