

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
RENTOR TIBAYAN, ACCUSED-APPELLANT.***G.R. No. L-39075. September 30, 1978*

Ponente: AQUINO, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/9626ea794545/>**AQUINO, J.:**

Rentor Tibayan appealed from the decision of the Court of First Instance of Cavite, Tagaytay City Branch, convicting him of murder, sentencing him to reclusion perpetua and ordering him to pay an indemnity of P12,000 to the heirs of the deceased Nicomedes Garcia plus P20,000 as moral damages (Criminal Case No. TG-124-73).

At around six-thirty in the morning of August 10, 1969, Nicomedes Garcia, a twenty-three-year old farmer, was feloniously ambushed and shot to death at Pasong Lagarian near Barrios Minantok and Bucal, Amadeo, Cavite.

The postmortem examination of his body conducted by the municipal health officer revealed that he sustained six entrance gunshot wounds and six exit wounds, to wit: (1) a wound in the left shoulder exiting at the right supra-scapular region; (2) a wound in the right mammary region exiting at the infra-scapular region; (3) a wound in the epigastric region exiting at the right lumbar region; (4) a wound in the right mesogastric region, exiting also at the right lumbar region, and (5) two wounds in the left forearm, both exiting at the palmar region thereof.

From the nature and location of the entrance wounds, the doctor concluded that they were caused by a carbine and that the victim was facing his assailant and was at some distance from him since there were no powder burns.

According to the version of Priscila Garcia-Poniente, the victim's younger sister and the only prosecution eyewitness, at around five-thirty on that morning of August 10, 1969, Priscila's mother, Marcela Villanueva, and two brothers, Nicomedes and Consorcio, left their house situated at Barrio Maymangga, Amadeo, Cavite in order to go to the highway at Barrio Lalaan, Silang, Cavite. To go to Barrio Lalaan (Gitna) from Barrio Maymangga, one had to pass the pathway going to Pasong Lagarian at Barrio Minantok and then pass Barrio Santol and after that Barrio Lalaan. Nicomedes was riding on a horse which carried the bananas and jackfruit that Consorcio and his mother were going to sell in the public market of Silang. It was Sunday, a market day in Silang. From Barrio Lalaan, Consorcio and his mother would take a jeepney to the Silang market. Nicomedes was to return to Barrio Maymangga.

Priscila and her father, Mamerto Garcia, about half an hour after the departure of her mother and brothers, also left the house and, following the same path, walked downhill towards Lalaang Gitna. She was going to Manila to get her things in her former boarding house at 954 San Andres Street, Malate. When she and her father were in Barrio Minantok, near Pasong Lagarian and the river, about a kilometer away from their house, her father nudged her and pointed to two men about a hundred meters away on an elevated ground whom they recognized as Rentor Tibayan and Cesar de la Rea, both residents of Minantok. Tibayan was armed with a carbine and De la Rea with a .45 caliber pistol. The two were looking around and were apparently waiting to ambush somebody.

Afraid to proceed further, Priscila and her father sat on the ground and sought cover among the barak or

luya-luyahan plants. Priscila was behind her father. They saw Tibayan and De la Rea looking in the southwest and then scanning the surrounding area and afterwards looking at the southeast in the direction of Lalaang Gitna. After watching them for about two minutes, Priscila saw a horse ascending the slope of the pathway. At that juncture, Tibayan aimed his carbine and fired successively at the rider of the horse which jumped (lumundag) three times until it reached the level ground. The rider fell from the horse. Father and daughter recognized the rider as Nicomedes Garcia. He fell on the ground. Tibayan and De la Rea approached the victim. De la Rea turned around the victim's body face up maybe to verify if he was dead. Then, the two malefactors fled westward. Nicomedes was returning from Barrio Lalaan and was presumably on his way home to Barrio Maymangga.

The killing unnerved Priscila. She collapsed and her father had to help her get up. He instructed her to go home to apprise those who were there that Nicomedes was shot and that their father would attend to him. She went home, taking another route, and told her brother, Teodorico, that Nicomedes had been shot and requested him to inform their relatives about the tragedy. Because of shock, Priscila was not able to do anything afterwards.

The victim's family did not immediately denounce to the authorities Redentor Tibayan as the gunwielder. Although at the autopsy conducted immediately after the killing, the vice-mayor, two policemen and a Constabulary officer were present, no report of investigation was submitted by the peace officers.

