

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. WILFREDO TALLA AND JOLITO TALLA, DEFENDANTS, WILFREDO TALLA, DEFENDANT-APPELLANT.

G.R. No. L-44414. January 18, 1990

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

While walking along the Suage river bank in barrio Barasalon, Janiuay, Iloilo City, at about 10:00 in the morning of June 22, 1972, Ernesto Maderse was shot to death with a home made shotgun (pugakhang). On the same day, his cadaver was brought to Janiuay.[1] The following day, Dr. Asisclo Tirador, the Rural Health Physician of the town conducted the post mortem examination which revealed that the deceased suffered eight (8) gunshot wounds.[2]

Two weeks thereafter, or on July 6, 1972, Esperidion, Alfredo (whose real name is Wilfredo, as testified to by him later) Ruperto, Cirila (Sila), Erlinda and Jolito, all surnamed Talla were summoned by the police authorities, for investigation in connection with the killing.[3] It was also during that day that Wilfredo executed a written extra judicial confession admitting the killing, at the same time implicating his brothers and sister-in-law in the commission thereof[4]. After preliminary investigation, Wilfredo and Jolito were charged with the crime of murder in an information which reads:

"That on or about the 22nd day of June, 1972, in the municipality of Janiuay, province of Iloilo, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating, and helping one another, armed with a firearm locally known as 'pugakhang', without any justifiable motive, with treachery and evident premeditation, and with a decided purpose to kill, did then and there willfully, unlawfully, and feloniously attack, assault and shoot one ERNESTO MADERSE with their said weapon thereby inflicting upon said Ernesto Maderse gunshot wounds on the vital parts of his body which caused his death thereafter.

"CONTRARY TO LAW." (p. 5, Rollo)

During the arraignment, both accused pleaded not guilty[5].

During the trial, the prosecution presented two (2) eyewitnesses to the shooting incident.

The first prosecution eyewitness, Anacleto Molina, testified that at the time of the shooting incident he and the other prosecution witness Felipe Marbebe were walking along the riverbank of Barrio Barasalon, Janiuay, Iloilo, on their way to Barrio Quipot of the same town. At the opposite side of the river, he saw Wilfredo and Jolito come from behind a big stone going up the riverbank. Moments later, he saw Jolito shoot Ernesto with a long gun locally known as "pugakhang" (shotgun). Right after the shooting, he sought cover, behind the tall talahib grasses. He further declared that he saw Wilfredo also armed with a "pugakhang" but he just pointed it to Ernesto and he never fired the same; and that he saw Wilfredo and Jolito run away after the shooting. When they disappeared, he and Felipe Marbebe crossed the river and proceeded to Barrio Quipot where they informed the wife of Ernesto

about what happened to the latter. On cross-examination, he declared that he did not know the names of Wilfredo and Jolito but he personally identified them inside the office of the chief of police in one afternoon in July 1972; that before Ernesto was shot, he was following Cirila Talla, sister-in-law of Wilfredo and Jolito, and her son Gaudencio; that when Ernesto fell down, Cirila went to search his pocket; that at the time Jolito shot Ernesto, the latter was about 10 meters away from Cirila and Gaudencio and he (Molina) was 8 meters away from Cirila and Gaudencio and, Felipe Marbebe was only about three armslength from him. He further stated that he saw the faces of Wilfredo and Jolito when they went up the riverbank just before Jolito shot Ernesto because he and Marbebe were at the other side of the river which was only 7 meters in width. He added, that Wilfredo fell on his gun after the shot; that when Wilfredo and Jolito turned their backs he (Molina) sought cover for fear that he might be hit by stray bullets, while Felipe Marbebe did not seek cover because he was then carrying bundles of abaca fibers over his head belonging to him (Molina) and which made his (Marbebe) head bow while walking; that Wilfredo and Jolito were hatless at that time; that he did not go near Ernesto because he was scared (pp. 1-25, TSN, January 31, 1973).

