

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ELIAS BARASINA Y LAYNEZA, ACCUSED-APPELLANT.

G.R. No. 109993. January 21, 1994

Ponente: MELO, J.

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MELO, J.:

It was around 6:40 in the evening of July 17, 1988 when Fiscal Lino Mayo of Olongapo City succumbed to a single bullet on his side of his face fired from an unlicensed .45 caliber firearm while he was walking at the VIP parking lot of the Victory Liner Compound at Caloocan City. According to the People, it was herein accused-appellant who was accountable therefor, resulting in his being charged with the separate misdeeds of illegal possession of a firearm and murder in this manner:

The undersigned Assistant City Fiscal accuses ELIAS BARASINA y LAYNEZA for violation of P.D. 1866, committed as follows:

That on or about the 17th day of July, 1988 in Kalookan City, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused did then and there willfully, unlawfully and feloniously in violation of the above-mentioned Presidential Decree, have in his possession, custody and control one (1) .45 cal. pistol-type firearm, marked Colt bearing SN-008645 with four (4) rds of live ammos. one (1) cartridge case and one (1) magazine, without first securing the necessary license/permit to possess the same. And while in possession thereof, said accused used said firearm in committing the crime of MURDER.

CONTRARY TO LAW.

x x x

The undersigned Assistant City Fiscal accused ELIAS BARASINA y LAYNEZA, JOHN DOE AND PETER DOE, true names, real identities and present whereabouts of the last two mentioned accused, still unknown of the crime of MURDER, committed as follows:

That on or about the 17th day of July, 1988 in Kalookan City, Metro Manila, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring together and mutually helping one another, without any justifiable cause, with treachery and evident premeditation and with deliberate intent to kill, did then and there willfully, unlawfully and feloniously attack and shoot with a .45 cal. firearm on the head one FISCAL LINO MAYO y MANIAGO, thereby inflicting upon the latter serious physical injuries which injuries caused his instantaneous death.

CONTRARY TO LAW.

(pp. 25-26, Rollo)

When haled to respond to the inculpatations, accused-appellant was indifferent in entering any plea, thus the plea of not guilty to the two criminal charges was entered by the court of origin in his behalf (p. 140, Record).

The generative facts of the case at bar, as culled from the exhaustive decision of the trial judge, the Honorable

Rene Victoriano, are supported by the record and are accordingly adopted, thusly:

At about 6:40 in the evening of July 17, 1988, Rufino Alvarez was on his way to the comfort room located inside the waiting shed for passengers at the Victory Liner Terminal Compound, Kalookan City. He was aware of the two men walking ahead of him who were almost abreast of each other. A gunshot was heard. Instinctively, Rufino looked ahead of him where the sound of the gunshot came from. He saw the man immediately in front of him holding a .45 cal. hand gun. He also saw at the same time the other man just beside the gun man falling down on the ground. The gun man continued walking at the same time holding his gun with two hands trying to cock it. After walking a few meters, the gun man tucked the gun in his right waist and began running away. At this time, Rufino saw Barangay Councilman Prudencio Motos and about four other men chasing the gun man. After this, Rufino approached and viewed the victim who was sprawled on the ground. At this time there were already many people around trying to view the victim.

At about the same time on said evening of July 17, 1988, Felipe Hamtig who was a security guard was at his assigned post at the V.I.P. Parking Space at the Victory Liner Compound. He saw a stout man carrying an attache case pass by his post beside the entrance to the V.I.P. parking area. There was another man following the aforementioned stout man. When the stout man was about five meters away, Felipe Hamtig saw the second man shoot the stout man who was just ahead of him on the left cheek with a .45 cal. hand gun. The gun man then cocked his gun and ran towards Rizal Avenue Extension. Felipe Hamtig tried to chase the assailant but he saw several people already chasing him (assailant). Among the persons chasing the assailant was Councilman Prudencio Motos. Because of this Felipe Hamtig no longer ran after the assailant but he went back to see the victim who was sprawled on the ground. He later came to know the victim as Olongapo City Fiscal Lino Mayo.

At about the same time and date, Ruel Ganiola, a porter, was at the Sunshine Restaurant waiting for cargoes coming from Olongapo. This is located about 20 meters from the Victory Liner Terminal Compound. While standing, he heard a gunshot coming from the V.I.P. parking area. He looked at the area where the sound came from. He saw a person slump on the ground. He saw another person running away from the man slumped on the ground who was holding a gun and was even cocking it. Councilman Motus ordered them to chase the gun man. Motus was in front of the Sunshine Restaurant at the time. He followed the order of Motus and ran after the gun man. Michael Estapia, a porter, also ran after the gun man. The chasers shouted at a policeman several meters ahead and pointed at the fleeing gun holder. The policeman was able to catch the gun wielder at the stairway of LRT Station at Monumento, Kalookan City. Pat. Francia took the gun of the accused (a .45 cal. gun) from his right waist.

