

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ELMER ESTRADA, DEFENDANT-APPELLANT.*G.R. No. L-26103. January 17, 1968*

Ponente: ANGELES, J.

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Convicted of murder for the killing of Alexander Almendras and sentenced to suffer an indeterminate prison term of from twelve years and one day of reclusion temporal as minimum to twenty years of reclusion temporal as maximum, to indemnify the heirs of the offended party in the sum of three thousand pesos (P3,000.00), and to pay one-sixth of the costs, Elmer Estrada, nicknamed Baby, appealed from the decision to the Court of Appeals. Said court, however, found that the trial court had erroneously applied the provision of the Indeterminate Sentence Law in the imposition of the penalty which, in its opinion, should be reclusion perpetua, accordingly certified the case to this Tribunal pursuant to Section 17 of the Judiciary Act of 1948, as amended. Hence, this review.

A few meters outside the door of the Insular Cafe at the corner of Juan Luna and Martires Streets, Cebu City, at about 11:00 o'clock on the night of November 27, 1963, a flash of gunfire was seen from the direction of three men standing in front of Alex-ander Almendras, nicknamed Sonny. Almendras reeled. More sounds of gunshots followed; and Almendras fell to the ground. Informed of the shooting, members of the Cebu City Police Department rushed to the scene and when they arrived at the Insular Cafe some minutes thereafter, they found the fallen body of the victim being carried by a young man named Jorge Cor-dero who, upon seeing them spontaneously exclaimed: "Sonny gipusil ni Baby Estrada, gukda ninyo." [1] Finding that the victim was already dead, the police officers immediately pursued the gunwielders who have fled from the place. One of them who stayed behind ordered Cordero to put down the victim back on the pavement, then entered the Insular Cafe and notified the Homicide Section of their Department by phone. Soon, the policemen who chased the killers returned empty-handed. They decided to proceed to the house of Baby Estrada and keep watch over the place.

When members of the Homicide Section of the Police Department came to the scene still later, they found the lifeless body of Sonny Almendras into whose left breast a bullet had plowed 21 centimeters deep, still sprawled on the ground, lying on its belly. They took the body thereafter to the Cosmopo-litan Funeral Parlor at Junquera Street where it was autopsied by Dr. Venerando Pilapil, Medical Officer of the Cebu City Health Department at about 12:45 o'clock that same evening. His post-mortem findings described the wound that snuffed out the life of Alexander Almendras as follows:

"Chest:

1. Wound, gunshot, entrance, oval in shape, diameter, widest 0.7 cm. shortest 0.6 cm., with contusion collar more on the left side of the wound, located 3.5 cm. to the left of the anterior median line at the level of the 2nd left rib, 5 cm. below the left clavicle, penetrating the skin, subcutaneous tissue, mus-cles of the chest, 2nd left rib near its sternal attachment, perforating the ascending aorta, penetrating upper lobe of the right lung, 3rd right intercos-tal muscles posteriorly, muscles, of the chest, right scapula up to the muscles posteriorly to the right scapula where one slug was recovered marked VP at the tip and AA at the bottom, directed posteriorly,

medially to the right side. x x x."

For the death of Alexander Almendras, Elmer Estrada alias Baby and Alberto Tejero were later apprehended, and, together with a certain Yuli, John Doe, Richard Doe, and Thomas Doe who have remained at large, were charged before the Court of First Instance of Cebu with the crime of murder, committed with conspiracy and the qualifying circumstance of evident premeditation, and attended by the aggravating circumstances of night time, grave abuse of superior strength and treachery both Elmer Estrada and Alberto Tejero pleaded not guilty to the charge. They interposed a de-fense of alibi.

In the course of the trial, after the prosecution had rested its case, the defense moved for the dismissal of the case on the ground of insufficiency of evidence. The trial court, after listening to the argument of the defense counsel and the private prosecutor, denied the motion and ordered the defense to present its evidence.

After the trial, the court promulgated its decision on February 17, 1964. It acquitted Alberto Tejero on reasonable doubt, and found Elmer Estrada guilty of the offense charged.

After serving notice of his intention to appeal from the decision to the Court of Appeals, Baby Estrada filed a petition with the trial court praying that order issue setting the amount of bail for his provisional liberty pending appeal which the court granted on February 25, 1964. He was ordered released on February 29, 1964, after posting an appeal bond of P20,000.00. But a few days thereafter, Elmer (Baby) Estrada was rearrested by members of the Cebu City Police Department when he was found illegally possessing a 45-Cal. pistol with magazine and six rounds of ammunition tucked to his waist, and upon complaint filed by the Assistant City Fiscal of Cebu, the trial court ordered Elmer Estrada reincarcerated. His appeal bond was cancelled by the lower court on March 3, 1964.

Elmer Estrada then prosecuted his appeal to the Court of Appeals. For failure of the Solicitor General to submit the People's brief after several extensions granted by the court, the case was ordered submitted for decision solely on appellant's brief. A subsequent motion for bail Filed by the appellant on February 28, 1966, was denied by the said court on April 22, 1966. And, as aforesaid, the Court of Appeals upon review of the records of the case, was of the opinion that the penalty imposable is reclusion perpetua and resolved to certify the case to this Court.

A reexamination of the evidence revealed the contrast between the theory of the prosecution and that of the appellant.

