

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS, JOSE I. BALUYOT, DEFENDANT AND APPELLANT.

G.R. No. 14476. November 06, 1919

Ponente: STREET, J.

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STREET, J.:

This cause has been brought to the Supreme Court upon an appeal prosecuted by Jose I. Baluyot from a judgment of the Court of First Instance of the Province of Bataan, convicting him of the crime of murder, committed August 3, 1918, upon the person of Conrado Lerma, governor of said province, and sentencing him to undergo the penalty of death, to indemnify the heirs of the deceased in the sum of P1,000, and to pay the costs.

At the general election which was held on June 6, 1916, Conrado Lerma was elected governor of the Province of Bataan. One of his competitors upon this occasion was the accused, Jose I. Baluyot, who came out third in the race. As a result of this contest a feeling of personal rancor was developed in the mind of Baluyot against his successful competitor, and during the two years which followed the accused became fully imbued with the idea that Governor Lerma was persecuting him.

In the year 1918 Baluyot was prosecuted in the Court of First Instance of the city of Manila for the offense of estafa in connection with a loan of money which had been negotiated at the Philippine National Bank. This proceeding had been tried and in the early days of August, 1918, was pending decision by the judge who tried the case.

Upon the organization of the National Guard, Baluyot had been commissioned as captain in that body, and owing possibly to the pendency of the accusation for estafa and its damaging effects upon his reputation, he had been asked to resign from the position of captain in the National Guard; and although he had not resigned when the act which gave occasion to this prosecution occurred, he had apparently been temporarily relieved from duty with that organization pending investigation.

The misfortunes above mentioned, as well as others of a minor character, were attributed by Baluyot to the machinations of Governor Lerma, all of which served to foment and increase his feeling of enmity towards the latter.

On August 2, 1918, the defendant left the city of Manila and went to the town of Orion, in the Province of Bataan, taking with him a revolver. Early on the following day, August 8, he shipped to Manila from Orion a piano belonging to his wife, and at 8 a. m., went to Balanga, the capital of the Province, arriving at the recorder's office in the provincial building at about 9 o'clock a. m., where he inquired for Governor Lerma.

He was told that the governor had not arrived, but was expected later. The accused accordingly determined to wait in the recorder's office, which served as a sort of anteroom to the office of the governor. At about 11 o'clock a. m. the governor arrived. He and the accused greeted each other in a friendly manner by shaking hands; and the governor, upon being informed that Baluyot had called to confer with him, invited Baluyot into his office. Baluyot

hesitated, having noted the presence of another caller, and asked if the latter did not have a prior right to an interview. The governor said that Baluyot should enter first, which the latter accordingly did. The governor and the accused remained alone in the former's office for 3 or 4 minutes, whereupon it occurred to Governor Lerma that the interview might be more extended than he had expected, and he accordingly requested that Baluyot should withdraw long enough for the governor to confer with one Antonino Aranjuez, the other caller to whom reference has already been made. Baluyot accordingly withdrew into the recorder's office and told Aranjuez that the governor wanted to see or talk to him. Aranjuez then went in and had a conference with the governor for a few minutes about the appointment of the former as chief of police for the municipality of Limay. When Aranjuez came out Baluyot said that it was now his turn and again entered the governor's office.

The evidence shows that at the time Baluyot reentered the governor's office the latter was sitting behind his desk in an ordinary office chair. Baluyot approached the desk and upon reaching a position directly in front of the governor spoke certain words which were heard, though not distinctly, by persons in the recorder's office, Antonino Aranjuez merely heard the accused call out "governor," while Gregorio de Guzman understood Baluyot to be asking the governor for his revolver. The accused himself testified that his reference to the revolver was intended to admonish the governor to prepare for a mortal combat and he says that the words spoken were these:

"BALUYOT. It appears to me that your revolver and mine have the same calibre.

"GOVERNOR LERMA. No sir; mine is 32.

"BALUYOT. So is mine. Be prepared because one of us must die."

