

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EDWIN DE VERA Y GARCIA, RODERICK GARCIA Y GALAMGAM, KENNETH FLORENDO AND ELMER CASTRO, ACCUSED, EDWIN DE VERA Y GARCIA, APPELL...

G.R. No. 128966. August 18, 1999

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

When is a lookout deemed an accomplice and when a conspirator? What is the distinction between the two?

Statement of the Case

These are the main questions passed upon by the Court in resolving the present appeal, which assails the March 12, 1997 Decision[1] of the Regional Trial Court of Quezon City (Branch 57) in Criminal Case No. Q-92-31323, finding Appellant Edwin De Vera and Accused Roderick Garcia guilty beyond reasonable doubt of murder and sentencing them to reclusion perpetua.

In an Information dated June 11, 1992, Assistant City Prosecutor Tirso M. Gavero charged with murder Appellant Edwin De Vera, together with Roderick Garcia and two other persons who were subsequently identified during the trial as Kenneth Florendo and Elmer Castro. The crime was allegedly committed as follows:

"That on or about the 8th day of June, 1992, in Quezon City, Philippines, the said accused, conspiring [and] confederating [with] and helping xxx two (2) other persons, did then and there wilfully, unlawfully and feloniously with intent to kill, with evident premeditation, treachery and use of superior strength, attack, assault and employ personal violence upon the person of one FREDERICK CAPULONG y DIZON, by then and there shooting him with the use of a .22 cal. with trade mark 'Paspas Armas' bearing SN-29069 with five (5) pieces of caliber 22 ammo inside, hitting him between his eyes and striking him with the use of a baseball bat in the mouth, thereby inflicting upon him serious and mortal wounds which were the direct and immediate cause of his untimely death, to the damage and prejudice of the heirs of the said Frederick Capulong y Dizon." [2]

On July 9, 1992, Assistant City Prosecutor Enrico P. Bringas filed a Motion to Amend the Information to include the use of a .32 caliber firearm in the killing of Frederick Capulong. The trial court granted the Motion, and the Amended Information now reads as follows:

"That on or about the 8th day of June, 1992, in Quezon City, Philippines, the said accused, conspiring [and] confederating [with] and helping xxx two (2) other persons, did then and there wilfully, unlawfully and feloniously with intent to kill, with evident premeditation, treachery and use of superior strength, attack, assault and employ personal violence upon the person of one FREDERICK CAPULONG y DIZON, by then and there shooting him with the use of a .22 cal. with trade mark 'Paspas Armas' bearing SN-29069 with five (5) pieces of caliber 22 ammo inside and a .32 cal. firearm of still undetermined make, hitting him between his eyes and striking him with the use of a baseball bat in the mouth, thereby inflicting upon him serious and mortal wounds which were the direct and immediate cause of his untimely death, to the damage and prejudice

of the heirs of the said Frederick Capulong y Dizon."[3]

On their arraignment, Appellant Edwin De Vera[4] and Roderick Garcia[5] pleaded not guilty. The other two accused were at large. Trial in due course proceeded only against De Vera and Garcia. Thereafter, the trial court rendered the assailed Decision, the dispositive portion of which reads:

"WHEREFORE, judgment is hereby rendered finding the accused EDWIN DE VERA y GARCIA and RODERICK GARCIA y GALAMGAM guilty beyond reasonable doubt of the crime of MURDER and they are hereby accordingly sentenced to suffer reclusion perpetua, including all its accessory penalties; to indemnify the heirs of Frederick Capulong y Dizon, as follows:

- a) P50,000.00, as death indemnity;
- b) P211,670.00, as compensatory damages;
- c) P600,000.00, as indemnification for loss of earning capacity;
- d) P500,000.00, as moral damages;
- e) Interest at the legal rate on a) and b), hereof from the filing of the information until full payment; and,
- f) Costs of suit."[6]

Only Edwin De Vera filed a Notice of Appeal.[7]

The Facts

Version of the Prosecution

In its Brief,[8] the Office of the Solicitor General presented the following narration of facts:[9]

"As earlier stated, the prosecution presented an eyewitness in the person of Bernardino Cacao, a resident of Denver Loop Street, Filinvest II, Quezon City before he moved to No. 58 Elisa Street, Caloocan City. He was residing at Filinvest II, together with his wife and children, at the time of the incident on June 28, 1992 in the house owned by David Lim. He was then employed at a Kodak branch in Caloocan City, while his wife served as secretary of the homeowners association.

"About 1:30 in the afternoon of June 8, 1992, while bringing out the garbage, the witness saw a car passing by, driven by victim Frederick Capulong together with four (4) other passengers. He knew the victim by name who was a resident of the subdivision. He recognized and identified two of the passengers as Kenneth Florendo and Roderick Garcia, both familiar in the subdivision.

"Cacao did not at first notice anything unusual inside the car while it passed by him, but then he heard unintelligible voices coming from the car as it was cruising around Denver Loop Street, a circular road whose entrance and exit were through the same point (ibid, p. 12). His curiosity taking [the] better part of him, Cacao walked to the opposite side of the road from where he saw the car already parked. Moments later, he saw the victim dragged out of the car by Florendo and brought to a grassy place. Florendo was holding a gun (ibid, p. 13). Upon reaching the grassy spot, Florendo aimed and fired the gun at the victim, hitting him between the eyes. After the shooting, Florendo and his companions fled in different directions.

"When he submitted a sworn statement to the investigating prosecutor, Cacao attached a sketch of the crime scene prepared by police officers, indicating therein his relative position at the time of the incident. While testifying in court, Cacao identified Garcia and pointed to appellant as among the companions of Florendo.

"Ten minutes later, or about 2:40 in the afternoon, the desk officer of the Investigation Division, Station 5, Central Police District, Quezon City received a report about the shooting incident from a security guard of the subdivision. The officer immediately dispatched a team to Filinvest II, composed of PO2 Armando Garcia,

PO3 Armando Junio, and PO3 Jovencio Villacorte, to investigate and gather evidence (TSN, p. 5, September 13, 1993). A security guard guided the team to the corner of Denver and Doña Justina Streets, site of the shooting, where they discovered blood stains and damaged grass (ibid, p. 6). The guard informed them that the victim was rushed to the East Avenue Medical Center by other security guards. The policemen then found a color red sports car with plate no. NBZ 869, with engine still running and its doors opened. They recovered inside the car several class cards and a license belonging to one Ric Capulong, who was later identified as Frederick Capulong.