On the other hand, Felipe Marbebe, the second prosecution eyewitness on direct examination, testified that in that same morning but prior to the shooting incident, he met Pedo (Wilfredo) and Jolito Talla somewhere in barrio Barasalon. He further stated that he also met Ernesto in a crossing somewhere within the same barrio and they even talked about their going to barrio Quipot. He admitted that he was carrying over his head, bundles of abaca fibers owned by one Serg; that he saw Wilfredo and Jolito, who were both armed with pugakhang, shoot Ernesto who was just four (4) armslength away from him; that when Ernesto fell down, he crossed the river, approached him (Ernesto) and after putting down his load, touched Ernesto's head and asked the latter if he recognized him but Ernesto just moaned. He further declared that Anacleto Molina was behind him during the shooting incident.

On cross-examination, he stated that before Ernesto was shot, he (Ernesto) was following Cirila Talla and her son Gaudencio and he (Marbebe) was four armslength from Ernesto. He admitted that his load was heavy and so it made his head bow; that upon hearing the shot he immediately looked where it came from and he saw Pedong (Wilfredo) and Lito (Jolito); that he also saw Cirila ran away after the shot but he did not notice where Anacleto Molina hid (pp. 26-50, TSN, January 31, 1973).

Dr. Asisclo Tirador confirmed his findings as stated in his necropsy report. Testifying thereon, he declared that all wounds sustained by Ernesto could have caused his death and that he could have been shot at a distance of more than five (5) feet because of the absence of powder burns in the wounds or in his clothes (pp. 129-135, TSN, March 28, 1973).

The accused, on the other hand, interposed the defense of alibi.

Thus, accused Jolito Talla, then barrio councilman of barrio Barasalon, on direct examination declared that at the time of the shooting incident, he was in his riceland pulling out weeds together with his helpers Rodolfo Millar and Florita Armada and from there, he saw Montano Claudio, the barangay captain, stripping abaca on the adjoining land opposite the creek and the latter informed him of the meeting of the barangay council regarding the construction of a cottage for the school to be held in the afternoon at the house of Andres Armada, also a councilman. At about 11:30, he and Montano Claudio had lunch in his house after which they proceeded to the house of Andres Armada. During the meeting, his nephew Gaudencio Talla arrived and informed them of the shooting incident and the presence of policemen who were waiting for barangay captain Montano Claudio at the scene of the incident; that he denied the request of Montano Claudio to be accompanied because he had to go back to his workers in his farm; that in the evening, barangay captain Montano Claudio informed him of the arrest of his brother Ruperto in connection with the shooting incident; and the following morning, while on their way to Janiuary to see Ruperto, they met Cirila Talla who informed them that she saw Apad Capillo and Willie Capillo

shoot Ernesto; and that he was also arrested by the police at about 5:00 p.m. of July 7, 1972, while visiting his brothers who were detained (pp. 68-83, TSN, June 14, 1974).

On cross-examination, he stated among others, that he went to his farm at exactly 6:00 o'clock in the morning to do the weeding and he was later joined by his workers whom he had hired one week earlier; that the meeting which was attended by Andres Armada, Rogelio Armada, Anito Bejo and Sergio Vajante with the last presiding, actually began at one o'clock in the afternoon and at about four o'clock but before the meeting was about to be finished, Gaudencio arrived and informed them about what happened to Erning. That Gaudencio was instructed by Montano Claudio to go back to where he came from and to return when somebody sends him again. When Gaudencio returned he informed Montano Claudio that the policeman had arrived. So they proceeded to the scene of the shooting incident but they met the policeman at the house of Polion Claudio. Upon the request of the policeman, they looked for a hammock where the former placed and carried the body of Ernesto. Thereafter, he went back to his farm (pp. 235-254, TSN, August 20, 1974).

Accused Wilfredo Talla testified that at 6 o'clock in the morning of June 22, 1971, he went to his abaca plantation to strip abaca thereat. With him were Basilio Dago, Rodrigo Claudio and Noning Fabila; that they stopped working only at about twelve o'clock in the afternoon when they had lunch which was brought by his wife and they left the plantation at five o'clock in the afternoon; that he came to know of the incident only when he was arrested together with his brothers Ruperto, Esperidion and Jolito, three weeks after the incident happened. That prior to his arrest, he often saw Apad Capillo and Willie Capillo in Barasalon.

He further declared that the day after his arrest, he was visited in his detention cell by Mayor Galan of Janiuay and he confessed to the latter the maltreatment he suffered in the hands of 2 policemen the night before and by reason of which he admitted participation in the killing. That when the mayor left, he was again manhandled. He averred that he affixed his thumbmark on a document (written confession) the contents of which he did not know because he was not then in his proper senses as he did not even know whether or not he was inside the jail. Upon further questioning, he blatantly denied talking to the mayor one day after his arrest or even thereafter.

