

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
ROBERTO NER Y FELICIANO, DEFENDANT-APPELLANT.***G.R. No. L-25504. July 31, 1969*

Ponente: CONCEPCION, C.J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/4407d267bb52/>**CONCEPCION, C.J.:**

Appeal by defendant Roberto Ner y Feliciano from a decision of the Court of First Instance of Manila convicting him of the crime of murder, with which he is charged, and sentencing him to life imprisonment, with the corresponding accessory penalties, to indemnify the heirs of the deceased Jose de Leon, in the sum of P6,000, without subsidiary imprisonment in the event of insolvency, and to pay the costs.

It is not disputed that, while he was in his apartment at No. 2036-C Anacleto Street, Sta. Cruz, Manila, on May 17, 1964, at about 10:00 p.m., Jose de Leon was shot and sustained several wounds in different parts of the body, as a consequence of which, he died soon thereafter, before reaching the North General Hospital, to which he was brought immediately after the occurrence. According to Dr. Angelo Singian, Assistant Chief Medical Examiner of the Manila Police Department, the cause of death was profuse hemorrhage due to 9 "through and through" gunshot wounds, five (5) produced by a .38 or .45 caliber firearm and four (4) by a .32 caliber firearm. Indeed, .45 and .32 caliber slugs and shells were found at the scene of the shooting. Later, the corresponding information for murder was filed against Roberto Ner y Felicia o, who allegedly killed Jose de Leon "conspiring and confederating With two (2) others, whose true names, identities and whereabouts are still unknown," although the complaint filed with the office of the City Fiscal of Manila named Valentino Villanueva and Jose Lopena as the persons who had thus assisted Ner in the commission of the crime. After due trial, under a plea of not guilty, the lower court convicted and sentenced Ner as above stated. Thereupon, Ner moved for a new trial, upon the ground of newly discovered evidence, but the motion was denied. Hence, this appeal.

The case hinges on whether or not appellant has been sufficiently identified as the killer or one of the killers of Jose de Leon. In this connection, the main witnesses for the prosecution were Estanislao de Leon, Leonardo Bolea, Rddolfo Rosales and Artemio Tiong.

The first is a lieutenant in the Manila Police Department, and will, accordingly, be referred to by his aforementioned rank. The lieutenant was, at the time of the occurrence, in his house at No. 2063 Anacleto St., about 30 meters away from that of Jose de Leon, who was his nephew and will hereafter be referred to as "Boy", his nickname. Upon hearing the report of gun fire, the lieutenant ran to the latter's house, at the ground floor of which he learned that the shooting had taken place in Boy's apartment, at the third floor. At the door of said apartment, he found Boy on the floor, lying on his right side, bleeding profusely, with his feet at the door and the head inside the room, wearing no other garment than a "short" trunk. Lifting Boy's head, the lieutenant inquired about the identity of his assailant, to which Boy answered, in a "low voice": "Bobby" "Pirate". These are the nicknames of appellant herein. As the lieutenant asked "who Bobby" and "who Pirate" was, Boy looked at him (lieutenant), but did not answer. Forthwith, the lieutenant ran down and asked several persons, whom he found at the ground floor, to get a vehicle so that Boy could be taken to a hospital. Then the lieutenant and four (4) other

persons, who followed him to Boy's apartment, brought Boy down and placed him in a jeep, at the door of the building, whereupon the lieutenant bade those helping him to take Boy "to the hospital," which they did. Meanwhile, the lieutenant posted himself at the door of the apartment, outside the same, "so that nobody could touch anything."

According to Leonardo Bolea, he thrice saw appellant Ner, accompanied by Jose Lopena and Valentino Villanueva, in the evening of May 17, 1964, cruising aboard a red-colored jeep along Anacleto St., where he was. In fact, when the jeep passed in front of Bolea, for the first time - after he had bought cigarettes from a store nearby - Lopena greeted him. When the jeep passed for the third time, Bolea was seated in front of the house of one Aling Asiang, about 15 meters away from the building in which Boy's apartment was. Ner was then behind the "wheel", with Villanueva seated beside him, and Lopena in the back seat. The jeep made a U-turn and then parked in front of said apartment, facing Camarines Street. Lopena alighted from the jeep and talked with someone seated on a bench, whereas Ner, followed by Villanueva, entered said building. Soon there was a volley of shots in Boy's apartment, after which Ner emerged hurriedly from the building, holding a firearm, which he threw into the back of the jeep. He blew its horn twice, and, forthwith starting the motor, drove off alone. Then Angelina Viray, Boy's common-law-wife, rushed out of the apartment shouting several times "Binaril si Boy ni Pirate; binaril si Boy" (Boy was shot by Pirate; Boy has been shot). Thereafter, the lieutenant came running towards the apartment.

The testimony of Rodolfo Rosales was, substantially, to the same effect. He was at Anacleto Street, near said apartment, at the time of the occurrence and shortly before. In fact, Bolea passed in front of him on his (Bolea's) way to the place of Aling Asiang. When the aforementioned jeep passed for the third time, with Ner, Lopena and Villanueva on board the vehicle, they parked it in front of the building above mentioned. Then Ner and Villanueva entered the same, but, no sooner had they done so than gunshots were fired. Forthwith, Ner ran out of the building and sped away. Then Angelina Viray emerged therefrom saying "Tulungan ninyo ako. Binaril si Boy; binaril si boy x x x Pirate" (Help me. Boy has been shot; Boy has been shot x x x Pirate"). Immediately thereafter, the lieutenant went up the building and entered Boy's apartment. Rosales followed the lieutenant to the third floor of the building and saw the body of Boy on the floor, in a pool of blood. The lieutenant held Boy's head and asked him who had shot him. Boy opened his eyes and, with a trembling voice, replied: "Pirate" or "Bobby Pirate". The lieutenant further inquired: "What Bobby? What Pirate?" Rosales heard no answer. He was, also, one of those who brought Boy to the North General Hospital, but Boy died before reaching the same.

Artemio Tiong declared that, in response to a call, received by him as mobile patrolman, he reached Boy's apartment at about 10:09 p.m., but he (Boy) was then already gone. Tiong, however, asked Angelina Viray what had happened, and she said that Boy lived with her in the apartment, she being his wife; that between 9:50 and 10:00 o'clock that evening, Pirate Bobby Ner had visited them; that Boy and Ner talked in the living room, after which, Ner left; that, when Boy and Angelina retired to their bed-room, soon thereafter, somebody knocked at the door; that as Boy opened the same, there was a hail of gunshots; that rushing out of the bed-room, she saw Boy sprawled on the floor, mortally wounded; and that his assailant was Bobby Ner alias Pirate.

