

EN BANC

G.R. No. 182555 --- LENIDO LUMANOG and AUGUSTO SANTOS,
Petitioners, versus PEOPLE OF THE PHILIPPINES, Respondent.

G.R. No. 185123 --- CESAR FORTUNA, Petitioner, versus PEOPLE OF THE
PHILIPPINES, Respondent.

G.R. No. 187745 --- PEOPLE OF THE PHILIPPINES, Appellee, versus SPO2
CESAR FORTUNA y ABUDO, RAMESES DE JESUS y CALMA, LENIDO
LUMANOG y LUISTRO, JOEL DE JESUS y VALDEZ and AUGUSTO SANTOS y
GALANG, Accused; RAMESES DE JESUS y CALMA and JOEL DE JESUS y
VALDEZ, Appellants.

Promulgated:

September 7, 2010

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DISSENTING OPINION

ABAD, J.:

I concur with Mr. Justice Antonio T. Carpio's powerful dissent. I would, however, add a few thoughts that deeply bothered me while pondering the question of whether or not to join the ponencia of Mr. Justice Martin Villarama, Jr. that affirms the lower courts' judgments of conviction against the accused.

The ponencia has to rely solely on the testimony of just one witness, Freddie Alejo, the private security guard who happened to be on the sidewalk of Katipunan Avenue in Quezon City when gunmen ambushed Col. Rolando Abadilla, former head of an intelligence and security unit of the defunct Philippine Constabulary, while driving his car. The trial court found Alejo's testimony straightforward, categorical, and convincing, unaffected by any possible ill-motive. His testimony, said the trial court, obliterated the denials and alibis of all the accused. Further, like the CA and the RTC, the ponencia downplayed as inconclusive the physical evidence that the defense offered in the case.

The Issue Presented

Inevitably, the ultimate issue in this case is whether or not Alejo's testimony is sufficiently credible to support the finding of guilt of all of the accused beyond reasonable doubt.

Arguments

The ponencia would defer to the factual findings of the trial court given that it had the advantage of hearing the evidence in the case first hand from Alejo's lips. But this would be a false start since the Judge who sat at the trial when Alejo took the witness stand was then Judge Jose C. Mendoza,[1] not Judge Jaime N. Salazar, Jr., who eventually weighed the evidence and passed judgment on the accused. Judge Salazar was just as deprived as the members of this Court of the advantage of observing Alejo's demeanor as he claimed having witnessed how the accused gunned down Col. Abadilla in cold blood.

Justice Mendoza, who personally heard Alejo's testimony, is of course now a member of the Court. But he cannot join his colleagues in their deliberation and contribute whatever insight he might have acquired when he listened to Alejo testify. For, first, that would mean bringing into the deliberation matters that are not of record. It would mean depriving the parties of their right to confront by cross examination evidence not adduced at the trial but considered by this Court on appeal.

And, second, it would not be fair to query Justice Mendoza regarding his assessment of Alejo's credibility at the trial minus the responsibility of conscience that every judge who renders the decision in a criminal case must bear when passing upon such question. Justice Mendoza would merely be required to speculate on what his views would be if he had the chance to decide the case. Therefore, like Judge Salazar, the Court must rely solely on the cold record of the case in assessing witness Alejo's testimony.

As already stated, the following discussions are on top of what Justice Carpio already covered in his separate dissenting opinion:

The place to start is Alejo's supposed lack of ill motive in testifying against the accused. Doubtless he had nothing but good motive when he described to the police, shortly after the shooting of Colonel Abadilla, all that he saw. The Court can at that point trust his unembellished story.

But something weighs heavily against the version he delivered at the trial. The police apprehended several suspects, including the accused in this case, and built up evidence against them. Unfortunately, perhaps convinced by the police that these men were Colonel Abadilla's assailants and desiring to ensure a successful prosecution, his family took and sheltered Alejo and another security guard, Merlito Herbas, paying them allowances to make up for their lost earnings.

Called by the defense, Herbas testified that the Abadillas housed Alejo and him (together with Melissa Villasin, the latter's live-in partner) somewhere in Quezon City.[2] Parenthetically, the defense presented Herbas who testified that none of the accused was involved in the ambush. But the RTC rejected Herbas' testimony because he admitted having previously received, together with Alejo, money and economic benefits from the Abadillas. And, when the latter were unable to fulfill their promise to him, Herbas instead testified for the defense.

