THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. FIDEL ABRENICA CUBCUBIN, JR., ACCUSED-APPELLANT.

G.R. No. 136267. July 10, 2001

Ponente: MENDOZA, J.

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MENDOZA, J.:

This case is here on automatic review of the decision,[1] dated October 5, 1998, of the Regional Trial Court, Branch 88, Cavite City, finding accused-appellant Fidel Abrenica Cubcubin, Jr. guilty of murder and sentencing him to suffer the penalty of death.

The information against accused-appellant alleged:

> That on or about August 26, 1997, in the City of Cavite, Republic of the Philippines and within the jurisdiction of this Honorable Court, the abovenamed accused, armed with an unlicensed homemade (paltik) Smith and Wesson caliber .38 revolver, with no serial number, with intent to kill, acting with treachery and evident premeditation and taking advantage of the darkness of [the] night, did, then and there, willfully, unlawfully, and feloniously, assault, attack and shoot with the aforesaid unlicensed firearm a certain HENRY PECHO PIAMONTE, hitting and inflicting upon the latter gunshot wounds in the head which caused the latter's instantaneous death.
>
> CONTRARY TO LAW.[2]

Accused-appellant pleaded not guilty to the charge, whereupon trial on the merits ensued.

Eight witnesses were presented by the prosecution: police officers Florentino M. Malinao, Jr., Enrico A. Rosal, Raymundo D. Estoy, Jr., and Virgilio L. Pilapil, all of whom belong to the Cavite City Police Department; National Bureau of Investigation ballistician Isabelo D. Silvestre, Jr.; NBI Forensic Chemist II Juliet Gelacio-Mahilum; Dr. Regalado D. Sosa, City Health Officer II and City Medico-Legal Officer of the Department of Health (DOH) in Cavite City; and Danet D. Garcellano, a food server at the Sting Cafe in San Antonio, Cavite City. The testimony of Police Chief Inspector Edwin G. Nemenzo, Chief of the Records, Firearms and Explosives Division of the Philippine National Police (PNP) in Camp Crame, Quezon City, was dispensed with in view of his certification, dated October 7, 1997 (Exh. N),[3] that accused-appellant is not a licensed/registered holder of firearm of any kind and caliber.

The prosecution evidence is to the following effect:

At about 3:30 in the morning of August 26, 1997, Sgt. Rogel, desk officer of the Cavite City police station, received a telephone call that a person had been shot near the cemetery along Julian Felipe Boulevard in San Antonio, Cavite City. For this reason, a police team, composed of SPO1 Malinao, Jr., PO3 Rosal, PO3 Estoy, Jr., PO3 Manicio, and SPO3 Manalo, responded to the call and found Henry P. Piamonte slumped dead on his tricycle which was then parked on the road. Police photographer Fred Agana took pictures of the crime scene (Exhs. A, A-1, A-2, and A-3)[4] showing the victim slumped on the handle of the tricycle.[5] PO3 Rosal testified that a

tricycle driver, who refused to divulge his name, told him that accused-appellant and the victim were last seen together coming out of the Sting Cafe, located in San Antonio near the gate of Sangley Point, Cavite City, about a kilometer and a half away from the crime scene. Forthwith, PO3 Rosal and SPO1 Malinao, Jr. went to the cafe and talked to Danet Garcellano, a food server/waitress in Sting Cafe.[6] The other policemen at the police station called up City Prosecutor Agapito Lu who also proceeded to Sting Cafe. Garcellano told the police investigators that she had seen accused-appellant arrive at Sting Cafe at about 12:00 midnight and drink beer; that at about 2:30 a.m., the victim arrived and joined accused-appellant; that the two stayed in the cafe until 3:30 a.m.; and that she did not know if they left together as she was serving other customers. Garcellano described accused-appellant as a lean, dark-complexioned, and mustachioed man who had on a white t-shirt and brown short pants.[7]

Armando Plata, another tricycle driver, told PO3 Rosal and SPO1 Malinao, Jr. that Garcellano's description fitted a person known as alias "Jun Dulce." Armando Plata, who knew where accused-appellant lived, led PO3 Rosal, SPO1 Malinao, Jr., and Prosecutor Lu to accused-appellant's house in Garcia Extension, Cavite City. The policemen knocked on the door for about three minutes before it was opened by a man who answered the description given by Danet Garcellano and who turned out to be accused-appellant. The police operatives identified themselves and informed him that he was being sought in connection with the shooting near the cemetery. Accused-appellant denied involvement in the incident. PO3 Rosal and SPO1 Malinao, Jr. then asked permission to enter and look around the house.[8]

SPO1 Malinao, Jr. said that upon entering the house, he noticed a white t-shirt, bearing the brand name "Hanes" (Exh. H)[9] and the name "Dhenvher" written in the inner portion of the shirt's hemline, placed over a divider near the kitchen. Upon close examination, he said that he found it to be "bloodied." When he picked up the t-shirt, two spent .38 caliber shells fell from it. PO3 Rosal stayed with accused-appellant while he conducted a search. They then took the t-shirt and the two bullet shells. SPO1 Malinao, Jr. then asked accused-appellant to go with them to Sting Cafe for purposes of identification. There, accused-appellant was positively identified by Danet Garcellano as the victim's companion. The police investigators asked accused-appellant where the fatal gun was. SPO1 Malinao, Jr. said accused-appellant refused to tell him where he hid the gun so he sought his (accused-appellant's) permission to go back to his house to conduct a further search. Thereupon, SPO1 Malinao, Jr., accompanied by Prosecutor Lu, PO3 Estoy, Jr., PO3 Manicio, SPO3 Manalo, and PO3 Rosal, proceeded thereto.[10] Inside the house, they saw accused-appellant's 11-year old son Jhumar. PO3 Estoy, Jr. found on top of a plastic water container (drum) outside the bathroom a homemade Smith and Wesson caliber .38 revolver (six shooter), without a serial number (Exh. F). He found the gun loaded with five live bullets (Exhs. M, M-1, M-2, M-3, and M-4). PO3 Estoy, Jr. said that he inscribed his initials "RDE" (for Raymundo D. Estoy) on the cylinder of the gun with the use of a sharp object. While PO3 Estoy, Jr. was conducting the search, SPO1 Malinao, Jr. and PO3 Rosal stayed with accused-appellant in the sala.[11] The .38 caliber gun (Exhs. B, B-1),[12] the white "Hanes" t-shirt (Exhs. B-2, B-2-A, B-2-B),[13] and the two spent .38 caliber shells (Exhs. B-2, B-2-B)[14] were all photographed. Accused-appellant was then taken to the police station, where he was photographed (Exh. B-3)[15] along with the things seized from him.