The accused gives a color to this conversation which seems to us somewhat unnatural, and his statement as to what occurred, especially with reference to the length of time that elapsed after he entered the governor's office until the first shot was fired, is wholly lacking in verisimilitude. What really occurred, as the lower court found, and as the testimony of the witnesses in the recorder's office shows, is that the first shot was fired within a few seconds after Baluyot reentered the governor's office and that the interval which elapsed was scarcely more than sufficient to allow Baluyot to reach the governor's desk. The inference is conclusive that, immediately upon asking the governor about his revolver, and discovering that he was unarmed, Baluyot drew his own revolver and fired.

In the testimony given by Baluyot himself a circumstance is mentioned which appears to us important in this connection. He says that while he was sitting in the recorder's office, awaiting the arrival of Governor Lerma, Paulo Venegas, a guard attached to the provincial jail, came up and after speaking in a low voice with the recorder, entered the office of the governor and presently emerged, bringing a revolver and some cartridges. Baluyot noticed that the revolver was discharged and remarked to the person having it in hand that an unloaded revolver is less useful even than a cane. The guard replied that he was not the person charged with loading it, but was going to take it out to be cleaned, whereupon he disappeared carrying the revolver with him. This act of carrying away of the revolver from Governor Lerma's office was especially noticed by Baluyot and naturally from this he must have supposed that the revolver seen by him was a weapon commonly kept in the governor's office. The still further inference was obvious to Baluyot that the governor upon arrival would be unarmed in his office, unless he should possibly bring a revolver upon his person.

This circumstance shows that the words which Baluyot directed to Governor Lerma immediately before the fatal attack were intended to discover whether Governor Lerma was in fact unarmed. Upon discovering that Governor Lerma did not have his revolver at hand, the accused at once drew his own weapon and fired. Baluyot therefore knew Governor Lerma to be unarmed and practically defenseless, and it is plain that the attack was not begun until the assailant was fully assured upon this point.

The bullet first fired by Baluyot entered in the frontal region of the right shoulder blade of Governor Lerma and inflicted a wound of minor importance, passing through the aforesaid part of the body and penetrating the back of the chair in which the governor was sitting. Passing on from the chair, the ball entered the wall of the office building, but was so far spent that it did not penetrate deeply. Instead it merely made a circular hole in the wall of moderate depth and rebounded, falling on the floor. The line of direction followed by the ball indicates that the accused directed the shot in somewhat downward direction and that Governor Lerma was in all probability reclining backwards in the chair at the instant the shot struck him.

The governor immediately drose. His free action was impeded by the table in front, and by the walls of the office behind and on either side, since his table was in a corner of his office. His exit was further obstructed by a small book stand on his immediate right. His only convenient direction of escape was, therefore, in the direction to his left by way of the space between the left corner of his desk and the wall nearby. This direction the governor accordingly took, directing himself towards a passageway in the wall a few feet from his desk leading into a corridor. When the governor had cleared the desk so as to leave a free space between himself and his assailant, the distance which separated them was only a few feet. Baluyot meanwhile turned somewhat to his right and advanced slightly in the direction taken by Governor Lerma.

The latter desiring to make good his escape, started to run in the direction aforesaid, and Baluyot, raising his revolver, again fired. The ball struck Governor Lerma in the region of the right shoulder blade and passed through the body an inch or two from the wound made by the first shot. The firing of the second shot was seen by Antonino Aranjuez, whose attention had been attracted by the noise of the first shot. Being then seated at a desk in the recorder's office near the door leading into the governor's office; this witness immediately arose upon hearing the first shot, and having arrived at a point in the governor's office where stood a screen, occluding direct vision from the door to the governor's desk, he placed himself at the side of the screen and was thus able to see the scene then being transacted. It was at this instant that Baluyot, with his arm extended, fired the second shot at his fleeing victim. The governor at this moment had his right hand raised to his already wounded shoulder and was running in a direction away from his assailant rather than towards him. Immediately upon seeing this shot fired, Aranjuez, instead of intervening to save the governor, as would have been becoming, turned and fled to obtain succor.