He further claimed that on the day of the incident and 2 days prior thereto, his workers slept and ate in his house. He also stated that the houses of his workers Basilio Dago and Rodrigo Claudio where members of their families also live, were just one kilometer away from his house, while the house of Noning Fabila is very far from his. On redirect examination, he insisted that he was manhandled and that he did not converse with the mayor at anytime and anywhere and that nobody visited him in his cell while he was detained (pp. 383-425, TSN, December 16, 1974).

Gaudencio Talla, on direct examination stated that when he and his mother first saw Ernesto, the latter was taking a bath in the river but the next time he saw him, Ernesto was already following them; that he was only three meters away from Willie Capillo when the latter shot Ernesto (p. 214; TSN) and he was also about the same distance from Ernesto; that before Ernesto was shot, Willie and Apad Capillo, both armed with guns, were hiding behind a big rock; that he did not see Anacleto Molina and Felipe Marbebe at the scene of the crime.

He further declared that he and his mother were about six meters away from the big rock when he looked back and saw the deceased, who was 80 meters away, dressed up and followed them; that at the time they were in line with the rock, he saw from his left, at a distance of about 2½ meters, Willie and Apad Capillo hiding behind it. That at the time he saw the Capillos, Ernesto was already 5 meters behind him and his mother. When Willie Capillo made the sign for them to proceed, they hurriedly walked but as he looked back, he saw Willie Capillo shoot Ernesto who was only 3 meters away from the former; that he did not warn Ernesto because he was afraid, and that Ernesto was able to fire back with his gun while falling but he was not able to hit Willie Capillo. That

when Ernesto fell, Willie and Apad crossed the river. They never helped Ernesto because they were afraid that the Capillos might come back to harm them. Upon their arrival at barrio Quipot, they informed Bening Colaja of what they saw and when they returned to barrio Barasalon, he was instructed by his uncle and mother to inform the group holding a meeting at the house of Andres Armada, about the incident. He confirmed the presence of his uncle Jolito and Montano Claudio during the meeting. After informing the group, he was told by Montano Claudio to go ahead and when he arrived at their house there were three policemen who ordered him to return to Montano Claudio and request a hammock to be used to carry the body of Ernesto (pp. 51-54, TSN, February 21, 1974, pp. 210-234, TSN, February 13, 1974).

Rodolfo Millar, on direct examination, substantially corroborated the testimony of Jolito Talla. On cross-examination, he declared and admitted that he and Jolito are first cousins because their mothers are sisters; that Jolito requested him to testify only after his release on bail sometime in September, 1973 (pp. 153-168, TSN, January 30, 1974).

Montano Claudio declared among others, that the wives of prosecution witness Anacleto Molina, and the deceased are sisters. He stated that on the day of the incident, he was stripping abaca in his farm at the other side of the river of Barasalon which was only about 15 meters from the farm of Jolito where he saw the latter with Florita Armada and Rodolfo Millar weeding. The proximity of the distance enabled him to inform Jolito about the meeting of the barangay council to be held at the house of his first cousin Andres Armada. He joined Jolito, in having lunch at the latter's house and thereafter they proceeded to the house of Andres Armada to attend the meeting during which Gaudencio arrived and told him about the shooting incident. He instructed Gaudencio to go ahead and he will follow but he did not because it was raining and he was suffering from flu. After a while, Gaudencio returned with some policemen who requested him to look for a hammock to be used in carrying the body of Ernesto. He further stated that prior to the incident, he met Apad Capillo who allegedly vowed to kill Ernesto for the reason that when he, (Apad Capillo), Rodolfo Millar and Ernesto were charged of theft of an abaca stripping machine, Ernesto was acquitted despite the fact that he never shared with them the proceeds of the crime (pp. 136-152, TSN, October 10, 1973; pp. 293-333, TSN, November 6, 1973).

