

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. SIMPLICIO REALON AND EUTROPIO SOLIVEN, ACCUSED-APPELLANTS.

G.R. No. L-30832. August 29, 1980

Ponente: GUERRERO, J.

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GUERRERO, J.:

This is an automatic review of the death sentence imposed by the Circuit Criminal Court of Baguio City (Second Judicial District) in Criminal Case No. CCC-II-33-BB on the accused-appellants Simplicio Realon and Eutropio Soliven for the crime of Murder qualified by treachery and attended by the aggravating circumstance of evident premeditation.

The information filed on April 14, 1969 in the Court below by Acting First Assistant City Fiscal Antonino L. Cortes charges both accused as follows:

"That on or about the 13th day of April, 1969, in the City of Baguio, Philippines, and within the jurisdiction of this Honorable Court, the said defendants, SIMPLICIO REALON and EUTROPIO SOLIVEN, conspiring, confederating and mutually aiding each other, and armed with a deadly weapon, to wit: "Paltic," 12 gauge, did then and there willfully, unlawfully and feloniously attack and shoot VICENTE RAMOS at the back of his head (just above the nape), with treachery and known premeditation, and as a result thereof, said VICENTE RAMOS died almost instantly.

"All contrary to law, and with the qualifying circumstance of alevosia, and the generic aggravating circumstance of known premeditation.

"Baguio City, Philippines, April 14, 1969."[1]

During arraignment, the two accused entered a plea of not guilty with the assistance of two defense counsels.[2] Thereafter, trial proceeded.

For a better perspective of the incident involved in this case, it is well to start with the following uncontroverted facts:

On April 13, 1969 which was a Sunday, at about past three o'clock in the afternoon at the grand and in the Athletic Bowl located at the Burnham Park in Baguio City, a group of more than forty (40) male and female public school teachers were assembled and rehearsing a song for the inaugural ceremonies of the Benguet Division of the Bureau of Public Schools at La Trinidad, Benguet. The group was arranged in four horizontal rows on four steps of the grandstand and facing the basketball court below. Those belonging to the different voice groups of soprano, alto, tenor and bass were together or placed near each other so that on the fourth or uppermost row from left to right facing the conductress, Lena Domingo, and the basketball court stood the members of the tenor group which included, Serafino Gayudan, Simplicio Realon (one of the accused), Severino Dionisio, Jose Viray, Cipriano Bayangan, and Basilio Tumpac, Jr., then Vicente Ramos (the deceased victim), Federico Pacleb,

Mr. Puyasan, Mr. Balao, Andrew Sagubo, and Joseph Dampac, all members of the bass group. Between Federico Pacleb and Puyasan was a post.

Earlier, Joseph Dampac, Andrew Sagubo and the accused Simplicio Realon arrived together, the latter being accompanied by the other accused Eutropio Soliven, a mason working for one Delfin Balajadia of Baguio City. During the song practice, and apparently while waiting for his co-accused Realon, Soliven seated himself somewhere higher up the steps of the grandstand behind the fourth line of the teachers, more specifically at the back of the tenor group.

Because the place of the rehearsal was situated in a public park, there was a considerable number of people around. Children were playing at the uppermost step or part of the grandstand, just above the singing group but to the left, and in the ball court below, some young men were playing basketball. Within the immediate vicinity of the grandstand, it being a Sunday, there were promenaders and excursionists, young and old, either walking or just lazing around.

The teachers in the grandstand were holding copies of their song selection and were actually singing and blending their voices to the song "Come Where the Lilies Bloom" when accused Simplicio Realon pulled out of the formation and shortly thereafter, a loud explosion was heard. Immediately, panic ensued. Adults and children were screaming, some were running in different directions while others were scampering to safety. Realon and Soliven left the grandstand in haste, one following the other. Near the main gate of the Athletic Bowl, both Realon and Soliven were caught and held separately, then turned over first to Patrolman Patrick Tolentino, then to Patrolman Jose Abellera, both of the Baguio City Police Department. Pat. Abellera later brought the two accused to the City Hall for investigation.

Immediately after the loud explosion, Vicente Ramos, one of the teachers, fell from where he was standing in the grandstand. It turned out that he was shot at the upper portion of the nape. He died from the gunshot wound inflicted. The Necropsy Report[3] dated April 14, 1969 of Dr. Perfecto O. Micu, Medico-Legal Officer of the Baguio City Police Department who examined the cadaver of the deceased Ramos, reveals the following:

"Postmortem Findings:

- Gunshot wound of entry (buckshot), consisting of a lacerated wound stellate in shape (with 5 points), with a diameter of 2.5 cms., located on the nape (posterior part of the neck) and directed inward and upward.

Resultant effects:

a)

Laceration of the skin, muscles, nerves and blood vessels on the back part of the neck.

b)

Fracture, comminuted, open, base of the skull, posterior to and abutting the foramen magnum, severe.

c)

Fracture, comminuted, open, first cervical vertebra, severe.

d)

Laceration (complete severance) of the vertebral artery, severe.

e)

Laceration of the Cerebellum, medulla oblongata, and brain stem, severe.

f)

Intracranial and other internal and external hemorrhages, massive.

- Contusion - hematoma, upper right eyelid, severe,
- Shed blood - about 300 cc. at the place where the body fell (2nd step of grandstand).
- Four (4) metal pellets, distorted in shapes, about size smaller than corn grains and three (3) brown hard board stoppers about 16 mm. in diameters each-recovered from the cranial cavity through the wound.
- Numerous blackish powder burns around the wound.

Cause of Death:

Fractures, complete, open, comminuted, base of skull, and first cervical vertebra, severe; laceration, complete, vertebral artery and other blood vessels; lacerations, cerebellum, medulla oblongata, and brain stem, severe and resultant intracranial, internal and external hemorrhages, massive, all due to the gunshot (buckshot) wound on the back of the neck."

Dr. Micu, testifying for the prosecution, stated that when he performed the autopsy, he actually found two wounds on the person of the deceased Ramos - a gunshot wound at the nape and a contusion with hematoma near the eye. He stated, however, that the latter wound could have been caused by one of the pellets which came from the gunshot which caused the first wound. Because of the presence of blackish powder burns within the vicinity of the gunshot wound, he estimated that at the time of firing, the distance between the skin of the back of the victim's neck and the muzzle of the gun used was between two to three inches, more or less. He further added that the gunshot wound could cause instantaneous death because the shot passed the spinal cord which is a vital organ.

Aside from Dr. Micu, the prosecution presented as witnesses five teachers who were among the participants in the rehearsal, four of whom belonged to the row of the accused Realon and the victim Ramos, which row was the fourth or last row; Remedios D. Ramos, the widow of the deceased victim; Alejandro Alo; Patrolman Patrick Tolentino; and three bystanders, namely Adeline Lumbag, Romeo Mandawe, and Ricardo Birog.

A brief recital of their respective testimonies follow:

Witness SERAFINO GAYUDAN, an elementary school teacher of Catublang Barrio School, Buguias, Benguet, who stood at the extreme left of the last row of the chorus, recalled that during the song rehearsal at the Burnham Park grandstand, the accused Soliven placed himself at the back of the group of teachers about one meter directly behind him. This witness further testified that while they were singing "Come Where the Lilies Bloom," he noticed the accused Realon, who was just beside him to his right, pull out of line. About less than a minute thereafter, he heard an explosion, then saw Vicente Ramos fall. He jumped down one step from his position, then turned his back and saw both accused Realon and Soliven running towards the direction of the skating rink at the Burnham Park. Just before he went to help the victim Ramos, he saw several children running after the two accused shouting something which he could not understand. About ten minutes later, he saw the accused arrested near the tennis court where the body of the victim was brought. He did not see any weapon in the possession of the accused Realon nor did he see who shot the victim Ramos. (t.s.n., pp. 47-63, May 14, 1969).

Witness SEVERINO DIONISIO, a teacher at the Badayan Elementary School, Buguias, Benguet, declared that he was the third on the last row from the left; he testified that the accused Soliven was seated about two feet behind Serafino Gayudan and the accused Realon who were both to his (witness') left. Like Serafino Gayudan, this witness noticed the accused Realon leave his place in the last row of the group while they were in the middle of a song. He noticed further that said accused moved towards the right, and a few moments later, there was a gun

explosion. This witness sat down for cover, then after about two seconds turned his head to see where the explosion came from. He saw Vicente Ramos collapse and fall forward. Then he saw both accused running towards the Burnham Park Lake with the accused Soliven in the lead. He also saw that the children who were earlier playing at the upper portion of the grandstand to their left were now running after the two accused. The children were shouting but he could not distinguish the words, except that he heard them say that they saw a gun. This witness, however, did not see if the accused Realon had a gun. (t.s.n., pp. 146-158, May 23, 1969).

Another witness, CIPRIANO BAYANGAN, an elementary school teacher of Saclalan Barrio School, Buguias, Benguet, who stood second to the left of the victim Ramos, testified that while the group was in the middle of "Come Where the Lilies Bloom," he turned his head to the right and saw a gun about two inches away from and pointed at the head of said Ramos, who was about one meter away from him. After the gun exploded, this witness covered the back of his head with his two hands, then he saw the victim lying on the cement floor of the grandstand, blood oozing from the back of his head where the gun had been pointed at. This witness described the barrel of the gun as "very big" and declared that the color of the handle was brown. When showed the gun marked as Exhibit "A" for the prosecution, he stated that "(t)he barrel is similar to this and the handle is brown like this." He did not see who fired the gun. (t.s.n., pp. 37-47, May 14, 1969).

