

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
VEDASTO MORENO, RODRIGO BARICUATRO, ELPIDIO BARICUATRO,
ROMEO BARICUATRO, ELY BARICUATRO, EMILIO GENERALAO,
CARLOS PASLON,...**

G.R. Nos. L-37801-05. October 23, 1978

Ponente: PER CURIAM: On the night of January 21, 1970, in an ambush perpetrated at Barrio Tutay, Pinamungajan, Cebu, Mayor Samson Cerna, 51, of that town was mortally wounded. He died about two hours later. His companions, Lourdes Cerna, Candida Comahig, Francisco Jabido and Jose de los Reyes, were also wounded. As an aftermath of that tragic occurrence, an information for murder with atentado, two informations for frustrated murder and two for attempted murder (five cases) were filed against thirteen persons with the Circuit Criminal Court at Cebu City. The lower court's judgment.- After trial, the lower court convicted (1) Vedasto Moreno, (2) Rodrigo Baricuatro, (3) Romeo Baricuatro, (4) Carlos Paslon and (5) Emilio Generalao of murder with direct assault upon a person in authority and sentenced each of them to death and to pay solidarily to the heirs of Mayor Cerna the sum of P50,000 as actual and moral damages. In the same case, (1) Crescencio F. Nemenzo, (2) Elpidio Baricuatro, (3) Ely Baricuatro, (4) Salvador Peña, (5) Victoriano Baraga, (6) Rodulfo Umbay and (7) Roberto Paslon were convicted as co-principals and were each sentenced to reclusion perpetua and to pay solidarily an indemnity of P50,000 (Criminal Case No. CCC-XIV-95). The same twelve accused were convicted of four frustrated murders. Each of them was sentenced to four indeterminate penalties of six years and one day to eight years and one day of prison; and to pay solidarily an indemnity of P8,000 to Mrs. Cerna and P2,000 each to Candida Comahig, Jabido and De los Reyes (Criminal Cases Nos. CCC-XIV-129 to 132). All the twelve defendants appealed. Crispin Baraga, the thirteenth accused, is at large. Issue as to the identity of the culprits.- There is no question as to the corpus delicti or the commission of the five offenses. The nagging question is the identity of the malefactors. The prosecution was not able to use a co-conspirator as a State witness or to obtain an extrajudicial confession. Sometime after the commencement of the trial, the prosecution used as a witness, Avelino Norteza, an alleged co-conspirator, who withdrew from the conspiracy but who was not indicted and who was not present when the ambush was consummated. His testimony as to the conspiracy was severely assailed by the defense and even by the Solicitor General. Antecedents.- Certain undisputed circumstances preceding the ambush may shed light on the motivation for the assassination of Mayor Cerna and serve to explain why the appellants were implicated therein. In 1969, Vedasto Moreno, 26, a college graduate and a businessman, residing at Barrio Tutay, was the number one councilor of Pinamungajan affiliated with the Liberal Party. Rodrigo Baricuatro, 42, a Constabulary sergeant, was being groomed as the Liberal Party candidate for mayor of that town in the coming 1971 elections. He would be the opponent of Mayor Cerna, a Nacionalista. Moreno would be Baricuatro's running mate (1265-66 tsn November 16, 1971). A controversial incident occurred on election day, November 11, 1969, at Barrio Tutay. According to Moreno, on that day, he arrested Mamerto Lausa, a barrio captain, and Patrolman Filemon Diacamus because they were buying votes. He took from them the envelopes containing money and turned them over to the Constabulary authorities, as shown in the receipt, Exhibit 8-Moreno, signed by Sergeant Marcillano. The prosecution has a contrary version of that incident. According to the chief of police, on that day, Moreno, Generalao, Paslon and Romeo Baricuatro entered the house of Gabina Baron and, employing force and intimidation, took from Lausa, the sum of P800 and grabbed from Patrolman Diacamus his service revolver. (That firearm was allegedly turned over to Rodrigo Baricuatro. 154 tsn November 19, 1971. It was later recovered from Paslon.) Because of that incident, the chief of police filed on November 15, 1969 in the municipal court two almost identical complaints, both sworn to before Mayor Cerna, charging Moreno, Romeo Baricuatro, Paslon and Generalao with robbery in band with intimidation for having taken the money and revolver (Criminal Cases Nos. 501-RP and

502-RP). On December 12, 1969 two other complaints, which were also sworn to before Mayor Cerna, were filed in the municipal court by the chief of police. One complaint against the same four accused was for direct assault against an agent of a person in authority, namely, Patrolman Diacamus, on the occasion mentioned above, when he was disarmed (Criminal Case No. 505-RP). The fourth complaint against the same four accused was for qualified trespass to dwelling for having entered Gabina's dwelling. That complaint was also sworn to before Mayor Cerna (Criminal Case No. 506-RP). (Those four cases were remanded to the Court of First Instance on February 23, 1970.) Also on December 12, 1969, the chief of police filed in the municipal court a complaint (Criminal Case No. 507-RP), sworn to before Mayor Cerna, charging Rodrigo Baricuatro, his nephew, Romeo Baricuatro (1404 tsn, November 25, 1971), and Arturo Kyamko, who were armed with a Thompson submachine gun, carbine and .45 caliber pistol, with having committed grave threats also on election day, when they threatened to kill Lausa, the offended party in the robbery case. Rodrigo Baricuatro was alleged to have told Lausa: "Do you want to die, Merto? Killing is what we want now. Who among you here is brave?" (The municipal court dismissed that case in its order of August 28, 1970 because of Lausa's failure to prosecute it.) In the aforementioned four criminal cases Nos. 501, 502, 505 and 506, Mayor Cerna conducted the preliminary examination although there was no showing that the municipal judge could not perform that duty. The mayor issued warrants for the arrest of the four accused. Moreno was arrested and imprisoned on January 16, 1970. He posted bail, paying P1,000 as premiums on four bail bonds. His release was ordered by the municipal judge on January 20, 1970 (Exh. 4 and 6 to 6-C-Moreno). On the other hand, it should be noted (according to the evidence for the defense) that Sergeant Rodrigo N. Baricuatro of the department of constabulary science and tactics of the University of the Visayas at Cebu City was given by his commandant a pass authorizing him to be absent for seventy-two hours, or from seven o'clock in the morning of January 21 to twelve o'clock midnight of January 23, 1970, for the ostensible purpose of attending to his family's needs in Sitio Manga, Pinamungajan (Exh. 9-Rod. Bar.). Thus, shortly before the ambush, considerable tension had developed between Moreno, Rodrigo Baricuatro and their followers, on one hand, and Mayor Cerna, on the other. It may be assumed that the arrest of Moreno and the impending arrest of Rodrigo Baricuatro, Romeo Baricuatro, Paslon and Generalao inflamed their smoldering resentment against Mayor Cerna. Mrs. Cerna testified that the mayor was ambushed "because Vedasto Moreno got angry with the mayor because he was confined in jail and this Rodrigo Baricuatro is jealous of the mayor because of his ambition to become a mayor of Pinamungajan and as long as the mayor x x x is still alive, he cannot become a mayor of our town" (155 tsn November 19, 1971). The ambush.- On January 19, 1970, Governor Osmundo Rama in a telegram to Mayor Cerna requested him come for a conference in connection with the release of funds for his town, the detail in that place of Constabulary soldiers, and the agenda to be taken up in the forthcoming conference of municipal mayors. (See pp. 39-43, Record of Criminal Case No. 10-T.) In compliance with that request, Mayor Cerna, using his cargo truck and accompanied by his wife, Lourdes Cerna, went to Cebu City in the morning of January 21, 1970. (Note that Elpidio Baricuatro saw the mayor's truck leaving for Cebu City and that Moreno, Rodrigo Baricuatro and Romeo Baricuatro were also in Cebu City on that fateful day, January 21, 1970. Moreno and Rodrigo went to Pinamungajan in the afternoon of that day. The return of Mayor Cerna to Pinamungajan in the evening of that date was known beforehand because on that day the mayor's housemaid, in answer to a policeman's inquiry, said that the mayor would return to Pinamungajan at nighttime.) Mayor Cerna conferred with the governor. He received a treasury warrant for P5,721 as national aid for the maintenance and improvement of municipal roads and bridges (Exh. M). According to Mrs. Cerna, the detail of Constabulary soldiers in Pinamungajan was necessary in order to apprehend a band headed by Generalao, that was wanted in connection with the death of Juanito Gabonada, and because there were rumors that Mayor Cerna's political enemies were intending to liquidate him. Late in the afternoon of that day, January 21, Mayor Cerna boarded his truck and proceeded to Barrio Tabunok, Talisay to pick up his cargo. At about six o'clock, the truck started on its trip to Pinamungajan via Carcar. Seated in the front seat were Jabido on the extreme left and then the driver, De los Reyes, Candida Comahig and Mrs. Cerna. Mayor Cerna was on the extreme right. Anacleto Barrientos and two helpers were in the back of the truck. At about eight o'clock on that moonlit night, the truck reached the five-meter-wide curve about seven meters from the end of the wooden bridge in an isolated place at Barrio Tutay, which is about three to four kilometers away from the poblacion of Pinamungajan. (See sketch, Exh. G, photographs, Exh. H, etc. and Exh. 1-Moreno.) After the truck had passed the bridge, its headlights revealed that a big log, about three to four arms' length,

a foot wide and six inches thick, the ends of which were connected to the sides of the road by two other pieces of wood, had been placed across the highway as a roadblock about three meters from the curve (66 tsn November 15, 1971; 308 tsn September 3, 1970). Pieces of lumber piled as high as the waistline of a person or less than a meter high and about seven meters long were stacked on the right side of the road below a cliff shaded by a balete tree. The truck's headlights were focused on the right end of the roadblock and the pile of lumber. The truck stopped opposite the pile of lumber and was about two arms' length from it (164 tsn November 19, 1971). One end of the roadblock rested on the pile of lumber. Moreno's house was about 100 to 150 meters away from the bridge. Stationed behind the piled lumber, which served as a barricade, were armed persons whom Mrs. Cerna allegedly recognized because of the moonlight and the truck's headlights and because their bodies from the waist up were exposed. She was instinctively afraid. She pressed the left thigh of her husband. He brushed her hand aside. The truck stopped at the curve, which is a few meters away from the end of the bridge and which on the right side is near the cliff and the pile of lumber. The driver did not shut off the headlights. The armed persons behind the barricade were Romeo Baricuatro, Rodrigo Baricuatro, Carlos Paslon, Vedasto Moreno, Emilio Generalao, and three others. The place was an ideal one for an ambush (67 tsn November 15, 1971). When Mrs. Cerna saw the roadblock, she turned to the right side of the road ("stooped down in order to peep") and she then saw "clearly" before the shooting the armed persons behind the pile of logs on the side of the road "beneath the cliff" (32-33, 66-67, 71, 72, 74, ts Exh. 2-Moreno). She testified that Mayor Cerna told her that Moreno and Rodrigo Baricuatro (Bide and Dido) were among the malefactors. The veracity of that testimony and similar testimony given by the chief of police, Anacleto Barrientos and Jose de los Reyes is vehemently contested by the appellants. On the identity of the assailants, Mrs. Cerna testified as follows on cross-examination at the preliminary investigation: "Q. Who were those persons with sidearms which (whom) you saw at the time of the incident? - A. Rodrigo Baricuatro, Vedasto Moreno, Emilio Generalao, Romeo Baricuatro, Carlos Paslon, and others whom I cannot identify because I could not see their faces. "Q. You said also yesterday that there were persons behind the pile of logs that were placed at the side of the road, do you know who were those persons? - A. Those are the same persons whom I have named. "Q. You said also it was a moonlight night and the headlight of the truck was on. Would you state to the investigator that the persons can still be seen on that night in question? - A. It (They) can be clearly seen. "Q. Who were those persons whom you can clearly see? -A. Rodrigo Baricuatro, Vedasto Moreno, Emilio Generalao, Romeo Baricuatro and Carlos Paslon. xxx xxx xxx "Q. Mrs. Cerna, you told this Honorable Investigator that you saw those persons you mentioned behind the pile of logs. Now, please tell this Investigator whether you saw those persons behind the pile of logs before the shooting or after the shooting? - A. Before the shooting. "Q. Mrs. Cerna, since you saw those persons behind the pile of logs, and in fact you named those persons, can you please tell this Investigator what were their relative positions when you saw them behind the pile of logs? - A. I could not tell their positions because I could only see their bodies from their breast up. "Q. Can you tell this Investigator if they were standing side by side or on file? - A. They were in line, side by side. "Q. Since you can tell this Honorable Investigator that they were in line side by side, can you please tell us who was that person who was first from the left while looking on them? - A. Those were fronting me from the cliff which (who) were in line side by side were: first was Rodrigo Baricuatro, Emilio Generalao, Vedasto Moreno, Romeo Baricuatro, Carlos Paslon and those who were at the back I could not see their faces because their faces were covered. xxx xxx xxx "Q. Since you said that after the shooting those persons you mentioned disappeared, can you tell whether they passed from the precise spot where you saw them before? - A. I do not know where they were, but I saw that when they disappeared, they passed by the side of the truck towards the end of the truck. "Q. You said that you observed those persons leaving the place where you saw them before, by passing by the side of the truck towards the end of the truck. Do you want us to understand that they cross(ed) the bridge towards the south? - A. I did not know where they went, but I observed that they passed by the side of the truck, on the right side of the truck." (71 - 77 ts Exh. 2-Moreno and Exh. 5-Romeo). At the trial, Mrs. Cerna testified: "Q. Were you able to recognize these persons behind those (that) pile of wood? - A. Very much. "Q. Will you name those persons to the court that you recognized behind the pile of wood? - A. Yes, sir, Rodrigo Baricuatro, Emilio Generalao, Vedasto Moreno, Romeo Baricuatro, Carlos Paslon and somebody behind whom I do not know because he was obstructed from my sight. "Q. Those persons you have named to the court, how long have you known them? - A. Vedasto Moreno and Rodrigo Baricuatro I