This is the theory of the prosecution as testified to by the witnesses for the State:

Months before November 27, 1963, bad blood already existed between appellant Elmer Estrada, nick-named Baby, and the deceased Alexander Almendras, nick-named Sonny. Thus, on June 8, 1963, at about 3:00 o'clock a.m., Sonny Almendras chased Baby Estrada and stabbed him in the back and stomach at the Elite Restaurant, Cebu City. The wound was serious and could have produced death were it not for the timely medical treatment. It required an emergency operation and Estrada had to be confined at the Cebu City Hospital for more than a month. Sometime in September of the same year, the same part of his body had to be operated on again because his abdomen was still weak. He was finally released from the hospital in the latter part of October. But for all these sufferings, Baby Estrada did not file any complaint against Sonny Almendras. He showed clear indications that he would want to even up the score with Sonny Almendras. He gave warning to a former friend, Mike Arriba, to stop going with Almendras or he will meet an accident. On another occasion late in October 1963, Baby Estrada and his companions threatened Sonny with death near the Center Theatre, Cebu City, Almendras ran and sought protection from Patrolman Gingoyon. When Baby Estrada and his friends saw Almendras coming with the policeman, they hoarded a taxi. Before they left, Alberto Tejero who was with Estrada at the time, said to

Almendras: "You are about to die; you are lucky this evening because Presio, is with you."

At about 10:00 o'clock on the night of November 27, 1963, Alexander Almendras and his friends, Carding Manceo, Luis Topacio, Fred Sugatan and Maximino Perez arrived at the Insular Cafe. There, they met Jorge Cordero with two companions, Jesse Navarro and a certain Doy. At the invitation of Almendras, the two groups joined and occupied one table. They started drinking liquor. At about 11:00 o'clock, Jorge Cordero received information from Virgilio Malig-on, a security guard at the Insular Cafe, that the enemies of Sonny Almendras had just passed by in a taxi. Cordero relayed the warning to Almendras who was then in the comfort room, but Sonny dismissed the warning, saying that "anyway they will not come inside the cafe." Cordero returned to the table. He gave the same information to Luis Topacio who, upon receipt of the news started looking, for Almendras. Just then people standing near the door of the Insular Cafe were running inside. Somebody shouted that Baby was there and Sonny should watch out. Luis Topacio who was looking for Almendras to warn him went outside the door and there he saw Sonny standing before Alberto Tejero, Elmer (Baby) Estrada and a certain Fred. He heard Sonny Almendras remarked: "Let us talk this over, Bert." Gunfire was the immediate answer from the direction of the three men. Jorge Cordero who followed Almendras was at the door of the cafe at that precise moment. He also saw the flash and heard the sound of the gunshot from the persons in front of Almendras, one of whom he recognized to be baby Estrada. There were two other men standing a little farther away. More shots followed from the same direction. Almendras reeled, then fell to the ground face downward. Luis Topacio hid behind the wall, while Jorge Cordero turned back inside the cafe and sought shelter behind the door. The assailants then fled in a taxi together. When Cordero came out of the door after the gunwielders were gone, he saw the body of Alexander Almendras on the ground. He came to his rescue, and Sonny told him he was hit. He tried to carry the body of Almendras with the aid of other people, with the intention of taking him to a hospital, but before he could do so, members of the Cebu City Po-lice Department arrived at the scene. He hid them to pursue Baby Estrada who shot Almendras and fled in a taxi, whereupon, the policemen immediately gave chase. A policeman who stayed behind examined the body of Sonny Almendras, and seeing him dead, notified the Homicide Section of the Department. They came later with a medical officer who took the lifeless body of Almendras to the Cosmopolitan Funeral Parlor and conducted its autopsy. Meanwhile, the police officers who pursued the killers soon returned without bagging the object of their man-hunt. Led by Detective Ricardo Ybañez, they proceeded to the house of Baby Estrada at Junquera Street, just opposite the Cosmopolitan Funeral Parlor where the body of Alexander Almendras had been taken. Detective Ortiz went up the Estrada home to see if Baby was there. He was met by Emma, Estrada's sister, at the door of the house who told him, that Baby Estrada was not there, although she knew that she had just met him coming up the house just a few minutes before.

Earlier that evening, Cresencio Laput was driving his taxi near the waterfront of Cebu City. A passenger hailed him, and four persons boarded his taxi. One of them ordered him to follow a Snow White taxi ahead of them. The Snow White taxi stopped near the Esso gasoline station at the corner of Juan Luna and Martires Streets, while the other taxi carrying the four passengers proceeded a little farther, beyond the Insular Cafe on the other side of the same street and stopped. Three of the four passengers got out of the taxi, while the fourth stayed and remained seated beside the driver. In about five minutes, the driver heard, two shots from the direction of the Insular Cafe, and when he looked back towards the place, he saw a taxi drove away from the scene. He started his car to leave the place, but the fellow sitting beside him, held his steering wheel and told him to wait for his companions. Soon the three passengers returned with two others; they boarded the taxi and ordered the driver to proceed. At the corner of Sikatuna and Bonifacio Streets, five of the passengers disembarked. The sixth remained inside the taxi and ordered the driver to proceed to Sanciangco Street, where the taxi bumped the car of a certain Mr. Bonpua as the taxi was going at a high speed from the time it left the Insular Cafe. At this moment, the last passenger got out of the taxi and hurriedly walked away without paying.

