PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PACIFICO BARELLANO @ "JUNIOR," ACCUSED-APPELLANT.

G.R. No. 121204. December 02, 1999

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

Epifanio Cabales and his friends Simplicio Garong, Benjamin Alico and Jose Dayola were drinking tuba in the evening of August 14, 1993 at the side of the auditorium in the middle of Barangay Tigbao, Matalom, Leyte when he was approached from behind and shot at the right side of the head with a .38 (paltik) revolver. He fell down on the ground face up. As he lay thus, his assailant fired a second shot which hit him at the right side of his upper lip. Thereafter, the malefactor walked away and then fired a third shot in the air.

For the fatal shooting of Epifanio Cabales, accused Pacifico Barellano @ "Junior" was indicted for Murder in an Information[1] alleging –

> That on or about the 14th day of August, 1993, at around 8:45 o'clock in the evening, in the municipality of Matalom, Province of Leyte, Philippines and within the jurisdiction of this Honorable Court, the above-named accused employing treachery and evident premeditation and with intent to kill, did then and there willfully, unlawfully and feloniously shot (sic) EPIFANIO CABALES with a handgun, particularly a .38 (paltic) Revolver which the accused had provided himself for the purpose thereby causing and inflicting upon the victim [a] fatal gunshot wound on his head causing the immediate death of Epifanio Cabales, to the damage of his heirs.
>
> CONTRARY TO LAW.

Upon arraignment, accused, assisted by counsel, pleaded not guilty to the crime charged.[2] The case then proceeded to trial after which the court a quo rendered judgment,[3] the dispositive portion of which reads:

> PREMISES CONSIDERED, the court finds accused, Pacifico Barellano, Jr. guilty for (sic) the crime of murder as principal and sentences him to undergo a penalty of Reclusion Perpetua, there being no aggravating circumstance attending the commission of the crime, and to indemnify the heirs of the victim P50,000.00 as indemnity; to pay the amount of P6,300.00 as actual damages and P50,000.00 as moral damages, with cost[s].
>
> SO ORDERED.[4]

Dissatisfied, accused interposed this appeal alleging that –

> "1. THE LOWER COURT ERRED IN NOT GIVING DUE COURSE TO THE DEFENSE OF ACCUSED."
>
> "2. THE LOWER COURT ERRED IN NOT ACQUITTING THE ACCUSED-APPELLANT IN THIS CASE."

The prosecution's version of the incident is summed thus by the Solicitor General in the People's brief:[5]

> On August 14, 1993, Felix Timkang went to the market in Barangay Tigbao, Matalom, Leyte to buy household

> needs. At around 6:30 in the evening, he met his friends Simplicio Garong, Benjamin Alico, Jose Dayola and the victim Epifanio Cabales. They started drinking tuba at the side of the auditorium located at the middle of barangay Tigbao, Leyte near the market place.[6] At about 8:45 p.m., Timkang saw appellant Pacifico "Jun" Barcellano approach the victim from behind and shot the victim. Appellant hit the victim at the right side of his head. The victim fell down on the ground face up. Appellant fired a second shot (sic) which hit the victim at the right side of his upper lip. Thereafter, appellant walked away. Then appellant fired a shot in the air.[7]
>
> On August 15, 1993, Dra. Radegunda Uy conducted an autopsy on the body of the victim Epifanio Cabales and prepared an autopsy report.[8] According to Dra. Uy, the first gunshot wound which penetrated the skull cavity of the head is fatal. The second gunshot wound which is located in the mouth inside the oral cavity penetrating the cranial fossa and with an exit wound in the middle back portion of the head is also fatal. The cause of death is hypovolemic shock, which means is (sic) severe blood loss and severe hemorrhage, secondary to [the] gunshot wound on the head.[9]

