

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF, VS. CELESTINO GARILLO Y ORJEL ALIAS CELING (DECEASED) AND FEDERICO FERNANDEZ Y ARELLANO ALIAS PUTOL, ACCUSED.

G.R. No. L-30281. August 02, 1978

Ponente: CONCEPCION, JR., J.

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CONCEPCION, JR., J.:

Automatic review of the decision rendered by the Circuit Criminal Court of Rizal in Case No. CCC-VII- 55 (P.C. 8153), finding the accused Celestino Garillo y Orjel alias Celing and Federico Fernandez y Arellano alias Putol guilty of the crime of Robbery with Homicide and sentencing each of them to suffer the penalty of Death; to indemnify the heirs of the offended party the amount of P12,000.00, jointly and severally; and to pay the costs. Celestino Garillo y Orjel alias Celing died in the National Penitentiary at Muntinglupa, Rizal on August 16, 1970 and his appeal was dismissed by the Court December 9, 1970.[1]

It is of record that Lim Tao Sing was the owner and operator of the Excel Ice Drop Factory located at No. 2504 Taft Avenue, Pasay City. His uncle, Lim Ping Suy, assisted him in the management of said factory. The factory was housed in a two-storey building, the upper floor of which was used by Lim Tao Sing as his sleeping quarters. The ground floor contained the factory equipment and the sleeping quarters of some of the factory workers. Lim Ping Suy resided elsewhere and went to the factory only in the daytime.

In the early evening of October 31, 1968, Lim Tao Sing and Lim Ping Suy counted their money, amounting to P3,200.00 which had been set aside for the operating expenses of the factory, such as wages, house rentals, and light and water bills. They also examined the jewelry, consisting of a necklace, a bracelet, a gold ring, a diamond ring, and other kinds of rings, all valued at P1,800.00, which Lim Ping Suy bought for his nephew and which the latter had intended to send as gifts to his children in China. Afterwards, they put the money and jewelry inside a trunk which Lim Tao Sing kept in his bedroom. Lim Ping Suy then left for home.

In the evening of November 1, 1968, All Saints' Day, Henry Barillo and Alejandro Buco alias Tangkad, workers in the factory, slept, as usual, on the ground floor of the factory. The room was well lighted with fluorescent lamps because the generator of the factory operated for twenty four hours. At about 11:00 o'clock that night, Henry Barillo woke up because he felt that he was being tied up. True enough, Henry Barillo saw his own co-worker at the plant, Tangkad, tying him up, while another person was pointing a gun at him (Barillo). Barillo also saw three more persons, two of whom were armed with knives, emerging from a hole which the culprits made on the plywood wall and then enter the factory. Barillo was ordered to lie face downwards but he saw three men, including Tangkad, go upstairs to the room occupied by Lim Tao Sing. A little later, he heard a shot, followed by the moans of Lim Tao Sing. Soon thereafter, he saw the men coming downstairs. They left the place in a hurry, all of them running.

About an hour later, Barillo saw, through the hole in the wall, one Norberto, an ice drop vendor, whom Barillo requested to call for the police. Two policemen arrived and Barillo was untied. Then Barillo and a policeman went

upstairs. They found the room of Lim ransacked and Lim Tao Sing dead and covered with a mosquito net soaked with his own blood. They saw the box, which had contained the money and jewelry, destroyed and emptied of its contents.

The body of the deceased Lim Tao Sing was brought to the NBI morgue for autopsy and the medical examiner reported that Lim Tao Sing died of multiple stab wounds in the body.[2]

Three persons, Celestino Garillo y Orjel alias Celing, Alejandro Buco y Valdez alias Tangkad, and Federico Fernandez alias Putol, were arrested and charged with the commission of the crime of Robbery with Homicide. Three other suspects remained at large. Garillo and Fernandez pleaded not guilty while Alejandro Buco y Valdez alias Tangkad entered a plea of guilty and was sentenced by the court to suffer the penalty of reclusion perpetua.[3] Garillo and Fernandez were subsequently found guilty of the crime charged and sentenced to suffer the death penalty. Garillo died in prison and his appeal was subsequently dismissed by this Court. Hence, We are concerned only with the case of Fernandez.