For the defense of herein appellant, the follow-ing evidence was presented to establish alibi:

As a result of the stab wound Sonny Almendras inflicted on Baby Estrada on June 8, 1963, the latter was operated on and confined in the Cebu City Hospital for more than a month. The operation had to be re-peated in September and he was confined again until his final release therefrom on October 21, 1963. But even during his confinement, hospital personnel received phone calls urging them to release Baby Estrada imme-diately so that Sonny Almendras could finish him. Be-cause of such threats, Baby Estrada had since then feared Sonny Almendras. Thus, after his discharge from the hospital on October 21, 1963, Baby stayed in his house and avoided night clubs for fear that he might meet Almendras and be killed by him. But on No-vember 26, 1963, a friend of his informed him that Sonny was in Manila. He was happy because he could go out and enjoy himself. So, on the night of the kill-ing of Almendras on November 27, 1963, he went out. He tried to borrow money from a friend upon the security of his Corsican jacket but failed. He tried another place where he met a friend named Claudio. The latter informed Baby that a certain Cesar was coming with a bottle of wine. Cesar did come a little while after with the wine, and Baby Estrada and he proceeded to Emmanuel's Store across the street. Claudio stayed behind and refused to join them. At the place, Cip-riano Gabica saw them and the three of them partook of the wine. Later, they transferred to Amado's place nearby where a natural brother of Estrada also joined in their drinking. The group dispersed before 10:00 o'clock. Baby Estrada invited his natural brother to join him to the Insular Cafe after that, but the lat-ter did not go with him. So, Baby Estrada had to go alone. He rode a rig and stopped at the corner of Juan Luna and Lapulapu Streets, about 30 meters from the Insular Cafe. He walked towards the place. Just as he was about to reach the Insular Cafe across the street, he saw Sonny Almendras with Bill Malig-on at the door of, said night club. He was scared and imme-diately turned back. He walked some distance along Lapu lapu Street before he boarded a taxi which took him back to the place where he and his friends drank liquor earlier. His friends were no longer there at the time, so he went straight home. At the stairs of the house, he met his sister, Emma whom he greeted. Baby went up the house end slept, while Emma went down to buy some typewriting paper. That was about 10:30 o'clock in the evening. About 10:35 or 10:40, while Emma was still downs airs talking with the store owner, two men with sidearms came along. They spoke to two other young men standing near the, store - they were looking for Baby Estrada. The armed men then continued their way. One of the young men near the store to whom they spoke commented before they left: "Just slow, Bay, we might be hit." Hearing that the armed men were looking for her brother, Emma went upstairs and closed the door. She looked inside the room and saw her brother in bed. She looked out of the window and watched. Around 10 minutes later, or at about 11:00 o'clock in the evening, a jeep parked beside their house and several men jumped out of it. They surrounded their house. One, of them came up the house. She met him at the door. The man was looking for her brother. Fearing that he may harm Baby Estrada, she lied, and told the man that Baby was not there. The man left after that. About midnight, she noticed that people were in a sort of commotion in the road gathered at the Cosmopolitan Funeral Parlor across their house. She knew something was wrong for it was usual that people flock at the Cosmopolitan Parlor when incidents happen. She did not sleep that evening. She watched the men who were, around their house. She recognized one of them to be Carding Ybañez, a detective. At about 3:00 a.m., the men around their house left.

In the morning, Emma went down to buy bread. She heard people talking that Alexander Almendras was shot the night before and was taken to the Cosmopolitan Funeral Parlor. She learned from these people also that it was her brother who shot Sonny Almendras. So, upon her return to the house, she informed her mother who was in the kitchen, about the news she heard, and to-gether they entered the room of her brother, Baby Es-trada, and woke him up. They asked Baby if it was true that he was the one who shot Sonny Almendras at the Insular Cafe the night before, and Baby gave indi-cation of being surprised. He admitted having been to the insular Cafe earlier that evening, but went straight home when he saw Sonny Almendras outside the door of the cafe because he was

afraid of him. As a matter of fact, he was seen by his sister, Emma, at the stairs of the house at about past 10:00 o'clock that evening when he came home. The assurance given by Baby Estrada that he had nothing to do with the killing of Almendras the night before, notwithstanding, the family worried because it had been broadcasted over the radio and it was already the talk of the town that Baby Estrada shot Sonny, so they decided to seek protection for Baby from the Philippine Constabulary. Baby's mother went to Opon, Cebu and sought the help of Estrada's uncle, and when they returned to the house, they (mother and uncle of Baby) were already accompanied by two PC soldiers. Baby Estrada was later taken to the PC headquarters. There, Baby Estrada requested for a paraffin test. The PC called the offices of the NBI and the CIS but said agencies answered that their technicians were not present, so the PC told him that it was not necessary. Soon Estrada was fetched by a po-lice officer from the PC headquarters. His lawyer accompanied him there too. Once again, he requested for a paraffin test, and again he was told that their technicians were not around.