Accused-appellant had a different story to tell. He testified that he is the common law husband of Catalina Lucido who lives in Barangay Tigbao, Matalom, Leyte.[10] He met Catalina in Cebu City where the latter lived from 1982 to June 1993 and has three (3) children by her.[11] Catalina returned to Barangay Tigbao, Matalom, Leyte in 1993.[12] Desirous of seeing his in-laws, he went for the first time to Barangay Tigbao, Matalom, Leyte sometime in November 1992, however, staying there for only one night.[13] He denied being at the scene of the crime at the time of its commission. He also denied having met Epifanio Cabales, Felicidad Cabales, Fernando Amoto, Felix Timkang, Simplicio Garong or Benjamin Alico on that fateful day.[14] He testified that at around 2:00 o'clock in the afternoon of August 14, 1993, he was at the house of his parents-in-law.[15] Together with Guillermo Lucido, his father-in-law, and several companions, they went to Barangay Tigbao, Matalom, Leyte, because it was market day and they went there to bet on the cockfights.[16] They left Tigbao at around 5:30 p.m. and went home to Sitio Victory, Barangay Tigbao, Matalom, Leyte, where they bought some drinks and had a drinking spree while the others played pool on a billiard table which was at the side of the house of accused-appellant's father-in-law.[17] They started drinking at about 6:00 p.m. and ended at around 1:00 a.m. the next day.[18] Accused-appellant got so drunk that he fell asleep on a bench near the place where he and his companions were drinking and woke up later at past 6:00 a.m.[19] After waking up, he went to the house where his wife was living and stayed at Sitio Victory for the entire day of August 15, 1993.[20] On August 16, 1993, he went together with his father-in-law to Matalom, Leyte because the latter was summoned by the police and investigated on who shot "Anciong" Cabales.[21]

Accused-appellant's defense is alibi. In insisting on his innocence, he claims that: 1.] the testimony of prosecution witness Felix Timkang which is the only one material from among the testimonial evidence presented, is not corroborated by any witness; 2.] the autopsy report which is a machine copy of the original should not be admitted in evidence despite the admission of said document by accused-appellant's counsel during trial; 3.] Jose Dayola was not presented as a witness, neither did he execute an affidavit regarding the shooting incident; and 4.] the trial court dwelt on the weakness of accused-appellant's defense rather than on the weakness of the prosecution evidence.

No rule in criminal jurisprudence is more settled than that alibi is the weakest of all defenses and should be rejected when the identity of the accused has been sufficiently and positively established by eyewitnesses to the crime.[22] In other words, alibi can not prevail over the positive identification of the accused by the prosecution witnesses[23] as in this case.

Assuming arguendo that prosecution witness Felix Timkang's testimony is indeed uncorroborated, the alleged singularity of his testimonial declarations does not make them any less credible. The Court has consistently stated, time and again, that the testimony of a single witness, if positive and credible, will suffice to sustain a judgment of

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conviction even in a charge for murder.[24] As aptly stated in People v. Romeo Hillado:[25]

> "... [W]ell-settled in our jurisprudence is the principle that the testimony of a single witness, if straightforward and categorical, is sufficient to convict.[26] Thus, the testimony of a lone eyewitness, if found positive and credible by the trial court, is sufficient to support a conviction especially when the testimony bears the earmarks of truth and sincerity and had been delivered spontaneously, naturally and in a straightforward manner.[27]Witnesses are to be weighed, not numbered.[28] Evidence is assessed in terms of quality not quantity. Therefore, it is not uncommon to reach a conclusion of guilt on the basis of the testimony of a lone witness. For although the number of witnesses may be considered a factor in the appreciation of evidence, preponderance is not necessarily with the greatest number and conviction can still be had on the basis of the credible and positive testimony of a single witness."[29]

It needs be stressed in this regard that Timkang is no ordinary witness testifying on circumstantial matters. He is an eyewitness who positively identified accused-appellant as the malefactor who shot Epifanio Cabales twice:

> "Q. Mr. Felix Timkang, could you still remember where were you on the day of August 14, 1993?
>
> A. I can remember, sir.
>
> Q.
>
> Where were you then?
>
> A. In Brgy. Tigbao.
>
> Q. What municipality?
>
> A. Matalom, Leyte.
>
> Q. What were you doing then at Brgy. Tigbao, Matalom, Leyte?
>
> A. I was there to buy what is needed in the house like salted fish, sugar and others.
>
> Q.
>
> Would you tell us what was the occasion in your barangay on August 14, 1993?
>
> A. It is market day.
>
> Q. While you were at Brgy. Tigbao, Matalom, Leyte, buying some provisions, what happened next if any?
>
> A. Epifanio was shot.
>
> Q. Prior to the incident did you not meet any friends of yours in the taboan or market place?
>
> A. I have (sic).
>
> Q. Who were your friends whom you said you met?

A. Simplicio Garong, Benjamin Alico, Epifanio Cabales and Jose Dayola.

Q.

When you meet (sic) with your friends Simplicio Garong, Benjamin Alico, Epifanio Cabales and Jose Dayola, what then did you do if any?

A We were drinking.

Q. Where did you had (sic) your drink?

A At the side of the auditorium.

Q. And where is this auditorium particularly located?

A. At the middle of Brgy. Tigbao.

Q. Is this auditorium near to (sic) the taboan or market place?

A. Yes, sir.

Q.

What kind of drink did you drink?

