

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
JOVITO AGUEL, SILVERIO AGUEL, AND RAMON JALIKO,
DEFENDANTS, SHEM JAKOSALEM, DEFENDANT-APPELLANT.**

G.R. No. L-36554. May 19, 1980

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an appeal from the decision, August 31, 1972, of the Circuit Criminal Court of Cebu City in Criminal Case No. CCC-XIV-613-Cebu, convicting SHEM JAKOSALEM of the crime of Robbery with Homicide and sentencing him to suffer the penalty of RECLUSION PERPETUA, the dispositive portion of which reads as follows:

"WHEREFORE, the Court finds the accused Shem Jakosalem GUILTY beyond reasonable doubt of the crime of Robbery with Homicide and applying the provisions of Article 294, paragraph 1 of the Revised Penal Code, and there being no mitigating nor aggravating circumstance present in connection with the crime charged, the accused is hereby sentenced to suffer the penalty of RECLUSION PERPETUA, to indemnify Aurora Ira the sum of P160,000.00 for the lost of money and other valuables and for the death of Cristituto [Restituto] Ira to pay the heirs the sum of P12,000.00 with one-fourth of the costs.

In the service of his sentence, the accused is hereby entitled to be credited with the period of his preventive imprisonment in accordance with law."

Restituto Ira and his wife, Aurora, were engaged in the jewelry business under the name La Moderna Jewelry. Their office was located in the second floor of the Labucay building at the corner of Calderon and Magallanes streets in Cebu City. They consigned jewelry to other shops and similarly accepted consigned jewelry. Adjoining the La Moderna Jewelry was their shop, the La Moderna Shop, where they made rings and other jewelry or mounted stones on rings.

On June 9, 1972, at about 2:15 o'clock in the afternoon, Aurora Ira was alone in the office making a list of consigned jewelry which she had placed on top of a table. Her husband had gone to the adjoining shop. She was thus pre-occupied when Lydia Pilaris who sold jewelry for the La Moderna Jewelry on consign-ment basis and who was also a permanent customer walked in. Aurora asked Lydia to sit down and they exchanged amenities. It was then that Aurora noticed that there were three men in the anteroom of the office. She opened the connecting door and asked the men if they wanted something. Instead of answering, they asked her if the establishment sold jewelry. Simultaneously, one of the three men pulled out a gun announcing, "This is a holdup." The man pushed her inside the office with the gun poked at her right side. In the office both Aurora and Lydia were ordered to squat on the floor and to look down. Both their mouths were taped with pieces of plaster. Aurora's hands were also tied with a rope. They were too afraid to look up to see what the men were doing but Aurora knew that the robbers were taking the jewelry on the table and those in the display counter by the tinkling sound of the jewelry.

As the three men started to leave, Aurora heard gunshot sounds coming from the anteroom. She signaled to Lydia

to remove the plaster from her mouth. While Lydia was removing the plaster from her mouth and untying her, she heard the door leading to the office being pushed. She opened the door and found her husband Restituto bloody and sprawled on the floor. He was lying on his back, face up, with his head towards the main door. She cradled his head on her lap, shouted for Lydia to get some help. Restituto Ira was rushed to the hospital where he was pronounced dead on arrival.

The Necropsy Report issued by the Medical Office of the Cebu City Police Department established the cause of death as gunshot wounds in the head, face and right side. The post mortem findings were as follows:

"Blood coming out from the mouth.

Gunshot wound, head, face, mandible, right, 136.0 cms. from the right heel, 4.0 cms. in front and 3.5 cms. below the right external auditory meatus, surrounded by smudging and tattooing with a diameter of 8.0 x 4.0 cms.; circular in shape, 0.8 x 0.7 cms. in size, contusion collar 0.3 cms. wide at its supero-lateral border and 0.2 cms. wide at its infero-lateral border, edges inverted directed forward, right to left, and slightly downward, involving the skin and underlying soft tissues, fracturing the body of the right mandible, into the oral pharynx, penetrating the trachea, internal carotid artery, and internal jugular vein, making an EXIT: wound at submandibular region, left, 135.5 cms. from the left heel, and 6.2 cms. directly below the left external auditory meatus.