FEDERICO PACLEB, another prosecution witness, who stood beside and to the right of the victim Ramos, declared that just before the loud explosion, the teachers were singing with their attention focused on their respective copies of the song they were rehearsing. After the explosion which he thought came from a firecracker, he touched his left ear because he could not hear anymore, and he felt pain. About twenty-five seconds later, he turned and saw that the victim had fallen. He also saw the victim's wife, Mrs. Ramos, crying for help. Some of the teachers went to help but he did not. Instead, he went with the other teachers who ran away because he was frightened. He did not see who fired the shot nor did he see the two accused after the explosion. (t.s.n., pp. 159-164, May 23, 1969).

MARCOS PALECPEC, elementary school teacher of Bangao Elementary School, resident of Baguio City, was the last among the teachers who testified for the prosecution. He declared that he was then the municipal principal for administrative matters, hence the accused Realon was one of the teachers under him administratively. He recounted that in the afternoon of April 13, 1969, he was among those who attended the scheduled song rehearsal at the Athletic Bowl of the Burnham Park. He was already at the appointed place at the grandstand when accused Realon arrived and approached him. The latter apologized for being late and for being drunk. This witness thereupon asked said accused, "Can you practice?" and Realon answered "Yes" then proceeded to join the group. In the actual formation, this witness stood in the second row and thus had his back to the accused and the victim who were both in the last row at the back. He claimed that he did not see who shot the deceased. (t.s.n., pp. 201-205, June 5, 1969).

The widow, Mrs. REMEDIOS D. RAMOS, also testified and related an alleged incident between her late husband and the accused Realon more than two years prior to the death of the former. At that time, her husband was the head teacher at the Guinaoang Elementary School with supervisory authority over Realon who was a shop teacher in the same school. Mrs. Ramos recalled that at around 11 o'clock in the evening of October 13, 1966, Realon was drunk and was going in and out of his quarters uttering words like "Come down, bull shet, head teacher of Guinaoang! He is a thief! Twenty centavos, one peso contributions. Even if you report me to the D.O. I am not afraid. Come down! x x x I am not afraid. Do not compare me with Viray!" As a consequence of that incident, the late Vicente Ramos wrote a letter to the then District Supervisor, Mr. Dampac. Mrs. Ramos came upon a draft of said letter among her husband's papers after his death, and the same was produced in Court and marked in evidence as Exhibit "J". Translated from Ilocano and read into the record by the Deputy Clerk of Court, the draft

reads as follows:

"The undersigned requests that Mr. Realon, shop teacher in this school, be investigated accordingly for his utterances with a loud shout that he made in the evening of October 13, 1966, 11 o'clock which was few meters (sic) from our quarters of the northern side of this quarters (sic) and sometimes to the eastern side coming closer to ours he started reciting thus:

'Hoy, contributions, contributions, sometimes one peso, sometimes twenty centavos. Come down there and shoot me. I am not afraid. You should be grateful because I have no intention against you, because if there is, you should have long been dead. You tell us to give contributions, but we don't know anything about it because these contributions are for your family. You are a thief, Mr. Ramos. Now shoot me. You report me and I will answer it. You demand contributions, but this is for your family. Ha, stupid, you old man. Sigue, shoot me. It is good I have no gun. You demand contribution, but it is not good at all, not for the good of the majority, and it is for your wife. It is s shady deal. Ha, Mrs. Ramos? What you have done to Viray, don't do it to me! Head teacher of Guinaoang, you are a thief, bull shet. Report this to the D.O. If you report me I am not afraid!'

The foregoing statements were repeated many times."

About a week after the incident, continued Mrs. Ramos, the District Supervisor, Mr. Dampac, went to Guinaoang and conducted an investigation in closed doors. After the investigation, the matter "was settled." Sometime in December, 1966, or January, 1967, Realon brought a goat to the residence of the Ramos spouses which the male teachers, including Mr. Dampac, butchered and partook of while drinking. According to Mrs. Ramos, she heard from Mr. Palecpec and her husband that Realon said of the goat, "This is my fine, sir."

Mrs. Ramos further recounted another incident which happened at the end of the same school year (1966-1967) after the closing exercises. Realon was drunk again and he threw stones at the teachers' quarters while uttering unprintable words. Mrs. Ramos stated that "his (Realon's) ire was vented against Mrs. Alegre including us." She and the other female teachers who were inside the quarters just kept silent. Her husband was then in the school offices.

When the school year ended, the Ramos spouses were transferred to Sinipsip while Realon stayed on at Guinaoang until he was transferred to Liñgaoan but still under the supervision of Mr. Ramos. They saw each other on several occasions and once Realon greeted Mrs. Ramos "Good Morning" but most of the time, according to this witness, "Sabalit ti pamagkit-kita na kada kami," "kasla kami traidor" (he looked at us as though we were traitors). On several occasions, too, she saw Realon in the company of the other accused Soliven.

One week before the shooting at the Athletic Bowl grandstand, Mrs. Ramos claims that her husband showed her a gun, which she later identified as Exhibit "K". She was informed by Mr. Ramos that he bought the gun "for security reasons" as Realon had evil plans against him. Two days before the song rehearsal on April 13, 1969, Vicente Ramos told his wife that he "sensed a plan by Mr. Realon," and that he learned that Realon had a gun. (t.s.n., pp. 110-141, May 15, 1969).

ALEJANDRO ALO, a gardener in the employ of the Department of Parks, Baguio City, and assigned in the Burnham Park Lake, declared that in the afternoon of April 13, 1969, he was near the lake when he saw many people rushing out of the Athletic Bowl. He particularly noticed two children who were saying, "Those were the persons who killed!", pointing at the two accused who were running. He gave chase and at the skating rink, he collared one of the accused, Soliven, while the others caught Realon. He held Soliven for about five minutes, then turned him over to policemen Tolentino and Abellera. It was Pat. Abellera who brought the two accused to the police station in his car. This witness added that from the time of their apprehension up to the time they were indorsed to the policement about 5 minutes thereafter, both accused did not make any protest nor did they say anything. (t.s.n., pp. 22-29, May 14, 1969, and pp. 404-411, June 19, 1969).

Patrolman PATRICK TOLENTINO of the Baguio City Police Department testified that in the afternoon of April 13, 1969, he was assigned to render traffic duty at the Burnham Park. It was about 3 o'clock while he was at the left side of the Burnham Park Lake when he heard an explosion which sounded like a firecracker. He was thereupon informed by Alejandro Alo, the park gardener, that there was a quarrel at the Athletic Bowl. He, Alo and others then went towards the Athletic Bowl. At the entrance thereof, they met two children who said to him (Pat. Tolentino), "So da gita" (They are the ones), pointing at the fleeing accused who were already about 30 to 40 meters away. He blew his whistle to make the accused stop running but they did not pay heed. When the accused reached the skating rink, Alo caught Soliven, while Realon was caught by the others. At the skating rink, Pat. Tolentino was handed a gun, Exhibit "A", by a boy about 17 years of age, with the information that it was thrown away by the accused. He smelled the muzzle of the gun and found that it was recently fired. Peering through the barrel, he saw one used shell or cartridge. He brought the gun, Exhibit "A" with him to the place where the body of the victim was being examined by investigators. There he was told by Palecpec that there was another gun at the grandstand. He verified this report and saw the other gun referred to, Exhibit "K", a 32-caliber Japanese Lugger, lying on the steps of the grandstand about one meter from where there was blood. Earlier, the investigators found a magazine of a Japanese Lugger in the clothing of the deceased. In the grandstand, an investigator came and took the Lugger, Exhibit "K". Patrolman Jose Abellera arrived and took the first gun, Exhibit "A", with him when he brought the two accused to the police station. (t.s.n., pp. 64-87, May 14, 1969). At the time that the two accused were being held, neither of them showed any kind of protest. (t.s.n., p. 403, June 18, 1969).

The bystanders who testified for the prosecution were Adeline Lumbag, an 18-year old college student, Romeo Mandawe, an 11-year old Grade VI student, and Ricardo Birog, an 18-year old houseboy who reached Grade VI.

ADELINE LUMBAG informed the Court that in the afternoon of April 13, 1969, she accompanied her aunt, Miss Victoria Suñgay, a substitute teacher, to the Athletic Bowl of the Burnham Park. While waiting for her aunt who was a participant in the song practice, she seated herself on the steps of the grandstand near the group of teachers, about two and a half meters from the last person in the formation at her side. In the middle of a song, she planned to go up the steps of the grandstand but as she started to do so, she changed her mind and turned back. As she turned back, she heard a shot and she looked at the direction from whence it came. She saw smoke coming from within the group and noticed that the crowd was starting to scatter, some of the teachers scampering to different directions. She did not see who fired the shot but as she tried to approach the victim, who was about seven meters away, she met two men running away from the group. (At this point during the direct examination, this witness was reluctant to identify the fleeing pair, but upon the Court's prodding, she pointed at the two accused.) She identified Soliven as the one running ahead followed by Realon whom she said was tucking a gun at his left waist while running. Both men passed her at a distance of about two meters. She also had a good view of the gun which she said was "just the same as" Exhibit "A" because of the side and the size of the muzzle. (t.s.n., pp. 1-21, May 14, 1969).

Miss Lumbag's presence within the vicinity of the scene of the crime was confirmed by the testimony of Serafino Gayudan. (t.s.n., p. 54, May 14, 1969).

ROMEO MANDAWA, an eleven-year old boy, testified that he was with his two younger brothers, aged 6 and 7 years, at the Burnham Park in the afternoon of April 13, 1969. They had come from Church, that day being a Sunday. They were near the lake when they heard a gun shot. After the explosion, this witness saw the accused Soliven running from the grandstand followed by many children who were also running. He saw Soliven throw a gun inside a garbage drum, then proceed to run towards the direction of the skating rink. The gun, this witness recalled, had a big muzzle and a white handle. He then saw another man retrieve the gun from the garbage drum

and hand it over to a policeman near the gate of the Athletic Bowl. Soliven was caught by the park gardener and a policeman at the skating rink. Witness Mandawe went to the tennis court to view the body of the victim and recognized the dead man as his neighbor, Vicente Ramos. Immediately, he went to inform the victim's son, Eduardo Ramos, that his father was dead. (t.s.n., May 15, 1969, pp. 90-108).