Cirila Talla, in substance, testified that before Ernesto was shot, she saw him cross the river and he followed her and her son Gaudencio. When Ernesto was about 3 meters away from them, she also saw Apad and Willie Capillo standing behind a big stone, both holding a gun; that although she was acquainted with them, they did not converse because Willie made a sign (finger across his lips and raised his hat) which meant that she and her son continue walking. She further stated that she first heard the shot fired by Willie and thereafter the latter signalled them to keep quiet and proceed; that Ernesto was able to fire back with his gun while he was falling down and when he finally fell down Willie repeated his signal for them to proceed; that she did not see both prosecution witnesses in the vicinity of the shooting incident. When they arrived at barrio Quipot, they informed Bing (Bening) Colaja of the incident and after selling abaca to him, they went to the market where they saw Anacleto Molina. When they returned to Barasalon, she told her husband what they witnessed and so the latter instructed Gaudencio to inform the group holding a meeting at Andres Armada's house of what they saw (pp. 54-67, TSN, February 21, 1974; pp. 169-177, TSN, March 5, 1974).

Nonito Fabila on the stand declared that while walking on his way to the house of accused Wilfredo Talla on June 20, 1971 at about one o'clock in the afternoon, he met Willie and Apad Capillo at the junction of Suage and Malbay rivers which was the place of the shooting incident. He mentioned that the two were carrying guns and when he asked them where they were going, they answered that they wanted to see Ernesto to clear something from him (pp. 335-345, TSN); that he arrived at the house of Wilfredo at around three o'clock and he spent the night there. He confirmed Alfredo's declaration that they were stripping abaca at the time of the shooting incident;

that Wilfredo had hired him to do the stripping one week before the incident happened; that it was only a month prior to his taking the witness stand that he was requested by the wife of Wilfredo Talla to testify (pp. 335-381, TSN, November 6, 1973).

Pablito Armada, the barangay council secretary also testified for the defense. He stated that he was among those who attended the conference at the house of Andres Armada on June 22, 1971. He corroborated Jolito's declaration that during the conference, Gaudencio arrived to inform them of the incident, but after informing the group, Gaudencio was ordered to go home by Montano Claudio, who said he would go to the scene of the crime. On cross-examination, he denied having any relation with Montano Claudio; He also denied any relation with Yuting Armada and Amay Armada, fathers of Andres Armada and Conchita Armada Capillo, the latter being the mother of Willie and Apad (pp. 257-289, TSN, November 3, 1975).

Rosita Maderse, wife of the deceased declared that one day in the month of May, 1971 he saw accused Jolito Talla at the public market at Barrio Quipot talking with somebody and as she passed by him from a distance of one meter, she heard him say that "It will not take a month and I will kill Erning," referring to her husband; that during the wake of her husband she spent P725.00 for 2 pigs, seven (7) sacks of rice at P65.00 each, P1,050.00 for her husband's funeral, P300.00 for his coffin and P100.00 for his burial, She disclosed that the night prior to her husband's death, the latter slept at the house of one Magde in Barrio Barasalon; that after the shooting incident, she, together with some policemen and a cousin, brought the body of her husband from the scene of the crime to Janiuay and they actually arrived in the poblacion at 10:00 p.m. (pp. 118-129, TSN, March 23, 1973; pp. 200-209, TSN, May 9, 1973).

Bienvenido (Bening) Colaja on direct examination stated that at about ten o'clock in the morning of June 22, 1972, while he was in his house in Barrio Quipot, Cirila Talla and her son Gaudencio arrived to sell him abaca. That the two had lunch in his house, during which he was informed by Cirila that Willie Capillo shot Erning (Ernesto). However, on cross-examination, he clarified that, he only heard Cirila tell his son Gaudencio, that it was Willie who shot Erning (pp. 178-184, TSN, October 1, 1974).

On the other hand, Milagros Talla, substantially corroborated the testimony of her husband Wilfredo (pp. 185-193, TSN, October 1, 1974).

As rebuttal witnesses, the prosecution presented Andres Armada and Conchita Capillo.

Andres Armada denied the holding of a meeting in his house on June 22, 1972 and stated that Jolito Talla and Gaudencio Talla were never in his house that day but it was Montano Claudio who went there at 7 o'clock in the morning to buy rice. He further declared that the barrio council had held several conferences regarding the construction of a cottage for the school but the meetings were either held at the school or at the house of the barangay captain, but never in his house (pp. 98-105, TSN, July 23, 1975).

