

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. LEONCIO JUSEP, DEFENDANT-APPELLANT.*G.R. No. L-45722. June 23, 1987*

Ponente: FERNAN, J.

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The records of this case were elevated to this Court from the Court of First Instance of Zamboanga del Norte, Branch III* at Dipolog City for automatic review of the decision of December 23, 1976 which found Leoncio Jusep guilty beyond reasonable doubt of murder and imposed on him the death penalty and other accessory penalties under the law, and the payment of an indemnity of P12,000 to the heirs of the victim, Jesus Gandola, plus the costs of the suit (Criminal Case No. 1118).

As gathered by the prosecution, the facts of the case are as follows:

Jesus Gandola was the administrator of the 28-hectare land located along the seashore of Malolong, Zamboanga del Norte, belonging to his aunt, Maria Perdices. He lived in nearby Loquilos, Manukan, also in Zamboanga del Norte. He was engaged in fishing ("sen-soro") as was Leoncio Jusep, who used to stay in Perdices' land before he was driven out of it for failure to pay rentals (TSN, November 14, 1974, pp. 25-26; August 23, 1974, pp. 4-5).

The stiff business competition between Gandola and Jusep developed into something akin to bad blood between them. One time, Gandola tried to borrow fifteen empty fish boxes from Jusep but the latter re-fused to lend him any. On another occasion, Jusep asked Gandola's father, Angel, to admonish Etot (Gandola's nickname) not to spread the rumor that Jusep had stolen a cow (TSN, *supra*, p. 26). And, there was a time when Gandola fired his rifle at Jusep whom he caught disturbing with a fish net the school of fish which had been spotted by Gandola's fisherman (TSN, August 23, 1974, pp. 11-12).

Sometime in May, 1967, Pastor Cotillas, who took charge of Jusep's fishing business, went to Hilongos, Leyte under the pretext of recruiting fishing laborers or "buseros". Actually, he was on an errand for Jusep to look for a hit man to do away with Gandola. Pastor contacted his cousin, Alfredo Cotillas, and brought him to Manukan where Alfredo met Jusep for the first time. The latter went with Pastor to Manukan.

When Pastor introduced them to each other, Jusep asked Alfredo if he was the same person that Pastor had told him about and Alfredo replied that he was indeed the one. Jusep then told Alfredo to shoot Gandola in consideration of the amount of P2,000. He promised to give Alfredo said amount after he had shot Gandola (TSN, August 15, 1974, pp. 14, 28 & 32).

Jusep and Alfredo frequently talked to one another because the former's house was very near that of Pastor where Alfredo stayed. When Alfredo asked Jusep where he would meet Gandola, Jusep answered that he should go to that part of Manukan where there was a big house and he would not miss Gandola who was a big fellow (TSN, *supra*, p. 15). The first time Alfredo saw Gandola was when they were on the seashore and Jusep pointed out Gandola who was then standing on a bamboo raft. The second time was when Jusep made him ride a jeep which

passed by Gandola's house (TSN, supra, pp. 57-58).

When Alfredo asked for a gun, Jusep told him to wait awhile because the .45 caliber gun had not yet arrived (TSN, supra, p. 16). In the morning of August 1, 1967, while Alfredo was in the kitchen of Pastor's house, Jusep arrived. He presented Alfredo with a .32 caliber revolver and told him to use it in shooting Gandola. Jusep said, "You always tack that revolver on your waist because there will be a movie in the afternoon and that fellow might come and you finish him ('butangi') there" (TSN, supra, p. 17). But, as instructed by Jusep, Alfredo did not leave Pastor's house that afternoon. When Jusep came back, he informed Alfredo that Gandola was not watching the movie. So, he told Alfredo, "You better go to his house because he is not around" (TSN, supra, p. 18).

Jusep and Alfredo then hiked along the sea-shore to the house of Gandola. When they arrived there, they stayed by the coconut tree near the house. They waited for people to come out of the house as it was then time for cooking supper. When they noticed that the people in the house were about to take supper, Jusep directed Alfredo to go under the house while he stayed a little distance therefrom (TSN, supra, pp. 19-23).

The floor of Gandola's house was 2½ to 3 feet from the ground. Alfredo went to that part of the ground underneath the house just below where Gandola was seated eating his supper. He could easily see the persons inside the house because the floor was made of bamboo slats placed one-fourth of an inch apart (Exh. E; Record, p. 164; TSN, supra, p. 24).

