

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JIMMY ALBERCA, ACCUSED-APPELLANT.

G.R. No. 117106. June 26, 1996

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PER CURIAM:

This case is here on appeal from the judgment dated August 11, 1994[1] of Branch 104 of the Regional Trial Court of Quezon City, finding accused-appellant Jimmy Alberca guilty beyond reasonable doubt of the crime of Robbery with Homicide and Physical Injuries[2] and sentencing him to death. Accused-appellant was in addition ordered to indemnify the heirs of Felipe Climaco in the amount of P50,000.00 and to pay the Triad Security and Allied Services, Inc. the amount of P10,000.00 for the value of one (1) .38 cal. Revolver, which had been taken from the victim by one of the malefactors, and the costs.

The information against accused-appellant alleged-

"That on or about the 11th day of April 1994, in Quezon City, Philippines, the above-named accused, conspiring, confederating and mutually helping with several others whose true names and real identities have not as yet been ascertained, did then and there, willfully unlawfully and feloniously entered the compound of Rebecca Saycon located at No. 99 Tandang Sora Avenue, this City, with intent to kill and with the use of bladed weapons stabbed FELIPE CLIMACO, a security guard on his body several times and JOEY RODRIGUEZ, a house boy thereat on his chest, respectively, thus inflicting upon FELIPE CLIMACO serious and mortal wounds which were the direct and immediate cause of his death and injuries to JOEY RODRIGUEZ and thereafter said accused with intent to gain, by means of such violence and intimidation against persons, did then and there, wilfully, and unlawfully and feloniously take, rob and carry away the service firearm of FELIPE CLIMACO, 1.38 caliber revolver with Serial No. 31897 with six (6) rounds of ammunitions of still undetermined value, belonging to Triad Security & Allied Services, Incorporated, to the damage and prejudice of the heirs of Felipe Climaco, Joey Rodriguez of the injuries sustained [sic] and Triad Security & Allied Services, Incorporated.

"Contrary to law."

The crime took place in the first hour of April 11, 1994, at the compound of Pastor and Rebecca Gaskell-Saycon at No. 99 Tandang Sora Avenue, Quezon City. At that time, only Rebecca, her two sons and their "yaya" (nursemaid), security guard Felipe "Philip" Climaco and houseboy Joey Rodriguez were in the house.[3]

According to Joey's testimony,[4] he was sleeping in the servant's quarters when he was awakened around midnight by the footsteps of Climaco. He asked Climaco what the matter was ("Ano po 'yon?") but the latter did not answer as he proceeded to the closet to get a gun. Joey saw Climaco running towards the swimming pool. After a while, he heard a gunshot. He got up and followed Climaco to the swimming pool where Joey heard shouts. Intending to ask help from neighbors, Joey opened the gate when he was suddenly attacked by a person whom he identified as accused-appellant.[5] He fought back but he was stabbed. He ran towards the house. Along the way he met another person with a gun in one hand and a knife in the other, and inside the house he saw Climaco lying on the floor, wounded. Climaco was in pain and asked to be taken to the hospital. Climaco said his

gun[6] had been taken by a person whom he described was "fatter," "taller," and heavier than Joey and who wore his hair long. Thereafter, several persons, arrived, including Danilo Saycon, Arnold Agustin, and Joey's twin brother Jonathan Rodriguez, and the police. Found dead in the garden by the police was one of the intruders, who was later identified as Diego Aruta.[7]

Climaco was taken to the Lanting General Hospital but he was dead on arrival.[8] The autopsy report[9] showed that he suffered several wounds in various parts of the body, to wit:

"Fairly developed, fairly nourished male cadaver, in rigor mortis with postmortem lividity over the dependent portions of the body. Conjunctivae, lips and nailbeds were pale.

"EXTERNAL INJURIES: TRUNK AND UPPER EXTREMITIES:

"(1) Stab wound, anterior left upper thorax, 130 cms. from heel, 11 cms. from anterior midline, measuring 7 x 2.5 x 6 cms. depth, directed upwards, slightly backwards, towards midline, thru the muscle tissue.

"(2) Stab wound, anterior right thorax, 121 cms. from heel, 9.5 cms. from anterior midline, measuring 5 x 1.5 x 13 cms. depth, directed slightly upwards, backwards, slightly towards lateral, fracturing the 5th right thoracic rib along the midclavicular line, piercing the middle and lower lobes of the right lung.

"(3) Stab wound, anterior right lumbar region, 107 cms. from the heel, 11 cms. from anterior midline, measuring 4 x 2 x 12 cms. depth, directed upwards, backwards, towards midline, fracturing the 9th right thoracic rib along the midclavicular line, piercing the loops and mesenteries of small intestines and portal vein.

"(4) Stab wound, right scapular region, 126 cms. from the heel, 12 cms. from posterior midline, measuring 5 x 1.5 x 12 cms. depth, directed upwards, slightly forwards, towards midline, thru the muscle tissue.

"(5) Incised wound, anterior proximal 3rd left arm, measuring 8 x 2 cms., 4 cms. from anterior midline.

"(6) Linear abrasion, anterior left lumbar region, measuring 6 x 0.1 cm., 11 cms. from anterior midline.

"(7) Abrasion, anterior left lumbar region, measuring 0.6 x 0.3 cm., 15 cms. anterior midline.

"(8) Linear abrasion, anterior left lumbar region, measuring 7 x 0.1 cm., 4 cms. from anterior midline.

"(9) Linear abrasion, anterior proximal 3rd right forearm, measuring 5 x 0.2 cm., 4 cms. from anterior midline.

"(10) Stabwound, posterior middle 3rd right arm, measuring 2.8 x 1.2 cms. x 10 cms. depth, directed upwards, forwards, towards lateral, thru the muscle tissue.

"(11) Stab wound, posterior proximal 3rd right forearm, 4 cms. from posterior midline, measuring 2.5 x 0.8 x 5 cms. depth, directed slightly downwards, towards lateral.

"(12) Stab wound, posterior proximal 3rd right forearm, 4 cms. from posterior midline, measuring 3.5 x 1 x 5 cms. depth, directed upwards, backwards, towards midline, thru the muscle tissue.