"The policemen went around the subdivision to look for possible suspects. They came upon a person wearing muddied maong pants and white t-shirt 'standing and walking around' near the clubhouse of the subdivision. When asked his name, the person identified himself as Edwin de Vera, herein appellant. Explaining the mud stains on his pants, appellant declared that he was a victim of a hold-up. Suspicious [of] his conduct, the policemen brought appellant to Station 5 and turned him over to the desk officer for investigation.

"Another prosecution witness, SPO3 Mario Guspud, a police investigator since 1989, was assigned to investigate the shooting of Frederick Capulong. He was assisted by SPO4 Pablito Selvido, SPO2 Armando Rivera, SPO3 Jovencio Villacorte, SPO3 Rolando Gacute, SPO3 Danilo Castro and other police officers.

"Upon receiving his assignment, SPO3 Guspud immediately went to the East Avenue Medical Center where he saw the victim lying inside the intensive care unit receiving medical treatment. The victim was unconscious. After conferring with the victim's parents and relatives, SPO3 Guspud returned to Station 5. On his arrival, the desk officer referred appellant to him for questioning. He was told that appellant was picked up near the crime scene acting suspiciously. When appellant was asked about his participation in the shooting, he was reluctant at first to talk, but later relented after SPO3 Guspud told him that his conscience would bother him less if he would tell the truth.

"Without any hesitation, appellant admitted being [with the] group which perpetrated the crime, and implicated Roderick Garcia. He was then persuaded to accompany a group of policemen to the residence of Garcia, which turned out to be at Doña Justina Street, Filinvest II Subdivision. Finding Garcia at home, SPO3 Guspud informed him that he was implicated by appellant [in] the crime. He was then invited to the station to shed light [on] the incident. Garcia consented.

"At Station 5, SPO3 Guspud interviewed appellant and Garcia. In the course of the interview, Garcia revealed the place where he hid a .22 caliber gun, black t-shirt and black cap. According to Garcia, Florendo asked them to wear black t-shirts. With the revelation, SPO3 Guspud, SPO2 Rivera, SPO3 Gacute and SPO3 Castro, together with the suspects, went back to the subdivision and proceeded to a grassy portion near the boundary of Filinvest II and San Mateo, Rizal. The place was near a creek and about 50 meters away from the residence of Garcia (TSN, pp. 9-14, September 30, 1993). Truly, the policemen recovered a .22 caliber revolver, black t-shirt and black cap (TSN, pp. 12-13, August 24, 1993). While there, SPO3 Guspud and SPO2 Rivera prepared a sketch of the crime scene to reflect the explanations and answers given by appellant and Garcia in response to their questions. As identifying marks, SPO3 Gacute placed his initials 'OG' (acronym for his first name and family name) between the handle and cylinder of the gun, and on the neck of the t-shirt, as well as in the inner lining of the black cap.

"From the crime site, the policemen and the suspects returned to Station 5 where SPO3 Guspud asked them if they were willing to give their written statements, to which they assented. Consequently, they were brought to the Integrated Bar of the Philippines, Quezon City Chapter, at Malakas Street, Diliman, Quezon City. They were then introduced to Atty. Confesor Sansano, the [c]hairman of the Free Legal Aid of the IBP. Also, present at that time were appellant's relatives, including his mother and sisters, and other lawyers of the IBP.

"SPO3 Guspud inquired from them if they would agree to be assisted by Atty. Sansano, 'a competent lawyer.' They replied in the affirmative. Thereafter, the two conferred with Atty. Sansano.

"Atty. Sansano, a rebuttal witness of the prosecution, testified that upon arrival of the suspects [i]n his office, he requested the policemen, as a matter of policy, to step outside the building in order to assure that no pressure would be exerted on the suspects even by their mere presence (TSN, p. 6, November 6, 1996). After they left, Atty. Sansano interviewed the suspects for about twenty minutes, informing them of their rights under the constitution and inquiring from them if they indeed wanted to give voluntary statements. To the query, the suspects answered positively. They also affirmed their earlier declaration that they were willing to be assisted by the IBP (ibid, pp. 8-9). He further advised them of their right during the investigation to answer or not to answer the questions which they thought would incriminate them, but they retorted that they fully understood their right.

"Satisfied that they were not coerced or threatened to give their statements, Atty. Sansano requested the suspects to show their upper bodies to enable him to determine any telltale signs of torture or bodily harm. Finding no such signs, he then summoned the policemen to re-enter the building. The investigators readied two typewriters and each suspect was assigned to an investigator. He served as the lawyer of the suspects, cautioning them against answering questions that they did not understand, and to seek xxx a clarification, if needed.

"According to Atty. Sansano, the interrogation took place in his office, a single separate room from where his five staff members were visible. He sat between the two tables used by the investigators for typing the questions and answers, involving himself from beginning to end of the investigation until the signing of the statements. He never left the office to attend to anything else, consistent with [the] standing policy of the IBP to properly safeguard the rights of suspects during investigation.

"He recalled that the investigators first typed the headings of the statements, then informed the suspects before starting the investigation about their rights under the constitution, specifically, the right of the suspects to have a lawyer of their own choice; if not, the police would provide them with one who would assist them; that they could answer or refuse to answer the questions. The investigators also asked him if he was willing to serve as counsel of the suspects. They also asked the suspects if they were willing to accept him as their counsel. They agreed expressly by saying: 'Oho.'

"SPO3 Guspid investigated Garcia while SPO4 Selvido investigated appellant. They conducted the question and answer investigation in Pilipino. The statement of appellant was marked as Exhibit O and that of Garcia was marked as Exhibit N. The statements were signed by the suspects and Atty. Sansano.

"For his part, SPO4 Selvido declared that SPO3 Guspid requested his help in taking the statements of the suspects (TSN, p. 4, June 29, 1993). He took the statement of appellant in the presence of Atty. Sansano. Before proceeding, he reminded appellant of the constitutional warnings, consisting of four (4) questions under the heading 'Pangunahing,' to which the latter gave positive answers. The statement was signed by appellant and Atty. Sansano. After taking down the statement, he turned over appellant to SPO3 Guspid.