Meanwhile, Gandola, his wife Arcelita, two of their three children, a baby-sitter and some "buseros" were taking their supper. Gandola was seated at one end of a bench beside his daughter. Unexpectedly, they heard an explosion. Gandola stood up, looked towards the national road and then towards the sea. Suddenly, he held his side and said, "Gin, I was shot" (TSN, August 23, 1974, p. 7).

Alfredo shot Gandola by holding the gun perpendicularly and aiming at the left side of Gandola's abdomen just below his ribs. Having hit his mark at the first shot, Alfredo aimed for another shot but due to the smoke emitted by the gun after the blast, he got out from under Gandola's house, went to where Jusep was, and together they proceeded to Jusep's house (TSN, August 15, 1974, pp. 24-25).

After learning that Gandola had been shot, one of the "buseros" tried to put out the light from the Petromax lamp but Arcelita quickly pumped air into the lamp to brighten the house. Seeing her husband wounded, she took a flashlight and went down the house hoping that she could still see the assailant. When she saw nobody downstairs, she went up the house and saw her husband leaning on the bench. Gandola told her to inform his father about the incident. Arcelita acquiesced and hurried towards Linay, Manukan to her father-in-law's house. Along the way, she met someone to whom she entrusted the task of informing Gandola's father about the shooting incident (TSN, August 23, 1974, pp. 7-8).

When Arcelita returned to their house, Gandola told her to inform his father that it was Leoncio Jusep who had "looked for" his killer. As he spoke, Gandola acted as if nothing had happened to him. He then asked Arcelita to hail a vehicle so that he could be brought to a hospital. He repeated his instruction to Arcelita to tell his father that it was Leoncio Jusep who had looked for a person to kill him (TSN, supra, p. 8).

Arcelita waited for a vehicle to pass by but none came. Later, the person she had told to go to her father-in-law arrived in a jeep. On the way to the hospital in Dipolog City, Gandola once more told Arcelita that Leoncio Jusep was the one who had looked for his killer and that, should he be unlucky and die, Arcelita should take over their fishing business.

When they arrived at the hospital at around 10:00 o'clock that evening, Gandola was x-rayed. While he was being wheeled to the operating room, Gandola reiterated to Arcelita that it was Leoncio Jusep who had looked for his

killer. Arcelita stayed outside the operating room while her husband was being operated on. At 4:00 o'clock the following morning, she was informed that Gandola was dead (TSN, supra, p. 9).

Gandola, who was 36 years old at the time of his death, underwent an exploratory laparotomy with gastrorraphy and splenectomy. The bullet which entered his left lower chest, lateral aspect, penetrated his abdomen and thoracic cavities, perforated his stomach and lacerated his spleen thus causing massive intra-abdominal hemorrhage (Exh. M; Record, p. 171). The immediate cause of his death was severe anemia due to massive hemorrhage (Exh. K; Record, p. 169).

In the meantime, coming from Gandola's place, Alfredo and Jusep encountered two persons (TSN, August 15, 1974, p. 25). One of them, Andres Gundes (Geondres), was defecating near his house about a hundred meters from Gandola's house. He heard the explosion and, shortly thereafter, saw two men walking towards him. Gundes aimed his flashlight at them and recognized them as Pidong Cotillas and Leoncio Jusep (TSN, August 22, 1974, p. 4). Gundes had known Jusep for several years and therefore he could not be mistaken in identifying him (TSN, supra, p. 5). The other person who saw Alfredo and Jusep was Teofisto Villarin, who, after hearing the explosion, alighted from the coconut tree on which he had perched extracting tuba. Upon reaching the ground, he switched on his flashlight and saw Alfredo and Jusep (TSN, August 15, 1974, p. 70).

Alfredo returned the gun to Jusep upon their arrival in Jusep's house (TSN, supra, p. 31). Jusep then instructed Alfredo to spend the night in Pastor's house. Alfredo stayed there until the 3rd of August, 1967 when Jusep handed Alfredo only around twenty pesos instead of the promised P2,000, and told him to return to Leyte (TSN, supra, pp. 26-27). Alfredo demanded from Jusep that he be given the P2,000 but Jusep promised him that he would send that amount to him through Pastor (TSN, supra, p. 32).

Agents of the National Bureau of Investigation (NBI) looked into the killing of Jesus Gandola. The first suspect to be investigated was one Rivera who allegedly had a quarrel with Gandola. Then they picked up Pastor Cotillas (TSN, August 22, 1974, pp. 29-30).