"(13) Incised wound, dorsum of the right hand, measuring 1.7 x 0.3 cms., 6 cms. from posterior midline.

"INTERNAL FINDINGS:

"(1) Recovered from the right thorax and abdominal cavity about 1,000 cc and 500 cc of blood and blood clots, respectively.

"(2) Recovered from the stomach 1 glass of partially digested food particles consisting mostly of rice.

"CONCLUSION:

"Cause of death is stab wounds, body."

On the other hand, Joey was taken to the Quezon City General Hospital. The medico-legal certificate of the attending physician stated that Joey suffered a "stab wound, 4 cm., 5th ICS, Ant. axillary line, chest (R)" which would require medical attendance for seven days under normal condition.[10] The wound would not have caused his death even if Joey had not been given immediate medical attendance as it did not penetrate his lungs.[11]

Accused-appellant, a "taho" vendor, was arrested by NBI agents on April 17, 1994 in San Miguel, Bulacan, in the house of his aunt, Priscilla Dagandang Mabuhay. He was taken to the NBI Headquarters on Taft Avenue in Manila where he gave an extrajudicial confession in the presence of his wife Noemi and of an assigned counsel, Atty. Erlando A. Abrenica.[12]

In his confession, given on April 19, 1994, accused-appellant said that the plan to rob the Saycons had been conceived by Diego Aruta and Darius Caenghog and that he had been told of it on the night of Saturday, April 9, 1994. According to accused-appellant, the following night, April 10, 1994, at around 7:00, Jhonny "Almar" Alcober, Oscar "Lucas" Clariza and Bengie "Benny" Demson arrived in his house. (Accused-appellant and his family lived in a house which was just outside the Saycon compound in Tandang Sora, Quezon City.) Diego and Darius arrived at about 10:00 in the evening. The accused-appellant and the group drank two bottles of gin. All the while, they were looking over the wall which separated accused-appellant's house from the Saycon compound ("Sinisilip nila sa pader ang bahay ni Mr. Saycon"). At around midnight, the group went into action. Diego climbed over the wall, followed by Darius and accused-appellant and then by the three, Almar, Lucas and Benny. But they were noticed by the security guard who shot Diego Aruta. Diego charged ("sinugod"), embraced the security guard and then stabbed him. Diego was joined by Darius who also stabbed the guard at the front and by accused-appellant who stabbed the guard at the back. The security guard staggered into the house. Accused-appellant then noticed a little man coming from a small room near the gate. He followed the man and stabbed him. The man, though stricken, was able to run inside the house. Accused-appellant then escaped by going over the wall, while Darius, who took the security guard's gun, escaped through the gate. Greatly weakened by his wound, Diego was left behind, eventually to die from his gunshot wound.

After the incident, the group dispersed. Accused-appellant stayed in his house until 4:00 in the morning and then left for Pasay City. On April 13, 1994 he proceeded to Barrio Tibagan, San Miguel, Bulacan, where NBI agents eventually found him.

Accused-appellant claimed that he signed the confession (Exhibits "B-1" to "B-3") because he had been "threatened" with harm if he did not[13] and that Atty. Abrenica, who assisted him in the execution of the confession, was not his counsel of choice but had merely been provided him by NBI Special Investigator Ramon Yap.[14] Accused-appellant claimed that he could not have committed the crime because at that time he was in San Miguel, Bulacan, having gone there on April 10, 1994 to visit an aunt.[15]

The trial court dismissed accused-appellant's alibi. It held that even without the extrajudicial confession, the prosecution's other evidence established beyond reasonable doubt accused-appellant's guilt. Hence this appeal based on the following assignment of errors:

I

THE COURT A QUO ERRED IN NOT DECLARING AS INADMISSIBLE IN EVIDENCE THE EXTRA-JUDICIAL CONFESSION EXECUTED BY ACCUSED-APPELLANT.

II

THE COURT A QUO ERRED IN GIVING FULL FAITH AND CREDENCE TO THE UNRELIABLE, IMPLAUSIBLE AND UNPERSUASIVE TESTIMONY OF THE PROSECUTION WITNESSES AND IN

DISREGARDING THE EVIDENCE PROFERRED BY THE DEFENSE.

III

THE COURT A QUO ERRED IN CONVICTING ACCUSED-APPELLANT OF THE CRIME CHARGED AND IN IMPOSING THE SUPREME PENALTY OF DEATH DESPITE THE FACT THAT HIS GUILT WAS NOT PROVED BEYOND REASONABLE DOUBT.

1. Art. III (Bill of Rights) of the Constitution provides in part:

"Sec. 12. (1) 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.

"(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

"(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

xxx xxx xxx

Accused-appellant signed a document, marked Exhibit "B", which consists of two parts. The first part, marked Exhibit "B-4," shows that accused-appellant was informed that he had a right to remain silent and not to give any statement; that any statement he gave could be used against him in court; that he had a right to retain counsel of his choice and that if he could not afford to hire the services of counsel he would be given a competent and independent one. After being thus informed, he said he was nonetheless willing to give a statement and tell the truth. Thus, written in Filipino, the first part of the document reads:

"0.1 TANONG: Bago and lahat, nais kong ipaalam sa iyo Ginoong JIMMY ALBERCA Y MABUHAY na ikaw ay aming iniimbistigahan sa kasong Robbery with Homicide na nangyari noong madaling araw ng Abril 11, 1994 sa tahanan ni MR. PASTOR SAYCON sa #99 Tandang Sora Avenue, Quezon City, naiintindihan mo ba ito?

SAGOT : Opo, sir.

"02. T: Nais ko rin na ipaalam sa iyo ang iyong mga karapatan sa ilalim ng ating saligang batas, na ikaw ay may karapatan na manahimik at huwag magbigay ng anumang pahayag sa pagsisiyasat na ito at anumang pahayag na iyong sasabihin ay maaaring gamitin laban sa iyo sa harap ng ating husgado, nauunawaan mo ba ito?

S: Opo, sir. Nauunawaan ko po at nais ko pong magbigay ng aking salaysay.