The main witness for the defense was Rolando Raymundo, an 18-year old tricycle operator, who would have us believe that, at the time of the occurrence, he was with his tricycle, parked beside the house of one Mrs. Aguilar, across the street from Boy's apartment. Then two (2) men came in an army jeep and went up the apartment. Soon, several shots rang out in succession, whereupon said men rushed out of the apartment, boarded the jeep and sped away. None of them was, however, appellant Ner, whom the witness knows. Nei-ther did he see either the lieutenant or Leonardo Bolea or Rodolfo Rosales, at the scene of the occurrence.

The defense introduced, also, the testimony of Ernesto Pascual and Eduardo Benito, who affirmed that on May

17, 1964, between 9:00 and 10:00 p.m., Bolea and Rosales were in a pool-room at Rizal Avenue, from which they proceeded to the scene of the occurrence after being informed that the same had taken place.

Likewise, testifying for the defense, Teodoro Villanueva, father of Valentino Villanueva, stated that Angelina Viray had never mentioned the name of Boy's assailant and that the first person who entered Boy's apartment, after the occurrence, was one Corporal Herrera, not Lt. de Leon, who did not reach the apartment until 12 minutes after the shooting.

Appellant Ner did not take the witness stand. He now maintains that His Honor, the trial Judge, Hon. Federico Alikpala, had erred in giving credence to the witnesses for the prosecution; in taking into account the testimony of Patrolman Tiong, relative to the statements made to him by Angelina Viray, notwithstanding the fact that she had not been placed on the witness stand; in drawing an unfavorable inference from his (appellant's) failure to testify on his behalf; in not holding that the evidence is insufficient to establish his guilt; and in denying his motion for a new trial.

Upon a review of the record, we find ourselves unable to disturb the findings of fact made by Judge Alikpala. Indeed, the lieutenant had no reason to implicate appellant herein, if Boy had not really named him (appellant) as his assailant. Instead of impelling him to commit perjury, the fact that Boy was his nephew was an added inducement for the lieutenant to adhere to the truth, as, otherwise, he would not only contribute to the conviction of an innocent person, but, also, assist the guilty party in evading punishment. The veracity of the lieutenant's testimony is, moreover, bolstered up by the testimony of Rosales, who heard the lieutenant inquire about the identity of the assailant, as well as the answer given by Boy.

Neither had Rosales and Bolea any possible motive to falsely incriminate appellant herein. On the contrary, the records show that Rosales and Bolea were old acquaintances of and in friendly terms with appellant Ner and Valentino Villanueva, as well as Jose Lopena, both of whom were, likewise, implicated by said witnesses for the prosecution. And this they must have done from the very beginning, for - as stated in appellant's motion for reconsideration - Villanueva and Lopena were included in the charge filed by the police in the office of the City Fiscal of Manila, because of which they took to hiding soon thereafter.

The defense makes capital of the fact that, according to Dr. Singian, Boy may have lived "one to two minutes" after being shot, during which period of time "it might be possible but less probable" for him to speak. Appellant deduces therefrom that Boy could not have told the lieutenant, when the latter reached the former's apartment, that his assailant was "Bobby", "Pirate", because the lieutenant's residence was about 30 meters away from Boy's apartment and said two minutes must have elapsed before the lieutenant had covered the distance. This conclusion is, however, debatable. Besides, Dr. Singian spoke merely in terms of possibilities and probabilities. He did not say that Boy could not have lived longer than or spoken after two (2) minutes. He even confessed that one "could not be certain," or positive about it. Indeed, Boy did live several minutes after the lieutenant had reached him. In fact, the lieutenant even asked several persons to take Boy to the North General Hospital, in view of which, said persons went up the apartment of Boy, took him down the building in which his apartment was, placed him in a jeep parked at Anacleto street and brought him to said hospital, although he died on the way thereto. By this time, from 5 to 10 minutes, at least, must have elapsed since he was shot. Hence, Boy may have really told the lieutenant that the assailant was "Bobby" "Pirate".

Appellant assails the veracity of Rosales, upon the ground that there are several contradictions between his testimony in court and that given by him at the preliminary investigation, in the office of the City Fiscal and between his testimony in chief and the answers given by him on cross-examination. The alleged contradictions refer to whether the jeep used by appellant Ner came from Camarines street or Tayabas street, before it parked in

front of the house in which Boy had his apartment; whether the jeep had three (3) or four (4) passengers; whether the passengers who entered said house were two (2) or three (3); the period of time that elapsed from such entry to the shooting; the caliber and color of the gun carried by appellant, when he emerged from said house, immediately after the occurrence; whether he started the motor of the jeep before blowing its horn, or the latter was first; and the precise words uttered by Angelina Viray when she came out of the building.

These are, however, minor details which do not affect the testimony of Rosales on appellant's presence in Boy's apartment, at the time of the occurrence, on which he has not incurred in any contradiction and was corroborated by Bolea, the lieutenant and Tiong. Furthermore, as regards the events immediately preceding the occurrence, it is well to remember that Rosales had not anticipated the same. Accordingly, his attention was not focussed on appellant's jeep and its occupants, so that it was only natural for him (Rosales) to have no more than a general idea about it, and to be uncertain about minute details. In fact, minor inconsistencies of a witness tend to reinforce, rather than weaken, his testimony, for they indicate that it was spontaneous and unrehearsed.[1]

Again, when Rosales testified in the City Fiscal's office, Valentino Villanueva, his father Teodoro Villanueva, Jose Lopena and the latter's lawyer were seated beside him (Rosales). Valentino Villanueva was so close to Rosales that the former used to nudge the latter's feet in the course of his testimony. There were then no other persons in said office, except the investigating fiscal and Boy's father, who was some distance away. Considering that Valentino Villanueva and Jose Lopena, aside from appellant Ner, who was then at large, had been implicated by Rosales, we accept, as satisfactory, his explanation to the effect that the inaccurate details mentioned by him on that occasion were due to his extremely nervous condition at that time.

It is next contended that Rosales had contradicted the lieutenant, because the latter testified that he was alone in Boy's room when he (lieutenant) inquired about the assailant's identity and Boy answered "Bobby" "Pirate", whereas Rosales affirmed that he saw and heard Boy give his ante mortem statement, and because the lieutenant claimed not to have met Angelina Viray as the former proceeded to Boy's apartment, although Rosales declared otherwise. Are there no contradictions between these testimonies, for the lieutenant was inside Boy's apartment and Rosales was outside the same when the ante mortem statement was made. So, too, when the lieutenant proceeded to said apartment, he was in such a hurry that he did not pay attention to the people on the way thereto.