In his first sworn statement which he executed on August 10, 1967 in Villaramos, Manukan, Zamboanga del Norte before NBI agents Arturo H. Nunag and Restituto M. Reluya, Pastor admitted having worked for Jusep. He claimed that at around 7:30 in the evening of August 1, 1967, he was selling fish in the market with his wife and the wife of Jusep. He stated that he knew Gandola because he used to stay in Gandola's land for around ten years. He added that Gandola and Jusep had a misunderstanding because the latter refused to lend fish boxes to the former but that they later made up and talked to each other again. He admitted that in February, 1967, he built his house on Jusep's land without paying rentals thereon, and that Jusep even lent him P200 for his house but Jusep never demanded that he pay back said amount. However, he denied having received from Jusep P500 to pay whoever would agree to liquidate Gandola (Exh. O; Record, p. 264).

Five days later or on August 15, 1967, Pastor executed another sworn statement before the same NBI agents but this time in Dipolog City. He admitted therein that he had offered P500 to one Tacluban to liquidate Gandola; that he was acting on instructions of Jusep; that it was Jusep who approached him to find a man who could kill Gandola; that he went to Ozamis City to look for a hired killer; that his cousin, Alfredo Cotillas, whom he had recruited for Jusep's fishing business, told him when they arrived in Manukan that Jusep had suggested to him (Alfredo) that he should kill Gandola; that he told Alfredo that it was not a good proposition because even if he (Pastor) had looked for the hired killer, he did not want any of his relatives to get involved in the killing; that at 6:00 o'clock in the morning of August 2, 1967, Jusep told him that Gandola did not die instantaneously of the gunshot wound inflicted on him by Alfredo ("Matay, tor, wa man ma antimano"); that the gun used in killing Gandola was in the possession of Jusep; and that on the day he executed the statement, he was leaving for Leyte

to warn Alfredo to keep his mouth shut because Jusep was afraid that Alfredo might reveal that Jusep had instigated the killing of Gandola (Exh. P; Record, pp. 266-269).

The following day, August 16, 1967, Pastor executed his third sworn statement before NBI agents Alberto de la Rosa and Arturo M. Nunag in Zamboanga City. The certified copy of said statement which was presented in court was in the Cebuano dialect and, like Exhibit P, it was the only available copy of said statement.*

Pastor stated therein that he was in the market when Gandola was shot. He knew that Jusep owned the .32 caliber revolver used in shooting Gandola because it was Jusep who master-minded or instigated ("nagsugo") the killing of Gandola. According to Pastor, Jusep gave him P600, of which P500 would be paid to whoever would agree to kill Gandola and the balance of P100 would be spent in looking for the killer. He reiterated that he had given Tacluban the P500 but Tacluban allegedly lost it in gambling. He stated that some-time in January, 1967, when Jusep passed by Gandola's place to fish, Gandola chased him with his pumpboat. Sometime in May (1967), Jusep instructed him to look for "buseros" in Leyte. There, he met Alfredo (Di-dong or Pidong) and told him about Jusep's quest for a killer. Alfredo went with him to Manukan and he introduced him to Jusep.

Pastor narrated that it was on July 15, 1967 when Alfredo, Jusep and himself, talked about the killing of Gandola. Jusep told Alfredo that if the latter would agree to kill Gandola, he (Jusep) would take care of everything. At around 11:00 o'clock in the morning of August 1, 1967, the three met once again in the warehouse ("kamalig") of Jusep to map out the plan to liquidate Gandola. They agreed that it would be best to pass through the seashore both in going to and in coming from Gandola's house and that they would execute the plan at 7:30 o'clock p.m. to coincide with supertime.

Pastor admitted that he was a friend and trusted business associate of Jusep whom he first met in 1958. The last time he talked to Jusep about the case was the day before (August 15, 1967) around 7:00 o'clock in the morning when Jusep instructed him to go to Leyte to warn Alfredo not to talk to the NBI agents (Exh. Q; Record, pp. 270-273).

From Zamboanga City, Pastor accompanied NBI Agent Nunag to Hilongos, Leyte. Together with NBI Agent Carlos Ortega and a policeman from Bato, Leyte, Nunag apprehended Alfredo. At first, Alfredo denied having participated in the commission of the crime. But when the NBI agents arranged a confrontation between him and Pastor, Alfredo admitted his involvement therein. After taking Alfredo's sworn statement*, the NBI agents took Pastor and Alfredo to Dipolog City via Cebu City (TSN, August 22, 1974, pp. 35-38). Thereafter, appellant was arrested at the residence of his lawyer (TSN, supra, p. 45).