At about the same time and date, Barangay Councilman Prudencio Motos was standing at the front of the Sunshine Restaurant. He heard a gunshot coming from the V.I.P. parking area. He looked at the place where the gunshot came from and saw a man fall down on the ground. He saw at the same time another man moving away from the fallen man and cocking a gun at the same time. The gun man then tucked the gun in his waistline and ran towards the direction of Rizal Avenue Extension. He shouted at his companions to run after the gun man. Prudencio Motos and his companions ran after the gun man and when the gun man was about to reach the LRT Station, they shouted at the policeman conducting traffic in the area and pointed at the running man. The policeman, Pfc. Napoleon Francia, shouted at the gun man who stopped and raised his hands. Pfc. Napoleon Francia then confiscated a .45 cal. pistol from the gun man. Afterwards, Pfc. Francia, Councilman Motos and others brought the gun man to the Kalookan City Police Headquarters aboard a passenger jeep.

Dr. Bienvenido Munoz, an NBI Medico-Legal Officer, conduct[ed] an autopsy on the body of the victim, Fiscal Lino Mayo on July 17, 1988. A request for autopsy was made by Sgt. Norberto Surara of the Kalookan City Police Force (Exhibit G). The autopsy was conducted at the International Funeral Homes located at Rizal Avenue, Manila. The body of the victim was identified by Omar Mayo, a relative of the victim (Exhibit H). The time and date of death was placed at 6:45 p.m. on July 17, 1988.

After conducting an external examination, Dr. Muñoz found out that the victim suffered one gunshot wound. The point of entrance of the bullet was on the left jaw and the point of exit was at the back of the right ear.

After conducting an internal examination, Dr. Muñoz found out that there was a fracture of the mandible and first cervical vertebra. There was also a fracture of the right mastoid bone. The cause of death was gunshot wound on the head. It was possible that the assailant was slightly at the back of the victim taking into consideration that the head is a very movable part (tsn, June 6, 1989, p. 12). The muzzle of the gun used was more than 24 inches from the victim (tsn, June 6, 1989, p. 18).

Dr. Muñoz produce a diagram he prepared showing the injuries sustained by the victim (Exhibit I). He identified the written report he made on his examination (Exhibit J).

Aida Magsipoc, a supervising Forensic Chemist of the NBI testified in this case concerning the paraffin examination conducted on the accused on July 18, 1988.

She received the letter request to conduct the examination at about 10:00 a.m. on July 18, 1988. Before taking a paraffin cast on the hands of the accused, she required the accused to first wash his hands under running water. His hands were then air-dried. The paraffin wax was melted and was applied on the dorsal aspects of the left and right hands of the accused. She dropped the melted paraffin on the dorsal portion of both hands of the accused. While she personally conducted the pre-casting on the hands of the accused, it was Edwin Purificando, her subordinate, who actually conducted the actual examination.

Edwin Purificando, a Forensic Chemist of the National Bureau of Investigation conducted the paraffin examination of the accused, Elias Barasina. He received a letter request dated July 17, 1988 to this effect from the Kalookan City Police Force, which was signed by Lt. Norberto Surara (Exhibit K). The accused was accompanied to the NBI Forensic Laboratory by Kalookan City policemen where the accused was subjected to the paraffin casting. The casting was made on the dorsal portion of the right hand and left hand of the accused in order to test the presence of gun powder residue on the hands of the accused. The casting was placed by Aida Magsipoc, an NBI Forensic Chemist Supervisor, in the morning of July 18, 1988. Edwin Purificando was the one who placed the chemical reaction agent, however, at about 10:00 p.m. of the said date. The chemical reaction agent was then allowed to react on the paraffin cast.

As a result of the foregoing process, the left and right hands of the accused were both found to be positive for gun powder nitrates. Edwin then, prepared a diagram of the left and right hands of the accused showing the exact spots where the presence of nitrates was found. The diagram was marked as Exhibit "L". A written report was then made on the paraffin examination. (Exhibit "M").