What has been said concerning Rosales applies equally to the contradictions allegedly found in Bolea's testimony. Emphasis is placed by appellant upon Bolea's failure to relate to the relatives of Boy, at any of the three (3) or four (4) days he (Boy) was lying in state, what he (Bolea) had witnessed in the evening of the occurrence. This has been sufficiently explained by Bolea. Boy's assassination was not an ordinary passion crime. He had been killed in gangland or goon fashion. All of his supposed assailants were then at large. Worse still, Valentino Villanueva, one of those he believed to have participated in the commission of the offense, was living in the same building in which Boy had his apartment. In short, Bolea's silence was dictated by prudence and the instinct of self-preservation.

The defense insists that the testimony of Patrolman Tiong concerning his conversation with Angelina Viray should be disregarded as hearsay, for Angelina did not take the witness stand. Said conversation took place in Boy's apartment, on May 17, 1964, between 10:09 and 10:30 p.m., or immediately after the occurrence, and referred to the circumstances surrounding the same. At that time, Angelina had not, as yet, fully recovered from the effects of the assassination of her common-law husband, practically, if not actually, before her own eyes. In fact, she was not only crying; she had, also, been repeatedly saying, almost hysterically, that Boy had been shot by "Pirate". Tiong's testimony about the statements then made by her, before she could deliberate on the events that had transpired a few minutes before, was properly admitted under Sec. 36 of Rule 130 of the Rules of Court, pursuant to which:

"x x x Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof, may be given in evidence as a part of the RES GESTAE. x x x"

Indeed, it has been held:

"x x x that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself.[2]

It is true that, in saying that Boy had been shot by Pirate, Angelina did not explain to Patrolman Tiong whether or not she had seen the latter in the act of firing, although she said so in an affidavit made by her in the City Fiscal's office. Her story to Patrolman Tiong indicated, however, that she had seen appellant and Boy talking in the living room of his apartment, shortly before the shooting, and that, accordingly, she had personal knowledge of appellant's presence at the scene of the occurrence.

The fact that Angelina's statement to Tiong was part of her narration, prompted by his questions about the details of the occurrence, does not detract from the spontaneity of her statement. All that is required for the admissibility of a given statement as part of the res gestae, is that it be made under the influence of a startling event witnessed by the person who made the declaration[3] before he had time to think and make up a story[4], or to concoct or contrive a falsehood[5], or to fabricate an account[6], and without any undue influence in obtaining it[7], aside from referring to the event in question or its immediate attending circumstances.[8]

Thus, in *People v. Ruzol*[9], we said:

"The circumstance that as soon as Eladio and his uncle reached the Philippine Constabulary barracks, he promptly told the authorities, without doubt or hesitation, that it was Manuel Torres and Lorenzo Ruzol that killed his father, is convincing proof that he recognized the accused when he saw them. The discovery of the crime by the witness, his pursuit of the accused, and the fact that immediately thereafter, as soon as he arrived at the barracks, he positively pointed to the accused as the perpetrators of the crime, without any sufficient intervening time for him to fabricate his account, is convincing proof of the correctness of his identification. All the events occurred in rapid succession, and the pointing out of the accused as the perpetrators may be said to be parts of the res gestae."

Similarly, the following statements have been held to be part of the res gestae: the statement of a child made within an hour of an alleged assault[10]; the testimony of a police officer as to what a victim told him not more than 30 minutes after the commission of an alleged crime[11]; the statements of defendant's employees made about 30 minutes after an accident[12]; and the declaration of a victim some 5 to 10 minutes after an incident[13].

Little need be said about the evidence for the defense. Teodoro Villanueva's assertion that Angelina had not mentioned appellant's nickname, immediately after the occurrence, cannot affect the result of the case. To begin with, his son, Valentino Villanueva, was one of those implicated by the evidence for the prosecution. Being naturally interested in the latter's failure, the testimony of Teodoro does not have much weight. Said interest is made even more manifest by the fact that it was Teodoro Villanueva who asked Ernesto Pascual and Eduardo Benito to testify for appellant herein. At any rate, said testimony cannot prevail over the positive evidence for the prosecution concerning the presence of appellant in Boy's apartment, corroborated by Boy's ante mortem declaration and the testimony of Patrolman Tiong regarding the statement of Angelina Viray immediately after the occurrence.

It is, likewise, clear that the negative testimony of Rolando Raymundo to the effect that none of the two (2) men who alighted from the jeep and entered the building at No. 2036 Anacleto street, was appellant Ner, and that he (Raymundo) had not seen the lieutenant, Leonardo Bolea and Rodolfo Rosales in that place, cannot blunt the positive testimony to the contrary of these witnesses for the prosecution. The inherent weakness of Raymundo's testimony becomes evident when we bear in mind that he denied having seen at the place of the occurrence, not only Bolea and Rosales, but, also, the lieutenant, despite the fact that the latter's presence in Boy's apartment had been admitted by defense witness Teodoro Villanueva. Then, again, if Raymundo merely failed to notice the lieutenant when the latter entered said building, then it is not unlikely - assuming that his (Raymundo's) tricycle was really parked in front of said building - that he had incurred in a similar oversight as regards the entry of Ner in the same building and the presence of Bolea and Rosales in the vicinity thereof. Indeed, such presence is incontestable, not only as regards the lieutenant, but, also, insofar as Rosales is concerned, he being one of those who brought Boy to the North General Hospital.

This fact, in turn, discredits the testimony of Ernesto Pascual and Eduardo Benito, who would have us believe that Rosales and Bolea were in a pool-room at Rizal Avenue, when Boy was shot, and that said witnesses for the prosecution did not leave said place until later, when someone came and brought news about the occurrence. Indeed, considering that the messenger of this news was someone who, apparently had walked from the scene of the occurrence, after inquiring about the identity of the victim, and that it took less than 9 minutes to remove the latter from his apartment, Rosales could not have reached the same on time to bring Boy to the hospital - as he did - had Pascual and Benito told the truth.

Upon a careful review of the record, we are fully satisfied that Judge Alikpala has not overlooked or misunderstood any fact or circumstance of weight and importance in deciding this case, in view of which we can not disturb his findings of fact based upon a reliance on the testimony of the witnesses for the prosecution, and the view that that of the witnesses for the defense is unworthy of credence.

About a week after the promulgation of the decision appealed from, appellant filed a motion for new trial based upon allegedly newly discovered evidence, namely, the testimony of Angelina Viray, Valentino Villanueva and Jose Lopena, whose affidavits were attached to said motion. Appellant maintains that the lower court has erred in denying said motion.