0 3. T: Ibig ko rin ipaalam sa iyo na ikaw ay may karapatang magkaroon o kumuha ng iyong sariling abogado na pili mo at kung ikaw naman ay wala at hindi mo kayang magbayad ng isang abogado upang tumulong sa pagsisiyasat na ito, ikaw ay bibigyan namin ng isang abogado na may sapat na kakayahan para pangalagaan ang iyong karapatan, ito ba ay naiintindihan mo?

S: Opo, sir. Naiintindihan ko. Naririto po ngayon si Atty. ERLANDO ABRENICA at ang aking asawa na si NOEMI ALBERCA na siyang aalalay sa akin sa pagbibigay ko ng aking salaysay na ito.

"04. T: Pagkatapos mong malaman ang iyong mga karapatan sa ilalim ng ating Saligang Batas, at matapos na ikaw ay paliwanagan ng iyong abogado na si Atty. ERLANDO A. ABRENICA kaharap ang iyong asawa na si

NOEMI ALBERCA Y JATULAN, nais mo pa rin bang magbigay ng iyong pahayag sa pagsisiyasat na ito at magbigay o magsabi ng katotohanan at pawang katotohanan lamang?

S: Opo, sir. Pagkatapos kong marinig at maintindihan ang aking mga karapatan sa ilalim ng ating Saligang Batas, ako po ay kusang loob na magbibigay ng aking salaysay at magsasabi ng katotohanan at pawang katotohanan lamang sa pagsisiyasat na ito.

"05. T: Kung gayon, ikaw ba ay nakahanda na lumagda sa kasulatang pagpapaubaya sa mga karapatang mong ito?

S: Opo, sir.

"PAGPAPAUBAYA

"Ako ay pinagpayuhan ng aking mga karapatan na manahimik at magkaroon ng sariling abogado. Lubos ko itong naiintindihan at nais kong ipaubaya ang mga karapatan kong ito kaharap ang aking abogado na si Atty. ERLANDO ABRENICA at ang aking asawa na si NOEMI J. ALBERCA. Nais kong magbigay ng aking kusang loob na salaysay at alam ko rin na anumang aking sasabihin sa pagsisiyasat na ito ay maaaring gamitin laban o pabor sa akin.

"Nauunawaan ko ang aking mga karapatan at nakahanda akong sumagot sa anumang mga katanungan. Hindi ako tinakot, pinilit o pinangakuan ng anumang bagay o may ginawa laban sa akin na makakagambala sa aking malayang pagpapaubaya.

"(SGD) JIMMY ALBERCA Y MABUHAY

"Nilagdaan sa harap ni:

"(SGD) NOEMI ALBERCA Y JATULAN

"CERTIFICATION

"THIS IS TO CERTIFY that Affiant JIMMY ALBERCA Y MABUHAY voluntarily waived all his right under the law after the same were satisfactory explained to him including whatever consequences his statements may do.

(SGD) Atty. ERLANDO A. ABRENICA
#5 Goldhill Tower, Annapolis St.,
Greenhills, San Juan, Metro Manila"

Accused-appellant claims that, contrary to what is recited in the document, the rights were not read to him and that Atty. Erlando A. Abrenica, who assisted him in waiving the constitutional rights, was not his counsel of choice. But his part of Exhibit "B" was signed and thumbmarked by accused-appellant, apart from the second part, which is his confession. He did so in the presence of his counsel, Atty. Erlando A. Abrenica, and of his wife Noemi Jatulan Alberca.

Accused-appellant makes much of the fact that Atty. Erlando A. Abrenica was not presented by the prosecution. He is joined in this regard by a dissenting member of the Court who contends that Atty. Abrenica should have been presented in order to testify on the extent of services he had rendered to accused-appellant. But beyond seeing to it that the suspect in custodial investigations had been informed of his constitutional rights and that he understood these rights before he waived them-and thus insure that the waiver was knowing, voluntary and intelligent - the assigned counsel does not have anything more to do.

In this case accused-appellant does not claim he did not understand what the document states. What he claims is that the constitutional rights stated in the document were not read to him because he was merely forced to sign

that document. This is improbable, given the fact that as already stated, this document was signed not only by him but also by his wife. Additionally, accused-appellant affirmed the document before the Assistant City Prosecutor.

In *People v. Llenaresas*,^[16] it was also alleged by the defense that accused-appellant's extrajudicial confession should have been excluded from evidence because the counsel, who assisted him in executing his confession, did not testify in court. Rejecting this contention, we held:

"It is true that the prosecution did not present Atty. Meliton Angeles as a witness to confirm his presence during the custodial investigation of Jabil and Llenaresas. Such failure is not, however, fatal to the case of the Prosecution since the testimonies of the police officers and of Prosecutor Pedro S. Nantes, in conjunction with the statements found in the extrajudicial confession itself, were quite adequate to sustain the conclusion reached by the trial court."

Indeed, what is noteworthy is not the prosecution's failure to present Atty. Abrenica but accused-appellant's failure to call on his wife to corroborate his allegation of coercion. After all, accused-appellant does not claim that she, too, was made to sign under duress.

Another member of the Court also dissents, arguing that in any event it does not appear from the document signed by accused-appellant that he was informed that it was his right to have a competent and independent counsel of his own, that he had been asked whether he had one, and that he had been given time to look for one.

Question No. 3 (quoted above) shows that accused-appellant was told that it was his right to have counsel chosen by him and that if he could not afford to hire one, he would be given a competent counsel in order to protect his rights. ("[I]kaw ay may karapatang magkaroon o kumuha ng iyong sariling abogado na pili mo at kung ikaw naman ay wala at hindi mo kayang magbayad ng isang abogado upang tumulong sa pagsisiyasat na ito, ikaw ay bibigyan namin ng isang abogado na may sapat na kakayahan para pangalagaan ang iyong karapatan.")

It was unnecessary to tell accused-appellant that he had a right to have a counsel of his choice who was competent and independent since he was told he could choose his own counsel. What was necessary was to assure him that if he could not afford to hire the services of counsel he would be provided by the investigator with a lawyer who was competent and independent, which was what was done in this case. Nor was it necessary to ask him whether he had counsel or give him an opportunity to look for counsel since he had waived the right to counsel and pointed to Atty. Abrenica as the counsel he wanted to assist him in making the waiver.