No doubt, there was a conspiracy to rob the Excel Ice Drop Factory. Alejandro Buco y Valdez alias Tangkad admitted that the plan to rob the Chinaman who owns and operates the Excel Ice Drop Factory was hatched up and proposed to him by Gaudencio Garillo alias Gauding, Celestino Garillo alias Celing, Roberto Quinto alias Berto, and Guillermo alias Emot in the morning of November 1, 1968.[4] The deceased Celestino Garillo y Orjel alias Celing likewise admitted that the plan to rob the said Chinaman was proposed to him by Gauden, Berto and Emot.[5] The accused Federico Fernandez y Arellano alias Putol was also aware of the said plan. He denies, however, that he was a co-conspirator, claiming that he was merely told of the plan to rob the ice drop factory; that he was further told by them that if he did not want to go with them in robbing the Chinaman, he should merely keep quiet and they will give him something, to which he answered that it was up to them that he was asked to accompany them in order to act as look-out or guard outside (bantay sa labas) to which he acceded because he was afraid of Alejandro Buco y Valdez alias Tangkad who has a tatoo "Simaron-Oxo" in his hands, but that he left the place when the conspirators started to destroy a portion of the wall of the ice drop factory.[6]

Counsel de oficio contends that it is obvious from the evidence that the accused Fernandez was not a party to the plan to commit the robbery since he was merely told of the plan and that he never agreed to participate in the commission thereof as shown by his leaving the place when the conspirators started to break the factory's wall preparatory to their entering the premises; and that if Fernandez had made a pretense, in the beginning, of joining the conspirators as a look-out or guard outside, it was because of his fear of displeasing the mastermind, Alejandro Buco alias Tangkad, who was a member of the notorious OXO gang and had a tattoo mark "Simaron-Oxo" in his hands.

The disclaimer of participation in the conspiracy and desistance in the commission thereof is, however, negated by the statement of Fernandez that he fled to Barrio Bicutan, Taguig, Rizal very early in the morning of the next day and thence to Angeles, Pampanga where he stayed in a house together with some of the conspirators. His statement reads, as follows:

"t - Iyo bang nalaman kung ano ang nangyari sa binalak o pinagusapan ninyong holdap sa intsik sa loob ng pabrika ng ice drop?

"s - Ang nalaman ko po ay pinatay nila ang intsik, dahil sa huli si Celing (Celestino Garillo) na tumakbo at sinabi sa akin na huag akong maingay at napatay namin ang intsik.

"t - Ng malaman mo ang nangyari, ano ang iyong ginawa?

"s - Kinabukasan ng umagang-umaga nagpunta ako kay Dado (Diosdado Paraiso y Flores, 26, m, lab., add - Bo. Bicutan, Tagig, Rizal), sa kanila sa Bicutan Tagig, Rizal at akin ipinagtapat ang nangyari. Ang ginawa niya ay isinama ako sa Angeles, Pampanga at iniwanan ako ruon para don na ako magtabas ng tubo, dahil panahon ngayon ng tabasan ng tubo.

"t - Magkano ang naparte mo sa holdap na isinagawa ninyo?

"s - Wala po, dahil ng magkita-kita kami ni Berto at Goding sa Angeles, Pampanga at akin tinanong kung ano na ang nangyari ang sabi pa nila sa akin ay walang nakuha dahil pumutok ang baril at napatay ang intsik dahil sa lumaban.

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"t - Sino naman ang nagsama kay Goding at Berto sa Angeles, Pampanga?

"s - Si Berto po ang nagsama kay Goding, dahil bayaw ni Dado (Diosdado Paraiso) at meon o kapatid ni Berto ang amin tinutuluyan." (See Exh. M, pp. 78, 79, Orig. Record).

If Fernandez were innocent as he claimed to be, there is no reason for him to run away and hide together with some of the conspirators. "The wicked flee when no one is chasing them. But the godly are bold as lions." [7]

The evidence thus presented proves conspiracy and that the accused Federico Fernandez not only knew of the plan to rob Lim Tao Sing, but also participated in its commission by previous and simultaneous acts (by acting as look-out or guard outside) which lent to the accomplishment of the criminal intent. Although the said accused may not have foreseen the killing of the victim and did not take part in its execution, he is, nevertheless, guilty of the crime of robbery with homicide. The rule is that when homicide takes place as a consequence of or on occasion of a robbery, all those who took part in the robbery shall be guilty as principals of the crime of robbery with homicide, unless there is proof that they have tried to prevent the killing. [8] Here, there is nothing in the record which would show that the accused Fernandez ever attempted to prevent the homicide.