SPO4 Virgilio Pilapil, Chief Investigator of the Criminal Investigation Division, testified that on August 26, 1997, the case involving the killing of Henry Pecho Piamonte was forwarded to him by PO3 Rosal together with the evidence consisting of a bloodstained white "Hanes" t-shirt, a .38 revolver with five live ammunitions, and two deformed slugs. After an evaluation of the evidence, he formally filed a criminal complaint for murder against accused-appellant. He took blood samples of the victim and submitted the same to the NBI for laboratory examination.[16]

Dr. Regalado Sosa, City Health Officer II and City Medico-Legal Officer of the Department of Health in Cavite

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City, conducted a postmortem examination of the cadaver and prepared an autopsy report (Exh. O)[17] which showed the following findings:

AUTOPSY REPORT

EXTERNAL FINDINGS:

A medium built fair complexioned male adult human body in its cadaveric state with gunshot wounds . . . described as follows:

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Gunshot wound, 1.5 cm. x 0.5 cm., oval in shape with powder burns more on top of the wound to 2.5 cms. elevation/height located at the angle of the right jaw and/or 5 cms. below the inferior level of the right ear. The wound has irregular and inverted borders. It is directed inwards fracturing the lower edge of the angle of the right mandible and the lead slug is embedded at the right lateral portion of the first (1st) cervical vertebrae hence extracted.

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Gunshot wound, 1 cm. in d[iameter] with inverted irregular borders located at the left frontal region 5 cms. above the temporal end of the left eyebrow. It is directed inwards and downwards fracturing the bone (frontal) underneath into [the] intracranial cavity.

INTERNAL FINDINGS:

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Presence of circular complete fracture, 0.8 cm. in d[iameter] at the left frontal region.

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The left frontal lobe of the brain is perforated and the frontal lobe is enveloped with liquid and clotted blood.

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The lead slug is found at the inner surface of the left frontal lobe.

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The right mandibular region was incised near the gunshot wound and the area is severely hematomatous and explored until a lead slug [was] found at the 1st cervical vertebrae at the right side.

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Stomach contains liquid and little rice and with alcoholic (beer) smell.

=

Other internal organs are significantly normal.

Slugs extracted:

- 0.6 cm. in d[iameter] lead slug with one end is markedly deformed. The length of the slug is 1.6 cms.

Note: One diagonal incised line was marked on the slug.

- A 0.7 cm. in d[iameter] lead slug . . . roundly/ovally deformed [on] one end. The length of the slug is 1.8 cm.

Note: Two diagonal incised lines [were] marked on the said slug.

Dr. Sosa testified that the victim sustained two gunshot wounds (Exh. R),[18] the first one located on the right jaw below the ear while the second wound located at the left temporal side above the left eyebrow. The slug from the first gunshot wound remained at the base of the neck, near the spinal column. There were powder burns, called "tatooing," surrounding the first wound which showed that the victim was shot point-blank. The second slug was also embedded at the front lobe of the brain.[19] Dr. Sosa indicated in the Certificate of Death (Exh. Q) that the victim died of "shock secondary to severe intracranial hemorrhage due to multiple gunshot wounds."[20]

Upon written request (Exh. C)[21] of Prosecutor Lu, the NBI conducted a ballistics examination to determine whether the two slugs taken from the body of the victim were fired from the firearm recovered from accused-appellant.

Isabelo D. Silvestre, Jr., an NBI ballistician, conducted on September 10, 1997 a comparative examination of the two "evidence bullets," marked as "HPP-1" (Exh. E) and "HPP-2" (Exh. E-1), which had been recovered from the victim's head and the three "test bullets" (Exhs. G, G-1, G-2) fired from the seized .38 caliber firearm. The tests showed that the "evidence bullets" were fired from the subject firearm.[22] The empty shells from the three "test bullets" fired were duly marked (Exhs. G-3, G-4, G-5). No photographs were taken. Silvestre's findings were confirmed by four other NBI ballisticians: Chief Ballistician Rogelio Munar, Supervising Ballistician Ernie Magtibay, Senior Ballistician Elmer Pieded, and, Flor Landicho, another ballistician. The two .38 caliber empty shells recovered from accused-appellant were no longer examined.[23]

Prosecutor Lu also made a written request (Exh. J)[24] for a laboratory examination of the bloodstains on the white "Hanes" t-shirt of accused-appellant to determine whether such were identical to the blood of the victim.

Juliet Gelacio-Mahilum, NBI Forensic Chemist II, testified that on September 26, 1997, she conducted three kinds of laboratory examinations, namely, (a) benzidine test, to determine the presence of blood; (b) precipitin test, to determine if the bloodstains came from human or animal blood; and (c) ABO grouping test, to determine the blood group. When tested and matched together, the bloodstained white "Hanes" t-shirt and the blood sample of the victim yielded positive results for human blood belonging to blood type "O" (Exh. K).[25]

For its part, the defense presented accused-appellant himself, his son Jhumar, and his sister Yolanda Cubcubin Padua.