Bonifacio Mencias, the sanitary official, who examined the wounds of Governor Lerma, says that both of the first two wounds were made by bullets which entered from the front. This is obviously true as to the first, but as to the second there seems to be room for doubt. The inspection made by the doctor may have been superficial, and his opinion may have been partly a matter of mere inference from his information as to the general features of the tragedy. At any rate he does not state any particulars from which it could clearly be discovered that the second shot entered from the front. The witness Aranjuez makes it clear that as the matter presented itself to his eye, the governor was fleeing with his right side, rather than his front, exposed to Baluyot. This witness says that the governor's face was turned in the direction of his flight, though he thinks the governor could have seen what Baluyot was doing. In this view the second shot should apparently have entered from behind.

The point we consider of little importance, inasmuch as it is obvious that Baluyot was the aggressor throughout and that the second shot was fired at an unarmed man whose only purpose was to effect an escape to a place of safety. Whether at the instant this shot was fired Governor Lerma may have had his body turned so as momentarily to confront his assailant, moving away sideways, can have no bearing upon the qualification and character of the crime. The testimony of Baluyot to the effect that as soon as Governor Lerma emerged from behind the table the two engaged in a hand to hand struggle is preposterous in the extreme.

After the second shot was fired, Governor Lerma continued his flight along the corridor and, instead of attempting to pass out to the right into the recorder's office, which would have exposed him to the danger of another shot

while passing through the open space, he took refuge in a closet at the end of the corridor. Once within, he shut the door and placed himself in a position to obstruct the entrance of his pursuer, who vainly attempted to open the door.

The governor then began to call aloud for help, and Baluyot, judging the position of the governor's head from the direction of the sound thus emitted, fired his revolver in the direction indicated. The bullet passed through the panel of the door and struck Governor Lerma in the forward part of the head near and above the right temple. It passed downwards and came out through the left eye, loosening the eyeball in its socket. This wound was necessarily fatal, though not instantly so; and the governor evidently lost consciousness at once,

Baluyot, feeling the movement of the body within the closet, opened the door without resistance. As he did so the body of Governor Lerma shot forward out of the closet, as if in an attitude to embrace the slayer, who drew backwards, and the body fell prone on the floor. In this position it remained and was found prostrate a few minutes later by persons who came upon the scene. Death ensued in about two or three hours, without recovery of consciousness. Baluyot, immediately after the tragedy, stepped over to a window of the room overlooking the public square and, calling to a squad of Constabulary, who were directing themselves to the provincial building, indicated that they should come up. At the same time he threw his revolver to the ground, with three empty shells and others that had not been discharged. Upon the arrival of the Constabulary he surrendered without resistance.

The offense committed in this case exhibits features markedly similar to those which characterized the crime which was the subject of prosecution in *United States vs. Gil* (13 Phil. Rep., 530) ; and the offense here committed was properly qualified by the trial judge as murder, in which was present the qualifying circumstance of *alevosia*. The presence, of this element is easily and in our opinion irrefutably indicated in the conditions and manner both of the original attack and of the final act by which the offense was consummated.

With reference to the manner in which the attack was begun, the proof shows that access was gained by Baluyot, to the governor's office upon the pretext that he desired a friendly interview; and although the strained relations existing between the two, owing to their political antagonisms, was appreciated by both, there was nothing in the situation to warn the governor of impending trouble. The fact that Baluyot had already been called into the office upon the governor's first arrival and had withdrawn for a few moments to permit another person to have an interview was also calculated to put the governor off his guard at the moment Baluyot reentered the office. Being seated in a reclining chair, and hemmed in by obstacles which prevented him from reaching his assailant, it is plain that the unarmed governor could make no effectual defense against a person armed with such a deadly weapon as a revolver. It is obvious also that the means and methods thus deliberately selected by the assailant were intended to insure the execution of the crime without any risk to himself arising from the defense which the offended party could make.