Twenty-nine days after the killing or on September 8, 1969, the statements of Mamerto C. Garcia, a fifty-three-year old farmer, and Priscila Garcia, a twenty-one-year old school teacher, were taken by Constabulary Sergeant Felix V. Gomez and were sworn to before the municipal judge of Amadeo.

Priscila Garcia explained that the complaint was delayed because she and the members of her family were afraid that they might be killed by Tibayan or that he might conceal himself. Mamerto Garcia in his statement said that he was afraid that he and his children might be killed if he accused Tibayan of murder. Mamerto decided later to denounce Tibayan because he was restless and he could not sleep. It seemed as if the spirit of his son would not give him any rest unless he brought the killer to the bar of justice.

Thus, Priscila declared in her statement:

"17. T - Gaano katagal kayong nakaupo bago binaril ang iyong kapatid ni Redentor Tibayan?

"S - Hindi gaanong natagalan, wala pa pong limang minuto humigit kumulang na kami'y nakaupong magama na magkalapit at pagkatapos ay pagyamba ni Redentor Tibayan ng baril at iyo'y pumutok ay lumabas namang palundag ang kabayo na sinasakyan ng aking kapatid na si Nicomedes hanggang sa ikatlong lundag ng kabayo ay nahulog sa lupa ang aking kapatid.

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"20. T - Pagkatapos na mabaril ang iyong kapatid, ano pa ang mga sumunod na pangyayari na iyong nalalaman at natatandaan?

"S - Nang matapos pong mabaril ang aking kapatid ay linapitan ni Cesar de la Rea at itinihaya ang aking kapatid pagkatapos ay umalis na silang dalawa na palinga-linga na tumatakbong paibaba bago nagpakanlurang

pasalunga sa pataas at nawala na. Nang wala na po ang dalawa ay itinayo na ako ng aking ama at sinabing ako'y umuwi na at sila na ang pupunta sa aking kapatid na si Nicomedes para alamin kung patay na nga. Ang ginawa ko po ay nagbalik na akong papauwi sa amin at sinabi ko na ang aming kapatid ay binaril." (p. 14, Record).

And her father, Mamerto, declared in his statement:

"6. T - Bakit naman ninyo nasabi na ang mga taong bumaril at pumatay sa inyong anak ay sina Dentor Tibayan at Cesar de la Rea gayong hindi naman kayo kasama niya ng siya ay patayin?

"S - Nakita ko po ng siya ay barilin kung kaya ko nasabi ang gayon.

"7. T - Saan kayo naroroon ng mangyari ang pagbaril sa inyong anak na si Nicomedes at sino ang inyong kasama kung mayroon man?

"S - Ako po ay nasa daan ding iyon na malapit sa lugar ng pinagbarilan sa aking anak na kasama ko si Priscila Garcia na anak ko ring dalaga na nagkataong naglalakad patungong Maynila para kuhanin ang ilang damit ni Priscila sa Maynila dahil siya'y nagtuturo at ang iba pa niyang gamit ay kukunin sa dati niyang tinuluyang bahay.

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"9. T - Sa layo bang humigit kumulang sa isang iktarya ay makikita ninyo ang pagbaril sa inyong anak?

"S - Opo. Dahil wala po namang ano pa mang bagay na nakakahadlang, dahil ang isa pa ay nasa mataas na lugar kami na pinanununghan namin ang lugar na pinagbarilan at kung kaya kitang-kita ang pagbaril sa aking anak na si Nicomedes Garcia.

"10. T - Masasabi rin ba ninyo sa imbestigasyong ito ang mga pangyayari ng sinasabi ninyong pagkakita ninyo ng barilin ang inyong anak na si Nicomedes kung inyong natatandaan?

"S - Samantalang kami nga pong dalawa ni Priscila ay naglalakad na pababa sa daang iyon ay nakita ko si Redentor Tibayan at si Cesar de la Rea na nakatayo sa tabing daan na may hawak na baril na carbine si Redentor Tibayan na parang may hinihintay at walang dalawang minuto a narinig ko ang putok na tuloy-tuloy na halos kasabay na rin noon ang paglundag ng kabayo na sinasakyan ng aking anak na si Nicomedes na ng ikatlong lundag ng kabayo ay nakita ko ring nahulog sa lupa si Nicomedes samantalang ang kabayo ay mabilis na nagtatakbo na papalayo na may karga pang bakid.