Accused-appellant Fidel Abrenica Cubcubin, Jr. testified that he enlisted in the Philippine Constabulary as a soldier in 1974 but was discharged in 1977 for being AWOL. He said he left for Saudi Arabia where he worked as a driver and came back in 1979. He was later employed as a driver by a friend, who owned a junk shop in Cavite City. He admitted knowing the victim whom he addressed as "Kuya." Accused-appellant testified that from 10:00 in the evening to 12:00 midnight of August 25, 1997, he and some friends played a card game called "tong-its" on Molina Street, Cavite City. Afterwards, he proceeded to the Sting Cafe where he had some drinks while waiting for food to be served. Henry Piamonte, a tricycle driver, arrived and had drinks with him. After a while, the victim left as a passenger was waiting to be given a ride. The victim came back to the restaurant before 1:00 a.m. and had another bottle of beer with accused-appellant. At about 1:30 a.m., the victim again left to transport another passenger. After that, the victim did not come back anymore.[26]

Accused-appellant said he left Sting Cafe at about 2:00 a.m. and took a tricycle home to 1151 Garcia Extension, San Antonio, Cavite City. He was sleeping on the sofa in his bedroom when he was awakened by the arrival of three policemen, two of them he recognized as SPO1 Malinao, Jr. and PO3 Estoy, Jr., who pointed their guns at him and told him to lie face down. He said he was handcuffed while the policemen searched his room, turning the

sala set upside down and opening the cabinets. His son, Jhumar, stood beside him. Before leaving, the policemen took from the clothes stand a white t-shirt belonging to his son Denver. Accused-appellant said that he did not ask them why they were searching the place as he was afraid they would maltreat him. He denied the claim of the policemen that the white t-shirt had blood stains. He claimed that the policemen did not have any search warrant nor a warrant of arrest when they took him into custody. Nor did they inform him of his constitutional right to remain silent and to be assisted by counsel. He also said that he was made to stay in a police patrol car for almost two hours before he was brought inside the police station. He denied owning the .38 caliber revolver presented to him by Prosecutor Lu and SPO4 Pilapil or that the same had been recovered from his house. He also denied the prosecution's claim that he was taken to the Sting Cafe where he was allegedly identified by Danet Garcellano as the person last seen with the victim before the latter was killed.[27]

Jhumar Cubcubin, son of accused-appellant, testified that at about 4:00 in the morning of August 26, 1997, he was sleeping on the second floor of the house when he was roused from his sleep by loud knocks on the door. When he opened the door, he saw three policemen who were looking for his father. He told them that his father was not around, but he was shoved away. They proceeded upstairs to the room of his father where they took from the clothes stand a white "Hanes" t-shirt belonging to his brother Denver. They put his father in a police patrol car waiting outside. Jhumar immediately went to his aunt, Yolanda Cubcubin Padua, and reported to her what had happened. He went back to the house and saw some policemen still conducting a search. As the policemen were about to leave, a van with some other policemen on board arrived. They asked him where the water container was located. They went inside the house and, when they came out, one of them announced that he had found a gun, which was then photographed. Jhumar said that while his father was inside the police patrol car, his aunt was arguing with the policemen. At that instance, SPO1 Malinao, Jr. spread the t-shirt and told Jhumar's aunt "Eto, puro dugo damit niya," although the t-shirt had no bloodstains. He said that he and his father never gave permission to the policemen to search their house.[28]

Yolanda Cubcubin Padua, accused-appellant's sister, testified that at about 5:30 in the morning of August 26, 1997, she was told by her nephew, Jhumar, that accused-appellant had been apprehended by some policemen. She and Jhumar then went to the police patrol car where she saw her brother in handcuffs. She said she protested to the policemen that there was no evidence that accused-appellant had killed the victim. Yolanda said she saw the confiscated white Hanes t-shirt, but she claimed the same did not have any bloodstain on it. She went back to her house to call up her mother in Gen. Trias, Cavite to let her know what had happened. She then went out to see accused-appellant and saw Jhumar, who told her that some policemen were searching accused-appellant's house and found a gun.[29]

On October 5, 1998, the trial court rendered its decision finding accused-appellant guilty of murder. It based its finding on circumstantial evidence, to wit: (1) That Danet Garcellano, a waitress at the Sting Cafe, saw accused-appellant arrive at about 12:00 midnight of August 25, 1997 and drink beer, while the victim arrived at about 2:30 a.m. of August 26, 1997 and joined accused-appellant in drinking beer at the bar. She said that she served them beer and they stayed for about an hour, that the two later had an argument as accused-appellant wanted to have two more bottles of beer which the victim paid for, and that at about 3:30 a.m., the victim and accused-appellant left and boarded the victim's tricycle; (2) That PO3 Rosal and SPO1 Malinao, Jr. testified that they saw the lifeless body of the victim, with bullet wounds on his head, slumped on the handle of his tricycle, that the crime scene was about 50 meters away from the house of accused-appellant, and that when they were told by an unidentified tricycle driver that the victim and accused-appellant were seen leaving the Sting Cafe together, they went to Sting Cafe and interviewed Danet Garcellano who described the appearance of the victim's companion. Armando Plata, another tricycle driver who knew accused-appellant as the person being described by Garcellano, accompanied the policemen to the house of accused-appellant; (3) That after SPO1 Malinao, Jr. was

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allowed to enter the house, he found a white "Hanes" t-shirt with bloodstains on it and also recovered two spent .38 caliber shells; (4) That when accused-appellant was taken to the Sting Cafe, he was positively identified by Danet Garcellano as the victim's companion moments prior to his death; (5) That when the investigators returned to the house of accused-appellant, PO3 Estoy, Jr. found a .38 caliber revolver placed on top of a plastic water container located outside the bathroom; (6) That laboratory examination conducted by the forensic chemist, Juliet Gelacio-Mahilum, showed that the bloodstains on the white "Hanes" t-shirt were human blood, type "O," which matched the blood type of the victim; and (7) That per ballistic examination of NBI ballistician, Isabelo D. Silvestre, Jr., the two slugs recovered from the head of the victim were fired from the .38 caliber revolver seized from accused-appellant's house.