Because of the foregoing, it was possible that the accused fired gun before the paraffin examination was conducted (TSN -6/6/89, p. 40). Gun powder residue stay in the hands of a person for not more than 3 days. A photograph of the accused taken at the NBI Forensic Laboratory just before the paraffin examination was identified (Exhibit "N").

Brandeis Flores is a ballisticsian of the National Bureau of Investigation. On July 17, 1988, his office received a written request from Sgt. Norberto Surara of the Kalookan City Police Headquarters for the ballistic examination of one cal. .45 hand gun with Serial No. 008645 with magazine loaded with four rounds of live ammunitions and one empty shell marked "DDR" (Exhibit "W"). Pat. Loreto Samson of the Kalookan City Police Force personally carried the foregoing specimen to the NBI together with the letter request.

Brandeis Flores first conducted the actual test firing of the submitted .45 cal. handgun in order to obtain empty shells for comparison with the evidence shell. After obtaining the test shells, Brandeis compared them with the evidence shell under the microscope. He found out that the evidence shell contains similar characteristics markings with the three test shell was previously marked as Exhibit[s] "V-1". The three test shells were taped together and were marked as Exhibit "X". His finding was that the evidence bullet (Exhibit "V-1") was fired

from the submitted .45 cal. gun marked as Exhibit "U". A written report of the ballistic examination was prepared and marked as Exhibit "Y".

Pfc. Arsenio Nacis of the Kalookan City Police Force conducted the investigation of this case. At about 7:00 o'clock in the evening of July 17, 1988, Cpl. Napoleon Francia, Barangay Councilman Motos, and a Barangay Tanod appeared in the office of Cpl. Nacis at the Station Investigation Division. Cpl. Francia then turned over to Investigator Nacis the accused and a .45 cal. handgun with 4 bullets and an empty shell. After having been informed that the accused was a suspect in the death of a person at the Victory Liner Compound, Pfc. Nacis, Cpl. Daniel del Rosario, Pfc. Elmario Adelante, Sgt. Serrano, and the inquest Fiscal proceeded immediately to the scene of the crime. They found the body of the victim right at the entrance of the Victory Liner Terminal. Investigator Nacis noticed blood still oozing from the victim's ear. He prepared a sketch of the scene of the crime and tried to get his evidence (Exhibit "F"). The victim was found lying face down and was positively identified by the Inquest Fiscal Bonifacio Sison as Olongapo City Fiscal Lino Mayo, his former classmate. He then invited the following witnesses to his office, namely: Councilman Prudencio Motos, Rufino Alcaraz, Felipe Hamtig, Ruel Ganiola, Michael Estapia and Pat. Napoleon Francia. Cpl. Daniel del Rosario took the statements of Rufino Alcaraz (Exhibits "A" to "A-1") and the joint sworn statements of Ruel Ganiola and Michael Estapia (Exhibit "D").

Pfc. Nacis took down the sworn statement of Felipe Hamtig (Exhibit "C"). He also executed his own sworn statement (Exhibit "R"). He prepared a referral slip for the Kalookan City Fiscal (Exhibit "S").

Cpl. Daniel Del Rosario investigated the accused but before doing so, he informed the latter of his Constitutional rights. The accused then stated his desire to have a lawyer. As instructed by Lt. Norberto Surara, one private practitioner named Atty. Abelardo Torres was fetched from the latter's office. Atty. Torres arrived at the Station Investigation Divisions of the Kalookan City Police Station at 3:00 P.M. on July 18, 1988. Atty. Torres conferred with the accused for about 30 minutes. The accused indicated his desire to give a statement in the presence of Atty. Torres. Before actually taking down the statement of the accused, Cpl. Del Rosario prepared a written appraisal of the Constitutional rights of the accused in a document entitled "PAALALA" (Exhibit "P"). It was signed both by the accused and Atty. Torres, Cpl. Del Rosario then proceeded to take a written statement of the accused. His counsel was present in the investigation room. The sworn statement of the accused was identified (Exhibits "Q", "Q-1" and "Q-2"). Cpl. del Rosario identified the signatures of the accused in each page of said statement (Exhibits "Q-3", "Q-4" and "Q-5"). He also identified the signature of the statement (Exhibit "Q-6").

Lt. Norberto Surara, the Chief of the Homicide Section of the Caloocan Police Force confirmed that he assigned Pfc. del Rosario to take the sworn statement of the accused. He also confirmed that he directed that Atty. Abelardo Torres be fetched to act as counsel of the accused during the investigation. He introduced Atty. Torres to the accused and after this, the accused accepted the services of Atty. Torres (TSN -7/3/89, p. 12). He execute[d] a sworn statement on his participation in the execution of the sworn statement of the accused (Exhibit "Z"). The accused, when brought to Inquest Fiscal Nepthali Aliposa, refused to sign the statement. Thus, the statement was not sworn to (TSN -7/3/89, p. 20).