There is therefore no basis for the plea of accused-appellant that his extrajudicial confession should have been excluded from the evidence because it was obtained in violation of his rights under Section 12 of Art. III.

Accused-appellant also claims that he signed the extrajudicial confession because he had been "threatened" with harm if he did not. He made this claim twice in his testimony in the trial court, once during his direct examination^[17] and again in his cross-examination.^[18] If true, this would render his confession inadmissible under paragraphs (2) and (3) of Section 12. However, apart from saying that he was "threatened," he did not elaborate as would naturally be his wont had he really been coerced to sign his confession. He did not say he was beaten up or subjected to third degree methods. He did not even say what he was told would be done to him if he refused to sign the confession. Neither did he say who allegedly made the threat.

On the contrary, the following circumstances belie his claim that he had been coerced into signing the confession:

(a) Accused-appellant signed the confession (Exhibits "B-1" to "B-3") in the presence of his wife Noemi Jatulan Alberca and counsel, Atty. Erlando A. Abrenica, who signed the confession as witnesses thereto. The confession comprises the second part of the document marked Exhibit "B". Like the first part, which is the waiver of constitutional rights, the second part was also signed by him, with his wife by his side. The presence of Noemi

could only have worked to prevent accused-appellant's will from being overborne by pressure, let alone intimidation. However, Noemi was never presented to corroborate accused-appellant's claim that he had been threatened into signing the confession.

(b) As already noted, before answering the questions of the investigator, accused-appellant was informed in Filipino of his constitutional rights to remain silent and to have competent and independent counsel of his choice and warned that any statement he gave could be used against him. Nonetheless he willingly gave a statement in order, according to him, to tell the truth.

(c) The NBI investigator Ramon Yap testified on the due execution of the extrajudicial confession and on the fact that accused-appellant was informed of his constitutional rights but he waived his rights and decided to proceed with the investigation, which lasted morning and afternoon of April 19, 1994.[19] He denied that the confession had been prepared beforehand and that accused-appellant was simply made to sign it.

(d) On April 22, 1994, accused-appellant was taken to the Assistant City Prosecutor of Quezon City, before whom accused-appellant affirmed his confession. Although accused-appellant claims that he told the prosecutor that the content of the extrajudicial confession was not true, he does not claim that he complained of any threat, intimidation or force used against him to make him sign the confession and waiver of rights.[20]

Indeed to disregard the foregoing circumstances and give credence instead to the accused-appellant's claim that he was forced to sign his confession would be to suggest that accused-appellant's wife, Noemi, the assigned counsel, Atty. Abrenica, the investigator Ramon Yap and the Assistant City Prosecutor conspired to railroad him to conviction.

The confession of accused-appellant in the case at bar is replete with details, which makes it improbable that it was not voluntarily given. This is evident in the following portion of the confession:

"09. T: Kung gayon, maaari mo bang sabihin sa akin sa pagsisiyasat na ito ang iyong mga nalalaman na may tungkol sa nangyari sa bahay ni Mr. PASTOR SAYCON doon sa #99 Tandang Sora Avenue, Quezon City, noong ika-11 ng Abril 1994?

S: Ang nasabi pong bahay ay aming pinasok, at nilooban at ninakawan, noong mga bandang alas dose ng madaling araw ng Abril 11, 1994, araw po ng Lunes.

"10. T: Maaari mo bang isalaysay ng maigi ang mga pangyayari?

S: Noon pong araw ng Sabado, petsa 9, 1994, bandana alas dose ng tanghali ay nagplano sina DIEGO ARUTA at DARIUS CAENGHOG sa aking tinitirhan sa 101 Tandang Sora Avenue, Quezon City na papasukin at pagnanakawan ang bahay ni Mr. SAYCON na nasa kabila lamang ng pader ng aking tirahan. Sinabi nila ito sa akin bandang alas 7:00 ng gabi noon ding po Sabadong iyon. Kinabukasan araw ng linggo, petsa Abril 10, 1994, bandang alas 7: 00 ng gabi ay dumating sina JHONNY ALCOVER @ "Almar," OSCAR CLARIZA @ "Lucas," at BENGIE DEMSON @ "Benny." Sila po ay nagtuloy sa aking tinitirhan at doon pa po sila naghapunan. Bandang alas 10:00 ng gabi ay dumating na rin sina DIEGO at DARIUS sa aking bahay. Kami po tatlo nila DIEGO at DARIUS ay uminom ng dalawang boteng Ginebra habang sina ALMAR, LUCAS at BENNY ay nagpapahinga sa itaas ng bahay ko. Habang kami ay nag-iinuman ay panay ang labas nila DIEGO at DARIUS at sinisilip nila sa pader ang bahay ni Mr. Saycon. Ang plano ni DIEGO ay pasukin namin ang bahay ni Mr. Saycon ng bandang ala-una petsa Abril 11, 1994 pero nainip po sina DARIUS at ALMAR at sinabi nila na pasukin namin ang nasabing bahay ng bandang alas dose."

Accused-appellant claims that this portion of his confession was supplied by Ramon Yap, the NBI investigator. Yap would not know who the members of the group were if accused-appellant did not give their names. Accused-appellant does not deny that he knows these persons. In fact it would seem that Alcover, Clariza and

Demson were accused-appellant's townmates because it was to Barogo, Leyte, where according to the confession, the three fled after the crime. On the other hand, Caenghog was from Carigara, also in Leyte, according to the confession.