A. Tuba, sir.

Q. For how long did you have a drink with your friends?

A. We started 6:30 and we finished at 8:45.

Q. On this length of time from 6:30 to 8:45, was there any unusual incident that happened in the course of your drinking?

A. There was.

Q. By the way, when you said 6:30, was this in the morning or in the evening?

A. In the evening.

Q.

Will you please tell this Honorable Court what happened?

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A. Epifanio was shot.

Q. When was (sic) that shooting incident happened?

A. I don't know what time it was.

Q. You said you ended your drink[ing] at about 8:45 in the evening. Will you please tell this Court what happened when you were able to end your drink at 8:45?

A. After our drinking spree that was the time that Epifanio was shot.

Q. Will you please tell this Honorable Court how the incident happened when Epifanio was shot?

A. He was sitting.

Q.

Who was this whom you are referring to was sitting?

A. Epifanio.

Q. Did you see the person who shot Epifanio Cabales while he was sitting?

A. Yes, sir, I know.

Q. Who was the person who shot Epifanio Cabales?

A. Jun.

Q. Do you know the real name of Jun?

A. No, sir.

Q.

Why do you know this person named Jun?

A. Because he had been there quite a long time.

Q. Could you recognize this person named Jun?

A. Yes, sir.

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Q. If this person named Jun is inside the courtroom, would you please point him out?

A. Yes, sir.

Q. Will you please point him out?

A. Yes, sir. (Witness pointed out to a person inside the courtroom who when asked stood up and identified himself as Pacifico Barellano.)

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PROSECUTOR RUBIO:

Q. In this place where you were drinking, was it dark or lighted?

A. There was.

Q. What kind of lamp was used?

A. 2 kerosene lamps.

Q. Were there other lights aside from the 2 kerosene lamps?

A. There was still.

Q. What kind of lamp was it?

A. Hasag.

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Q.

You said that the victim Epifanio Cabales was shot. Where did the accused Pacifico Barellano came (sic) from when Epifanio Cabales was shot?

A. He came from the side.

Q. How many times was Epifanio shot?

A. Twice, sir.

Q. During the first shot where was Epifanio hit?

A. (Witness pointed to the left side of his head.).

Q. What happened to Epifanio Cabales when he was first hit by the first shot?

A. He fell down.

Q.

What was his position when he fell down?

A. He was lying on the ground with face up.

Q. When Epifanio Cabales fell down, what happened next if any?

A. He shot again Epifanio Cabales.

Q. Was Epifanio hit by the second shot?

A. Yes, sir.

Q. Where was he hit?

(The witness pointed to the right side of his upper lip).

Q.

After the second shot hitting Epifanio Cabales, what happened next if any?

A. He went away.

Q. Whom are you referring to he?

A. Jun.

Q. The accused in this case?

A. Yes, sir.

Q. When he left, what happened next if any?

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A. When he left away he fired a shot again.

Q.

To what direction did the accused fire his shot?

A. Upward.

Q. He used his left hand?

(Witness demonstrated by raising his right hand.)"[30]

Timkang, whose highest educational attainment is Grade 3, could understand neither English nor Cebuano and only speaks the Matalomon dialect,[31] remained consistent particularly in stressing the proximity between him and accused-appellant when the latter shot the victim, despite being intensely grilled by the trial court itself, viz:

"COURT:

Q. You said that you saw the victim shot, how far were you from the victim when he was shot?

A. (The witness demonstrated estimated about one [1] meter.)

Q. You want to convey that the victim was sitting at the table?

A. We were sitting.

Q. Sitting before the table?

A. It is only a small table.

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Q.

You stated that the first shot was hit to (sic) the victim, did he fell (sic) to the ground?

A. He fell to the ground.

Q. So he did not fall to the table where he was there?

A. He fell to the ground.

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Q. How as you said when he was shot were you at the side of the person since you were facing the victim and this person according to you came to the side, which side did the victim came (sic)?

A. The right side.

Q. And so if you said that Epifanio was shot and fell to the ground are you implying that he fell to the ground?

A. Yes, sir.

Q.

Are you sure he was not fell (sic) to the table?

A. Yes.

Q. Was Epifanio sat at the bench (sic)?

A. Small stool (bangkito).

Q. What kind of stool?

A. That is a round one.

Q. When he sat on the stool it could probably [be] that he was falling down to the right or to the left or backward?

A. He cannot fall towards the left because there is a table.

x x x x x x x x x

Q.

Now, if you cannot tell the time when the person shot the victim or fired the gun can you tell how far is the person when he shot the victim? Please demonstrate.