Regarding the incident at the Elite Restaurant on June 8, 1963, where Sonny Almendras stabbed Baby Estrada in the back and in the stomach, end for which Estrada was operated on and confined in the hospital for more than a month, it was explained that Estrada tried and wanted to file a criminal complaint against Sonny Almendras but had no witnesses. One of the eyewitnesses who saw the attack on Estrada was also later on shot by Almendras and hospitalized. The police also informed him that no waitress of the Elite Restaurant was willing to testify against Almendras, hence, the non-filing of any complaint against Almendras.

From the foregoing conflicting theories, the trial court deduced that Baby Estrada and his companions conspired to kill Alexander Almendras; that they resolved to kill Almendras on a vendetta - to vindicate the wrong committed on Estrada by Almendras when the latter stabbed the former at the Elite Restaurant on June 8, 1963; and that the attending circumstances of the case convincingly show evident premeditation on the part of the conspirators. It, therefore, convicted herein appellant, Baby Estrada, of the crime of murder for the killing of Almendras.

Appellant first assails the finding of the lower court that conspiracy existed between him and his co-accused in the killing of Alexander Almendras. In support of his stand, he argues as follows:

"It was fully established that a certain Fred was the one who fired the fatal shot (Decision, p. 20; Tsn-La Paz, p. 51) that felled Almendras. That, standing alone makes Fred liable for his acts, for

'In the absence of a previous plan or agreement to commit a crime, the criminal responsibility arising from different acts directed against one and the same person is individual and not collective, and each of the participants is liable only for the acts committed by himself.' [U. S. vs. Magcomot, 13 Phil. 386-]

For the killing, only Fred and Fred alone is solely responsible."

We are more inclined to reject this theory. The evidence, it is true, shows that the first flash of gunfire was seen in front of Sonny Almendras, and the persons standing in front of him at the time were Alberto Tejero, Baby Estrada, and a certain Fred,[2] but the evidence is not clear as to who among them fired the fatal shot.[3] According to the eyewitnesses, Fred was standing in front of Sonny Almendras at a point situated in an oblique direction from Sonny's right, while Alberto Tejero stood in an oblique direction from Sonny's left with Baby Estrada standing behind Alberto Tejero.[4] Sonny was heard addressing Alberto Tejero: "Let us talk this over, Bert." [5] Immediately after the remark, Fred fired "Bang Bang," [6] and Sonny Almendras reeled and fell to the ground after the shot. [7] These facts do not justify an inference, however, that the bullet that killed Almendras came from the direction of Fred, for according to the post-mortem findings of the medical officer who autopsied the body of Almendras, the entrance of the wound in the chest of the victim was about 3.5 cm. left of the center of the body at the level of the 2nd left rib, penetrating the anterior muscles of the chest and the 2nd left rib,

perforating the ascending aorta of the heart, penetrating the right lung and the posterior muscles of the chest to the right scapula where the slug was recovered directed posteriorly to the right side,[8] tending to show that the bullet came from an oblique direction towards Sonny's left. We do not lose sight of the fact, also established, that the first shot came soon after the address of Almendras "Let us talk this over, Bert" to Alberto Tejero,[9] who was standing in front of Almendras in an oblique direction from the left of the latter.[10] The logical conclusion under the circumstances would therefore be this: either the first shot came from the direction of Alberto Tejero or Baby Estrada who was behind him if that first shot was really, the one that felled Almendras, or, it, was one of the other shots that followed the first shot,[11] coming from the same direction where Bert Tejero and Baby Estrada stood, which fatally hit Almendras. The position of the three men in relation to that of Almendras, and the point of entrance of the wound, detracts from appellant's theory that it was Fred who fired the, fatal shot. At any rate, assuming that it was really Fred who fired the shot that killed Sonny Almendras, and herein appellant did not fire any of the other succeeding shots, still he is liable as a co-conspirator to the killing of Sonny Almendras as will be shown hereafter.

Appellant would insist that the trial court fell into error when it held that all the accused had acted "with concert and in unison in obedience to a plan or prior agreement,"[12] and hence, "Estrada is liable for the killing of Almendras to the same extent as Fred,"[13] inspire of its finding that "no witness was presented to establish any previous agreement between them to commit murder." [14] We are not impressed with this argument either. There is competent evidence to the effect that at about 10:00 o'clock on the night of November 27, 1963, four (4) persons boarded a taxi near the pier area of Cebu City and directed the driver to follow a Snow White taxi ahead of them to the corner of Juan Luna and Martires Streets. There the Snow White taxi stopped near the Esso Gasoline Station along Juan Luna Street, while the other stopped near the Insular Cafe on the other side of the same street.[15] Three of the four passengers of the taxi near the Insular Cafe disembarked, while the fourth stayed inside the car. At about the same time, inside the Insular Cafe where Sonny Almendras and his friends were drinking liquor, one of them named Jorge Cordero, received warning from a security guard that the enemies of Almendras just passed by in a taxi,[16] which warning he relayed to Sonny Almendras and to another companion, Luis Topacio.[17] And no sooner had the presence of the feuding protagonists - Almendras and his friends on the one hand against Baby Estrada and his group on the other - manifested itself in the excitement of the people standing near the door of the Insular Cafe at the time. Knowing that bad blood existed between them, people at the door of the cafe became apprehensive of the tenseness of the situation and went inside running, shouting that Baby was there and Sonny should watch out.[18] Two among the friends of Almendras inside the cafe went outside the door and saw Almendras standing at the time in front of three men near him, one of whom they recognized to be Baby Estrada.[19] Two other men were seen standing a little farther away aside from the three in front of Sonny Almendras.[20] Almendras addressed one of the men in front of him: "Let us talk this over, Bert." [21] Immediately, gunfire flashed in front of Sonny Almendras who, thereafter reeled.[22] The driver of the waiting taxi from which the three men previously disembarked, heard the gunshots from the Insular Cafe,[23] and when he looked at the place, he saw the other taxi scampered away from the place. "He started his car to leave the place also, but the fourth passenger who remained inside the taxi beside him, held the steering wheel of the car and told him to wait for his companions,[24] who arrived later with two other men with them. They boarded the taxi and told the driver to go fast, directing him to turn left, then right until they reached the corner of Sikatuna and Bonifacio Streets where five of the passengers disembarked, the sixth ordering the driver to take him to Sanciangco Street.[25] Before they reached the place, however, the taxi bumped the car of another,[26] during which distraction, the last passenger hurriedly slipped away without paying the taxi fare.[27] Back at the Insular Cafe, the police soon arrived at the scene of the shooting. They found the body of Sonny Almendras being carried by Jorge Cordero who, upon seeing them spontaneously exclaimed that Baby Estrada has shot Sonny Almendras and urged them to pursue him.[28] These circumstances, woven together, convincingly