"Following the investigation, the policemen brought the suspects to the Philippine National Police Crime Laboratory for paraffin testing. The result: 'both hands of Edwin de Vera y Garcia @ Boy/Bong gave positive results [in] the test for gunpowder nitrates while both hands of Roderick Garcia y Galamgam @ Deo gave negative result [in] the test for gunpowder nitrates.'

"After coming from the crime laboratory, SPO3 Guspid contacted the mother of the victim to get her own statement. Next, he obtained a death certificate and prepared a referral to the Quezon City Prosecution Office which was signed by Senior Inspector Ernesto Collado, Chief of the Station Investigation Division. During the inquest, the prosecutor asked the suspects some clarificatory questions.

"Surveillance and follow-up operations were conducted against Florendo and his other companion, Elmer Castro. However, the two were never arrested and brought to trial."

Version of the Defense

Appellant claims that he had no part in the killing, and that it was Kenneth Florendo who had shot the victim. He avers that he merely accompanied to Filinvest the other accused and Florendo, who was his friend, upon the latter's request. A few hours after the shooting incident, appellant was picked up by the police, who subsequently tortured and coerced him into signing his Statement regarding the incident. The trial court summarized appellant's evidence in this wise:[10]

"Edwin de Vera admitted that, as of June 8, 1992, he and Kenneth Florendo were already close friends for about a year, sometimes sleeping in the latter's house at No 106 Kamias Road, Quezon City. His own residence at the time was at No. 7 Bignay Street, Project 2, Quezon City. That was also the address of Elmer Castro, his and Kenneth's friend.

"Edwin had slept in Kenneth's house on Kamias Road from June 6 to June 8, 1992 and went home at 7:00 am of June 8[th]. Later at around 10:30 am, Kenneth passed by Edwin's house to invite him back to [the former's] house that morning and to bring Elmer along. Kenneth mentioned that he, his girlfriend, and Deo, who were then with him, would be going somewhere first. Deo, or Roderick Garcia, was another friend of Kenneth's."

"Edwin and Elmer later went to and arrived at Kenneth's house at 11:00 am. Kenneth, his girlfriend, and Deo were already taking lunch, and invited the two to lunch. After lunch, Kenneth asked Edwin to go with him to Filinvest without telling why. It was Deo who mentioned to Edwin that Kenneth was going to see a friend. Edwin was not aware if Kenneth had also asked the others to go with him to Filinvest, but the four of them - Kenneth, Edwin, Elmer, and Deo - later proceeded to Filinvest [i]n Kenneth's car. Edwin sat at the back seat. The time was past 12:00 noon.

"Kenneth drove his car. Upon reaching Filinvest, Kenneth stopped at a house and the four of them alighted in front of the house. Edwin did not know whose house it was. Kenneth and Elmer told Edwin and Deo to wait near the car because they were going to see a friend. At that point in time, Edwin knew the person[,] whom Kenneth and Elmer went to see[,] by name, never having met him personally before then. From his conversation with Deo, Edwin found out that the house was where Deo stayed.

Then, Edwin heard the voices of Kenneth and his friend and they appeared to be arguing ('x x x x parang nagtatalo sila'). The voices came from some twenty-two (22) meters away. Not before long, Edwin also heard a gunshot which came from where Kenneth and Elmer had gone to. He was shocked because he was not used to hearing gunfire. Frightened, he panicked and ran away from the place. His singular thought while running was to get out of Filinvest. Deo also ran away.

Edwin denied that either he or Deo carried any firearm on that occasion.

Edwin was arrested by the police at past 2:00 pm when he was already outside of Filinvest subdivision in front of Batasan. He was brought to Station 5 where four (4) persons in civilian attire tortured him by forcing him to lie down on a bench, tying his feet together and binding his hands from his back with handcuffs, and then covering his face with a piece of dirty cloth into which water was poured little by little into his face and mouth, while one of them sat on his thighs. This maltreatment lasted for about 20 or 25 minutes, because they wanted him to admit 'something' and to name 'my companions' but he refused to admit or to name anyone. They next took him outside to a mango tree where they repeated his ordeal for 30 minutes. At one point during the torture, a policeman untied his feet and hands and poked a gun to his temple, telling him to run as it was his chance to escape, but he did not escape because he could see that they were merely frightening him.

None of the policemen told him that he could xxx get a lawyer[;] instead, one of them, whose name he [did] not know, told him that 'I should listen only to them and not to anyone else.' He claimed that he saw one [of] his tormentors in court, and he identified him as police officer Rivera. Guspido did not participate in his torture, because he merely took down his statement. His tormentors were not drunk or under the influence of drugs, but

Guspid seemed to be under the influence of drugs when he took his statement because of his troubled appearance.

Edwin was not advised to inform or call any of his relatives. Before his torture, his request to contact his relatives or lawyer was turned down. His intimidation continued ('x x x x puro pananakot and ginawa nila sa akin'). After his torture at the mango tree, he was returned inside and thrown into a cell, where he remained until the following day (June 9[th]). During the night, an inmate named Cesar boxed him once in the upper body upon instruction of a policeman. He was not given any dinner.

At around noontime of the next day (June 9[th]), Edwin was taken out of the cell and brought to the IBP office by police officers Guspid and Selvido. Also with them were Deo Garcia and two other police officers. At the IBP office, the officers talked with one of the lawyers there, whom Edwin came to know to be Atty. Sansano only after the lawyer was introduced ('present') to him and Deo. That was the first he met and saw Atty. Sansano.

Atty. Sansano informed both Edwin and Deo that they had the choice whether to talk or not. Edwin could not make any comment because 'wala po ako sa sarili ko'. Then, Atty. Sansano warned Edwin substantially that: 'Alam n'yo ba na ang salaysay na ito ay maaring hindi ninyo sumpaan,' referring to the statement taken from Edwin by officers Guspid at around past 8 pm until 9 pm on the day before (June 8, 1992) at the police station. He was not assisted by counsel, and had no relatives present. Guspid appeared to be 'like drunk or tipsy,' when he took down Edwin's statement that night.'