The trial court's rejection of Herbas' testimony may be correct but the grant by the Abadillas of financial benefit to Alejo equally tainted the latter's testimony. Indeed, economic benefit and the sense of obligation that it created appear to have induced him to disregard his initial physical descriptions of the two armed men who prevented him from intervening in the shooting of Colonel Abadilla. At the trial, Alejo pointed to two of the

accused who did not fit his prior description of the two armed men. He also enhanced his impression of the actual shooting of the victim by claiming that he had the opportunity, no matter if as brief as a camera's flash, to see and remember the faces of each of all four men who shot the colonel down the middle of Katipunan Avenue.

The Government has a witness protection program designed to secure vital witnesses from threats or harm. Apparently, the public prosecutor chose instead to allow the Abadillas, who had an interest in Alejo's testimony, to make him dependent on them for his livelihood at least for the duration of the trial of the case. Knowing this, I cannot but hesitate to swallow everything that Alejo said at the trial.

Consider Alejo's testimony, culled from the ponencia's summary. He testified that on June 13, 1996 he was assigned as security guard at 211 Katipunan Avenue. He went on duty at 7:00 a.m. At about 7:30 a.m., he noted two men, whom he later identified as Joel de Jesus and Lorenzo delos Santos suspiciously walking to and fro by his outpost, which stood between the building he was guarding and the street.

Alejo recalled witnessing at about 8:40 a.m. four men fire their guns at the driver of a black car that had stopped on the street before his outpost. One of the two men on the sidewalk, Joel de Jesus (marked as No. 5 in Exhibit H) pointed his hand gun at Alejo and ordered him to go down his post ("Baba!") but he did not budge. Alejo then saw Lenido Lumanog (marked as No. 1 in Exhibit H), standing on the car's left door, grab the victim by the neck, reach for the latter's clutch bag in the car, and pull the bloodied body out of the car, dropping him on the pavement.

Alejo claimed that at this point he heard Lumanog fire another shot, evidently at the victim. Just then, Joel de Jesus, one of the two men with Alejo on the sidewalk, shouted, "Dapa... walang makikialam!" At this point, the rest of the shooters on the street, namely, Rameses de Jesus (No. 2); Cesar Fortuna (No. 3); and Augusto Santos (No. 4) turned their faces towards Alejo, enabling him to make a mental note of their identities. Next, delos Santos, the second man on the sidewalk, pointed a gun at Alejo, prompting the latter to lower his body and hide behind the covered half of the guard post. Less than a minute after the shooting had stopped, Alejo stood up. The assailants were gone, leaving the window of the victim's car shattered.

The police later interviewed Alejo and brought him and another security guard to Camp

Karingal.

In addition to what Justice Carpio pointed out in his separate dissenting opinion, Alejo's testimony does not inspire belief for the following reasons–

1. Alejo said that he noticed earlier that morning de Jesus and delos Santos walking to and fro by his guard post. Since the behavior of the two men seemed to Alejo unusual, his trained mind did not put them down in the category of ordinary pedestrians waiting for a ride or companions. Innocent pedestrians did not walk to and fro on the same place on the sidewalk for an extended period (more than an hour) without inviting suspicion. Yet, Alejo did not, as his training would have made him, take any step to anticipate some trouble like informing the establishment he was guarding about it or writing a note on his logbook of the description of the two men.

2. Alejo claimed that he actually saw four men shoot at the driver of a black car on the street facing his building. But this is doubtful since, admittedly, he was seated at his guard post with his back slightly turned towards the street.[3] He said, “tagilid ang upo ko,”[4] and demonstrated this during the ocular inspection.[5] As a matter of fact, he confessed that “at the start of the shooting, I did not see because I was still seated and the next gun reports I stood up and then I saw.”[6] Alejo claimed then seeing the four accused already in the position described in Exhibit H.[7]

Clearly, then, Alejo did not see the men fire their guns at Colonel Abadilla. If Alejo were to be believed, the shots alerted him to the trouble and it was their noise that made him turn towards the street at the direction of the shooting. Indeed, he said that as he looked what he saw were the four assassins standing two at each side of the car's front seats. The shooting had stopped.

3. Besides, Alejo said that he looked in the direction of the ambush after he heard the volley of shots. But this could not be accurate because it was right after those shots were fired that Joel de Jesus pointed a gun at him and told him to get out of the outpost and go down from it. How could Alejo see which of four other accused stood at what side of Colonel Abadilla's car when his attention was at Joel de Jesus who was threatening to shoot him if he did not come out of his outpost?

Alejo of course claimed that he was not intimidated. He did not budge and continued to watch what was going on. His courage is surprising, however, since guns had been fired so close to him at someone in a car on the street and now he sees a gun pointed directly at him. Since Alejo chose not to fight back, it seems odd that he would dare one of the men to shoot him for not obeying the order for him to step out of the out post.