We need not detain ourselves to analyze the conditions which existed when the second shot was fired, and we pass on to the third, with the single observation that the entire assault from the beginning must be considered continuous and that the second shot was fired while the victim was endeavoring to flee to a place of safety. The presence of *alevosia* in the firing of the third shot seems to be too patent to permit of controversy. The victim in his effort to escape had been driven to take refuge in the closet, and with the door shut, it was impossible for him to see what his assailant was doing or to make any defense whatever against the shot directed through the panel of the door. It was as if the victim had been bound or blindfolded, or had been treacherously attacked from behind in a path obscured by the 'darkness of night.

Even supposing that *alevosia* had not been present in the beginning of the assault, it would be necessary to find this element present from the manner in which the crime was consummated. In *United States vs. Elicanal* (35 Phil.

Rep., 209) Justice Moreland said:

"This court has held repeatedly that, even though the beginning of an attack resulting in the death of the deceased is free from treachery of any sort, nevertheless it will be found present if, at the time the fatal blow is struck, the deceased is helpless and unable to defend himself. While the writer of this opinion formerly held the view that, where there is no treachery in the attack which results in the death of the deceased, there can be no treachery which will qualify the crime as murder notwithstanding the fact that, at the time the fatal blow was struck, the deceased was unarmed and defenseless, nevertheless, the court having held so frequently the contrary, the writer accepts the doctrine so well established."

There was present in the offense in question the generic aggravating circumstance that said offense was committed in a place where public authority was engaged in the discharge of duty. (Subsec. 19, art. 10, Penal Code.) There is no discernible difference at this point between the present case and that of *United States vs. Gil* (13 Phil. Rep., 530, 533), in which this aggravating circumstance was declared to be present.

The trial court also found that the crime in question was characterized by the further aggravating circumstance of evident premeditation. Certain items of proof which tend strongly to show the presence of this element may be briefly mentioned. It was testified by one Pedro Magajes, a friend of the accused, that on July 14, 1918, Baluyot in the course of a conversation with Magajes exhibited ill-feeling against Lerma and said that Lerma would pay for the misfortunes that were befalling him (Baluyot). Domingo Lintag, compadre of the accused, testified that on the Friday in the month of August, prior to the commission of the crime in question, he saw the defendant in Orion; that when he and the defendant shook hands the latter squeezed his hand tightly and said, "Parece ser que esta es la ultima vez que vamos a dar la mano" [may be that this will be the last time we will shake hands]. This remark is especially noteworthy, since it shows that the accused contemplated some occurrence which would have grave consequences to him. On the morning of August 3, the day on which the crime was committed, the accused asked more than one person if they thought, he was in Bilibid, intimating that a false rumor to this effect had been maliciously circulated by his archenemy, Governor Lerma. This shows clearly that the mind of the accused was fixed upon Lerma as the supposed author of his wrongs.

No very satisfactory explanation is given by the accused as to the reason for his trip to Orion and especially to Balanga; and the conclusion is irresistible that he was carried to the latter place by a thirst for vengeance. Furthermore, the conduct of the accused in the next day or two succeeding the commission of the crime was that of a person stimulated by a feeling of gratification over the successful accomplishment of a fixed purpose, not the conduct of one effected by grief over the fatal results of a sudden and unexpected altercation. At no time did he exhibit any sign of regret for the act committed. The conclusion reasonably to be drawn from the evidence as a whole is that the accused, for several days prior to the perpetration of this murder, had determined to seek an interview or encounter with Governor Lerma regardless of consequences. It is impossible to say at what moment the determination to take life became a fixed resolution. The design to kill was probably entertained when the accused went in the early morning of August 3 to the governor's office, and the putting of this resolution into effect was at once determined upon when the accused found that the governor was unarmed. In order to constitute the element of known premeditation in the crime of murder it is not necessary that the slayer should have prefigured in his mind all of the details of the crime or determined upon the exact moment when he should carry his purpose into effect. It is enough that the determination to take life should have been formed for a period sufficiently long to allow the actor time to reflect coolly upon the character and the consequences of the act, the accomplishment of the crime being left to some suitable opportunity such as chance or design may present.

It is thus manifest that the conclusion of the trial court that the offense was characterized by known premeditation is by no means without support in the evidence. Nevertheless, as an express ruling on this point is unnecessary to

the disposition of the case, we concede to the accused the benefit of the possible doubt, and we accordingly refrain from making any express findings as to the presence of said element.