know them since their boyhood. "Q. How about the others you have mentioned, how long have you known them? - A. I came to know them when they were already of age because they live in the barrio. xxx xxx xxx "Q. How were you able to recognize these persons you have named since it was 8:30 in the evening? - A. Not only because of the light of the moon but they were also lighted by the beam of the light of our truck." (62-64 tsn September 2, 1970). xxx xxx xxx "Q. But definitely, what you saw first, because of the beams of the lights on the front of the truck and the moonlight, was these pile of logs across the street and not the pile of logs on the side of the road, is that right? - A. The first that I saw, because of the light of the moon, was the log blocked across the road and when I saw I immediately turned to the side of the road and I saw the pile of logs and behind it were some persons. xxx xxx xxx "Q. But the beams of the front lights of your truck was directed forward, is that right? - A. It is not towards the front all the time, because the light is scattered as adjusted. xxx xxx xxx "Q. How (What) do you mean by like that? - A. That the lights (of the truck are) is not straight but it is scattered on the sides. "Q. But you will agree with me that when you saw that pile of wood across the street, the truck was moving? - A. Still moving and that was the time I saw clearly the persons standing by the side of the road." (110-111, 113-114, tsn September 3, 1970). xxx xxx xxx "Q. But, definitely, you cannot inform the Honorable Court whether they were having sidearms with them at that time? - A. All I saw were guns held like this (witness demonstrated a position by holding something in her hands in a port arms position). "Q. So, you did not see any sidearms? - A. I only saw the barrel placed on top of the wood which they were holding." (Ibid, 126 tsn). xxx xxx xxx "Q. How long after the silence by the time allegedly your husband mentioned the name? - A. After two to five minutes, more or less and I called him: 'Do', and after I called to him, he spat and then he said: 'Dido and Bidi, Day', together with the accused to be arrested.' "Q. You are quite sure that what he said were those words: 'Dido and Bidi, Day and the rest who were the accused? -A. Dido and Bidi, Day and also the accused who are to be arrested." (Ibid, 131 tsn). "Q. Did he (the chief of police) ask you whom you saw? -A. Yes, sir, I was asked. "Q. Did he ask you whether you saw this Dido (Rodrigo Baricuatro)? - A. He asked me 'Who were they, Day?' and I told him they were Dido Baricuatro, Bidi Moreno, Romeo Baricuatro, Emilio Generalao, Carlos Paslon and there were some whom I did not recognize because their faces were covered." (147-148 tsn September 3, 1970). Mrs. Cerna further testified that the headlights (with 12 volts) of the truck were on during the shooting and a long time thereafter and that she saw the malefactors retreating (Ibid, 95-97 tsn). De los Reyes, the driver, gave the following testimony on the identity of the malefactors: "Q. Upon noticing the shots, what did you do? - A. After I heard the shots, I turned my head to the right and I saw Dido Baricuatro and Emilio Generalao like this (witness demonstrating a position as if holding firearms in his hands). "Q. When you saw Emilio Generalao and Dido Baricuatro, where did you see those persons? - A. Near the end of the pile of wood at the side of the road. "Q. What were they doing at that time when you saw them? - A. They were firing their guns because I have seen fire flashes coming from their direction and they were carrying guns like this (witness demonstrating right and left hand in an aiming position). "Q. The place where you saw Emilio Generalao and Dido Baricuatro, how far were they from the truck? - A. Maybe more than two arms' length, more or less." (229-230 tsn September 3, 1970). xxx xxx xxx "Q. While in that position at the right rear wheel of the truck, what did you notice? - A. At that moment, while I was already behind the right rear wheel of the truck, I saw Vedasto Moreno moving backwards from the truck with a gun on his hand. "Q. After seeing this Vedasto Moreno in that position you have described, what else happened? - A. After seeing Vedasto Moreno in that same position, Romeo Baricuatro followed him only an interval of one arms' length, and after Romeo Baricuatro followed in the same position as Vedasto Moreno, came Carlos Paslon. "Q. What happened more? - A. Then, I saw Emilio Generalao followed also on the same position and in the same manner and had an interval (distance) of only one arms' length and then was followed by another man whom I did not know and the last one was Dido Baricuatro. "Q. Those persons you have noted and observed, to what direction did they go? - A. They were moving along the small path towards the upper portion of the hill." (Ibid, 232-234 tsn). "Q. You said that when you jumped out of the truck, the headlights were on and you said that you saw two persons. Do you know those two persons whom you saw because of the headlights? - A. Dido Baricuatro and Emilio Generalao. "Q. Do you know those persons personally? - A. Yes, sir, I know them. "Q. When you said that when you were already hiding on the left rear portion of the truck, you were able to see those persons, am I right? - A. I saw.

"Q. Who were those persons whom you saw? Name them one by one. - A. The first was Vedasto Moreno, and then Romeo Baricuatro. "Q. Who else? - A. Carlos Paslon. "Q. Were there other persons aside from the persons you named? - A. Emilio Generalao and next was the person whom I do not know by name, and the next was Dido Baricuatro. "Q. When you said Dido Baricuatro, is he the same Rodrigo Baricuatro who is accused of this case? - A. Yes, sir. "Q. When you said Bedi Moreno, is the the same Vedasto Moreno who is one of the accused in this case? - A. Yes, sir." (116-118 tsn Exh. 2-Moreno and Exh. 5-Romeo). The truck slowed down and swerved to the left. Immediately after the truck had halted in front of the roadblock, or while it was about to stop, volleys of gunfire were directed at its front and right side which was near the cliff. The shots came from the right side of the road. The fusillade lasted only for a brief interval. Jabido and Candida Comahig jumped out of the truck after the firing had started. Barrientos remained in the back of the truck. De los Reyes, the driver (a resident of Barrio Tutay, whose house was about 400 meters away and who was familiar with the place), on hearing the shots, turned his head and saw Rodrigo Baricuatro and Generalao at the end of the roadblock. The driver jumped out of the truck and sought cover under the truck near the left rear tire which was about four arms' length from the pile of lumber. After the firing had stopped, he stationed himself behind the right rear tire. As testified by him, from that coign of vantage, he saw and recognized Moreno, Generalao, Romeo Baricuatro, Rodrigo Baricuatro and Carlos Paslon still holding their firearms. He was acquainted with them because they were well-known residents of Pinamungajan. Their figures were silhouetted by the headlights of his truck which were on during the shooting. After the firing had ceased, Mrs. Cerna perceived that her husband was gravely wounded. She shouted for help. As there were no houses in the vicinity, no one answered her clamor for succor. Sometime later, the truck ("Estela") of Jose Peña (Otic) arrived. Peña's companions removed the roadblock. At that juncture, De los Reyes showed up. He drove the mayor's truck and took him to the poblacion. (On the witness stand, Peña, in answer to a leading question of whether he asked Mrs. Cerna and her companions who shot the mayor, replied that "they said they did not know" [269 tsn January 5, 1972]. That answer of Peña has been capitalized upon by the defense to counteract Mrs. Cerna's testimony that she knew the assailants of Mayor Cerna.) The mayor was brought to Toledo City fifteen kilometers away. On arriving at that place, he was placed in another car and taken to the Don Andres Soriano Memorial (Atlas Consolidated Mining Company) Hospital at Lutopan where he died. Injuries inflicted and results of the investigation at the scene of the crime.- The autopsy on the body of Mayor Cerna disclosed six entrance gunshot wounds, located in the mandibular region, right shoulder, anterior chest wall, right arm, and left leg, and four exit wounds, aside from abrasions and contusions (Exh. A to A-2). A slug was recovered at the right side of the lower lip of Mayor Cerna. It was lodged between the lower lip and the teeth of the victim or at his gums. The injuries caused by that slug involved the blood vessels, tissues and nerves of the injured portion of the jaw. The defense argues that, because of the wound in his jaw, Mayor Cerna could not have made a dying declaration to Mrs. Cerna and the chief of police that he was shot by Moreno and Rodrigo Baricuatro and their companions. Mrs. Cerna sustained fractures in the ring and middle fingers and metacarpal of her left hand. An operation was performed on her left hand. It was permanently deformed. She spent P2,000 for her hospitalization (Exh. D-12). Jabido had a gunshot wound on his right cheek. He was confined in the hospital for eleven days (Exh. F). Candida Comahig suffered contusions on her right knee and thigh which were not caused by bullets but by some hard objects. Probably, the contusions were the consequence of her having jumped out of the truck and having fallen on the hard ground (Exh. J). De los Reyes had abrasions on the chin and a lacerated wound on his right arm from which a shrapnel was extracted (Exh. E). Recovered at the scene of the crime were a grease submachine gun caliber .45 (issued to Constabulary Sergeant Mamerto Generalao), twenty-five empty caliber .45 shells, two empty caliber .30 shells, five slugs and a magazine with 25 rounds of ammunition, caliber .45. (Exh. B, C and II-1). On the right side of the truck, there were fifteen bullet holes from a .45 caliber submachine gun, two bullet holes on the right side of the front and windshield from a .30 caliber rifle and twenty-six other bullet holes. And at the scene of the ambushade, there were bloodstains on the road and footprints on the swamp nearby. (See Exh. H-1-B and H-3-A.) On the high ground near the curve, the investigators found empty cans, a Pepsi-Cola bottle, human waste matter, the remains of food, and the wrappers for cooked rice known as "puso", indicating that certain persons at their supper there before the ambushade. In that place, the aroma of tuba could still be smelt at seven o'clock in the morning of the following day, January 22, 1970. (67, 70 and 72 tsn November 15, 1971). Mrs. Cerna testified that, as a consequence of the death of her husband, who

was the family's breadwinner, their ice candy business, from which they derived a considerable daily income, was stopped. She spent P4,000 for the metal casket, P4,000 for the twelve days during which the mayor's remains lay in state, and P7,000 for his marble tomb with a canopy. Mayor Cerna's physical condition after the ambush. - The fact that Mayor Cerna was wounded in the jaw generated a controversy as to whether he could have made the antemortem declaration, attributed to him by Mrs. Cerna, Chief of Police Lesigues, driver De los Reyes, Anacleto Barrientos and Candida Comahig, that Moreno, Rodrigo Baricuatro and their companions were his assailants. According to the medico-legal officer, Mayor Cerna retained his power of speech in spite of his wounds (180 tsn June 19, 1972). Mrs. Cerna testified that after the fusillade, Mayor Cerna bent forward, spat saliva mixed with blood and said that he saw Moreno, Rodrigo Baricuatro and the other persons to be arrested. Mayor Cerna allegedly told her not to leave him. She shouted for help and when nobody answered her, Mayor Cerna allowed her to leave the truck and go with Jabido to look for help. Even after Mrs. Cerna had gone down from the truck and failed to find Jabido, the wounded mayor allegedly told her not to leave the place. This was tearfully recounted on the witness stand by Mrs. Cerna. The session had to be suspended at that juncture. (72-73 tsn September 2, 1970). Then, when she informed Mayor Cerna that Peña's truck had arrived, the mayor told her that Peña's truck should be parked alongside their truck so that he could be transferred to Peña's truck. But because the road was narrow, that maneuver could not be accomplished. Anacleto Barrientos remained inside the mayor's truck when the ambush was being perpetrated. After the gunfire had ceased and when he heard Mrs. Cerna shouting, he thought that there was a holdup. He left the truck and hid under the bridge. After about ten minutes, he emerged from his hiding place and saw Mrs. Cerna walking to and fro in front of the truck. He wondered why the mayor had not left the truck. He went to the right side of the front seat to find out what had happened to the mayor. He saw that there was blood on the mayor's white shirt. The mayor was leaning on the truck's steering wheel. The mayor saw him and asked him who he was. He identified himself as a passenger who had boarded the truck in Cebu City. The mayor directed him to go after Moreno, Rodrigo Baricuatro and their companions who had fled to the elevated portion near the scene of the ambush. He saw the cliff or elevated ground but he did not comply with the mayor's directive. He went back to the bridge. While there, he heard the sound of the engine of a motor vehicle which was ahead of the cargo truck. It seemed to him that the vehicle was in the vicinity of the barrio schoolhouse. (The same sound was heard by Mrs. Cerna, Candida Comahig and Jabido.) Later, Peña's truck arrived, the roadblock was removed, and De los Reyes, the driver of the mayor's truck, appeared and started it. Barrientos seated himself on the right of the wounded mayor and placed his left arm around his left shoulder. The mayor told Barrientos to raise the mayor's right hand and to lift his left leg so that he (the mayor) could rest. Barrientos demonstrated on the witness stand how he complied with the mayor's instruction (552-553 tsn September 1, 1971). On the way to the poblacion, the mayor even asked Barrientos to take out something inside the back pocket of his pants since it caused him pain. Mrs. Cerna from time to time would call her husband "Do" and he would answer "Day". When the truck reached the mayor's garage in the poblacion, the chief of police, who was on the lawn of the mayor's residence, was called by Mrs. Cerna and was informed that the mayor had been ambushed. The chief of police approached the mayor, who was being held by Barrientos, and asked him who had shot him. The mayor replied that he was shot by Dido Baricuatro and the other accused already known to the chief of police. The latter asked the mayor if he was referring to Moreno, Romeo Baricuatro, Carlos Paslon and Generalao. The mayor replied in the affirmative (10-14 tsn September 2, 1970; 241-2 tsn September 3, 1970). According to De los Reyes, it was Mayor Cerna who suggested that the jeep of the priest be used in bringing him to the hospital because the cargo truck, which was old, might break down. After the priest said that it might not be good to transfer the mayor to the jeep, the mayor ordered that he be brought to the West Coast Hospital at Toledo City. On the way to that place, Mayor Cerna asked the chief of police, who was sitting at his feet, if the place was still far. The chief of police cautioned him not to talk much because talking was not good for a wounded person. The mayor asked the same question of his wife when he was being brought to the hospital at Lutopan. When the mayor was being transferred from his truck to Barba's car, he cried "Agog". Evidently, he was suffering much pain. He sat on the left thigh of Barrientos while he was in Barba's car. From time to time, the mayor would tell Barrientos to let him recline and then, he would tell the latter to let him "lay flat" on his back. He was restless and, obviously, subjected to paroxysms of pain. Possibly, the transfer of Mayor Cerna from the truck to Mayor Barba's car in Toledo City and the trip from Toledo City to the hospital at Lutopan and the transfer to the stretcher of the hospital sapped his last reserves

