Republic of the Philippines
SUPREME COURT
Manila

En Banc

Copy No. ___

LENIDO LUMANOG and AUGUSTO SANTOS,
Petitioners,

- versus –

G.R. No. 182555
(CA-G.R. CR HC No. 00667,
ABADILLA MURDER CASE)

PEOPLE OF THE PHILIPPINES,
Respondent.

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

MOTION FOR RECONSIDERATION

> *One witness is not enough to convict a man of a crime; at least two witnesses are necessary to prove that a man is guilty.*[1]
>
> *However, he may be put to death only if two or more witnesses testify against him; he is not to be put to death if there is only one witness.*[2]

The Good Book, believed by Christians and secularly accepted as the Word of God, has, throughout the history of mankind, guided men and women in their individual and communal pursuits, steered souls to the narrow path, guided God's people on their way to the promised land, and produced saints out of sinners.

With this as a backdrop to the conviction of five innocent men based on the uncorroborated testimony of a coached witness that

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[1] Deuteronomy 19:15, The Good News Bible, Today's English Version

[2] Deuteronomy 17:7, The Good News Bible, Today's English Version

PETITIONERS Augusto Santos and Lenido Lumanog, through counsel, hereby plead and respectfully move for this Honorable Court to reconsider its Decision dated September 8, 2010, based on the following:

ASSIGNMENT OF ERRORS

The Honorable Supreme Court erred in:

I. Setting out in the facts of the case the contents of inadmissible extrajudicial confessions;
II. Not including the extrajudicial confession of Lorenzo delos Santos as excluded evidence;
III. Applying the ruling in People v. Rivera "that the testimony of a sole eyewitness is sufficient to support a conviction so long as it is clear, straightforward and worthy of credence by the trial court";
IV. According finality to the evaluation made by the lower court of the testimony of Freddie Alejo;
V. Ruling that there was positive identification;
VI. Finding "none of the danger signals enumerated by Patrick M. Wall" when 3, 7, 10, 11, 12 in said enumeration are present;
VII. Dismissing the mismatch between the prior description given by the witness and the actual appearances of the accused;
VIII. Relying on the ocular inspection conducted at a time when a material condition is significantly altered;
IX. Ruling that the inconsistencies in Alejo's earlier statement and his in-court testimony have been explained;
X. Not discrediting Alejo's testimony despite acceptance of benefits from the Abadilla family;
XI. Holding that the acquittal of Lorenzo delos Santos does not necessarily benefit the appellants;

XII. Ruling that the ballistic and fingerprint examination results are inconclusive and not indispensable;

XIII. Not considering the totality of evidence presented by the defense as against the alleged "positive identification" of the accused.

XIV. Allowing Justice Jose Catral Mendoza to take part in the deliberation and the voting;

XV. Dismissing the evidence presented by Augusto Santos;

XVI. Ruling that the silence of accused Lumanog amounts to a quasi confession;

XVII. Holding that the delay of (4) four years during which the case remained pending with the CA and this Court was not unreasonable, arbitrary or oppressive.

The Concurring Opinion erred in:

XVIII. Ruling that the urging to take judicial notice of the fact that victim was a natural target of the ABB is unwarranted.

XIX. Showing its bias for the victim by applying the right to due process and the equal protection of the laws to a dead man.

DISCUSSION

I. The Court erred in setting out in the facts of the case the contents of extrajudicial confessions ruled inadmissible.

When evidence is inadmissible, the judge, and much more so, the reviewing magistrate, must disregard the same.

It is highly questionable and smacks of utterly incorrect judicial decision writing to find in the statement of facts the whole content of a "Sinumpaang

Salaysay" extracted from a witness thru the use of force and violence, and thus, excluded for being inadmissible. This is even more appalling when the witness repudiated the same statement as being forced upon him to be signed by the police officers who arrested him.[3]

By setting out the contents of the extra-judicial confession in the statement of facts, the Honorable Court has unwittingly contradicted its own ruling that the evidence is inadmissible.

By including the inadmissible narration of facts which might have been prepared by the police officers and not elicited thru a question and answer interrogation, the statement of facts creates an impression in the decision maker that what is set out in the extrajudicial confession are true, and clouds the mind of the decision maker that the declarant is, indeed, the perpetrator of the crime.

In People v. Caguioa, this Court already had the occasion to say:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[4]

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[3] Sinumpaang Salaysay ni Joel de Jesus dated September 12, 1996 offered as Exh. 6 by the Defense for Joel de Jesus, page 4.

"5. Na nuon pong ikatlong (3) araw, Hunyo 21, 1996, sapagka't wala nga po akong contact sa aking pamilya at hawak ako ng mga buhong at walang kaluluwang mga pulis, ay pinapirma na naman ako nina CAPT. RODOLFO at LT. CASTILLO ng dalawang (2) statement na yari na ng ipakita sa akin at papirmahan.

> 5.01 Mga pasado ala-6:00 na po ng hapon nuong ika-21 ng Hunyo ng papirmahan sa akin ng mga pulis ang dalawang (2) statement duon sa safehouse na pinagtataguan sa akin.
>
> 5.02. An una sa dalawang statement na diumano ay ibinigay ko nuong 9:30 ng umaga ng Hunyo 21, 1996 (Annex "B") ay lumalabas na pinanindigan ko sa harap ni 4th Assistant Fiscal Fracisco Soller samantalang hindi naman po ako inilalabas ng safehouse ng araw na yon, Hunyo 21, 1996, at wala po akong kilalang Fiscal SOLLER.
>
> 5.03 Ganuon din pos a ikalawang statement na diumano ay ibinigay ko nyong alas 5:00 ng hapon sa room 235 ng City Hall sa harap ng isang nagngangalang ATTY. FLORIMOND ROUS at sinumpaan ko raw kono sa harap ni ASST. CITY PROXECUTOR ELIGIO LOFRANCO (Annex "C").

Katulad ng sinabi ko, hindi po kami lumabas ng safehouse nuong Junyo 21, 1996, wala po akong nakaharap ng PROSUCUTOR LOFRANCO at hind ko rin po kilala itong ATTY. FLORIMOND ROUS at iniisip ko pa sa ngayon KUNG ITO AY BABAE O LALAKE?"

[4] People v. Caguioa, 95 SCRA 2, 9-10 (1980)

If the prosecution is prohibited from using statements obtained without observing the procedural safeguards, why then, did the inadmissible statements find their way into the statement of facts?

This is the first and blatant error of the Honorable Supreme Court's decision: conditioning the mind of the reader that indeed, the accused plotted and carried out the ambush of the victim, drawing sympathy from the reader that such a dastardly act must not go unpunished and that exclusion of evidence must not favor any accused.