It is contended in behalf of the accused that the crime in question was qualified by two extenuating circumstances, namely, first, that it was committed under "an impulse so powerful as naturally to have produced passion and obfuscation" (art. 9, subsec. 7, Penal Code), and, secondly, that "the offender had no intention to commit so great a wrong as that committed." (Art. 9, subsec. 3, Penal Code). This contention rests upon certain statements found in the testimony of the accused and which, in our opinion, are discredited by other evidence. Baluyot states that he began his first interview with Governor Lerma on August 3 by saying that he wished Diputado [delegate] Reyes of Bataan could have been present as there were certain things which he wanted to say in the presence of them both. Baluyot then stated that there was no doubt that Governor Lerma had won in the political contest and that it was also undeniable that in all his own misfortunes the governor had played an important and direct part. The governor, according to Baluyot, thereupon replied: "viene usted con la misma queja, Sr. Baluyot, pero no somos enemigss? Si fuéramos amigos, menos mal; y usted en nuestro lugar hubiera hecho lo mismo como usted ha hecho con mi compadre Velez qua acaba de ser separado de la Guardia Nacional." [You come with the same complaint, Mr. Baluyot, but, are we not enemies? If we were friends, not quite so bad. If you were in our place you would have done the same as you have done with my friend (compadre) Velez who has just been discharged from the National Guard.]

Baluyot says that in reply to this he protested that he had nothing to do with the separation of Captain Velez from the National Guard. At this juncture the governor suggested that the interview was going to be somewhat lengthy and requested that Baluyot should yield his turn for a few minutes until the governor could have a short interview with Aranjuez. Thereupon the interview was interrupted in the manner already stated, Baluyot withdrawing for a few moments into the recorder's office. Baluyot says that, when he was readmitted into the presence of the governor, he seated himself in the same chair in front of the governor's desk where he had been seated before, and the conversation was resumed. This conversation according to Baluyot was of the following tenor:

"GOVERNOR Lerma. Where do you say you are going to, Mr. Baluyot?

"BALUYOT. I am thinking of going to Cebu and residing therefor some time with my brother-in-law.

"The GOVERNOR. But you will not be able to do so very soon, perhaps until after several months.

"BALUYOT. That is not true. On my return to Manila, I'll prepare for my trip and go to Cebu.

"The GOVERNOR. I believe you will not be able to carry that out, because Judge Concepcion will detain you.

"BALUYOT. Why?

"The GOVERNOR. Well, Judge Concepcion has sentenced you for estafa to four months, and I don't know how many days; truly that is a good idea, to change location, a location so full of people as Cebu where nobody knows you perhaps you may be able to cheat better."

Baluyot says that, upon being informed by Governor Lerma that Judge Concepcion had rendered judgment against him in the estafa case condemning him to prison, he lost his head, as he was in high hopes of being acquitted in that prosecution. He accordingly, at the close of the foregoing words imputed to Governor Lerma, rose from his chair and used the words which we have quoted in a former part of this opinion with reference to the calibre of Governor Lerma's revolver, at the same time unbuttoning his coat and producing his own weapon.

Even supposing that the conversation between the accused and Governor Lerma was exactly as stated by Baluyot, the language used by Governor Lerma was not such as could have produced passion and obfuscation in Baluyot

sufficient to constitute the mitigating circumstance defined in subsection 7 of article 9 of the Penal Code. It is to be noted, however, that no such conversation as that above transcribed could possibly have taken place in the interval between the reentrance of Baluyot into the governor's office and the time when the words addressed to the governor about the revolver were heard in the recorder's office. From the testimony given by the witnesses Pedro Gonzales, Antonino Aranjuez and Gregorio de Guzman, we consider it to be irrefutably established that the first shot was fired within nine or ten seconds after Baluyot reentered the governor's office and that the interval which elapsed was scarcely more than sufficient to allow Baluyot to reach the governor's desk.