show that herein appellant and his companions had conspired together to attain a common purpose - to kill Sonny Almendras. While admittedly, the driver of the get-away taxi failed to identify herein appellant to be one of his passengers who disembarked near the Insular Cafe at the time of the shooting, nor did he see them going to the said night-club, from the fact that herein appellant was positively identified to be one of the men standing in front of Son-ny Almendras when the latter was fired upon, coupled with the circumstance that people standing near the door of the cafe became frantic when they saw Estrada and his companions there, and the further circumstance that Son-ny Almendras appears to have gone out of the door of the cafe to see or meet them upon the information of the security guard who relayed the news that his enemies were seen in the taxi than passed by shortly before the shooting, it follows that he was one of the men who alighted from the taxi that stopped near the Insular Cafe telling the driver to wait and then, barely five minutes thereafter boarded back the waiting taxi with two other men immediately after the shooting and hurriedly fled from the scene. This conclusion sustains the holding of the trial court that herein appellant and his companions that evening, had acted with concert and in unison in obedience to a plan or prior agreement - to kill Sonny Almendras. Their agreement or conspiracy is manifested in their acts. To establish conspiracy, it is not necessary to prove previous agreement to commit a crime if there is proof that the malefact-ors have acted in consort and in pursuance of the same objective.[29] This Court has repeatedly decided that conspiracy may be inferred from the acts of the accused themselves when such acts point to a joint purpose and design.[30] Their action must be judged by what they do and not altogether by what they say; for what men do is the best index of their intention.[31] Thus, this Court has ruled in a similar situation:[32]

“Although there is no direct proof of conspiracy between the appellants, the simultaneous presence of both at the scene of the crime, the shot fired by appellant Timoteo Cruz, imme-diatly after Valencia had been shot by Felipe de la Cruz, and the circumstance that, forth with thereafter the latter boarded the former's car, which was there ready for the get away, leave no room for doubt as to the existence of unity of action and purpose between them.”

Further, appellant argues that he was not present at the Insular Cafe at the precise time the shooting of Almendras occurred, pointing out that even the alleged eyewitnesses to the shooting were not agreed as to his position in relation to Almendras when they saw him.[33] He vehemently maintains that he could not have been there because at the time of the shooting he was al-ready at home fast asleep, having left the Insular cafe earlier in the evening upon seeing Almendras there for he was afraid of him. The suggestion should be reject-ed. It is true, as pointed out by herein appellant, that in the course of his testimony witness Jorge Cordero had said that he saw him (Baby Estrada) in front of Almendras at the time of the shooting,[34] which witness Luis Topacio said at one instance in his testimony that Estrada was behind Almendras,[35] but such inconsistency may be overlooked. Both witnesses were required during the course of the trial, to re-enact the position of the assailants and the deceased and to indicate in separate sketches their relative positions as they saw them, and both illustrations show that herein appellant was in front of Almendras.[36] This is in addition to their other statements that they saw Baby Estrada standing in front of Sonny when the latter was shot.[37] The alleged inconsistency, therefore, cannot justify an inference that herein appellant was not at the scene of the crime at the time. And so with the alibi he proffers. No jurisprudence in criminal cases is more settled than the rule that alibi is the weakest of all defenses and that the same should be rejected when the identity of the accused has been sufficiently and positively established by eyewitnesses to the crime.[38] Such should be the rule for as a defense alibi is easy too concoct, and difficult to disprove.[39] And for alibi to prosper, it is not enough to prove that defendant was somewhere else when the crime was committed, but he must, likewise, demonstrate that it was physically impossible for him to have been at the scene of the crime at the time.[40] Herein appellant's alibi does not meet this standard. In the first place, appellant admits having been to the Insular Cafe on the night of the shooting, although he claims to have left at about 10:00 o'clock upon seeing that Almendras was there,[41] because he was afraid of him.[42] Secondly, appellant's sister, Emma, declared that she met him (appellant Estrada) coming up the stairs of their