The trial court rejected accused-appellant's alibi, giving full credence to the testimonies of Danet Garcellano and the police investigators whom it found to have no motive to falsely implicate accused-appellant. It admitted the prosecution evidence consisting of the white "Hanes" t-shirt, two spent shells, and the .38 caliber revolver, on the ground that these items had been seized as incident to a lawful arrest. It ruled that since Dr. Sosa testified that the victim was shot point-blank while on his tricycle and was not in a position to see the assailant, the qualifying circumstance of treachery was present, not to mention that the victim was unarmed and thus totally defenseless. The trial court theorized that while the victim was on his tricycle, the assailant went around and shot him on the left temple. It held that the use of an unlicensed firearm in killing the victim constituted an aggravating circumstance. Hence, the trial court found accused-appellant guilty of murder and accordingly imposed on him the penalty of death. Hence, this appeal.

On April 18, 2000, the Court received a letter, dated April 5, 2000,[30] from Victoria Abrenica Dulce, mother of accused-appellant, with an attached affidavit of desistance entitled "Sinumpaang Salaysay ng Pag-Uurong," dated November 14, 1997,[31] executed by Marilou B. Piamonte, widow of the victim, stating that accused-appellant had been mistakenly identified as the assailant, and, by reason thereof, sought the dismissal of the criminal case against him. In her letter, Dulce said that the affidavit of desistance was supposed to be submitted to the trial court prior to the presentation of the evidence for the prosecution, but, for unknown reasons, the same was not done by accused-appellant's counsel. This affidavit of desistance, however, not being formally offered before the trial court, has no probative value.

We now consider accused-appellant's assignment of errors.

First. Accused-appellant contends that his arrest, effected on August 26, 1997 without a warrant, was illegal. On this point, Rule 113, §5(b) of the 1985 Rules on Criminal Procedure, as amended, provides:

> Sec. 5. Arrest without warrant; when lawful. ¾ A peace officer or a private person may, without a warrant, arrest a person:
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> (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
>
> (b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it;
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> (c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another."

Under §5(b), two conditions must concur for a warrantless arrest to be valid: first, the offender has just committed an offense and, second, the arresting peace officer or private person has personal knowledge of facts indicating

that the person to be arrested has committed it. It has been held that "`personal knowledge of facts' in arrests without a warrant must be based upon probable cause, which means an actual belief or reasonable grounds of suspicion."[32]

In this case, the arrest of accused-appellant was effected shortly after the victim was killed. The question, therefore, is whether there was "probable cause" for PO3 Rosal and SPO1 Malinao, Jr., the arresting officers, to believe that accused-appellant committed the crime. We hold that there was none. The two did not have "personal knowledge of facts" indicating that accused-appellant had committed the crime. Their knowledge of the circumstances from which they allegedly inferred that accused-appellant was probably guilty was based entirely on what they had been told by others, to wit: by someone who called the PNP station in San Antonio, Cavite City at about 3:30 in the morning of August 26, 1997 and reported that a man had been killed along Julian Felipe Boulevard of the said city; by an alleged witness who saw accused-appellant and the victim coming out of the Sting Cafe; by Danet Garcellano, waitress at the Sting Cafe, who said that the man last seen with the victim was lean, mustachioed, dark-complexioned and was wearing a white t-shirt and a pair of brown short pants; by a tricycle driver named Armando Plata who told them that the physical description given by Garcellano fitted accused-appellant, alias "Jun Dulce" and who said he knew where accused-appellant lived and accompanied them to accused-appellant's house. Thus, PO3 Rosal and SPO1 Malinao, Jr. merely relied on information given to them by others.

In an analogous case,[33] the police was informed that the accused was involved in subversive activities. On the basis of this information, the police arrested the accused and, in the course of the arrest, allegedly recovered an unlicensed firearm and some subversive materials from the latter. This Court held that the arresting officers had no personal knowledge since their information came entirely from an informant. It was pointed out that at the time of his arrest, the accused was not in possession of the firearm nor engaged in subversive activities. His arrest without a warrant could not be justified under §5(b).

In another case,[34] the accused, in a case of robbery with rape, were arrested solely on the basis of the identification given by one of the victims. This Court held the arrest to be illegal for lack of personal knowledge of the arresting officers. More recently, in Posadas v. Ombudsman,[35] this Court, in declaring the arrest without warrant of two University of the Philippines students to be illegal, held:

> There is no question that this case does not fall under paragraphs (a) and (c). The arresting officers in this case did not witness the crime being committed. Neither are the students fugitives from justice nor prisoners who had escaped from confinement. The question is whether paragraph (b) applies because a crime had just been committed and the NBI agents had personal knowledge of facts indicating that [the students] were probably guilty.
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> . . . .
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> [T]he NBI agents in the case at bar tried to arrest [the students] four days after the commission of the crime. They had no personal knowledge of any fact which might indicate that the two students were probably guilty of the crime. What they had were the supposed positive identification of two alleged eyewitnesses, which is insufficient to justify the arrest without a warrant by the NBI.
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> Indeed, at the time [the victim] was killed, these [NBI] agents were nowhere near the scene of the crime. When [the NBI agents] attempted to arrest [the students], the latter were not committing a crime nor were they doing anything that would create the suspicion that they were doing anything illegal. On the contrary, [they], under the supervision of the U.P. police, were taking part in a peace talk called to put an end to the violence on the campus.