The said accused is, therefore, guilty of the crime of robbery with homicide, covered by Article 294, No. 1, of the Revised Penal Code. The trial Court found that the commission of the crime was attended by the aggravating circumstances of nighttime, superior strength, evident premeditation, and treachery.

Evident premeditation, however, is not considered as an aggravating circumstance in crimes of robbery because the same is inherent in the crime, especially where it is committed by various persons since there must be an agreement and the plotters have to meditate and reflect on the manner of carrying out the crime and they have to act coordinately in order to succeed. In the crime of robbery with homicide, there should be evident premeditation to kill, besides stealing, in order that it can be considered as an aggravating circumstance. [9] In the instant case, it has not been proven that the accused, before committing the crime, planned and decided, not only to steal, but

also to kill Lim Tao Sing. Hence, evident premeditation cannot be considered as an aggravating circumstance in this case.

Abuse of superior strength cannot also be appreciated in the instant case in the absence of proof of the relative physical strength of the aggressors and the victim and that the assailants took advantage of their combined strength in order to consummate the offense.[10]

Treachery is likewise absent in this case since the attack was made upon the impulse of the moment, as a sequence of the unexpected turn of events.[11] It appears that while Tangkad, Gauden, and Berto were in the second floor, used by Lim Tao Sing as his sleeping quarters, the gun held by Cauden hit a table and misfired. As a result, Lim Tao Sing rose from his bed holding a bolo. So, some of the accused stabbed him.[12]

But, nocturnity is present since the accused purposely sought the cover of darkness of the night in committing the crime. However, this aggravating circumstance is offset by the mitigating circumstance that appellant suffers some physical defect which thus restricts his means of action, defense, or communication with his fellow beings, to wit: appellant's right hand is missing as a consequence of an accident involving "kuwitis" which occurred on New Year's eve of 1966.[13]

Premises considered, the judgment imposed upon the accused Fernandez should be reduced to reclusion perpetua.

WHEREFORE, modified as thus indicated the appealed decision is hereby affirmed in all other respects.

SO ORDERED.

Fernando, Barredo, Makasiar, Aquino, Santos, Fernandez, and Guerrero, JJ., concur.

Castro, C.J., concurs in the result.

Teehankee and Antonio, JJ., no part.

Muñoz Palma, J., dissents in a separate opinion.

[1] pp. 64, 66-70, rollo.

[2] Exh. A, p. 53, Original Record

[3] p. 153, rollo.

[4] Exh. D, p. 65, Original Record.

[5] Exh. L, p. 74, Original Record.

[6] Exh. M, p. 77, Orig. Rec., which reads:

"s - Ganito po iyan. Ako po ay pinuntahan nila sa bahay, dahil sa alam nila na palagi akong istambay sa ice drapan, malapit po ang bahay ko sa ice drapan. Sinabi nila sa akin na huholdapin ang intsik na katiwala sa pabrika ng ice drop. Halagang limang libo (P5,000.00) raw po ang makukuha. Ang sabi nila kung ayaw ko man sumama ay basta huag na lang akong maingay at sila ang bahala. Bibigyan na lang nila ako. Ang sagot ko po sa kanila ay kayo ang bahala. Umalis na sila. Pagkagabihan bumalik po sila sa akin sa bahay mga pagitan nga po ng alas 11 at 12 ng gabi, Nobiembre 1, 1968. Papasukin at huholdapin nga po ang intsik sa loob ng pabrika. Isinama pa ako para bantay sa labas at sila ang papasok.

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"t - Ipagpatuloy mo ang iyong salaysay, tumigil ka sa ikaw ay isinama para bantay sa labas at sila ang papasok.