Pastor Cotillas, Alfredo Cotillas and Leoncio Jusep were charged with murder for the death of Jesus Gandola. The municipal judge of Manukan, who conducted a preliminary examination on the case, issued a warrant for the arrest of the three suspects. The record of the case was then forwarded to the Court of First Instance of Zamboanga del Norte and the provincial fiscal filed the corresponding information before said court (Criminal Case No. 4826).

When he was arraigned on November 16, 1967 Leoncio Jusep pleaded not guilty (Record, p. 48). After the case was set for trial, Second Assistant Provincial Fiscal Hermogenes S. Balisado filed a motion to discharge Leoncio Jusep as an accused alleging that after "a judicious study, evaluation and analysis of the evidence on record", he was con-vinced that the prosecution could not establish conspiracy between Jusep and his co-accused, and therefore, it would be futile for the prosecution to proceed with the trial of the case with respect to Jusep who would anyway be acquitted. He prayed that Jusep be "provisionally discharged from the information". The motion, dated November 28, 1967, was made with the conformity and signature of Leoncio Jusep (Record, pp. 102-103).

The provisional dismissal of the case against Jusep was granted by the court for "lack of sufficient evidence to connect him with the crime" (Criminal Case No. 4826 Decision, p. 2; Record, p. 107). Said dismissal order was issued after the parties had agreed that the investigators would continue gathering evidence on the case aimed at its refile should the gathered evidence so warrant (Record, p. 82).

The trial of Alfredo and Pastor Cotillas proceeded. On August 20, 1969, the Court of First Instance of Zamboanga del Norte, Branch II, promulgated a decision finding the Cotillas cousins guilty beyond reasonable doubt of murder and imposed on them the indeterminate sentence of ten years and one day of prison mayor to twenty years of reclusion temporal, and the payment jointly and severally of P12,000 indemnity to the heirs of Gandola (Criminal Case No. 4826 Decision, p. 10; Record, pp. 106-115). Alfredo and Pastor Cotillas did not appeal from said decision.

Angel Gandola, the victim's father, who was apparently convinced that Jusep was as guilty as Alfredo and Pastor, initiated the taking of sworn statements of more witnesses. The affidavits were forwarded to the office of the provincial fiscal. Consequently, the case was reopened and Fiscal Balisado started the reinvestigation on August 24, 1970 (Record, p. 82).

Due to the delay in the issuance of a resolution regarding the reinvestigation, Angel Gandola referred the case to the Department of Justice (Record, p. 53-54). Thereafter, on April 12, 1973, Fiscal Balisado issued a resolution stating that there was no prima facie evidence against Jusep to warrant his prosecution for murder, and dismissed the case against him without prejudice to its reopening "should new material evidence be discovered" (Record, pp. 80-97).

On May 7, 1973, the Chief State Prosecutor directed Fiscal Balisado to transmit to his office the record of the case and his resolution thereon. Five months later, then Undersecretary of Justice Efren I. Plana, through a letter dated October 4, 1973, found that there was a prima facie case against Jusep, set aside Fiscal Balisado's April 12, 1973 resolution and directed the Acting Provincial Fiscal to file with a competent court the corresponding information against Leoncio Jusep for murder (Record, pp. 27-28).

On November 29, 1973, Third Assistant Provincial Fiscal Rodolfo T. Mata filed before the trial court a motion to admit an information charging Jusep as the mastermind of the murder of Gandola with a prayer that Jusep be arrested and that no bail be granted for his provisional liberty (Record, p. 1). Attached to the information was a certification issued by Fiscal Mata which states that:

"I HEREBY CERTIFY that a proper preliminary investigation No. 1222 against respondent LEONCIO JUSEP has been conducted by Second Assistant Provincial Fiscal Hermogenes S. Balisado whose resolution to dismiss was appealed to the Secretary of Justice who reversed said resolution of Preliminary Investigation No. 1222 and found out that there exists a prima facie case or that respondent Leoncio Jusep is probably guilty of the offense of Murder.

"Dipolog City, November 29, 1973.

(Sgd.) RODOLFO T. MATA

Third Assistant Provincial Fiscal

"SUBSCRIBED AND SWORN to before me this 29th day of November, 1973 at Dipolog City, Philippines.

(Sgd.) RODABALLO Y. REALIZA

Acting Provincial Fiscal"

On December 12, 1973, Jusep filed a motion to quash the information and to suspend the issuance of a warrant of

arrest on the grounds that Fiscal Mata had no authority to file the information because he did not conduct the preliminary investigation pursuant to Republic Act No. 5180 and Presidential Decree No. 77; that the filing of the information was merely a revival of Criminal Case No. 4826, and that pursuant to paragraph 6 of Department of Justice Circular No. 74 dated July 26, 1967, where several persons commit a crime but are charged or investigated separately, the head of the office "shall see to it that the charges are investigated by the same investigating fiscal" (Record, pp. 9-11). The prosecution opposed said motion.