Nor can it be argued that the arresting officers had probable cause to believe accused-appellant to be guilty of the

killing of the victim because they found a bloodstained t-shirt, a .38 caliber revolver, and two spent .38 caliber shells in his house. At the time accused-appellant was arrested, he was not doing anything overtly criminal. The alleged discovery of the gun came after his arrest. Moreover, as will presently be explained, the objects allegedly seized from accused-appellant were illegally obtained without a search warrant.

Be that as it may, accused-appellant cannot now question the validity of his arrest without a warrant. The records show that he pleaded not guilty to the charge when arraigned on November 11, 1997. It is true that on August 28, 1997, he filed a petition for reinvestigation in which he alleged that he had been illegally detained without the benefit of a warrant of arrest. In its order, dated September 9, 1997, the trial court granted his motion and ordered the City Prosecutor to conduct a preliminary investigation and submit his findings within thirty (30) days thereof.[36] On October 7, 1997, City Prosecutor Agapito S. Lu moved for the resetting of accused-appellant's arraignment from October 8, 1997 to the first week of November, 1997 on the ground that the findings on the laboratory and ballistics examinations had not yet been received from the NBI.[37] Accused-appellant did not object to the arraignment. The City Prosecutor's request was, therefore, granted and the arraignment was reset to November 11, 1997.[38] Nor did accused-appellant move to quash the information on the ground that his arrest was illegal and, therefore, the trial court had no jurisdiction over his person. Instead, on November 11, 1997, at the scheduled arraignment, accused-appellant, with the assistance of counsel, pleaded not guilty to the charge.[39] On the same day, the trial court issued an order stating that, as a result of accused-appellant's arraignment, his motion for preliminary investigation had become moot and academic and, accordingly, set the case for trial.[40] Accused-appellant thus waived the right to object to the legality of his arrest.[41]

Second. Accused-appellant contends that neither he nor his son gave permission to the arresting police officers to search his house and, therefore, the "Hanes" t-shirt, the two spent slugs, and the .38 caliber revolver allegedly found in his house are inadmissible in evidence. The prosecution, on the other hand, insists that accused-appellant consented to the search of his house.

To be sure, the right against unreasonable searches and seizures is a personal right which may be waived expressly or impliedly. But a waiver by implication cannot be presumed. There must be persuasive evidence of an actual intention to relinquish the right. A mere failure on the part of the accused to object to a search cannot be construed as a waiver of this privilege. For as Justice Laurel explained in Pasion Vda de Garcia v. Locsin,[42] "As the constitutional guaranty is not dependent upon any affirmative act of the citizen, the courts do not place the citizen in the position of either contesting an officer's authority by force, or waiving his constitutional rights; but instead they hold that a peaceful submission to a search or seizure is not consent or an invitation thereto, but is merely a demonstration or regard for the supremacy of the law."

Because a warrantless search is in derogation of a constitutional right, peace officers who conduct it cannot invoke regularity in the performance of official functions and shift to the accused the burden of proving that the search was unconsented. It is noteworthy that the testimonies of the two prosecution witnesses, SPO1 Malinao, Jr. and PO3 Rosal, on the search show laborious effort to emphasize that accused-appellant gave them permission to search his house. At every turn, even when they were not being asked, they said the search was made with the consent of the accused. As Shakespeare would put it, "the lady doth protest too much, methinks." Indeed, not only does accused-appellant stoutly deny that he ever consented to the search of his dwelling but the prosecution has not shown any good reason why accused-appellant might have agreed to the search.

The prosecution says the search can be justified as incidental to a valid arrest. Even assuming the warrantless arrest to be valid, the search cannot be considered an incident thereto. A valid arrest allows only the seizure of evidence or dangerous weapons either in the person of the one arrested or within the area of his immediate control. The rationale for such search and seizure is to prevent the person arrested either from destroying evidence

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or from using the weapon against his captor. It is clear that the warrantless search in this case cannot be justified on this ground. For neither the t-shirt nor the gun was within the area of accused-appellant's immediate control. In fact, according to the rosecution, the police found the gun only after going back to the house of accused-appellant.

Nor can the warrantless search in this case be justified under the "plain view" doctrine. As this Court held in People v. Musa:[43]

> The "plain view" doctrine may not, however, be used to launch unbridled searches and indiscriminate seizures nor to extend a general exploratory search made solely to find evidence of defendant's guilt. The "plain view" doctrine is usually applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. [Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed. 2d 564 (1971)] Furthermore, the U.S. Supreme Court stated the following limitations on the application of the doctrine:
> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification -- whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused -- and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. [Id., 29 L.Ed. 2d 583. See also Texas v. Brown, 460 U.S. 730, 75 L. Ed. 2d 502 (1983)]

Here, the search of accused-appellant's house was illegal and, consequently, the things obtained as a result of the illegal search, i.e., the white "Hanes" t-shirt, two spent shells, and the .38 caliber gun, are inadmissible in evidence against him. It cannot be said that the .38 caliber gun was discovered through inadvertence. After bringing accused-appellant to the Sting Cafe where he was positively identified by a waitress named Danet Garcellano as the victim's companion, the arresting officers allegedly asked accused-appellant where he hid the gun used in killing the victim. According to SPO1 Malinao, Jr., when accused-appellant refused to answer, he sought accused-appellant's permission to go back to his house and there found the .38 caliber revolver on top of a plastic water container outside the bathroom. Thus, the gun was purposely sought by the police officers and they did not merely stumble upon it.