It is alleged therein that the defense could not have availed, prior thereto, of the testimonies of Valentino Villanueva and Jose Lopena because they had been in hiding up to June 14, 1965, or after the conclusion of the trial on April 2, 1965. The record shows, however, that, as early as December 16, 1964, or even before the prosecution had completed the presentation of its evidence, Villanueva and Lopena had executed a joint affidavit, in Manila, before appellant's counsel. Hence, the testimony of said witnesses is not newly discovered evidence.

Neither is that of Angelina Viray. Indeed, the decision appealed from was promulgated on October 4, 1965. Thereupon, a news item about it appeared in the issue of the Manila Daily Bulletin, of October 5, 1965, reading:

"YOUNG HOOD METED OUT A LIFE TERM

"A youthful police character Roberto Ner y Feliciano, was convicted for murder yesterday and sentenced to life imprisonment by the Court of First Instance.

"Judge Federico Alikpala convicted Ner for the slaying of Jose de Leon nephew of a police officer, last May 17, 1964. De Leon was shot and killed in his house.

"The defense headed by Candelario R. Domingo, indicated it would ask for a new trial on the basis of newly found evidence. It intended to present a certain Angelina Viray, who was said in the verdict to be the

common-law wife of De Leon and was also the lone eye-witness to the slaying."

It is thus manifest that the testimony of Angelina Viray was available to the defense even before October 4, 1965, for, otherwise, appellant's counsel could not have announced then the intention to file a motion for new trial based upon her testimony, which, in fact, he filed soon thereafter. This explains why she did not appear before the court, despite the subpoena issued to her, as witness for the prosecution, when the trial began on September 10, 1964, and notwithstanding an affidavit subscribed and sworn to by her, before an assistant fiscal of Manila, on June 17, 1964 - or before the filing of the information against appellant herein - confirming the story given by her to Patrolman Tiong in the evening of May 17, 1964. Another subpoena issued to her for the resumption of the trial on September 29, 1965, could not be served, because she was "no longer residing at given address." The prosecution stated to the Court that it (the prosecution) had "tried to locate her" and had "not been successful" in this endeavor.

At any rate, in her affidavit attached to the motion for new trial, Angelina declared - contrary to her aforementioned affidavit of June 17, 1964 - that she did not see the person who shot Boy and that, immediately after the occurrence, she did not mention appellant's nickname as that of Boy's assassin. In their joint affidavit appended to the same motion, Valentino Villanueva and Jose Lopena, in turn, stated that Lopena "was never at Anacleto Street, Sta. Cruz, Manila, during the evening of May 17, 1964" and that "Valentino Villanueva was already sleeping in the bedroom of their apartment during said time" -- "about 10 o'clock" in the evening -- "and date." Thus, this alleged newly discovered evidence is merely impeaching, cumulative or corroborative of that already introduced by the defense, for which reason Judge Alikpala did not abuse his discretion in denying appellant's motion for new trial.[14]

Inasmuch as Boy was shot suddenly and unexpectedly, as he opened the door of his apartment, in response to the knocking thereat, soon after the visit paid to him by appellant herein, when he (Boy) was almost naked, for he was about to go to bed, it is evident that appellant had acted with treachery, he having employed means and ways, in the commission of the crime, tending directly and specially to insure its execution, without risk to himself arising from the defense that Boy may put up, and which Boy had no opportunity to make.[15] The crime committed was, therefore, murder, which was attended, also, by the aggravating circumstance of dwelling of the offended party. Moreover, nighttime was manifestly sought, to be sure that Boy was not only in the house, but, also, about to go to bed. In fact, to avoid any possible miscalculation, appellant even pretended to pay Boy a social visit and to part from the apartment in seeming friendly spirit, only to knock at the door thereof soon thereafter for the kill.[16] The measures thus taken by appellant, coupled with the fact that he drove three times past the building in which the apartment was, together with two (2) men, before entering said building, armed with a firearm, establish beyond doubt that he had planned the commission of the offense and had, accordingly, acted with evident premeditation.[17] In view of this circumstance and the aggravating circumstances of nighttime and dwelling, without any mitigating circumstance to offset the same, the maximum penalty prescribed for murder, or death, should be meted out to appellant herein, although, for lack of the number of votes necessary therefor, the penalty imposed by the lower court is in order.

WHEREFORE, modified as to the indemnity, which is increased from P6,000 to P12,000,[18] the decision appealed from should be, as it is hereby affirmed, in all other respects, with costs against appellant Roberto Ner y Feliciano.

SO ORDERED.

Reyes, J.B.L., Dizon, Makalintal, Sanchez, Fernando, Capistrano and Teehankee, JJ., concur.
Castro, J., dissents.

Zaldivar and Barredo, JJ., did not take part.

[1] People v. Gracia, L-21419, Sept. 29, 1966; People v. Limbo, 49 Phil. 94; U.S. v. Go Foo Suy, 25 Phil. 187.

[2] Louisville N.A. & C. Ry. Co. v. Buck, 19 NE 453, 458.

[3] People v. Cuevas, L-5844-45, May 30, 1955; Air France v. Carrascoso, et al., L-21438, Sept. 28, 1966.

[4] People v. Avila, L-4640, March 23, 1953; 92 Phil. 805.

[5] People v. Alban, et al., L-15203, March 29, 1961.

[6] People v. Ruzol, L-8699, Dec. 26, 1956.

[7] People v. Durante, 53 Phil. 363, 371.

[8]

5 People v. Nartea, 74 Phil. 8; People v. Cuevas, L-5844-45, May 30, 1955; People v. Quianzon, 62 Phil. 162; People v. Portento, 48 Phil. 971; U.S. v. Macuti, 26 Phil. 170.

[9] L-8699, Dec. 26, 1956.

[10] Wheeler v. U.S. (1954), 211 Fed. 2d. 19.

[11] State v. Finley (1959), 338 P. 2d. 790.

[12] Peterson v. General Geophysical Co. (1947), 185 P. 2d. 56.

[13] People v. Costa (1953), 252 P. 2d. 1.

[14] People v. Tan, 88 Phil. 609; People v. Ventura, L-16946, July 31, 1962; People v. Evaristo, L-14520, Feb. 26, 1965; Bernabe v. Court of Appeals, L-18278, March 30, 1967; Colcol v. Philippine Banking Corp., L-23117, Nov. 17, 1967; People v. Gutierrez, L-25372, Nov. 29, 1968.

[15] U. S. v. Gil, 13 Phil. 530, 548; People v. Pengzon, 44 Phil. 224; People v. Alban, L-15203, March 29, 1961; People v. Simon, L-18035, Feb. 28, 1964; People v. Sagario, L-18659, June 29, 1965.