RICARDO BIROG testified as the lone eyewitness to the actual shooting as follows: He was employed as a houseboy in the home of Pedro Madarang in Baguio City. April 13, 1969 which was a Sunday, was his off-day. In the afternoon of that day, he was with one Julie Carbonell at the Burnham Park. They stayed for a while near the skating rink then he left Julie there to go to the basketball court where a game was going on. From there, he saw a group of persons singing at the grandstand near the basketball court. He then went up the grandstand, to its uppermost steps. He seated himself about 25 meters behind the group to its left facing the basketball court. From this oblique position, he noticed the accused Soliven seated about three meters also to the left of and behind the group. After about twelve minutes of watching the song practice, he saw the accused Realon, who was the second man from the left side of the fourth and uppermost row in the group, move to the right and with his (Realon's) right hand point a gun at and shoot the deceased victim at the back of the neck. The end of the gun was about two inches from the victim's neck at the time of the explosion. The gun had a big muzzle and was about seven inches long. After the explosion, the victim slowly fell, while the two accused Realon and Soliven ran away together, Realon tucking the gun at his left waist. This witness then declared that he ran to the side of the grandstand to have a view of the fleeing accused and saw that when they were near two big trees about fifteen meters from the grandstand, Realon pulled out the gun from his waist and passed it to Soliven. The last he saw of the accused was when they were going out of the gate of the Athletic Bowl.

This witness identified the gun as Exhibit "A". He further averred that he did not relate the incident to anybody except two teenagers in front of the St. Louis University, and that it was on May 11, 1969, or about a month after the incident, when he was asked by the fiscal to testify in this case. (t.s.n., pp. 169-200, June 5, 1969).

For the defense, the following were presented in Court: the two accused, Simplicio Realon and Eutropio Soliven; Andrew Sagubo, one of the teachers; Delfin Balajadia, accused Soliven's employer; and Patrolman Jose Abellera.

Accused SIMPLICIO REALON testified that on July 19, 1966, he started teaching at the Guinaoang Elementary School where his head teacher was the late Vicente RAMOS. He confirmed that there was an incident between him and Ramos sometime in October, 1966 when he called the latter a thief and accused him of using his collections for his family. This accused claimed that the matter was investigated and thereafter, he and Ramos were in good terms with each other, although it was only two or three months later that he was able to bring the goat which District Supervisor Dampac had suggested for the amicable settlement of his differences with Ramos. Thereafter, he and Ramos were transferred and assigned to different places but when they met each other on certain occasions, he always greeted the Ramos spouses.

In the evening of April 12, 1969, he arrived at Baguio City for the song rehearsal scheduled the following day. He boarded at the house of Aproniano Soliven whom he had known from the time he got married. It was there that he saw the other accused Eutropio Soliven, Aproniano's brother.

In the morning of April 13, 1969, he was accompanied by said accused Soliven to the residence of Andrew Sagubo to get his check, but he was informed by the latter that the check had not arrived yet. Both accused then went to the market, then had lunch at the house of Aproniano. After lunch, accused Soliven invited Realon to a dog party. Realon accepted the invitation provided that they would go after the practice at the Burnham Park. At about 2 o'clock in the afternoon, while both accused were walking along General Luna Road, Soliven left Realon to urinate. When Soliven came back, he was holding a toy gun with paper bullets (Exhibit "2" for the defense)

which he claimed he had picked up. Realon "played" with the toy gun for a while, then asked Soliven if he could have it for his son, but Soliven refused so the toy gun was returned to him. They went on and saw Andrew Sagubo having his shoes shined. Realon also had his shoes shined, and so did Joseph Dampac who came along shortly. After their shoes were shined, Soliven volunteered to treat the three teachers, Realon, Sagubo and Dampac, to a drink. After the drink at a nearby store, they all boarded a cab and went to the Burnham Park.

Upon their arrival at the park, Realon approached Principal Palecpec to apologize for being late. Soliven sat himself at the back of the group of teachers about one meter away. During the practice and in the middle of a song, Realon claims that he folded his copy of the song, put it in his pocket and left his position in the fourth and last row of the group with the intention of telling Soliven to go ahead to the dog party because he (Realon) could not go anymore. As he was approaching Soliven to where the latter moved in line with the fourth row, he heard a very loud explosion which sounded like a backfire of a truck. He was frightened and saw Soliven standing up. When Soliven stood up, the toy gun (Exhibit "2") fell from him. Realon then turned his back and saw the teachers running to different directions. He heard someone shout, "Take cover!" so he went down the grandstand walking fast because he was afraid and all the teachers had gone away and he did not want to be left alone. Soliven was ahead of him about 6 to 7 meters also walking fast. When he was nearing the gate, he met Patrolman Tolentino to whom he said, "Sir, there is a commotion there. Please go and see." Pat. Tolentino went right away. Realon continued out of the gate and about 40 meters therefrom, he saw that Soliven was apprehended by a policeman. He himself was apprehended and held by a man not in uniform but who showed a badge and claimed he was a "justicia". Later, a jeep arrived and Soliven and he were told to ride the jeep. The two men who caught them also rode in the jeep. They were all brought to the police department. (t.s.n., pp. 323-400, June 17-18, 1969).

Accused EUTROPIO SOLIVEN's testimony was in accord with that of his co-accused insofar as he (Soliven) was concerned. Additionally, he declared that he had known Realon from the time the latter married his townmate, now Mrs. Realon, although he is not related to his said co-accused. At the time of the incident in question, he had been employed for five days as a mason by Delfin Balajadia. It was to his said employer's dog party that he invited Realon on April 13, 1969.

This accused also claims that he picked up the toy gun (Exhibit "2") in the vacant lot where he relieved himself in the afternoon of April 13, 1969. He allowed Realon to try the toy gun, and the latter used up all its paper bullets, but he refused to give the toy gun away to Realon because he had intended to give it to his own child. When they both went on their way, he placed the toy gun well inside his pocket.

At the Burnham Park while waiting for Realon, he sat at the back of the group of teachers, then transferred about five meters to the left because he wanted to watch the basketball game going on below the grandstand. It was when he saw Realon approaching him when he heard the explosion. He immediately stood up and the toy gun fell from him. He picked it up and put it back inside his pocket. He ran away because he was afraid as he knew there were tough guys in Baguio and because he was in a hurry to go to Balajadia's dog party. At the skating rink, he was collared by someone, then turned over to a policeman. (t.s.n., pp. 254-316, June 10, 1969).

ANDREW SAGUBO confirmed both accused's testimony regarding their call at his residence in the morning of April 13, 1969, and their meeting each other again along General Luna Road at around two o'clock in the afternoon of the same day, up to the time they all went together to the Athletic Bowl in a taxicab. At the grandstand, however, this witness did not notice where the accused Soliven seated himself but he saw about four or five children playing at a place higher up the steps of the grandstand. This witness was in the fourth row, the second man from the right facing the basketball court, but he claims that he did not see anyone pull out of the line before the explosion. Immediately after the explosion, he saw Realon just standing where he was supposed to be, then saw him leave the place, going towards the left of the grandstand. He (Sagubo), together with a co-teacher

Joseph Dampac, tried to help when they saw the victim Ramos lying on the steps of the grandstand and Mrs. Ramos crying. (t.s.n., pp. 210-244, June 9, 1969).

Witness DELFIN BALAJADIA, confirmed that at the time of the incident, the accused Soliven had been working for him as a mason on and off for about a week, and that he had organized a dog party for his laborers, including Soliven, to be held at four o'clock in the afternoon of April 13, 1969. According to this witness, the dog party was held as planned but the accused Soliven was not able to attend.

Patrolman JOSE ABELLERA recalled that in the afternoon of April 13, 1969, he was then at the Burnham Park near the parking station when he heard a shot and noticed people running towards the direction of the Athletic Bowl. He rode in his car and went to the place. At the gate of the Athletic Bowl, he saw Pat. Tolentino. The latter turned over to him a pistolized shotgun and the two suspects, Realon and Soliven. The two park gardeners, Alejandro Alo and one Andaya, were also there. He brought the gun, the suspects, and the two gardeners to the police station in his car. At the station, he frisked the suspects as customarily done and found tucked in the waist of Soliven a toy gun (Exhibit "2") which he handed over to the desk sergeant. (t.s.n., pp. 245-252, June 9, 1969).

After the case was submitted for decision, the lower court rendered on July 15, 1969 the decision appealed from, the dispositive portion of which states:

"The court, therefore, finds the accused Simplicio Realon and Eutropio Soliven guilty beyond reasonable doubt of the crime of Murder as charged in the information qualified by treachery and aggravated by evident premeditation. There being no mitigating circumstance to offset it, the court has no alternative but to impose the maximum penalty of death to each of the accused, to indemnify the heirs of the deceased jointly and severally in the amount of Twelve Thousand Pesos (P12,000.00).

"The accused shall also pay jointly and severally the heirs the sum of Three Thousand Pesos (P3,000.00) as moral damages, plus Ten Thousand Pesos (P10,000) for the loss of the earning capacity of the deceased and One Thousand Pesos (P1,000) in exemplary damages, and the accessory penalties provided for by law and to pay the costs.