Nor were the police officers justified in seizing the white "Hanes" t-shirt placed on top of the divider "in plain view" as such is not contraband nor is it incriminating in nature which would lead SPO1 Malinao, Jr. to conclude that it would constitute evidence of a crime. Contrary to what SPO1 Malinao, Jr. said, the t-shirt was not "bloodied" which could have directed his attention to take a closer look at it. From the photograph of the t-shirt (Exh. B-2), it is not visible that there were bloodstains. The actual t-shirt (Exh. H) merely had some small specks of blood at its lower portion.

Third. There is no evidence to link accused-appellant directly to the crime. Danet Garcellano said that accused-appellant arrived at about midnight of August 25, 1997; that the victim joined him at about 2:30 a.m.; and that although both left the Sting Cafe at about 3:30 a.m., she really did not know if they left together. Thus, Danet testified:

> PROSECUTOR LU:
>
> . . . .
>
> Q

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Were they together when they left Sting Cafe or they left one after the other?

A

When they were already bringing along with them the two bottles of beer, they talked and afterwards, I already left them and I served the other customers.

Q

Did you actually see Henry Piamonte leave the Sting Cafe?

A

They were about to leave already at that time because they were already bringing with them the two bottles of beer, Sir.

Q

But did you see Henry Piamonte actually leave the Sting Cafe?

A

When Henry Piamonte left the Sting Cafe, Henry boarded a tricycle, Sir.

Q

How about Cubcubin, how did he leave the Sting Cafe?

A

He followed Henry, Sir.

Q

How did he follow Henry, on foot, on board a vehicle or what?

A

I do not know anymore, Sir, because I already served the other customers inside.[44]

. . . .

On cross-examination, Danet said:

ATTY. BAYBAY:

Q

When he left, he left alone?

A

I do not know anymore, Sir, because I already served inside.

Q

Are you saying to us that you did not see him when he left?

A

No, Sir, what I know is that he and Cubcubin were together because of the two bottles of beer which were paid

by Piamonte inside, Sir.

. . . .

ATTY. BAYBAY:

Q

The accused Fidel Cubcubin left Sting Cafe at 3:30?

A

Yes, Sir.

Q

Now, how could you be sure of the time when you were serving other people at that time?

A

That is only my estimation, Sir.

Q

You only estimated?

A

Yes, Sir.

Q

And, what was the basis of your estimation?

A

Because at that time there were only few customers in that place, Sir.

Q

So, you are not really sure what time Fidel Cubcubin left?

A

Yes, Sir.

Q

You also did not see him leave?

A

No, Sir.[45]

In People v. Gallarde,[46] it was explained that positive identification refers essentially to proof of identity and not per se to that of being an eyewitness to the very act of commission of the crime. A witness may identify a suspect or accused in a criminal case as the perpetrator of the crime. This constitutes direct evidence. Or, he may not have actually seen the crime committed, but is nevertheless able to identify a suspect or accused as the perpetrator of the crime, as when the latter is the person or one of the persons last seen with the victim immediately before and right after the commission of the crime. This is the second type of positive identification,

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which, when taken together with other pieces of evidence constituting an unbroken chain, leads to a fair and reasonable conclusion that the accused is the author of the crime to the exclusion of all others.

This rule, however, cannot be applied in the present case because Danet Garcellano did not actually see accused-appellant and the victim leave the Sting Cafe together. There is thus serious doubt as to whether accused-appellant was really the last person seen with the victim. Her testimony is insufficient to place accused-appellant in the scene of the crime so as to form part of the chain of circumstantial evidence to show that accused-appellant committed the crime. Suspicion alone is insufficient, the required quantum of evidence being proof beyond reasonable doubt.[47]

Nor is there adequate evidence to prove any ill motive on the part of accused-appellant. Accused-appellant testified that he could not have killed the victim because the latter was his friend whom he considered his "kuya" or elder brother.[48] There is no showing that the killing of the victim was by reason of a supposed altercation they had as to who would pay for the two bottles of beer ordered while they were at the Sting Cafe. The beer was later paid for by the victim. Motive is proved by the acts or statements of the accused before or immediately after the commission of the offense, i.e., by deeds or words that may express the motive or from which his reason for committing the offense may be inferred.[49]

Rule 133, §4 of the Revised Rules on Evidence requires the concurrence of the following in order to sustain a conviction based on circumstantial evidence: (a) there is more than one circumstance; (b) the facts from which the inferences are derived are proven; and (c) the combination of all the circumstances is such as to produce a conviction beyond reasonable doubt.

In the case at bar, there are serious doubts as to whether the crime was committed by accused-appellant in view of the following: (1) As already stated, Danet Garcellano, a waitress at the Sting Cafe, did not actually see accused-appellant and the victim leaving the cafe together at about 3:30 a.m. of August 26, 1997; (2) PO3 Rosal and SPO1 Malinao, Jr. testified that when they arrived at the scene of the crime, they were informed by a tricycle driver that the victim and the accused-appellant had earlier left the Sting Cafe together, but the tricycle driver was not presented to confirm this fact; (3) SPO1 Malinao, Jr. testified that the white "Hanes" t-shirt was "bloodied," but the evidence shows that it had some bloodstains only on its lower portion (Exh. H), while the photograph of the t-shirt (Exhs. B-2, B-2-A, B-2-B), supposedly taken at the time of the search, shows that it had no bloodstains and this discrepancy was not explained by SPO1 Malinao, Jr.; (4) The fact that the t-shirt was tested positive for type "O" blood does not necessarily mean that the bloodstains came from the victim who also had a type "O" blood; (5) Accused-appellant was never given a paraffin test to determine if he was positive for gunpowder nitrates; (8) The .38 caliber gun allegedly found in his house was not examined for the possible presence of accused-appellant's fingerprints; and (9) The allegation that the gun was placed on top of a water container in accused-appellant's house is unbelievable as it is improbable that accused-appellant could be so careless as to leave the fatal weapon there when he could have hidden it or thrown it away.