[16] People v. Ubiña, 97 Phil. 515, 536; People v. Sagario, supra.

[17] U.S. v. Gil, 13 Phil. 530; U.S. v. Cornejo, 28 Phil. 457; People v. Timbang, 74 Phil. 295; People v. Sagario, supra; People v. Curiano, L-15256-57, Oct. 31, 1963; People v. Estrada, L-26103, Jan. 17, 1968.

[18] People v. Pantoja, L-18793, Oct. 11, 1968; People v. Gutierrez, L-25372, Nov. 29, 1968.

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DISSENTING OPINION

CASTRO, J.:

On August 29, 1964 Roberto Ner y Feliciano was charged before the Court of First Instance of Manila with murder, committed, according to the indictment, as follows:

"That on or about the 17th day of May, 1964, at nighttime purposely sought to better accomplish his criminal ends, in the City of Manila, Philippines, the said accused conspiring and confederating with two (2) others whose true names, identities and whereabouts are still unknown and helping one another, with intent to kill and with evident premeditation and treachery, did then and there wilfully, unlawfully and feloniously attack, assault and shoot with a gun Jose de Leon y Buenaventura several times on the different parts of his body, inside his residence, thereby inflicting upon the latter mortal gunshot wounds which were the direct and immediate cause of his death moments thereafter."

After due trial, the court a quo found the defendant guilty of murder, qualified by treachery, and, there being no other modifying circumstance, sentenced him to suffer the penalty of life imprisonment (reclusion perpetua), with the accessory penalties of the law, to indemnify the heirs of the deceased in the sum of P6,000, without subsidiary imprisonment in case of insolvency, and to pay the costs. From this decision, the defendant Ner appealed to this Court.

The facts, as found by the trial court and set forth in its decision, are as follows:

1. Sometime after 9:30 p.m. on May 17, 1964, Jose Lopeña, Roberto Ner and Valentino Villanueva were riding in a jeep along Anacleto Street, coming from Camarines Street; the jeep proceeded to Tayabas Street, with the first-named party driving the vehicle.
2. After a short while, the vehicle, with the same parties on board, passed for the second time Anacleto Street, coming from Camarines Street, and again proceeded to Tayabas Street.
3. For the third time, the said vehicle, with the accused this time driving it, entered Anacleto Street, coming from Camarines Street, after several minutes had elapsed. Instead of proceeding to Tayabas Street, the jeep, however, made a U-turn in front of the apartment building where Jose de Leon was residing, after which it parked directly in front of the building, facing Camarines Street.
4. Lopeña, Ner and Villanueva alighted from the vehicle, after which Lopeña approached and talked to a person seated on a bench on the sidewalk, while Ner and Villanueva entered the apartment.
5. Ner proceeded to the third floor, and, upon being admitted to the living room (sala), had a short talk with Jose de Leon, after which he left and the latter returned to his bedroom.
6. After a short while, someone knocked at the main door of the third-floor apartment and when Jose de Leon opened it, there came successive discharges of firearms. Angelina Viray immediately went out of the bedroom and saw Jose de Leon sprawled on the floor near the door, his assailant still firing.
7. Moments after the shots were fired, Ner came running out of the ground floor of the apartment, threw a firearm into the back seat of the jeep, and seated himself behind the steering wheel. He then started the engine, sounded the horn three times, and drove away.
8. Angelina Viray, the common-law wife of Jose de Leon, ran down the apartment toward the residence of the parents of the latter, shouting, "Tulongan ninyo ako, binaril si Boy ni Pirate," which she repeated several times.
9. Police Lieutenant de Leon heard the shots while he was standing by the window of his house and he immediately ran toward the place where the shots came from.

10. Upon reaching the third floor of the apartment building, the police lieutenant saw Jose de Leon lying on his right side on the floor, and he forthwith placed the head of the latter in his arms. This police officer inquired from Jose de Leon who shot him and the latter in a weak, faltering voice replied, "Bobby Pirate." The police officer asked who "Bobby Pirate" was, but Jose de Leon did not answer anymore and merely looked at the face of the former.

11. Jose de Leon was brought to the North General Hospital but was already dead upon arrival at 10:10 p.m.

12. At 10:09 p.m., Patrolman Tiong arrived in the apartment, and questioned Angelina Viray who in reply stated that Jose de Leon was shot by "Bob-by Pirate."

13. The body of Jose de Leon was autopsied by Dr. Singian who found nine "thru and thru" gunshot wounds, resulting in profuse hemorrhage which caused the death of the former.

14. "Bobby Pirate" is the nickname of Roberto Ner.

From this "chain of circumstances," the court a quo deduced that the assailant of Jose de Leon could have been only the accused, with the assistance of two other persons whose identities have not yet been established. No eyewitness to the shooting incident was presented by either of the parties. Although listed in the information as one of the witnesses for the prosecution, Angelina Viray, the common-law wife of the deceased and the only probable eyewitness to the murder, did not testify in court. Nothing appears in the record to explain adequately the Government's failure to find and present her. The only evidence introduced by the prosecution to inculcate the appellant consisted of the testimony of Lt. Estanislao de Leon of the Manila Police Department (an uncle of the deceased) relative to an alleged dying declaration made by Jose de Leon, and the declarations of Leonardo Bolea, Rodolfo Rosales and Patrolman Artemio Tiong referring to statements allegedly made by Angelina Viray that the appellant was the murderer of the deceased.

I will now analyze their testimonies in seriatim.

1. Lt. Estanislao de Leon - The strongest link in the incriminating chain of circumstantial evidence forged by the prosecution is provided by the testimony of this fifty-nine year old police lieutenant. He declared that he was standing by the window of his house on Anacleto Street when he heard the sound of gunfire. Quickly, he grabbed his carbine, loaded it, and ran downstairs and out into the street. Without breaking his stride, he sprinted toward the apartment of his nephew, rushed to the third floor where the latter lived, and found him near the door riddled with bullets. Nobody else was in the room. In answer to his inquiry as to the identity of the assailant, Jose de Leon, in a very weak, low and faltering voice, answered, "Bobby Pirate." The lieutenant tried to elicit more information from the deceased to no avail, as the latter could thereafter no longer speak.

The trial court found the requisites for a dying declaration present and ruled the victim's statement to his uncle admissible as such. Upon a careful examination of the evidence on record, however, I find the lower court's appreciation of the factual situation faulty and at war with common human experience.