At the IBP office, Edwin's and Deo's statement were taken separately by Guspid and Selvido, respectively. At the time, Edwin and Deo were about six (6) meters from each other, but he could hear what was being asked of Deo. Guspid asked the questions and typed both the questions and his answers, which were given in Tagalog. All the while, Atty. Sansano was inside his office, which was about seven (7) meters away from where he and Guspid were situated. The office of Atty. Sansano was separated by a divider, so that he could not see what Atty. Sansano was doing at the time. After the questioning, he signed a paper which he was not able to read. He did not see Atty. Sansano sign the paper.

x x x x x x x x

On July 14, 1992, Edwin executed a so-called salaysay ng pagbabawi ng sinumpaang salaysay, which he swore to before Prosecutor Tobia of Quezon City, for the purpose of recanting his statements given at the precinct in the evening of June 8, 1992 and at the IBP office on June 9, 1992 on the ground that they were given under coercion, intimidation, and in violation of his constitutional rights."

Ruling of the Trial Court

Based on the testimony of Eyewitness Bernardino Cacao, the trial court ruled that it was indeed Kenneth Florendo who had actually shot the victim, Roderick Capulong. It convicted appellant as a principal, however, because "the scientific and forensic findings on the criminal incident directly and substantially confirmed the existence of conspiracy among the four [accused], namely, Kenneth Florendo, Elmer Castro, Edwin de Vera, and Roderick Garcia." [11]

The Issues

Appellant submits for the consideration of this Court the following alleged errors:

"I

THE TRIAL JUDGE ERRED IN NOT FINDING THAT PROSECUTION EYE-WITNESS BERNARDO CACAO HAD TESTIFIED TO NO CRIMINAL ACT OF APPELLANT;

II

THE TRIAL JUDGE ERRED IN FINDING AND CONCLUDING THAT THERE WAS A CONSPIRACY

TO KILL THE VICTIM AND THAT APPELLANT WAS A CO- CONSPIRATOR;

III

THE TRIAL JUDGE ERRED IN ADMITTING EXHIBIT 'O', ALLEGED STATEMENT OF APPELLANT; AND IN NOT DECLARING THE SAME AS AN INADMISSIBLE EVIDENCE CONSIDERING THE BARBARIC MANNER UNDER WHICH IT WAS EXTRACTED/OBTAINED FROM THE APPELLANT WHICH VIOLATED THE LATTER'S CONSTITUTIONAL RIGHTS;

IV

THE TRIAL COURT ERRED IN NOT FINDING AND DECLARING THAT THE PROSECUTION HAS NOT PROVED THE APPELLANT'S GUILT BEYOND REASONABLE DOUBT AND IN NOT ACQUITTING THE APPELLANT."[12]

In the main, the Court will resolve three questions: (1) the sufficiency of the prosecution evidence, (2) the admissibility of appellant's extrajudicial statement, and (3) the nature of his liability.

The Court's Ruling

The appeal is partly meritorious. Appellant should be convicted only as an accomplice, not as a principal.

First and Third Issues:

Sufficiency of Prosecution Evidence

and Appellant's Liability

Because the first and the third questions mentioned above are interrelated, they shall be discussed jointly.

Eyewitness Account

In ruling that there was conspiracy between Florendo, Castro, Garcia and Appellant De Vera, the trial court relied mainly on the testimony of Eyewitness Cacao. Specifically, it based its conclusions on the following facts: appellant was seen with the other accused inside the victim's car; the victim was clearly struck with a blunt object while inside the car, and it was unlikely for Florendo to have done it all by himself; moreover, it was impossible for De Vera and Garcia to have been unaware of Florendo's dark design on Roderick.

We disagree. It is axiomatic that the prosecution must establish conspiracy beyond reasonable doubt.[13] In the present case, the bare testimony of Cacao fails to do so.

Cacao testified that he saw Appellant De Vera in the car, where an altercation later occurred. Thereafter, he saw Florendo drag out of the vehicle an apparently disabled Capulong and shoot the victim in the head moments later.

Cacao's testimony contains nothing that could inculcate appellant. Aside from the fact that he was inside the car, no other act was imputed to him. Mere presence does not amount to conspiracy.[14] Indeed, the trial court based its finding of conspiracy on mere presumptions, and not on solid facts indubitably indicating a common design to commit murder. Such suppositions do not constitute proof beyond reasonable doubt. As the Court has repeatedly stated, criminal conspiracy must be founded on facts, not on mere surmises or conjectures. Clearly, Cacao's testimony does not establish appellant's culpability.

Appellant's Extrajudicial
Statement

Aside from the testimony of Cacao, the prosecution also presented Appellant De Vera's extrajudicial statement, which established three points.

First, appellant knew of Kenneth Florendo's malevolent intention.

"T:

Ito bang balak ni Kenneth para patayin itong si Frederick ay alam mo ba ito at pumayag kang maging kasapakat nito?

S:

Sinabi po niya ito sa akin. Hindi po ako pumayag. Pero noong araw na iyon ay nagkahiyaan na lamang at napilitan akong sumama."^[15]

Second, appellant's companions were armed that day, a fact which revealed the unmistakable plan of the group.

"T:

Ikaw ba ay mayroong dalang armas noong hapon na iyo[n]?

S:

Wala po akong dalang armas. Pero itong si Kenneth ay mayroong dalang dalawang baril[,] sina Deo at Elmer ay wala. Pero noong naroroon na kami sa lugar ay ibinigay ni Kenneth ang isang baril niya kay Deo at itong si Elmer ay mayroong nang dalang baseball bat."