"SO ORDERED."[4]

In their Brief, appellants Realon and Soliven make the following Assignment of Errors:

- The lower court erred in giving credence to the testimonies of prosecution witnesses Ricardo Birog, Romeo Mandawe and Adeline Lumbag;
- The lower court erred in finding that accused Simplicio Realon had the motive to kill Vicente Ramos;
- The lower court erred in not giving due significance to the suppression by the prosecution of the testimony of the National Bureau of Investigation officer who fingerprinted and paraffin-tested the accused;
- The lower court erred in convicting the accused and imposing the death penalty; in finding conspiracy attended by the aggravating circumstance of evident premeditation.[5]

Anent the first assigned error, appellants maintain that the lower court should have discredited and disregarded the testimonies of prosecution witnesses Ricardo Birog, Romeo Mandawe and Adeline Lumbag for being doubtful, unreliable and/or incredible.

The rule is well-settled that "where the issue is one of credibility of witnesses, the appellate court will generally not disturb the findings of the trial court, considering that it is in a better position to decide the question, having heard the witnesses themselves and observed their treatment and manner of testifying during trial, unless it has plainly overlooked certain facts of substance and value that, if considered, might affect the result of the case."[6]

In the instant case, We find no justifiable or compelling reason to disturb the findings and conclusions of the trial court on the credibility of the prosecution witnesses singled out by herein appellants.

With respect to the eyewitness Ricardo Birog, appellants set forth the following circumstances which allegedly cast grave doubt on the said witness' credibility and on his supposed presence at the place of incident: first, Birog was a last minute witness, his name was not included in the Information, and he was not presented during the hearing on the petition for bail; second, Birog did not report what he allegedly saw to the police, to his employer, or to the Fiscal, but he related the story to two teenagers both unknown to him; third, Birog was presented as an alleged eyewitness, but it appears that the Fiscal simply asked him to come to Court and did not even bother to take down his statement; fourth, Birog's testimony shows that he could not have been present during the occurrence of the incident in question; and fifth, Birog claimed that he did not know the persons assembled at the grandstand of the Athletic Bowl rehearsing songs nor remember their faces, and that he did not know Realon nor Ramos before the incident, yet he was able to show where the latter were positioned in the formation of teachers. Appellants further express bewilderment at the fact that nowhere in the records is there an explanation as to how witness Birog was "discovered" by the prosecution.[7]

As to the first circumstance, although the defendant in a criminal case is entitled as a matter of right to be furnished by the prosecution with a list of witnesses to be presented against him during the trial, the last sentence of Section 1, Rule 116[8] of the Rules of Court allows the prosecution to call at the trial witnesses other than those named in the complaint or information.[9] Thus in the case of *People vs. Zapatero*, We reiterated the ruling that "the prosecution is not precluded from calling as a witness a person who was not listed as a witness in the information." [10]

In this case, therefore, there was nothing irregular with the presentation of witness Birog at the trial by reason of the fact that his name was not included in the list of witnesses at the end of the Information filed against herein appellants. Moreover, it appears that the prosecuting fiscal came to know of Birog's witnessing the incident only after the Information had been filed in the lower court on April 14, 1969. Birog himself declared that it was only on May 11, 1969 that he was asked by Fiscal Carbonell to testify (t.s.n., p. 179, June 5, 1969). Birog's name could therefore not have been included in the Information which was filed on an earlier date. And even if the Fiscal had known of Birog at the time he filed the Information, no right of the accused is violated. As We ruled in *People vs. Estrada*, [11] the doctrine enunciated therein states its rationale, thus:

"x x x 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. While the accused in a criminal prosecution is entitled to know the nature and cause of the accusation against him, 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."

Lastly, the fact that no explanation appears in the records as to how the prosecution came to know of Birog and his presence at the scene of the crime cannot be a basis for appellant's assertion that this witness was "discovered" as a last minute witness to fill a gap in the prosecution's evidence. A mere suggestion or insinuation that a witness is perjured or planted will not suffice to destroy his credibility. The allegation must be supported by convincing and satisfactory proof, and such proof herein appellants have failed to provide.

As to the second circumstance urged upon Us by appellants, We do not find it highly incredible that Birog did not report what he knew about the incident to the authorities or to his employer, and instead related the story to strangers. It must be remembered, as correctly observed by the trial court that Birog "was merely a houseboy who

reached only the sixth grade, unaccustomed to the ways of public life, much less to determine whom to confer with in matters of criminal prosecution." [12] Given his quite modest means of livelihood, Birog understandably did not want to be involved in the case, so he chose not to confide in those persons who could compel his involvement, but only to the two teenagers who were not known to him and who in all probability did not know him as well. The natural reticence of most people to get involved in a criminal case is of judicial notice. [13] As was held in *People vs. Delfin, et al.*, [14] "x x x the initial reluctance of witnesses in this country to volunteer information about a criminal case and their unwillingness to be involved in or dragged into criminal investigations is common, and has been judicially declared not to affect credibility." [15] In any case, herein witness Ricardo Birog had agreed to be, as in fact he was, presented in court as a witness for the prosecution, and he declared what he knew about the shooting incident.

Moreover, the circumstance that Birog did not execute a written statement prior to his oral testimony in court could not in any way affect his credibility as a witness. There is no law which requires that the testimony of a prospective witness be first reduced to writing in order that his declarations in court at a later time may be believed or accepted by the trial judge. "The rules do not make it a condition precedent for a witness to give his affidavit before taking the stand. The procedure is adopted to safeguard the parties from a recalcitrant witness." [16] In the case of *U.S. vs. Dacir*, the Supreme Court pronounced the rule as to the basis of the credibility of a witness' testimony, thus:

"The value as evidence of the testimony of a witness given in open court in the course of a trial had therein is due for the most part to the following considerations: That under such conditions it is given under the sanction of an oath and of the penalties prescribed for perjury; that the witness' story is told in the presence of an impartial judge in the course of a solemn trial in open court; that the witness is subject to cross-examination, with all the facilities afforded thereby to test the truth and accuracy of his statements and to develop his attitude of mind toward the parties, and his disposition to assist the cause of truth rather than to further some personal end; that the proceedings are had under the protection of the court and under such conditions as to remove, so far as is humanly possible, all likelihood that undue or unfair influences will be exercised to induce the witness to testify falsely; and finally that under the watchful eye of a trained judge his manner, his general bearing and demeanor and even the intonation of his voice often unconsciously disclose the degree of credit to which he is entitled as a witness." [17]

The fourth and fifth circumstances cited by appellants, which are equally not deserving of merit, may be considered together. Appellants claim that Birog's testimony shows that he could not have been present during the shooting incident because he did not know what songs the teachers were singing or how many songs were sung, he could not calculate how long he stayed watching the teachers and he could not remember the faces of those present at the rehearsal because he saw "only the one who shot." Appellants also assert as unbelievable the fact that Birog could remember the face of Realon, and likewise point out the incongruity between the two sketches (Exhibits "I" and "I-A") drawn by Birog.

First of all, it is not true that Birog could not say how long he stayed to watch the song rehearsal. He specifically stated during cross-examination that he was in the grandstand "about twelve minutes" before the shooting took place (t.s.n., p. 183, June 5, 1969). Secondly, it is understandable that Birog could not remember the faces of the teachers, how many songs were sung and what song was being sung at the time of the shooting. It must be kept in mind that he was a mere bystander. He was seeing the group of forty or so teachers for the first time and in a place where there were many other people around. He did not even go to the park with the intention of watching the teachers, as in the first place, he could not have known that there was going to be a practice. His presence at the specific place where he was when the shooting occurred was accidental. Nor was he seated or positioned in front of the teachers to be able to see their faces. He was up the grandstand at the back of the formation. And even if he

passed in front of the group, he could not have possibly memorized all those faces. Neither could he be expected to recall the songs that were sung if in the first place he was not familiar with the songs. As a matter of fact, there is evidence to show that even some of the teacher-participants were learning their songs for the first time that day.

On the other hand, it should not come as a surprise that Birog remembered the face of Realon, and, for that matter, that he could also identify Soliven. Birog specifically declared that when the two accused fled, "x x x they were running near me" (t.s.n., p. 195, June 5, 1969), and even when the accused had left the grandstand, Birog ran to have another look at them and that was when he saw Realon pass the gun (Exhibit "A") to Soliven between the two big trees (t.s.n., pp. 176 and 193, June 5, 1969). Besides, regardless of the fact that Birog did not know either of the accused prior to the shooting, he indicated in a sketch that the assassin was the second man from the left in the last line of the group of teachers. It is admitted that such was the position of accused Realon during the song practice.

The matter of the discrepancy between the two sketches of Birog is not of any consequence. Birog himself stated that the first sketch was wrong so he drew another one. In other words, he identified the second sketch as the correct one. Lastly, contrary to appellants' assertions, an objective and fair examination of Birog's entire testimony shows that he was at the place of the incidence of the crime when it was committed and that he actually witnessed the shooting at the time when it was being perpetrated.

With respect to the 11-year old witness Romeo Mandawe, appellants likewise contend that his testimony should be discredited because 1. although he testified that he saw and could identify the gun used in the shooting, when shown Exhibit "A" he stated that what he saw was a different gun with a big muzzle and with a different handle, and 2. while this witness testified that he saw the gun being placed in a drum, he did not inform the police about it.[18]

From the records, the evidence shows factually that when confronted with Exhibit "A", witness Mandawe did not expressly say that it was a different gun that he saw. He merely stated that "It has a different handle" (t.s.n., p. 92, May 15, 1969), and on cross-examination, he said "the one I saw was with (a) white handle" (t.s.n., p. 101, May 15, 1969). On the other hand, when asked to describe the gun which he saw, he replied, "It has a big muzzle" (t.s.n., p. 99, May 15, 1969), exactly the same description given by the other witnesses who saw the gun used in the shooting. Coincidentally, Exhibit "A" also has a big muzzle. This witness may have been mistaken as to the color of the handle of the gun but considering the excitement attendant to the event, this is trivial and inconsequential. The vital point in his testimony is that he saw the accused Soliven throw the gun inside a garbage drum and afterwards, the gun was retrieved by another man who delivered it to a policeman. This part of Mandawe's testimony is again corroborated by other prosecution witnesses.