Adhesions, pleural, fibrous, obstructive, left lung.

Heart filled with dark fluid blood. Brain and their visceral organs, pale.

Stomach, full, with partially digested rice and other food particles." (Exh. I.)

On the basis of the investigation of the case conducted by the Theft and Robbery Section of the Cebu City Police Department SHEM JAKOSALEM together with three others originally denominated as JOHN DOE, PETER DOE and RICHARD DOE were charged with the crime of Robbery with Homicide in an information dated July 3, 1972, alleging:

"That on or about the 9[th] day of June, 1972, at about 2:15 o'clock P.M., in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, conniving and confederating together and mutually helping one another, with deliberate intent, with intent of gain and by means of violence and intimidation upon person, to wit: by accused, Shem Jakosalem pointing a gun at the person of one Aurora B. Ira and while in such act, the other accused hogtied said Aurora B. Ira and covered her mouth with a plaster after which said accused, did then and there take, steal and carry away cash, Philippine currency and assorted pieces of jewelry valued all in all in the amount of P160,000.00, belonging to the spouses Restituto Ira and Aurora B. Ira, to the damage and prejudice of said spouses in the amount aforesaid; and while the accused were in the process of getting out from the scene, did then and there shoot the husband Restituto Ira, hitting him on the vital parts of his body, thereby inflicting upon him the following:

'GUNSHOT WOUND, HEAD, FACE, RIGHT SIDE' and as a consequence of which said Restituto Ira died instantaneously."

On arraignment date, July 20, 1972, the three Does had not yet been identified and apprehended although according to Sgt. Josefino Pilapil, Head of the Control Area Zone, Theft and Robbery Section, the basis of the police for pinpointing the accused was the information given by an informer, a police character named Jolly Amameo alias Boy Alas, who was killed a week after the appellant was arrested on June 18, 1972, that the persons responsible for the robbery were Shem Jakosalem, a certain Umpad, Romeo Estrada alias Carlito, and Roberto Sastrillo alias Boy. Shem Jakosalem pleaded not guilty to the crime charged. He was tried on the merits and sentenced as aforesaid.

Jovito Aguel, Silverio Aguel and Ramon Jalico were arrested on Aug. 2, 1972, and identified as the John Doe, Peter Doe and Richard Doe in the information. They were arraigned on August 14, 1972. All three pleaded not guilty and were tried on the merits but they were acquitted for insufficiency of evidence in a decision dated December 16, 1972.

Shem Jakosalem was convicted mainly on the basis of the identification made by Aurora Ira, as the robber who poked a gun at her during the robbery of their establishment on June 9, 1972, and taxi driver Virgilio Ababon who identified Jakosalem as one of those who rode his cab from the vicinity of the Labucay building after the robbery.

In urging reversal of the judgment of conviction, appellant contends that the lower court erred in (1) giving credence to the prosecution witnesses instead of those of the defense, and (2) finding that there was a conspiracy to commit the robbery.

The testimony of the witnesses as narrated by the trial court is quoted hereunder:

"Aurora Ira, 40 years old, widow, housekeeper and a resident of 509-C P. del Rosario Street, Cebu City. She testified that at about 2:15 o'clock in the afternoon of June 9, 1972 she was in their office at the second floor of the Labucay building a customer of hers by the name of Lydia Pilaris came and greeted her. She offered her a seat and afterwards struck a conversation with her. Not long after three men came and inquired from her whether they were selling jewelries and almost simulta-neously one of the three whom she identified as herein accused Shem Jakosalem pulled out a gun and announced it was a holdup. She was then push aside and told to sit on the floor and was told to look down. When she and Lydia Pilaris was already down on the floor a plaster was placed over her mouth and that of Lydia. The three men gathered all the jewelries on top of the table and also those placed inside the display show case and the cash inside the safe. When the men left she heard an explosion in the receiving room and when she verified it she saw her husband lying on the floor with blood over his face. She placed the head of her husband over her lap and told Lydia to go out of the office and asked for help. Somebody came and helped her husband out of the office and to the hospital for treatment but her husband succumbed to the gunshot wound he sustained that day. She further declared that the total amount of cash and jewelries that they lost in that robbery was P164,562.00.