Dr. Angelo Singian, Assistant Chief Medical Examiner of the Manila Police Department and a witness for the prosecution, testified on cross-examination that the left auricle of the victim's heart was pierced by a .45 caliber bullet; that considering the nature, number and gravity of the wounds sustained by the deceased, he could have survived for only one or two minutes after the last gunshot wound had been inflicted; that while the deceased could have lived for one or two minutes, he could not have retained his senses for more than one minute and even then they would have been very much impaired; that within a minute after he received the last gunshot wound, it might be possible but less probable for him to be able to speak; that if he could speak, he could utter only words and monosyllables but not sentences; and that after a minute, it was most probable that he could no longer talk.

Evidently, the time element is of crucial importance to de Leon's testimony. The prosecution claims that the police

lieutenant was able to negotiate the distance from the second floor of his house to the third floor of the apartment where his nephew lived in thirty or forty seconds and that he was in time to receive the deceased's dying declaration. The mass of facts on record, however, does not support this assertion. From the house of Lt. de Leon to the apartment of the deceased is a distance of about thirty meters. To get to the third floor of the apartment building where his ne-phew lived, the lieutenant had to come down from the second floor of his house, run the length of the street, and climb two flights of stairs. While the distance might have been easy for a young man to negotiate in thirty or forty seconds, it is noteworthy to remember that the witness was already fifty-nine years old at the time. Furthermore, two circumstances delayed his progress: first, he had to take his carbine and load it before he could go downstairs, and second, when he came out of his house, he did not yet know where to go or what direction to take. As he himself admitted, it was only after someone told him that the shots came from the apartment that he ran toward it. Other evidence presented by the prosecution discloses that by the time Lt. de Leon arrived in front of the apartment house, several other circumstances had meantime occurred. After the last shot was fired, the supposed assailant ran out of the house, seated himself in the jeep, blew his horn three times, started the vehicle, and sped away toward Camarines Street. When the jeep had gone, Angelina Viray rushed out of the building and ran toward the house of the victim's parents. On the way, he met the lieutenant. As narrated by the witnesses for the prosecution, the events that transpired from the time the last shot was fired to the time Lt. de Leon arrived at the apartment occurred successively and not simultaneously. We cannot, therefore, entertain the suggestion of the prosecution that all these happened within the space of thirty or forty seconds. In all probability, these events took more than a minute and by the time the lieutenant reached his nephew the latter could no longer speak.

2. Rodolfo Rosales - This witness narrated that between the hours of nine and ten in the evening of May 17, 1964, he was standing with a friend in front of the store of Mrs. de Leon (the legal wife of the deceased) along Anacleto Street when the jeep bearing Ner, Lopeña and Villanueva passed by thrice. On the third turn, it parked in front of Jose de Leon's apartment, and the three occupants alighted. Lopeña sat on a bench nearby while Ner and Villanueva went inside the apartment. After three or five minutes, he heard gunshots. Forthwith, he and his friend ran to an alley. From his hiding place, he saw Ner run out of the apartment, throw something into the back of the jeep, board the vehicle, blow the horn three times, and then speed away. Not long thereafter, Angelina Viray came out of the house, shouting as she ran toward Lt. de Leon's house, "Tulungan ninyo ako, Binaril si Boy, Binaril si Boy," and "Pirate." On the way, she met the lieutenant who was hurrying toward the apartment. When the police lieutenant entered the building, Rosales followed him. He saw the body of the deceased bleeding profusely with his head cradled in the arms of Lt. de Leon. In reply to the lieutenant's query as to the identity of his assailant or assailants, Rosales testified that he heard the deceased mention the name "Pirate."

Through Rosales' testimony, the prosecution hoped to place the appellant within the vicinity of the crime and to provide corroborative evidence for Lt. de Leon's statement as to the deceased's alleged dying declaration. I find myself, however, unable to give credence to his testimony on account of its inconsistency with his previous declarations made before the investigating fiscal during the preliminary investigation of the case as well as with the declarations of the other witnesses for the prosecution.

It was the fiesta of the parish of Espiritu Santo on the night of the murder, and Anacleto Street was well-lighted. Adding to the illumination was the light coming from the store of Mrs. de Leon. The street is narrow, around four and a half meters wide according to one witness, and any vehicle that passes by would be readily noticed as Rosales did notice, according to his testimony, the jeep carrying Ner, Lopeña and Villanueva. However, while Rosales declared in court that in the three times the jeep passed the store of Mrs. de Leon it was moving toward Tayabas Street, he stated at the preliminary investigation that on the first two trips it headed for Camarines and only on the third turn did it move toward Tayabas. In court, Rosales emphatically stated that there were only three

persons inside the jeep (Ner, Lopeña and Villanueva), while before the investigating fiscal, he repeatedly mentioned the presence of a fourth one, even going to the extent of describing him in detail. As to the order of alighting from the jeep, Rosales said the first one to get out was Lopeña, followed by Ner and then Villanueva. Before the fiscal, however, it was Villanueva first, followed by the unidentified man, then Lopeña, and, lastly, Ner. Not only Ner and Villanueva entered the apartment, as he testified in court later, but also the unidentified man.

From the beginning to the end of his story, Rosales made a number of statements inconsistent with his previous declarations, thus putting a heavy cloud of doubt over the accuracy and veracity of his testimony. As he continued, Rosales buried himself deeper in the quagmire of contradiction. Before the investigating fiscal, he stated that ten or fifteen minutes elapsed after the appellant entered the apartment of the deceased before he heard the shots and that when the former came out of the building, he threw a nickel-plated .45 caliber firearm inside the jeep. On the witness stand, however, he changed his testimony and said that only three or five minutes passed and that the gun was a .32 caliber of indeterminate color. Considering the inherent weakness of Lt. de Leon's testimony, I am persuaded that alterations were made in Rosales' previous statements to corroborate and strengthen the lieutenant's declarations. Thus, in confirmation of Lt. de Leon's testimony, Rosales related in court that the former was carrying only a carbine when he went to the apartment of the deceased and that it was the lieutenant who held the head of the deceased before the latter died. During the preliminary investigation, however, Rosales emphatically stated that not only was the lieutenant carrying a carbine but he also had with him a .45 caliber fire-arm, and that it was Angelina Viray who held the head of Jose de Leon.

The most telling point in Rosales' story was the affirmation of Lt. de Leon's statement with respect to the deceased's alleged dying declaration. However, the evidence on record does not sustain his assertion. First, Lt. de Leon was unequivocal that there was nobody else in the room where he found the deceased when the latter made his dying declaration. Second, Leonardo Bolea testified that Lt. de Leon was alone when he went up the apartment, contrary to Rosales' statement that he followed the lieutenant. Lastly, even assuming that he was present in the room, it is highly improbable that he would have heard the deceased's declaration as it was delivered in a very weak, low and faltering voice and, by his own admission, he was two meters away from the deceased at the time.