Third, he cooperated with the other accused in the commission of the crime by placing himself at a certain distance from Kenneth and the victim in order to act as a lookout. This is clear from the following portion of his statement:

"S:

Kabarkada ko po si Kenneth at dalawang araw po akong nakitulog sa kanila at noong araw ng June 08, 1992 ay sinabihan ako ni Kenneth Gumabao na huwag raw akong uuwi, dahil [mayroon] daw po kaming lakad. Pagkaraan ng ilang oras ay dumating naman itong si Roderick Garcia @ Deo at may sinabi sa kanya itong si Kenneth at sinabi naman ito sa akin ni Deo na kaysa raw maunahan siya ni Frederick Sumulong [sic] ay uunahan na raw po niya ito. Umalis po itong si Kenneth na kasama ang kanyang nobya at itong si Deo, para ihatid ang kanyang [sic] sa hospital at bago sila umalis ay sinabihan ako ni Kenneth na sunduin ko raw itong si Elmer Castro at magbhihai [magbihis] na rin daw ako at pagdating nila ay xxx lalakad na raw po kami. Mga ilang oras pa ay sinundo ko na itong si Elmer Castro at pagdating namin sa bahay nila Kenneth ay naroroon na itong si Kenneth at Deo. Matapos magpalit ng damit itong si Kenneth ay sumakay na kami sa kanilang kotse at nagtuloy sa kanilang katabing bahay at doon ay kumain kami. Pagkatapos noon ay umalis na kami at nagtuloy sa F[i]l-Invest. P[a]gdating namin sa isang lugar doon sa medyo malayo-layo sa bahay nila Deo ay bumaba na itong si Deo at Elmer at sila ay nagpunta doon sa lugar ng pinagbarilan para kunin ang bayad sa utang ni Fred[er]ick Capulong sa tiyuhin ni Deo. P[a]gkaraan ng ilang minuto ay sumunod po kami ni Kenn[e]th sa lugar at ako ay naiwan nang medyo malayo-layo sa lugar upang tignan kung mayroong darating na tao. Samantalang si Kenneth ay lumapit kina Deo at Frederick at kasunod noon ay nagkaroon ng sagutan itong si Kenneth at Frederick at nakita kong inaawat ni Deo itong si Kenneth. Hindi nakapagpigil itong si Kenneth at nasipa niya s[i] Frederick at kasunod noon ay binunot niya ang kanyang baril na kalibre .38 at pinaputukan niya ng isang beses itong si Frederick na noong tamaan ay natumba sa lupa. Lumapit si Elmer kina Kenneth habang binabatak ni Kenneth itong si Frederick at kasunod po noon ay lumapit sa akin si Deo at sinabihan ako na tumakbo na kami. Tumakbo na po kami, pero ako po ay nahuli ng mga security guard ng Subdivision at itong si Deo ay nahuli naman sa kanilang bahay. Itong sina Kenneth at Elmer ay hindi pa nahuhuli."^[16]

Appellant an Accomplice,
Not a Conspirator

In other words, appellant's presence was not innocuous. Knowing that Florendo intended to kill the victim and

that the three co-accused were carrying weapons, he had acted as a lookout to watch for passersby. He was not an innocent spectator; he was at the locus criminis in order to aid and abet the commission of the crime. These facts, however, did not make him a conspirator; at most, he was only an accomplice.

The Revised Penal Code provides that a conspiracy exists when "two or more persons come to an agreement concerning the commission of a felony and decide to commit it." [17] To prove conspiracy, the prosecution must establish the following three requisites: "(1) that two or more persons came to an agreement, (2) that the agreement concerned the commission of a crime, and (3) that the execution of the felony [was] decided upon." [18] Except in the case of the mastermind of a crime, it must also be shown that the accused performed an overt act in furtherance of the conspiracy. [19] The Court has held that in most instances, direct proof of a previous agreement need not be established, for conspiracy may be deduced from the acts of the accused pointing to a joint purpose, concerted action and community of interest. [20]

On the other hand, the Revised Penal Code defines accomplices as "those persons who, not being included in Article 17, [21] cooperate in the execution of the offense by previous or simultaneous acts." [22] The Court has held that an accomplice is "one who knows the criminal design of the principal and cooperates knowingly or intentionally therewith by an act which, even if not rendered, the crime would be committed just the same." [23] To hold a person liable as an accomplice, two elements must be present: (1) the "community of criminal design; that is, knowing the criminal design of the principal by direct participation, he concurs with the latter in his purpose;" and (2) the performance of previous or simultaneous acts that are not indispensable to the commission of the crime. [24]

The distinction between the two concepts needs to be underscored, in view of its effect on appellant's penalty. Once conspiracy is proven, the liability is collective and not individual. The act of one of them is deemed the act of all. [25] In the case of an accomplice, the liability is one degree lower than that of a principal.

Conspirators and accomplices have one thing in common: they know and agree with the criminal design. Conspirators, however, know the criminal intention because they themselves have decided upon such course of action. Accomplices come to know about it after the principals have reached the decision, and only then do they agree to cooperate in its execution. Conspirators decide that a crime should be committed; accomplices merely concur in it. Accomplices do not decide whether the crime should be committed; they merely assent to the plan and cooperate in its accomplishment. Conspirators are the authors of a crime; accomplices are merely their instruments who perform acts not essential to the perpetration of the offense.

Thus, in *People v. Castro*, [26] the Court convicted Rufino Cinco, together with two others, as a principal, although he had acted merely as a lookout. The Court held that "their concerted action in going armed and together to their victim's house, and there, while one stayed as a lookout, the other two entered and shot the mayor and his wife, leaving again together afterwards, admits no other rational explanation but conspiracy." It may be noted further that Cinco executed a Sworn Statement that the three of them, together with some others, had planned to kill the victim on the promise of a P5,000 reward.

In *People v. Tawat et al.*, [27] the lookout, Nestor Rojo, was convicted as a principal for conspiring with two others. The Court ruled that the conspiracy was shown by their conduct before, during and after the commission of the crime. The Court also noted that, upon their arrest, they disclosed that they had intended to rob the victim's store and that they did so in accordance with their plan. In that case, it was clear that all three of them, including the lookout, were the authors of the crime.

In *People v. Loreno*, [28] the Supreme Court convicted all the accused as principals because they had acted in band. In acting as a lookout, Jimmy Marantal was armed at the time like the other conspirators, and he gave his

companions effective means and encouragement to commit the crime of robbery and rape.

Upon the other hand, in *People v. Corbes*,^[29] the Court noted that Manuel Vergel knew of the criminal design to commit a robbery, and that he cooperated with the robbers by driving the vehicle to and from the crime scene. In convicting him as an accomplice and not as a conspirator, the Court observed that he was merely approached by one of the robbers who was tasked to look for a getaway vehicle. He was not with the robbers when they resolved to commit a robbery. When his services were requested, the decision to commit the crime had already been made.