"Pagkatapos po ng tuloy-tuloy na paputok na iyon at matapos na makalayo ang aming kabayo na sinakyan ni Nicomedes ay nakita kong linapitan pa ni Cesar ang aking anak at pinihit pa at pagkatapos ay nagtatakbo pang umalis sa lugar ang dalawa na palinga-linga, na tuloy-tuloy rin sa paibaba bago lumiko sa pakaliwa na nagtatakbuhanag paitaas sa x x x hanggang sa nawala ang dalawa.

"Pagkatapos kong matiyak na wala na ang dalawa, kami ng aking anak na si Priscila na noon ay nakakubli sa barakan sa tabing daan iyon na nakakanlungan ng ilang mga dawag, ay saka pa umalis na ang ginawa ko ay pinauwi ko na si Priscila at ako'y siyang nagpunta sa aking anak na si Nicomedes para alamin kung patay na nga siya o hindi.

"Pagdating ko sa aking anak at natiyak kong patay na nga ay napahagolhol na lamang ako ng iyak. Humigit kumulang mga isang oras ay saka lamang may mga dumating na mga tao doon hanggang sa nagkarami at ng malaunan na ay dumating din ang mga PC at pulis Amadeo at siyang nagimbestiga sa bangkay. Noong humigit kumulang lampas nang ika-10:00 ng umaga x x x ay dinala na sa amin ang bangkay ng mga taong dumamay sa amin.

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"12. T - Sinabi ninyo na nang magpaputok itong si Redentor ng carbin ay pagkatapos ay lumundag ang kabayo na nakilala ninyo na iyon ay ang inyong kabayo pati na ang sakay niyaon na si Nicomedes, bakit malayo ba si Redentor Tibayan kay Nicomedes ng iyon ay kanyang barilin?

"S - Malapit na malapit po humigit sa tatlo lamang metro ang layo ni Redentor Tibayan kay Nicomedes ng iyon ay kanyang barilin.

"13. T - Samakatuwid maaaring makita rin ninyo nang ang inyong anak na si Nicomedes ay dumarating bago ito binaril at maaari din naman ninyong masabi sa imbestigasyong ito kung bakit noon lamang ninyo nakilala ang inyong anak ng lumundag ang kabayo habang namumutok si Redentor Tibayan?

"S - Dahil po sa ang lugar na iyon na pinagbantayan nina Redentor Tibayan at Cesar de la Rea ay kung kayo ang nasa sa lugar ng aming kinalalagyan noon ay talagang hindi kaagad ninyo makikita ang taong darating sap at ang daang iyon ay paahon at nasa makaahon ang dalawa nina Redentor Tibayan at Cesar de la Rea na makikita lamang ninyo o ng sinoman na nasa aming kinalalagyan ang tao ng dumarating kung iyon ay makaahon na sa kapatagang kinatayuan nina Redentor at Cesar kung kaya noong lumundag lamang ang kabayo na makaahon sa kapatagang iyon saka lamang makikita ang tao doon."

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"18. T - Sinabi ninyo na nang mangyari ang pagpatay sa inyong anak ay may mga PC at pulis na nagimbestiga

sa inyo doon, bakit hindi ninyo sinabi sa kanila kaagad, disin (sana) ay matagal nang nahuli ang mga kriminal na yaon?

"S - Hindi ko po sana nais pang magharap ng sumbong dahil ako'y natatakot na baka pati ako ay kanilang patayin gayon din ang iba ko pang mga anak, subalit parang ako'y sinusumbatan ng aking anak at hindi ako makatulog kung hindi ko rin lamang maihingi ng katarungan ang mga pangyayari kung kaya po ako ngayon ay nagsasalaysay dito sa inyo ng ganitong pangyayari.

"19. T - Mga taga saan naman itong dalawa nina Redentor Tibayan at Cesar de la Rea kung inyong nalalaman?

"S - Si Redentor Tibayan po ay taga roon sa Minantok, Amadeo, Kabite. Si Cesar de la Rea po naman ay taga Dagatan na matagal na naninirahan sa Minantok sa kanyang kamaganak.

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"26. T - Ito bang sina Dentor o Redentor Tibayan at Cesar de la Rea ay kagalit ng inyong anak?