The circumstance that Mandawe did not inform the police that he saw the gun thrown inside the drum, even if true, is also not material to this witness' credibility. Being a young boy, he could not be expected to volunteer information to the authorities especially if he was not being asked. In any case, he has revealed what he knew in Court, and We find no justifiable reason to disbelieve the parts of his testimony which are sufficiently corroborated by the other evidence on record.

With respect to prosecution witness Adeline Lumbag, appellants express incredulity at her claim that she stayed after the shooting and even approached the victim while all the others, including the male teachers, were scampering to safety. Appellants point out that in the confusion that ensued, with everybody running around, she could not have seen the accused Realon tuck a gun inside his waist as her view was obstructed.

Appellants' position, however, assumes facts which are not of record. Although it is not doubted that immediately after the loud explosion, people were scared and ran for cover, there is no evidence to show that all the teachers

ran in the same direction as Realon. On the contrary, the evidence shows that the teachers scampered in different directions and most of them went downwards to the lower portion of the grandstand. Even if it were to be speculated that some of the teachers went towards the direction taken by Realon, they could not have been that many as to have completely obstructed Adeline's view of the said accused. In fact, the testimony of Adeline does not disclose whether or not some teachers ran abreast of or near Realon. What is clear is that she saw both the accused running one after the other, passing her at a distance of about two meters and that she saw Realon tucking a gun at his waist.

Neither does the evidence show that everybody left the grandstand after the shooting, as appellants would assume. It was not only Adeline Lumbag who remained where she was and who tried to approach the place where the victim was. Mrs. Ramos, the victim's widow, was the first to go near her husband. Some of the teachers went to help, three of whom were Joseph Dampac, Serafino Gayudan, and one of the defense witnesses, Andrew Sagubo. It is not clear why Adeline Lumbag moved toward the victim but she said she did and it could have been for a number of different reasons. In any case, although Adeline Lumbag's actuations as claimed by her may be characterized as exceptional considering the reaction of the majority of the persons in the grandstand and its vicinity, We do not find this a ground for discrediting her testimony. It is a fact that different people react differently to the same types of situations.

As a final disposition of the first error assigned by herein appellants, We quote the following observations of the trial court which We find to be persuasive, clear and convincing:

"x x x the declarations of the principal witnesses Adeline Lumbag, Alejandro Alo, Ricardo Birog, Romeo Mandawe and Patrick Tolentino, who are disinterested witnesses, were clear, unequivocal and convincing. From the declarations of these witnesses, the court notes the continuous and unbroken chain of events and circumstances which, to an unbiased mind, all tend to point to the positive identification of both accused. The testimony of Ricardo Birog has all the earmarks of truth. The court carefully observed him while testifying and his answers were sincere, clear, candid and unerring." [19]

In the second assigned error, appellants contend that the lower court erred in finding that the accused Simplicio Realon had a motive to kill the deceased Ramos because of the incident between them which took place in 1966 and investigated by the District Office, and after which Realon was transferred to another school. The decision under review states:

"x x x Whether or not his transfer was the result of the investigation or thru the proddings of the deceased, or a matter of administrative routine, the evidence fails to show, the bare fact being that the accused Realon was eventually transferred to another station. Quite naturally, the accused resented his transfer. He had reasons to believe that, despite the goat he bought, the deceased was responsible for his transfer. This, the court finds, was the motive behind the killing. The accused nurtured a hatred for the deceased and vowed revenge." [20]

We agree with the trial court's finding that revenge was the motive. The unfortunate incident between Realon and Ramos above referred to could not easily be forgiven and forgotten. It had definitely caused both of them much embarrassment and humiliation, especially for Realon who was then a young teacher just starting his career. His record as a teacher was undoubtedly tainted after Ramos reported the matter of his drunkenness and undesirable conduct to the District Office, and instigated an investigation to be conducted thereon. Realon resented Ramos for doing what he did, without regard for the propriety or impropriety of the latter's actions. Despite the attempt at amicable settlement, We are convinced that the differences were not really "settled". Even if it were true, as Realon alleges, that he greeted the Ramos spouses "Good Morning" or "Good Afternoon" on several occasions subsequent to the incident, such actuations were merely an outward show of civility or respect, Ramos then having supervisory authority over him. Mrs. Ramos, though admitting that Realon greeted her and her late

husband once, testified that the said accused threw contemptuous looks at them.

The fact that the incident between the accused Realon and the deceased Ramos took place in October of 1966 and the latter was killed in April of 1969 does not rule out revenge as the motive in this case. As We had the occasion to say in the case of *People vs. Turalba*: "Although the incident transpired in 1962 and killing was perpetrated in 1964, the long interval of time would not necessarily mean that the flame of revenge had flickered and died. To proud and sensitive persons, who desire to retain a good reputation or image in the community and who do not want to be regarded as cowards, such an affront or loss of face would rankle for many years. The suppressed rage would find adequate release only in some sort of vindictive retaliation." [21]

Regardless of whether or not the accused had any motive to kill, however, We have consistently held in a long line of cases that when there is no doubt as to the identity of the culprit, motive is not essential to conviction. [22] We so hold now. There is overwhelming evidence in the case at bar pointing to accused Realon as the gunwielder. He was positively identified by a disinterested and credible eyewitness as the one who fired at the deceased. Two witnesses, the teachers who stood on either side of Realon during the song practice, declared that they noticed the latter leave his place in the last row just a few moments before the gun shot rang out. One of them significantly added that upon pulling out of the line Realon "moved to the right," onwards the place where the victim was. Upon the other hand, there is no evidence that immediately before the shooting, somebody else in the group left his place in the formation or that an outsider approached the victim from behind. Two disinterested bystanders testified that after the loud explosion, they saw Realon tuck a gun at his waist while fleeing with the other accused Soliven. One of these witnesses added that after both accused had ran some distance, he saw Realon pass the gun to Soliven. Another disinterested witness saw the accused Soliven throw the gun inside a garbage drum. Children who were playing at the grandstand chased the running pair and were heard to shout that they saw a gun. The children even informed the policeman "They are the ones," pointing at the two accused. The latter continued in their flight despite a warning whistle from the policeman, and when they were caught at last, they did not show any kind of protest. The fatal gun was recovered immediately after the incident and found by the police to have been recently fired. The gun was likewise identified by witnesses during the trial.

We have held that the testimony of only one witness, if credible and positive and if it satisfies the Court beyond reasonable doubt, is sufficient to convict the accused. [23] Such is the testimony of eyewitness Ricardo Birog, the prosecution's direct and strongest evidence. In addition thereto, there is ample corroborative evidence, testimonial as well as real, to support the inevitable finding of guilt.

For the defense, on the other hand, the evidence is weak and unconvincing. Realon claims that he folded his copy of the song lyrics and put it inside his pocket before he left his place in the fourth row to tell Soliven to go ahead to the dog party. The question, however, is why he had to fold and keep that piece of paper that he was holding. A few words to Soliven, who was only a few meters away from him, would not take a long time and certainly a piece of paper would not interfere with or in any way disturb their conversation. Realon's act of folding the paper and putting it inside his pocket would rather suggest an intention NOT to return to the song practice anymore. It could also imply that he intended to use his hands for some other purpose, hence he had to get rid of the paper. At this point, the significance of the testimony that Realon "moved to the right" is likewise brought to the fore. The victim was to the right of Realon while Soliven was to his left. When Realon "moved to the right," he did not go to where Soliven was, contrary to the claim of the defense. Moreover, considering everything that has been said above, it strikes Us as too much of a coincidence that Realon had to leave his place only a few moments before the victim was shot.

We also note that during the trial, the defense was careful to use the phrase "walking fast" in describing how the two accused left the grandstand immediately after the gun shot was heard. In addition, it is also claimed that the

accused were frightened of the explosion. If this were true, why did the accused merely "walk fast"? They should have ran like the others who scampered to safety. Or perhaps the accused actually "ran" but were careful not to say so in court lest it be understood to mean that they "fled" from the scene of the crime, for after all flight is considered as evidence tending to establish guilt.[24] Yet that was exactly what they did, according to several disinterested witnesses who saw the accused leave the grandstand and up to the time they reached the skating rink where they were finally caught.

In the third assignment of error, it is contended that the failure of the prosecution to present the NBI officers who fingerprinted and paraffin-tested the accused-appellants gives rise to the application of the rule that evidence wilfully suppressed shall be disputably presumed to be adverse if produced, under Rule 131, Sec. 5(e) of the Rules of Court. The contention is without merit.

The rule on suppression of evidence finds no applicability in cases where the evidence allegedly suppressed is merely corroborative or cumulative. Thus:

"No inference arises against a party failing to call a witness where the only object of calling such witness would be to produce corroborative or cumulative evidence x x x (31 C.J.S., 857).

"Failure to present some witnesses for the prosecution, even if the omitted witnesses are eyewitnesses of the crime, does not of necessity give rise to the presumption that evidence wilfully suppressed would be adverse if produced, which does not apply to the suppression of merely corroborative evidence (People vs. Tuzon, 56 Phil. 649, citing U.S. vs. Gonzales, 22 Phil. 325 and U.S. vs. Dinola, 37 Phil. 797.)"[25]

In the instant case, the testimony of the NBI officers would indeed merely be corroborative in view of the overwhelming evidence on the positive identification of both accused.