2. Accused-appellant's defense is alibi. He claims that at the time of the commission of the crime on April 11, 1994 he was in San Miguel, Bulacan. He claims that he went to San Miguel, Bulacan in the morning of April 10 and stayed there until he was picked up by NBI agents on April 17.[21] Accused-appellant would have called on his relatives Priscilla Dagandang Mabuhay and Antonio Dagandang, as well as Isa Joson, a neighbor in Bulacan, to testify, except that the prosecution agreed that if presented their testimonies would corroborate accused-appellant's alibi.[22]

Now the rule is settled that the defense of alibi cannot prevail over the positive identification of the accused.[23] In this case, positive identification of accused-appellant was made by Joey Rodriguez. Joey was a houseboy of the Saycons. He engaged accused-appellant in a fight and was stabbed by the latter.[24] He did not know accused-appellant personally but neither was the latter a "total stranger" to him. For the fact was that accused-appellant's house was just outside the Saycon compound.[25] The premises were sufficiently illuminated by light coming from the terrace of the house and from the MERALCO street light which made identification of the accused-appellant possible.[26] Joey could not, therefore, have been mistaken as to the identity of accused-appellant.

Furthermore, the claim that accused-appellant was in San Miguel, Bulacan at the time of the crime was contradicted by prosecution witness Joselito Aborquez.[27] Aborquez was also a "taho" vendor. He was a neighbor of accused-appellant. Aborquez testified that he saw accused-appellant in the latter's house with three male visitors at around 7:00 p.m. of April 10, 1994[28] as he (Aborquez) and his wife went out for a stroll. The defense tried to discredit him by imputing to him a desire to eliminate a competitor since they were both "taho" vendors and by pointing out that Aborquez had given his statement to the NBI five days after the crime.[29] Aborquez denied he and accused-appellant were business rivals.[30] Even if they were, this would not be enough for him to testify falsely against accused-appellant. As for the contention that it was only on April 16, 1994 that he gave his statement to the NBI, it is sufficient to say that the reluctance of some people to be involved in criminal trials is a matter of judicial notice. Failure to volunteer what one knows to law enforcement officials does not necessarily impair a witness' credibility.[31] In any event the trial court, which had the opportunity to observe this witness' demeanor, found his testimony to be truthful and we find no reason to disregard its finding on this matter.

For the defense of alibi to prosper, accused-appellant must establish by clear and convincing evidence not only that he was not present at the scene of the crime but also that it was physically impossible for him to have been present there at the time of its commission.[32] This accused-appellant failed to do. According to him, the distance between San Miguel, Bulacan and Tandang Sora, Quezon City, where the Saycon compound is, can be negotiated in two and a half hours, and even an hour less if traffic is not heavy.[33] Hence, even assuming that accused-appellant really went to Bulacan in the morning of April 10, 1994, he could have easily returned to Tandang Sora later the same day.

It is true that none of the witnesses for the prosecution testified having seen accused-appellant stab Felipe Climaco, a point on which the defense harps.[34] There was conspiracy in this case, however, as shown by the concerted manner in which accused-appellant and his companions entered the Saycon compound and later withdrew from it and the way they attacked the security guard and the houseboy. Regardless of the part of accused-appellant in the stabbing of the guard and the wounding of the houseboy, he is liable because of the rule in conspiracy that the act of one is the act of all.[35]

Moreover, what the prosecution lacked by way of an eyewitness was made up by the circumstantial evidence in the record of this case.[36] As provided in Sec. 4 of Rule 133 of the Revised Rules on Evidence, circumstantial evidence is sufficient for conviction if (a) there is more than one circumstance; (b) the facts from which the inferences are derived are proven; and (c) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt. In this case it is established that (1) accused-appellant was present at the scene of the crime; (2) he had a bladed weapon in his possession and displayed a readiness to use the same when he stabbed Joey Rodriguez; (3) Climaco died due to multiple stab wounds; (4) bloodstains were found on the wall separating the Saycon compound from the house of accused-appellant;[37] and (5) accused-appellant fled to Bulacan thereafter. His flight is evidence of his guilt.[38] It is logical to infer from all these circumstances that accused-appellant was among those who inflicted fatal wounds on Climaco. As noted in *People v. Abitona*,[39] facts or circumstances which are not only consistent with the guilt of the accused but also inconsistent with his innocence, constitute evidence which, in weight and probative force, may surpass even direct evidence in its effect upon the court.

3. Upon the facts thus established the Court is convinced that accused-appellant is guilty of robbery with homicide. While accused-appellant and his companions failed to rob the Saycons, the fact is that they took the gun of the security guard for the purpose of gain. Since the group in addition killed the guard, the crime committed is the complex one of robbery with homicide. It is not necessary that the person robbed be the same person whom the malefactors originally intended to rob. In *People v. Ga*,[40] the accused planned to rob a house at Forbes Park in Makati. They killed the house owner, Don Julio Gonzaga, and his wife and houseboy and seriously wounded his daughter and, as help was coming, they fled without being able to take anything from the house. Instead they took a wristwatch and transistor radio belonging to a houseboy. It was held that the crime was robbery with homicide.

In *People v. Balanag*,[41] the accused entered the house of Dr. Guillermo Lopez, Sr. and then killed him for having filed a case against one of the accused. They fled after taking with them a shoulder bag of Dr. Lopez's daughter, Genoveva. This was also held to be robbery with homicide.

Nor is it necessary to show that the sole purpose was robbery and by reason thereof homicide was committed. Article 294 of the Revised Penal Code provides that there is robbery with homicide not only when "by reason of the robbery" homicide is committed but also when "on the occasion" thereof homicide is committed. If robbery and homicide are committed on the same occasion, the special complex crime is deemed committed.

Thus, in *People v. Pamintuan*,[42] the accused, who were detention prisoners, escaped from jail, killing jail guards and taking firearms from the armory. They were found guilty of robbery with homicide.

In *People v. Tolentino*,[43] three individuals were creating trouble in a store. When a policeman across the street was summoned for help by the storeowner, the three turned to him and ganged up on him. The accused took the service revolver of the policeman and shot him and then fled with the gun. It was contended that the taking of the gun was a mere afterthought and that to prove robbery with homicide the prosecution must show that the robbery preceded the killing. In rejecting this contention, we held:

"The contentions of the accused-appellant are untenable. The testimony of Lourdes Santos clearly shows that there was an intent to rob the victim of his gun. The gun was first taken from the victim before he was killed. The gun was then taken away and hidden. Nevertheless, whether or not the taking was before or after the death of the victim is of no moment in this case. It is immaterial that homicide preceded the robbery where robbery was the real motive of the culprits. (*People v. Gapasin* 145 SCRA 178). In the case at bar, the accused intended both to take the gun and kill the victim."