house at about 10:30 or past that night while she was going down the house to buy writing paper.[43] Shortly thereafter, while she was still downstairs at the store, two men carrying firearms passed by looking for Baby Estrada.[44] She then went up the house and closed the door. It was about 10:35 or 10:40 at the time.[45] She watched out side from the window and according to her, "about 10 or 5 minutes later" a jeep parked near their house; men jumped out of it and encircled their residence. One of them with a firearm came running up their house; she met him at the door; and when the armed man inquired for her brother (Baby), she lied and told him that Baby Estrada was not there.[46] Around midnight, she noticed people flocking at the Cosmopolitan Funeral Parlor just across their house. She stayed awake that whole evening, and noticed that at around 3:00 a.m. the jeep near their house left although some men continued watching their house.[47] In the morning, she went down the house to buy bread and she heard people talking that the body of Sonny Almendras, shot the night before by her brother, was brought to the Cosmopolitan Funeral Parlor.[48] That was the time she informed her mother about the news, and together they entered Baby Estrada's room and questioned him about the incident, which herein appellant denied having anything to do with the killing of Almendras. But the trial court did not believe the story, and upon the other evidence on record, concluded that Baby Estrada (appellant) and his gang went to the Insular Cafe that evening on a vendetta.[49] And We find no compelling reason to disturb this finding of the lower court. The defense of alibi is an issue of fact that hinges on credibility; the credibility of an alibi depends so much on the credibility of the witnesses who seek to establish it; and in this respect, the relative weight which the trial judge assigns to the testimony of said witnesses must, unless patently and clearly inconsistent with the evidence on record, be accepted. For, as is well recognized, his proximate contact with those who take to the witness chair places him, compared to appellate Justices, in the more competent position to discriminate between the true and the false.[50] More-over, from the foregoing narration of events by appellant's sister, We note that barely some 5 or 10 minutes after Baby Estrada came up their house, two armed men were already following his trail; and soon after the lapse of another 5, 10 or 15 minutes, a jeep-load of men were already seen surrounding their residence, one of whom came running up the house and inquired from her if herein appellant was there. Such proximity in time between appellants alleged arrival in the house and the immediate coming of the police officers pursuing him, belies the claim of herein appellant that he had left the Insular Cafe earlier that evening and could not have been there at the time of the shooting. Finally, the Court cannot simply accept without mental reservation the veracity of here in appellants sister that she and her mother questioned Baby Estrada if he had anything to do with the shooting of Almendras only the following morning after she heard the news from other people and over the radio that her brother was the principal suspect in the shooting of Almendras the previous night. Under the tenseness of the situation - having seen and heard two men carrying firearms inquiring for her brother barely 5 or 10 minutes after she saw Baby Estrada came up the house; seeing a group of men among them Detective Ricardo Ybañez surrounding their house a few minutes thereafter; having met another armed man (Detective Ortiz) who came running up the stairs of the house and inquired if her brother was there; and having taken note thereafter of the commotion at the Cosmopolitan Funeral Parlor across their house which admittedly, she know takes place only when, incidents happen - it is quite unnatural, may unbelievable, that she stayed up the whole evening watching the movement of the men who he surrounded their house without asking her brother then and there where he really had been before coming home that evening, when the natural thing to do under the circumstances, would either be to have asked those armed men inquiring about the whereabouts of her brother why they were looking for him, why Detective Ricardo Ybañez (their neighbor) and his men were surrounding their house, or to have informed her mother and ask Baby Estrada about the situation. It is highly probable under the circumstances that Baby Estrada had confessed or told her sister, Emma of his involvement in the shooting of Almendras before the coming of the police to their house; and in her desire to conceal or protect herein appellant denied his presence in the house when Detective Ortiz went up the house that evening and inquired if Baby Estrada was there.

Appellant next assails the holding of the lower court that the statement of Jorge Cordero to the police immediately after the shooting of Sonny Almendras,[51] was admissible as part of the *res gestae*. Apparently, the trial court finds to consider that the principle of *res gestae*, being an exception to the hearsay rule, is not applicable when, as in this case, the person speaking about a startling event or occurrence testifies in court, for then the truth of his assertions may be tested through cross-examination. At any rate, this holding of the court is a harmless error, since the witness reiterated in his testimony before the court the event that he had witnessed. What the trial court correctly considered as part of the *res gestae* was the warning given by the people present near the door of the Insular Cafe at the time who, in their excitement, shouted "that Baby was there, and Sonny should watch out." And although herein appellant would insist that what was heard was only the word "Baby" and not "Baby Estrada", the conclusion of herein appellant that it could have been another "Baby" referred to and not he, fades into insignificance in the light of the testimony of eyewitnesses that he (Baby Estrada) was seen standing in front of Sonny Almendras when the shooting occurred.

In connection with the third assignment of error, appellant laments the holding of the lower court that he had a powerful motive to commit the crime. He contends that motive on his part should not be considered for the reason that the evidence for the prosecution points to a certain Fred as the person who mortally shot Almendras. The claim is without merit. It is true that motive is not necessary where there is no doubt that the defendant was the one who caused the death of the victim.[52] But as earlier explained, We are not even convinced that it was Fred who fired the shot that killed Almendras for the reason that the medical findings tend to show that the bullet that entered the body of the deceased, came from an oblique direction towards the left chest of the victim, contrary to the evidence that Fred stood and fired from an oblique direction towards the right of Almendras. Appellant herein was convicted on a finding of conspiracy without defining any act of his that directly contributed to the ultimate act that killed the deceased. Motive, is here material, for it gives the reason why he participated in the conspiracy.