II. Not including the extrajudicial confession of Lorenzo delos Santos as excluded evidence.

The Court did not include the extrajudicial confession of Lorenzo delos Santos as excluded evidence. Like the uncounselled extrajudicial confession of Joel de Jesus, Lorenzo delos Santos' uncounselled extrajudicial confession must also be declared inadmissible in evidence and excluded from the narration of the facts.

The Court might have just overlooked this but it just passed upon the extrajudicial confession extracted or forced upon Joel de Jesus by his police captors. Lorenzo delos Santos' confession, similarly flawed as that of Joel's must be treated no differently.

III. ***The Court erred in applying the ruling in People v. Rivera "that the testimony of a sole eyewitness is sufficient to support a conviction so long as it is clear, straightforward and worthy of credence by the trial court."***

The Supreme Court applied its ruling in People v. Rivera[5] "that the testimony of a sole eyewitness is sufficient to support a conviction so long as it is clear, straightforward and worthy of credence by the trial court."

[5] G.R. No. 139185, September 29, 2003

What is wrong in applying this ruling to the instant case?

The eyewitness in People v. Rivera, Renato Losaria, “knows the accused Riveras as they are his friends.”[6] Moreover, Renato Losaria’s testimony is not totally uncorroborated.

> In addition, Baylon's testimony that the accused brothers, riding a motorcycle, asked him about Jonnifer Losaria, earlier on the day of the latter's killing, corroborated Renato's identification of the appellant as the culprit.[7]

Even the precursors of People v. Rivera, specifically, People v. Quillosa[8], People v. Lotoc[9], and People v. Platilla[10], all the individual eyewitness in each of these cases knew and were familiar with the accused.

In People v. Quillosa,

> Prosecution witness Vasquez testified that he knew both appellant and his companion since they frequented the place of the stabbing incident as "standby" ("istambay"). Identification is facilitated by the fact that the person has gained familiarity with another.[11]

In People v. Lotoc, witness Cecilio Mabingnay knew and is familiar with the suspects whom he referred to by their names and referred to one suspect (Baul) with his alias.[12]

In People v. Platilla, witness Eduardo Andalahao knew and is familiar with the suspect Renato Platilla.

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[6] *Id.*
[7] *Id.*
[8] G.R. No. 115687. February 17, 2000.
[9] G.R. No. 132166. May 19, 1999.
[10] G.R. No. 126123. March 9, 1999.
[11] Supra, Note 7
[12] Supra, Note 8

Q: You seem to know Renato Platilla and Joaquin Platilla, will you tell the court why?
A: This Renato Platilla usually visit (sic) our barangay.[13]

The familiarity of the eyewitness with the accused in these cases cited by the Court make them different from the instant case where Freddie Alejo, the only eyewitness presented in court, does not know the assailants and was not familiar with any of the men whom he saw on that fateful day of June 13, 1996.

With this evident contrast between the factual milieu of the cases cited and the facts of the instant case, the ruling that "the testimony of a sole eyewitness is sufficient to support a conviction" cannot be applied in the instant case.

It should take more than just the testimony of a sole eyewitness who is not familiar with and has no previous knowledge of the identity of the accused to secure a conviction.

Truly, any identification made by a single eyewitness who only saw the felons briefly during the commission of the crime cannot be accorded the same degree of certainty than that of an eyewitness who already knew or who has gained familiarity with the accused before the crime was committed.

In all these cases, the testimony of the sole eyewitness involves not just the manner by which the crime was committed or the acts done that constitute a felony, but also, and more importantly, the establishment of the identity of the criminals. For upon the identification of the criminal hinges the attribution of criminal responsibility.

[13] Supra, Note 9

These two aspects of the eyewitness testimony must be evaluated separately for it does not mean that just because the eyewitness was able to provide a detailed, blow-by-blow (to borrow a boxing lingo) account of the incident, his identification of the criminals is already worthy of credence. The identification of the criminals itself, must be scrutinized to ensure that the persons made to bear the criminal responsibility are the ones, to the exclusion of others, guilty of the offense.

It is easier to give a detailed account of an incident than to identify unknown persons seen once briefly by the witness.

The holding that "the testimony of a sole eyewitness is sufficient to support a conviction" is also qualified by the phrase "so long as it is clear, straightforward, and worthy of credence by the trial court."

Both the account of the incident and the identification of the criminals must be separately established as clear, straightforward, and worthy of credence, in order that the eyewitness testimony will be sufficient to support a conviction.

When the account of the incident is clear, straightforward, and worthy of credence, but the identification of the criminals is not, then the credibility of the witness falls. Similarly, when the identification of the criminals is clear, straightforward and worthy of credence but the account of the incident is not, the witness' credibility crumbles.

The phrase "worthy of credence by the trial court" is a problematic qualifier. The testimony of a sole eyewitness must be worthy of credence not just by the trial court, but even more so, by the reviewing magistrates.

To qualify that it is enough that the testimony is "worthy of credence by the trial court" is to discredit the fact that there are trial court determinations which have been overturned by the higher tribunals upon a showing that "the

trial court has failed to appreciate certain facts and circumstances which, if taken into account, would materially affect the result of the case."[14]

Thus, to be sufficient to support a conviction, the testimony of a sole eyewitness must also be worthy of credence by the reviewing tribunal.

As we shall show later in the next assignment of error, the trial court's determination of the credibility of the eyewitness on the two aspects of his testimony (the crime committed and the identity of the criminal), when accorded with finality by the reviewing tribunal, despite a showing of several factors that cast doubts both to the credibility of the witness and to the trial court's determination, can lead to a fatal pitfall of injustice unto which the innocent is unwittingly thrown by the reviewing tribunal because of its refusal to pass upon the credibility of a sole eyewitness whose testimony is the only anchor for the conviction.

IV. The Court erred in according finality to the evaluation made by the lower court of the testimony of Freddie Alejo;

The Supreme Court, in according "the highest respect, even finality to the evaluation made by the lower court of the testimonies of the witnesses presented before it"[15] justifies its stance by citing the case of Concepcion v. Court of Appeals[16] when it said:

> It is axiomatic that the fact alone that the judge who heard the evidence was not the one who rendered the judgment, but merely relied on the record of the case, does not render his judgment erroneous or irregular. This is so even if the judge did not have the fullest opportunity to weigh the testimonies, not having heard all the witnesses speak or observed their deportment and manner of testifying.[17]

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[14] People v. Ramos, G. R. Nos. 135068-72, September 20, 2001.
[15] Decision promulgated September 7, 2010, page 59.
[16] G. R. No. 120706, January 31, 2000. 324 SCRA 85.
[17] *Id.*, p. 92

This case cited by the Court, however, is a civil case involving claims for damages and should not be applied to the instant criminal case. The constitutional fiat of presumption of innocence always weighs heavily in the balance of justice when the Court is called upon to consider any criminal case filed before it for review. That presumption of innocence is absent in civil cases where the court, upon a finding of civil responsibility, may award damages that restitute complainant's claim. That presumption of innocence, however, looms largely in the consideration of a criminal case where life and liberty of the accused is at stake when the Court pronounces a guilty verdict.