In another case, *People v. Hasiron*,^[44] three individuals, one of whom was the accused, went to the house of the victim and, when told that he was asleep, left with the advice that they would return. An hour later they returned. They talked with the victim outside his house and after awhile one of the trio shot the victim, another one went inside his house and took his M-16 Armalite, while the accused took the victim's service pistol which was tucked in his waist. It was contended that robbery was not the primary motive because if this had been their intention, they would have robbed the victim of his guns the first time they came. Indeed, the trial court said that the groups' purpose in looking for the victim was to "confront [him] about something." But the contention was dismissed. Finding the accused guilty of robbery with homicide, this Court said:

"[T]here is no reasonable doubt that a principal (though not necessarily the only) objective of the malefactors was to take away the firearms in the possession of the deceased policeman. They evidently knew that Abdulmonim had a firearm in his house, apart from the handgun tucked in his waist; Jerry Hayudini promptly and unerringly went inside the Aspi house and secured the M-16 armalite, while appellant pulled out the handgun from Abdulmonim's waist."

4. Now as to the penalty. Republic Act No. 7659, which took effect December 31, 1993, amended Article 294 of the Revised Penal Code as follows:

"Sec. 9. Article 294 of the same Code is hereby amended to read as follows:

'Article 294. Robbery with violence against or intimidation of persons - Penalties. - Any person guilty of robbery with the use of violence against or intimidation of any person shall suffer:

'1. The penalty of reclusion perpetua to death, when by reason or on occasion of the robbery, the crime of homicide shall have been committed, or when the robbery shall have been accompanied by rape or intentional mutilation or arson.'"

It provides in Section 23:

"SEC. 23. Article 62 of the same Code, as amended, is hereby amended to read as follows:

'Art. 62. Effects of the attendance of mitigating or aggravating circumstances and of habitual delinquency.- Mitigating or aggravating circumstances and habitual delinquency shall be taken into account for the purpose of diminishing or increasing the penalty in conformity with the following rules:

'1. Aggravating circumstances which in themselves constitute a crime specially punishable by law or which are included by the law in defining a crime and prescribing the penalty therefor shall not be taken into account for the purpose of increasing the penalty.

'1(a). When the commission of the crime, advantage was taken by the offender of his public position, the penalty to be imposed shall be in its maximum regardless of mitigating circumstances.

'The maximum penalty shall be imposed if the offense was committed by any person who belongs to an organized/syndicated crime group.

'An organized/syndicated crime group means a group of two or more persons collaborating, confederating or mutually helping one another for purposes of gain in the commission of any crime. x x x"

On the basis of these provisions, the trial court imposed on accused-appellant the death penalty.

We hold that the trial court erred in finding that accused-appellant and his companions constituted a syndicated or an organized crime group within the meaning of Article 62, as amended. While it is true they confederated and mutually helped one another for the purpose of gain, there is no proof that they were a group organized for the general purpose of committing crimes for gain, which is the essence of a syndicated or organized crime group.

The following exchange between Senator Tolentino and Senator Guingona during the deliberation on what is now Art. 62, paragraph 1(a) of the Revised Penal Code is enlightening:[45]

"Senator Guingona. May we know the difference between the offense committed by a syndicated crime group and one which is committed by conspiracy of two or more persons.

"Senator Tolentino. Mr. President, the syndicated crime is something like an offense by a group actually for gain purposes. In case of conspiracy, that is not necessarily so.

"Senator Guingona. So that, that is the only difference.

"Senator Tolentino. The difference, of course, is that in the case of syndicated crime, the group is an organized group, while such organization is not required in the case of mere conspiracy. Two or more persons just agree to commit a crime, we have a conspiracy, while in the case of a syndicate there is a group that is actually organized for crime purposes.

"Senator Guingona. How about the difference between the syndicated group and a band in case of specific crimes against persons and property?

"Senator Tolentino. Well, in the case of a band that means all of them participate in the commission of the offense. All the members, I think, four or more participate in the commission of the offense. But in the case of a syndicated crime, maybe one member of the group alone commits a crime, while in the organized group one or two members may commit the crime.

"xxx xxx xxx

"Senator Guingona. Yes, but as can be gleaned from the answer of the distinguished Sponsor, only those who actually commit the offense would be the one liable for this aggravating circumstance. Those who know but do not participate are not principals, and even if they are members of the syndicate, they will not be held liable.

"My question is: Would the same situation not arise if we say that conspiracy would qualify the offense instead of having a syndicated crime here where the member of the syndicated group, who does not participate, is not liable?

"Senator Tolentino. Mr. President, I think the concept of syndicate here is different from conspiracy. Two or more persons may conspire to commit robbery. All right. That is a particular offense. But in the case of a syndicate, the concept here is a group that is organized for commission of crimes, not only a particular crime, but of crimes. So, there is a big difference between the conspiracy and the syndicate.

"Now, if the idea of the distinguished President Pro Tempore is to make the mere fact of conspiracy an aggravating circumstance, well, that is another matter. We can have that as a proposal later on. But mere conspiracy does not constitute a syndicate as conceived in this provision that we are presenting.

"Senator Guingona. So that if two or more persons get together and decide to commit one crime only, that is not a syndicate.

"Senator Tolentino. That is not a syndicate. That is a conspiracy.

"xxx xxx xxx

"Senator Guingona. That is why under the circumstances, if there is a conspiracy to sell prohibited drugs, under the principle of conspiracy, the liability of the seller would be equally applied to the liability of the financier or to the importer.

"Senator Tolentino. But if they are not syndicate, there is no aggravating circumstance. They are all liable equally, but there is no aggravating circumstance.

"Senator Guingona. Precisely. Can we not change or instead of amending the conspiracy concept, apply that and say that conspiracy will now be considered as the qualifying aggravating circumstance? In that way, all will have the same liability, and it is up to the individual person to put up the defense and say: 'I did not know. I was a part of the syndicate, but I was only doing something that I thought was confined to this.'