In its resolution of December 14, 1973, the lower court granted the motion to quash "without prejudice to the right of the fiscal who originally conducted the preliminary investigation to sign and file the corresponding information" or should Fiscal Mata sign and file the information and prosecute the case, he should conduct a "subsequent preliminary investigation in conformance with law" (Record, pp. 14-17).

Five days later, the lower court amended said order, reconsidering the quashal of the information, and holding in abeyance the action on the motion to admit the information until the provincial fiscal shall have signed and filed the corresponding information" as the authority that was delegated to him by the Department of Justice to do cannot be redelegated" (Record, p. 18).

Hence, Fiscal Balisado took over the case (Record, p. 19). On December 27, 1973, the following amended information was filed:

"The undersigned Acting Provincial Fiscal, with leave of court and pursuant to its amendatory order dated December 19, 1973, hereby amends the information on record and accuses LEONCIO JUSEP as Principal by induction of the crime of MURDER, committed as follows:

"That in the evening on or about the 1st day of August, 1967, in the municipality of Manukan, Zamboanga del Norte, within the jurisdiction of this Honorable Court, the said accused LEONCIO JUSEP being then the mastermind in the bizarre plot to liquidate one JESUS GANDOLA alias Etot, conspiring, confederating and working together with PASTOR COTILLAS (Principal) by indispensable cooperation and ALFREDO COTILLAS (Principal by direct participation) who were already convicted by final judgment in a decision promulgated by this Honorable Court on August 28, 1969 for the same crime of Murder in Criminal Case No. 4826, and are still presently serving their respective sentence, did then and there induce, offer a price and reward to his co-accused Pastor Cotillas and Alfredo Cotillas, the latter having acted as the triggerman, arming them with revolver Cal. 32, and all with intent to kill by means of treachery and evident premeditation and by taking advantage of the darkness of the night to better accomplish their evil motives in pursuance to their conspiracy, did then and there wilfully, unlawfully and feloniously attack, assault and shoot said JESUS 'Etot' GANDOLA while the latter was eating his supper in his dwelling house thereby inflicting upon him gunshot wounds on his left lower chest penetrating the abdominal and thoracic cavities, perforating the stomach, liver, diaphragm and crushing his spleen, which caused his death the following dawn despite the medical attendance rendered to him; that as a result of the commission of the said crime, the heirs of the victim suffered the following damages, viz:

1. Indemnity for the death of the victim

P12,000

2. Loss of earning capacity

5,000

3. Moral damages

10,000

4. Exemplary damages

TOTAL ---

10,000

P37,000

"CONTRARY TO LAW, with the qualifying circumstances of treachery and evident pre-meditation, and the aggravating circumstance of nighttime, dwelling, and consideration of price and reward.

"Dipolog City (for Zambo. del Norte), December 26, 1973.

(Sgd.) RODABALLO Y. REALIZA

Acting Provincial Fiscal"

The Acting Provincial Fiscal's motion to admit the amended information was opposed by the accused on the ground that it did not contain a certification stating that a proper preliminary investigation had been conducted before it was filed (Record, pp. 23-24). In view of that development, the Acting Provincial Fiscal submitted to the Court Undersecretary of Justice Plana's letter of October 4, 1973 (Record, pp. 27-28).

In its order of January 21, 1974, the lower court resolved that the said letter would "suffice as the requisite certification that forms part of the said amended information", admitted the said information, directed the issuance of a warrant for the arrest of the accused and fixed the bail at P40,000 (Record, p. 38).

The prosecution moved for a reconsideration of that order insofar as it granted the P40,000 bail (Record, pp. 45-49). On the other hand, the accused moved to quash the amended information on the grounds that the officer who filed the information had no authority to do so; that the information did not conform substantially to the prescribed form for lack of a certification that a preliminary examination or investigation had been conducted; and that the accused was previously in jeopardy of being convicted or acquitted of the offense charged because he had pleaded not guilty in Criminal Case No. 4826 when he was discharged as an accused therefrom (Record, pp. 45-49).

The lower court resolved both motions in its order denying the motion to quash. In his arraign-ment, Jusep pleaded not guilty of the crime charged (Record, p. 125).