"Virgilio Ababon, 27 years old, taxi driver and a resident of Molave, Tabunok, Talisay, Cebu testified that at about two o'clock in the afternoon of June 9, 1972 a person hailed his taxi at the corner of Leon Kilat and P. del Rosario Sts. and told him to proceed to the Tansan Auto Supply at Manalili Street. Upon reaching the place his passenger instructed him to wait. He waited as instructed. Moments later, three men suddenly came and barged inside his taxi telling him to start the same. He refused these three men and informed them that he was waiting for a passenger who was buying spare parts at Tansan Auto Supply but the men told him that the person who requested him to wait was their companion. He was then ordered to start his taxi and as ordered he started the engine and proceeded towards M. C. Briones and then Lapulapu Street where he was ordered to stop upon reaching Colon and Jakosalem Streets. While inside the taxi, he very well recognized herein accused Shem Jakosalem because this accused was seated at the middle position of the backseat of the taxi he was driving and his car was equipped with a rear view mirror to which the image of the accused was clearly reflected. Besides Shem Jakosalem, he also clearly saw and could identify another one who was seated on his right side at the front seat. Upon reaching corner D. Jakosalem and Colon Streets, he was ordered to stop and four men alighted from his taxi cab after giving him the amount of five pesos although the taxi meter registered only two pesos and forty-five cen-tavos. When the four men alighted he saw accused Shem Jakosalem carrying with him a plastic bag with something inside it.

"On June 19, 1972 he was brought by the police at the police headquarters and there he was made to identify the accused Shem Jakosalem in a line-up of five persons. He asked the police to place an eyeglass on said accused because according to him he was wearing an eyeglass when he saw him inside his taxi that afternoon of June 9, 1972. The moment an eyeglass was placed on the accused, he readily identified the latter as the

person inside his taxi on June 9, 1972 together with three other men.

"Josefino Pilapil, police sergeant, Cebu Police Department declared that while they were on patrol aboard a patrol car at the vicinity of corner Colon and Junquera Street, Cebu City, they received a radio call from Base Control informing them to proceed to Labucay building at Magallanes Street to follow up a robbery alarm. They immediately proceeded to the place and upon arrival there they went up the second floor of the building and searched for evidence in connection with the heist just committed. They found in the scene of the robbery two pieces of plaster, marked exhibits "A" and "B", seven pieces of rope and two holster. They also tried to followup the taxi that was used by the robbers and from information they gathered that the taxi used in the robbery was a Quijada Taxi No. 92. After following up the taxi on that day June 9, 1972 they learned that the driver was Virgilio Ababon. He conducted an investigation on him and the driver told them that if he (Virgilio Ababon) could see those persons who were his passenger, he will be able to identify them. Three days after the incident they brought several pictures to the house of Mrs. Ira for identification. Mrs. Ira readily identified the picture of the accused Shem Jakosalem as one of the persons who robbed them on June 9, 1972. They picked up the said accused Shem Jakosalem on June 19, 1972 and brought him to the police headquarters. The following morning he was brought to the house of Mrs. Ira and there the accused was identified by Mrs. Ira as the person who went up the second floor of the Labucay building and robbed them of their jewelries.

"Mercedes Mercado, 44 years old, married, merchant and a resident of 1357 R-Sto. Niño, Pardo, Cebu City. She stated that at about 9:00 o'clock in the morning of June 9, 1972 the accused Shem Jakosalem went to her store in Taboan Public Market and asked from her one peso for breakfast. She gave him the money and Shem Jakosalem went to a nearby store and ate. After eating the accused went back to her store and stayed there with her son Danilo up to four o'clock when they left for the Police Taboan Precinct in connection with the case of her son who was a victim of "paregla". From there they returned to their store with the accused and there he stayed until the evening of that day. She further declared that never an instance did the accused Shem Jakosalem left [leave] her store from nine o'clock in the morning until the evening of that day. Practically, the whole day of June 9, 1972 the accused Shem Jakosalem was with his son Danilo inside her store at the Taboan public market.