"s - Opo. Ng sinisira po nila ang dingding ng pabrika ng ice drop, ang ginawa ko po umuwi ako sa bahay namin. Hindi po nagtagal nadinig ko pumutok. Ngayon pagkaraan po ng putok na iyon ay nakita kong nagtakbuhan sila. Sa tabi po ng bahay sila nagdaan. Umakyat sila pader dahil sarado na po ang pinto papuntang Zamora. Hindi ko na po nalaman kung saan sila mga nag punta."

[7] The Living Bible, p. 733, Proverbs 28:1

[8] People vs. Carunungan, 109 Phil. 534.

[9] People vs. Valeriano, 90 Phil. 15.

[10] Aquino, The Revised Penal Code, 1976 ed., p. 350, 354.

[11] Id., p. 372, citing People vs. Vente, L-8344, Feb. 28, 1957, 100 Phil. 1099.

[12] See Exhibit D.

[13] See Exhibit M, p. 3.

DISSENTING OPINION

MUÑOZ PALMA, J.:

The evidence of the prosecution to which Judge Onofre A. Villaluz of the Criminal Circuit Court of Rizal referred for his findings that Federico Fernandez was a co-principal in the commission of the robbery and killing of the chinaman Lim Tao Sing, consist solely of the oral testimony of the alleged lone eyewitness Henry Barillo, the extrajudicial statement of one of the accused Celestino Garillo marked as Exhibit "D" and that of appellant herein Federico Fernandez marked as Exhibit "M".[1] Thus, the trial judge stated inter alia in his decision that: (a) "after tying Henry Barillo, the accused Celestino Garillo, armed with a balisong, Federico Fernandez and Roberto Guinto, both were armed, entered the said factory" (p. 11 of decision); (b) "the three accused in this case were positively identified by the witness Henry Barillo" (p. 23, *ibid.*); and (c) "based on the statements of the two accused, marked as Exhibits 'D' and 'M', the said accused, Celestino Garillo and Federico Fernandez acknowledged having committed the crime when all of them were armed with deadly weapons and firearms." (*ibid.*) (*Italics supplied*)

The above findings insofar as Federico Fernandez is concerned are not borne out by the evidence alluded to by His Honor.

The testimony of the prosecution witness Barillo given during the direct as well as the cross examination shows that this witness positively identified only two of the accused in the case, namely, Alejandro Buco alias "Tangkad", who pleaded guilty and Celestino Garillo alias "Celing" now deceased.[2] While it is true that Barillo declared that aside from the accused Alejandro Buco alias "Tangkad" who tied him with a rope and accused Celestino Garillo who pointed a gun at him, three other persons entered the factory through an opening made on the plywood wall, he never mentioned the name of appellant Federico Fernandez alias "Putol" as one of the three other persons who entered the factory nor did he point at and identify Fernandez in open court as one of the perpetrators of the crime charged.

Let us now examine and analyze the documentary evidence Exhibits "D" and "M". Exhibit "D" is the extrajudicial statement of the accused now deceased Garillo. The pertinent portions of the statement are quoted hereunder:

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“T: Kung gayon isalaysay ma sa iyong sariling pananalita kung papaano naganap ang sinasabi mong pagkaka-hold-up at pagkakapatay sa intsik.

S: Ang natatandaan ko, nuong pista ng patay, mga alas 9:00 ng gabi, pumunta sina Gaudin, ang pangalan na tunay niya, Gaudencio Garillo, Berto, tunay na pangalan, Roberto Quinto, saka si Emot, pangalan, Guillermo, hindi ko alam ang apilyido niya, sa kinaroroonan ko sa may tambakan sa likuran ng terminal ng LTB sa Pasay; Inaya nila ako na pumunta kami sa fabrika ng Ice Drop sa Taft Ave. Pasay; Sumama naman ako sa kanila; Nagdaan muna kami sa bahay nila Putol (Federico Fernandez) diyan sa malapit sa Zamora St., dito rin sa Pasay; Inabutan namin siya duon;

T: Bago ka sumama sa tatlong kataong sinasabi mo, sina Berto, Gauden at Emot, ano naman ang sabi nila sa iyo na inyong pupuntahan nuon?

S: Mayroon daw intsik na hohold-apin namin.

T: Sa kabila ng pagkaka-alam mo na gayon nga ang inyong gagawin, sumama ka pa rin sa kanila, ganoon ba?

S: Sumama na rin ako sa kanila.