The prosecution offered its version of the crime as narrated above. Thereafter, the defense presented Pastor Cotillas as witness and he testified that sometime before August, 1967, he visited Barrio Baliw, Hilongos, Leyte to look for "buseros" at the request of Leoncio Jusep. His cousin, Alfredo, went back with him to Manukan with the seven "buseros" he had recruited for Jusep. On August 1, 1967, he and Alfredo went to Loquilos to shoot Gandola. They had decided to kill Gandola because the latter chased him with a gun and boxed Alfredo. Gandola was mad at him because he refused to buy fish from him.

During the commission of the crime, he hid among the coconut trees some twenty meters away and, after Alfredo shot Gandola with his own gun, they went back to his (Pastor's) house. They did not meet anyone along the way.

A few days later, Alfredo re-turned to Leyte (TSN, July 18, 1975, pp. 31-34 & 37).

While he was a detention prisoner in the provincial jail of Zamboanga del Norte, Gandola's father and wife "Estelita" visited him. Gandola's father told him that a case had already been filed against Jusep and that should he agree to be a state witness in said case, Gandola's father would give him P5,000 (TSN, supra, p. 35).

Leoncio Jusep interposed alibi as his defense. He testified that on July 24, 1967, he left Manukan for Dapitan City and from there, took a boat bound for Dumaguete City, arriving therein the following day. He proceeded to the house of his younger brother, Tranquilino Jusep. Later, he went to Tanjay, Negros Oriental to buy "sinamay" or "bulsahon" to be used as a fish net. In Tanjay, where there was a town fiesta, he stayed with Jose Tabanda until the 27th of July. He gave P250 to Tabanda so that the latter could buy the "bulsahon" before his return to Tanjay from Dumaguete City on the 29th of July. He had to go back to Dumaguete City because he had a fever. He was treated by one Doctor Bueno who ordered the laboratory examination of his urine, blood and stool. He obtained the result of the laboratory tests the following morning and gave them to Doctor Bueno. For his cough and fever, Doctor Bueno gave him injections twice a day. He reported to Doctor Bueno's clinic until August 2, 1967.

He left Dumaguete City around midnight of August 2, 1967 and arrived at Dapitan City in the early morning of August 3. Then he boarded a jeep bound for Dipolog City and from there he proceeded to Manukan, arriving there at around ten o'clock in the morning (TSN, January 29, 1976, pp. 51-56).

Jose Tabanda and Tranquilino Jusep corroborated Jusep's alibi. Ricardo Binondo testified that he heard the news that Gandola was shot at around 7:00 o'clock in the evening of August 1 and that, while waiting for the fishermen at the beach in Manukan, he saw prosecution witnesses Gundes and Villarin alighting from a boat at around 8:00 o'clock that same evening (TSN, October 17, 1975, pp. 31-37).

The trial court did not give credence to the defense version. On December 23, 1976, it rendered the aforementioned decision imposing the death penalty on Jusep. He filed a motion for its reconsideration but the lower court denied it. Hence, the instant automatic review of the lower court's decision.

In his brief, appellant avers that the lower court erred in: (a) admitting the information against him without the proper preliminary investigation; thus, infringing his right to due process of law; (b) giving credence to the testimonies of Alfredo Cotillas, Arcelita Gandola, Angel Gandola and the other prosecution witnesses; (c) finding that he conspired with Alfredo and Pastor Cotillas; thus, totally ignoring the affidavit executed by Alfredo stating that he acted alone in shooting Gandola; (d) considering the statement of Gandola that it was he who looked for Gandola's killer; (e) finding that he was positively identified by Villarin and Gundes; (f) discrediting his alibi and the oral and documentary evidence in support thereof; (g) completely discrediting the testimonies of defense witnesses Pastor Cotillas, Jose Tabanda, Ricardo Binondo and Tranquilino Jusep; and (h) finding him guilty as charged and imposing on him the death penalty.

Appellant's allegation of deprivation of due process of law resulting from the filing of the information without a proper preliminary investigation is baseless.

Contrary to his allegation, the record shows that Fiscal Balisado did in fact conduct a preliminary investigation. Although on the basis of said preliminary investigation, he recommended the dismissal of the charge against appellant, his dismissal resolution was reversed by the Department of Justice.