As held by this Court in People v. Alto:

> As a salutary proposition, this Court usually desists from disturbing the conclusions of the trial court on the credibility of witnesses, in deference to the rule that the lower court, having seen and heard the witnesses and observed their demeanor and manner of testifying, is in a better position to appreciate the evidence. But this doctrine must bow to the superior and immutable rule that the guilt of the accused must be proved beyond a reasonable doubt, because the law presumes that a defendant is innocent, and this presumption must prevail unless overturned by competent and credible proof.[18]

By relying on its ruling in a civil case in justifying its refusal to substitute its own findings to the findings of the trial court, the Honorable Supreme Court disregards its ruling in People v. Baula, where it pronounced:

> The rule has generally been that where the culpability or innocence of the accused hinges on the issue of credibility of witnesses and the veracity of their testimony, the assessment made by the trial court thereover is entitled to a great degree of respect and, absent strong justifications to the contrary, it will not be disturbed on appeal. This rule will not apply where one judge hears the testimony of the witnesses and another judge pens the decision, for, in such a case, the thesis for the rule is not in the least extant.[19]

[18] People v. Alto, 26 SCRA, 342, 365 (1968)
[19] G.R. No. 132671. November 15, 2000, 344 SCRA 663

Verily, a judge who pens the decision by relying on the records, with no opportunity to observe "the demeanor of the person on the stand"[20] which "can draw the line between fact and fancy"[21] is in no better position than the Honorable Justices of the Supreme Court who review the records on appeal when it comes to determining the credibility of the eyewitness.

The judge who wrote the decision but who did not observe "[t]he forthright answer or the hesitant pause, the quivering voice or the angry tone, the flustered look or the sincere gaze, the modest blush or the guilty blanch"[22] is equally deprived as the reviewing magistrate to ascertain "if the witness is telling the truth or lying in his teeth,"[23] based on behavioral observation.

The Court cites the case of People v. Rayray in saying

> that the fact that the judge who heard the evidence is not himself the one who prepared, signed and promulgated the decision, but some other judge in his place, constitutes no compelling reason to jettison his findings and conclusions and does not per se render it erroneous. [24]

The Court also cites the case of Pilipinas Shell Petroleum Corporation v. Gobonseng Jr. in saying that

> The validity of a decision is not necessarily impaired by the fact that its ponente only took over from a colleague who had earlier presided at the trial. This circumstance alone cannot be the basis for the reversal of the trial court's decision.[25]

The Court, however, cut this last sentence and excluded the phrase:

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[20] People v. Espinosa, G.R. No. 72883, Dec. 20, 1989
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] G. R. No. 90628, February 1, 1995, 241 SCRA 1, 8-9
[25] G.R. No. 163562. July 21, 2006, 496 SCRA 305, 320.

> unless there is a clear showing of grave abuse of discretion in the appreciation or a misapprehension of the facts.[26]

We are not asking the Honorable Court to reverse the trial court's decision just because the judge who wrote the decision is not the judge who heard the case.

We are not even asking the court, to summarily brush aside the findings of the trial court based solely on the fact that the ponente is a different judge from the one who listened to the testimonies.

We are asking the Honorable Court to make its own assessment of the witness' credibility based on the circumstances and not to take the trial judge's assessment of the witness' credibility hook, line and sinker in light of the disturbing doubts whether the witness was telling the truth as shown by the following circumstances:

1. witness unequivocal assertion that he saw two men walking to and fro in front of his post prior to the incident, which fact he never mentioned to the police during the initial investigation;
2. witness' assertion that these two men separately pointed a gun at him;
3. the acquittal of Lorenzo delos Santos whom witness identified as one of the two men who were walking in front of his post before the incident, pointed a gun at him, and shouted to him;
4. discrepancies in the descriptions of the suspects and the appearances of the accused which was brushed aside lightly by the Court.

V. The Court erred in ruling that there was positive identification.

[26] *Id.*

The transcript of stenographic notes is herein reproduced to show the manner of in-court identification that Freddie Alejo was made to identify the accused-appellants.

TSN, Testimony of Freddie Alejo – Direct, August 20, 1996, pp. 51-66

PROS CHUA CHENG:

Q: The person who first pointed the gun at you and told you to "bumaba ka", if he is inside the court room will you please step down from your place and tap the shoulder of that person or point at him if that person is inside the court room…

ATTY AZARCON:

I object to the pointing, your Honor, no basis to the identity of the suspects mentioned from 1 to 6, your Honor.

PROS CHUA CHENG:

That is the reason why we requested the witness to point the suspect, your Honor. Before the witness comply with the request, may we request that whoever pointed by the witness be refrained from any comment, your Honor.

Q: Inside the court room… will you please look around the court room and tell us if these suspects #1, 2, 3, 4, 5, & 6 are inside the court room.

INTERPRETER:

Witness is looking around the court room.

ATTY CORPUZ:

May we request, your Honor, that all those persons wearing glasses including lawyers removed their glasses.

ATTY AZARCON:

Your Honor, that is uncalled for. That is not necessary.

PROS CHUA CHENG:

May we move, your Honor, that all persons inside the court room to sit down.

COURT:

All persons inside the court room please sit down.

PROS CHUA CHENG:

Q: Are all these six (6) persons inside the court room?

A: Yes, mam.

Q: This number 5 the person who first pointed a gun at you and told you “baba ka”, will you please pointed to us?

INTERPRETER:

Witness went down from the witness stand and approaching to the group of persons and witness pointing to a man seated in the courtroom wearing stripe polo and when asked to identify himself he gave his name as JOEL DE JESUS.

PROS CHUA CHENG:
May we request that the name JOEL DE JESUS be placed under #5, your Honor.

INTERPRETER:

(Placing the name of Joel de Jesus under #5 as requested).

PROS CHUA CHENG:

Q: This person referred by you as #1 the person who got the clutch bag, grabbed the neck and pulled the victim outside the car, is he inside the courtroom?

A: Yes, mam.

Q: Please step down and pointed to us that person?

INTERPRETER:
Witness went down from the witness stand and approaching to the group of persons and witness pointing to a man wearing maroon T-shirt and when asked to identify himself he gave his name as LENIDO LUMANOG.