T: Bago kayo nakarating sa inyong pinuntahan na fabrika ng ice drop sa Taft Ave., ano naman ang inyong pinag-usapan sa daan?

S: Basta sumama raw ako, mayroon hohold-apin, sila ang bahala.

T: Ng kayo'y dumating sa bahay nitong si Putol na sinasabi mo, ano pa ang sumunod na pangyayari.

S: Napag-usapan namin duon kung ano ang gagawin ng bawat isa sa amin na pang-hohold-up; Napag-usapan namin duon, si Tangkad ang nakaka-alam lahat ng gagawin; Pinuntahan na namin iyong fabrika ng ice drop; Si Tangkad nuon, nasa boob na ng ice drop factory; Itong si Gauden, pumasok sa butas duon sa may likod ng bahay; Tapos, sumunod na ako sa kaniya; Nandoon na kami sa boob ng fabrika; Inabutan na namin si Tangkad sa boob; Ng nandoon na kami nina Gauden, Tangkad, sumunod itong si Berto sa loob; Ngayon, apat na kami sa boob; Naiwanan si Emot saka si Putol sa labas ng fabrika; Nakita namin sa ibaba ang isang tao, nakagapos na iyon;

T: Nalalaman mo ba naman kung sino ang may gawa nito?

S: Nalaman ko na lang ng nasa loob na kami na si Tangkad ang naggapos niyon."

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"T: Bago kayo magtungo sa pinang-hold-apan ninyo na ayon sa iyo, sino-sino naman ang nalalaman mong may dala ng mga patalim nuon?

"S: Si Gauden, may dalawang dala, isang balisong, isang paltik, kasi isang putok lang ang baril eh; Si Tangkad, balisong din ang hawak, nakita ko iyon sa boob eh; Si Berto may dala rin, balisong din iyon; Ako, may dala rin, balisong, bente nueve; Si Emot, hindi ko alam hung may dala; Si Putol, wala, basta duon lang siya sa labas;"

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(pp. 65-67, original record)

The foregoing demonstrates that (1) Fernandez did not enter the ice drop factory but remained outside during the robbery, and (2) Fernandez was not at all armed on that occasion.

Exhibit "M" is the extrajudicial statement of appellant Fernandez wherein the latter narrated about the plan to rob the china-man in the ice drop factory and named the five persons hatching the plan; that he was asked to go with the group to stand guard outside the factory; that they all went to the ice drop factory as planned and he stood outside as instructed; that while his companions were breaking down the wall he left the place and went home, and some time later he heard a shot.

Quoted hereunder are the pertinent portions of Exhibit "M"

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T: Ano ang kaugnayan at nalalaman mo tungkol sa sinasabi mong hold-up sa intsik?

S: Ganito po iyan. Ako po ay pinuntahan nila sa bahay, dahil sa alam nila na palagi akong istambay sa ice drapan, malapit po ang bahay ko sa ice drapan. Sinabi nila sa akin na huhold-apin ang intsik na katiwala sa pabrika ng ice drop. 'Halagang limang libo (P5,000.00) raw po ang makukuha. Ang sabi nila kung ayaw ko man sumama ay basta huag na lang akong maingay at sila ang bahala. Bibigyan na lang nila ako. Ang sagot ko po sa kanila ay kayo ang bahala. Umalis na sila. Pagkagabihan bumalik po sila sa akin sa bahay, mga pagitan nga po ng alas 11 at 12 ng gabi, Nobiembre 1, 1968. Papasukin at huhold-apin na nga pa ang intsik sa boob ng pabrika. Isinama po ako para bantay sa labas at sila ang papasok.

T: Bago ka magpatuloy sa iyong salaysay, sinu-sinong sila ang nais mong tukuyin na siyang nagdaan sa iyo sa bahay at pinag-usapan ang hold-up sa intsik sa loob ng pabrika ng ice drop?

S: Si Gaudencio, si Berto, ito po si Celing (Celestino Garillo y Orgel, 18, s, porter sa Divisoria Market, add - 551 E. De los Santos Ave., PC), si Imot at saka si Tangkad, (declarant pointing to Alejandro Buco y Valdez, @ "CIMARON", 32, m, lab., address, Bakawan St., Pasong Tamo, Makati, Rizal). Lima (5) po silang lahat at bilang pang anim (6) ako.