Atty. Abelardo Torres admitted being fetched in the afternoon of July 18, 1988 to assist the accused (TSN -7/10/89, p. 4). He admitted having conferred with the accused on said date before the statement of the latter was taken down. He was present when the accused gave a written statement but left at the beginning to take his merienda. He returned to the investigation room a few minutes later (TSN -7/20/89 pp. 21-22). He was present when the accused signed his written statement.

Teresa Mayo, the widow of Fiscal Lino Mayo, testified on the civil aspect of this case. Fiscal Mayo was the City Fiscal of Olongapo City at the time of his death and was receiving a monthly salary of P12,100.00 then and a monthly allowance of P2,000.00. The body of the late Fiscal was buried at Infanta, Pangasinan, after having lain in state at Olongapo City for two days and at Infanta for 2 days. She paid P20,000.00 for the burial

of the victim (Exhibit "AA"). She spent P1,600.00 for the religious funeral services (Exhibit "BB"). She also spent P40,000.00 for constructing the burial site of the victim (Exhibit "CC"; Exhibit "DD"; Exhibit "DD-1"). She spent for food and groceries during the wake in the total amount of P50,000.00.

The place where the victim, Fiscal Lino Mayo, was shot was inside the V.I.P. Parking area inside the Victory Liner Compound located at Kalookan City. The V.I.P. Parking area is located on the ground floor of the Administrative Office of said bus company (see Exhibit "B" and Exhibit "F").

Rufino Alcaraz described the area where Fiscal Mayo, the victim, was shot as well lighted (TSN- 5/9/89. p. 7). The lighting facilities inside the Bus Terminal of the Victory Liner consisted of fluorescent lamps installed at the ceiling. A distance of four to five meters separate one fluorescent lamp from another (TSN - 5/9/89, p. 4). This was corroborated by Felipe Hamtig (TSN - 5/9/89, p. 5). This was likewise corroborated by Ruel Ganiola who stated that the lighting facilities included the V.I.P. Parking Area. (TSN - 5/22/89, p. 9).

Prosecuting witness Rufino Alcaraz was residing at Stall No. 1 inside the Victory Liner Compound on the day of the incident. He was only about five (5) meters from the assailant when he heard a gunshot (TSN - 5/3/89, pp. 5; 26). He saw the faces of both men although they were in front of him because their faces were a little oblique (TSN - 5/9/89, p. 28). The gunman was carrying a .45 cal, pistol (TSN ? 5/9/89, p. 38). Witness Alcaraz first identified the gunman when he executed a statement before the police on the evening of July 17, 1988 right after the shooting. The gunman turned out to be Elias Barasina, the accused (TSN - 5/9/89, p. 37).

Prosecution witness Felipe Hamtig was employed as a security guard of the Lions Security Agency with assignment at the Victory Liner Compound (V.I.P. Parking Area) at the time of the incident. He was seated at his post at the V.I.P. Parking area when he saw the accused shoot the victim at the left cheek with a .45 cal. pistol (TSN - 5/10/89, pp. 8-9). He was only five (5) meters away from the victim then (TSN-5/10/89, p. 6). He identified the gunman on the evening of July 17, 1988 when he was investigated by the Kalookan City Policemen (Exhibit "C-1"). The gunman was Elias Barasina whom the witness again identified during the trial. (TSN - 5/10/89, pp. 6--7).

Prosecution witness Ruel Ganiola was a resident of Stall No. 3 inside the Victory Liner Compound at the time of the incident. He was then working as a porter at the Victory Liner Compound. He was standing at the Sunshine Restaurant which is about 20 meters from the V. I. P. Parking area inside the Victory Liner compound when he heard a gunshot (TSN-5/22/89, p. 10).

He saw the gunman running towards Rizal Avenue Extension from the V.I.P. Parking area. In doing so the gunman passed by the place where Ganiola and another porter, Michael Estapia were standing in front of the Sunshine Restaurant (TSN -5/22/89, pp. 36-37). Because he recognized the gunman, he identified the latter inside the Kalookan City Police Headquarters on July 17, 1988. (TSN -5/22/89, p. 18). The gunman was the accused, Elias Barasina.