"S - Ang nalalaman ko po ay si Redentor Tibayan ay nakasagutan ni Nicomedes at iyon ay umabot hanggang sa magkahamonan ang dalawa ni Nicomedes at Redentor sa may paaralan ng Minantok, Amadeo, Kabite, isang hapon kasama pa ni Redentor ang kanyang kuya Ofring at iyo'y hinamon ni Nicomedes na hindi naman nakalaban.

"27. T - Papaano naman ninyo nalaman iyon? Nakita rin ba ninyo?

"S - May taong nagsabi po sa akin, at pagkatapos ay itinanong ko kay Nicomedes kung totoo nga. At sinabi sa akin na totoo nga daw, kaya ang sinabi ko ay makibagay na sila.

"28. T - Kailan naman nangyari iyon kung inyong nalalaman?

"S - Ang nalalaman ko po ay isang linggo bago nila pinatay si Nicomedes." (pp. 15-17, Record).

On the basis of those statements of Mamerto Garcia and Priscila Garcia, Sergeant Gomez filed in the municipal court on September 22, 1969 a complaint for murder against Tibayan and De la Rea. At the preliminary examination, Mamerto Garcia, in answer to the questions propounded by the municipal judge, repeated what he stated in his sworn statement that he had witnessed the waylaying of his son by Tibayan and that about a week before the incident, there was an altercation (sikmatan o sagutan) between his son and Tibayan near the schoolhouse of Minantok. Mamerto Garcia said he did not make known his presence to Tibayan at the scene of

the crime because he was afraid that Tibayan might kill him also. (pp. 21-26, Record). Priscila Garcia, in answer to the questions of the examining magistrate, reiterated that she witnessed the shooting of Nicomedes by Tibayan. She said:

"Noon pong araw na iyon na humigit-kumulang sa ika-6:30 ng umaga, kami po ay naglalakad patungong Lalaan na ang layo po sa amin ay humigit-kumulang sa isang ektarya, ako po ay binatak ng aking ama at kami ay nangubli at itinuro po sa akin sina Redentor Tibayan at Cesar de la Rea na may dalang baril.

"Hindi po nalalaonan humigit-kumulang sa dalawang minuto ay nakarinig na kami ng sunod-sunod na putok. Kasabay noon ang paglundag ng kabayo ay sa patatlong lundag na bumagsak ang sakay noon na nakilala kong kapatid ko pala.

"Nang matapos po ang mga putok ay nilapitan ni Cesar de la Rea and aking kapatid at pinihit at sila po ay nagpalinga linga at patakpong umalis sa gawing paibaba at pagkatapos ay pakanluran." (p. 28, Record).

Having found probable cause, the municipal judge issued on October 2, 1969 a warrant for the arrest of Tibayan and De la Rea. Tibayan was arrested eleven months later or on September 7, 1970. He was confined in the municipal jail. At the second stage of the preliminary investigation held on September 14, 1970, Tibayan pleaded not guilty when arraigned. He was shown the statements of Priscila Garcia and Mamerto C. Garcia.

His counsel cross-examined Priscila. She identified the accused and declared that she had known him since childhood (back of p. 32, Record). The municipal court in its order of January 30, 1971 denied the motion of the accused for the dismissal of the case.

During the second stage of the preliminary investigation, the accused did not testify. He presented as witnesses Mayor Eusebio N. Leachon, Celsa A. Tibayan, Constanca Pacifico, Demenciano Villanueva, Rosario Vidal, Alejandro Perido and Sergeant Isaias Garcia.

The municipal court held that the evidence for the defense had overthrown the prima facie case against the accused which was established by the testimonies of Mamerto C. Garcia and Priscila Garcia. It dismissed the case in its order of December 29, 1971.

The case was reviewed and reinvestigated by Assistant Provincial Fiscal Candido P. Villanueva. On April 24, 1973, he filed in the lower court an information for murder against Tibayan. A warrant was issued for his arrest. He surrendered on May 5, 1973 to the Constabulary detachment at Tagaytay City. He pleaded not guilty at his arraignment.