ATTY CORPUZ:

May we ask, your Honor, that the accused not to make unnecessary movement the one pointed by the witness, your Honor.

ATTY BAGATSING:

The accused is not moving unnecessary, your Honor.

PROS CHUA CHENG:

He did , your Honor. May we request that the #1 in the picture be named LENIDO LUMANOG, your Honor.

INTERPRETER:

(Placing the name of Lenido Lumanog under #1 as requested).

PROS CHUA CHENG:

Q: This #2 which you referred to in the picture if he is inside the courtroom, will you please point him to us?

INTERPRETER:

Witness stepping down from the witness stand approaching the group of people and pointed at a man wearing printed polo shirt and when asked to identify himself gave his name as RAMESES DE JESUS.

ATTY CORPUZ:

May we make it of record that the person pointed to by the witness who answered the name as RAMESES DE JESUS even transferred his position from the group of the suspects to the right side of the audience and that is also true with the accused Lenido Lumanog that before the identification was made he transferred his sitting position and even used eyeglasses, your Honor.

PROS CHUA CHENG:

May we request, your Honor, that the #2 in the picture be named Rameses de Jesus.

INTERPRETER:

(Placing the name of Rameses de Jesus under #2).

PROS CHUA CHENG:

Q: This person, #6, the second person who pointed a gun at you, if he is inside the court room, will you please point to him.

INTERPRETER:

Witness stepping down from the witness stand approaching the group of people and pointed at a man and when asked to identify himself he gave name as LORENZO DELOS SANTOS.

PROS CHUA CHENG:

May we indicate #6 as Lorenzo delos Santos.

INTERPRETER:

(Placing the name of Lorenzo delos Santos under #6).

PROS CHUA CHENG:

Q: The #4 in the picture if he is inside the court room, will you please point to us?

INTERPRETER:

Witness stepping down from the witness stand approaching the group of people and pointed at a man and when asked to identify himself he gave his name as AUGUSTO SANTOS.

ATTY CORPUZ:

May we know from the accused pointed to by the witness if he is using an alias…

ATTY AZARCON:

That is your information…

ATTY CORPUZ:

Because the accused pointed to by the the name is Augusto Santos is using an alias…

COURT:

Anyway they were identified during the arraignment.

PROS CHUA CHENG:

Q: Now, this #3 who was positioned in the right side of the car, passenger front door, right front door of the car, if he is inside the court room, will you please point to us

INTERPRETER:
Witness stepping down from the witness stand approaching the group of people and pointed at a man and when asked to identify himself he gave his name as CESAR FORTUNA.

PROS CHUA CHENG:

May we request, your Honor, that the name of Cesar Fortuna be placed in #3.

INTERPRETER:

(Placing the name of Cesar Fortuna in #3).

PROS CHUA CHENG:

Q: You earlier said that you saw four (4) persons shooting at the driver of a black car which was positioned almost infront of you. Now, who of these persons shot the driver of the car when you first saw it by stating the number?

A: They were two (2) of them, sir, they are #1 and #3, mam.

Q: How about this #2, what did he do, if any?

A: I just saw this person standing and facing the driver with a gun in his hand, mam.

PROS CHUA CHENG:

Witness is referring to accused Rameses de Jesus, your Honor.

Q: How about Augusto Santos, #4?

ATTY BAGATSING:

I object to the prosecution's line of questioning, your Honor. It should be referred by the number because it was not yet established…

COURT:

It was already identified. #2 was already identified as Remeses de Jesus.

ATTY BAGATSING:

that is the claim of the witness, your Honor, but the questioning should be by the number not by the name.

PROS CHUA CHENG:

Anyway, your Honor, when he pointed at #2, we make it of record that the #2 is Rameses de Jesus. We just make reference to the exhibit, your Honor.

Q: This #4, what did he do, if any?

A: I just saw him standing and facing the driver, sir.

Q: Was he holding anything?

A: Yes, sir, he was holding a gun.

Q: What kind of gun was he holding at that time?

A: It was a short one, mam.

Q: And you are referring to #4?

A: Yes, mam.

When the in-court identification made by Freddie Alejo is tied up with the fact that Alejo was only able to give descriptions of two of the suspects to the police investigators and the fact that those descriptions did not match the actual physical appearances of any of the accused reveals serious flaw in the identification process.

In open court, Freddie Alejo referred to the suspects only by numbers (1 to 6) which was used to indicate the relative positions of the criminals at the crime scene. This affirms that Freddie Alejo does not know the persons who actually committed the crime.

Indicating the relative positions of the perpetrators at the scene of the crime does not provide enough basis for the positive identification of the perpetrators. It pertains to the commission of the acts and not to the identity of the actor.

Positive identification means an affirmation by the witness that the accused are the ones he saw commit the crime, and such affirmation must convince the court that the witness cannot be mistakened in identifying the accused as the criminals either because he is familiar with the accused or because the witness is able to provide certain clues or distinctive features that allows him to single out the accused from other persons.

There can be no positive identification when there is a doubt as to whether the persons pointed to by the witness are the actual culprits. When the manner of identifying the suspects is merely by indicating their relative positions at the crime scene, without providing any basis for verifying why person 1 cannot be person 2 and vice versa, such type of in-court identification is inherently flawed as one can substitute any persons with the number of suspects and all the eyewitness has to do is to cursorily point to them.

If such type of in-court identification is considered positive, any Juan, Pedro, Jose, can be labeled 1, 2, 3 and once pointed to by the witness can be easily convicted because the witness will never appear to have any difficulty in arbitrarily assigning numbers to the suspects.

The in-court identification, to be positive, must also be free from any suggestion or coaching, direct or indirect from anyone. The witness must be left unaided except by his own mental faculties in recalling the appearance of the suspects.

There can be no positive identification if the witness is aided by the prosecutors in pointing to the accused.

The transcript shows that prior to the identification of Lenido Lumanog, Atty. Corpuz requested that all persons wearing glasses remove their glasses but was objected to by Atty. Azarcon.

> ATTY CORPUZ:
>
> May we request, your Honor, that all those persons wearing glasses including lawyers removed their glasses.
>
> ATTY AZARCON:
>
> Your Honor, that is uncalled for. That is not necessary.

Such manifestation coming from the private prosecutor is a form of coaching the witness, giving a clue that one of the suspects is wearing eyeglasses, and thus, aided the witness in pointing to the accused.

True enough, after Lumanog was pointed to by the witness, Atty. Corpuz again manifested before the Court:

> ATTY. CORPUZ:
>
> May we make it of record that the person pointed to by the witness who answered the name as RAMESES DE JESUS even transferred his position from the group of the suspects to the right side of the audience and that is also true with the **accused Lenido Lumanog** that **before the identification was made** he transferred his sitting position and **even used eyeglasses,** your Honor.