Furthermore, the presumption of suppression of evidence is inapplicable to a case where the evidence was at the disposal of both the defense and the prosecution and would have the same weight against one party as against the other.[26] Stated otherwise, the unproffered evidence which appellants urge Us to presume as unfavorable to the prosecution was equally available or accessible to the defense. The Government, represented by the Fiscal, does not have the exclusive prerogative or privilege to avail of the services of the NBI or to have the officers of said office summoned in court in connection with criminal case. The defense itself, during the trial, could have presented the NBI officers and/or the results of the fingerprint and paraffin tests allegedly conducted if the evidence so presented was favorable to the accused, but the defense did not avail of said privilege. It is rather late in the day to complain that the NBI officers were not called to testify.

At this point, it is pertinent to quote from the case of People vs. Equipilag, et al., thus:

"We do not depreciate the value of paraffin tests xxx as aids to criminal investigation and analysis as well as to judicial appreciation of the probability of guilt; we are of the opinion, however, that their absence does not constitute a bar to a judgment of conviction where, on the basis of the evidence adduced, we are convinced, with moral certainty, at the accused are guilty."[27]

Still under the third assignment of error, appellants contend that "the fact that the prosecution, without explanation, failed to call several witnesses, three mentioned in the Information and two others mentioned by its lone witness gives rise to the presumption that their testimony would not be favorable to the prosecution's cause." The contention is misleading hence should not even deserve consideration.

A verification of the original records in the trial court reveals the falsity of herein appellants' averment that three witnesses mentioned in the Information were not presented by the prosecution. Of the seven witnesses named in the Information, it was only Mrs. Lena Domingo who did not testify during the trial.[28] And the prosecution

presented not one but twelve witnesses. We therefore do not know whom appellants refer to as the prosecution's "lone witness", much less the alleged "two others mentioned" by said lone witness.

Nevertheless, in connection with the non-presentation of Mrs. Lena Domingo, the records show that a subpoena dated April 22, 1969 was issued to Mrs. Domingo but the same could not be served on her because she was "out of town." [29] "No adverse inference will be drawn against a party by reason of the absence of a witness who has been subpoenaed and against whom an attachment has been issued to compel his attendance," [30] At any rate, examining Mrs. Domingo's statement which is on record, [31] taken and sworn to on the day of the shooting itself, there appears nothing therein that is prejudicial to the case for the prosecution.

The fourth and last assignment of error raises, among others, the issue of whether or not conspiracy between the two accused was established by the evidence. The lower court premises its finding of conspiracy on the following circumstances: "(1) In the evening of May (April) 12, 1969, Realon and Soliven met in the house of the latter's brother Aproniano; (2) the following morning, they were together again allegedly to see Mr. Andrew Sagubo at La Trinidad to claim Realon's salary check. (3) Then they proceeded together to the market at Baguio City; (4) they lunched together at the house of Aproniano Soliven, brother of Eutropio; (5) They went together again to Gen. Luna Road in the afternoon; (6) Soliven previously provided himself with a toy-gun x x x (7) They drank gin together at Gen. Luna Road. (8) Arriving at the grandstand, Soliven sat behind the fourth row x x x. (9) They ran together after the shooting and on the way Realon passed the fatal gun to Soliven who quickly dumped it in a garbage barrel," [32] holding both accused Realon and Soliven guilty as co-principals in the crime of murder and sentencing them to the capital penalty of death. The Solicitor General maintains that the finding of conspiracy should be upheld.

We do not agree. Upon a review of the record, We are not satisfied that conspiracy has been duly proven. To begin with, the evidence is clear that accused Soliven did not actively participate in the shooting of the deceased victim. It may likewise be considered that only Realon had a known possible motive to kill the late Ramos. On the part of Soliven, there is no proof that he knew or had ever met Ramos before the shooting incident. More importantly, it is Our considered opinion that neither the circumstances cited by the trial court enumerated above nor the facts established by the evidence suffice to meet the requirement of conclusive proof [33] to declare the existence of conspiracy. We have consistently held that conspiracy must be shown by positive and convincing evidence, [34] as clearly as the commission of the offense itself, [35] although direct proof is not necessary. [36]

It is an admitted fact that the two accused were together from the evening of April 12, 1969 up to the time of the shooting the very next day. However, it is neither alleged nor shown that their meeting at Aproniano Soliven's house on the date abovementioned was planned. Accused Eutropio Soliven had been boarding with his brother for some time, while Realon arrived in Baguio to attend the song rehearsal scheduled the day after his arrival. Neither is there any evidence that either of the accused knew that the other was going to be in the particular place where they met or that the meeting was purposely sought by one of them. The most that can be said on the basis of the evidence at hand is that the encounter at Aproniano Soliven's residence was purely coincidental. Further, the accused's being together on the day of the shooting, April 13, 1969, is also not unusual to be considered suspicious. They were former townmates, it so happened that they lodged at the same place, and their known activities for two days, April 12 and 13, up to the day of the shooting were perfectly legitimate. In the morning, they went to get Realon's check from Mr. Andrew Sagubo. This was confirmed by the latter. Upon being informed that the check had not yet arrived, the accused claimed that they went to the market. This was not contradicted. Then they had lunch at their lodging house then proceeded to Gen. Luna Road where they met Sagubo and Dampac and where the latter and Realon had their shoes shined. Sagubo and Dampac were also with the accused when they stopped at a nearby store for a drink. The four of them arrived at the Burnham Park.

Earlier, accused Soliven invited Realon to a dog party, hence it was quite natural that Soliven accompanied Realon to the rehearsal and waited for the latter at the grandstand where the practice was held. That there was going to be a dog party was corroborated by Soliven's employer, Delfin Balajadia, whom We find to have no reason to testify falsely in court. Up to the time of the shooting, there is nothing in the evidence that would suffice to make Soliven liable as a co-conspirator or even an accomplice. With regards to his presence at the scene of the crime, the jurisprudence laid down in *People vs. Custodio*[37] penned by Mr. Justice Felix Q. Antonio is elucidating, and We quote:

"It is well to recall the settled rule that conspiracy presupposes the existence of a preconceived plan or agreement and in order to establish the existence of such a circumstance, it is not enough that the persons supposedly engaged or connected with the same be present when the crime was perpetrated. There must be established a logical relationship between the commission of the crime and the supposed conspirators, evidencing a clear and more intimate connection between and among the latter, such as by their overt acts committed in pursuance of a common design. Considering the far-reaching consequences, of criminal conspiracy, the same degree of proof required for establishing the crime is required to support a finding of its presence, that is, it must be shown to exist as clearly and convincingly as the commission of the offense itself.

"The evidence fails to meet such requirements. To hold him liable, upon the other hand, as an accomplice, it must be shown that he had knowledge of the criminal intention of the principal, which may be demonstrated by previous or simultaneous acts which contribute to the commission of the offense as aid thereto whether physical or moral. As aptly stated in *People vs. Tamayo*: 'It is an essential condition to the existence of complicity, not only that there should be a relation between the acts done by the principal and those attributed to the person charged as accomplice, but it is further necessary that the latter, with knowledge of the criminal intent, should cooperate with the intention of supplying material or moral aid in the execution of the crime in an efficacious way. 'x x x From our view of the evidence it has not been convincingly established that appellant cooperated in the commission of the offense, either morally, through advice, encouragement or agreement or materially through external acts indicating a manifest intent of supplying aid in the perpetration of the crime in an efficacious way. Such circumstances being absent his mere passive presence at the scene of the crime certainly does not make him either a co-principal or an accomplice in the commission of the offense.'"[38]

As We held in the recently decided case of *People vs. Toling, et al.*[39] with respect to one of the appellants therein, the accused "cannot be held criminally responsible as principal x x x since there is no direct proof that he conspired with his co-appellants or directly participated in the commission thereof. He cannot also be held criminally responsible as an accomplice. In order to hold one liable as an accomplice, it is essential that it be proved beyond reasonable doubt that between the supposed accomplice and the principal, there is community of criminal purpose which implies that it be shown that the supposed accomplice committed the acts imputed to him with the intention to help morally or materially in the commission of the crime."

This is not to say, however, that the accused Soliven is without any liability at all. The evidence clearly and evidently establishes his participation and involvement as an accessory to the crime committed by Realon. We are convinced from the circumstances of the case at bar and Soliven's actuations immediately subsequent to the shooting up to the time of his apprehension that he has incurred criminal liability as an accessory.

The Revised Penal Code defines accessories as follows:

"Art. 19. Accessories. - Accessories are those who, having knowledge of the commission of the crime, and without having participated therein, either as principals or accomplices, take part subsequent to its commission in any of the following manners:

- By profiting themselves or assisting the offender to profit by the effects of the crime;

- By concealing or destroying the body of the crime or the effects or instruments thereof, in order to prevent its discovery;
- By harboring, concealing, or assisting in the escape of the principal of the crime, provided the accessory acts with abuse of his public functions or whenever the author of the crime is guilty of treason, parricide, murder, of an attempt to take the life of the Chief Executive, or is known to be habitually guilty of some other crime."

(Italics supplied.)

In finding Soliven guilty as an accessory, We have considered the following facts and circumstances as gathered from the evidence: (1) from where he was seated at the grandstand of the Athletic Bowl, Soliven must have seen Realon leave his place in the formation, approach the victim from behind and fire the gun at the latter; (2) Soliven ran with Realon when the latter fled from the scene of the crime; (3) while in flight, Realon passed the fatal weapon to Soliven who in turn dumped the gun inside a garbage barrel; and (4) upon his apprehension Soliven did not show or make any act of protestation. From the foregoing, there can be no conclusion other than that Soliven witnessed his friend Realon commit the crime and that having done so, Soliven assisted in Realon's escape by concealing the instrument used in the perpetration of the offense in an obvious effort or attempt to prevent its discovery. The additional fact that Soliven made no protest at the time of his apprehension only serves to indicate a guilty mind.