At the trial on January 22 and 29 and February 6, 1974, Priscila Garcia-Poniente was grilled and subjected to a gruelling cross-examination. During the hearing on February 6, 1974, the private prosecutor moved for a continuance on the ground that his other witness, Consorcio Garcia, the victim's brother, was sick. The trial court denied that motion. The private prosecutor then made an offer of evidence. He manifested that Consorcio Garcia would declare that in the morning of August 10, 1969, when he and the victim, Nicomedes Garcia, and their mother were on their way to Barrio Lalaan, Consorcio saw Redentor Tibayan (armed with a long firearm) and Cesar de la Rea near a mango tree about twenty-five meters away from the road where they were walking and that when Consorcio and his mother returned from Silang, he saw the body of Nicomedes in a place not far from the place where he saw Tibayan that morning (13-14 tsn February 6, 1974).

Sergeant Garcia, Mayor Leachon, Perido (the municipal secretary), Rosario Vidal, her son Domiciano Villanueva, and Celsa A. Tibayan, six of the seven witnesses presented by the accused during the preliminary investigation, also testified at the trial. The accused presented a new witness, Florencio Bawag.

Villanueva, Leachon, Rosario Vidal and Celsa A. Tibayan testified first. After Bawag had testified on May 23, 1974, the case was scheduled for hearing on June 3, 10, 19 and 26, 1974, for the presentation of the other defense witnesses. Perido testified on June 3 and Sergeant Garcia testified on June 10. It was understood that the defense would present its other witnesses on June 19 and 26.

However, on June 19, the defense counsel did not appear. He just sent his messenger to the court to ask for postponement on the ground that he (counsel) would go to the hospital. The trial court found the messenger's explanation to be unsatisfactory and regarded the "absence of counsel as a waiver on the part of the accused to present further evidence" and, consequently, the case was "deemed submitted for decision".

The defense counsel filed a motion for reconsideration wherein he explained that, as shown in the verified medical certificate, he was under treatment for peptic ulcer on June 18 and 19. The trial court denied the motion in its order of July 1. Unaware of that denial, the accused filed on July 3 a motion for the resolution of his motion for reconsideration. He intimated therein that an adverse resolution would constrain him to "bring the matter before a higher court". He did not do so. The decision convicting Tibayan was promulgated on July 9, 1974. On July 23, 1974, when the accused filed his notice of appeal, he also made a written offer of his Exhibits 1, 2 and 3.

Tibayan in his first assignment of error contends that the trial court erred in regarding his counsel's nonappearance at the hearing on June 19, 1974 as a waiver of his right to present further evidence and in considering the case submitted for decision.

To understand the trial court's viewpoint, the antecedent circumstances should be recalled. The assassination of Nicomedes Garcia was perpetrated on August 10, 1969. The complaint for murder against Tibayan was filed in the municipal court on September 22, 1969. He was arrested eleven months later. He presented evidence at the second stage of the preliminary investigation. And, as already stated, the municipal court in its order of December 29, 1971 dismissed the complaint because it found that the prosecution witnesses, Mamerto Garcia and Priscila Garcia, were not at the scene of the crime when the murder was committed.

However, the case was reinvestigated by the fiscal. He reversed the municipal court's order of dismissal and filed an information for murder against Tibayan. He was arraigned on May 16, 1973. He posted bail and was released on October 29, 1973.

The trial started on January 22, 1974 and the prosecution finished the presentation of its evidence on February 6, 1974. On February 28, 1974, the date scheduled for the presentation of the defense witnesses, Tibayan and his counsel did not appear. Upon motion of the prosecution, the case was deemed submitted for decision and the promulgation thereof was scheduled on March 14, 1974. Tibayan moved for the reconsideration of that order on the ground that he was sick on February 28. His counsel alleged in his motion that he had intended to present Tibayan "as first witness" and since Tibayan was sick, the defense counsel did not appear in court anymore on February 28.

The trial court set aside its order wherein the case was deemed submitted for decision. It scheduled the continuation of the trial for the presentation of the defense witnesses. As already stated, after the defense had presented seven witnesses who tried to establish that the sole prosecution witness, Mrs. Poniente, did not see the shooting at all because she was allegedly at home and was not near the scene of the crime, the defense counsel did not appear at the next hearing and merely sent his messenger to apprise the court that he would enter the hospital.