Likewise, the right of the prosecution to call at the trial witnesses other than those listed in the complaint or information may not be seriously questioned. This right is supported by the rules and jurisprudence on the matter.[53] While the accused in a criminal prosecution is entitled to know the nature and cause of the accusation against him,[54] yet it does not mean that he is entitled to know in advance the names of all the witnesses for the prosecution. The success of the prosecution might be endangered if such right be granted to an accused, for the known witnesses might be subjected to pressure or coerced not to testify. The time for the accused to know all the witnesses against him is when they take the witness stand.[55] And from the fact that the witnesses here objected to are members of the police department of Cebu City, it does not necessarily follow that the danger to the success of the prosecution above-contemplated is totally obliterated.

Finally, appellant contends that the trial court erred in believing witness for the prosecution, Jorge Cordero, and in not believing appellant and his witness. He would capitalize on the statement made by Cordero to the police immediately after the shooting urging them to arrest him as an act of vengeance against him because Cordero was a long time friend of Almendras and an enemy of his. He concludes that as the facts proven tend to show that it was not herein appellant who shot Almendras, Cordero's testimony is suspicious and is not worthy of belief. The contention is not well taken. Cordero appears to have made the statement to the police immediately after the shooting, the dying victim in his arms, He urged the police to chase herein appellant spontaneously, without time to reflect. And the fact is, he saw Baby Estrada with two other men in front of Almendras when the shooting occurred, and because he did not recognize the two other men, he told the police to pursue herein appellant. His statement grew out of his nervous excitement, and may not fully be in accord with the facts subsequently proved, but We cannot subscribe to the suggestion of herein appellant that Cordero, under such a startling occurrence, could have been influenced by any evil motive against herein appellant. Moreover, the rule is well settled that

where the issue in a case is the credibility of witnesses, appellate courts do not generally disturb the findings of the trial court, the judge thereof being in a much better position to decide the question, having seen and heard the witnesses himself and observed their deportment and manner of testifying, unless it is shown that it has overlooked certain facts of substance and value that, if considered, might affect the result of the case.[56] This case does not fall under the exception.

By and large, therefore, We find the conclusion of the lower court legally sound - that herein appellant is liable for the killing of Alexander Almendras on the night of November 27, 1963. We also find no justifiable reason to disturb the holding of the court that the aggravating circumstance of night time cannot be considered for there is authority to the effect that for nocturnity to be aggravating, it must appear that it has been purposely sought by the offender to facilitate the commission of the crime.[57] Nor did the court err in not appreciating the aggravating circumstance of treachery for as correctly observed by the trial judge: "It would appear that the shooting was preceded by a verbal altercation, as shown by the remark of Sonny Almendras to them, 'Let us talk this matter over, Bert.' When he uttered said words, he was facing Fred, Estrada and others. Besides, he was observed to insert his hand in his pocket a gesture which might have been considered as an act of hostility - considering his previous homicidal proclivities and his being 'trigger happy'." And so with the aggravating circumstance of taking advantage of superior strength which was not appreciated for, mere superiority in number of assailants does not prove it.[58]

Lastly, the trial court was correct in appreciating the presence of evident premeditation in the killing. Soon after the appellant had nursed for more than a month the stab wounds which Sonny Almendras inflicted upon him, said appellant showed clear indications that he would even up the score with Sonny. He forewarned a friend to stop going with Almendras or he might meet an accident.[59] His resolution to carry a vendetta was known to his friends who fraternized with his cause, in as much the same way that Almendras knew and felt that the day of reckoning was coming soon. Thus, when by chance they met one evening, Almendras frantically ran away and sought protection from a policeman, on which occasion, one of herein appellant's companions gave stern warning to Sonny - even in the presence of the peace officer - that his death was near.[60] Appellant and his friends who conspired with him, had more than sufficient time to reflect upon the consequences of their resolve, but they did not inhibit themselves. Their determination to kill is indicated by their simultaneous arrival at the scene of the crime on the light of the killing, their immediate attack upon the victim, and their departure together in the same getaway car that was made to wait for them after carrying out their evil plan.[61] Such evident premeditation qualifies the killing to murder.

Murder is punishable by reclusion temporal in its maximum period to death. When, as in this case, no mitigating or aggravating circumstances attended the commission of the crime, the penalty should be imposed in its medium period which is reclusion perpetua.[62] Obviously, therefore, the trial court fell into error in sentencing herein appellant to an indeterminate prison term by applying the provisions of the Indeterminate Sentence Law which is not applicable when the person convicted of an offense is punished with death penalty or life imprisonment.[63] Consequently, the said prison sentence should be modified accordingly.

WHEREFORE, decision in this case as to the penalty is modified, setting aside the sentence from twelve years and one day of reclusion temporal as minimum, to twenty years of reclusion temporal as maximum, and in its stead, the accused (appellant) is hereby sentenced to reclusion perpetua and to indemnify the heirs of Alexander Almendras, the sum of P6,000.00. As thus modified, the judgment is affirmed in other respects.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Bengzon, J.P., Zaldivar, Sanchez, Castro, and Fernando, JJ., concur.