Nor can we rest easy on the prosecution's claim as to where the two empty shells and the t-shirt were allegedly found. SPO1 Malinao, Jr. testified that these were placed beside the white "Hanes" t-shirt and fell when he took the shirt. On direct examination, SPO1 Malinao, Jr. said:

> PROSECUTOR LU:
>
> Q
>
> What else did you tell Cubcubin at that time?
>
> A

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We asked him to allow us to go inside the house and he let us go inside the house, then after entering the same, while we were in the sala near the kitchen we saw the white Hanes t-shirt there, Sir, that was near the kitchen.

Q

Where exactly was the white t-shirt placed at that time when you saw the same?

A

Because after entering the house you will see the entire portion of that house and there is a table there and that t-shirt was placed on the table.

Q

Was that t-shirt visible from the front door of the house?

A

Yes, Sir.

Q

Can you describe to us the t-shirt that you saw?

A

Before I got the t-shirt, I even asked his permission for me to be able to get the t-shirt, Sir, and he even gave me the permission to get the same, after getting the t-shirt there were even 2 empty shells which fell, and I saw the t-shirt was with blood stains.

Q

This white t-shirt, can you tell us the brand of the t-shirt?

A

Hanes, Sir.

Q

How about the blood spot or blood stains, can you tell us how many, if you can remember?

A

We were in a hurry, I did not count the blood stains anymore but there were blood stains on the t-shirt, Sir.

Q

How about these 2 empty shells that fell when you lifted the t-shirt, can you describe to us these 2 empty shells?

A

Empty shells of .38 cal. bullets, Sir.

Q

What did you do with the empty shells?

A

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I got the t-shirt as well as the 2 empty shells and I showed them to him, Sir.[50]

However, on cross-examination, he said he found the empty shells on top of a cabinet (tokador) in the bedroom on the second floor of the house. Thus, he testified:

ATTY. BAYBAY:

Q

Where was this t-shirt again when you first saw it?

A

In the kitchen area, Sir.

Q

Where in the kitchen area, on the floor or on the wall?

A

It was immediately in front of the door because the house has no divider anymore, Sir.

Q

And that t-shirt was immediately near the door, on the floor?

A

Yes, Sir.

Q

What did you do after that, when you saw the t-shirt there?

A

I asked his permission so that I could take a look at the t-shirt, Sir.

Q

And you said, you looked at it?

A

Yes, Sir.

Q

When you said, you looked at it, how did you look at it?

A

I spread it out in front of him, Sir.

Q

And when you spread it out in front of him, did you ask him whose t-shirt is it?

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A

I asked him if that t-shirt belongs to him, Sir.

Q

What did he say?

A

According to him, the t-shirt does not belong to him, Sir.

Q

You also testified that you found two empty shells?

A

Yes, Sir.

Q

Where did you find these two empty shells?

A

From the bedroom upstairs, Sir.

Q

Bedroom upstairs?

A

Yes, Sir.

Q

You mean, it is a two-storey house?

A

Yes, Sir, there is a bedroom upstairs.

Q

You found it when you went up?

A

I first asked his permission to look around inside the house, Sir, because I was asking him also about the whereabouts of the firearm he had.

Q

And he allowed you?

A

He allowed me, sir.

Q

And when you went upstairs, you found the two empty shells?

A

Yes, Sir, they were placed on their tokador on a place where there is a curtain.

Q

In your previous testimony and this is found on page 41 of the TSN, you stated that you got the t-shirt and when you lifted the t-shirt, two empty shells fell off?

A

After finding the two empty shells for a .38 caliber, Sir, I placed them together with the t-shirt.

Q

What you are telling us now is that you went upstairs, you found two empty shells and you put them together with the t-shirt, that is what you are telling us now?

A

After finding and taking a look at the t-shirt, I put it on the original place where it was, Sir, and after finding the two empty shells, it so happened that the investigator was behind me so after that, I showed to him the t-shirt as well as the empty shells.[51]

. . . .

Q

Also in your previous testimony, you got the t-shirt and you asked the permission to get the t-shirt, after getting the t-shirt, there were 2 empty shells which fell. The question is, do you remember that this happened?

A

These two empty shells which I recovered upstairs, sir, I placed them on top of the t-shirt.

Q

You said, when you got the t-shirt, something fell, in your direct testimony?

A

While Fidel Cubcubin was just beside me, Sir, I got the t-shirt, I spread it out and nothing fell yet at that time, then I asked him about the firearm that he used.

. . . .

Q

Do you remember having been asked this particular question:

"Q Can you describe to us the t-shirt that you saw?

A Before I got the t-shirt I even asked his permission for me to be able to get the t-shirt, Sir, and he even gave me the permission to get the same, after getting the t-shirt there were even 2 empty shells which fell, and I saw the t-shirt was with blood stains."

A

Yes, Sir, I remember it.

Q

I am just referring to two empty shells that fell, which you said, is that true?

A

Yes, Sir, there were empty shells that fell, but I first placed them on top of the t-shirt because I was planning to wrap these empty shells in the t-shirt.

Q

You also testified here on page 40 that the t-shirt was visible from the front door of the house, is that true?

A

Yes, Sir.

Q

And you were referring to the time that you entered the house?

A

Yes, Sir.

Q

And that was the time that you lift[ed] the t-shirt when you saw it and you got it?

A

What I said before was that, I got the t-shirt, I lifted it, after that, I placed it on its original place, Sir, and I asked him about the firearm but he was not commenting anything on that, so I asked permission from him to go upstairs to look around.

Q

When you said you placed that from the place where you found it, how did you put it on the place where you found it?