of resistance. He died seven minutes after his arrival at the hospital. As long as he was in the truck, his mental faculties appeared to be unimpaired in spite of the gunshot wounds. The mayor, a heavily built man, was endowed with a strong constitution. He weighed 198 pounds (102 tsn September 3, 1970; 427 tsn September 1, 1970). Appellant's contention that Mayor Cerna was already in a comatose condition after he was shot and that he could no longer talk is unfounded. The credibility of Avelino Norteza on the complicity of the seven appellants, Crescencio F. Nemenzo, et al.- On January 26, 1970, a Constabulary officer filed in the municipal court against (1) Moreno, (2) Generalao, (3) Rodrigo Baricuatro, (4) Romeo Baricuatro and (5) Carlos Paslon a single complaint for murder and multiple frustrated murder. The complaint was supported by the affidavits of Jose B. Lesigues, the chief of police, Patrolman Eulogio B. Kyamko, Jose de los Reyes (the driver), and Placido Mondejar. Lourdes Cerna and Jose R. Kyamko also executed affidavits dated January 28 and 30, 1970. The municipal judge conducted a preliminary examination and, having found probable cause, he issued a warrant for the arrest of the five accused, fixing their bail at P50,000 each in his order of January 28, 1970. Moreno was arrested at Dumaguete City on January 28, 1970 (Exh. 3-Moreno). Rodrigo Baricuatro was arrested on January 29, 1970 in Cebu City. Moreno and Baricuatro were released on bail on February 2, 1970. Generalao, Romeo Baricuatro and Carlos Paslon went into hiding. The three were to be given a separate trial. On February 4, 1970 the municipal judge elevated the record to the Court of First Instance because of the nonappearance of the accused at the second stage of the preliminary investigation which they had presumably waived. On February 24, 1970 the provincial fiscal filed in the Court of First Instance of Cebu at Toledo City five informations charging Moreno, Generalao, Rodrigo Baricuatro, Romeo Baricuatro, Carlos Paslon and three unknown persons with murder with atentado and four frustrated murders [Criminal Cases Nos. 10(T) to 14(T)]. On June 22, 1970 the fiscal filed amended informations charging attempted murder only in connection with the assaults against Candida Comahig and Jose de los Reyes [Criminal Cases Nos. 11(T) and 14(T)]. The Court of First Instance transferred the five cases to the Circuit Criminal Court at Cebu City where they were docketed as Criminal Cases CCC-XIV-95, 129, 130, 131 and 132. In Case No. 95, warrants were issued for the arrest of Moreno and Rodrigo Baricuatro. No bail was recommended. The trial started on September 2, 1970. About six months after the trial had started, or on March 12, 1971, that is to say, after the witnesses, Jose B. Lesigues, Lourdes Cerna and Jose de los Reyes, had testified at the trial, the fiscal filed amended informations against the five accused originally named and against eight new defendants, namely, (1) Crescencio F. Nemenzo, (2) Rodolfo Umbay, (3) Salvador Peña, (4) Roberto Paslon, (5) Victoriano Baraga, (6) Crispin Baraga, (7) Elpidio Baricuatro and (8) Ely Baricuatro. The basis of the amended informations was the affidavit dated February 24, 1971 of Avelino Norteza who, as mentioned earlier, claimed to be privy to the conspiracy to ambush Mayor Cerna (Exh. 2-Romeo). On the basis of that affidavit, the fiscal conducted another preliminary investigation. One important issue in this appeal is Norteza's credibility. The Solicitor General regards him as a perjured witness. At the trial, Norteza, a 37-year old mason and a high school undergraduate, testified that at about six o'clock in the evening of January 21, 1970 Crescencio Nemenzo, Rodrigo Baricuatro, Rodolfo Umbay and Salvador Peña allegedly went to his house at Barrio Mangoto and invited him to go to Barrio Tutay for a drinking spree. They went to the cliff or the elevated portion in the barrio near the bridge, arriving there at about seven o'clock. There, Norteza saw firearms (greasegun, Thompson, Garand rifle) dumped under a tree. He also saw his friends, Roberto Paslon, Carlos Paslon, Victoriano Baraga, Crispin Baraga, Emilio Generalao, Elpidio Baricuatro, Romeo Baricuatro and Moreno. Using only one glass, they were drinking tuba mixed with Pepsi-Cola. Rodrigo Baricuatro allegedly disclosed to him that the group would kill Mayor Cerna. Norteza was given the option to select what firearm he would use. The plan was for Ely Baricuatro to go to his house at Sitio Mohon, Aloguinsan, and fire a shot as a signal announcing the approach of Mayor Cerna's truck. A pile of logs on the right side of the road near the bridge would be used as a barricade to block the truck. In accordance with that suggestion, Roberto Paslon, Carlos Paslon, Generalao, Crispin Baraga and Victoriano Baraga blocked the road with logs. The roadblock was removed when three trucks, none of which belonged to Mayor Cerna, passed by. After the third truck had passed, a gunshot was heard. That meant that Mayor Cerna's truck was approaching. Some members of the group stationed themselves behind the roadblock. Others were stationed in the upper portion near the bridge. At that juncture, Norteza allegedly sneaked out of the place. He did not witness the ambush. On his way home through the fields, he heard the gunshots coming from the place which he had left. The foregoing testimony was the trial court's basis for convicting appellants Elpidio Baricuatro, Ely Baricuatro, Nemenzo,

Peña, Umbay, Roberto Paslon and Victoriano Baraga. Can credence be given to Norteza's testimony? As already stated, the Solicitor General agrees with the appellants that Norteza is a perjured witness. Norteza explained that he kept silent about the ambushade for more than one year because he was fearful that he might be prosecuted and he was allegedly warned that if he squealed he and his family would be liquidated. He changed his mind because he realized that, eventually, it would be known that he had some knowledge of the conspiracy and because he surmised that if he disclosed what he knew about the killing of Mayor Cerna, other persons would follow his example and disclose what they knew about the unsolved killing of his brother, Miguel, on January 31, 1971. We have conscientiously evaluated Norteza's uncorroborated and contradicted testimony. Our conclusion is that it cannot be accorded any credence. Consequently, the guilt of the seven appellants implicated by him was not established beyond reasonable doubt. It is not merely the long delay in the giving of his testimony that impairs its veracity and engenders the notion that it might be fabricated. What strongly militates against his credibility is the undeniable fact that he was a follower of Mayor Cerna and, therefore, it is not believable that he would have been invited by the appellants (some of whom were confirmed political enemies of Mayor Cerna) to join in the conspiracy to kill the mayor (1846 tsn January 11, 1972). And because he was a follower of Mayor Cerna, it is not surprising that he was used as a prosecution witness in this case. Norteza, as a tough guy, was well-known in the small town of Pinamungajan and its environs where, as in the case of small communities, political affiliations are not secret. The appellants could not be ignorant of the fact that Norteza and his father belonged to Mayor Cerna's faction. The mayor was one of Norteza's three bondsmen in Criminal Case No. 472-RP of the municipal court, a 1968 case, wherein he was charged with serious physical injuries for having assaulted Teodoro Alpas (Exh. 7 to 7-F-Moreno). Norteza voted for Mayor Cerna in the 1967 election and for Mayor Cerna's son in the 1971 election. His father was a leader of Mayor Cerna (147, 150 tsn November 17, 1971). In July, 1971, or after Norteza surfaced as a prosecution witness, he was appointed a municipal caminero (1249 tsn November 16, 1971). Norteza's version as to the conspiracy contains improbabilities. He made it appear that although the conspirators or the appellants had already decided on killing the mayor and had foregathered in the upper portion of Barrio Tutay to wait for the mayor's truck, they had not yet agreed on the specific measures to be employed in accomplishing their diabolical purpose. From Norteza's story, it appears that the conspirators had to converse aloud in his presence and agree on the blocking of the road and the giving of the signal announcing the approach of the mayor's truck and that they had to invite him to implement their plan. He did not explain why his presence was still indispensable for the execution of the scheme to kill the mayor, considering that (according to Norteza's version) there were already thirteen armed persons present who were ready to perform their nefarious task. He did not mention any special qualifications on his part, which induced the conspirators to invite him to join them. These facets of his story appear to be incredible. The fact that he did not join in the conversation; that he did not make any suggestions; that he was a mere listener; that he did not even participate in placing the roadblock and in removing it when certain trucks passed, and that he played a passive role or was a mere spectator makes it hard to believe that the conspirators would have taken him into their confidence. It is within the realm of possibility that the seven appellants had some participation in the ambushade and that someone, who had actual knowledge thereof but who was not indicted, had informed Norteza of what had transpired. But it is certain from the record that Norteza's uncorroborated testimony is not sufficient to prove the complicity of the seven appellants in the assassination. Norteza's testimony contains details that convey the impression that he was a co-conspirator. Such details as the giving of the signal and the placing of the roadblock, and the passing of three trucks before Mayor Cerna's truck passed, might have convinced the trial court that Norteza was present when the preparations for the ambushade were made. But the record also reveals that other details were not mentioned by Norteza and that such omission casts doubt on the veracity of his testimony. For example, Norteza did not mention that the conspirators were provided with food which they ate while on the cliff, as shown in the telltale wrappers of "puso" rice and the empty tins of canned food (59 tsn July 24, 1972). Norteza could not tell the kind of firearms carried by the conspirators. He merely said that something was bulging at their waists. If he was a co-conspirator trusted by the appellants and was present on the cliff, he could have easily ascertained the kind of weapons carried by his companions. Norteza's explanation as to his long silence is not convincing and satisfactory. It cannot erase the impression that he was a rehearsed witness whose testimony was concocted in order to strengthen the prosecution's case. The fact that he did not confide to his wife and parents his knowledge of the ambushade (1239 tsn November 16, 1971) is quite unusual and

may signify that he was not privy to the conspiracy. In a grave case, like the instant case, the guilt of the accused cannot be predicated on delayed testimony, like that of Norteza's, which exhibits earmarks of fabrication. It would be highly injudicious to rely on such testimony because blanket acceptance thereof might result in the conviction of an innocent person. With the rejection of Norteza's testimony, the seven appellants, already named, should be acquitted. Having disposed of the appeal of the additional seven defendants, we now address ourselves to the appeal of the original five defendants against whom criminal actions were filed in the municipal court of Pinamungajan, in four of which cases Mayor Cerna conducted the preliminary examination and issued the warrants of arrest. Case of appellant Moreno. - He relied on an alibi the details of which his counsel did not bother to discuss in his brief. He testified that when the ambushade was perpetrated, or in the evening of January 21, 1970, he was in the house of his sweetheart, Maria Milan, at Barrio Dakit, Pinamungajan. Maria Milan, Juan Dejito and Casiano Flores corroborated Moreno's alibi. Dejito and Flores are the brothers-in-law of appellant Nemenzo, who in turn is a first cousin of the brothers, appellants Rodrigo and Elpidio Baricuatro. However, Romula Gleocam, the mother of Maria Milan, who lived with her, contradicted her and testified that Moreno called at their house at around nine o'clock in the evening of that day or after the ambushade had been perpetrated. Maria Portes corroborated Romula's testimony. It may be recalled that Mrs. Cerna, Barrientos and Candida Comahig testified that, after the gunfire had ceased, they heard the sound of the engine of a vehicle. They imagined that it was an oncoming truck. Actually, it was leaving the scene of the crime. That sound came from that part of the highway near the schoolhouse or near Moreno's house at Barrio Tutay (69 tsn, Exh. 2-Moreno). At around eight-thirty of that night, as Jose Kyamko, the brother-in-law of Mrs. Cerna, was crossing the highway, a jeep without any light passed by him. It came from Barrio Tutay and was driven to the poblacion. Kyamko recognized it as the passenger jeepney which Leon Moreno, the father of Vedasto, had converted into a private vehicle. When the jeep passed Kyamko, he noticed that it was driven by Moreno. Beside him was Rodrigo Baricuatro. (See p. 37, Records of Crim. Case No. 95-Cebu.) As already stated, according to Romula Gleocam, at around nine o'clock on that same night, Moreno, riding in a jeep, went to the house of her daughter, Maria Milan, at Barrio Dakit, which was near the poblacion (Exh. T). Romula noticed that Moreno spoke in a quavering voice and that he looked untidy and ill-kempt. On prior occasions, he had a well-groomed appearance. After talking with Maria for about an hour, Moreno (Vidi) departed in his jeep. Shortly thereafter, Romula heard again the drone of the jeep. Moreno called and asked Rufina Milan (Romula's sister) that he be allowed to pass the night in her house because no one was allowed to pass Barrio Tutay. On that night Moreno slept at Rufina's house. When Moreno was already inside the house, Romula heard a man's voice outside calling Moreno and saying: "Boss, he is already dead". Moreno did not make any reply. On the following morning, Moreno requested Luz, a daughter of Romula, to buy bread in the market and to listen to the rumors being spread around. After Luz had returned, she told Moreno that some persons in the street corner were saying that Moreno had killed Mayor Cerna. While Romula was preparing breakfast, she observed that Moreno was always looking out of the window. After taking breakfast, he left the house together with Maria Milan. They rode in the jeep. They passed by the store of Maria Portes where Moreno bought cigarettes. When she handed the cigarettes to him, he noticed that he looked pale and that his hands were trembling. In fact, he dropped the cigarettes on the ground. She asked Moreno what was wrong with him. he answered that he is being implicated in the killing of Mayor Cerna. She said that if he had not done anything wrong, he had no reason to be afraid. Moreno testified that after bringing Maria Milan to the high school, he went to his residence at Barrio Tutay and took his lunch there. Then, he went to Barrio Pandacan and supervised the gathering of the coconuts, the cutting of the bamboos and the plowing of the family lands. He went to the house of his aunt and passed the night there. On the following day, January 23, his uncle, Francisco Gabante, arrived from San Carlos City. He went with his uncle to Trozo, San Carlos City, arriving there by boat in the early morning of January 24, 1970. He visited his aunt, Victoria Gabon. On the following day, January 25, he went to Bais City to visit his uncle, Felix Moreno. Then, the next day, he went to the residence of a lawyer at Dumaguete City in order to seek legal advice. On January 28, 1970, he was arrested in that city by three Constabulary sergeants of the Cebu City Constabulary detachment. Moreno went to the Constabulary headquarters at Dumaguete City and slept there (Exh. 3-Moreno). He and the Constabulary sergeants took a boat on the following day and arrived at Cebu City on January 30 (Exh. 5-Moreno). Maria Portes declared that after Moreno was arrested, he went to see her and requested her to testify that she saw him at the house of Rufina Milan at six o'clock in the evening of January 21, 1970. He offered her money. She