We have already said that the trial court regarded the nonappearance of the defense counsel as a waiver of the presentation of further evidence and considered the case submitted for decision. The defense counsel in his motion for reconsideration, which was denied, did not state categorically whether the accused would testify at the next hearing. Even in his brief, he does not indicate whether appellant Tibayan was disposed to testify in his behalf. Tibayan contends that he was denied due process and that the trial court acted with grave abuse of discretion in terminating the trial and in not giving him another opportunity to present additional evidence.

What must have irked the trial court was that the defense counsel, instead of requesting another member of his law firm to ask for the cancellation of the hearing, just sent his messenger to perform that task. The practice of some lawyers of sending their messengers or clerks to ask for postponement evinces disrespect to the court, detracts from the decorum and dignity of the judicial proceeding, and is tantamount to trifling with the court and belittling the presiding judge. That practice should not be tolerated.

Appellant Tibayan, who was born on May 10, 1945 and was twenty-four years old when the crime was committed and who was out on bail and should have known that his case was in its last stage, should have exerted efforts to insure the presence of his counsel or a substitute lawyer at the hearing on June 19, 1974.

The Solicitor General points out that appellant Tibayan, through his witness, Florencio Bawag, a thirty-year-old farmer and neighbor of Tibayan in Barrio Minantok, disclosed that his defense would be an alibi. Bawag testified that he heard gunshots at around six-thirty in the morning of August 10, 1969 and that about fifteen minutes later or before seven o'clock appellant Tibayan, who seemed to have just awakened, arrived in his barbershop in the company of Councilor Tibayan and had a haircut. Redentor allegedly asked Bawag where the gunshots originated and Bawag replied that the shots "came from the south". Bawag admitted that his wife and appellant Tibayan are first cousins and that, in testifying for Redentor, he was trying to help the latter.

The Solicitor General contends that, considering that Bawag heard the gunshots, his barbershop must be near the scene of the crime and that it was possible for Tibayan to have gone to that place and then go to Bawag's barbershop. That contention is tenable. Tibayan's alibi is not sufficient to exculpate him.

Taking up once more the question of whether the trial court erred in not allowing Tibayan to present additional evidence, we hold, after a careful consideration of the surrounding circumstances, that he was not deprived of his right to defend in person and by attorney at every stage of the proceedings.

He was afforded adequate opportunity to present his evidence. The case, certainly not a complicated one, had been pending for more than four years. The trial court did not act capriciously in discountenancing an informal request for transfer of hearing based on a dubious ground.

Aside from the defense of alibi, which appellant Tibayan articulated through the farmer-barber, Florencio Bawag, and the veracity of which is questionable, Tibayan interposed the defense that Mamerto Garcia and Priscila Garcia did not witness the killing and were not telling the truth because, at the time of the shooting, Mamerto was allegedly gathering mushrooms and Priscila was at home.

A painstaking scrutiny of appellant's evidence reveals that the defense witnesses were not candid and trustworthy. Thus, Alejandro Perido, the municipal secretary, testified at the trial that in the morning of August 10, 1969, after a report was received by the police that Nicomedes Garcia was shot at Barrio Minantok, Perido, in the company of the vice-mayor, the municipal health officer and sanitary inspectors, Sergeant Isaias Garcia and Patrolman Serafin Garcia rode in a jeep and proceeded to the scene of the crime; that before reaching that place, Sergeant Garcia went alone to the house of Mamerto Garcia at Barrio Maymangga and Perido and the others waited for him; that after Sergeant Garcia had come back, the group repaired to the scene of the crime and brought the

victim's body to his house and that, while in the victim's house, Perido was not able to talk with Mamerto because the latter was not well. Perido added that he is related to Mamerto Garcia because the latter was the first cousin of his maternal grandmother.

The foregoing declarations of Perido at the trial are inconsistent with his testimony at the preliminary investigation where he testified that he and his companions in the morning of August 10, 1969 "first" made an investigation and then proceeded to the victim's residence and that, after the victim's body was brought to his residence, he (Perido) talked with Mamerto Garcia. Perido declared at the preliminary investigation that he was not related to the victim (pp. 71-72, Record).

Not content with having testified at the preliminary investigation, Perido executed an affidavit, wherein he stated that, before proceeding to the scene of the crime on August 10, 1969, he and his companions went to the residence of Nicomedes Garcia, where he talked with the victim's father, Mamerto, who told him (Perido) that he (Mamerto) did not know the killer because he was not at the scene of the crime (Exh. G). That allegation in Perido's 1972 affidavit is inconsistent with his testimony in 1971 at the preliminary investigation that he talked with Mamerto only after the victim's body was brought to his residence, and with his testimony at the 1974 hearing that he was not able to talk at all with Mamerto. It is evident that Perido's contradictory declarations have no probative value.