Conchita Capillo also declared that her sons went to Mindanao in 1971 to look for jobs and since then she never saw or heard from them (pp. 93-97, TSN, July 23, 1975).

In an attempt to discredit the testimony of Andres Armada, the defense recalled accused Jolito Talla as surrebuttal witness. He informed that Andres Armada and Conchita Capillo are first cousins because their fathers are brothers; that Andres Armada bears a grudge against him because, during their confrontation before barangay captain Montano Claudio sometime in 1969 relative to a controversy over the boundary of their adjoining lands, he was able to secure what belonged to him, and thereafter Andres Armada threatened him with a bolo.

On May 13, 1976, the trial court rendered a decision, the dispositive portion of which states:

"WHEREFORE, the Court finds Wilfredo Talla or Alfredo Talla guilty of the crime of murder, and sentences

him to reclusion perpetua to indemnify the heirs of Ernesto Maderse in the sum of P12,000.00 for his death, plus the sum of P1,872.60 as damages, representing expenses for the burial of said Ernesto Maderse, without subsidiary imprisonment in case of insolvency and to pay the costs of suit.

"The accused Jolito Talla is acquitted of the offense charged, and his bail bond ordered cancelled.

"SO ORDERED." (pp. 24-25, Original Record)

The instant appeal pertains only to Wilfredo Talla considering that his brother Jolito was absolved of the crime charged.

Accused-appellant assails his conviction on four grounds:

THE COURT A QUO ERRED IN RELYING HEAVILY ON THE EXTRAJUDICIAL CONFESSION MADE BY THE ACCUSED WILFREDO TALLA THE ADMISSIBILITY OF WHICH WAS HIGHLY QUESTIONABLE UNDER THE CIRCUMSTANCES.

THE COURT A QUO ERRED IN SUSTAINING THE TESTIMONY OF TWO PROSECUTION WITNESSES AS AGAINST ALL OTHER WITNESSES AND OTHER EVIDENCE PRESENTED TO SUPPORT THE CONVICTION OF THE ACCUSED WILFREDO TALLA NOTWITHSTANDING THE FACT THAT THEY GAVE CONTRADICTORY, CONFLICTING AND INCONSISTENT TESTIMONIES ON MATERIAL AND VITAL POINTS RELATING TO THE FATAL INCIDENT THAT CLAIMED THE LIFE OF THE DECEASED ERNESTO MADERSE.

THE COURT A QUO ERRED IN FINDING THAT THE ACCUSED WILFREDO TALLA WAS THE ONE WHO SHOT AND KILLED THE VICTIM, ERNESTO MADERSE.

THE COURT A QUO ERRED IN FINDING THE ACCUSED WILFREDO TALLA GUILTY AS CHARGED DESPITE REASONABLE DOUBT AS TO HIS GUILT DUE TO THE INSUFFICIENCY OF DIRECT, POSITIVE AND CONVINCING EVIDENCE THAT WOULD SUPPORT HIS CONVICTION.
(pp. 1-2, Appellant's Brief, p. 68, Rollo)

It is the contention of accused-appellant that his extra-judicial confession is inadmissible because it was obtained thru force and intimidation. He claims that he was tortured and manhandled by the police investigators during his detention so that he admitted the killing of Ernesto. Appellant professed innocence of the contents of his confession claiming that they were not explained to him and he was not in his senses when he was made to affix his thumbmarks thereon. Appellant also faulted the trial court for giving credence to the testimony of Anacleto Molina, an octagenarian, who, on the witness stand, displayed his forgetfulness exemplified by his failure to remember his name and that of his brother Jolito even though their names were repeatedly mentioned by the trial fiscal and also the name of his tenant who was allegedly his companion at the time of the incident (p. 18, Appellant's Brief).

Accused-appellant further argues that, although Felipe Marbebe may have seen him and his brother at the scene of the crime, Marbebe could not have seen him actually shoot Ernesto considering that the place was full of talahib, tall grass and big stones enough to hide people. He added that since Ernesto suffered eight (8) gunshot wounds, it is probable that other persons had also shot him right after the first shot, even assuming that the latter shot was fired by him (appellant) or his brother (p. 22, Appellant's Brief).