refused to testify in his favor. We are convinced that Moreno's complicity in the perpetration of the ambushade was proven beyond reasonable doubt by the testimonies of Mrs. Cerna and the driver, De los Reyes, and the declaration of Mayor Cerna to his wife, the chief of police and Barrientos. The motive for the killing was sufficiently established. Moreno felt aggrieved by Mayor Cerna's issuance of the warrant for his arrest and by his incarceration and posting of four bail bonds which entailed the payment of a substantial amount as premiums. Moreno's alibi, instead of showing his innocence, served to confirm his guilt because, if he had no participation in the ambushade, there was no reason for him to sleep in his sweetheart's house, three kilometers away from his residence in Barrio Tutay where the ambushade was committed. His flight to San Carlos City clearly signified that he had a guilty conscience. Case of Rodrigo Baricuatro.- This appellant was 44 years old when he testified in 1972. He was a Constabulary sergeant connected with the reserve officers training corps (ROTC) unit of the University of the Visayas at Cebu City, with training and experience in perpetrating ambushades. He testified that in the afternoon of January 21, 1970, he was given by his commandant a three-day pass so that he could go to Pinamungajan and transfer to a new residence on the lot of his parents. He arrived at Pinamungajan at past five o'clock. He and his wife took supper at six o'clock. Then he allegedly went to the house of Tonying Batitay to play mahjong. He was accompanied by appellant Umbay, his brother-in-law. He stayed at Batitay's place until nine o'clock when the brothers Eleazar and Jose Peña came with the information that Mayor Cerna had been ambushed at Barrio Tutay. Rodrigo Baricuatro, accompanied by Umbay and Loreto Quesido, left Batitay's place, and went home. Two days later, or on January 23, 1970, Colonel Jose Nazareno, the Constabulary zone commander who was in Pinamungajan, took him into custody because of the suspicion that the firearms used in the ambushade might have come from the armory of the University of the Visayas. Rodrigo was in charge of the armory. Upon his arrival at Cebu City, an inventory of the arms at the armory was made. He was later detained at the enlisted men's quarters and then at the guardhouse after a criminal charge was filed against him. He denied any complicity in the ambushade. He refuted Norteza's statements implicating him in the assassination of Mayor Cerna. However, and this is a decisive point, Antonio Batitay, the owner of the house where Rodrigo Baricuatro and Umbay allegedly played mahjong from seven o'clock in the evening of January 21, 1970 (the night of the ambushade), testified that Rodrigo and Umbay did not play mahjong in his house at that time. They arrived in the mahjong den shortly before nine o'clock or after the ambushade was committed. The mahjong game was stopped after nine o'clock when news of the ambushade was relayed to the mahjong players. (156-7, tsn March 6, 1972). Batitay's testimony nullified Rodrigo Baricuatro's alibi and cancelled the testimonies of Eleazar Peña, Loreto Quesido, and Beato Peña, and Sergeant Norberto Alvarado, supporting that alibi. The falsity of his alibi removes any doubt as to his guilt. Like Moreno, Rodrigo Baricuatro was identified by the eyewitnesses, Mrs. Cerna and De los Reyes, as being present at the scene of the crime, and by Mayor Cerna himself in his declaration to them, to Barrientos and to the chief of police. Rodrigo had reason to surmise that Mayor Cerna instigated the criminal action for grave threats filed against him. Being a potential candidate of the Liberal Party for mayor in the 1971 election, he could believe that the elimination of Mayor Cerna would insure his election. Four prosecution witnesses, namely, Placido Mondejar, Angela Yanong, Lazaro Deroy and Sergio Perito, testified to certain incidents which reveal that Rodrigo Baricuatro had nursed the design to kill Mayor Cerna before the 1971 elections and had recklessly made an open avowal of that intention. Rodrigo made a blanket denial of that imputation. It would seem that before the ambushade Rodrigo Baricuatro and Moreno had already prepared their alibis. Rodrigo would be in the mahjong den while Moreno would be in his girl friend's residence. What they did not foresee was that, immediately after the ambushade, the finger of suspicion would be pointed at them by their fellow townsmen as individuals implicated in that iniquitous and dastardly deed. Thus, Candida Comahig stopped her narrative about the ambushade when she noticed that Rodrigo was among those listening to her. And Fiscal Alfredo S. Pancho testified that on the day following the ambushade a group of around fifteen persons, some of whom were armed and drunk, stopped the Moreno bus at the public market of Pinamungajan and wanted to be brought to Sitio Tubod where Rodrigo Baricuatro was residing. The group harassed the bus driver and the conductor, the employees of Vedasto Moreno's family. That circumstance led Fiscal Pancho, a bus passenger bound for Aloguinsan, to conclude that it was dangerous for Moreno to remain in Pinamungajan. Because of that incident, the bus could not proceed to Barrio Tutay. It had to take a roundabout route (via Carcar) to Aloguinsan. Fiscal Pancho rejected the offer that Moreno himself would drive the bus to Aloguinsan by way of Barrio Tutay. Case of Romeo Baricuatro.- This appellant, the nephew of Rodrigo Baricuatro,

was thirty-three years old in 1970. He is married with five children. He was a student of criminology at the University of the Visayas in Cebu City. He declared in support of his alibi that in the afternoon of January 20, 1970 his wife came from Pinamungajan to inform him at his boarding house in Cebu City of the warrant of arrest issued against him in the four criminal cases pending in the municipal court. She also apprised him that Moreno had already been arrested. He testified that at around noontime, he took his wife to the bus station for her return trip to Pinamungajan. At the station, he saw Avelino Norteza who was working as a mason in Cebu City. Romeo denied Norteza's testimony that he was in Barrio Tutay in the evening of January 21, 1970. Romeo's alibi is that he was in the house of Atty. Rodolfo Acido in Cebu City at the time when the ambushade was perpetrated. Romeo conferred with Atty. Acido whom he had hired as his counsel in the four criminal cases. His landlord, Mario Saromines, was with him when he conferred with Acido. Romeo returned to his boarding house after nine o'clock in the evening. He was already in the boarding house when the whistle announcing the curfew for minors was sounded at ten o'clock. Romeo explained that Norteza testified against him because the Cerna family had helped Norteza in a certain case and that Mrs. Cerna implicated him because she hated his uncle, Rodrigo. Mario Saromines, a thirty-nine year old barber, corroborated Romeo's alibi. But Acido (Moreno's counsel in the preliminary investigation), whose corroboration would be vital in establishing the truth of Romeo's alibi, did not testify in court. Hence, Romeo's alibi cannot prevail against the testimonies of Mrs. Cerna and De los Reyes that he was among those who ambushed Mayor Cerna. After eluding arrest for more than twenty-two months, Romeo was arrested by Sergeant Servando Tio in his house at Sta. Cruz, Pinamungajan on November 20, 1971. Cases of Emilio Generalao and Carlos Paslon.- Generalao, a resident of Barrio Tutay, was thirty-eight years old when he testified in 1972. He reached the first year of high school. His alibi was that from January 6, 1970 to May 3, 1971, or for about one year and five months, he was doing farm work in Barrio Calibasan, Toledo City which was fifteen kilometers away from the provincial road at Matabang. To go to that place, one had to walk from Matabang. The trip took more than six hours. Generalao stayed with his brother-in-law, Filomeno Cantutay, a resident of Calibasan. Cantutay corroborated his alibi. Generalao testified that in May, 1970, his wife went to Calibasan to inform him that he was implicated in the killing of Mayor Cerna. He returned to Barrio Tutay on May 3, 1971 in order to confer with his brother and his wife regarding his surrender. He denied that he was with Norteza in Barrio Tutay in the evening of January 20, 1970. His theory was that Norteza was angry with him because he refused to help Norteza and his brother in gathering the coconuts of Clemente Yanong. He was arrested in his father's house on November 25, 1971 by certain Constabularymen named Aldaba, Nebres and Carding and others whose names he did not know. He said that he was brought to the Constabulary station at Pinamungajan where he was mauled by the Constabularymen and by Jesus Cerna and Jose Kyamko in the presence of several persons. Then, he was taken to the Constabulary headquarters at Sibonga where he was again maltreated. There, he signed an affidavit which he did not read. The affidavit, Exhibit B-Generalao, was taken by Sergeant Benjamin Solante in the presence of Sergeants Nicanor E. Bancog and Edmundo Panistante and sworn to before Fiscal Benicio Arzadon who prosecuted this case. Generalao, on cross-examination by Fiscal Arzadon, denied that he signed freely that affidavit. In that affidavit, Generalao admitted that on January 2, 1970, he killed Juanito Gabonada; that, because of that killing, he went into hiding at Sitio Calibasan and Barrio Guingkamote, Toledo City, staying with his brother-in-law Cantutay, his friend Marcelo Tante and his mother's cousin, Felicisimo Maturan; that he returned to his father's house at Sitio Santa Cruz, Barrio Sacsac, Pinamungajan on May 3, 1971 in order to surrender but he was not able to do so because he feared that he might be killed, so he just laid low and talked from time to time with Carlos Paslon and Romeo Baricuatro; that in November, 1971, in the course of an encounter with Constabulary soldiers, he threw away his Garand rifle and it was recovered by the Constabularymen, and that his companions in that encounter were Carlos Paslon and Gavino Laya. (Translation.) Carlos Paslon, married, with seven children, was thirty-six years old in 1972. He finished the fifth grade. His alibi was that from November, 1969 to February, 1970 he stayed in the house of his elder brother, Doming, in Barrio Lawaan, Talisay, Cebu. He was working as driver at six pesos a day with the Cebu United Enterprises. Afterwards, he lived in Duljo, Cebu City where his wife established a dress shop. He left Duljo in April, 1971 and returned to Pinamungajan. Paslon testified that in the evening of January 21, 1970 he attended a party in the house of Eutiquio Cabuenas in Barrio Lawaan. According to Paslon, the occasion was a "yearly devotion". According to Cabuenas, it was the birthday of his wife. Paslon could not remember the birthdays of his children. Cabuenas corroborated his alibi. However, on cross-examination, Cabuenas

declared when he testified on August 26, 1972 that the current months was July. Cabuenas admitted that he was requested by the wife of Carlos Paslon to testify that Carlos was in the house of Cabuenas in the evening of January 21, 1970. Carlos Paslon denied the imputation of Norteza that he was in Barrio Tutay on that date. Norteza was angry with him because he refused to sell a pig to him. He was arrested on November 24, 1971 in the house of Sabina Intong at Barrio Sambagon, Pinamungajan by certain Constabularymen named Aldaba, Alpon and Carding who maltreated him. They stopped maltreating him when Sergeant Nebres told them that according to Mrs. Cerna, Carlos Paslon would be a State witness. He was brought to Sibonga where he signed an affidavit after having been mauled. The alibis of Generalao and Carlos Paslon cannot be accorded any credence because they were positively identified by Mrs. Cerna. And the fact that, like Romeo Baricuatro, they were fugitives from justice for around twenty-two months, hiding in the mountain barrios of Pinamungajan, conveys the impression that they had a guilty conscience. Appellants' criminal liability.- As to Mayor Cerna, the offense committed was correctly categorized as the complex crime of murder with direct assault upon a person in authority (Arts. 48, 148 and 248, Revised Penal Code). The killing of Mayor Cerna was indisputably treacherous. The ambushade exhibited the characteristic features of alevosia. (Art. 14[16], Revised Penal Code). Nocturnity is aggravating because the appellants took advantage of the night for the consummation of their nefarious enterprise. The killing constituted a direct assault against a person in authority (Art. 152, Revised Penal Code; U.S. vs. Gumban, 39 Phil. 76), as charged in the information, because the rule is that the person in authority or his agent should have been assaulted "while engaged in the performance of official duties, or on occasion of such performance". At the time Mayor Cerna was ambushed, he was returning from Cebu City where he had transacted official business with the governor. The impelling motive for the direct assault was Mayor Cerna's performance of his official duty in conducting the preliminary examination of the four criminal cases against appellants Moreno, Generalao, Romeo Baricuatro and Carlos Paslon and the issuance of warrants of arrest which resulted in the incarceration of Moreno and constrained him to pay P1,000 as premiums on his bail bonds. Undoubtedly, that caused resentment. (Justo vs. Court of Appeals, 99 Phil. 453; U.S. vs. Garcia, 20 Phil. 358). As the crime is complex, the penalty of reclusion temporal maximum to death for murder, the more serious offense, should be imposed in the maximum period. Hence, the death penalty should be imposed on the principals. The trial court correctly imposed the death penalty upon Moreno and Rodrigo Baricuatro, whose guilt as co-principals in the assassination of Mayor Cerna, was established to a moral certainty. For lack of the requisite votes, the death penalty cannot be imposed on appellants Generalao, Carlos Paslon and Romeo Baricuatro. They should be sentenced to reclusion perpetua. In this connection, it may be noted that in People vs. Ubiña, 97 Phil. 515, where Aureliano Carag, the mayor of Solana, Cagayan, was killed by eight persons led by Tomas Ubiña, his political enemy, only Ubiña was sentenced to death because he was the one who conceived the plan and utilized his influence to perpetrate the killing. "For him justice cannot be tempered with mercy; the law must be applied to its full force and to its full extent." His four companions, who were indebted to him for personal favors, were sentenced only to reclusion perpetua. Three others, who were present at the killing but did not conspire with Ubiña, were considered accomplices. (See People vs. Sakam, 61 Phil. 27; People vs. Cabrera, 43 Phil. 82; People vs. Chua Huy, 87 Phil. 258, and People vs. Ging Sam, 94 Phil. 139, capital cases, wherein not all those convicted as principals were sentenced to death.) In the other four cases, the trial court convicted the appellants of frustrated murder. This is a glaring error. The trial court overlooked that there were only two informations for frustrated murder. These refer to the cases where the victims were Lourdes Cerna and Jose de los Reyes. The other two informations charged attempted murder only in the cases where the victims were Candida Comahig and Francisco Jabido. In these four cases, the crime committed is attempted murder only because the injuries suffered by the victims could not have caused their death. Band (cuadrilla) is aggravating in addition to nocturnity. Only the five appellants originally charged should be held responsible for the attempted murders. We have already ruled that the seven additional appellants implicated by Norteza should be acquitted. However, Generalao, Romeo Baricuatro and Carlos Paslon cannot be held responsible for the attempted murder committed against Jabido and De los Reyes because these two offended parties did not testify at their separate trial. Neither did Doctors Florante Batucan and Ramon Arcenas, who examined the injuries of Jabido and De los Reyes and issued the corresponding medical certificates (Exh. E and F), testify at the separate trial of Generalao, et al. WHEREFORE, the trial court's decision is modified and the following judgment is rendered in these five cases: 1. In Criminal Case No. 95-Cebu, L-37801, appellants Vedasto Moreno,

Rodrigo Baricuatro, Romeo Baricuatro, Carlos Paslon and Emilio Generalao are convicted as co-principals in the crime of murder with assault upon a person in authority. Moreno and Rodrigo Baricuatro are each sentenced to death, while Romeo Baricuatro, Paslon and Generalao are each sentenced to reclusion perpetua. The five appellants are ordered to pay solidarily to the heirs of Mayor Samson Cerna an indemnity of P50,000. 2. In the other four cases, Criminal Cases Nos. 129-Cebu, L-37802; 130-Cebu, L-37803; 131-Cebu, L-37804, and 132-Cebu, L-37805, appellants Moreno and Rodrigo Baricuatro are convicted of four attempted murders and are each sentenced to four indeterminate penalties each consisting of four (4) years of prison correctional medium, as minimum, to seven (7) years of prison mayor minimum, as maximum, and to pay solidarily an indemnity of two thousand pesos (P2,000) to each of the three victims, Candida Comahig, Francisco Jabido and Jose de los Reyes. The same two appellants are further ordered to pay solidarily to Lourdes Cerna an indemnity of ten thousand pesos (P10,000). The penalty and civil liability in Criminal Cases No. 129, L-37802 and 130, L-37803, involving Candida Comahig and Lourdes Cerna, are imposed upon appellants Generalao, Romeo Baricuatro and Carlos Paslon. These three appellants have no liability in Criminal Cases Nos. 131 and 132, L-37804 and L-37805, involving Francisco Jabido and Jose de los Reyes. 3. The other seven appellants, Crescencio F. Nemenzo, Elpidio Baricuatro, Ely Baricuatro, Salvador Peña, Rodolfo Umbay, Roberto Paslon, and Victoriano Baraga, are acquitted in the five cases on the ground of reasonable doubt. The convicted appellants will pay the costs. SO ORDERED. Barredo, Makasiar, Antonio, Muñoz Palma, Aquino, Concepcion, Jr., Santos, Fernandez, and Guerrero, JJ., concur. Castro, C.J., and Fernando, J., no part. Teehankee, J., concurs in a separate opinion. CONCURRING OPINION TEEHANKEE, J.

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PER CURIAM:

On the night of January 21, 1970, in an ambush perpetrated at Barrio Tutay, Pinamungajan, Cebu, Mayor Samson Cerna, 51, of that town was mortally wounded. He died about two hours later. His companions, Lourdes Cerna, Candida Comahig, Francisco Jabido and Jose de los Reyes, were also wounded.

As an aftermath of that tragic occurrence, an information for murder with atentado, two informations for frustrated murder and two for attempted murder (five cases) were filed against thirteen persons with the Circuit Criminal Court at Cebu City.