In *People v. Tatlonghari*,^[30] the Court was asked to resolve the responsibility of some appellants who "knowingly aid[ed] the actual killers by casting stones at the victim, and distracting his attention." The Court ruled that they were accomplices and not co-conspirators, "[i]n the absence of clear proof that the killing was in fact envisaged by them."

In *People v. Suarez et al.*,^[31] Wilfredo Lara merely introduced the gang of Reyes to Suarez who intended to perpetrate the crime with the help of the said group. In ruling that he was merely an accomplice, the Court noted that there was no evidence showing that he "took part in the planning or execution of the crime, or any proof indicating that he profited from the fruits of the crime, or of acts indicative of confederacy on his part."

In *People v. Balili*,^[32] the Court convicted appellant as an accomplice, holding that "in going with them, knowing their criminal intention, and in staying outside of the house with them while the others went inside the store to rob and kill, [he] effectively supplied the criminals with material and moral aid, making him guilty as an accomplice." The Court noted that there was no evidence that he "had conspired with the malefactors, nor that he actually participated in the commission of the crime."

In *People v. Doble*,^[33] the Court held that Cresencio Doble did not become a conspirator when he looked for a banca that was eventually used by the robbers. Ruled the Court: "Neither would it appear that Joe Intsik wanted to draft Cresencio into his band of malefactors that would commit the robbery more than just asking his help to look for a banca. Joe Intsik had enough men, all with arms and weapons to perpetrate the crime, the commission of which needed planning and men to execute the plan with full mutual confidence of each other, which [was] not shown with respect to appellants by the way they were asked to look and provide for a banca just a few hours before the actual robbery."

In the present case, Appellant De Vera knew that Kenneth Florendo had intended to kill Capulong at the time, and he cooperated with the latter. But he himself did not participate in the decision to kill Capulong; that decision was made by Florendo and the others. He joined them that afternoon after the decision to kill had already been agreed upon; he was there because "nagkahiyaan na." This is clear from his statement, which we quote again for the sake of clarity:

"T:

Ito bang balak ni Kenneth para patayin itong si Frederick ay alam mo ba ito at pumayag kang maging kasapakat nito?

S:

Sinabi po niya ito sa akin. Hindi po ako pumayag. Pero noong araw na iyon ay nagkahiyaan na lamang at napilitan akong sumama."^[34]

Significantly, the plan to kill could have been accomplished without him. It should be noted further that he alone was unarmed that afternoon. Florendo and Garcia had guns, and Castro had a baseball bat.

In any event, the prosecution evidence has not established that appellant was part of the conspiracy to kill the

victim. His participation, as culled from his own Statement, was made, after the decision to kill was already a fait accompli. Thus, in several cases, the Court has held:

"[L]ack of complete evidence of conspiracy, that creates the doubt whether they had acted as principals or accomplices in the perpetration of the offense, impels this Court to resolve in their favor the question, by holding x x x that they were guilty of the 'milder form of responsibility,' i.e., guilty as mere accomplices." [35]

Second Issue:

Admissibility of Extrajudicial Statement

Extrajudicial confessions must conform to constitutional requirements. Section 12, Article III of the Constitution, provides:

'(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.

x x x x x x x x

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

If the confession meets these requirements, "it is subsequently tested for voluntariness, i.e., if it was given freely -- without coercion, intimidation, inducement, or false promises; and credibility, i.e., if it was consistent with the normal experience of mankind." [36]

Appellant claims that his extrajudicial statement was inadmissible, because it was not made in the presence of counsel. Although Atty. Confesor Sansano of the Quezon City IBP Legal Aid Committee purportedly assisted him and his co-accused in the execution of their extrajudicial Statements, appellant asserts that the lawyer was in his office, not with them, at the time. Appellant adds that he was tortured.

Appellant's claims must be rejected. Atty. Sansano testified that he did not leave them at any time.

"Q:

You were involved in the interrogation from the very start?

A:

Yes, from the beginning to the end of the interview until the boys signed their statements.

Q:

Did you recall having at any time left your office to attend to some official matters?

A:

I never left the office to attend to anything.

Q:

Is that the usual manner by which you assist persons referred to you by the police insofar as custodial investigation is concerned?

A:

It is our policy that when we assist [in] that capacity, we [want] to see to it that the rights of the accused or suspects are properly [protected] during the course of the entire interrogation."[37]

In fact, Atty. Sansano even checked to see if there were torture marks on Appellant De Vera, and Garcia and interviewed the two to make sure that they understood what they were doing.

"Q:

What was your purpose in asking the police officers to leave the room?

A:

My purpose in asking the police officers to step out of the building was to assure myself that no pressure could be exerted on the two boys by the presence of the police officers during my personal interview. Before we allow any police officers to take the statements of people brought before us[,] we see to it [that] we interview the persons personally out of hearing and sight of any police officer.

Q: After the police officers left the room, completely left the room[,] you were able to interview the two accused namely Mr. de Vera and Mr. Garcia?

A: Yes, I spent about 15 to 20 minutes interviewing the boys.

Q:

What was the nature of your initial interview with these two accused?

A:

I asked the boys Roderick and Edwin if it [was] true that they [were] going to give their own statements to the police?

Q: And what did they say?

A: They said yes, sir.

Q:

What was your reaction to that?

A: Routinely[,] I informed them about their rights under the constitution.

x x x x x x x x

Q: Having obtained their answers, what next transpired?

A:

After telling them the statements they may give to the police could be used against them for a [sic] in any court of the Phil., I was satisfied that nobody coerced them, that they were never threatened by anybody much less by the police officers to give these statements. Casually I asked the two boys to raise their upper clothes.

X X X X X X X X

Q: What was your purpose in requiring these persons to show you or remove their upper clothing?

A:

I wanted to assure myself that there were no telltale signs of torture or bodily harm committed on the[m] prior to their [being brought] to the office. In spite of their [personal] assurances xxx, verbal assurance that they were never hurt."[38]

The right to counsel is enshrined in the Constitution in order to address, among others, the use of duress and undue influence in the execution of extrajudicial confessions.[39] In the present case, the Court is satisfied that Atty. Sansano sufficiently fulfilled the objective of this constitutional mandate. Moreover, appellant's allegations of torture must be disregarded for being unsubstantiated. To hold otherwise is to facilitate the retraction of solemnly made statements at the mere allegation of torture, without any proof whatsoever.