Prosecution witness Prudencio Motos was a Barangay Councilman compound the area around the Victory Liner Compound and owned a carinderia inside the compound of the Victory Liner Compound at the time of the incident. The gunman was three meters away when he passed in front of witness Motos outside the Sunshine Restaurant. Witness Motos saw the face of the gunman (TSN -5/23/89, p. 24). He was with Pfc. Napoleon Francia and others when the accused was brought to the Kalookan City Police Headquarters (TSN -5/23/89, p. 3). He identified the gunman at the Kalookan City Police Headquarters on July 18, 1988 (TSN-5.23/89, p. 16)

The gun which was confiscated from the accused by Pfc. Napoleon Francia on July 17, 1988 is a cal. .45 pistol marked "Colt" with Serial No. 008645 with four (4) live bullets and one (1) empty shell. It was marked as Exhibit "U" during the trial. The four live bullets which were taped together and the markings exhibit was placed on the tape. The spent shell was marked as Exhibit "V-1".

Barangay Councilman identified the gun in Court. He was able to recognize it because of the extended barrel and because of its serial number. He first saw the gun when the gunman passed by him. He was one meter away when Pfc. Francia confiscated the gun from the gunman. (TSN-6/27/89, p. 3). He saw Pfc. Francia recover the spent bullet from the gun while Pfc. Francia, Motos and others were inside the jeep with the gunman on their way to the police headquarters (TSN-6/27/89, p. 6).

Witness Rufino Alcaraz testified that the accused used a .45 cal. pistol (TSN-5/9/89 pp. 8; 39-40).

Witness Felipe Hamtig stated that the accused used a .45, cal. pistol in shooting the victim (TSN--5/10/89 pp. 8-9).

Witness Ruel Ganiola stated that when the gunman passed by him the gunman was holding a .45 cal. pistol handgun (TSN-5/22/89, p. 52).

Witness Pfc. Arsenio Nacis identified the gun which was turned over to him by Pfc. Francia and Councilman Motos and which was previously marked as Exhibit "U". This was previously marked as Exhibit "U". This was previously confiscated from the accused. (TSN-6/27/89 p. 12). He recognized the gun (Exhibit "U") because of its serial no. and because of its extended muzzle which is called a "Pin gun" (TSN-6/27/89, pp. 12-13).

The accused, Elias Barasina is not a licensed firearm holder of any kind. This was certified to by the Chief of the Records, Legal and Research Branch of the Firearms and Explosives Unit located at Camp Crame, Quezon City in a certification dated June 13, 1989 (Exhibit "T"). The Certification was brought to the courtroom by Lt. Agrifino Javier of the aforesaid office. Lt. Javier identified the Certificate marked Exhibit "T".

In the course of the trial, the accused, through counsel, filed a Motion to Quash on the ground of double jeopardy. It was alleged that the accused was in jeopardy of being convicted of two offenses -- -Murder and Illegal Possession of Firearms based on an alleged act which is defined and penalized as only one offense under Paragraph 2 of Section 1 of P.D. 1866 which states:

If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed.

This Motion was opposed by the Prosecution.

In an Order, dated August 17, 1989, this Court denied the Motion to Quash and cited the case of *Tangan vs. People*, 155 SCRA 435; 436 in support of its Order. Its ruling follows:

There is no double jeopardy in the filing of the two aforesaid separate criminal cases against the accused because the first jeopardy has not yet attached. It is well settled that the mere filing of two informations or complaints charging the same offenses does not yet afford the accused in those cases the occasion to complain that he is being placed in jeopardy twice for the same offense, for the simple reason that the primary basis of the defense of double jeopardy is that the accused has already been convicted or acquitted in the first case or that the same has been terminated without his express consent. It is the conviction or jeopardy of being convicted or the acquittal of the accused or termination of the case that bars further prosecution of the same offense or any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information. (*Tangan vs. People*, 155 SCRA 435, 436).

Another issue cropped up during the Joint Trial. The cross examination of prosecution witness Felipe Hamtig was not completed because he did not return despite the issuance of subpoena and a warrant for his arrest. Hamtig testified on direct examination on May 10, 1989. A partial cross-examination was conducted. Because of the failure of Hamtig to return for the completion of the cross-examination, accused through counsel moved to strike out from the records the entire testimony of Felipe Hamtig. The principal basis of the Motion is the right of the

accused to confront and cross-examine the witnesses against as mentioned under Sec. 14, Article III of the Constitution of the Philippines; as stated under paragraph F of Rule 115 of the Revised Rules of Criminal Procedure and as listed in paragraph 6 of Rule 132 of the Revised Rules on Evidence. This was opposed by the Public Prosecutor in his Memorandum of August 4, 1989.