The lower court's judgment.- After trial, the lower court convicted (1) Vedasto Moreno, (2) Rodrigo Baricuatro, (3) Romeo Baricuatro, (4) Carlos Paslon and (5) Emilio Generalao of murder with direct assault upon a person in authority and sentenced each of them to death and to pay solidarily to the heirs of Mayor Cerna the sum of P50,000 as actual and moral damages.

In the same case, (1) Crescencio F. Nemenzo, (2) Elpidio Baricuatro, (3) Ely Baricuatro, (4) Salvador Peña, (5) Victoriano Baraga, (6) Rodolfo Umbay and (7) Roberto Paslon were convicted as co-principals and were each sentenced to reclusion perpetua and to pay solidarily an indemnity of P50,000 (Criminal Case No. CCC-XIV-95).

The same twelve accused were convicted of four frustrated murders. Each of them was sentenced to four indeterminate penalties of six years and one day to eight years and one day of prison mayor and to pay solidarily an indemnity of P8,000 to Mrs. Cerna and P2,000 each to Candida Comahig, Jabido and De los Reyes (Criminal Cases Nos. CCC-XIV-129 to 132).

All the twelve defendants appealed. Crispin Baraga, the thirteenth accused, is at large.

Issue as to the identity of the culprits.- There is no question as to the corpus delicti or the commission of the five offenses. The nagging question is the identity of the malefactors. The prosecution was not able to use a co-conspirator as a State witness or to obtain an extrajudicial confession.

Sometime after the commencement of the trial, the prosecution used as a witness, Avelino Norteza, an alleged co-conspirator, who withdrew from the conspiracy but who was not indicted and who was not present when the ambushade was consummated. His testimony as to the conspiracy was severely assailed by the defense and even by the Solicitor General.

Antecedents.- Certain undisputed circumstances preceding the ambushade may shed light on the motivation for the assassination of Mayor Cerna and serve to explain why the appellants were implicated therein.

In 1969, Vedasto Moreno, 26, a college graduate and a businessman, residing at Barrio Tutay, was the number one councilor of Pinamungajan affiliated with the Liberal Party. Rodrigo Baricuatro, 42, a Constabulary sergeant, was being groomed as the Liberal Party candidate for mayor of that town in the coming 1971 elections. He would be the opponent of Mayor Cerna, a Nacionalista. Moreno would be Baricuatro's running mate (1265-66 tsn November 16, 1971).

A controversial incident occurred on election day, November 11, 1969, at Barrio Tutay. According to Moreno, on that day, he arrested Mamerto Lausa, a barrio captain, and Patrolman Filemon Diacamus because they were buying votes. He took from them the envelopes containing money and turned them over to the Constabulary authorities, as shown in the receipt, Exhibit 8-Moreno, signed by Sergeant Marcillano.

The prosecution has a contrary version of that incident. According to the chief of police, on that day, Moreno, Generalao, Paslon and Romeo Baricuatro entered the house of Gabina Baron and, employing force and intimidation, took from Lausa, the sum of P800 and grabbed from Patrolman Diacamus his service revolver. (That firearm was allegedly turned over to Rodrigo Baricuatro. 154 tsn November 19, 1971. It was later recovered from Paslon.)

Because of that incident, the chief of police filed on November 15, 1969 in the municipal court two almost identical complaints, both sworn to before Mayor Cerna, charging Moreno, Romeo Baricuatro, Paslon and Generalao with robbery in band with intimidation for having taken the money and revolver (Criminal Cases Nos. 501-RP and 502-RP).

On December 12, 1969 two other complaints, which were also sworn to before Mayor Cerna, were filed in the municipal court by the chief of police. One complaint against the same four accused was for direct assault against an agent of a person in authority, namely, Patrolman Diacamus, on the occasion mentioned above, when he was disarmed (Criminal Case No. 505-RP).

The fourth complaint against the same four accused was for qualified trespass to dwelling for having entered Gabina's dwelling. That complaint was also sworn to before Mayor Cerna (Criminal Case No. 506-RP). (Those four cases were remanded to the Court of First Instance on February 23, 1970.)

Also on December 12, 1969, the chief of police filed in the municipal court a complaint (Criminal Case No. 507-RP), sworn to before Mayor Cerna, charging Rodrigo Baricuatro, his nephew, Romeo Baricuatro (1404 tsn, November 25, 1971), and Arturo Kyamko, who were armed with a Thompson submachine gun, carbine and .45 caliber pistol, with having committed grave threats also on election day, when they threatened to kill Lausa, the offended party in the robbery case. Rodrigo Baricuatro was alleged to have told Lausa: "Do you want to die, Merto? Killing is what we want now. Who among you here is brave?" (The municipal court dismissed that case in its order of August 28, 1970 because of Lausa's failure to prosecute it.)

In the aforementioned four criminal cases Nos. 501, 502, 505 and 506, Mayor Cerna conducted the preliminary examination although there was no showing that the municipal judge could not perform that duty. The mayor issued warrants for the arrest of the four accused. Moreno was arrested and imprisoned on January 16, 1970. He

posted bail, paying P1,000 as premiums on four bail bonds. His release was ordered by the municipal judge on January 20, 1970 (Exh. 4 and 6 to 6-C-Moreno).

On the other hand, it should be noted (according to the evidence for the defense) that Sergeant Rodrigo N. Baricuatro of the department of constabulary science and tactics of the University of the Visayas at Cebu City was given by his commandant a pass authorizing him to be absent for seventy-two hours, or from seven o'clock in the morning of January 21 to twelve o'clock midnight of January 23, 1970, for the ostensible purpose of attending to his family's needs in Sitio Manga, Pinamungajan (Exh. 9-Rod. Bar.).

Thus, shortly before the ambushade, considerable tension had developed between Moreno, Rodrigo Baricuatro and their followers, on one hand, and Mayor Cerna, on the other. It may be assumed that the arrest of Moreno and the impending arrest of Rodrigo Baricuatro, Romeo Baricuatro, Paslon and Generalao inflamed their smoldering resentment against Mayor Cerna.

Mrs. Cerna testified that the mayor was ambushed "because Vedasto Moreno got angry with the mayor because he was confined in jail and this Rodrigo Baricuatro is jealous of the mayor because of his ambition to become a mayor of Pinamungajan and as long as the mayor x x x is still alive, he cannot become a mayor of our town" (155 tsn November 19, 1971).

The ambushade.- On January 19, 1970, Governor Osmundo Rama in a telegram to Mayor Cerna requested him come for a conference in connection with the release of funds for his town, the detail in that place of Constabulary soldiers, and the agenda to be taken up in the forthcoming conference of municipal mayors. (See pp. 39-43, Record of Criminal Case No. 10-T.)

In compliance with that request, Mayor Cerna, using his cargo truck and accompanied by his wife, Lourdes Cerna, went to Cebu City in the morning of January 21, 1970. (Note that Elpidio Baricuatro saw the mayor's truck leaving for Cebu City and that Moreno, Rodrigo Baricuatro and Romeo Baricuatro were also in Cebu City on that fateful day, January 21, 1970. Moreno and Rodrigo went to Pinamungajan in the afternoon of that day. The return of Mayor Cerna to Pinamungajan in the evening of that date was known beforehand because on that day the mayor's housemaid, in answer to a policeman's inquiry, said that the mayor would return to Pinamungajan at nighttime.)

Mayor Cerna conferred with the governor. He received a treasury warrant for P5,721 as national aid for the maintenance and improvement of municipal roads and bridges (Exh. M).

According to Mrs. Cerna, the detail of Constabulary soldiers in Pinamungajan was necessary in order to apprehend a band headed by Generalao, that was wanted in connection with the death of Juanito Gabonada, and because there were rumors that Mayor Cerna's political enemies were intending to liquidate him.

Late in the afternoon of that day, January 21, Mayor Cerna boarded his truck and proceeded to Barrio Tabunok, Talisay to pick up his cargo. At about six o'clock, the truck started on its trip to Pinamungajan via Carcar. Seated in the front seat were Jabido on the extreme left and then the driver, De los Reyes, Candida Comahig and Mrs. Cerna. Mayor Cerna was on the extreme right. Anacleto Barrientos and two helpers were in the back of the truck.

At about eight o'clock on that moonlit night, the truck reached the five-meter-wide curve about seven meters from the end of the wooden bridge in an isolated place at Barrio Tutay, which is about three to four kilometers away from the poblacion of Pinamungajan. (See sketch, Exh. G, photographs, Exh. H, etc. and Exh. 1-Moreno.)

After the truck had passed the bridge, its headlights revealed that a big log, about three to four arms' length, a foot wide and six inches thick, the ends of which were connected to the sides of the road by two other pieces of wood,

had been placed across the highway as a roadblock about three meters from the curve (66 tsn November 15, 1971; 308 tsn September 3, 1970).

Pieces of lumber piled as high as the waistline of a person or less than a meter high and about seven meters long were stacked on the right side of the road below a cliff shaded by a balete tree. The truck's headlights were focused on the right end of the roadblock and the pile of lumber. The truck stopped opposite the pile of lumber and was about two arms' length from it (164 tsn November 19, 1971). One end of the roadblock rested on the pile of lumber. Moreno's house was about 100 to 150 meters away from the bridge.

Stationed behind the piled lumber, which served as a barricade, were armed persons whom Mrs. Cerna allegedly recognized because of the moonlight and the truck's headlights and because their bodies from the waist up were exposed. She was instinctively afraid. She pressed the left thigh of her husband. He brushed her hand aside.

The truck stopped at the curve, which is a few meters away from the end of the bridge and which on the right side is near the cliff and the pile of lumber. The driver did not shut off the headlights. The armed persons behind the barricade were Romeo Baricuatro, Rodrigo Baricuatro, Carlos Paslon, Vedasto Moreno, Emilio Generalao, and three others. The place was an ideal one for an ambushade (67 tsn November 15, 1971).

When Mrs. Cerna saw the roadblock, she turned to the right side of the road ("stooped down in order to peep") and she then saw "clearly" before the shooting the armed persons behind the pile of logs on the side of the road "beneath the cliff" (32-33, 66-67, 71, 72, 74, tsn Exh. 2-Moreno). She testified that Mayor Cerna told her that Moreno and Rodrigo Baricuatro (Bide and Dido) were among the malefactors. The veracity of that testimony and similar testimony given by the chief of police, Anacleto Barrientos and Jose de los Reyes is vehemently contested by the appellants.

On the identity of the assailants, Mrs. Cerna testified as follows on cross-examination at the preliminary investigation:

"Q. Who were those persons with sidearms which (whom) you saw at the time of the incident? - A. Rodrigo Baricuatro, Vedasto Moreno, Emilio Generalao, Romeo Baricuatro, Carlos Paslon, and others whom I cannot identify because I could not see their faces.

"Q. You said also yesterday that there were persons behind the pile of logs that were placed at the side of the road, do you know who were those persons? - A. Those are the same persons whom I have named.

"Q. You said also it was a moonlight night and the headlight of the truck was on. Would you state to the investigator that the persons can still be seen on that night in question? - A. It (They) can be clearly seen.

"Q. Who were those persons whom you can clearly see? -A. Rodrigo Baricuatro, Vedasto Moreno, Emilio Generalao, Romeo Baricuatro and Carlos Paslon.

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"Q. Mrs. Cerna, you told this Honorable Investigator that you saw those persons you mentioned behind the pile of logs. Now, please tell this Investigator whether you saw those persons behind the pile of logs before the shooting or after the shooting? - A. Before the shooting.

"Q. Mrs. Cerna, since you saw those persons behind the pile of logs, and in fact you named those persons, can you please tell this Investigator what were their relative positions when you saw them behind the pile of logs? - A. I could not tell their positions because I could only see their bodies from their breast up.

"Q. Can you tell this Investigator if they were standing side by side or on file? - A. They were in line, side by side.

"Q. Since you can tell this Honorable Investigator that they were in line side by side, can you please tell us who was that person who was first from the left while looking on them? - A. Those were fronting me from the cliff which (who) were in line side by side were: first was Rodrigo Baricuatro, Emilio Generalao, Vedasto Moreno, Romeo Baricuatro, Carlos Paslon and those who were at the back I could not see their faces because their faces were covered.

xxx xxx xxx

"Q. Since you said that after the shooting those persons you mentioned disappeared, can you tell whether they passed from the precise spot where you saw them before? - A. I do not know where they were, but I saw that when they disappeared, they passed by the side of the truck towards the end of the truck.

"Q. You said that you observed those persons leaving the place where you saw them before, by passing by the side of the truck towards the end of the truck. Do you want us to understand that they cross(ed) the bridge towards the south? - A. I did not know where they went, but I observed that they passed by the side of the truck, on the right side of the truck." (71 - 77 tsn Exh. 2-Moreno and Exh. 5-Romeo).

At the trial, Mrs. Cerna testified:

"Q. Were you able to recognize these persons behind those (that) pile of wood? - A. Very much.

"Q. Will you name those persons to the court that you recognized behind the pile of wood? - A. Yes, sir, Rodrigo Baricuatro, Emilio Generalao, Vedasto Moreno, Romeo Baricuatro, Carlos Paslon and somebody behind whom I do not know because he was obstructed from my sight.

"Q. Those persons you have named to the court, how long have you known them? - A. Vedasto Moreno and Rodrigo Baricuatro I know them since their boyhood.

"Q. How about the others you have mentioned, how long have you known them? - A. I came to know them when they were already of age because they live in the barrio.

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"Q. How were you able to recognize these persons you have named since it was 8:30 in the evening? - A. Not only because of the light of the moon but they were also lighted by the beam of the light of our truck." (62-64 tsn September 2, 1970).

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"Q. But definitely, what you saw first, because of the beams of the lights on the front of the truck and the moonlight, was these pile of logs across the street and not the pile of logs on the side of the road, is that right? - A. The first that I saw, because of the light of the moon, was the log blocked across the road and when I saw I immediately turned to the side of the road and I saw the pile of logs and behind it were some persons.

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"Q. But the beams of the front lights of your truck was directed forward, is that right? - A. It is not towards the front all the time, because the light is scattered as adjusted.

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"Q. How (What) do you mean by like that? - A. That the lights (of the truck are) is not straight but it is scattered on the sides.

"Q. But you will agree with me that when you saw that pile of wood across the street, the truck was moving? - A. Still moving and that was the time I saw clearly the persons standing by the side of the road." (110-111, 113-114, tsn September 3, 1970).

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"Q. But, definitely, you cannot inform the Honorable Court whether they were having sidearms with them at that time? - A. All I saw were guns held like this (witness demonstrated a position by holding something in her hands in a port arms position).

"Q. So, you did not see any sidearms? - A. I only saw the barrel placed on top of the wood which they were holding." (Ibid, 126 tsn).

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"Q. How long after the silence by the time allegedly your husband mentioned the name? - A. After two to five minutes, more or less and I called him: 'Do', and after I called to him, he spat and then he said: 'Dido and Bidi, Day', together with the accused to be arrested.'

"Q. You are quite sure that what he said were those words: 'Dido and Bidi, Day and the rest who were the accused? -A. Dido and Bidi, Day and also the accused who are to be arrested.'" (Ibid, 131 tsn).