A. (The witness demonstrated to a measurement more or less two [2] feet).

Q. You mentioned about an acacia tree, in your drawing will you put an acacia tree?

A. Yes, Your Honor.

Q. How far is the acacia tree to the table where you were drinking?

A. More or less five (5) armslength.

Q. Now if you will compare from the time you saw the person who shot the victim which is nearer from the distance.

A. The distance between the man I saw.

Q.

From exactly where did he came (sic) from when you first saw him from the house or from the tree?

A. I did not know where he came from.

Q. All you can say is that you saw him walking towards the victim?

A.
Yes.

Q. More or less from the victim to where you are sitting how far?

A. More or less five (5) feet.

Q. Now please tell the court from where you are sitting to the time you first saw him how far?

A. More or less two (2) armslength.

(The witness pointed to Miss Lina Tabinas which is estimated [to be] about more or less three (3) meters to 10 feet.)

Q.

Can you tell the court from the first time that you saw the accused how far was it, just by pointing to an object until he fired [the] gun how far was the distance he travel (sic)?

A. More or less three (3) armslength.

(The witness demonstrated by appointing (sic) Atty. Mario Alonzo about 9 feet [away] more or less)

Q. Was this person walking fast or even walking towards the victim?

A. He was just walking normally sir.

Q. Of course you have not noticed that he [could] have carried a gun?

A. No I did not.

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Q.

When you said that you saw him shot (sic) of course you saw the gun in his hands?

A. Yes, Your Honor.

Q. You did not observe where it came from?

A. No."[32]

Contrary, however, to the claim of accused-appellant, Felix Timkang's account was corroborated by Benjamin Alico who was also drinking tuba with Timkang, Simplicio Garong, Jose Dayola and the victim at the time the latter was shot. He testified thus on direct examination:

Q. You said you heard a gun burst where did it originate?

A. At the back of where we were drinking.

Q. In what particular place in relation to this sketch?

A. At the back of Simplicio Garong.

Q. Upon hearing of the gun burst what did you observe if any?

A. It was Epifanio Cabales.

Q. What happened to Epifanio?

A. He fell down.

Q.

When Epifanio fell down after the gun burst what happened if any?

A. When I saw Epifanio fell (sic) down whose mouth was opened he was shot again in the mouth.

Q. How many times did you hear the gun burst?

A. Twice.

Q. On the second gun burst you said that the gun pointed to the mouth of Epifanio Cabales did you see who pointed the gun?

A. Yes, I saw.

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Q. Did you recognize him?

A. Yes, sir.

Q.

Who was he?

A. Barellano.

Q. Do you know the first name of Barellano?

A. Yes, Junior.

Q. Are you referring to Pacifico Barellano alias Junior, the accused in this case?

Q. Why do you know him?

A. Because he was married to a woman from Barangay Tigbao.

Q. If Pacifico Barellano Junior is here in [the] court room can you point him out?

A. Yes, sir.

Q.

(The witness demonstrated by pointing to a man sitting in the bench wearing LPJ and when he was asked his name, he stood up and answered that his name is Pacifico Barellano, Jr.)

Q. You said Mr. Alico that the accused Pacifico Barellano alias Junior fired at the victim Epifanio Cabales twice, after firing the second gun shot what happened if any?

A. He went away.

Q. To what directions (sic) did he go?

A. Towards the coop.

Q. What happened next if any?

A. When he reached the coop just infront (sic) of the acasia tree he fired again a gun shot."[33]

Alico remained steadfast and unwavering on cross-examination despite persistent efforts by defense counsel to

throw him off track:

"Q.

Did you see the accused shot (sic) the victim?

A. Yes, sir.

Q. Now, when you heard the first gun shot how far was the assailant from the victim?

A. He was near, about 1 meter.

ATTY. VITERBO:

Take a distance from this person to where the assailant was.

INTERPETER:

(The witness demonstrated by standing towards the back of the victim which is about 1 meter.)

ATTY. VITERBO:

Q.

Show to the court how did the assailant shot (sic) the victim?

A. (The witness demonstrated by pointing his right hand towards the back of the victim.)

Q. And the victim was hit on the left side of his head?

A. Yes, sir.

Q. Point to me what part of the head he was hit?

A. (Witness pointed to the left portion, back of the ear of the victim).

Q. Mr. Witness, at the first gun shot, of course you were afraid?

A. Yes, sir, that is why I remained standing.

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Q.

You mean you did not take cover or hide?

A. No, sir.

Q. And because you were afraid you cannot also remember what happened next?

A. I remember because I saw the person shot.

Q. From that position the assailant at the back of the victim while you were at the left of the victim at a distance of one meter from the edge of the table you saw the shooting incident from the left side of the assailant?

A. Yes, sir.

Q. So what you saw is the side view of the assailant?

A. Yes, sir.

Q.