The mind of an unbiased person must also be impressed" with the inverisimilitude of imputing to Governor Lerma knowledge of a judgment rendered by a court in the City of Manila against Baluyot of which Baluyot was ignorant, for under section 41 of the Code of Criminal Procedure sentence in such a proceeding as that then pending against this accused must be pronounced in the presence of the condemned person, and if Baluyot had in fact been convicted he himself would have been among the first to learn of it. It is highly improbable that Governor Lerma would have been guilty of conduct so unbecoming as to have engaged in bantering a political enemy over a matter so delicate, when judgment had not in fact been pronounced. Our conclusion is that Baluyot's account of the words which passed between him and Governor Lerma immediately prior to the firing of the first shot must be rejected as false.

The contention that the accused had no intention to commit so great a wrong as that committed rests upon the statement of Baluyot that the third shot was accidentally discharged from his revolver while he was attempting to push open the door of the closet in which the Governor had taken refuge. This pretension is hardly deserving of serious notice, as it is refuted not only by the circumstantial evidence bearing upon this phase of the tragedy but also by an admission made by Baluyot on August 5 in conversation with Eusebio Reyes, reporter of a Manila newspaper. In this conversation Baluyot stated that he pursued the deceased to the door of the closet and, having observed from the cries emitted by Governor Lerma that the latter was seated behind the door, he (Baluyot) discharged his pistol in the direction where he divined the governor to be. We have no doubt as to the truth of this admission, and it is a complete refutation of the suggestion that the discharge of the revolver was accidental.

What we have thus far said suffices to demonstrate that in slaying Governor Lerma, the accused was guilty of murder with at least one aggravating circumstance and that the penalty for murder was properly imposed in its maximum degree. It is, however, further insisted in the brief of the Attorney-General that in reality two crimes were committed by the accused in the same act, namely, murder and assault upon a person in authority. Under this conception of the case also the penalty for murder should be imposed in its maximum degree under article 89 of the Penal Code.

We agree with the Attorney-General upon the proposition that the same act in fact resulted in this case in the perpetration of two crimes. That the homicide is to be characterized as murder we have already determined; and it is undeniable that, an attack was in the same act made upon a person in authority while exercising the duties of his office, as charged in the complaint, since the deceased was, as a provincial governor, an authority within the meaning of article 249 of the Penal Code. These considerations in our opinion supply an additional irrefutable basis for the imposition of the death penalty by the trial judge, though his decision did not discuss this aspect of the case.

What has been said is sufficient to dispose of so much of the appeal as is concerned with the commission of the offense and its legal qualification under the law. Other questions, however, are raised relative to the conditions under which the case was called to trial and the manner in which the prosecution was conducted in the Court of First Instance. In this connection various errors of law are imputed, in separate assignments, to the action of the Hon. Carlos Imperial, who acted as judge in the court below.

In the first specification of error the appellant alleges that "he was not given ample opportunity to defend himself," because the court denied his attorney's last request for a continuance. Upon this ground the appellant seeks to secure from this court, if not a reversal of the judgment, at least an order for a new trial. The assignment of error is in our opinion without merit. It appears in evidence that on August 3, 1918, the provincial fiscal filed an information in the court of the justice of the peace charging the accused with the crime of murder. On the 5th, he appeared and waived the right to be defended by an attorney and requested that the "expediente" be sent to the Court of First Instance as soon as possible. On the 9th, an information was filed in the Court of First Instance, whereupon Manuel Banzon, a regularly admitted member of the bar, was appointed by the court as attorney de officio for the defendant upon the latter's request, and he was duly arraigned, entering a plea of not guilty. On that date the attorneys for the Government asked that the trial be set for the 12th, but the counsel for the accused requested that it be set for the 15th, which petition was granted. After the case was called for hearing on the 15th, the court received a telegram from Vicente Sotto, then a member of the bar in Manila, stating that he had been employed by the family of the accused and asking that the hearing be postponed until the following Monday. The attorneys for the Government objected to this request but the court, nevertheless, postponed the hearing until the following day, and Sotto was immediately notified by telegram of that order. Sotto at once departed for Balanga and was present in court when the case was called for trial the next morning. Banzon was authorized by the court to retire from the case only with the defendant's consent and after Sotto had made his appearance and taken charge of the case.