Appellant also leans heavily on the conflicting and inconsistent testimonies of the prosecution eyewitnesses. He avers that while Molina testified that he (appellant) did not fire his gun, Marbebe declared that he (appellant) and Jolito fired at Ernesto; that while Molina said that Cirila Talla went to search the pocket of Ernesto, yet Marbebe declared that she ran away after the shot; that whereas Molina claimed that the abaca then being carried by

Marbebe was his, Marbebe on the other hand, declared that it belonged to a certain "Serg"; that while Molina declared that after Ernesto was shot, he and Marbebe did not go near or touch Ernesto, Marbebe testified that he approached Ernesto, touched his head and asked the latter if he still recognize him (pp. 23-25, Appellant's Brief).

Appellant further asserts that he and Jolito did not have the motive to kill Ernesto because it was Willy and Apad Capillo who had the intention of killing him considering that the two were convicted of theft which they committed together with Ernesto who was acquitted and whom they suspected of possessing the loot (p. 27, Appellant's Brief).

The basic thrust of appellant's assignment of errors is the inadmissibility of his extrajudicial confession and the credibility of the prosecution witnesses.

The contention of appellant that his extrajudicial confession is inadmissible because it was obtained thru force and intimidation is untenable. The rule is well settled that a confession is presumed to be voluntary until the contrary is proved and the burden of proof is upon the person who gave the confession (*People v. de la Cruz*, No. L-32661, 20 July 1982, 115 SCRA 184). Appellant in the case at bar failed to overcome the presumption. The Court is hardly convinced of his bare assertion that force or duress was employed upon him. Except his testimony, no other evidence was presented to prove his pretension that he was forced to confess. Not even the Municipal Mayor before whom appellant had sworn to and to whom he allegedly complained about the ordeal he suffered from his captors, was presented as a witness. And during his testimony, he never attempted to show marks of violence. More importantly, the confession is replete with details which could have been known only to him and which could not have been the product of mere imagination. But even if appellant's confession were disregarded, there is overwhelming evidence that he was part of a conspiracy to kill Ernesto.

With regard to the alleged conflicting testimonies of the two principal witnesses, the Court finds that, except for their contradictory statements as to who fired upon Ernesto, the other contradictory statements refer only to minor details which do not destroy their credibility. Their inconsistency in minor details is proof that they were not rehearsed. The fact that the wife of witness Anacleto Molina and the deceased are sisters is not reason enough to discredit the testimony of the former. The record does not show that Anacleto Molina harbored ill feelings against appellant. It is worthy to mention that when Anacleto Molina testified, he was 80 years old. At that age, We fail to see any cause or reason for him to prevaricate the truth.

The conflicting testimonies of the two principal witnesses on the matter of the identity of the one who fired the shot is understandable. The variance can be attributed to the fact that different persons have diverse impressions and perceptions of a startling event. On the other hand, the testimonies of two or more witnesses would be under a serious doubt if their declarations tallied in their minutest details, for then, that would not be natural. That would indicate that the testimonies were rehearsed (*People v. Ferrera*, No. L-66965, June 18, 1987, 151 SCRA 113).

The Court is convinced that it was not appellant who fired the fatal shot. The prosecution evidence disclose that at the time of the actual shooting, prosecution witnesses Felipe Marbebe and Anacleto Molina were walking at the other side of the river with the latter following the former. It was further established that Marbebe was carrying bundles of abaca over his head, the heaviness of which he conceded made his head bow while he was walking. From these confirmed facts, Felipe Marbebe could not have seen appellant shoot Ernesto because in all probability, he was looking down on his path. That is why when he heard the shot, he immediately looked to where it came from and there he saw appellant, Jolito, Cirila, Gaudencio and Ernesto. In addition, the fact that the number of wounds sustained by Ernesto was only eight (8) indicates that one shot was fired towards Ernesto as testified to by prosecution witness Anacleto Molina. Judicial notice can be taken of the fact that one bullet of a shotgun contains 12 slugs. Felipe Marbebe's testimony that both appellant and Jolito shot Ernesto with their guns

is incredible because the latter could have suffered more than 8 gunshot wounds. Furthermore, if Marbebe's declaration were true, he could have been hit by the slugs that did not find their mark on Ernesto, if he were, as he also declared only four (4) armslength from Ernesto. It comes as a surprise to Us why the trial court acquitted appellant's brother, when all the evidence pointed to him as the one who fired the shot. The reason of the trial court in acquitting Jolito - that he looks like his brother Esperidion - is hardly convincing and acceptable considering that both Jolito and appellant were positively identified by the two (2) prosecution witnesses.