4. Alejo claimed that Lumanog grabbed Colonel Abadilla by the neck, reached out for the latter's clutch bag in the car, and pulled the colonel out of the car before dropping him on the pavement. But if Lumanog held a gun with one hand and held the colonel's neck by the other, what hand did he use to reach out for the clutch bag in the car?

5. Alejo testified that when Joel de Jesus, one of the two men on the sidewalk, pointed a gun at him and cried out: "Dapa, walang makikialam!," all four men who fired their guns at Colonel Abadilla turned their faces towards Alejo on the sidewalk, enabling the latter to see their faces clearly. But this is a strained scenario. How could Alejo in such infinitesimal second pay attention to de Jesus pointing a gun at him and commanding him to go out of his guard post and lie face down on the ground and at the same time examine the faces of each of the four men surrounding Colonel Abadilla's car, one after the other, to remember their identities?

6. At best, Alejo had but a glimpse of those who took part in shooting down Colonel Abadilla. But the police remedied this. After arresting the several accused in the case, the police first took their pictures at the police headquarters. Now, rather than call Alejo to make a direct identification of the accused from a police lineup and rule out any possibility of suggestion and mistake, the police investigators first showed him the pictures of the men they nabbed. This is admission that the police needed to prepare Alejo with those pictures before showing to him the accused who had been in their custody all along.

It is very well known that the police, bent on their theory of a case, would sometimes falsely tell the supposed eyewitness that those in the pictures had already confessed to the crime. It takes little subtle convincing to make a witness believe that the person or persons on the pictures were the ones he saw commit the crime and that, unless he identified them, they would walk out free. Naturally, later at the police lineup, the witness when asked would unhesitatingly identify the men he saw on the pictures. His point of reference would be the men on the pictures rather than his recollection of the persons he saw or did not see at the crime scene.

7. It was rush hour when the incident happened and Katipunan Avenue was filled with traffic. It was most unlikely for the assassins who surrounded Colonel Abadilla's car to pose exclusively for Alejo, turning their faces towards him in unison as if he was going to take a class picture of them from the sidewalk. The street was teeming with other cars and people in them. The assassins had enough to watch out for, the least of which was the sidewalk where they knew they had lookouts protecting them from any kind of interference.

Being housed and paid allowances by the victim's family enabled Alejo to substantially alter the previous descriptions he gave to the police of some of the accused. Further, he got to look with plenty of time at the faces of those who fired their guns at Colonel Abadilla and, despite the threats to his life by two men on the sidewalk who had their guns on him, he could remember with remarkable details the shooting of the victim on the street.

8. The assassins fled on a hijacked vehicle. When this was recovered, none of the fingerprint marks on that vehicle matched any of those of the accused. Men would lie but object evidence like fingerprints would not.

9. One cannot ignore the fact that, based on the ballistics report, a slug recovered from the body of Colonel Abadilla matched a slug recovered from the body of a known victim of the Alex Boncayao Brigade (ABB) of the New People's Army. This is clear evidence of the truth of the ABB's claim, told the media, that they were the ones responsible for Colonel Abadilla's death. Again, physical evidence cannot lie; it is a silent witness that could not be housed and bought. Since none of the accused had been identified with the ABB, they could not have been involved in that killing.

The Court should also have taken judicial notice of the fact that, as former head of the dreaded Metropolitan Command Intelligence and Security Group of President Marcos' Philippine Constabulary, Colonel Abadilla had always been a natural target of the communist's death squad, the ABB. Indeed, there had been reports of its previous attempts to kill him.

I have more than reasonable doubt for not being taken in by Alejo's testimony. Those who saw the daylight shooting of Colonel Abadilla did not know the assassins by face. How the police got to identify and pick up the particular accused in this case from their homes or places of work to be shown to the witnesses as their prime suspects is a mystery that the prosecution did not bother to tell the trial court. I can only assume that this is the handy work of police informers, those who made a living of snitching on criminals and saving the police from the shame of having another crime, a crime called to such tremendous public attention because of the identity of the slain victim, left unsolved.

I vote to GRANT the appeals and ACQUIT all the accused.

ROBERTO A. ABAD

Associate Justice

[1] Now a member of this Court.

[2] TSN, February 20, 1998, p. 67.

[3] TSN, September 4, 1996, p. 9.

[4] TSN, September 26, 1996, p. 23.

[5] *Id.*

[6] TSN, September 4, 1996, p. 20.

[7] *Id.*