That the offense was accomplished with treachery is beyond question. The sudden and unexpected attack from behind directly and specially insured the killing without risk to Realon since the victim Ramos had no chance to retaliate at all.[40] It indubitably appears that Realon had consciously adopted and deliberately chosen a mode of attack intended to facilitate the perpetration of the crime without risk to himself[41] arising from any defense which Ramos might have made. Indeed, the surprise assault precluded the victim from making any defense at all. Realon, therefore, committed murder qualified by alevosia.

Lastly, We find merit in appellants' contention that the lower court erred in finding that the killing was attended by the aggravating circumstance of evident premeditation. To properly appreciate premeditation, the prosecution must conclusively establish: (1) the time when the offender determined to commit the crime; (2) an act manifestly indicating that the culprit has clung to his determination; and (3) a sufficient lapse of time between the determination and the execution to allow him to reflect.[42] None of these requisites are present in the instant case. As in the case of *People vs. Mil*,[43] "if there is nothing in the case that can serve as a ground x x x to determine if the x x x criminal resolution was meditated on, reflected upon or persisted in, which constitutes premeditation, this circumstance is not present. The evidence must show not only when the intent to commit the crime was engendered in the mind of the accused, but the motive which gave rise to it, the means which he selected beforehand to carry out his criminal intention, in short, all those facts and antecedents which together show that the crime was knowingly premeditated, as required by law, and that the accused acted not only with pre-existing design, which is a condition ordinarily found in all crimes, but with a cold and deep meditation and tenacious persistence in the accomplishment of his criminal purpose."

While there is evidence to show that there had been a previous quarrel or disagreement between the accused Realon and the deceased victim which would suffice to give the former a motive to kill in revenge, such evidence standing alone cannot justify a finding of evident premeditation. Thus, "while at first blush it would seem that there was evident premeditation, since the killing was motivated by vindictiveness, nevertheless, that circumstance cannot be regarded as aggravating" due to the absence of requisites.[44] "(I)t is not enough that premeditation be suspected or surmised, but the criminal intent must be evidenced by notorious outward acts evincing the determination to commit the crime." [45] The circumstance of evident premeditation must be established and proven as clearly as the criminal act itself.[46]

The crime committed by appellant Simplicio Realon being murder, qualified by treachery, without any generic aggravating or mitigating circumstance attending the commission of the crime, the proper penalty to be imposed on him is reclusion perpetua, the medium period of the penalty for murder (Arts. 64 and 248, Revised Penal Code).

As to appellant Eutropio Soliven, his guilt or culpability is only as an accessory to the same murder and penalized with imprisonment of two degrees lower than that prescribed by law for the consummated felony (Art. 53, R.P.C.). Since the penalty for murder is reclusion temporal in its maximum period to death, two degrees lower is prision correccional in its maximum period to prision mayor in its medium period, the same to be imposable in its medium period or from six (6) years and one (1) day to eight (8) years. Imposing the Indeterminate Sentence Law, said accused should be and is hereby sentenced to imprisonment of four (4) years and two (2) months of prision correccional as minimum to eight (8) years of prision mayor as maximum, with the accessory penalties of the law.

However, since the accused Eutropio Soliven has been in prison since 1969, according to the records, he should be deemed to have served his sentence and should be released, unless he is being detained for another cause.

WHEREFORE, IN VIEW OF ALL THE FOREGOING, We find the appellant Simplicio Realon guilty beyond reasonable doubt of murder without any modifying circumstance, and he is hereby sentenced to reclusion perpetua.

We also find the appellant Eutropio Soliven guilty beyond reasonable doubt as accessory to the same murder, and he is hereby sentenced to suffer the indeterminate penalty of four (4) years and two (2) months of prision correccional as minimum to eight (8) years of prision mayor as maximum, with the accessory penalties of the law. Since said accused Eutropio Soliven has been in prison since 1969 up to the present, he is deemed to have served his sentence and should be released therefrom, unless detained for any other cause.

In all other respects, the judgment of the trial court is hereby affirmed, with costs against appellants.

SO ORDERED.

Fernando, C.J., Makasiar, Aquino, Concepcion, Jr., Fernandez, De Castro, and Melencio-Herrera, JJ., concur.

Teehankee, J., files a concurring and dissenting vote.

Barredo, J., dissents in a separate opinion.

Abad Santos, J., on leave.

[1] CCC Record, p. 1.

[2] Certificate of Arraignment, CCC Record, p. 40.

[3] CCC Records, p. 57.

[4] Decision of the Lower Court, p. 35; CCC Records, p. 123.

[5] Rollo, p. 115.

[6] People vs. Repato, et al., L-23431, July 20, 1979, citing People vs. Espejo, et al., L-27708, December 19, 1970, 36 SCRA 401. See also People vs. Balictar, et al., L-29994, July 20, 1979; People vs. Robles, et al., L-30060, July 30, 1979; People vs. Balili, L-38250, August 6, 1979; People vs. Abejuela, et al., L-32702, Aug. 6, 1979; People vs. Villagonzalo, L-35793, Aug. 31, 1979; People vs. Castañeda, et al. L-32625, Aug. 31, 1979.

[7] Brief for the Appellants, pp. 9-12.

[8] Rule 116, Section 1, Rules of Court. Arraignment - How made. - The defendant must be arraigned before the court in which the complaint or information has been filed unless the cause shall have been transferred elsewhere for trial. The arraignment must be made by the judge or clerk, and shall consist in reading the complaint or information to the defendant and delivering to him a copy thereof, including a list of witnesses, and asking him whether he pleads guilty or not guilty as charged. The prosecution may, however, call at the trial witnesses other than those named in the complaint or information.

[9] Francisco, *The Revised Rules of Court in the Philippines, Criminal Procedure*, 1963 edition, pp. 452-453.

[10] L-31960, August 15, 1974, 58 SCRA 450, 455, citing *People vs. Bagsican*, L-13486, Oct. 31, 1962, 6 SCRA 400 where this Court said:

"Attention of this Court was called to the fact that some of the witnesses presented at the trial were not among those originally listed in the complaint. Appellant would have this as reversible error. Apparently, appellant is unaware of this Court's ruling in the case of *People vs. Acanzado*, 37 Phil. 658 and *People v. Manabat*, G.R. Nos. L-8904-05, December 28, 1956, where the rule was re-expressed that witnesses not so listed may be called upon to testify."

[11] L-26103, Jan. 17, 1968, 22 SCRA 111, 131-132, *Italics supplied*.

[12] Decision of the Lower Court, p. 32; CCC Records, p. 125.

[13] *People vs. Estocada, et al.*, L-31024, February 28, 1977, 75 SCRA 295, 308.

[14] L-15230 and L-15979-81, July 31, 1961, 2 SCRA 911.

[15] *Ibid.*, pp. 918-919, citing *People vs. Villamin*, 64 Phil. 884. See also *People vs. Cadacio*, L-12943, October 31, 1963, 9 SCRA 292, 298; *People vs. Antonio*, L-16547, May 30, 1964, 11 SCRA 260, 265; *People vs. Equal, et al.*, L-13469, L-14240, L-14209, May 27, 1965, 14 SCRA 89, 99; *People vs. Lumantas*, L-28355, July 17, 1969, 28 SCRA 764, 768; *People vs. Kipte*, L-26662, Oct. 30, 1971, 42 SCRA 199; *People vs. Cariño*, L-33608, Feb. 12, 1974, 55 SCRA 516, 523; *People vs. Moises, et al.*, L-32495, Aug. 13, 1975, 66 SCRA 151, 161; *People vs. Aleta*, L-40694, Aug. 31, 1976, 72 SCRA 542, 552; *People vs. Roxas*, L-32912, Oct. 29, 1976, 73 SCRA 583, 590; *People vs. Estocada, et al.*, L-31024, Feb. 28, 1977, 75 SCRA 295, 308; and *People vs. Equipilag, et al.*, L-21960, Oct. 18, 1977, 79 SCRA 374, 386.

[16] *People vs. Morado*, L-16714, Jan. 31, 1962, 4 SCRA 292, 295.

[17] 26 Phil. 503, 507-508.

[18] Brief for the Appellants, p. 13.

[19] Decision of the Lower Court, p. 32; CCC Records, p. 125.

[20] Decision of the Lower Court, pp. 27-28; CCC Records, pp. 120-121.

[21] L-29118, February 28, 1974, 55 SCRA 697, 703.

[22] *People vs. Madera, et al.*, L-35133, May 31, 1974, 57 SCRA 349, 355; *People vs. Alviar*, L-32276, September 12, 1974, 59 SCRA 136, 160; *People vs. Verzo, et al.*, L-24917, July 25, 1975, 65 SCRA 324, 332; *People vs. Pajenado, et al.*, L-26458, Jan. 30, 1976, 69 SCRA 172, 178; *People vs. Veloso*, L-33132, Aug. 6, 1979. See also *Castañares vs. CA and People*, L-41269-70, Aug. 6, 1979; and *People vs. Beralde*, L-32832, June 29, 1979.

[23] *People vs. Orzame, et al.*, L-17773, May 19, 1966, 17 SCRA 161, 165, and *People vs. Gamao, et al.*,

L-19347, February 27, 1968, 22 SCRA 809, 814, citing *People vs. Argana, et al.*, L-19448, February 28, 1964, 10 SCRA 311. See also *People vs. Salazar*, L-32858, August 19, 1974, 58 SCRA 467, 472; *People vs. Boduso*, L-30450-51, September 30, 1974, 60 SCRA 60, 69; *People vs. Montero*, L-33155, April 22, 1977, 76 SCRA 437, 444; and *People vs. Naba-unag*, L-30414-15, September 9, 1977, 79 SCRA 33.