But, be that as it may, the error committed by the trial court in this regard does not affect appellant's culpability. Appellant's defense of alibi is jurisprudentially weak (*People v. Onquillano*, 149 SCRA 442; *People v. Acelajado*, 148 SCRA 142) as he was not able to demonstrate by convincing evidence that it was not physically impossible for him to have been at the scene of the crime at the time it was committed. Moreover, the defense of alibi is generally accepted with caution in the face of corroboration by near relatives for in such case, alibi is easier to fabricate (*People v. Detuya*, 154 SCRA 410; *People v. Pecoto*, 151 SCRA 14). In the case at bar, not only, was appellant physically present in barrio Barasalon, Janiway, Iloilo at the time of the commission of the crime, he and Jolito were also positively identified by prosecution witness Anacleto Molina as the persons who went up the river bank carrying guns and who levelled their guns at Ernesto. Only, it was Jolito who fired while appellant did not. Although appellant did not pull the trigger, his actual presence, and his act of pointing a gun towards Ernesto and their act of fleeing together when Ernesto fell down after the shot fired by Jolito, are all indicative of an existing conspiracy between him and his brother. Their acts show a unity of purpose and unity in the execution of their unlawful objective. No conclusion can be drawn from the acts of appellant except that he consented and approved the act of his brother in firing upon Ernesto. It is well settled that a person may be convicted for the criminal act of another where, between them, there has been conspiracy or unity of purpose and intention in the commission of the crime charged (*People v. Ibanez*, 77 Phil. 664; *People v. Serrano*, L-45382, May 13, 1985, 136 SCRA 899). Conspiracy arises on the very instant the plotters agree, expressly or impliedly to commit the felony and forthwith to pursue it. Once the assent is established each and everyone of the conspirators is made criminally liable for the crime actually committed by anyone of them (*People v. Monroy*, 104 Phil 759). The alleged lack of motive to kill Ernesto is likewise untenable. Motive is immaterial by reason of the positive identification of appellant by the prosecution witnesses. The qualifying circumstance of treachery attended the killing. As the evidence show, appellant and his brother Jolito hid and waited for Ernesto behind a big rock and as the latter got near the rock, he was suddenly shot by Jolito. The mode of attack adopted by appellant and his brother, enabled them to consummate the crime without risk to themselves arising from the defense which Ernesto might have offered. Likewise attendant in the commission of the crime is the aggravating circumstance of evident premeditation. The elements of this circumstance namely: (1) the time when the offender determined to commit the crime, (2) an act manifestly indicating that he has clung to his determination, (3) sufficient lapse of time between determination and execution to allow him to reflect upon the consequences of his act and to allow his conscience to overcome the resolution of his will had he denied to hearken to its warnings, are present in the case at bar as shown by the fact that the plan to kill Ernesto was hatched as early as 12 o'clock of June 21, 1972; that pursuant to the plan, appellant in the early morning of June 22, 1972, got his homemade shotgun and proceeded to the scene of the crime together with his brothers. Under prevailing jurisprudence, the trial court's award of civil indemnity in favor of the heirs of the deceased, Ernesto Maderse should be, as it is hereby ordered increased to P30,000.00.

ACCORDINGLY, except as to the above modification, the judgment appealed from is AFFIRMED in toto.

SO ORDERED.

Narvasa, (Chairman), Gancayco, and Griño-Aquino, JJ., concur.

Cruz, J., see concurring opinion.

[1] Exhibit I, Original Exhibits, p. 17

[2] Exhibit A, Ibid, p. 1.

[3] P. 17, supra.

[4] Exhibit N and N-1, PP. 15-16, Ibid.

[5] P. 3, Original Record

CONCURRING OPINION**CRUZ, J.:**

I concur but with the reservation that the extra-judicial confession, although really unnecessary in view of the other evidence submitted by the prosecution, should not have been considered at all.

It is clear from the records of this case that the said confession was obtained without the assistance of counsel or a valid waiver thereof in writing or in the presence of counsel. Art. III, Sec. 12 (3) of the Constitution clearly provides that "any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against" the accused.

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