Strictly speaking, no appeal was interposed from said dismissal resolution as the case was re-referred to the Department of Justice even before said resolution was issued. However, when the Secretary of Justice later reversed the dismissal resolution, he exercised his power "to alter, modify or nullify or set aside what a subordinate officer had done in the performance of his duties and substitute the judgment of the former for that of

the latter" (Vda. de Jacob vs. Puno, G. R. No. 61554-55, July 31, 1984, 131 SCRA 144, 148 quoting Noblejas vs. Salas, L-31788 & 31792, September 15, 1975, 67 SCRA 47). Another preliminary investigation would have been superfluous because the Secretary of Justice based his order to file the information on his review of the evidence presented during the preliminary investigation conducted by Fiscal Balisado. Parenthetically, it should be noted that under the 1985 Rules on Criminal Procedure, in cases where the Minister (now Secretary) of Justice reverses the resolution of the provincial or city fiscal or chief state prosecutor, "he shall direct the fiscal concerned to file the corresponding information without conducting another preliminary investigation or to dismiss or move for dismissal of the complaint or information" (Section 4, Rule 112).

On the merits of the case, We are convinced that the prosecution has proven beyond reasonable doubt that appellant is guilty of masterminding the murder of Jesus Gandola.

Ironically, the sworn statements of appellant's trusted friend Pastor Cotillas helped in sealing the case against him. Pastor's declaration in court that he executed those statements because he was afraid that the NBI agents would manhandle him is entirely untrue as he himself admitted that physical force was never inflicted on him. It seems, however, that Pastor was more apprehensive of the consequences of his revelations than anything else. He was heavily indebted to Jusep and therefore, to his mind, telling the truth to the authorities would be an act of betrayal. In fact, he tried to correct the damage his sworn statements had done to his avowed friend, Jusep, by presenting the story that he was Alfredo's co-author of the crime and that it was he who accompanied Alfredo when the latter performed the dastardly act, forgetting all the while that in two of his sworn statements, he had stated that he was in the market selling fish when Gandola was murdered.

We hold that the testimony of Alfredo Cotillas alone is sufficient to prove appellant's direct involvement in the crime. The testimonies of Arce-lita and Angel Gandola merely fortify the fact that it was appellant's idea to liquidate Gandola, and the testimonies of the other witnesses, especially those regarding appellant's presence at the scene of crime prove beyond reasonable doubt that appellant is as guilty as the convicted Cotillas cousins for the murder of Gandola.

The credibility of triggerman Alfredo Cotillas as a witness has remained intact notwithstanding the attempts of the defense to demolish it. Concededly, the testimony of a co-conspirator or a co-accused should be treated with caution. However, the same may be admitted and considered should there be no convincing proof that his credibility is impaired.

In this case, the defense failed to show any reason why Alfredo's testimony should not be given weight and credence. What it considered as a taint to his credibility is the fact that it took him more than two years to reveal the complicity of appellant in the murder. But the delay is not without an explanation.

During the trial of Criminal Case No. 4826, Alfredo and Pastor were both defended by a counsel provided by appellant (TSN, August 15, 1974, pp. 37-38). It was but natural that said counsel would not present them in court for there was the risk that during cross-examination, they might implicate their benefactor, appellant herein. Moreover, until the information for murder was filed against Jusep, there was no occasion for Alfredo to appear in court to tell the truth. Coupled with that is the fact that even after his conviction, Alfredo was still entertaining the hope that Jusep would make good his promise to give him P2,000. That hope dissuaded him from implicating Jusep in his sworn statement before the NBI agents (TSN, supra, pp. 49-50, 63).

In said sworn statement, Alfredo allegedly admitted that he was alone when he shot Gandola. Appellant now contends that said sworn statement was "suppressed" by the prosecution. This contention is unfounded. Said sworn statement was an exhibit in Criminal Case No. 4826 the record of which had been lost (TSN, supra, pp. 5-6; Record, pp. 16 & 116). If the appellant was really convinced that it was vital to his defense, then he should

have exerted extra efforts in procuring it so that it could be presented in court.

Appellant's professed non-involvement in the crime is belied by his frequent visits to the Cotillas cousins while they were detained in the provincial jail. According to the warden, appellant was particularly interested in the actual date of the Cotillas' transfer to the San Ramon Penal Colony as he wanted to give them money or "pabalon" (TSN, November 14, 1974, p. 24). Hence, it is not far-fetched to assume that he was behind Pastor's return to said colony four days after his release on parole on July 17, 1974. Although Pastor claimed that he returned there to visit Alfredo and to give him P150, We are convinced that the purpose of his trip was actually to make Alfredo sign an affidavit claiming sole authorship of the murder and ownership of the fatal weapon (TSN, August 15, 1974, pp. 40-41; July 18, 1975, pp. 48-49; September 4, 1975, pp. 3-4).