When an extrajudicial statement satisfies the requirements of the Constitution, it constitutes evidence of a high order, because of the strong presumption that no person of normal mind would deliberately and knowingly confess to a crime unless prompted by truth and conscience.[40] The defense has the burden of proving that it was extracted by means of force, duress or promise of reward.[41] Appellant failed to overcome the overwhelming prosecution evidence to the contrary.

Section 3, Rule 133 of the Rules of Court, provides that "[a]n extrajudicial confession made by an accused shall not be sufficient ground for conviction, unless corroborated by evidence of corpus delicti." In the present case, the prosecution presented other evidence to prove the two elements of corpus delicti: (a) a certain result has been proven - for example, a man has died; and (b) some person is criminally responsible.[42] It is indubitable that a crime has been committed, and that the other pieces of prosecution evidence clearly show that appellant had conspired with the other accused to commit the crime. He himself does not deny that he was at the crime scene. In fact, he was seen by the prosecution eyewitness in the company of the gunman. Furthermore, Atty. Sansano and the police officers testified to the voluntariness of his confession. It must be stressed that the aforementioned rule merely requires that there should be some other evidence "tending to show the commission of the crime apart from the confession." [43]

Criminal and Civil Liability

In ruling that the crime committed was murder, the trial court found that the killing was attended by treachery, evident premeditation and abuse of superior strength. One of these was enough to qualify the crime as murder; the two others constituted generic aggravating circumstances. The lower court explained that the evidence established evident premeditation, for Florendo's group acted with deliberate forethought and tenacious persistence in the accomplishment of the criminal design. Treachery was also proven, because the attack was planned and performed in such a way as to guarantee the execution of the criminal design without risk to the group. There was also abuse of superior strength, because the attackers took advantage of their superiority in numbers and weapons.

We disagree with the court a quo in appreciating two generic aggravating circumstances, because treachery

absorbs abuse of superior strength.[44] Hence, there is only one generic aggravating circumstance, not two. Notwithstanding the presence of a generic aggravating circumstance, we cannot impose the death penalty, because the crime was committed before the effectivity of the Death Penalty Law.

In the present case, the penalty of appellant as an accomplice is one degree lower than that of a principal, which in murder cases is reclusion temporal in its maximum period to death. He is also entitled to the benefits of the Indeterminate Sentence Law.

We sustain the trial court's grant of P50,000 as indemnity ex delicto, which may be awarded without need of proof other than the commission of the crime. The award of P211,670 as compensatory damages was duly supported by evidence. Based on the evidence presented, moral damages is also warranted, but only in the amount of P50,000, not P500,000 as fixed by the trial court. Furthermore, we affirm the payment of interest.[45] However, the grant of P600,000 for loss of earning capacity lacks factual basis. Such indemnification partakes of the nature of actual damages, which must be duly proven.[46] In this case, the trial court merely presumed the amount of Capulong's earnings. Since the prosecution did not present evidence of the current income of the deceased, the indemnity for lost earnings must be rejected.

WHEREFORE, the appeal is hereby partially GRANTED. Appellant De Vera is CONVICTED as an accomplice, not as a principal, in the crime of murder. He is sentenced to an indeterminate prison term of 8 years and 1 day of prision mayor as minimum, to 14 years 8 months and 1 day of reclusion temporal as maximum. We AFFIRM the awards of: (a) P50,000 indemnity ex delicto, (b) P211,670 as compensatory damages and (c) interest of six percent per annum on these two amounts. The award of moral damages is however REDUCED to P50,000 and the award for the loss of earning capacity is DELETED. No pronouncement as to costs.

SO ORDERED.

Melo, (Chairman), Purisima, and Gonzaga-Reyes, JJ., concur.
Vitug, J., Please see separate opinion.

[1] Penned by Judge Lucas P. Bersamin.

[2] Information, p. 1; rollo, p. 12.

[3] Amended Information, p. 1; records, p. 31.

[4] Assisted by Atty. Raymundo de Cadiao.

[5] Assisted by Atty. Domingo Floresta.

[6] Assailed Decision, p. 35; rollo, p. 84.

[7] The case was deemed submitted for resolution on November 27, 1998, upon the receipt by this Court of the Appellee's Brief. The filing of a reply brief was deemed waived, as none was submitted within the reglementary period.

[8] Signed by Sol. Gen. Ricardo P. Galvez, Asst. Sol. Gen. Carlos N. Ortega and Associate Sol. Thomas M. Laragan.

[9] Appellee's Brief, pp. 3-12; rollo, pp. 195-204.

[10] RTC Decision, pp. 10-13; rollo, pp. 59-62.

[11] Assailed Decision, p. 18; rollo, p. 157.

[12] Appellant's Brief, pp. 3-4; rollo, pp. 98-99. This was signed by Atty. Vicente D. Millora.

[13] *People v. Magallano*, 266 SCRA 305, 314, January 16, 1997; *People v. Albao*, 287 SCRA 129, March 6, 1998; *People v. Obello*, 284 SCRA 79, January 14, 1998; *People v. Sumalpong*, 284 SCRA 464, January 20, 1998; *People v. Timple*, 237 SCRA 52, September 26, 1994; *People vs. Orehuela*, 232 SCRA 82, 93, April 29, 1994; *People v. Villagonzalo*, 238 SCRA 215, 230-231, November 18, 1994; *Fonacier v. Sandiganbayan*, 238 SCRA 655, 695, December 5, 1994.

[14] *People v. Campos*, 202 SCRA 387, October 3, 1991; *People v. Saavedra*, 149 SCRA 610; May 18, 1987; *People v. Madera*, 57 SCRA 349, May 31, 1974.

[15] Sworn Statement of Edwin De Vera, p. 2; records, p.10.

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

[17] Article 8. See also *People v. Abarri*, 242 SCRA 39, 45, March 1, 1995; *People v. Cayanan*, 245 SCRA 66, 77, June 16, 1995.

[18] Reyes, *The Revised Penal Code*, 12th ed., p. 133.