"Senator Tolentino. Mr. President, if what the distinguished Gentleman means that instead of 'who belongs to an organized or syndicated crime group,' we just have to say 'who is a part of conspiracy,' that will not carry the intent of this provision. Because that means, whenever there is an agreement between two or more persons to commit a particular crime at one time, we already increase the penalty. That is not the idea of this. The idea of this proposal is that this group actually engages in the commission of crimes, not just a particular crime.

"As in the case already mentioned by the distinguished Gentleman, there is a syndicate, but one group commits the crime of selling; another group commits the crime of importing; another group commits the crime of planting drugs. There are different crimes committed by a single group that is organized for that purpose.

"But when we talk of conspiracy, we mean an agreement between two or more persons to commit a particular crime. I do not think the Gentleman can raise that to a level of making it an aggravating circumstance because there is no reason for it. The reason in the syndicated crime is that it is practically a profession that is being adopted by a group.

"Senator Guingona. Must there be more than one offense planned?

"Senator Tolentino. Maybe, several in the future, not in a particular instance.

"Here is a syndicate that may commit one crime now; another crime tomorrow; another crime two days afterwards. It is really a crime group."

What emerges from this discussion is the idea of a group of persons, at least two in number, which is organized for the purpose of committing crimes for gain. In the case at bar, while the evidence shows that accused-appellant and his companions planned to rob the Saycons, there is no evidence that they were organized for the purpose of committing crimes for gain. There was a conspiracy to commit robbery but not a syndicated or organized crime group.

The foregoing is the opinion of nine (9) members of the Court, five (5) of whom believe that the aggravating circumstance of nighttime should have been appreciated by the trial court. To them it is clear that accused-appellant and his companions waited until it was midnight of April 10, 1994 before carrying out their plan, the better to ensure its success. As earlier noted, three of accused-appellant's companions (Alcober, Clariza and Demson) arrived at 7:00 o'clock in the evening of April 10, 1994 in the house of accused-appellant. But the group did not then go into action. At 10:00 o'clock the other two (Aruta and Caenghog) arrived to join the group. Still the group did not strike. They waited until midnight before they did. All the time, the group was looking over the wall. Evidently accused-appellant and his group were waiting until the occupants of the house had retired for the night. Even viewed objectively, it can be said that nighttime greatly facilitated the commission of the crime because with people asleep, the possibility of resistance from the occupants of the house and help from the neighbors was considerably diminished. As held in *People v. Alcala*:^[46]

"While it does not positively appear that the accused sought the nighttime for the perpetration of the crime, the fact is that they at least took advantage of it, for they approached the house at an early time, and yet they did not commit the crime until late in the night. This is sufficient in order that the aggravating circumstance of nocturnity may be held to exist. (*U.S. vs. Billedo*, 32 Phil., 574.)"

Since there is no mitigating circumstance to offset the aggravating circumstance of nighttime, in the opinion of the five (5) Justices the greater penalty (i.e., death) must be imposed on accused-appellant, in accordance with Article

63, paragraph 2, no. 1 which provides that when only an aggravating circumstance is present in the commission of an offense, the penalty for which is composed of two indivisible penalties, the greater penalty should be imposed.

Since the votes of the five (5) Justices fall short of the majority of eight (8) votes needed to affirm the sentence of death of the trial court, the penalty of reclusion perpetua should be imposed on accused-appellant in accordance with Article 47 of the Revised Penal Code, as amended by Republic Act No. 7659.

On the other hand, four (4) of the Justices, while holding that accused-appellant is guilty of robbery with homicide, do not agree that nighttime was sought in this case in order to facilitate the commission of the crime and therefore they vote to impose on accused-appellant the penalty of reclusion perpetua.

The remaining six (6) other Justices believe that accused-appellant is guilty only of the separate crimes of homicide and physical injuries. Of these six, four (4) believe that nighttime should be appreciated as an aggravating circumstance, while two (2) do not think it should. Two (2) of the six (6) Justices, with whom the other four (4) concurred (so far as the two find the crimes committed to be homicide and physical injuries), expressed different reasons for their dissents. One said:

[1] "In *People vs. Galit* (135 SCRA 465 [1985]), it was held that to satisfy the constitutional guarantees accorded a person under custodial investigation, 'there should be several short and clear questions and every right explained in simple words.' The warning given to the accused-appellant in the form of two paragraphs falls short of this requirement. He was not informed by the investigator of his right to a competent and independent counsel of his choice. Neither was he asked whether he has a counsel of his choice, nor was he given an opportunity to look for one."

[2] "My reading of the *PAGPAUBAYA* suggests that he waived not just the right to remain silent but also the right to counsel. However, as can be gleaned from his certification, Atty. Abrenica did nothing as a procured lawyer; he remained as a mere stolid witness to an act of a lowly taho vendor, which could seal the latter's destiny with death. [The Constitution] requires of the counsel a meaningful presence consisting of a sincere effort to explain further to the subject the significance, import, and consequences of the waiver."

[3] "Even assuming that the extrajudicial confession spoke the truth and was not extracted by means of violence or intimidation, the denial of the accused-appellant's right to a competent and independent counsel or the absence of effective legal assistance when he waived his constitutional rights rendered the confession inadmissible pursuant to Section 12(3), Article II of the 1987 Constitution."

The other said:

[1] "The NBI ought to have given him reasonable opportunity to get a lawyer of his confidence thru his family or friends before extracting his confession. The police practice of calling any lawyer on-sight to assist a suspect under custodial investigation should be discontinued. x x x For generally, these on-sight lawyers give their services free and understandably lack the enthusiasm to defend the rights of an accused. Atty. Abrenica appears to belong to this variety. x x x The records do not show how well he advised appellant of his rights. Indeed, he did not even appear during the trial to enlighten the court of the extent of his legal services to the appellant. When the crime is heinous and punishable by death, it behooves this Court to be strict in safeguarding the right to counsel of the accused. It can spell the difference between life and death."