"Pedro Montemayor, 31 years old, married, merchant and a resident of 84 Figueroa street, Cebu City testified that he is also the owner of a store at the Taboan market situated about six meters from the store of Mrs. Mercado. At past nine o'clock in the evening he saw Shem Jakosalem in the store of Mrs. Mercedes Mercado. At quarter to two o'clock in the afternoon of that day June 9, 1972 his wife arrived to replace him in the store and about that time he left in order to dispose of his Jai-alai tickets. He went to the store of Mrs. Mercado and offered tickets to Evelyn the daughter of Mrs. Mercado. At about 2:30 o'clock in the afternoon he went to the bingo game to play bingo and returned to his store at 5:00 o'clock in the afternoon. When he arrived in his store he still saw Shem Jakosalem together with the daughter of Mrs. Mercado.

"Shem Jakosalem, 20 years of age, married, and a resident of Bulakao, Talisay, Cebu testified that Mrs. Mercado is his grandaunt and that he used to go to there store at the Taboan market twice or sometimes thrice a week. At about ten o'clock in the morning of June 9, 1972 he went to the store of Mrs. Mercado and upon arrival there he asked money for breakfast. He stayed in the store of Mrs. Mercado until four o'clock in the afternoon of that day when he accompanied her to the Taboan police precinct to listen to the police investigation conducted with regard to the complaint made by Mrs. Mercado in connection with the mauling of her son. They went back to the store at the Taboan market and in the evening of that day he went home.

"On July 14, 1972 someone was requested by his grandmother Cayetana Jakosalem to fetch him in his house at Bulakao, Talisay, Cebu and he went to the house of his grandmother at Tupas in the morning of that day June 14, 1972 and waited for the police to come but the police only came in the evening at about past eight o'clock. The police team were composed of Lt. Ponciano Gacho with his men who were Tito Chavez, Joven Rivera and a certain Nene. Lt. Gacho and Chavez asked him about the robbery that took place at the Labucay building and inquired from him who his companions were. The policemen left at about ten o'clock that evening with a word

that they will not bring him to the scene of the incident but somehow promised to come the next day. The following day the police came back and brought him to the house of Mrs. Ira at P. del Rosario street. Upon their arrival in the house of Mrs. Ira the policemen called Mrs. Ira and the latter upon looking at him told the police that he was not one of the robbers that robbed them on June 9, 1972. From the house of Mrs. Ira the same group of police brought him to Bulakao in order to be confronted by a Chinaman who was also a victim of robbery but this Chinaman also told the police that he was not the one who robbed him. From Bulakao he was brought back to the house of his grandmother in Tupas and from there the police-men left. From the house of his grandmother he went home to his house in Bulakao and the following day he went back to visit his younger sister in Tupas.

"On June 18, 1972 at about ten o'clock in the eve-ning while he was buying bread at a bakery near the Nation Theatre at Colon street he was apprehended by another team of policemen composing of Boy Aguilar, Romeo delos Reyes and two other companions whom he does not know and was brought to the Theft and Robbery Section of the Cebu Police Department. He was investigated by Aguilar there and was asked the same question about the robbery at the Labucay building and from the police headquarters he was brought around the City of Cebu until he found himself behind bars at the Taboan Police Precinct. The following morning June 19, 1972 the same group of policemen fetched him from the Taboan police precinct and brought him again at the police headquarters and from there the team of Captain Basak brought him to Labucay building and from the Labucay building to the ABS terminal then to the police headquarters at F. Ramos and from there to the city jail."

We shall now proceed to discuss the contentions of the appellant.

1. The issue of credibility. At the outset we have to re-state the axiom that the question of which testimony should be given cre-dence is best left to the trial judge who had the advantage of hearing the parties testify and observing their demeanor in the witness stand. Moreover, "The doctrine is well-settled that absent any fact or circumstances of weight and influence which has been misinter-preted as to impeach its findings or call for a different finding, the appellate courts will not interfere with or set aside the trial court's judgment and findings on the credibility of witnesses." (People vs. Abboc, et al., L-28327, September 4, 1973; 53 SCRA 54.)

Appellant seeks to impugn the credibility of the witnesses for the prosecution by characterizing their testimony as "replete with gross inconsistencies and dubious probabilities." However, appel-lant has merely reproduced excerpts from the transcript of their testimony without indicating or explaining fully why they are incon-sistent or incredible thus making it difficult for us to ascertain his points. Nonetheless, we shall examine them in seriatim.