This subtle, indirect, yet effective coaching from the lawyer of the witness, impairs the validity and credibility of the in-court identification process. It takes away the freedom of the witness to rely solely on his own recollection of the appearance of the suspect. With suggestive coaching attending the identification, said identification can never amount to a positive identification because the witness was aided by the lawyer in identifying the accused.

Likewise, the in-court identification of Joel de Jesus has already been tainted by the earlier showing of Joel's photograph to the witness. As this Court held in People v. Pineda quoting Patrick M. Wall:

> [W]here a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party, but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he previously identified may say, "That's the man that did it," what he may actually mean is, "That's the man whose photograph I identified."
> xxx xxx xxx
> A recognition of this psychological phenomenon leads logically to the conclusion that where a witness has made a photographic identification of a person, his subsequent corporeal identification of that same person is somewhat impaired in value, and its accuracy must be evaluated in light of the fact that he first saw a photograph.[27]

The Court's finding that:

> [T]here was no evidence that the police had supplied or even suggested to Alejo that appellants were the suspects, except for Joel de Jesus whom he refused to just pinpoint on the basis of a photograph shown to him by the police officers, insisting that he would like to see said suspect in person.[28]

and Justice Bersamin's finding in his concurring opinion that

> the records of the present case show that impermissible suggestion did not precede Alejo's out-of-court positive identification of De Jesus as one of the perpetrators of the crime. Alejo's testimony on September 3, 1996 reveals, on the contrary, that Alejo even categorically declined to identify any suspect by mere looking at a photograph[29]

is contradicted by the response given by Alejo admitting that the picture of Joel de Jesus was already shown to the witness prior to his identification de Jesus.

> ATTY. BAGATSING:
>
> Q: What conversation, if any, did you have with the police officers who were with you on June 19, 1996 from 2:00 o'clock to 3:00 o'clock in the afternoon?
>
> A: There was a conversation, sir. I asked them where we are going and they told me that we would **go to the person depicted in the picture which was**

[27] G.R. No. 141644. May 27, 2004, quoting Patrick M. Wall, Eye-Witness Identification in Criminal Cases 68-69 (1965).

[28] Decision, p.65

[29] Concurring Opinion, page 4.

> **shown to me yesterday**, and so I told them that I would like to see the person in person because I would not want to point any person "kawawa naman".[30]

The impermissible suggestion preceding the identification of Joel de Jesus consists in showing Alejo the picture of Joel. It does not matter whether the witness declined to identify the suspect for what matters is that the picture shown to the witness narrowed down his choice and singled out Joel de Jesus, giving Alejo an indirect instruction to match the appearance of the person to be identified with the picture shown to him.

Such impermissible suggestion cannot be cured by an in-court identification because it is precisely the ability of the witness to point to the suspects unaided by any suggestion or coaching that has been irreparably impaired when he was shown a photograph of Joel de Jesus and of nobody else before proceeding to identify Joel in person.

There can also be no positive identification of Augusto Santos. In fact, the person #4 would be the most difficult to be identified by the witness and is the most susceptible of mistaken identity. The person indicated as # 4 in the photograph had his back towards the witness. Witness saw the back of this person for the whole time that the shooting incident was happening save for that brief moment when the witness claims, if indeed it is true, that all the suspects face him simultaneously for less than a minute.

It was only thru the witness' incredible testimony that when one of the suspects pointing a gun at him shouted Baba! suspect #4 faced him simultaneously with all the other assailants and that the witness had allegedly seen all the faces of the suspects for less than a minute.

The incredibility of such a feat to be able to look, from a distance of about ten meters, at four different people situated far apart from each other,

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[30] TSN, Hearing held on September 3, 1996, page 27

negates the ability of Freddie Alejo or of any human being for that matter, to be able to etch the face of suspect #4 in one's memory with infallible accuracy.

If we substitute Augusto Santos with any male within his age range, Freddie Alejo will simply affirm he saw that person as suspect #4 and there will also be a conviction if we allow this type of identification and consider it as a positive identification.

To take Freddie Alejo's testimony as infallible is to attribute to him superhuman qualities especially the ability to simultaneously look at different people located far apart from each other and only for a brief moment, and then be able to memorize with certainty the appearances of all the persons he saw, as if possessing digital imagery in his memory out of the vision his eyes had captured. We believe the Supreme Court will not create super beings out of witnesses and will be guided by the natural course of things in appreciating the incredible testimony of Freddie Alejo, which the prosecution bolstered to secure a basis for a positive identification.

VI. The Court erred in finding "none of the danger signals enumerated by Patrick M. Wall" when 3, 7, 10, 11, 12 in said enumeration are present.

The Court held:

> We also found none of the danger signals enumerated by Patrick M. Wall, a well-known authority in eyewitness identification, which give warning that the identification may be erroneous even though the method used is proper. The danger signals contained in the list, which is not exhaustive, are:
>
> (1) the witness originally stated that he could not identify anyone;
>
> (2) the identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
>
> (3) a serious discrepancy exists between the identifying witness' original description and the actual description of the accused;
>
> (4) before identifying the accused at the trial, the witness erroneously identified some other person;

(5) other witnesses to the crime fail to identify the accused;

(6) before trial, the witness sees the accused but fails to identify him;

(7) before the commission of the crime, the witness had limited opportunity to see the accused;

(8) the witness and the person identified are of different racial groups;

(9) during his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;

(10) a considerable time elapsed between the witness' view of the criminal and his identification of the accused;

(11) several persons committed the crime; and

(12) the witness fails to make a positive trial identification.[31]

Clearly, Number 3, 5, 7, 10, 11, and 12 are present in the instant case.

(3) a serious discrepancy exists between the identifying witness' original description and the actual description of the accused

The prior description of the suspect who pointed a gun at the witness never matched the actual physical appearance of Joel.

The prior description of the person who shot at the victim, grabbed the victim and took the clutch bag also did not match the actual physical appearance of accused Lenido Lumanog.

(5) other witnesses to the crime fail to identify the accused;

This is similar to a witness denying that the accused are the ones he saw at the crime scene. Herbas, the other security guard, testified that he did not see any of the accused at the crime scene.

(7) before the commission of the crime, the witness had limited opportunity to see the accused;

[31] Decision, pp. 63-64

Clearly, Freddie Alejo had limited opportunity to see the accused before the commission of the crime.

(10) a considerable time elapsed between the witness' view of the criminal and his identification of the accused;

Considerable time is relative. When the witness knows or is familiar with the suspect, even months or years interval between the witness' view of the criminal and the identification of the accused will not matter.