[2] "Even assuming that the appellant was not denied the right to counsel, x x x he should only be convicted for the separate crimes of homicide and physical injuries. x x x They failed to consummate their conspiracy because of the intervention of security guard Felipe "Philip" Climaco and houseboy Joey Rodriguez. On the occasion of said attempted robbery, accused-appellant and his companions stabbed Climaco and Rodriguez. Climaco died while Rodriguez sustained serious physical injuries. x x x

"The taking of Climaco's gun cannot be complexed with the stabbing of Climaco and Rodriguez to constitute

robbery with homicide. Before they entered the premises, the group had no intention of robbing Climaco of his gun. It was only Darius, one of the companions of accused-appellant, who seized Climaco's gun after they had killed him. His act was merely an afterthought. x x x

"The facts in *People vs. Tolentino* and *People vs. Hasiron* are different from the case at bar. In those cases, the intent to rob the victims is clear and the killing was only incidental to the robbery. x x x

"The taking [by another malefactor] of Climaco's gun constitutes theft. Be that as it may, accused-appellant cannot be held liable for theft because that is not the object of the conspiracy. The evidence shows that the group only conspired to rob the Saycon residence. The rule is that conspirators are liable only for acts done pursuant to the conspiracy. x x x"

WHEREFORE, the decision of Branch 104 of the Regional Trial Court of Quezon City, so far as it finds the accused-appellant guilty of robbery with homicide is, **AFFIRMED** with the modification that the penalty of reclusion perpetua is imposed on him for lack of necessary votes to affirm the death sentence.

SO ORDERED.

Narvasa, C.J., Padilla, Regalado, Davide, Jr., Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Francisco, Hermosisima, Jr., Panganiban, and Torres, Jr., JJ., concur.

[1] Rollo, pp. 16-32.

[2] A misnomer actually, because robbery with homicide absorbs the crime of physical injuries. *People v. Salazar*, 248 SCRA 460 (1995); *People v. Pamintuan*, 222 SCRA 716 (1993); *People v. Ga*, 186 SCRA 790 (1990); *People v. Maranan*, 13 SCRA 642 (1965).

[3] TSN of testimony of Rebecca Gaskell-Saycon, June 14, 1994, p. 19.

[4] TSN of testimony of Joey Rodriguez, June 7, 1994, pp. 5-10-, TSN, June 13, 1994, pp. 3-7.

[5] Accused-appellant wore his hair long. When Joey saw accused-appellant at the NBI on Aug. 18, 1994, a week after the incident took place, accused-appellant had his hair cut. TSN of testimony of Joey Rodriguez, June 14, 1994, p. 7-8.

[6] The gun was a .38 cal. service revolver issued to Climaco by the Triad Security and Allied Services Inc. which was hired by Pastor Saycon to guard his residence. See "Exh. C-1".

[7] Autopsy report on Diego Aruta, Vol. I of Recorded, p. 16.

[8] Per Felipe Climaco's death certificate (Exh. "E").

[9] Medico-Legal Report No. M-0631-94 (Exh. "F"), dated April 20, 1994, of Dr. Florante F. Baltazar, PNP Medico-Legal Officer and Chief Inspector.

[10] Per Medico-Legal Certificate dated April 19, 1994 (Exh. "D") of Dr. Jun Paul Castolo.

[11] TSN of Testimony of Dr. Castolo, June 28, 1994, p. 7.

[12] Exhs. "B-1" to "B-3."

[13] TSN of testimony of Jimmy Alberca, July 11, 1994, p. 7.

[14] Ibid.

[15] Id., pp. 4-5.

- [16] 248 SCRA 629 (1995) (per Feliciano, J.).
- [17] TSN of testimony of Jimmy Alberca, July 11, 1994, p. 7.
- [18] Id., p. 11.
- [19] TSN of testimony of Ramon Yap, June 21, 1994, pp. 6-7.
- [20] TSN of testimony of Jimmy Alberca, July 11, 1994, p. 17.
- [21] Id., pp. 4-6, 17.
- [22] TSN, July 18, 1994, pp. 2-3.
- [23] People v. Jose, G.R. No. 107106, Nov. 24, 1995; People v. Sanchez, G.R. Nos. 98402-04, Nov. 16, 1995; People v. Pidia, G.R. No. 112264, Nov. 10, 1995; People v. De Leon, 248 SCRA 609 (1995); People v. Armada, Jr., 225 SCRA 644 (1993).
- [24] TSN of testimony of Joey Rodriguez, June 14, 1994, p. 9.
- [25] Id., p. 12.
- [26] Id., June 7, 1994, p. 11; Id., June 13, 1994, p. 5.
- [27] Spelled "Avorque" in his affidavit dated April 16, 1994. Exh. "G."
- [28] TSN of testimony of Joselito Aborque, July 19, 1994, p. 5. See also Aborque's Affidavit, Exh. "G".
- [29] Id., p. 11.
- [30] Id., p. 8.
- [31] People v. De Leon, 248 SCRA 609 (1995).
- [32] People v. Dalanon, 237 SCRA 607 (1994).
- [33] TSN of testimony of Jimmy Alberca, July 11, 1994, pp. 10-11.
- [34] Appellant's Brief, p. 10, Rollo, p. 49.
- [35] People v. Calegan, 233 SCRA 537 (1994).
- [36] People v. Balansi, 187 SCRA 566 (1990); People v. Duero, 136 SCRA 514 (1985); People v. Pamintuan, 127 SCRA 820 (1984).
- [37] TSN of testimony of Rebecca Gaskell-Saycon, June 14, 1994, p. 27.
- [38] People v. Daniel, 236 SCRA 499 (1994).
- [39] 240 SCRA 335 (1995).**
- [40] 186 SCRA 790 (1990) (Per Gancayco, J.).
- [41] 236 SCRA 474 (1994) (per Puno, J.).
- [42] 236 SCRA 236 (1994) (per Quiason, J.).
- [43] 165 SCRA 495 (1988) (per Gutierrez, Jr., J.).

[44] 214 SCRA 586 (1992) (per Feliciano, J.).

[45] TSN of Senate Deliberation on S.B. No. 891, May 12, 1993, pp. 8; 10-12. (*Italics supplied*)

[46] 46 Phil. 739, 743-44 (1922).

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