Since you only meet (sic) the assailant twice accordingly during the proposal of marriage and second during the vesper day of Brgy. Tigbao, what remarkable identity of the assailant [is it] that makes you remember?

A. Yes, sir.

Q. What is the identifying mark [with] which you can clearly identify the assailant?

A. His face, sir.

Q. What is in his face that makes you remember when you were only looking at the side view of his face.

A Because he turned down the moment that Epifanio Cabales fell down and was shot again.

Q. When the victim fall (sic) down was his face down or face up.

A. Sidewise."[34]

To reiterate, accused-appellant's defense of alibi is the weakest of all defenses for it is easy to contrive and difficult to prove.[35] A positive identification of the accused made by an eyewitness prevails over such a defense.[36] In this case, not one, but two eyewitnesses identified accused-appellant as the assailant of the victim.

Furthermore, it is not enough to prove that herein accused-appellant Barellano was somewhere else when the crime was committed. It must likewise be shown that he was so far away as to make it impossible for him to have been physically present at the locus criminis or its immediate vicinity at the time of its commission.[37] In other

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words, it is elementary that for alibi to prosper, the requirements of time and place must be strictly met.[38] This means that the accused must not only prove his presence at another place at the time of the commission of the offense but he must also demonstrate that it would be physically impossible for him to be at the scene of the crime at that time.[39]

Accused-appellant's alibi does not preclude his presence at the locus criminis. Indeed, there has been no showing that it was physically impossible for accused-appellant to have been at the scene of the crime at the time of its commission. On the contrary, accused-appellant himself admitted that Sitio Victory where he allegedly was at the time of the incident is just one (1) kilometer away from Barangay Tigbao and the latter could be reached by walking.[40] Sitio Victory and Barangay Tigbao was also connected by a road which can be negotiated by jeeps and motorcycles.[41] Suffice it to state in this regard that these circumstances, in fact, serve to underscore the possibility of accused-appellant's presence rather than his absence at the scene of the crime.

Article 248 of the Revised Penal Code, before its amendment by Republic Act No. 7659 on December 31, 1993 provides that:

> "ART. 248. Murder. – Any person who, not falling within the provisions of Article 246 shall kill another, shall be guilty of murder and shall be punished by reclusion temporal in its maximum period to death if committed with any of the following attendant circumstances:
> 1. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity.
>
> 2. In consideration of a price, reward or promise.
>
> 3. By means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a railroad, fall of an airship, by means of motor vehicles, or with the use of any other means involving great waste and ruin.
>
> 4. On occasion of any calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic or other public calamity.
>
> 5. With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse."

Treachery is alleged in the information filed against accused-appellant. There is treachery when the offender commits any of the crimes against persons, employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make.[42] The essence of treachery is a swift and unexpected attack on the unarmed victim without the slightest provocation on the part of the victim.[43] Thus, this Court ruled that even a frontal attack can be treacherous when it is sudden and the victim is unarmed.[44] Treachery may also be appreciated even when the victim is warned of the danger to his person if the execution of the attack made it impossible for the victim to defend himself or to retaliate.[45] For treachery to be a qualifying circumstance, it must be shown that: 1.] the malefactor employed means of execution that affords the person attacked no opportunity to defend himself or to retaliate; and 2.] such means of execution was deliberately or consciously adopted.[46]

In the case at bar, there is no question that treachery qualified the crime to murder because when herein accused-appellant Barellano stealthily approached the unarmed victim from the back, the latter did not have any inkling whatsoever of the impending danger that lurked behind him and was rendered totally defenseless against his assailant when accused-appellant shot him in the head from behind. This attack by herein accused-appellant came without warning and without the slightest provocation on the part of the victim. It also was deliberate and unexpected, affording the hapless, unarmed and unsuspecting victim no chance to resist or to escape. Given the

foregoing circumstances, this Court is convinced of the treacherous nature of the assault.[47] This Court has held that when the assailant consciously employed means of execution that gave the person attacked no opportunity to defend himself, much less retaliate, which tended directly and specially to insure the plan to kill the victim,[48] the crime is qualified to murder.