[19] *People v. De Roxas*, 241 SCRA 369, February 15, 1995.

[20] *People v. Cawaling*, 293 SCRA 267, 306, July 28, 1998; *People v. Andres*, GR No. 122735, September 25, 1998; *People v. Sumalpong*, 284 SCRA 464, January 20, 1998; *People v. Leangsiri*, 252 SCRA 213, January 24, 1996; *People v. Salison Jr.*, 253 SCRA 758, February 20, 1996; *People v. Obzunar*, 265 SCRA 547, December 16, 1996.

[21] Article 17 of the Revised Penal Code reads:

"ART. 17. Principals. -The following are considered principals:

Those who take a direct part in the execution of the act;

Those who directly force or induce others to commit it;

Those who cooperate in the commission of the offense by another act without which it would not have been accomplished."

[22] Article 18, Revised Penal Code.

[23] *People v. Corbes*, 270 SCRA 465, 472, March 26, 1997, per Bellosillo, J.; citing *People v. Lingad*, 98 Phil. 5, 12, November 29, 1955; *People v. Fronda*, 222 SCRA 71, May 14, 1993; *People v. Custodio*, 47 SCRA 289, October 30, 1972.

[24] Reyes, *Revised Penal Code*, 12th ed., p. 515. See also Aquino, *The Revised Penal Code*, 1997 ed., p. 557; Padilla, *Criminal Law*, 1987 ed., p. 700; *People v. Custodio*, 47 SCRA 289; *People v. Tamayo*, 44 Phil 38, November 17, 1922.

[25] *People v. De Roxas*, 241 SCRA 369, February 15, 1995.

[26] 11 SCRA 699, August 31, 1964, per curiam.

[27] 126 SCRA 362, December 21, 1983. See also *People v. Evangelista*, 86 Phil. 112, April 12, 1950.

[28] 130 SCRA 311, July 9, 1984, per Concepcion, J.

[29] *Supra*.

[30] 27 SCRA 726, March 28, 1967, per J. B. L. Reyes, J.

[31] 267 SCRA 119, January 28, 1997, per Regalado, J.

[32] 17 SCRA 892, August 5, 1966, per Makalintal, J.

[33] 114 SCRA 131, May 31, 1982, per De Castro, J.

[34] Sworn Statement of Edwin de Vera, p. 2; records, p.10.

[35] *People v. Rival*, 10 SCRA 462, March 31, 1964, per Bengzon, CJ; *People v. Torejas*, 43 SCRA 158, January 31, 1972; *People v. Tolentino*, 40 SCRA 514, 519, August 31, 1971; *People v. Ablog*, 6 SCRA 437, October 31, 1962; *People v. Ubina*, 97 Phil 515, August 31, 1955; *People v. Tatlonghari*, 27 SCRA 726; March 28, 1969.

[36][*People v. Santos*, 283 SCRA 443, December 22, 1997, per Panganiban, J. See also *People v. Muleta*, GR No. 130189, June 21, 1999.]

[37] TSN, November 6, 1996, p. 15.

[38] TSN, November 6, 1996, pp. 7-11.

[39] *People v. Lucero*, 244 SCRA 425, 434, May 29, 1995; *People v. Rous*, 242 SCRA 732, March 27, 1995.

[40] *People v. Montiero*, 246 SCRA 786, July 31, 1995; *People v. Alvarez*, 201 SCRA 364, September 5, 1991.

[41] *People v. Dasig*, 221 SCRA 549, April 28, 1993.

[42] *People v. Lorenzo*, 240 SCRA 624, January 26, 1995, per Davide, J. (Now CJ)

[43][*Ibid.*]

[44] *People v. Caritativo*, 256 SCRA 1, April 1, 1996; *People v. Torrefiel*, 265 SCRA 369, April 18, 1996.

[45] Article 2211 of the Civil Code provides: "In crimes and quasi-delicts, interest as part of the damages may, in a proper case, be adjudicated in the discretion of the court."

[46] *Kierulf v. Court of Appeals*, 269 SCRA 433, March 13, 1997.

SEPARATE OPINION

VITUG, J.:

I share the ponencia of my colleagues in its affirmance of the conviction of appellants except, with all due respect, insofar as it has concluded that appellant De Vera is guilty merely as an accomplice.

There is conspiracy under Article 8 of the Revised penal Code when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Conspiracy of, course, by itself is legally inconsequential unless the criminal plot is, in fact, carried out. Once the offense is perpetrated, the responsibility of the conspirators is collective, not individual, that render, all of them equally liable regardless of the extent of their respective participations, the act of one being deemed to be the act of the other or the others, in the commission of the felony. An accomplice, under Article 18 of the same Code, is one who, not being a principal

who (a) takes a direct part in the execution of the act, (b) directly forces or induces others to commit, (c) cooperates in the commission of the offense by another act without which the offense would not have been accomplished (per Article 17 of the Code), collaborates in the execution of the offense by previous or simultaneous acts.

In the case at bar, De Vera, "knowing that Florendo intended to kill the victim and that the three co-accused were carrying weapons, he had acted as a lookout to watch for passersby. He was not an innocent spectator; he was at the locus criminis in order to aid and abet the commission of the crime" (ponencia).

I cannot bring myself to accept any material variance between the terms "to decide," on the one hand, and "to concur" or "to assent," on the other hand, in defining, i.e., whether as a conspirator or as an accomplice, the specific criminal liability of the criminal offender. Where there is concurrence or assent by one to a plan, even when previously hatched by another or others, to commit a felony which concurrence or assent is made prior to the actual perpetration of the offense, and he then actually participates in its commission, regardless of the extent of such participation, his liability should be deemed, in my view, that of a conspirator rather than that of an accomplice. I would equate the liability of an accomplice to one who, knowing of the criminal design, but neither concurring nor assenting to it, cooperates in the execution of the crime short of taking a direct part in, and short of taking an indispensable act for, the commission of the offense. In the last two instances (taking a direct part in, or taking an indispensable act for, the commission of the felony), his participation would be that of a principal under Article 17 of the Revised Penal Code.

When appellant De Vera, aware of the plan to kill the victim, agreed to be lookout during the commission of the crime which, in fact, so took place as planned, he rendered himself liable no less than that incurred by his co-accused.

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