When the witness, however, does not know the criminals, and has only seen them for the first time when the crime happened, even a week can already be a considerable lapse of time as mental images tend to be displaced by newer ones.

(11) several persons committed the crime;

There were four (4) men who committed the crime as reported to the police by several eyewitnesses immediately after the incident. That several people who saw the same occurrence are one in saying that there were four suspects who ambushed the victim, is a clear indication that only four (4) and not five (5) nor six (6) men were involved in the crime.

We are perplexed why the Court finds that none of the danger signals is present in the instant case.

(12) the witness fails to make a positive trial identification.

As we have discussed in the fourth assignment of error, there is no positive trial identification at all.

With these several danger signals, the identification is rendered erroneous.

VII. The Court erred in dismissing the mismatch between the prior description given by the witness and the actual appearances of the accused;

In dismissing the mismatch between the prior description given by the witness and the actual appearances of the accused, the Court held:

> Though his estimate of Joel's age was not precise, it was not that far from his true age, especially if we consider that being a tricycle driver who was exposed daily to sunlight, Joel's looks may give a first impression that he is older than his actual age. Moreover Alejo's description of Lumanog as dark-skinned was made two (2) months prior to the dates of the trial when he was again asked to identify him in court. When defense counsel posed the question of the discrepancy in Alejo's description of Lumanog who was then presented as having a fair complexion and was 40 years old, the private prosecutor manifested the possible effect of Lumanog's incarceration for such length of time as to make his appearance different at the time of trial.[32]

The use of conjectural reasoning to dismiss facts must not find its place in judicial writing. The age estimate given by the witness is a range and not an exact age. That the true age of accused Joel de Jesus missed the range given by the witness by 8-13 years and that the true age of Lenido Lumanog missed the range given by the witness by 10- 15 years cannot simply be dismissed by the Court and justified with its own reasoning.

Absent any evidence presented that Joel de Jesus actually looked older than his age, the Court does not have any basis to justify its reasoning.

To dismiss the difference in Lumanog's skin tone with the description given by the witness to the police with the manifestation made by counsel during trial that "the possible effect of Lumanog's incarceration for such length

[32] Decision, pp. 64-65

of time as to make his appearance different at the time of trial"[33] is to allow argumentative remarks of counsels to be taken as factual evidence.

The Court, by using counsel's manifestation to justify its stance that the discrepancy is explained, is allowing the use of possibilities to counter facts supported by evidence. Evidence must be rebutted by evidence and not by arguments based on conjectures.

VIII. The Court erred in relying on the ocular inspection conducted at a time when a material condition is significantly altered.

The Court takes the ocular inspection as a verification of Alejo's clear view of the incident, thus:

> The clear view that Alejo had at the time of the incident was verified by Judge Jose Catral Mendoza (now an Associate Justice of this Court) during the ocular inspection conducted in the presence of the prosecutors, defense counsel, court personnel, and witnesses Alejo and Maj. Villena.

It must be pointed out, however, that the ocular inspection was conducted from 10:00 a.m. onwards. The incident occurred between 8:30 and 9:00 a.m. when the glare of the morning sun directly hits the guardpost where Freddie Alejo was stationed.

The angle of the morning sun relative to Alejo's position is such that its direct glare impedes the vision of anyone looking eastwards.

This material condition was different when the ocular inspection was conducted, and therefore, the observation by the good Judge, unimpeded by the sun's glare, cannot be compared to the actual view of Freddie Alejo at the time of the incident.

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[33] Decision, p. 65

We submit this as part of judicial notice under the laws of nature and the measure of time[34] that the morning sun's glare was directly hitting the buildings where Freddie Alejo was stationed and thus was directly hitting the line of vision of Freddie Alejo when the incident occurred.

It is also observable as a law of nature that anyone looking towards a bright sunlight cannot clearly see the objects between the observer and the sunlight.

IX. The Court erred in ruling that the inconsistencies in Alejo's earlier statement and his in-court testimony have been explained.

The Court would want us to believe that by "using number four (4) to refer those persons actually standing around the car and two (2) more persons as lookouts,"[35] Alejo has sufficiently explained the discrepancy between his earlier statement given to the police where he said there were only four (4) suspects and his testimony increasing the number of suspects to six (6), saying there were two lookouts.

If, indeed, there were two lookouts whom Alejo saw even earlier before the commission of the crime, why did he not mention anything about these two (2) lookouts to the police investigator just hours after the incident?

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

[34] Rule 129, Section 1of the Revised Rules of Court.
[35] Decision, p. 61.

> to mention. The point of inquiry is whether the contradictions are important and substantial…"[36]

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.

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. [37]

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[36] (*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).
[37] (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.

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. [38]

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"**[39] which the court referred to in a line of decisions.

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.

X. The Court erred in not discrediting Alejo's testimony despite acceptance of benefits from the Abadilla family.

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[38] TSN, August 21, 1996, pp. 74 – 84

[39] (*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).

In dismissing the claim that the receipt of benefits from the family of the victim has tainted the credibility of Alejo, the Court ratiotianated:

> As to appellants' attempt to discredit Alejo by reason of the latter's acceptance of benefits from the Abadilla family, the same is puerile, considering that the trial court even verified for itself how Alejo could have witnessed the shooting incident and after he withstood intense grilling from defense lawyers. Case law has it that where there is no evidence that the principal witness for the prosecution was actuated by improper motive, the presumption is that he was not so actuated and his testimony is entitled to full faith and credit

The fact of verification how Alejo could have witnessed the incident does not dismiss the fact that he received benefits from the family, enough to color his testimony to favor the family of the victim.

Such receipt of benefits from the victim's family created a motive in Freddie Alejo to continue being in the favor of the family, otherwise, he will be losing whatever benefits he was receiving. Such motive directly affects his testimony and, in fact, made him a very cooperative witness for the prosecution. The signs of coaching, like the repudiation of his earlier statement that he was not nervous, the clue of the eyeglasses, and the addition of two other suspects in his testimony when those suspects were not mentioned in his earlier statement all point to one thing: Alejo will agree to enhance his testimony so he can continue enjoying the benefits accorded him by the victim's family.

XI. The Court erred in holding that the acquittal of Lorenzo delos Santos does not necessarily benefit the appellants.

We are not asking the court to review the acquittal of Lorenzo delos Santos so he may also be implicated.

We are calling the Court's attention to the acquittal of Lorenzo delos Santos in relation to the supposed positive identification made by Freddie Alejo out of court and during the trial.

This accused was identified twice, was seen longer, and must have occupied more space in the memory of the witness. Yet Lorenzo delos Santos was acquitted based on alibi defense.

He was not at the crime scene. And the trial court believed the defense as against the supposed positive identification made by the eyewitness.