However, it is unnecessary to consider the presence of evident premeditation although this has likewise been alleged in the information, for the trial court itself did not consider this circumstance. In any event, for evident premeditation to be appreciated, there must be proof, as clear as the evidence of the crime itself, of the following elements thereof, to wit: 1.] the time when the accused decided to commit the crime; 2.] an overt act manifestly indicating that he has clung to his determination; and 3.] sufficient lapse of time between the decision and the execution to allow the accused to reflect upon the consequence of his act.[49]

The records are bereft of evidence of any of the above requisites of evident premeditation. There is absolutely no proof of the time accused-appellant decided to commit the crime. Neither is there any showing how the accused-appellant Pacifico Barellano planned the killing of the victim, Epifanio Cabales. Nor is there any showing how much time elapsed before executing his plan. Absent all these, evident premeditation can not be appreciated.[50]

The argument that the xerox copy of the autopsy report should not be admitted in evidence inspite of his counsel's admission of its authenticity will not extricate accused-appellant from his predicament. Even assuming ex gratia argumenti that the document is indeed inadmissible in evidence and is not given any evidentiary weight, still it would not alter the judgment of conviction because accused-appellant was found guilty primarily on the basis of the testimonies of the eyewitnesses who positively identified him as the perpetrator of the crime. The fact of death was sufficiently established through the credible and straightforward testimonies of these eyewitnesses who saw the victim die as a result of the gunshot wounds inflicted by accused-appellant.

At any rate, it is a trifle too late at this time for accused-appellant to raise the question of the autopsy report's supposed lack of evidentiary value because he never objected to its admissibility when it was offered in evidence and was, in fact, admitted to be genuine by his counsel during trial. The rule is that evidence not objected to is deemed admitted and may be validly considered by the court in arriving at its judgment. Particularly instructive on this point is Quebral v. Court of Appeals,[51] where the Court said that:

> "Even if it were true that Exhibit K consisted of a mere photocopy and not the original of the petitioner's letter, petitioner nevertheless failed to make a timely objection thereto. As to when an objection to a document must be made, the Court ruled in Interpacific Transit, Inc. v. Aviles:[52]
> "Objection to the documentary evidence must be made at the time it is formally offered, not earlier. The identification of the document before it is marked as an exhibit does not constitute the formal offer of the document as evidence for the party presenting it. Objection to the identification and marking of the document is not equivalent to objection to the document when it is formally offered in evidence. What really matters is the objection to the document at the time it is formally offered as an exhibit."

In the case at bench, no such timely objection was ever made. Consequently, the evidence not objected to became the property of the case, and all the parties to the case are considered amenable to any favorable or unfavorable effects resulting from the evidence. x x x"

Accused-appellant can not likewise seek refuge behind the claim that the failure of the prosecution to present Jose Dayola as a witness raises the presumption that if produced his testimony would not be favorable to the prosecution, As pointed out by the Court in the recent case of People v. Jose Silvestre y Cruz :[53]

> "Appellant cannot fault the prosecution for failure to present Bernadette Matias. The prosecution has [the]

> discretion to decide on who to call as witness during trial and its failure to do so did not give rise to the presumption that "evidence willfully suppressed would be adverse if produced"[54] since the evidence was at the disposal of both parties.[55] If the defense believed that the testimony of Bernadette Matias was important to its case, it should have insisted on presenting her as witness, or as appellee points out, made a tender of excluded evidence of the witness in question under Section 40, Rule 132 of the Rules of Court. The same may be said of Joanna Santiago, another supposed witness to the shooting, who was also not presented."

Furthermore, it must be pointed out that Dayola's testimony would merely be corroborative of that of the two eyewitnesses. Suffice it to state in this regard that the adverse evidentiary presumption invoked by accused-appellant does not apply when testimony of the witness not produced would only be corroborative.[56] In other words, no prejudicial inference can arise against a party who fails to call a witness where the only object of presenting him would be to produce corroborative or cumulative evidence.[57]

All told, the issues raised herein boil down to the primordial question of credibility. As is so oftenly repeated by this Court, the matter of assigning values to declarations on the witness stand is best and most competently performed by the trial judge who had the unmatched opportunity to observe the witnesses and to assess their credibility by the various indicia available but not reflected on the record. The demeanor of the person on the stand can draw the line between fact and fancy. The forthright answer or the hesitant pause, the quivering voice or the angry tone, the flustered look or the sincere gaze, the modest blush or the guilty blanch, these can reveal if the witness is telling the truth or lying through his teeth.[58] Time tested is the rule that the trial judge's assessment of the credibility of witnesses and their testimonies is not disturbed on appeal in the absence of any clear showing that some facts or circumstances of weight or substance, which would have affected the result of the case, have been overlooked, misunderstood or misapplied. In his appeal, accused-appellant has not given this Court sufficient reasons to deviate from this doctrine.