Taken singly, these inconsistencies do not even appear to be minor and unimportant; considered together, their cumulative effect is to completely impeach Rosales' testimony. His excuse that he was nervous and confused during the preliminary investigation does not merit belief. The subsequent alterations in his testimony appear to me to have been made deliberately to shore up the improbabilities in Lt. de Leon's story.

3. Leonardo Bolea - This witness' testimony substantially corroborates the prosecution's theory as to the events that transpired before and after the shooting. It suffers, however, from two major infirmities which considerably weaken its corroborative value. First, he related that after the shooting and the subsequent departure of Ner, he met Lt. de Leon as the latter ran toward the apartment of the deceased; but neither the lieutenant nor Rosales remembered having seen him. While Rosales saw Angelina Viray meet the lieutenant, he did not see Bolea at all. Second, on the night of the murder he had all the opportunity to disclose to Lt. de Leon and to the relatives of the deceased the events he had witnessed, but he never told anyone about what he saw until the preliminary investigation of the case. Bolea sought to excuse himself by stating in court that he was afraid, but, surprisingly, while the shooting was going on, he never attempted to hide. Even after Ner allegedly came out of the apartment with gun in hand, Bolea remained in his position near the apartment, seemingly unafraid of the suspected assailant.

4. Pat. Artemio Tiong - As a member of the mobile patrol division of the MPD, this witness investigated Angelina Viray on the night of the murder in the latter's apartment. His findings disclose that the incident

took place sometime between 9:50 and 10:00 p.m. of May 17, 1964. Tiong's testimony dealt mainly with what Angelina Viray related to him in the course of his investigation. According to Angelina, Ner visited her husband that night, talking with him for a few minutes in the sala and leaving afterwards. Soon thereafter, they heard knocks on the main door of their third-floor apartment and the deceased went out of their bedroom to see who it could be. Suddenly, she heard shots, and when she rushed out, she saw her husband sprawled and bleeding on the floor. In answer to the patrolman's question as to the deceased's assailant, Angelina Viray was supposed to have replied that it was Roberto Ner.

Clearly, Patrolman Tiong's testimony as to Angelina Viray's statement regarding the circumstances surrounding the shooting and the identity of her husband's slayer is hearsay, but the trial court admitted it as an exception under the *res gestae* rule (Sec. 36, Rule 130, New Rules of Court). Reviewing the facts narrated by Patrolman Tiong and the jurisprudence on this point, I find the lower court in error. Section 36, Rule 130 of the New Rules of Court^[1] speaks of two classes of statements: spontaneous exclamations and verbal acts. Angelina Viray's declaration to Patrolman Tiong is neither a verbal act nor, as the court a quo mistakenly construed it, a spontaneous exclamation. For a declaration to fall under the latter category, three essential requisites must be met, namely, that the principal fact be a startling occurrence, that the statement or statements be made before the declarant has had time to contrive or devise, and that the statement or statements must refer to the occurrence in question and its immediately attending circumstances (VI Wigmore on Evidence 142-155). Since the hearsay statements are being offered as testimonial evidence under the exception provided by the *res gestae* rule, the ordinary principles applicable to all testimonial evidence must first be complied with. One of these is that the witness can testify only to those facts which he knows of his own knowledge, that is, which are derived from his own perception (section 30, Rule 130, New Rules of Court). To put it in another way, the declarant must appear to have had an opportunity to observe personally the matter whereof he or she speaks (VI Wigmore, *supra*, 155). The consequence of a contrary rule would be disastrous to the rights of an accused. It would emasculate his fundamental right to cross-examine those who would testify against him and lead to the absurd situation whereby one hearsay statement is founded on another. Thus, even before the presence of the three afore-mentioned requisites may be looked into by the court, it should satisfy itself first that the declarant, whose statement or statements are being related in court by another, had indeed observed that whereof he or she speaks. Absent a showing of testimonial knowledge, it is futile to consider whether the statements are spontaneous exclamations or not. In the case at bar, Patrolman Tiong testified that in answer to his question as to the identity of Jose de Leon's assailant, Angelina replied that it was Roberto Ner. How she arrived at her conclusion, Patrolman Tiong's testimony does not disclose. Did she see the appellant shoot the deceased, or did the latter make a dying declaration to her identifying the appellant as the killer? If it were the first then her statement may be admitted as part of the *res gestae*; if it were the second then it would be inadmissible. In the latter case, Angelina herself should testify and not Patrolman Tiong, as the latter would then be testifying on something which is hearsay based on another hearsay. It is true the trial court in its decision made the finding that when Angelina rushed out of her bedroom, she saw Jose de Leon sprawled on the floor near the door "while his assailant was still firing at the former." I have closely combed the evidence on record, however, and I cannot find support for this conclusion.

Even in the presence of testimonial knowledge, Angelina's statements to Patrolman Tiong cannot be admitted under the *res gestae* rule. I find them devoid of that spontaneity required of this class of exclamations. The test is whether the evidence offered is that of the event speaking through the participant (or observer) or that of the participant (or observer) speaking about the event. (I Wharton's Criminal Evidence 745). If it were the former, what was thus said can be introduced without calling those who said it; if it were the latter, such participant or observer must be called to testify. The circumstances enveloping Angelina's declaration to Patrolman Tiong point to the latter conclusion. Her statements were not forced out of her by the event in question but were elicited by the interrogation of the policeman. Her identification of the appellant was not an impulsive utterance but a

part of a mere narration. The form it took presupposes reflection on her part, which is alien to the concept of a spontaneous exclamation. It is a fact that prior to the arrival of the patrolman there were already other policemen in the apartment, yet Angelina, as far as the record shows, never revealed to any of them what she knew of the killer's identity.

To secure the conviction of the appellant, the Government chose to rely on evidence wholly circumstantial in character supplied by Lt. de Leon, Rosales, Bolea and Pat. Tiong. No direct proof of guilt was adduced against the accused. Even on the supposition that Angelina's declaration to Pat. Tiong is a spontaneous exclamation, it would be improper for the court a quo to accept the same, under the circumstances of the present case, without the strongest proof of her inability or unavailability to testify personally in court. Angelina Viray, the only person who could have unraveled the tangled mass of conflicting testimonies given by the prosecution witnesses and perhaps positively identify the murderer of the deceased, should have been presented in court. But she was not. Neither was she made to testify in the preliminary investigation conducted by the fiscal although she was present thereat twice. In truth, her testimony was waived by the prosecution in the hearing before the fiscal. Nothing appears on record to explain satisfactorily the Government's failure to locate and present her. The prosecution's effete reason that she had disappeared cannot and should not be accepted. To do so is to encourage reliance by the prosecution on circumstantial, indirect and less explicit evidence. To allow the same is to sanction a practice dangerous to the rights of accused persons. What would prevent an unscrupulous prosecuting officer from conjuring incriminatory evidence out of supposed spontaneous exclamations? I am not here formulating as an additional requisite for the admissibility of spontaneous exclamations that the declarant testify in court for that would render the rule superfluous, but where, as in this case, the horn that impales the accused is that of a person not presented in court and not subjected to the probing scalpel of cross-examination, courts must be doubly cautious in accepting so-called spontaneous exclamations. As the source of the inculcating statement, testified to by Rosales, Bolea and Pat. Tiong, that it was the appellant who killed the deceased, Angelina Viray's appearance in court was imperative.