Item 1. Why were Aurora's hands tied with a rope but not Lydia's? Obviously only the robbers could give a satisfactory explanation. But an explanation based on probabilities is not unwarranted: namely, perhaps they were in such a hurry to accomplish the robbery that they forgot to tie Lydia's hands; and perhaps Lydia was part of the conspiracy which possibly also explains why she failed to identify the perpetrators of the robbery and to testify in court.

Item 2. Why did Aurora testify that "they pushed me into the office" but later said that she was pushed by the man who poked the gun at her? This could be explained by the fact that her first statement described the general conduct of the group whereas in her second statement she referred to the appellant only who was then holding a gun. Moreover, assuming that there was an inconsistency, it is so minor that it deserves scant consideration and does not impair her credibility.

Item 3. Why did Aurora at first testify that only Jakosalem had a gun but later said, "When I opened the door I asked them what they wanted and they asked whether we were selling jewelries and simultaneously pulled out a gun and announced this is a holdup." We are asked to believe that by her second statement she meant to say that each of the three robbers had guns. But the meaning imputed to her second statement is without basis for while

she said, "they wanted and they asked," the word "they" does not appear before the phrase "simultaneously pulled out a gun." It is to be noted that the quoted phrase lacks a subject (a noun or a pronoun). The most logical subject would be the pronoun "he" which is congruent with her first statement. Moreover, she mentioned "a gun" in her second statement so there was indeed only one gun.

Item 4. Why did Aurora fail to identify the appellant when he was brought to her house by Lt. Ponciano Gacho? The explanation for this is given in the testimony of Sgt. Pilapil who said that before Jakosalem was brought to Aurora's house she had identified Jakosalem thru his picture as one of the robbers but that when the confrontation took place she was afraid to identify him because she had no confidence in the group led by Lt. Gacho and so she later made the identification to Capt. Basak whom she trusted. This explanation is not implausible considering the notoriety of the police then as now.

Item 5. Why did Aurora fail to give the police a complete and detailed description of the jewelry taken? The ready answer is that the jewelry taken from her store was of assorted sizes, types and forms so that the listing and valuation could not be done immediately. In fact, when she testified in court on July 20, 1972, she had not yet finished the task. However, she gave the police investigators a sketch (Exh. Q) showing the description of some of the jewelry taken from her office.

Item 6. Why did not the information state that a gun was taken by the robbers? Suffice it to say this does not affect Aurora's credibility for she did not prepare the information. In point of fact, the investigators had been informed that the gun of Restituto Ira was among the articles robbed.

Item 7. Why was Virgilio Ababon unable to say if his original passenger was one of the four who boarded his taxi and yet he was able to identify Jakosalem as one of those inside the cab? He explained this by saying that "they did not want me to look back while the taxi was moving." Upon the other hand, the appellant was seated in the middle of the back seat and was in direct line of Virgilio's rear view mirror. Furthermore, it is not inconceivable that Virgilio had already seen the appellant before he was told not to look back.

Item 8. Why did Virgilio say three persons suddenly opened his taxi and yet he said four passengers alighted from it? This is explained by the fact that Virgilio was waiting for his original passenger when the latter's three companion hurriedly barged into the waiting cab and Virgilio, not knowing of the robbery, refused to take the three new passengers but changed his mind when told that his original passenger was their companion and presumably had reboarded the cab. In sum, Virgilio had three new passengers but four alighted from his cab including the former passenger.

Relevant to the issue of credibility is the defense of alibi interposed by the appellant. Both Mercedes Mercado and Pedro Montemayor corroborated the appellant's claim that he was at the Taboan market at the time of the robbery-killing.