At the time of the commission of the crime, the penalty for Murder under Article 248 of the Revised Penal Code was reclusion temporal in its maximum period to death. It must be pointed out in this regard that even if the killing was attended by treachery thus qualifying it to murder, the imposition of death is not automatic. It is an elementary rule in criminal law that where two indivisible penalties are prescribed for an offense and there is neither mitigating nor aggravating circumstances in the commission of the crime, the lesser penalty shall be applied.[59] Thus, Article 63 of the Revised Penal Code provides, inter alia, that:

> "ART. 63. Rules for the application of indivisible penalties. – In all cases in which the law prescribes a single indivisible penalty, it shall be applied by the courts regardless of any mitigating or aggravating circumstances.
>
> In all cases in which the law prescribes a penalty composed of two indivisible penalties, the following rules shall be observed:
>
> x x x x x x x x x1. When there are neither mitigating nor aggravating circumstances in the commission of the deed, the lesser penalty shall be applied. x x x" (italics supplied)

Thus, in the absence of any mitigating or aggravating circumstance, the penalty was correctly imposed in its medium period, which is reclusion perpetua.[60]

The sum of P50,000.00 awarded by the court a quo as civil indemnity ex delicto, without further need of proof of damage, is proper as it follows prevailing jurisprudence and is in line with the policy of the Court.[61] With regard to actual damages, the trial court found that the wife of the victim spent P2,800.00 for the embalming of the victim's corpse and P3,500.00 for the wake.[62] Since accused-appellant does not question this finding of the trial court, he is liable to private complainants in the said amount as actual damages.[63]

This Court, however, can not sustain the award of moral damages in the absence of sufficient evidence to support

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it.[64] It is elementary that for moral damages to be properly adjudicated in criminal offenses resulting in physical injuries, there must be a factual basis for the award thereof.[65]

WHEREFORE, with the sole modification that the award of Fifty Thousand (P50,000.00) Pesos by way of moral damages be DELETED, the Decision appealed from is AFFIRMED in all respects.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Puno, Kapunan, and Pardo, JJ., concur.

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[1] Record, p. 15; Rollo, p. 7.

[2] Record, p. 19.

[3] Ibid., p. 220.

[4] Id., p. 225.

[5] Rollo, pp. 89; 93-94.

[6] TSN, 24 May 1994, pp. 3-5.

[7] Ibid., pp. 9-11.

[8] TSN, 22 March 1994, p. 4.

[9]Ibid., pp. 9-10.

[10] TSN, 24 October 1994, pp. 10-12.

[11] Ibid., p. 11.

[12] Id.

[13] Id., pp. 11-13; 5 December 1994, pp. 3-4.

[14] TSN, 24 October 1994, p. 17; 5 December 1994, p. 7.

[15] TSN 24 October 1994, p. 16; 5 December 1994, p. 7.

[16] TSN 24 October 1994, p. 16.

[17] Ibid., pp. 17-18.

[18] Id., pp. 18-19.

[19] Id., p. 19.

[20] Id., p. 20.

[21] Id., pp. 20-21.

[22] People v. Jimmy Mijano y Tamora, G.R. No. 129112, 23 July 1999, citing People v. Sancholes, 271 SCRA 527 [1997]

[23] People v. Nomer Velasco y Pangilinan, G.R. No. 125016, 28 May 1999, citing Arceno v. People, 256 SCRA 569 [1996]

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[24] People v. Erick Macahia, et al., G.R. No. 130931, 19 May 1999, citing People v. Batidor, G.R. No. 126027, 18 February 1999; People v. Navarro, G.R. No. 129566, 7 October 1998; People v. Daranan, G.R. No. 126046, 7 August 1998, 294 SCRA 27; People v. Tulop, et al., 289 SCRA 316 [1998]; People v. Obello, 284 SCRA 79 [1998]; People v. Salcedo, 273 SCRA 473 [1997].

[25] G.R. No. 122838, 24 May 1999.

[26] People v. Navarro, G.R. No. 129566, 7 October 1998; People v. Villanueva, 284 SCRA 501 [1998]; People v. Hayahay, 279 SCRA 567 [1997].

[27] People v. Tulop, supra.

[28] People v. Villanueva, supra, citing People v. de Roxas, 241 SCRA 369 [1995].

[29] People v. Tulop, supra, citing People v. Dela Cruz, 207 SCRA 632 [1992].

[30] TSN, 24 May 1994, pp. 2-7, 8-10.

[31] TSN, 25 May 1994, pp. 15-16.

[32] TSN, 25 May 1994, pp. 26-28, 30-32.

[33] TSN, 8 August 1994, pp. 10-12; Italics supplied.

[34] TSN, 13 September 1994, pp. 9-11; Italics supplied.

[35] People v. Godofredo Marfil, 30 April 1999, p. 5, citing People v. Realin, G.R. No. 126051, 21 January 1999, p. 13.