This leads me to a consideration of the prosecution's failure to prove motive and to link the accused with the alleged murder weapons. It is an accepted principle that proof of motive in criminal prosecutions is not indispensable nor necessary if the guilt of the accused is otherwise established by sufficient evidence (*People vs. Divinagracia*, L-10611, March 13, 1959) as the absence of motive or the apparent lack of it is not proof of innocence (*People vs. Ragsac*, 61 Phil. 146, 152; *People vs. Caggauan*, 94 Phil. 118, 129; *People vs. Reyno*, L-19071, April 30, 1965). Where there is no eyewitness, however, and there is doubt as to whether the defendant is or is not the person who committed the offense charged, the question of motive becomes very important (*U. S. vs. M'Mann*, Phil. 561, 563; *People vs. Tagasa*, 68 Phil. 147, 153). Proof of motive in such cases is a substantial aid in completing the proof of the commission of the crime by the accused (*U.S. vs. Carlos*, 15 Phil. 47, 51) and in attaining the necessary judicial perspective of the case (*People vs. Dalmani and Marudi*, 63 Phil. 188, 195). A void in the evidence in this respect lays bare a weakness in the case for the prosecution (*People vs. Hajan*, 50 Phil. 545, 547). In the present case, no attempt was made by the prosecution to show motive on the part of the appellant. This lacuna in the evidence against the accused engenders very grave doubt as to his guilt.

The last item in the evidence for the prosecution concerns the ballistic findings of the Government experts. Of the nine gunshot wounds sustained by the deceased, Dr. Angelo Singian testified that five were probably caused by bullets discharged from either a .38 or a .45 caliber gun and four by a .32 caliber firearm. The empty shells and slugs recovered from the premises of the deceased's apartment by police investigators were examined by Simeon Molina, Chief of the Forensic Ballistics Section of the Manila Police Department, and he found that five slugs and five cartridges were discharged from one .45 caliber pistol while three slugs and three cartridges were fired from one .32 caliber pistol. Two .32 caliber cartridge cases were also examined by Molina, but he did not find

sufficient markings thereon to form a definite conclusion as to whether they were discharged from the same firearm as the other three .32 caliber cartridge cases. The possibility that not only two but three firearms were used in shooting down Jose de Leon cannot thus be discounted. Unfortunately, none of these weapons were produced in court nor was proof adduced linking the appellant to any of them. No evidence was presented to show that Roberto Ner ever owned or possessed or was priorly seen with any firearm of the calibers referred to. Rosales, as we have noted before, stated during the preliminary investigation of the case that when Ner came out of the apartment where the deceased lived, he threw a .45 caliber pistol inside the jeep but, as we pointed out, he contradicted himself in court later when he said it was a .32 caliber gun. This absence of a nexus between any of the alleged murder weapons and the appellant further considerably weakens the case for the prosecution.

For his defense, the appellant presented the testimonies of Ernesto Pascual, Eduardo Benito, Rolando Raymundo and Teodoro Villanueva. With the declarations of these four witnesses, the accused sought to impeach and destroy the apparently damaging statements made by Rosales, Bolea and Lt. de Leon implicating him in the murder of Jose de Leon. In the pursuit of this objective, Pascual and Benito both averred that during the shooting incident, they were in a pool hall located on Rizal Avenue, near the corner of that thoroughfare and Tayabas Street, and on the said occasion, the two prosecution witnesses, i.e., Rodolfo Rosales and Leonardo Bolea, were also in the same place, watching a game of pool. To discredit the assertion of Lt. de Leon that he was the first to reach the deceased and that he was able to do so in less than a minute, Teodoro Villanueva testified that the lieutenant arrived in the apartment more than twelve minutes after the last shot was fired and that it was a certain Corporal Herrera who first responded to the sound of gunfire. Rolando Raymundo, a tricycle operator, tried to mitigate the effect of Rosales' and Bolea's identification of the appellant as one of the men who ran out of the apartment house after the shooting by declaring in court that he saw the men who came out of the building and that neither of them was the appellant.

The declarations of Pascual and Benito serve to confirm my grave doubts as to the truth of the testimonies of Rosales and Bolea. Such doubts, as I have lengthily discussed earlier, were occasioned by the innumerable contradictions made by these two prosecution witnesses in court and before the investigating fiscal. It would then appear that Rosales and Bolea were not present near the scene of the murder at the time it was committed and that their testimonies were nothing but the figment of their, or somebody else's, imagination. The rest of the evidence for the defense, however, is as improbable as that for the prosecution, and, were the burden of proof on its shoulders, it would have failed to exculpate the accused. But since the onus is on the prosecution, the weaknesses of the defense do not work to convict the appellant. Conviction in a criminal prosecution can only rest on the strength of the Government's case.

The evidence presented against Roberto Ner is purely circumstantial. After a painstaking examination of the whole proof, I am unable to let my mind rest easy upon the certainty of his guilt. Lt. de Leon's revelation of an alleged dying declaration made to him by the deceased, naming the appellant as his murderer, does not inspire belief. Despite his asserted celerity, the lieutenant could not have made it to the scene of the crime in time to hear the last words of Jose de Leon, on account of the latter's gravely impaired physical condition. The declarations of Rosales and Bolea, on the other hand, concerning the supposed presence of the appellant within the vicinity of the incident before and after the shooting, and the alleged exclamations of Angelina Viray identifying the accused as the killer, are saddled with too many damaging contradictions as to be unworthy of credence. Neither can I accept the narration of Patrolman Tiong with respect to Angelina's imputation of the crime to Ner as the same is pure hearsay. Considering further the failure of the prosecution to prove motive and to relate any of the alleged murder weapons to the accused, I am completely unconvinced of the appellant's guilt.

I vote for his acquittal.

[1] "SEC. 36. Part of the res gestae. Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof, may be given in evidence as a part of the res gestae. So, also, statements accompanying an equivocal act material to the issue, and giving it a legal significance, may be received as a part of the res gestae."

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