"Q. Did he (the chief of police) ask you whom you saw? -A. Yes, sir, I was asked.

"Q. Did he ask you whether you saw this Dido (Rodrigo Baricuatro)? - A. He asked me 'Who were they, Day?' and I told him they were Dido Baricuatro, Bidi Moreno, Romeo Baricuatro, Emilio Generalao, Carlos Paslon and there were some whom I did not recognize because their faces were covered." (147-148 tsn September 3, 1970).

Mrs. Cerna further testified that the headlights (with 12 volts) of the truck were on during the shooting and a long time thereafter and that she saw the malefactors retreating (Ibid, 95-97 tsn).

De los Reyes, the driver, gave the following testimony on the identity of the malefactors:

"Q. Upon noticing the shots, what did you do? - A. After I heard the shots, I turned my head to the right and I saw Dido Baricuatro and Emilio Generalao like this (witness demonstrating a position as if holding firearms in his hands).

"Q. When you saw Emilio Generalao and Dido Baricuatro, where did you see those persons? - A. Near the end of the pile of wood at the side of the road.

"Q. What were they doing at that time when you saw them? - A. They were firing their guns because I have seen fire flashes coming from their direction and they were carrying guns like this (witness demonstrating right and left hand in an aiming position).

"Q. The place where you saw Emilio Generalao and Dido Baricuatro, how far were they from the truck? - A. Maybe more than two arms' length, more or less." (229-230 tsn September 3, 1970).

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"Q. While in that position at the right rear wheel of the truck, what did you notice? - A. At that moment, while I was already behind the right rear wheel of the truck, I saw Vedasto Moreno moving backwards from the truck with a gun on his hand.

"Q. After seeing this Vedasto Moreno in that position you have described, what else happened? - A. After seeing Vedasto Moreno in that same position, Romeo Baricuatro followed him only an interval of one arms' length, and after Romeo Baricuatro followed in the same position as Vedasto Moreno, came Carlos Paslon.

"Q. What happened more? - A. Then, I saw Emilio Generalao followed also on the same position and in the same manner and had an interval (distance) of only one arms' length and then was followed by another man whom I did not know and the last one was Dido Baricuatro.

"Q. Those persons you have noted and observed, to what direction did they go? - A. They were moving along the small path towards the upper portion of the hill." (Ibid, 232-234 tsn).

"Q. You said that when you jumped out of the truck, the headlights were on and you said that you saw two persons. Do you know those two persons whom you saw because of the headlights? - A. Dido Baricuatro and Emilio Generalao.

"Q. Do you know those persons personally? - A. Yes, sir, I know them.

"Q. When you said that when you were already hiding on the left rear portion of the truck, you were able to see those persons, am I right? - A. I saw.

"Q. Who were those persons whom you saw? Name them one by one. - A. The first was Vedasto Moreno, and then Romeo Baricuatro.

"Q. Who else? - A. Carlos Paslon.

"Q. Were there other persons aside from the persons you named? - A. Emilio Generalao and next was the person whom I do not know by name, and the next was Dido Baricuatro.

"Q. When you said Dido Baricuatro, is he the same Rodrigo Baricuatro who is accused of this case? - A. Yes, sir.

"Q. When you said Bedi Moreno, is the the same Vedasto Moreno who is one of the accused in this case? - A. Yes, sir." (116-118 tsn Exh. 2-Moreno and Exh. 5-Romeo).

The truck slowed down and swerved to the left. Immediately after the truck had halted in front of the roadblock, or while it was about to stop, volleys of gunfire were directed at its front and right side which was near the cliff. The shots came from the right side of the road. The fusillade lasted only for a brief interval. Jabido and Candida Comahig jumped out of the truck after the firing had started. Barrientos remained in the back of the truck.

De los Reyes, the driver (a resident of Barrio Tutay, whose house was about 400 meters away and who was familiar with the place), on hearing the shots, turned his head and saw Rodrigo Baricuatro and Generalao at the end of the roadblock. The driver jumped out of the truck and sought cover under the truck near the left rear tire which was about four arms' length from the pile of lumber. After the firing had stopped, he stationed himself behind the right near tire.

As testified by him, from that coign of vantage, he saw and recognized Moreno, Generalao, Romeo Baricuatro, Rodrigo Baricuatro and Carlos Paslon still holding their firearms. He was acquainted with them because they were well-known residents of Pinamungajan. Their figures were silhouetted by the headlights of his truck which were on during the shooting.

After the firing had ceased, Mrs. Cerna perceived that her husband was gravely wounded. She shouted for help. As there were no houses in the vicinity, no one answered her clamor for succor.

Sometime later, the truck ("Estela") of Jose Peña (Otic) arrived. Peña's companions removed the roadblock. At that juncture, De los Reyes showed up. He drove the mayor's truck and took him to the poblacion. (On the witness stand, Peña, in answer to a leading question of whether he asked Mrs. Cerna and her companions who shot the mayor, replied that "they said they did not know" [269 tsn January 5, 1972]. That answer of Peña has been capitalized upon by the defense to counteract Mrs. Cerna's testimony that she knew the assailants of Mayor Cerna.)

The mayor was brought to Toledo City fifteen kilometers away. On arriving at that place, he was placed in another car and taken to the Don Andres Soriano Memorial (Atlas Consolidated Mining Company) Hospital at Lutopan where he died.

Injuries inflicted and results of the investigation at the scene of the crime.- The autopsy on the body of Mayor Cerna disclosed six entrance gunshot wounds, located in the mandibular region, right shoulder, anterior chest wall, right arm, and left leg, and four exit wounds, aside from abrasions and contusions (Exh. A to A-2).

A slug was recovered at the right side of the lower lip of Mayor Cerna. It was lodged between the lower lip and the teeth of the victim or at his gums. The injuries caused by that slug involved the blood vessels, tissues and nerves of the injured portion of the jaw. The defense argues that, because of the wound in his jaw, Mayor Cerna could not have made a dying declaration to Mrs. Cerna and the chief of police that he was shot by Moreno and Rodrigo Baricuatro and their companions.

Mrs. Cerna sustained fractures in the ring and middle fingers and metacarpal of her left hand. An operation was performed on her left hand. It was permanently deformed. She spent P2,000 for her hospitalization (Exh. D-12).

Jabido had a gunshot wound on his right cheek. He was confined in the hospital for eleven days (Exh. F).

Candida Comahig suffered contusions on her right knee and thigh which were not caused by bullets but by some hard objects. Probably, the contusions were the consequence of her having jumped out of the truck and having fallen on the hard ground (Exh. J).

De los Reyes had abrasions on the chin and a lacerated wound on his right arm from which a shrapnel was extracted (Exh. E).

Recovered at the scene of the crime were a grease submachine gun caliber .45 (issued to Constabulary Sergeant Mamerto Generalao), twenty-five empty caliber .45 shells, two empty caliber .30 shells, five slugs and a magazine with 25 rounds of ammunition, caliber .45. (Exh. B, C and II-1).

On the right side of the truck, there were fifteen bullet holes from a .45 caliber submachine gun, two bullet holes on the right side of the front and windshield from a .30 caliber rifle and twenty-six other bullet holes. And at the scene of the ambushade, there were bloodstains on the road and footprints on the swamp nearby. (See Exh. H-1-B and H-3-A.)

On the high ground near the curve, the investigators found empty cans, a Pepsi-Cola bottle, human waste matter, the remains of food, and the wrappers for cooked rice known as "puso", indicating that certain persons at their supper there before the ambushade. In that place, the aroma of tuba could still be smelt at seven o'clock in the morning of the following day, January 22, 1970. (67, 70 and 72 tsn November 15, 1971).

Mrs. Cerna testified that, as a consequence of the death of her husband, who was the family's breadwinner, their ice candy business, from which they derived a considerable daily income, was stopped. She spent P4,000 for the metal casket, P4,000 for the twelve days during which the mayor's remains lay in state, and P7,000 for his marble tomb with a canopy.

Mayor Cerna's physical condition after the ambushade. - The fact that Mayor Cerna was wounded in the jaw generated a controversy as to whether he could have made the antemortem declaration, attributed to him by Mrs. Cerna, Chief of Police Lesigues, driver De los Reyes, Anacleto Barrientos and Candida Comahig, that Moreno, Rodrigo Baricuatro and their companions were his assailants. According to the medico-legal officer, Mayor Cerna retained his power of speech in spite of his wounds (180 tsn June 19, 1972).

Mrs. Cerna testified that after the fusillade, Mayor Cerna bent forward, spat saliva mixed with blood and said that he saw Moreno, Rodrigo Baricuatro and the other persons to be arrested. Mayor Cerna allegedly told her not to leave him. She shouted for help and when nobody answered her, Mayor Cerna allowed her to leave the truck and go with Jabido to look for help. Even after Mrs. Cerna had gone down from the truck and failed to find Jabido, the wounded mayor allegedly told her not to leave the place. This was tearfully recounted on the witness stand by Mrs. Cerna. The session had to be suspended at that juncture. (72-73 tsn September 2, 1970).

Then, when she informed Mayor Cerna that Peña's truck had arrived, the mayor told her that Peña's truck should be parked alongside their truck so that he could be transferred to Peña's truck. But because the road was narrow, that maneuver could not be accomplished.

Anacleto Barrientos remained inside the mayor's truck when the ambushade was being perpetrated. After the gunfire had ceased and when he heard Mrs. Cerna shouting, he thought that there was a holdup. He left the truck and hid under the bridge. After about ten minutes, he emerged from his hiding place and saw Mrs. Cerna walking to and fro in front of the truck. He wondered why the mayor had not left the truck. He went to the right side of the front seat to find out what had happened to the mayor.

He saw that there was blood on the mayor's white shirt. The mayor was leaving on the truck's steering wheel. The mayor saw him and asked him who he was. He identified himself as a passenger who had boarded the truck in Cebu City.

The mayor directed him to go after Moreno, Rodrigo Baricuatro and their companions who had fled to the

elevated portion near the scene of the ambushade. He saw the cliff or elevated ground but he did not comply with the mayor's directive. He went back to the bridge. While there, he heard the sound of the engine of a motor vehicle which was ahead of the cargo truck. It seemed to him that the vehicle was in the vicinity of the barrio schoolhouse. (The same sound was heard by Mrs. Cerna, Candida Comahig and Jabido.)

Later, Peña's truck arrived, the roadblock was removed, and De los Reyes, the driver of the mayor's truck, appeared and started it. Barrientos seated himself on the right of the wounded mayor and placed his left arm around his left shoulder. The mayor told Barrientos to raise the mayor's right hand and to lift his left leg so that he (the mayor) could rest. Barrientos demonstrated on the witness stand how he complied with the mayor's instruction (552-553 tsn September 1, 1971).

On the way to the poblacion, the mayor even asked Barrientos to take out something inside the back pocket of his pants since it caused him pain. Mrs. Cerna from time to time would call her husband "Do" and he would answer "Day".

When the truck reached the mayor's garage in the poblacion, the chief of police, who was on the lawn of the mayor's residence, was called by Mrs. Cerna and was informed that the mayor had been ambushed. The chief of police approached the mayor, who was being held by Barrientos, and asked him who had shot him. The mayor replied that he was shot by Dido Baricuatro and the other accused already known to the chief of police. The latter asked the mayor if he was referring to Moreno, Romeo Baricuatro, Carlos Paslon and Generalao. The mayor replied in the affirmative (10-14 tsn September 2, 1970; 241-2 tsn September 3, 1970).

According to De los Reyes, it was Mayor Cerna who suggested that the jeep of the priest be used in bringing him to the hospital because the cargo truck, which was old, might break down. After the priest said that it might not be good to transfer the mayor to the jeep, the mayor ordered that he be brought to the West Coast Hospital at Toledo City.

On the way to that place, Mayor Cerna asked the chief of police, who was sitting at his feet, if the place was still far. The chief of police cautioned him not to talk much because talking was not good for a wounded person. The mayor asked the same question of his wife when he was being brought to the hospital at Lutopan. When the mayor was being transferred from his truck to Barba's car, he cried "Agog". Evidently, he was suffering much pain. He sat on the left thigh of Barrientos while he was in Barba's car. From time to time, the mayor would tell Barrientos to let him recline and then, he would tell the latter to let him "lay flat" on his back. He was restless and, obviously, subjected to paroxysms of pain.

Possibly, the transfer of Mayor Cerna from the truck to Mayor Barba's car in Toledo City and the trip from Toledo City to the hospital at Lutopan and the transfer to the stretcher of the hospital sapped his last reserves of resistance. He died seven minutes after his arrival at the hospital. As long as he was in the truck, his mental faculties appeared to be unimpaired in spite of the gunshot wounds. The mayor, a heavily built man, was endowed with a strong constitution. He weighed 198 pounds (102 tsn September 3, 1970; 427 tsn September 1, 1970).

Appellant's contention that Mayor Cerna was already in a comatose condition after he was shot and that he could no longer talk is unfounded.

The credibility of Avelino Norteza on the complicity of the seven appellants, Crescencio F. Nemenzo, et al.- On January 26, 1970, a Constabulary officer filed in the municipal court against (1) Moreno, (2) Generalao, (3) Rodrigo Baricuatro, (4) Romeo Baricuatro and (5) Carlos Paslon a single complaint for murder and multiple frustrated murder. The complaint was supported by the affidavits of Jose B. Lesigues, the chief of police, Patrolman Eulogio B. Kyamko, Jose de los Reyes (the driver), and Placido Mondejar. Lourdes Cerna and Jose R.

Kyamko also executed affidavits dated January 28 and 30, 1970.

The municipal judge conducted a preliminary examination and, having found probable cause, he issued a warrant for the arrest of the five accused, fixing their bail at P50,000 each in his order of January 28, 1970.

Moreno was arrested at Dumaguete City on January 28, 1970 (Exh. 3-Moreno). Rodrigo Baricuatro was arrested on January 29, 1970 in Cebu City. Moreno and Baricuatro were released on bail on February 2, 1970. Generalao, Romeo Baricuatro and Carlos Paslon went into hiding. The three were to be given a separate trial.

On February 4, 1970 the municipal judge elevated the record to the Court of First Instance because of the nonappearance of the accused at the second stage of the preliminary investigation which they had presumably waived.

On February 24, 1970 the provincial fiscal filed in the Court of First Instance of Cebu at Toledo City five informations charging Moreno, Generalao, Rodrigo Baricuatro, Romeo Baricuatro, Carlos Paslon and three unknown persons with murder with atentado and four frustrated murders [Criminal Cases Nos. 10(T) to 14(T)].

On June 22, 1970 the fiscal filed amended informations charging attempted murder only in connection with the assaults against Candida Comahig and Jose de los Reyes [Criminal Cases Nos. 11(T) and 14(T)].

The Court of First Instance transferred the five cases to the Circuit Criminal Court at Cebu City where they were docketed as Criminal Cases CCC-XIV-95, 129, 130, 131 and 132. In Case No. 95, warrants were issued for the arrest of Moreno and Rodrigo Baricuatro. No bail was recommended. The trial started on September 2, 1970.