T: Dito sa lima (5) na nagpunta sa iyo sa bahay at nagsabi sa iyo na huhold-apin ang intsik sa loob ng pabrika ng ice drop at ikaw ay ipinagsasama pa para bantay, ilan ang iyong talagang kilala?

S: Sila pong lahat ay kilala ko, dahil sa madalas silang magpunta sa pabrika hanggang sa kami po ay magkakilakilala.

T: Ito ba rin lima (5) na iyong binanggit sa una ang siyang sinasabi mong bumalik sa iyo sa bahay ng gabi rin ng Nobiembre 1, 1968, pistang mga patay para isagawa ang hold-up na binalak o pinag-usapan ng tanghali ng araw ng pista ng patay Nobiembre 1, 1968?

S: Sila rin pong lahat.

T: Ipagpatuloy mo ang iyong salaysay, tumigil ka sa ikaw ay isinama para bantay sa labas at sila ang papasok.

S: Opo. Ng sinisira po nila ang dingding ng pabrika ng ice drop, ang ginawa ko po umuwi ako sa bahay namin. Hindi pa nagtagal nadinig ko pumutok. Ngayon pagkaraan po ng putok na iyon ay nakita kong nagtakbuhan sila. Sa tabi po ng bahay sila nagdaan. Umakyat sila sa pader dahil sarado na po ang pinto papuntang Zamora. Hindi ko na pa nalaman kung saan sila mga nagpunta.

T: Iyo bang nalaman kung ano ang nangyari sa binalak o pinagusapan ninyong holdup sa intsik sa loob ng pabrikang ice drop?

S: Ang nalalaman ko po ay pinatay nila ang intsik dahil sa huli si Celing (Celestino Garillo) na tumakbo at sinabi sa akin na huag akong maingay at napatay namin ang intsik."

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(pp. 77-78, original record)

Nowhere in the foregoing narration of Federico Fernandez did he ever admit that he was armed on that occasion, or that he entered the factory with the group, as stated in the trial court's decision.

On what then can the conviction of appellant Fernandez stand? There is proof of the corpus delicti, that is, the robbing and killing of the chinaman - yes, that is true; but what evidence links Fernandez to the crime committed? I agree with appellant's de officio counsel, Atty. Teodoro R. Dominguez, that there is none under the law.

As there is nothing in the testimony given in court by the witness Henry Barillo which directly or indirectly connects Federico Fernandez to the robbery and killing of the ice drop factory owner, all that We have are the extrajudicial statements Exhibits "D" and "M", and We may even include Exhibit "L" which is the statement of the other accused Alejandro Buco.

Defense counsel correctly argues in his brief that Exhibits "D" and "L" are "incompetent and inadmissible evidence against his client, Federico Fernandez" (p. 17 of brief) invoking the maxim *res inter alios acta alterinocere non debet* embodied in section 25, Rule 130 of the Rules of Court which provides:

"The rights of a party cannot be prejudiced by an act, declaration, or omission of another, and proceedings against one cannot affect another, except as hereinafter provided."

It is a settled rule that an extrajudicial confession made by a defendant is admissible against him but not against his co-defendant as to whom said confession is hearsay evidence for he had no opportunity to examine the former.[3]

And on the premise that appellant Fernandez is alleged to be a co-conspirator, We have the rule that the act or declaration of a conspirator relating to the conspiracy or its existence may be given in evidence against the co-conspirator after the conspiracy is shown by evidence other than such act or declaration.[4]

In order that Exhibits "D" and "L" may be admitted as evidence against appellant Fernandez as a co-conspirator it is necessary that there be proof of the conspiracy independent of said extrajudicial statements; here there is no such independent proof and in its absence, no conviction can stand simply on the basis of said statements.[5]

Another point not to be overlooked is that the accused Garillo while testifying in court in his defense denied that he implicated Federico Fernandez in his statement, Exhibit "D".[6]

Verily, it is well to repeat here what the Court pronounced in *People vs. Custodio* that "considering the far-reaching consequences of criminal conspiracy, the same degree of proof required for establishing the crime is required to support a finding of its presence, that is, it must be shown to exist as clearly and convincingly as the commission of the offense itself." [7]

Finally, there is the supposed "confession", Exhibit "M" wherein according to the trial Judge, the appellant Fernandez "acknowledged having committed the crime."