If the eyewitness can be mistakened in identifying the person whom he allegedly saw for a longer period of time prior to the shooting, if the eyewitness can be mistakened in identifying the person who allegedly pointed a gun at him, how much more can this same eyewitness be not mistakened in retaining in his memory the faces of the other accused, especially Lumanog and Augusto Santos whom he has seen for a very brief moment?

This is what we are asking the Court to review.

Delos Santos is not a conspirator. He has proven that he was never in the crime scene.

The rulings relied upon by the Court in which the acquittal of a co-conspirator will not benefit the other conspirators cannot, therefore, be applied in this case.

The acquittal of Lorenzo delos Santos directly discredits Alejo's identification of him as one of the persons he saw walking in front of the guardpost before the incident and as one of the two persons who pointed a gun towards him commanding him "Dapa!"

The acquittal was based on the trial court's finding that delos Santos was not at the crime scene at all.

If Freddie Alejo, was so emphatic in his testimony that it was Lorenzo delos Santos he saw on that day of the incident as the person who was walking to and fro in front of the guardpost Alejo was manning, if Freddie Alejo affirmed upon oath that Lorenzo delos Santos was one of the two men who allegedly pointed a gun at him, then the credibility of Alejo as an eyewitness to positively identify the culprits is seriously flawed.

Alejo was proven to be mistaken in identifying Lorenzo delos Santos. It goes directly to his credibility in identifying the other perpetrators of the crime. It calls for a special application of the maxim *falsus in uno, falsus in omnibus*. His mistake in identifying one of the accused puts to doubt the other identifications he made whether out of court or in open court.

XII. The Court erred in ruling that the ballistic and fingerprint examination results are inconclusive and not indispensable.

The majority's UNDERVALUING OF BALLISTICS & DACTYLOSCOPIC (FINGERPRINT) EVIDENCE HAS VERY GRAVE ADVERSE IMPLICATIONS to the more scientific gathering of facts at a time when we are already allowing DNA evidence, electronic evidence, forensic evidence a la CSI[40], etc. It is a step backward with implications for so many other cases and also an unwarranted insult to work done by ballistics & dactyloscopic experts -- and also to jurisprudence on the reliability of ballistics evidence in particular.

[40] The title of a currently popular TV series on "Crime Scene Investigation" through the thorough gathering and rigorous analysis of forensic evidence."

What is more disturbing is how the majority dismissed the negative result of ballistic examination:

> the negative result of ballistic examination was inconclusive, for there is no showing that the firearms supposedly found in appellants' possession were the same ones used in the ambush-slay of Abadilla. The fact that ballistic examination revealed that the empty shells and slug were fired from another firearm does not disprove appellants' guilt, as it was possible that different firearms were used by them in shooting Abadilla.[41]

To say that the result of ballistic examination was inconclusive, is to disregard the conclusions the guns found in the possession of accused were not the ones used in the ambush of the victim. Absent any finding that the accused used other guns, the conclusion that "it was possible that different firearms were used by them" remains just that: a possibility and not a proven fact. Criminal convictions must always be anchored on proven facts and not on possibilities.

To say that the ballistic result does not disprove appellants' guilt presupposes that their guilt have already been established by other evidence beyond reasonable doubt. The lingering doubt as to whether Alejo's testimony can, indeed be considered positive identification, and its insufficiency to support a conviction given the discussion of the assignment of errors discussed above, renders erroneous the premise that appellants are guilty.

The finding that the empty shells and slugs matched those in another criminal case involving ABB members confirm the claim of the ABB as the ones responsible for the killing of the victim.

The absence of any fingerprint in the get-away car matching the fingerprints of the accused appellants also take them away from the scene of the crime.

XIII. The Court erred in allowing Justice Jose Catral Mendoza to take part in the deliberation and the voting.

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[41] Decision,

Justice Abad, in his dissenting opinion, already mentioned that Justice Mendoza "cannot join his colleagues in their deliberation and contribute whatever insight he might have acquired when he listened to Alejo testify"[42] and gave two compelling reasons.

A third, and equally, if not the most compelling reason why Justice Mendoza should have not joined his colleagues is that he was asked to inhibit by the accused Rameses de Jesus. A judge who inhibited himself from deciding the case, upon motion of a party, cannot later participate in the deliberation and vote on appeal just because he is now part of the reviewing tribunal. A sense of propriety calls for the Judge who is now a Justice to voluntarily inhibit himself from participating in the deliberation of the case, and more so, in the voting.

XIV. The Court erred in dismissing the evidence presented by Augusto Santos.

The Court dismissed the defense of Augusto Santos that he was at the Fabella Hospital while the crime was happening along Katipunan Avenue. Augusto Santos presented the testimony of his brother-in-law who testified that her wife Dorothy had given birth at that hospital and presenting the birth certificate of the child to corroborate the testimony. Said evidence must be given credence when compared to the testimony of the lone eyewitness who testified that he barely saw suspect #4 and who cursorily pointed to Augusto Santos as that suspect #4 without any basis for such identification. Weighed against the cursory pointing of a witness and the incredible, if not impossible, testimony of the witness that he saw suspect #4 when all suspects faced him simultaneously, the evidence presented by Augusto Santos should be given credence.

[42] Abad Dissenting Opinion, p. 2

XV. The Court erred in ruling that the silence of accused Lumanog amounts to a quasi confession.

As early as 1903, in the case of U.S. v. Muyot, this Court already held:

> A person charged with a crime is not called upon to make any explanation or denial, except to plead guilty or not guilty. He can remain silent as well before the trial as during it, and his silence can not be considered as a confession of guilt. Any other rule would lead to the result that, every time anything was said in the presence of a prisoner indicating his guilt, he would be called upon to deny it, whether it was said by the prosecuting attorney, newspaper reporters, police officers, or others.[43]

This ruling announces a legal philosophy that supports the very foundation of the criminal justice system. It was promulgated by the Court En Banc and therefore, cannot be overturned by the ruling relied upon by the trial court in the case of People v. Delmendo[44] which was promulgated by a division.

XVI. The Court erred in not considering the totality of evidence presented by the defense as against the alleged "positive identification" of the accused.

Aside from denial and alibi presented by each of the accused appellants, there are other circumstances and evidence presented, which when taken together point to the innocence of the accused appellants:

a. the personal circumstances of the accused appellants before their arrests in 1996 – that all five have separate concerns and have never acted as a group;

b. the circumstances of the arrest – where no one fled from their place in Fairview where they were rounded up and tortured to exact confession;

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[43] United States v. Muyot, 2 Phil 176, 178 (1903), http://www.thecorpusjuris.com/jurisprudence/cases/jurisprudence1900to1910/130-jurisprudence1903/325-gr-no-1126.html

[44] G.R. No. 123300. September 25, 1998

c. ballistics evidence confirming the reported ABB admission of the ambush of the victim;

d. absence of any fingerprint in the vehicles that match the fingerprints of the accused.