About six months after the trial had started, or on March 12, 1971, that is to say, after the witnesses, Jose B. Lesigues, Lourdes Cerna and Jose de los Reyes, had testified at the trial, the fiscal filed amended informations against the five accused originally named and against eight new defendants, namely, (1) Crescencio F. Nemenzo, (2) Rodolfo Umbay, (3) Salvador Peña, (4) Roberto Paslon, (5) Victoriano Baraga, (6) Crispin Baraga, (7) Elpidio Baricuatro and (8) Ely Baricuatro.

The basis of the amended informations was the affidavit dated February 24, 1971 of Avelino Norteza who, as mentioned earlier, claimed to be privy to the conspiracy to ambush Mayor Cerna (Exh. 2-Romeo). On the basis of that affidavit, the fiscal conducted another preliminary investigation.

One important issue in this appeal is Norteza's credibility. The Solicitor General regards him as a perjured witness. At the trial, Norteza, a 37-year old mason and a high school undergraduate, testified that at about six o'clock in the evening of January 21, 1970 Crescencio Nemenzo, Rodrigo Baricuatro, Rodolfo Umbay and Salvador Peña allegedly went to his house at Barrio Mangoto and invited him to go to Barrio Tutay for a drinking spree. They went to the cliff or the elevated portion in the barrio near the bridge, arriving there at about seven o'clock.

There, Norteza saw firearms (greasegun, Thompson, Garand rifle) dumped under a tree. He also saw his friends, Roberto Paslon, Carlos Paslon, Victoriano Baraga, Crispin Baraga, Emilio Generalao, Elpidio Baricuatro, Romeo Baricuatro and Moreno. Using only one glass, they were drinking tuba mixed with Pepsi-Cola. Rodrigo Baricuatro allegedly disclosed to him that the group would kill Mayor Cerna. Norteza was given the option to select what firearm he would use.

The plan was for Ely Baricuatro to go to his house at Sitio Mohon, Aloguinsan, and fire a shot as a signal announcing the approach of Mayor Cerna's truck. A pile of logs on the right side of the road near the bridge would be used as a barricade to block the truck. In accordance with that suggestion, Roberto Paslon, Carlos Paslon, Generalao, Crispin Baraga and Victoriano Baraga blocked the road with logs. The roadblock was removed

when three trucks, none of which belonged to Mayor Cerna, passed by.

After the third truck had passed, a gunshot was heard. That meant that Mayor Cerna's truck was approaching. Some members of the group stationed themselves behind the roadblock. Others were stationed in the upper portion near the bridge. At that juncture, Norteza allegedly sneaked out of the place. He did not witness the ambush. On his way home through the fields, he heard the gunshots coming from the place which he had left.

The foregoing testimony was the trial court's basis for convicting appellants Elpidio Baricuatro, Ely Baricuatro, Nemenzo, Peña, Umbay, Roberto Paslon and Victoriano Baraga. Can credence be given to Norteza's testimony? As already stated, the Solicitor General agrees with the appellants that Norteza is a perjured witness.

Norteza explained that he kept silent about the ambushade for more than one year because he was fearful that he might be prosecuted and he was allegedly warned that if he squealed he and his family would be liquidated. He changed his mind because he realized that, eventually, it would be known that he had some knowledge of the conspiracy and because he surmised that if he disclosed what he knew about the killing of Mayor Cerna, other persons would follow his example and disclose what they knew about the unsolved killing of his brother, Miguel, on January 31, 1971.

We have conscientiously evaluated Norteza's uncorroborated and contradicted testimony. Our conclusion is that it cannot be accorded any credence. Consequently, the guilt of the seven appellants implicated by him was not established beyond reasonable doubt.

It is not merely the long delay in the giving of his testimony that impairs its veracity and engenders the notion that it might be fabricated. What strongly militates against his credibility is the undeniable fact that he was a follower of Mayor Cerna and, therefore, it is not believable that he would have been invited by the appellants (some of whom were confirmed political enemies of Mayor Cerna) to join in the conspiracy to kill the mayor (1846 tsn January 11, 1972). And because he was a follower of Mayor Cerna, it is not surprising that he was used as a prosecution witness in this case.

Norteza, as a tough guy, was well-known in the small town of Pinamungajan and its environs where, as in the case of small communities, political affiliations are not secret. The appellants could not be ignorant of the fact that Norteza and his father belonged to Mayor Cerna's faction. The mayor was one of Norteza's three bondsmen in Criminal Case No. 472-RP of the municipal court, a 1968 case, wherein he was charged with serious physical injuries for having assaulted Teodoro Alpas (Exh. 7 to 7-F-Moreno). Norteza voted for Mayor Cerna in the 1967 election and for Mayor Cerna's son in the 1971 election. His father was a leader of Mayor Cerna (147, 150 tsn November 17, 1971).

In July, 1971, or after Norteza surfaced as a prosecution witness, he was appointed a municipal caminero (1249 tsn November 16, 1971).

Norteza's version as to the conspiracy contains improbabilities. He made it appear that although the conspirators or the appellants had already decided on killing the mayor and had foregathered in the upper portion of Barrio Tutay to wait for the mayor's truck, they had not yet agreed on the specific measures to be employed in accomplishing their diabolical purpose. From Norteza's story, it appears that the conspirators had to converse aloud in his presence and agree on the blocking of the road and the giving of the signal announcing the approach of the mayor's truck and that they had to invite him to implement their plan.

He did not explain why his presence was still indispensable for the execution of the scheme to kill the mayor, considering that (according to Norteza's version) there were already thirteen armed persons present who were ready to perform their nefarious task. He did not mention any special qualifications on his part, which induced the

conspirators to invite him to join them. These facets of his story appear to be incredible.

The fact that he did not join in the conversation; that he did not make any suggestions; that he was a mere listener; that he did not even participate in placing the roadblock and in removing it when certain trucks passed, and that he played a passive role or was a mere spectator makes it hard to believe that the conspirators would have taken him into their confidence.

It is within the realm of possibility that the seven appellants had some participation in the ambushade and that someone, who had actual knowledge thereof but who was not indicted, had informed Norteza of what had transpired. But it is certain from the record that Norteza's uncorroborated testimony is not sufficient to prove the complicity of the seven appellants in the assassination.

Norteza's testimony contains details that convey the impression that he was a co-conspirator. Such details as the giving of the signal and the placing of the roadblock, and the passing of three trucks before Mayor Cerna's truck passed, might have convinced the trial court that Norteza was present when the preparations for the ambushade were made.

But the record also reveals that other details were not mentioned by Norteza and that such omission casts doubt on the veracity of his testimony. For example, Norteza did not mention that the conspirators were provided with food which they ate while on the cliff, as shown in the telltale wrappers of "puso" rice and the empty tins of canned food (59 tsn July 24, 1972). Norteza could not tell the kind of firearms carried by the conspirators. He merely said that something was bulging at their waists. If he was a co-conspirator trusted by the appellants and was present on the cliff, he could have easily ascertained the kind of weapons carried by his companions.

Norteza's explanation as to his long silence is not convincing and satisfactory. It cannot erase the impression that he was a rehearsed witness whose testimony was concocted in order to strengthen the prosecution's case. The fact that he did not confide to his wife and parents his knowledge of the ambushade (1239 tsn November 16, 1971) is quite unusual and may signify that he was not privy to the conspiracy.

In a grave case, like the instant case, the guilt of the accused cannot be predicated on delayed testimony, like that of Norteza's, which exhibits earmarks of fabrication. It would be highly injudicious to rely on such testimony because blanket acceptance thereof might result in the conviction of an innocent person. With the rejection of Norteza's testimony, the seven appellants, already named, should be acquitted.

Having disposed of the appeal of the additional seven defendants, we now address ourselves to the appeal of the original five defendants against whom criminal actions were filed in the municipal court of Pinamungajan, in four of which cases Mayor Cerna conducted the preliminary examination and issued the warrants of arrest.

Case of appellant Moreno. - He relied on an alibi the details of which his counsel did not bother to discuss in his brief. He testified that when the ambushade was perpetrated, or in the evening of January 21, 1970, he was in the house of his sweetheart, Maria Milan, at Barrio Dakit, Pinamungajan. Maria Milan, Juan Dejito and Casiano Flores corroborated Moreno's alibi. Dejito and Flores are the brothers-in-law of appellant Nemenzo, who in turn is a first cousin of the brothers, appellants Rodrigo and Elpidio Baricuatro.

However, Romula Gleocam, the mother of Maria Milan, who lived with her, contradicted her and testified that Moreno called at their house at around nine o'clock in the evening of that day or after the ambushade had been perpetrated. Maria Portes corroborated Romula's testimony.

It may be recalled that Mrs. Cerna, Barrientos and Candida Comahig testified that, after the gunfire had ceased, they heard the sound of the engine of a vehicle. They imagined that it was an oncoming truck. Actually, it was

leaving the scene of the crime. That sound came from that part of the highway near the schoolhouse or near Moreno's house at Barrio Tutay (69 tsn, Exh. 2-Moreno).

At around eight-thirty of that night, as Jose Kyamko, the brother-in-law of Mrs. Cerna, was crossing the highway, a jeep without any light passed by him. It came from Barrio Tutay and was driven to the poblacion. Kyamko recognized it as the passenger jeepney which Leon Moreno, the father of Vedasto, had converted into a private vehicle. When the jeep passed Kyamko, he noticed that it was driven by Moreno. Beside him was Rodrigo Baricuatro. (See p. 37, Records of Crim. Case No. 95-Cebu.)

As already stated, according to Romula Gleocam, at around nine o'clock on that same night, Moreno, riding in a jeep, went to the house of her daughter, Maria Milan, at Barrio Dakit, which was near the poblacion (Exh. T). Romula noticed that Moreno spoke in a quavering voice and that he looked untidy and ill-kempt. On prior occasions, he had a well-groomed appearance. After talking with Maria for about an hour, Moreno (Vidi) departed in his jeep.

Shortly thereafter, Romula heard again the drone of the jeep. Moreno called and asked Rufina Milan (Romula's sister) that he be allowed to pass the night in her house because no one was allowed to pass Barrio Tutay. On that night Moreno slept at Rufina's house. When Moreno was already inside the house, Romula heard a man's voice outside calling Moreno and saying: "Boss, he is already dead". Moreno did not make any reply.

On the following morning, Moreno requested Luz, a daughter of Romula, to buy bread in the market and to listen to the rumors being spread around. After Luz had returned, she told Moreno that some persons in the street corner were saying that Moreno had killed Mayor Cerna. While Romula was preparing breakfast, she observed that Moreno was always looking out of the window. After taking breakfast, he left the house together with Maria Milan.

They rode in the jeep. They passed by the store of Maria Portes where Moreno bought cigarettes. When she handed the cigarettes to him, he noticed that he looked pale and that his hands were trembling. In fact, he dropped the cigarettes on the ground. She asked Moreno what was wrong with him. he answered that he is being implicated in the killing of Mayor Cerna. She said that if he had not done anything wrong, he had no reason to be afraid.

Moreno testified that after bringing Maria Milan to the high school, he went to his residence at Barrio Tutay and took his lunch there. Then, he went to Barrio Pandacan and supervised the gathering of the coconuts, the cutting of the bamboos and the plowing of the family lands. He went to the house of his aunt and passed the night there.

On the following day, January 23, his uncle, Francisco Gabante, arrived from San Carlos City. He went with his uncle to Trozo, San Carlos City, arriving there by boat in the early morning of January 24, 1970. He visited his aunt, Victoria Gabon. On the following day, January 25, he went to Bais City to visit his uncle, Felix Moreno. Then, the next day, he went to the residence of a lawyer at Dumaguete City in order to seek legal advice.

On January 28, 1970, he was arrested in that city by three Constabulary sergeants of the Cebu City Constabulary detachment. Moreno went to the Constabulary headquarters at Dumaguete City and slept there (Exh. 3-Moreno). He and the Constabulary sergeants took a boat on the following day and arrived at Cebu City on January 30 (Exh. 5-Moreno).

Maria Portes declared that after Moreno was arrested, he went to see her and requested her to testify that she saw him at the house of Rufina Milan at six o'clock in the evening of January 21, 1970. He offered her money. She refused to testify in his favor.

We are convinced that Moreno's complicity in the perpetration of the ambushade was proven beyond reasonable doubt by the testimonies of Mrs. Cerna and the driver, De los Reyes, and the declaration of Mayor Cerna to his wife, the chief of police and Barrientos. The motive for the killing was sufficiently established. Moreno felt aggrieved by Mayor Cerna's issuance of the warrant for his arrest and by his incarceration and posting of four bail bonds which entailed the payment of a substantial amount as premiums.

Moreno's alibi, instead of showing his innocence, served to confirm his guilt because, if he had no participation in the ambushade, there was no reason for him to sleep in his sweetheart's house, three kilometers away from his residence in Barrio Tutay where the ambushade was committed. His flight to San Carlos City clearly signified that he had a guilty conscience.

Case of Rodrigo Baricuatro.- This appellant was 44 years old when he testified in 1972. He was a Constabulary sergeant connected with the reserve officers training corps (ROTC) unit of the University of the Visayas at Cebu City, with training and experience in perpetrating ambushades. He testified that in the afternoon of January 21, 1970, he was given by his commandant a three-day pass so that he could go to Pinamungajan and transfer to a new residence on the lot of his parents. He arrived at Pinamungajan at past five o'clock. He and his wife took supper at six o'clock. Then he allegedly went to the house of Tonying Batitay to play mahjong. He was accompanied by appellant Umbay, his brother-in-law.

He stayed at Batitay's place until nine o'clock when the brothers Eleazar and Jose Peña came with the information that Mayor Cerna had been ambushed at Barrio Tutay. Rodrigo Baricuatro, accompanied by Umbay and Loreto Quesido, left Batitay's place, and went home.

Two days later, or on January 23, 1970, Colonel Jose Nazareno, the Constabulary zone commander who was in Pinamungajan, took him into custody because of the suspicion that the firearms used in the ambushade might have come from the armory of the University of the Visayas. Rodrigo was in charge of the armory.

Upon his arrival at Cebu City, an inventory of the arms at the armory was made. He was later detained at the enlisted men's quarters and then at the guardhouse after a criminal charge was filed against him. He denied any complicity in the ambushade. He refuted Norteza's statements implicating him in the assassination of Mayor Cerna.

However, and this is a decisive point, Antonio Batitay, the owner of the house where Rodrigo Baricuatro and Umbay allegedly played mahjong from seven o'clock in the evening of January 21, 1970 (the night of the ambushade), testified that Rodrigo and Umbay did not play mahjong in his house at that time. They arrived in the mahjong den shortly before nine o'clock or after the ambushade was committed. The mahjong game was stopped after nine o'clock when news of the ambushade was relayed to the mahjong players. (156-7, tsn March 6, 1972).

Batitay's testimony nullified Rodrigo Baricuatro's alibi and cancelled the testimonies of Eleazar Peña, Loreto Quesido, and Beato Peña, and Sergeant Norberto Alvarado, supporting that alibi. The falsity of his alibi removes any doubt as to his guilt.