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- [1] T.s.n. (La Paz), pp. 21-22; Translated to English, the expression means: "Sonny was shot by Baby Estrada, go chase him."
- [2] Tsn (La Paz) p. 51.
- [3] Tsn (La Paz) pp. 51-52, 158-161.
- [4] Tsn (La Paz) pp. 49-52; Records, pp. 106 & 117-Exhibits.
- [5] Tsn (La Paz) p. 51.
- [6] Tsn (La Paz) p. 24.
- [7] Tsn (La Paz) p. 52.
- [8] Records, p. 85 (Autopsy Report)
- [9] Tsn (La Paz) p. 51.
- [10] Records, p. 106 (Exhibit)
- [11] One of the witnesses said he heard 3 shots, another witness said he heard 6, while still another witness heard only 2 (La Paz) p. 61 & 162; (Bornia) p. 117.
- [12] Decision, p. 21.
- [13] Decision, p. 24.
- [14] Decision, pp. 20-21.
- [15] Tsn (Bornia) pp. 114-116.
- [16] Tsn (La Paz) p. 155.
- [17] Tsn (La Paz) pp. 41 & 156.
- [18] Tsn (La Paz) pp. 157-158.
- [19] Tsn (La Paz) pp. 49, 51 & 160.
- [20] Tsn (Bornia) pp. 100-101.
- [21] Tsn (La Paz) pp. 50 & 51.
- [22] Tsn (La Paz) p. 52.
- [23] Tsn (Bornia) p. 117.
- [24] Tsn (Bornia) p. 120.
- [25] Tsn (Bornia) pp. 120-121.
- [26] Tsn (Bornia), p. 123.
- [27] Tsn (Bornia), p. 123.
- [28] Tsn (La Paz), pp. 22 & 165.
- [29] People v. San Luis, 86 Phil. 485.

- [30] See, *People v. Upao-Moro*, L-6771, May 28, 1957; and cases cited therein.
- [31] *People v. Bautista*, 49 Phil. 389, 395-396.
- [32] *People v. Cruz, et al.*, L-15369, April 26, 1962.
- [33] See, appellant's brief, p. 13.
- [34] *Tsn (La Paz)* p. 160.
- [35] *Tsn (La Paz)* p. 82.
- [36] Records, pp. 106 & 117 (exhibits).
- [37] *Tsn (La Paz)*, pp. 51-53; (*Bornia*), pp. 160-161.
- [38] *People v. Briz*, L-11063, August 22, 1958; *People v. Asmawil*, L-18761, March 31, 1965; *People v. Lumayag*, L-19142, March 31, 1965.
- [39] *People v. Cunanan*, L-17599, April 24, 1967, and cases cited therein.
- [40] *People v. Limpo, et al.*, L-13058, January 28, 1961; *People v. Pelagio, et al.*, L-16177, May 24, 1967.
- [41] *Tsn (Bornia)*, p. 244.
- [42] *Tsn (Bornia)*, p. 243.
- [43] *Tsn (La Paz)*, p. 376.
- [44] *Tsn (La Paz)*, p. 377-378.
- [45] *Tsn (La Paz)*, p. 379.
- [46] *Tsn (La Paz)*, pp. 379-380.
- [47] *Tsn (La Paz)*, p. 382; (*Bornia*) p. 176.
- [48] *Tsn (La Paz)* p. 383; (*Bornia*) pp. 176-177.
- [49] Decision, p. 24.
- [50] *People v. Constante*, L-14639, December 28, 1964; *People v. Berdida, et al.*, L-20183, June 30, 1966.
- [51] According to Cordero, what he said was: "arrest Baby Estrada", *Tsn (La Paz)*, pp. 165-166; while the policeman addressed to, said, Cordero's words were: "Sonny was shot by Baby Estrada, go chase him", *Tsn (La Paz)* p. 21.
- [52] *U. S. v. McMann*, 4 Phil. 561.
- [53] Sec. 1, Rule 112, Rules of Court; *People v. Santos*, L-7315, July 27, 1955; *People v. Manabat*, 53 Of. Gaz. 6090; *People v. Namoc*, L-11877, Nov. 23, 1959; *People v. Palacio, et al.*, L-13933, May 25, 1960.
- [54] Section 1(17), Art. III, Constitution; Section 1(b), Rule 111, Rules of Court.
- [55] *People v. Palacio, et al.*, *supra*.
- [56] *People v. Bergonio, et al.*, L-10121, December 29, 1960; *People v. Tania, et al.*, L-18514, April 30, 1966.
- [57] See, *People v. Matbagon*, 60 Phil. 887; *People vs. Trumata & Baligasa*, 49 Phil. 192.

[58] *People v. Devela*, et al., 3 Phil. 625; *People v. Diokno*, et al., 63 Phil. 601.

[59] *Tsn (La Paz)* p. 46.

[60] *Tsn (La Paz)* p. 246.

[61] *Tsn (Bornia)* 114-121.

[62] Art. 64, Revised Penal Code; *People v. Canitan* L-16498, June 29, 1963.

[63] Sect. 2, Indeterminate Sentence Law; *People v. Sepillo*, et al., 80 Phil. 805.

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