In my view Exhibit "M" is not to be given the weight and evidentiary value of an extrajudicial confession of guilt. As already indicated earlier, Fernandez narrated in Exhibit "M" the plan of five persons to rob the owner of the ice drop factory and that he was asked to accompany those persons and to act as guard outside the factory, and on the particular evening they all went to the place. But that was all insofar as he was concerned, for according to appellant while he was standing outside the factory and the five persons were breaking open the wall he left the place and went home. This is an act of voluntary desistance.

"The distinctive feature of a confession is that it must be an acknowledgment of guilt without any exculpatory statements or explanation. However, if the prosecution undertakes to prove statements of the accused as his confession, any exculpatory statements which he made at the time are admissible in his favor." (Bram vs. United States, 168 U.S. 532, 42 L. ed. 568, 16 S. Ct. 183, cited in Martin, Rules of Court in the Philippines, Vol. 5, 1974 Ed., p. 251)

"There is in every design or plan to commit a crime a place of repentance or locus penitentiae whereby the one planning to commit it may abandon the idea and thus avoid criminal liability. This is true where one of the persons who has entered into a conspiracy, necessarily involving an overt act, abandons the plan before the act is done." (15 Am Jur § 333, p. 22, citing U.S. v. Britton, 108 U.S. 199, 27 L. ed. 698, 2 S. Ct. 531; State v. Webb, 216 Mo 378, 115 S.W. 998, 20 L.R.A. (N.S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas 518)

Article 6, paragraph 3 of the Revised Penal Code exempts from liability those who spontaneously desist from the commission of a felony.

The voluntary desistance of appellant herein from the criminal act of assisting his co-accused before the crime was committed warrants his acquittal.

One last point. The main Opinion of the Court heavily relies on the statement of appellant Fernandez in Exhibit "M" that he went to Barrio Bicutan, Taguig, Rizal very early in the morning of the next day and thereafter to Angeles, Pampanga where he stayed in a house together with the other accused, Berto and Gauden, as indicative of his guilt.

It is the better rule however that evidence of flight is not substantive evidence of guilt;^[8] that it is merely a circumstance tending to establish guilt, not in itself conclusive, nor can it create a legal presumption of guilt.^[9]

In the absence of separate admissible evidence tending to establish the guilt of appellant Federico Fernandez, his departure for Angeles, Pampanga is at the most a circumstantial evidence but insufficient in itself to warrant his conviction.

ACCORDINGLY, I vote for the acquittal of Federico Fernandez.

[1] page 23, CFI decision, 174, original record.

[2] See pp. 4-10, 18-28, TSN of February 14, 1969.

[3] People vs. Amajul, et al., per Reyes, J.B.L., J. 1 SCRA 682, February 28, 1961, citing Moran's Comments on the Rules of Court, 1957 Ed. Vol. III, p. 109. See also U.S. vs. Castillo, et al., 2 Phil. 17; U.S. vs. Paete, et al., 6 Phil. 105; People vs. Tabuche, et al., 46 Phil. 28; People vs. Durante, et al., 47 Phil. 654; People vs. Orenciada and Cenita, 47 Phil. 970; and People vs. Bande, et al., 50 Phil. 37; Moran, 1970 Ed. Vol. 5, p. 276.

[4] Section 27, Rule 130 Rules of Court

[5] People vs. Capadocia, et al., per Makalintal, J., August 29, 1966, 17 SCRA 981; Moran, supra, p. 254; Martin, Rules of Court, 1974 Ed., Vol. 5, p. 237.

[6] TSN, February 17, 1969, p. 22

[7] Per Antonio, J., October 30, 1972, 47 SCRA 289, 302, reiterated in People vs. Madera, et al., May 31, 1974, 57 SCRA 349 and People vs. Tumulip, et al., October 28, 1974, 60 SCRA 303

[8] 22-A C.J.S. § 625, p. 460

[9] *ibid.*, citing *Ga. - Seay v. State*, 11 S.E. 2d 54, 56, 63 Ga. App. 286

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