This Court denied on August 8, 1989 the Motion to Strike Out the Testimony of Felipe Hamtig. This was based on the following:

1. The partial cross examination of the witness was fairly through considering that the same could be found from page 22 to page 37 of the Transcript of Stenographic notes taken on May 10, 1989;
2. The Court was able to make its observations on the reliability of its witness and to determine if his testimony in chief was adversely affected by the partial cross examination;
3. The failure to complete the cross-examination was not the fault of the Prosecution. The defense moved for a postponement of the cross examination on May 10, 1989 but this was opposed by the Prosecution. As a compromise, the Defense was directed to cross examine the witness up to 11:00 A.M. on said date. Had the postponement not been made, the cross-examination should have been completed on May 10, 1989;
4. Defense counsel failed to enter into the records how the absent witness, Felipe Hamtig would have testified if he were available for further cross-examination; and
5. The right of cross-examination is not absolute and the Court may at its discretion, limit the same and consider it terminated if it would serve the ends of justice (People vs. Gorospe, 129 SCRA 242, 243).

The version of the accused follows:

Between 6:30 P.M. and 7:00 P.M. on July 17, 1988, he was walking with his brother, Juanito, along Rizal Avenue Extension near the LRT Station, Caloocan City. They were on the right side of the Rizal Avenue Extension because they were taking the light railway on their way to Pasay. The accused noticed persons chasing each other at his back. Then somebody bumped him and he stumbled on the sidewalk. Something fell down from said person when he stumbled. This man stood up immediately and ran away. The accused picked up the thing which fell from the stranger. He saw that it was a gun. He ran after the man to return the gun and he even fired a warning shot. However, he lost his track of the man who ran inside the LRT Station. As he was holding the gun, policemen who were running after the said man accosted the accused and took the gun from him. He was then brought to the Caloocan City Police Headquarters. He submitted his sworn statement to the Fiscal who conducted a re-investigation of this case (See Exhibit "3", "3-A", "3-B", "3-C"). The testimony of the accused was partly corroborated by Rodolfo Laurente, a balot vendor. (pp. 2-12, Decision; p. 27, Rollo in CA-G.R. No. 10892).

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One of the principal defenses set up by the accused was that he was mauled, maltreated and forced to sign two documents by the Caloocan policeman while he was inside a small cell inside the Caloocan City Police Headquarters. He identified those two documents as Exhibit "P", the "Paalala", dated July 18, 1988, and his statement dated July 18, 1988 (Exhibits "Q", "Q-1", "Q-2"). He further claimed that he never read any of those documents and that he was not assisted by any lawyer during their execution. He claimed further that he did not know Atty. Abelardo Torres. He signed an Affidavit of retraction dated July 22, 1988 (Exhibit "2", "2-a", "2-b"). (pp. 2-13, RTC Decision; pp. 27 et seq., Rollo in CA-G.R. No. 10892.)

Accused-appellant was found guilty by the court of origin on February 28, 1990, the decretal portion of the discourse reading as follows:

WHEREFORE, in view of the foregoing, this Court finds the accused Elias Barasina y Layneza guilty beyond reasonable doubt of:

1. Violation of Par. 1 of P.D. 1866 (Illegal Possession of Firearm); and
2. Murder.

This Court hereby sentences said accused Elias Barasina as a result of his conviction under P.D. 1866 to suffer imprisonment of SEVENTEEN (17) Years, FOUR (4) months and ONE (1) Day of Reclusion Temporal as minimum to TWENTY (20) Years of Reclusion Temporal, as maximum, and to pay the costs after taking into consideration the Indeterminate Sentence Law.

This Court also sentences said accused as a result of his conviction of Murder, to suffer imprisonment of TEN (10) Years and ONE (1) Day of Prison Mayor as minimum to EIGHTEEN (18) Years, EIGHT (8) Months and ONE (1) Day of Reclusion Temporal, as maximum, there being no aggravating circumstances and after taking into consideration the Indeterminate Sentence Law, and to pay the costs.

The accused is hereby directed to indemnify the heirs of the victim. Fiscal Lino Mayo, the amount of P61,000.00 representing the funeral and burial expenses of the victim and the amount of P500,000.00 representing the moral damages suffered by his widow and the loss of income as a result of the victim's death at the age of 50 years.