Another defense witness, Mayor Leachon, testified that in the evening of August 10, 1969, he attended the wake or vigil in the house of Mamerto Garcia. He and Sergeant Carlos Tibayan (husband of Celsa A. Tibayan, appellant's first cousin) talked confidentially or secretly with Mamerto near the corral of his house. Mamerto allegedly told Mayor Leachon that he could not tell who killed his son, Nicomedes, because he was gathering mushrooms when he heard the gunshots.

Mayor Leachon further testified that three weeks later, when Mamerto and Priscila filed the complaint for murder, Mamerto explained to the mayor that the alum pointed to Redentor Tibayan as the culprit ("Si Redentor Tibayan ang pinagtamaan ng tawas")

The mayor identified the carbon copy of an affidavit of desistance dated November 16, 1973, sworn to before him by Priscila Garcia. In that affidavit, she withdrew as a witness in the case allegedly because there was no certitude in her declarations and that after studying the matter, she realized that it was difficult to identify the real culprit "dahil sa nasa masukal na lugar ang pinagkublihan ng pumatay sa aking kapatid" (Exh. 3).

The probative value of Mayor Leachon's testimony is doubtful because he testified after the death of Mamerto Garcia and, therefore, the latter had no chance to rebut his testimony. Mayor Leachon could have executed an affidavit in September, 1969, when Mamerto Garcia filed the complaint and executed a sworn statement, that Mamerto had told him that he did not know the gunwielder. Mayor Leachon did not do so and chose to speak out after Mamerto had died. The mayor, as a law-enforcing officer desirous of preventing a miscarriage of justice, according to his testimony, could have seasonably contradicted Mamerto's affidavit by executing his own counter-affidavit. The mayor was aware all the time that Mamerto had accused Tibayan of having killed Nicomedes. But the mayor kept silent and was emboldened to contradict Mamerto's accusation only after Mamerto's death.

With respect to Priscila's 1973 affidavit of desistance, the defense had not explained why the original thereof was not produced in court and why she was not impeached with that affidavit when she testified on January 22, and 29 and February 6, 1974. Her testimony in court was a total repudiation of that affidavit of desistance.

Another unreliable defense witness is Sergeant Garcia, the Constabulary detachment commander supervising the

police of Amadeo. He testified at the hearing on June 10, 1974 that in the morning of August 10, 1969, after he was informed that Nicomedes Garcia was shot at Barrio Minantok, he (Sergeant Garcia), accompanied by some town officials and later by Marcelo Garcia, the victim's brother, proceeded to the scene of the crime. But before going there directly, Sergeant Garcia went alone to the victim's house, where he talked with the father, Mamerto, who informed him that he (Mamerto) was gathering mushrooms when he heard the gunshots and that he knew that his son was shot because his horse returned to the house, riderless and with empty baskets (bakid) on its sides.

Sergeant Garcia testified that he invited some of the policemen of Amadeo to go with him to the scene of the crime. But he named Patrolman Serafin Garcia as the only policeman who went with him. He said that he did not remember whether Patrolman Onofre Tibayan, appellant's brother, was with him (8, 31-32 tsn). The municipal health officer and Mayor Leachon testified that Patrolman Tibayan was with the group of Sergeant Garcia that repaired to the scene of the crime (47 tsn January 24, 1974). If the municipal health officer could remember that appellant's brother was with Sergeant Garcia's group, it is not credible that Sergeant Garcia would not remember that fact. It may be noted that the municipal secretary also studiously avoided mentioning that Patrolman Tibayan was with the group.

Curiously enough, Sergeant Garcia did not make any written report of his investigation and did not make any sketch of the scene of the crime. At the preliminary investigation on June 26, 1971, Sergeant Garcia testified that, when he asked Mamerto Garcia on August 10, 1969 if the latter heard the shots, Mamerto allegedly answered that he did not hear the shots because he was sharpening his bolo ("naghahasa ng itak") (p. 79, Record). That declaration of Sergeant Garcia is at variance with his later declaration at the trial that Mamerto was gathering mushrooms, when he heard the shots, a theory adopted by Mayor Leachon and the other defense witnesses.