When these are juxtaposed against the testimony of the lone eyewitness presented in court whose testimony is doubtful because of the following factors:

a. material discrepancies in the details of his testimony in open court, and his statement to the police (increasing the suspects from (4) four to (6) six);

b. credibility of the identification is flawed because of the impermissible suggestion attending the identification of Joel de Jesus (photo was shown prior to identification) and the coerced confession attending the identification of the other victims who could not have been arrested without the coerced confession;

c. media exposure of the suspects which aided the witness in forming a belief from the continuous suggestion that the suspects are the culprits;

d. defective and questionable in-court identification where the witness was simply asked to conveniently identify suspects by number, without providing any other basis for saying why suspect #1 is Lumanog and not any other person; why suspect #2 is Rameses de Jesus and nobody else; why suspect #3 is Cesar Fortuna and not anyone; why suspect #4 is Augusto Santos and not another guy; why suspect #5 is Joel de Jesus and not a John Doe; and why Lorenzo delos Santos is suspect #6 and not another;

e. coaching by the lawyers in identifying Lumanog by giving a clue on the use of eyeglasses;

f. impossibility of the testimony as to how witness was able to see the faces of the suspects: that he saw them from the guard post when two of the suspects were pointing a gun at him and the other four, situated far apart, simultaneously faced him (a feat

that no person can ever do), and thus, contrary to human experience; and

g. acceptance by the witness of shelter and financial benefits from the victim's family which clouded the witness' impartiality, creating a bias for the victim's family;

all these, point to the discrediting of the testimony of the prosecution, whose cause must fail for failure to establish the guilt of the accused by proof beyond reasonable doubt.

The prosecution has other eyewitnesses that it could have presented but did not. The State's vast powers could have been used to present other corroborating evidence to secure conviction but the prosecution was content with the convenience of having a cooperative witness in Freddie Alejo.

XVII. The Court erred in holding that the delay of (4) four years during which the case remained pending with the CA and this Court was not unreasonable, arbitrary or oppressive.

The delay in the disposition of this case stemmed from the Supreme Court's action to remand the case to the Court of Appeals on January 18, 2005, or six (6) months after it rendered its ruling in People v. Mateo when as early as June 2004, all the appeal briefs have already been filed with the Court.

That the appeal briefs have been with the Court even before the promulgation of the Mateo ruling should have prompted this Court to exempt this case from the effect of said ruling.

From the time the case was transferred to the CA in 2005 up to the time that the CA rendered its decision on April 1, 2008, such delay could have been avoided if the Supreme Court did not remand this case to the CA.

XVIII. The Concurring Opinion erred in ruling that the urging to take judicial notice of the fact that victim was a natural target of the ABB is unwarranted.

The Concurring Opinion contends "that the victim was a natural target of the ABB was neither a matter of public knowledge, nor capable of unquestionable demonstration, nor ought to be known to judges by reason of their judicial functions."[45]

The fact that the victim was a natural target of the ABB does not fall under any of the instances of discretionary judicial notice but falls, more appropriately, under mandatory judicial notice specifically for being part of the political history of the Philippines.

In fact, the Court recognizes this as correctly pointed out in the Concurring Opinion,

> The Court is not unaware that accused-respondent Abadilla, rightly or wrongly, is identified with the violent arm of the past regime. To many, he is regarded with unusual ease and facility as the "hit man" of that regime.[46]

XIX. The Concurring Opinion erred in showing its bias for the victim by applying the right to due process and the equal protection of the laws to a dead man.

We question the Court's continuation in People v. Asuncion, that

[45] Section 2, Rule 129, Rules of Court.
[46] People v. Asuncion, G.R. No. L-80066, May 24, 1988, 161 SCRA 490, 499.

> The Court, however, is not swayed by appellations or opprobriums. Its duty, as a temple of justice, is to accord to every man who comes before it in appropriate proceedings the right to due process and the equal protection of the laws.[47]

By applying this ruling in People v. Asuncion ruled upon by the Court when the victim was still alive, to the instant case, when the victim has already been put down by bullets of his enemy, as consistently claimed by the ABB in news reports and press releases, is to accord a dead man the same rights as the living, the accused appellants, who are still languishing in jail because of this bias of the Court to give more protection to the victim who is already dead than to protect the Constitutional right of all accused-appellants to be presumed innocent and to be convicted only when there is proof of guilt beyond the whisper of a doubt.

RELIEF

WHEREFORE, in view of all the foregoing, it is respectfully prayed of this Honorable Supreme Court that it REVERSE its affirmation of the judgment of conviction and forthwith ACQUIT ALL THE ACCUSED-APPELLANTS.

Grant other relief as may be just under the circumstances.

Quezon City for Manila, 8 October 2010.

VICENTE DANTE P. ADAN
Counsel for Complainants
59 C. Salvador St.
Varsity Hills Subd.
Loyola Heights, Quezon City
Roll No. 47976
MCLE No.II - 0019712
IPB OR No. 798056

[47] *Id.*

Camarines Sur – 1/07/10
PTR No. 851396
San Jose, Cam. Sur – 1/07/10

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The Solicitor General
134 Amorsolo St.
Legaspi Village, Makati City

Reg. Receipt No.____

GIMENEZ LAW OFFICE
Counsel for Petitioners in G.R. No. 185123
Suite 2311 Cityland 10 Tower 2
H.V. dela Costa St., 1200 Makati City

THE LAW OFFICE OF DANTE S. DAVID
Unit 212 The Burgundy Place Condo.
174 B. Gonzales cor. Katipunan Ave.
Loyola Heights, Quezon City

ATTY. HECTOR P. CORPUS
M.M. Lazaro & Associates
19th Flr., Chatham House Bldg.
116 Valero cor. V.A. Rufino Sts.
Salcedo Village, 1227 Makati City

PUBLIC ATTORNEY'S OFFICE
Department of Justice
DOJ Agencies Bldg., NIA Road,
Cor. East Avenue, Diliman
Quezon City

ATTY. ANALYN VIRTUSIO
Suite 506, Pacific Place Condominium
Pearl Drive, Ortigas Center
1605 Pasig City

ATTY. LEANDRO AZARCON
1840 E. Rodriguez Avenue
Cubao, 1102 Quezon City

ATTY. ARLENE G. LAPUZ-URETA
Foria & Ureta Law Offices
Suite 2311 Cityland Tower II
6817 H. V. Dela Costa St, corner
Ayala Avenue

1226 Makati City