A

I placed it there the way I saw it before, the way it was previously placed there, Sir, because I was planning to bring the t-shirt.[52]

Thus, caught in his own contradiction, SPO1 Malinao, Jr. prevaricated but in the process committed more contradictions. He said he found the empty shells on top of the tokador on the second floor of the house, brought them downstairs, and then placed them on the t-shirt. When he got the t-shirt, the empty shells fell on the floor. But how could he have gotten the shells from the second floor if, according to him, he found them by accident when they fell from the t-shirt which he found immediately after entering accused-appellant's house and before going up to the second storey? It is also noteworthy that whereas at first SPO1 Malinao, Jr. said he found the t-shirt placed on the table near the kitchen, he later said he found it on the floor.

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WHEREFORE, the decision of the Regional Trial Court, Branch 88, Cavite City, finding accused-appellant Fidel Abrenica Cubcubin, Jr. guilty of the crime of murder, is REVERSED and accused-appellant is hereby ACQUITTED on the ground of reasonable doubt.

Accused-appellant is ordered immediately released from custody unless he is being held for some other lawful cause. The Director of Prisons is directed to implement this Decision and to report to the Court the action taken hereon within five (5) days from receipt hereof.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Vitug, Kapunan, Panganiban, Pardo, Buena, Ynares-Santiago, De leon, Jr., and Sandoval-Gutierrez, JJ., concur.
Quisumbing, J., abroad on official business.
Gonzaga-Reyes, J., on leave.

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[1] Per Judge Christopher O. Lock.

[2] Rollo, p. 10.

[3] Records, p. 96.

[4] Id., pp. 85-86.

[5] TSN (SPO1 Florentino M. Malinao, Jr.), pp. 13-33, Dec. 10, 1997.

[6] TSN (PO3 Raymundo D. Estoy, Jr.), pp. 37-44, Jan. 30, 1998; TSN (SPO1 Florentino M. Malinao, Jr.), pp. 34-36, Dec.10, 1997; TSN (PO3 Enrico A. Rosal), pp. 6-19, March 18, 1998.

[7] TSN (Danet Garcellano), pp. 4-29, April 20, 1998; Sinumpaang Salaysay of Danet D. Garcellano, dated August 26, 1997 (Exh. S), Records, p. 103.

[8] TSN (PO3 Enrico A. Rosal), pp. 19-22, 37, March 18, 1998.

[9] Contained in a separate envelope. Other exhibits, to wit: Exhs. E, E-1, F, G, G-1, G-2, G-3, G-4, and G-5, M, M-1, M-2, M-3, and M-4 were also placed in separate envelopes.

[10] TSN (PO3 Enrico A. Rosal), pp. 23-25, 46-53, March 18, 1998.

[11] TSN (SPO1 Florentino M. Malinao, Jr.), pp. 36-48, 51-58, Dec. 10, 1997; TSN (PO3 Raymundo D. Estoy, Jr.), pp. 44-76, Jan. 30, 1998; TSN (PO3 Enrico A. Rosal), pp. 25-30, March 18, 1998; Sinumpaang Salaysay of SPO1 Florentino M. Malinao, Jr., dated August 26, 1997 (Exh. I), Records, p. 92; Sinumpaang alaysay of PO3 Raymundo D. Estoy, Jr., dated August 26, 1997 (Exh. L), Records, p. 95.

[12] Records, p. 87.

[13] Id., p. 88.

[14] Id.

[15] Id.

[16] TSN, pp. 3-14, April 7, 1998.

[17] Records, pp. 98-99.

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[18] Id., p. 102.

[19] TSN, pp. 6-22, Feb. 6, 1998.

[20] Records, p. 101.

[21] Id., p. 90.

[22] Id., p. 91.

[23] TSN, pp. 4-5, 11-23, 34-36, 42-44, Jan. 23. 1998; TSN, pp. 75-77, Jan. 30, 1998.

[24] Records, p. 93.

[25] Id., p. 94; TSN, pp. 8-16, Jan. 30, 1998.

[26] TSN, pp. 65-75, June 23, 1998.

[27] Id., pp. 39-64, 75-77.

[28] TSN, pp. 4-35, June 9, 1998.

[29] TSN, pp. 3-20, June 23, 1998.

[30] Rollo, p. 139.

[31] Id., p. 141.

[32] People v. Mahusay, 282 SCRA 80 (1997); See also Posadas v. Ombudsman, G.R. No. 131492, September 29, 2000; Cadua v. Court of Appeals, 312 SCRA 703 (1999); People v. Doria, 301 SCRA 668 (1999).

[33] People v. Burgos, 144 SCRA 1 (1986).

[34] People v. Mahusay, supra.

[35] Supra at 5-7.

[36] Records, p. 11

[37] Id., p. 12.

[38] Id., p. 14.

[39] Id., p. 17.

[40] Id., p. 18.

[41] People v. Meris, G.R. Nos. 117145-50 and 117447, March 28, 2000; People v. Ereño, 326 SCRA 157 (2000); People v. Gallarde, 325 SCRA 835 (2000).

[42] 65 Phil. 689, 695 (1938).

[43] 217 SCRA 597, 611 (1993).

[44] TSN, pp. 15-17, April 20, 1998 (emphasis added).

[45] Id., pp. 28, 32 (emphasis added).

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[46] 325 SCRA 835 (2000).

[47] People v. Gargar, 300 SCRA 542 (1998).

[48] TSN, p. 58, June 23, 1998.

[49] People v. Melchor, 307 SCRA 177 (1999).

[50] TSN, pp. 39-41, Dec. 10, 1997 (emphasis added).

[51] TSN, pp. 77-80, Jan. 23, 1998 (emphasis added).

[52] Id., pp. 86-90 (emphasis added).

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