Like Moreno, Rodrigo Baricuatro was identified by the eyewitnesses, Mrs. Cerna and De los Reyes, as being present at the scene of the crime, and by Mayor Cerna himself in his declaration to them, to Barrientos and to the chief of police. Rodrigo had reason to surmise that Mayor Cerna instigated the criminal action for grave threats filed against him. Being a potential candidate of the Liberal Party for mayor in the 1971 election, he could believe that the elimination of Mayor Cerna would insure his election.

Four prosecution witnesses, namely, Placido Mondejar, Angela Yanong, Lazaro Deroy and Sergio Perito, testified to certain incidents which reveal that Rodrigo Baricuatro had nursed the design to kill Mayor Cerna before the

1971 elections and had recklessly made an open avowal of that intention. Rodrigo made a blanket denial of that imputation.

It would seem that before the ambushade Rodrigo Baricuatro and Moreno had already prepared their alibis. Rodrigo would be in the mahjong den while Moreno would be in his girl friend's residence. What they did not foresee was that, immediately after the ambushade, the finger of suspicion would be pointed at them by their fellow townsmen as individuals implicated in that iniquitous and dastardly deed.

Thus, Candida Comahig stopped her narrative about the ambushade when she noticed that Rodrigo was among those listening to her. And Fiscal Alfredo S. Pancho testified that on the day following the ambushade a group of around fifteen persons, some of whom were armed and drunk, stopped the Moreno bus at the public market of Pinamungajan and wanted to be brought to Sitio Tubod where Rodrigo Baricuatro was residing. The group harassed the bus driver and the conductor, the employees of Vedasto Moreno's family.

That circumstance led Fiscal Pancho, a bus passenger bound for Aloguinsan, to conclude that it was dangerous for Moreno to remain in Pinamungajan. Because of that incident, the bus could not proceed to Barrio Tutay. It had to take a roundabout route (via Carcar) to Aloguinsan. Fiscal Pancho rejected the offer that Moreno himself would drive the bus to Aloguinsan by way of Barrio Tutay.

Case of Romeo Baricuatro.- This appellant, the nephew of Rodrigo Baricuatro, was thirty-three years old in 1970. He is married with five children. He was a student of criminology at the University of the Visayas in Cebu City. He declared in support of his alibi that in the afternoon of January 20, 1970 his wife came from Pinamungajan to inform him at his boarding house in Cebu City of the warrant of arrest issued against him in the four criminal cases pending in the municipal court. She also apprised him that Moreno had already been arrested. He testified that at around noontime, he took his wife to the bus station for her return trip to Pinamungajan. At the station, he saw Avelino Norteza who was working as a mason in Cebu City.

Romeo denied Norteza's testimony that he was in Barrio Tutay in the evening of January 21, 1970. Romeo's alibi is that he was in the house of Atty. Rodolfo Acido in Cebu City at the time when the ambushade was perpetrated. Romeo conferred with Atty. Acido whom he had hired as his counsel in the four criminal cases. His landlord, Mario Saromines, was with him when he conferred with Acido. Romeo returned to his boarding house after nine o'clock in the evening. He was already in the boarding house when the whistle announcing the curfew for minors was sounded at ten o'clock.

Romeo explained that Norteza testified against him because the Cerna family had helped Norteza in a certain case and that Mrs. Cerna implicated him because she hated his uncle, Rodrigo.

Mario Saromines, a thirty-nine year old barber, corroborated Romeo's alibi. But Acido (Moreno's counsel in the preliminary investigation), whose corroboration would be vital in establishing the truth of Romeo's alibi, did not testify in court. Hence, Romeo's alibi cannot prevail against the testimonies of Mrs. Cerna and De los Reyes that he was among those who ambushed Mayor Cerna.

After eluding arrest for more than twenty-two months, Romeo was arrested by Sergeant Servando Tio in his house at Sta. Cruz, Pinamungajan on November 20, 1971.

Cases of Emilio Generalao and Carlos Paslon.- Generalao, a resident of Barrio Tutay, was thirty-eight years old when he testified in 1972. He reached the first year of high school. His alibi was that from January 6, 1970 to May 3, 1971, or for about one year and five months, he was doing farm work in Barrio Calibasan, Toledo City which was fifteen kilometers away from the provincial road at Matabang. To go to that place, one had to walk from Matabang. The trip took more than six hours. Generalao stayed with his brother-in-law, Filomeno Cantutay, a

resident of Calibasan. Cantutay corroborated his alibi.

Generalao testified that in May, 1970, his wife went to Calibasan to inform him that he was implicated in the killing of Mayor Cerna. He returned to Barrio Tutay on May 3, 1971 in order to confer with his brother and his wife regarding his surrender. He denied that he was with Norteza in Barrio Tutay in the evening of January 20, 1970. His theory was that Norteza was angry with him because he refused to help Norteza and his brother in gathering the coconuts of Clemente Yanong.

He was arrested in his father's house on November 25, 1971 by certain Constabularymen named Aldaba, Nebres and Carding and others whose names he did not know. He said that he was brought to the Constabulary station at Pinamungajan where he was mauled by the Constabularymen and by Jesus Cerna and Jose Kyamko in the presence of several persons. Then, he was taken to the Constabulary headquarters at Sibonga where he was again maltreated. There, he signed an affidavit which he did not read.

The affidavit, Exhibit B-Generalao, was taken by Sergeant Benjamin Solante in the presence of Sergeants Nicanor E. Bancog and Edmundo Panistante and sworn to before Fiscal Benicio Arzadon who prosecuted this case. Generalao, on cross-examination by Fiscal Arzadon, denied that he signed freely that affidavit.

In that affidavit, Generalao admitted that on January 2, 1970, he killed Juanito Gabonada; that, because of that killing, he went into hiding at Sitio Calibasan and Barrio Guingkamote, Toledo City, staying with his brother-in-law Cantutay, his friend Marcelo Tante and his mother's cousin, Felicisimo Maturan; that he returned to his father's house at Sitio Santa Cruz, Barrio Sacsac, Pinamungajan on May 3, 1971 in order to surrender but he was not able to do so because he feared that he might be killed, so he just laid low and talked from time to time with Carlos Paslon and Romeo Baricuatro; that in November, 1971, in the course of an encounter with Constabulary soldiers, he threw away his Garand rifle and it was recovered by the Constabularymen, and that his companions in that encounter were Carlos Paslon and Gavino Layar. (Translation.)

Carlos Paslon, married, with seven children, was thirty-six years old in 1972. He finished the fifth grade. His alibi was that from November, 1969 to February, 1970 he stayed in the house of his elder brother, Doming, in Barrio Lawaan, Talisay, Cebu. He was working as driver at six pesos a day with the Cebu United Enterprises. Afterwards, he lived in Duljo, Cebu City where his wife established a dress shop. He left Duljo in April, 1971 and returned to Pinamungajan.

Paslon testified that in the evening of January 21, 1970 he attended a party in the house of Eutiquio Cabuenas in Barrio Lawaan. According to Paslon, the occasion was a "yearly devotion". According to Cabuenas, it was the birthday of his wife. Paslon could not remember the birthdays of his children.

Cabuenas corroborated his alibi. However, on cross-examination, Cabuenas declared when he testified on August 26, 1972 that the current month was July. Cabuenas admitted that he was requested by the wife of Carlos Paslon to testify that Carlos was in the house of Cabuenas in the evening of January 21, 1970.

Carlos Paslon denied the imputation of Norteza that he was in Barrio Tutay on that date. Norteza was angry with him because he refused to sell a pig to him.

He was arrested on November 24, 1971 in the house of Sabina Intong at Barrio Sambagon, Pinamungajan by certain Constabularymen named Aldaba, Alpon and Carding who maltreated him. They stopped maltreating him when Sergeant Nebres told them that according to Mrs. Cerna, Carlos Paslon would be a State witness. He was brought to Sibonga where he signed an affidavit after having been mauled.

The alibis of Generalao and Carlos Paslon cannot be accorded any credence because they were positively

identified by Mrs. Cerna. And the fact that, like Romeo Baricuatro, they were fugitives from justice for around twenty-two months, hiding in the mountain barrios of Pinamungajan, conveys the impression that they had a guilty conscience.

Appellants' criminal liability.- As to Mayor Cerna, the offense committed was correctly categorized as the complex crime of murder with direct assault upon a person in authority (Arts. 48, 148 and 248, Revised Penal Code). The killing of Mayor Cerna was indisputably treacherous. The ambushade exhibited the characteristic features of alevosia. (Art. 14[16], Revised Penal Code). Nocturnity is aggravating because the appellants took advantage of the night for the consummation of their nefarious enterprise.

The killing constituted a direct assault against a person in authority (Art. 152, Revised Penal Code; U.S. vs. Gumban, 39 Phil. 76), as charged in the information, because the rule is that the person in authority or his agent should have been assaulted "while engaged in the performance of official duties, or on occasion of such performance".

At the time Mayor Cerna was ambushed, he was returning from Cebu City where he had transacted official business with the governor. The impelling motive for the direct assault was Mayor Cerna's performance of his official duty in conducting the preliminary examination of the four criminal cases against appellants Moreno, Generalao, Romeo Baricuatro and Carlos Paslon and the issuance of warrants of arrest which resulted in the incarceration of Moreno and constrained him to pay P1,000 as premiums on his bail bonds. Undoubtedly, that caused resentment. (Justo vs. Court of Appeals, 99 Phil. 453; U.S. vs. Garcia, 20 Phil. 358).

As the crime is complex, the penalty of reclusion temporal maximum to death for murder, the more serious offense, should be imposed in the maximum period. Hence, the death penalty should be imposed on the principals. The trial court correctly imposed the death penalty upon Moreno and Rodrigo Baricuatro, whose guilt as co-principals in the assassination of Mayor Cerna, was established to a moral certainty.

For lack of the requisite votes, the death penalty cannot be imposed on appellants Generalao, Carlos Paslon and Romeo Baricuatro. They should be sentenced to reclusion perpetua.

In this connection, it may be noted that in *People vs. Ubiña*, 97 Phil. 515, where Aureliano Carag, the mayor of Solana, Cagayan, was killed by eight persons led by Tomas Ubiña, his political enemy, only Ubiña was sentenced to death because he was the one who conceived the plan and utilized his influence to perpetrate the killing. "For him justice cannot be tempered with mercy; the law must be applied to its full force and to its full extent." His four companions, who were indebted to him for personal favors, were sentenced only to reclusion perpetua. Three others, who were present at the killing but did not conspire with Ubiña, were considered accomplices. (See *People vs. Sakam*, 61 Phil. 27; *People vs. Cabrera*, 43 Phil. 82; *People vs. Chua Huy*, 87 Phil. 258, and *People vs. Ging Sam*, 94 Phil. 139, capital cases, wherein not all those convicted as principals were sentenced to death.)

In the other four cases, the trial court convicted the appellants of frustrated murder. This is a glaring error. The trial court overlooked that there were only two informations for frustrated murder. These refer to the cases where the victims were Lourdes Cerna and Jose de los Reyes. The other two informations charged attempted murder only in the cases where the victims were Candida Comahig and Francisco Jabido. In these four cases, the crime committed is attempted murder only because the injuries suffered by the victims could not have caused their death. Band (cuadrilla) is aggravating in addition to nocturnity.

Only the five appellants originally charged should be held responsible for the attempted murders. We have already ruled that the seven additional appellants implicated by Norteza should be acquitted.

However, Generalao, Romeo Baricuatro and Carlos Paslon cannot be held responsible for the attempted murder

committed against Jabido and De los Reyes because these two offended parties did not testify at their separate trial. Neither did Doctors Florante Batucan and Ramon Arcenas, who examined the injuries of Jabido and De los Reyes and issued the corresponding medical certificates (Exh. E and F), testify at the separate trial of Generalao, et al.

WHEREFORE, the trial court's decision is modified and the following judgment is rendered in these five cases:

1. In Criminal Case No. 95-Cebu, L-37801, appellants Vedasto Moreno, Rodrigo Baricuatro, Romeo Baricuatro, Carlos Paslon and Emilio Generalao are convicted as co-principals in the crime of murder with assault upon a person in authority.

Moreno and Rodrigo Baricuatro are each sentenced to death, while Romeo Baricuatro, Paslon and Generalao are each sentenced to reclusion perpetua. The five appellants are ordered to pay solidarily to the heirs of Mayor Samson Cerna an indemnity of P50,000.

2. In the other four cases, Criminal Cases Nos. 129-Cebu, L-37802; 130-Cebu, L-37803; 131-Cebu, L-37804, and 132-Cebu, L-37805, appellants Moreno and Rodrigo Baricuatro are convicted of four attempted murders and are each sentenced to four indeterminate penalties each consisting of four (4) years of prision correctional medium, as minimum, to seven (7) years of prision mayor minimum, as maximum, and to pay solidarily an indemnity of two thousand pesos (P2,000) to each of the three victims, Candida Comahig, Francisco Jabido and Jose de los Reyes. The same two appellants are further ordered to pay solidarily to Lourdes Cerna an indemnity of ten thousand pesos (P10,000).

The penalty and civil liability in Criminal Cases No. 129, L-37802 and 130, L-37803, involving Candida Comahig and Lourdes Cerna, are imposed upon appellants Generalao, Romeo Baricuatro and Carlos Paslon. These three appellants have no liability in Criminal Cases Nos. 131 and 132, L-37804 and L-37805, involving Francisco Jabido and Jose de los Reyes.

3. The other seven appellants, Crescencio F. Nemenzo, Elpidio Baricuatro, Ely Baricuatro, Salvador Peña, Rodolfo Umbay, Roberto Paslon, and Victoriano Baraga, are acquitted in the five cases on the ground of reasonable doubt. The convicted appellants will pay the costs.

SO ORDERED.

Barredo, Makasiar, Antonio, Muñoz Palma, Aquino, Concepcion, Jr., Santos, Fernandez, and Guerrero, JJ., concur.

Castro, C.J., and Fernando, J., no part.

Teehankee, J., concurs in a separate opinion.

CONCURRING OPINION

TEEHANKEE, J.:

I concur in the result. I only wish to add that with the acquittal of the seven accused-appellants named therein, who had been sentenced by the lower court to reclusion perpetua, (at page 35, decision) with the Court's rejection of the lone uncorroborated testimony of the prosecution witness Avelino Norteza who "surfaced" as such only in July, 1971 "after he was appointed a municipal caminero" a year and a half after the fatal ambush of the victim, Mayor Samson Cerna, the case should be referred to the proper authorities for his prosecution as a

perjured witness.

The decision amply shows the utter incredibility of his testimony that despite his being a known follower of the slain mayor, the accused some of whom were the mayor's political enemies would conveniently (for the prosecution) invite and take him along in the ambushade, and after noting that "the Solicitor General agrees with the appellants that Norteza is a perjured witness" stresses the "impression that he was a rehearsed witness whose testimony was concocted in order to strengthen the prosecution's case" and that his "delayed testimony...exhibits earmarks of fabrication." (See pages 1723 of decision).

Let a copy of the decision with this concurrence be furnished to the Ministry of Justice and the provincial fiscal of Cebu province for the prosecution of said witness Avelino Norteza under Article 183 of the Revised Penal Code.

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