Appellant's alibi cannot save him either. Although he presented evidence that he was in Dumaguete City late in July, 1967, the possibility that appellant could have returned to Manukan to oversee the execution of his devious plan to kill Gandola, is not remote. As observed by the trial court, considering that the distance between Manukan and Dipolog City is only 38 kilometers and that between the Zamboanga peninsula and Dumaguete City it takes only three to four hours ride on a pumpboat, it is not impossible for appellant to have left Manukan after the commission of the crime and to be in the same place in the morning of August 2, 1967. Moreover, his defense of alibi totally crumbles in the face of his trusted friend Pastor's sworn statement that at 6:00 o'clock in the morning of August 2, appellant himself informed Pastor that Gandola was not killed instantaneously (Exh. P).

Alibi being the weakest of all defenses, it cannot prevail over direct positive evidence on the presence of the appellant at the scene of the crime (People vs. Reyes, L-18892, May 30, 1966, 17 SCRA 309; People vs. Venezuela, L-48057, August 19, 1982, 115 SCRA 865). Appellant's presence therein proves his complicity and evinces culpable association with the triggerman (People vs. Rivala, L-14077, March 31, 1964, 10 SCRA 462). It is worth noting that Villarin and Gundes were not the only ones who saw appellant near Gandola's house. Felipe Santander, in his sworn statement, stated that before 8:00 o'clock in the evening of August 1, 1967, he met Alfredo and the appellant along the seashore of Manukan (Exh. A). His re-fusal on the witness stand to identify the person he saw running on the seashore with Pidong Cotillas is explained by his own admission that appellant was his friend (TSN, August 22, 1974, pp. 19 & 21).

As it was the appellant who conceived the perpetration of the crime, met with the Cotillas cousins to deliberate on its execution and was present at the time of its consummation, he is a principal by direct inducement (U. S. vs. Bundal, 3 Phil. 89). His promise of P2,000 to Alfredo is equivalent to moral coercion as it was the moving cause which impelled Alfredo to kill Gandola, (U. S. vs. Mijares, 3 Phil. 447).

Conspiracy has also been proven by the prosecution. Appellant and the Cotillas cousins came to an agreement concerning the killing of Gandola and decided to go through with it. All three of them are therefore liable as co-principals and the act of each conspirator is the act of all (Art. 8, par. 2, Revised Penal Code; People vs. Timbang, 74 Phil. 295).

Treachery qualified the killing which was done in such a manner as to completely surprise the victim and make him a defenseless target. Nocturnity is absorbed by treachery. Evident pre-meditation, which was alleged as a qualifying circumstance in the information, should be considered only as a generic aggravating circumstance as treachery is sufficient to qualify the killing as murder (People vs. Diaz, L-24002, January 21, 1974, 55 SCRA 178). The crime was attended by evident premeditation because after appellant and the Co-tillas cousins had planned the manner by which they would kill Gandola, they allowed a sufficient interval of time to elapse wherein they could have dispassionately considered the consequences of their act.

Although Alfredo did not actually receive the P2,000 promised him by the appellant, the price, promise or reward

is a generic aggravating circumstance because it impelled Alfredo to shoot Gandola. Dwelling should also be considered as a generic aggravating circumstance with regard to appellant even if it was Alfredo who went under Gandola's house, because of the proven conspiracy in the commission of the crime.

Under Article 248 of the Revised Penal Code, murder is punishable by reclusion temporal maximum to death. There being three generic aggravating circumstances and no mitigating circumstances to offset them, the lower court correctly imposed the death penalty (Article 64, (3) & (6), Revised Penal Code). However, pursuant to Section 19, Article III of the 1987 Constitution, the death penalty imposed by the lower court should be reduced to reclusion perpetua (People vs. La-guardia, G. R. No. 63243, February 27, 1987).

WHEREFORE, the decision of the lower court is hereby affirmed with the modification that appellant is hereby meted the penalty of reclusion perpetua and ordered to pay the heirs of Jesus Gandola an indemnity in the amount of thirty thousand pesos. Costs against the appellant.

SO ORDERED.

Teehankee, C.J., Yap, Narvasa, Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Feliciano, Gancayco, Padilla, Bidin, Sarmiento, and Cortes, JJ., concur.

* Judge Dimalanes B. Buissan, presiding.

* The record of Criminal Case No. 4826 for murder with Alfredo and Pastor Cotillas as defendants, was lost in the files of the lower court's clerk of court (Record, pp. 66 & 116).

* This sworn statement was not presented in court. It must have been part of the lost record of Criminal Case No. 4826.

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