The subject .45 cal. pistol and the subject 4 rds. of live ammos., one cartridge case and one magazine are forfeited in favor of the government and the Deputy Sheriff of this Court is hereby directed to turn over the custody of the same to the Chief, Firearms and Explosives Unit, Camp Crame, Quezon City, for their disposition.

The accused shall be credited to the full period of his preventive imprisonment pursuant to Art. 29 of the Revised Penal Code, provided the conditions enumerated therein have been complied with.

SO ORDERED.

(p. 5, RTC Decision; p. 27, Rollo in CA-G.R. No. 10892.)

On December 29, 1992, the Court of Appeals (de Pano, Elbiñas, Gutierrez [P], JJ.), acting on the appeal interposed by accused-appellant, rendered a decision jacking up the penalties imposed on accused-appellant to reclusion perpetua for each of the two crimes committed, thusly:

ACCORDINGLY, the appealed decision is hereby MODIFIED. In Criminal Case No. C-30992 for illegal possession of firearm, the accused-appellant is sentenced to reclusion perpetua. In Criminal Case No. 30995 for murder, he is likewise sentenced to reclusion perpetua. With respect to his civil liabilities, in addition to the awards made by the trial court, the accused-appellant is hereby ordered to pay the victim's widow the sum of P50,000.00 as civil indemnity.

(p. 11, RTC Decision; p. 122, Rollo.)

The records do not show that the case was certified by the Court of Appeals to this Court pursuant to Section 13, Rule 124 of the 1985 Rules on Criminal Procedure although the records of the case were forwarded to us by the Court of Appeals on May 11, 1993 (p. 1, Rollo in G.R. No. 109993) after the assailed decision was promulgated on December 29, 1992. Seemingly, accused-appellant was served a copy of the decision of the appellate court from which no entry of judgment was made because of the proscription under Section 13, Rule 124 of the 1985

Rules on Criminal Procedure. In any event, the appeal was later accepted by us (p. 2, Rollo in G.R. No. 109993) and accused-appellant was thereupon required to file his brief following which the Solicitor General filed a brief for the People.

Accused-appellant submits that two errors supposedly committed below ought to be rectified at this stage, in that the Court of Appeals erred in:

I

. . . affirming the ruling of the trial court admitting in evidence the extrajudicial confession of the herein accused-appellant.

II

. . . affirming the judgment of the trial court finding accused-appellant guilty beyond reasonable doubt despite insufficient evidence adduced by the prosecution. (p. 10, Rollo in G.R. No. 109993)

To buttress the first point, accused-appellant makes reference to the manner the extrajudicial confession and waiver were extracted from him in the absence of a lawyer of his own choice. He maintains that he procured the services of Atty. Romeo Mendoza in the course of the custodial investigation but it turned out that it was Atty. Abelardo Torres who assisted during the interrogation upon the directive of P.Lt. Surara (p. 12, Brief for Appellant; p. 21, rollo). Accused-appellant concludes that the extrajudicial statement can not thus be utilized against him for want of competent, independent counsel of his own choice.

Section 12(1), Article 3 of the 1987 Constitution dealing with the rights of a person undergoing investigation reads:

Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

The phrase "competent and independent" and "preferably of his own choice" were explicit details which were added upon the persistence of human rights lawyers in the 1986 Constitutional Commission who pointed out cases where, during the martial law period, the lawyers made available to the detainee would be one appointed by the military and therefore beholden to the military (I Record of the Constitutional Commission 731-734; 1 Bernas. The Constitution of the Republic of the Philippines, 1987 First ed., p. 347). Yet, the apprehension of the human rights advocates then along this line hardly inspires belief in the case at bar inasmuch as there was no indication below that accused-appellant did in fact choose Atty. Romeo Mendoza to assist him while in the process of offering the inculpatory statements, to the exclusion of other lawyers. Verily, and as tersely put by the trial court:

. . . As previously stated, the execution of these two documents were testified to by Cpl. Daniel del Rosario who prepared Exhibits "P" and "Q". Exhibit "P" is actually a waiver signed by the accused by the investigator Cpl. del Rosario and by Atty. Abelardo Torres. Exhibit "Q" is actually a confession signed by the accused and by Atty. Abelardo Torres, the assisting counsel of the accused. Both Cpl. del Rosario and Atty. Torres described how the documents were prepared. Atty. Torres related how he was called and how he actually assisted the accused in the preparation of the two documents. Lt. Norberto Surara testified as to why he called Atty. Torres to assist the accused then. He identified his own sworn statement marked as Exhibit "Z" to show his participation in the execution of the two documents.