[24] *People vs. Tanchoco*, 76 Phil. 463, 468; *People vs. Kamad*, 100 Phil. 419, 425-426; *People vs. Berganio*, 110 Phil. 322, 331; *People vs. Pajenado, et al.*, L-26458, Jan. 30, 1976, 69 SCRA 172, 177. See also *People vs. Amiscua*, L-31238, Feb. 27, 1971, 37 SCRA 813, 819; *People vs. Samonte*, L-31225, June 11, 1975, 64 SCRA 319, 328-329; *People vs. Extra*, L-29205, July 30, 1976, 72 SCRA 119, 212-213; *People vs. Aleta and Encarnacion*, L-40694, Aug. 31, 1976, 72 SCRA 542, 552; *People vs. Moreno, et al.*, L-37801-05, Oct. 23, 1978, 85 SCRA 649, 681; *People vs. Molleda, et al.*, L-34248, Nov. 21, 1978, 86 SCRA 667, 706-707.

[25] Francisco, *The Revised Rules of Court in the Philippines*, Vol. VII, Evidence, Part II, 1973 ed., p. 133. See also *People vs. Tesorero*, L-34828-31, June 30, 1976, 71 SCRA 579, 588, citing *People vs. Tuzon*, 56 Phil. 649 and *Nicolas vs. Nicolas*, 62 Phil. 70; and *People vs. Extra*, L-29205, July 30, 1976, 72 SCRA 199, 209, citing *People vs. Sigayan, et al.*, 16 SCRA 844, *People vs. Cristobal*, 1 SCRA 151, and *People vs. Escalona*, 1 SCRA 891; and *People vs. Beralde*, L-32832, June 29, 1979.

[26] 20 Am. Jur., p. 193; *U.S. vs. Dinola*, 37 Phil. 797, 801; *People vs. De Otero, et al.*, 51 Phil. 201, 209; *People vs. Morado*, L-16714, January 31, 1962, 4 SCRA 292, 296; *People vs. Padiernos*, L-37282, February 27, 1976, 69 SCRA 484, 491-492.

[27] L-21960, October 18, 1977, 79 SCRA 374, 388, *Italics supplied*.

[28] See Information, p. 2; CCC Records, p. 3.

[29] Officer's Return of Service dated May 9, 1969; CCC Records, p. 47.

[30] 20 Am. Jur., p. 193; 29 Am. Jur. 2d., p. 226, citing *Manhattan Life Ins. Co. vs. Alexander*, 89 Hun 449, 35 NYS 325, affd 158 NY 732, 53 NE 1127.

[31] CCC Records, p. 19.

[32] Decision of the Lower Court, pp. 33-34; CCC Records, pp. 126-127.

[33] *People vs. Marco, et al.*, L-28324-5, May 19, 1978, 83 SCRA 338, 349.

[34] *People vs. Tingson and Hapitan*, 47 SCRA 243, 255; *People vs. Vistido*, 79 SCRA 616, 620.

[35] *People vs. Vicente, et al.*, 28 SCRA 247, 257; *People vs. Bartolay, et al.*, 42 SCRA 1, 7; *People vs. Custodio*, 47 SCRA 289, 302; *People vs. Llamera, et al.*, 51 SCRA 48, 60; *People vs. Geronimo*, 53 SCRA 246, 254; *People vs. Tumulip, et al.*, 60 SCRA 303, 317; *People vs. Macatanaw*, 62 SCRA 516, 527.

[36] *People vs. Cadag, et al.*, 2 SCRA 388, 394; *People vs. Cruz, et al.*, 4 SCRA 1114, 1120; *People vs. Belen, et al.*, 9 SCRA 39, 50; *People vs. Capito, et al.*, 22 SCRA 1130, 1150; *People vs. Peralta, et al.*, 25 SCRA 759, 775; *People vs. Alcantara, et al.*, 33 SCRA 812, 823; *People vs. Pudpud, et al.*, 39 SCRA 618; 625; *People vs. Mejia*, 55 SCRA 453, 456; *People vs. Genoguina, et al.*, 56 SCRA 181, 191; *People vs. Ogapay, et al.*, 66 SCRA 210, 214; *People vs. Manlangit, et al.*, 73 SCRA 49, 55; *People vs. Cabiling and Lopez* 74 SCRA 285, 299; *People vs. Roncal and Gabrieles*, 79 SCRA 509, 516.

[37] L-30463, October 30, 1972, 47 SCRA 289.

[38] *Ibid.*, pp. 302-303; *italic supplied*; quoted in *People vs. Madera, et al.*, L-35133, May 31, 1974, 57 SCRA

349, 355-356.

[39] L-28548, July 31, 1978.

[40] People vs. Mojica, 70 SCRA 502, 508; People vs. Lim, 71 SCRA 249, 260; People vs. Palencia, et al., 71 SCRA 679, 689; People vs. Roxas, 73 SCRA 583, 592; People vs. Cabiling and Lopez, 74 SCRA 285, 300-301; People vs. Ventura, 80 SCRA 515, 521; People vs. Pascual, et al., 81 SCRA 548, 563; People vs. Plateros and Lahoy, 83 SCRA 401, 411; People vs. Pay-an, 84 SCRA 353, 362; People vs. Candado, et al., 84 SCRA 508, 521; People vs. Barbosa, 86 SCRA 217, 224; People vs. Odencio, 88 SCRA 1, 6; People vs. Borja, et al., L-22947, July 12, 1979; People vs. Repato, et al., L-23431, July 20, 1979; People vs. Mil, L-28104-05, July 20, 1979; People vs. Bautista, et al., L-31900, Aug. 6, 1979; People vs. Abejuela, et al., L-32702, August 6, 1979; People vs. Castañeda, et al., L-32625, August 31, 1979.

[41] People vs. Macalisang, 22 SCRA 699, 704; People vs. Tesorero, 71 SCRA 579, 591; People vs. Santos, 85 SCRA 630, 639; People vs. Angeles, L-31646-52, August 6, 1979.

[42] People vs. Diva, L-22946, April 29, 1968, 23 SCRA 332, 338, citing People vs. Leaño, 36 Off. Gaz. No. 53, p. 1120. See also People vs. Ardisa, 55 SCRA 245, 259; People vs. Ramolete, et al., 56 SCRA 66, 81; People vs. Cardenas, et al, 56 SCRA 631, 645; People vs. Abletes, 58 SCRA 241, 247; People vs. Manzano, et al., 58 SCRA 250, 261; People vs. Lim, 71 SCRA 249, 260-261; People vs. Corachea, L-30101, July 16, 1979.

[43] L-28104-05, July 20, 1979.

[44] People vs. Abletes, supra; People vs. Zapatero, 58 SCRA 450, 459.

[45] People vs. Ordiales, 42 SCRA 238, 246-247.

[46] People vs. Mil, L-28104-05, July 20, 1979; People vs. Bautista, et al., L-31900, August 6, 1979.

CONCURRING AND DISSENTING OPINION

TEEHANKEE, J.:

I concur in the judgment against appellant Simplicio REALON; but dissent from that against appellant Eutropio SOLIVEN and vote for his acquittal on the ground that the evidence cited on page 32 of the decision against SOLIVEN is manifestly insufficient to justify beyond reasonable doubt his conviction even as an accessory.

DISSENTING OPINION

BARREDO, J.:

The clearly well written opinion of our esteemed colleague, Mr. Justice Juvenal K. Guerrero differs, I regret to say, from my personal appraisal of the respective criminal liabilities of the two appellants in this case. To my mind, since the Court is of the view that the 1969 incident between appellant Realon and the deceased Ramos evinced vindictiveness or revenge in the mind and heart of the former, notwithstanding positive evidence in the record that the two had reconciled, with a goat-giving ritual at that, it should follow that the desire to kill Ramos must have persisted with Realon all the time up to the moment of the killing. With such frame of mind and armed as he was when he went to the rehearsal knowing Ramos would be there and further positioning himself somewhere in the back rows behind the deceased convince me that there was evident premeditation. I, therefore,

dissent in this respect. With the incontestably proven alevosia with which Realon shot his victim, my vote is that said appellant is guilty of murder qualified by evident premeditation and aggravated by treachery, hence the judgment of the trial court should be affirmed in toto as to him.

On the other hand, I am not morally persuaded that appellant Soliven is guilty even as an accessory after the fact. It is quite probable or even true that he knew Realon had shot Ramos, but his running away together with him is no indication at all of any kind of criminal element insofar as he is concerned. Having gone to the Athletic Bowl at Burnham Park together, without any evidence whatsoever that he knew of Realon's malevolent intentions or otherwise innocent thereof, he waited for him (Realon) because he had invited him to go to the dog party of Mr. Balajadia, Soliven's employer. Soliven must have been as surprised and startled as almost all the others around were. It is but natural to conclude, as a matter of ordinary human experience that he ran in the same direction as Realon by instinct, considering they were together in going to that place. No one can state with certainty, and no evidence can be found in the record, exactly why he ran that way. To assume that he intended to help Realon is to presume guilt which is constitutionally enjoined. True, there is evidence that when they were running away, Realon passed the fatal gun, Exhibit A, to him and that he threw it into a garbage can. But again, under the circumstances, there being no evidence that he asked for the gun from Realon or that it was given to him by agreement, anyone would have tried to dispose of it lest it be found in his possession thereby directly connecting him with the shooting. I am for giving Soliven the benefit of the doubt. His silence during his apprehension should not be taken against him nor the weakness of his defense evidence. In brief, I cannot take it within my conscience to besmirch the personal record of Soliven with a criminal conviction - even only as an accessory - when I feel very strongly that his act of getting rid of the gun handed to him by Realon must have been done by him also instinctively as a matter of self-protection, there being not a bit of antecedent linking him to Realon's crime. My vote is to acquit him on, at least, reasonable doubt.

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