[36] People v. Pepito Tejero y Caranzo, et al., G.R. No. 128892, 21 June 1999, p. 15, citing People v. Nialda, 289 SCRA 521 [1998].

[37] People v. Mariano Verde, G.R. No. 119077, 10 February 1999, citing People v. Anonuevo, 262 SCRA 22 [1996] and People v. Supremeo, 244 SCRA 548 [1995].

[38] People v. Fuertes, G.R. No. 126285, 29 September 1998, 296 SCRA 602, citing People v. Tazo, 260 SCRA 816 [1996].

[39] People v. Fuertes, supra, citing People v. Alcantara, 254 SCRA 384 [1996].

[40] TSN, 5 December 1994, pp. 10, 12.

[41] Ibid., pp. 13-15.

[42] Article 14, par. 16, Revised Penal Code.

[43] People v. Romeo Belaro, G.R. No. 99869, 26 May 1999, citing People v. Lascota, 275 SCRA 591 [1997]; People v. Quinao, 269 SCRA 495 [1997]; and People v. Ombrog, 268 SCRA 93 [1997].

[44] People v. Chavez, 278 SCRA 230 [1997]; People v. Dansal, 275 SCRA 549 [1997]; People v. Tampon, 258 SCRA 115 [1996].

[45] People v. Landicho, 258 SCRA 1 [1996].

[46] People v. Hipolito Bermudez, et al., G.R. No. 129033, 25 June 1999, p. 11, citing People v. Cabodoc, 283 SCRA 187 [1996]; People v. Hubilla, 252 SCRA 471 [1996]; and People v. Landicho, supra.

[47] See People v. Turingan, 282 SCRA 424 [1997]; People v. Jagolingay, 280 SCRA 768 [1997]; People v. Agunias, 279 SCRA 52 [1997]; People v. Zamora, 278 SCRA 60 [1997]; People v. Lascota, supra.

[48] People v. Freddie Balisoro, G.R. No. 124980, 12 May 1999, citing People v. Cayabyab, 274 SCRA 387 [1997]; People v. Serzo, Jr., 274 SCRA 553 [1997]; People v. Baydo, 273 SCRA 526 [1997]; and People v. Israel, 272 SCRA 95 [1997].

[49] People v. Rodrigo Maldo, et al., G.R. No. 131347, 19 May 1999, citing People v. Castillo, 289 SCRA 213 [1998]; People v. Albao, 287 SCRA 129 [1998]; People v. Sumalpong, 284 SCRA 464 [1998]; People v. Quinao, supra; People v. Pedro Academia, Jr. y Baldado @ "Jun," G.R. No. 129251, 18 May 1999, pp. 6-7, citing People v. Baydo, supra.

[50] People v. Bahenting, G.R. No. 127659, 24 February 1999.

[51] 252 SCRA 353 [1996].

[52] 186 SCRA 385 [1990].

[53] G.R. No. 127573, 12 May 1999, p. 20.

[54] Sec. 3 [e], Rule 131, Rules of Court.

[55] People v. Andal, 279 SCRA 495 [1997].

[56] People v. Castaneda, 252 SCRA 247 [1996].

[57] People v. Paule, 261 SCRA 649 [1996].

[58] People v. Mayor Antonio L. Sanchez, et al., G.R. Nos. 121039-45, 25 January 1999; People v. Leonardo Bihison y Silencio, et al., G.R. No. 132024, 17 June 1999, p. 20.

[59] People v. Gilbert Basao y Maca and Pepe Iligan y Salahay, G.R. No. 128286, 20 July 1999, pp. 39-40; People v. Hilario Rebamontan @ Ayong, G.R. No. 125318, 13 April 1999, p. 17.

[60] People v. Rodrigo Agsunod, Jr. y Bibay, G.R. No. 118331, 3 May 1999, p. 17, citing Article 64 Revised Penal Code.

[61] People v. Virgilio Borreros, G.R. No. 125185, 5 May 1999, citing People v. Espanola, 271 SCRA 689 [1997]; People v. Gregorio, 255 SCRA 380 [1996], citing People v. Sison, 189 SCRA 643 [1990]; People v. Solis, 291 SCRA 529 [1998].

[62] RTC Decision, p. 5; Rollo, p.

[63] Dionisia Artajos v. Court of Appeals and People of the Philippines, G.R. No. 131113, 21 April 1999, p. 11.

[64] People v. Antonio v. Eribal, G.R. No. 127662, 25 March 1999, p. 10.

[65] People v. Loreto Noay, G.R. No. 122102, 25 September 1998, 296 SCRA 292, citing People v. Alas, 274 SCRA 310 [1997].

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