(p. 13, RTC Decision, p. 27, Rollo in CA G.R. No. 10892)

which observations were correctly sustained by the Court of Appeals, through Justice Angelina S. Gutierrez of the

Ninth Division in this wise:

The claim of herein appellant that he was assisted by counsel, not of his own choice, is belied by the records. During the custodial investigation, he failed to indicate in any manner and at any stage of the process that he wishes to consult with an attorney of his own preference before speaking or giving any statement. Indeed, there is no showing that he manifested any resistance when he was assisted by Atty. Torres. We are thus inclined to agree with the Solicitor General that the hiring of Atty. Romeo Mendoza as counsel by the appellant after the custodial investigation is an afterthought.

(p. 8 CA Decision; p. 119, Rollo in CA-G.R. No. 10892)

Withal, the word "preferably" under Section 12[1], Article 3 of the 1987 Constitution does not convey the message that the choice of a lawyer by a person under investigation is exclusive as to preclude other equally competent and independent attorneys from handling his defense. If the rule were otherwise, then, the tempo of a custodial investigation will be solely in the hands of the accused who can impede, nay, obstruct the progress of the interrogation by simply selecting a lawyer who for one reason or another, is not available to protect his interest. This absurd scenario could not have been contemplated by the framers of the charter.

Assailed as well is the testimony of Felipe Hamtig, the security guard at the VIP parking lot at the Victory Liner Compound, which accused-appellant claims should be expunged from the record considering that said witness was not thoroughly cross-examined (p. 12, Brief for Appellant; p. 22, Rollo). But what is proscribed by statutory norm (Section 1[f], Rule 115 of the Rules of Criminal Procedure) and jurisprudential precept is the absence of the opportunity to cross-examine the witness (U.S. vs. Javier, 37 Phil 449[1918]: 2 Regalado. Remedial Law Compendium, 1988 ed., p. 296) and certainly does not cover the situation where the witness had been extensively examined on material points and thereafter failed to appear (People vs. Gorospe, 129 SCRA 233 [1984]); 2 Regalado, Vide at p. 534) more so, when, in this case, the failure to complete the cross examination was not brought about by the prosecution (p. 12, RTC Decision; p. 27, Rollo in CA-G.R. 10892).

On the merits of the case, there is no need to re--emphasize accused-appellant's culpability derived from the positive open court declarations of the People's witnesses since the details indicating accused-appellant's participation have been sufficiently demonstrated to such a degree as to overcome the constitutional presumption of innocence. In the light of the mass of positive evidence adduced by the prosecution below when juxtaposed with accused-appellant's naked assertion of denial, coupled with the strange and bizarre (Nuttly would probably be the pedestrian term) behavior of accused-appellant in allegedly picking up a gun dropped by the imaginary gunman, attempting to return it to said gunman, and when the killer would not stop, firing a round to call his attention, we have no recourse but to agree with the conclusion reached by the Court of Appeals, on account of the elementary axiom in adjective law that affirmative, and, categorical testimony is stronger than negative testimony (People vs. Angeles, 218 SCRA 352[1993]). Verily, the efficacy of accused--appellant's own version that he merely picked up the gun which supposedly fell from a stranger who bumped appellant, presumably for the purpose of returning the firearm to its rightful owner (p. 7, Brief for Appellant; p. 16, Rollo) had been adequately diminished by Prudencio Motos who sat on the witness stand to particularly say that nobody bumped accused-appellant near the LRT station at Kalookan City (tsn, Aug. 31, 1989, pp. 2-4; p. 24, Brief for Appellee; p. 67, Rollo).

With respect to the penalty, we agree with the Court of Appeals that the imposable penalty is reclusion perpetua, for the illegal possession of firearm in Criminal Case No. C-30992, and another reclusion perpetua for murder in Criminal Case No. 30995, inasmuch as this action dovetails with the earlier doctrine laid down by the Court in People vs. Tac-an (182 SCRA 601 [1990]) and reiterated in People vs. Morato, (G.R. Nos. 95358-59, July 5, 1993).

WHEREFORE, as recommended by the Court of Appeals, the conviction of accused-appellant in Criminal Cases No. 30992 and 30995 is hereby AFFIRMED with the following modifications: (a) the penalty for each offense shall be reclusion perpetua and (b) the civil indemnity to be paid by accused-appellant to the heirs of the victim is increased to Fifty Thousand Pesos (P50,000.00). SO ORDERED.

Feliciano, (Chairman), Bidin, Romero, and Vitug, JJ., concur.

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