Two other defense witnesses, Domiciano (Demenciano) Villanueva, a high school graduate and a farmer, and his mother, Rosario Vidal, the mother-in-law of Patrolman Tibayan, appellant's brother, testified that they were near the scene of the crime, that they heard gunshots, and that they saw later the victim's body but they did not see in the vicinity Mamerto Garcia and his daughter, Priscila, nor appellant Redentor Tibayan and his companion, Cesar de la Rea.

That negative testimony is not a conclusive proof that appellant did not shoot Nicomedes Garcia. Nor does it completely belie the testimony of Priscila Garcia that she and her father witnessed the shooting. It is noteworthy that, in spite of the fact that Domiciano claims to be the victim's distant relative, he and his mother Rosario did not report the killing to the police nor did they contact the victim's parents whom they know to be residents of Barrio Maymangga.

Celsa Alcantara-Tibayan, the widow of the late Sergeant Carlos Tibayan of the criminal investigation service (CIS) (he died in December, 1969), testified that in the afternoon of August 10, 1969, when she condoled with Priscila Garcia in her house, the latter informed her that she (Priscila) did not know the killer because she was taking a bath when she heard the gunshots. Mamerto allegedly told Celsa that he was gathering mushrooms at that time. That was the same thing that Mamerto allegedly told Mayor Leachon in the evening of August 10, 1969 when Leachon and Sergeant Carlos Tibayan conferred with Mamerto near the corral of his house.

It is relevant to note that Celsa A. Tibayan, who is appellant's first cousin (their mothers are sisters), testified at the preliminary investigation that when the shooting was perpetrated appellant Redentor Tibayan "was sleeping" (p. 43, Record).

After a conscientious study of the record we find that the trial court did not err in giving credence to Priscila's testimony that she saw appellant Tibayan shooting her brother with a carbine in the early morning of August 10, 1969. She has known the appellant for a long time.

The motive for the killing, which was a heated altercation between the appellant and the victim a week before the shooting, was mentioned by Mamerto Garcia in his statement made to Sergeant Gomez, an investigator, in the presence of Captain Gregorio R. Abad and Sergeant Dionisio R. Doro, and sworn to before the municipal judge (p. 17, Record). Unfortunately, Mamerto Garcia died on January 15, 1970, or long before the trial started on January 22, 1974.

To counteract Priscila's testimony, the defense intimated that the appellant was still asleep when the shooting occurred (p.43, Record) and that about fifteen minutes after the shooting or before seven o'clock in the morning of August 10, 1969, appellant, accompanied by Councilor Tibayan, had a haircut at the barbershop of his neighbor, Florencio Bawag, whose wife is appellant's first cousin. Why the appellant should have a haircut at such an early hour has not been explained. At any rate, the barbershop was not far from the scene of the crime since the gunshots were heard by those inside that shop.

The defense witnesses, particularly Sergeant Garcia who investigated the shooting in the company of Patrolman Onofre Tibayan and who feigned that he could not remember that Patrolman Tibayan was his companion, evolved the theory that Mamerto Garcia had told them that he was gathering mushrooms when he heard the gunshots.

It was quite irregular or anomalous that Sergeant Garcia did not bother to make a written report of the result of his investigation. His failure to do so amounted to a cover-up. His theory, that Mamerto Garcia was gathering mushrooms, was adopted by the other defense witnesses, Mayor Leachon, Celsa A. Tibayan (appellant's first cousin), and Alejandro Perido, the municipal secretary.

Mamerto Garcia, being dead, could not refute the statement imputed to him by these witnesses. But Sergeant Garcia himself rendered incredible the "gathering mushrooms" theory because he testified at the preliminary investigation that Mamerto Garcia told him that he (Mamerto) did not hear the gunshots "because at that time he was 'naghahasa ng itak.'" (p. 79, Record). That contradiction gives to the evidence of the defense an aura of fabrication.

In view of all the foregoing considerations, we find no error in the lower court's judgment of conviction. The same is hereby affirmed. The appellant should be given credit for his preventive imprisonment pursuant to article 29 of the Revised Penal Code. Costs against the appellant.

SO ORDERED.

Fernando, (Chairman), Antonio, Concepcion, Jr., and Santos, JJ., concur.

Barredo, J., did not take part.

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