Mercedes Mercado was not an impartial witness for she admitted that she is related to the appellant's grandmother. Likewise Jakosalem described her as his grandaunt. And as to Pedro Montemayor, his testimony shows that he was not always in sight of the appellant for he left his store at the Taboan market at 1:45 p.m. on June 9, 1972, "in order to sell fake tickets of the Jai Alai." (*Italics supplied.*) Against these facts the defense of alibi cannot prevail over the positive identification of the appellant by Aurora Ira and Virgilio Ababon. Moreover, as stated by the trial court which should be presumed to know the physical geography of Cebu City, "x x x even granting that the alibi presented by the defense is to be admitted, the fact remains that Taboan market and the Labucay building where the robbery took place could easily be negotiated. 'No jurisprudence in criminal cases is more settled than the rule that alibi is the weakest of all defenses and that the same should be rejected when the identity of the accused has been sufficiently and positively established by eye-witnesses to the crime. Alibi to

prosper, it is not enough to prove that defendant was somewhere else when the crime was committed. He must demonstrate that it was physically impossible for him to have been at the scene of the crime at the time.' (People vs. Estrada, 22 SCRA 111)."

In the light of the foregoing, our minds rest easy in the belief that the appellant participated in the robbery-killing.

The appellant claims that evidence not available at the trial was later discovered to the effect that it was not Virgilio Ababon who drove the get-away taxi but one Sergio Carampotan. Copies of clippings from the "Morning Times" of Cebu City dated November 8 and 4, 1972, marked as Annexes "A" and "B" were submitted as the "newly discovered evidence." Suffice it to say, the clippings are hearsay and have no evidentiary value. More-over, the "newly discovered evidence" of November 8 and 4, 1972, should have been immediately utilized as a possible basis for a new trial since the judgment under appeal had not yet become final instead of submitting it as a ground for acquittal in a brief dated May 20, 1974.

2. The issue of conspiracy. The trial court ruled that there was conspiracy in the commission of the crime so that even if the evidence did not show that it was the appellant who shot Restituto Ira he is nonetheless liable for Ira's death.

We agree with the trial court. Well-settled is the rule that conspiracy need not be established by direct evidence but may be proven by a number of facts done in pursuance of a common unlawful purpose (People vs. Belen, L-13895, Sept. 30, 1963, 9 SCRA 39; People vs. Capito, L-24466, March 19, 1968, 22 SCRA 1130; People vs. Peralta, L-19069, Oct. 29, 1968, 25 SCRA 759; People vs. Alcantara, L-26867, June 30, 1970, 33 SCRA 812; People vs. Magcamit, L-25555, March 28, 1969, 27 SCRA 450; People vs. Tarrayo, L-26489, April 21, 1969, 27 SCRA 953; People vs. Pagaduan, L-26948, August 25, 1969, 29 SCRA 54.)

The facts to demonstrate conspiracy are narrated in the well-written brief of the People as follows:

"The evidence on record establishes that on June 9, 1972, at about 2:15 p.m.: (1) Three (3) men, including the appellant, armed with a gun, plasters and rope, entered the receiving room adjoining the office of Mrs. Aurora Ira; (2) When Mrs. Ira opened the door connecting the anteroom and the office, the three (3) men inquired whether Mrs. Ira was selling jewelry; (3) Before Mrs. Ira could answer, the appellant suddenly pulled out his gun and announced that it was a hold up; (4) The three (3) pushed Mrs. Ira inside the office, told her to look down, tied her hands with a rope and placed plaster on the mouth of Mrs. Ira and Lydia Pilaris who were then told to squat; (5) The three (3) robbers then methodically scooped up the jewelry and took the cash, in Mrs. Ira's office; (6) On their way out, one of the robbers who were met at the anteroom by the deceased, Restituto Ira, shot the latter to death and took the latter's gun; (7) The three (3) proceeded to and barged into a waiting taxi which had been hailed by a fourth companion as a get-away vehicle; (8) Initially refused to be taken as passengers by Ababon, the three, including appellant informed Ababon that the original passenger is a companion; (9) Together, the four alighted from the taxi with the appellant carrying the plastic bag which contained the loot."

Accordingly, even if we assume that it was not the appellant who killed Restituto Ira, he is liable therefor. In this connection, we can not hold back the thought that it was most probably the appellant who in fact killed Ira for among the robbers he was the only one shown to have carried a gun.

WHEREFORE, finding no reversible error in the judgment appealed from, the same is hereby affirmed in toto. Costs de officio.

SO ORDERED.

Barredo, (Chairman), Aquino, Concepcion, Jr., and De Castro,[*] JJ., concur.

[*] Justice Pacifico de Castro has been designated to sit with the Second Division.

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