From the foregoing statement it is seen that the accused was at all times represented before the court by a competent attorney, and no fact is adduced which would enable us to say that he was in any wise embarrassed in the making of his defense by the action of the court in setting the case for trial on August the sixteenth and proceeding with it on that day. It cannot be permitted that a trial court should be put in error for refusing a continuance when there is nothing whatever to show that the accused was in fact prejudiced by the action taken. Where a continuance is sought on the ground of want of preparation, an affidavit should ordinarily be filed showing in what respect the applicant is not ready and that he has made reasonable exertions to prepare for trial without success, or some good reason for not making such exertions. (13 Cor. Jur., 183.) Nothing of the kind was done in this case; and when Sotto actually appeared in court and assumed the duties of attorney for the accused, no application for a continuance of any sort was really made. On the contrary the attorney was content merely to cause a note to be made in the record to the effect that he respectfully protested against the telegram which the court had sent to him the day before notifying that the cause was set for trial on the 16th. No statement whatever was made showing why further delay was necessary. The action taken by the court was in our opinion in no wise prejudicial and was therefore not erroneous.

In *United States vs. Lao Chueco* (37 Phil. Rep., 53), it was held that "when an accused is obliged to come to trial without having the opportunity to cite his witnesses it cannot be said that he is given the opportunity to be tried completely, fully and impartially as the law prescribes, and a new trial will be ordered." But in that case the accused was deprived of the opportunity to subpoena his witnesses, whereas in the case at bar neither the accused nor his attorney informed the court that there was any witness that they wanted to be cited. It does not appear even now that there was any essential witness whom he could have presented had not the case been tried on August 16th. When the accused was arraigned on August 9 the court told him that, if he had any witness that he wanted the court to subpoena, he should so inform the court as soon as possible in order that the trial of the case might not be delayed.

The second assignment of error raises a question which is addressed to the personal qualification of his Honor, Carlos A. Imperial, to preside at the hearing of this case. The exception to the trial judge was based on the fact that the latter had attended the funeral obsequies of Governor Lerma, which had been characterized by marked

manifestations of public grief and sympathy. This fact was relied upon as showing that Judge Imperial was biased and could not be relied on to try the accused with rectitude, justice, and impartiality. The judge, however, did not accede to this suggestion and proceeded with the trial as already stated. There is in our opinion no merit in the assignment. No prejudice on the part of the judge is in fact shown, and the record by no means bears out the assumption that the judge was in fact in any wise biased.

Furthermore, the objection raised is not based upon any of the grounds of disqualification stated in section 8 of Act No. 190. This section expressly enumerates without ambiguity the cases in which a judge or justice of the peace is disqualified from acting as such, and the express enumeration of these cases excludes others. Such is the tenor of the decisions of this court in the cases of *Perfecto vs. Contreras* (28 Phil. Rep., 538), and *Joaquin vs. Barretto* (25 Phil. Rep., 281). In the case last cited it was held that extreme delicacy was no ground for disqualifying a judge from trying a case. The decisions just cited are civil cases but in the absence of express provision in the Code of Criminal Procedure, the analogy is of value.

In the third assignment it is imputed as error that the court at the hearing denied a motion of the attorney of the accused to withdraw the plea of not guilty previously entered by him in order to permit a demurrer to be filed to the information. The attorney did not disclose to the court the ground on which he proposed to base his demurrer, and as the information appears to be sufficient, it is evident that this motion was merely dilatory, and the court committed no error in refusing to accede thereto. The action of the trial court in passing upon an application of this character is largely discretionary and is not subject to review except where the judicial discretion appears to have been abused.

The fourth specification is addressed to the supposed error of the court in refusing to compel the provincial fiscal to produce in court at the request of the attorney for the accused certain written statements which had been made by the witnesses Pedro Gonzales, Gregorio de Guzman, and Antonio Aranjuez in a preliminary inquiry conducted by the fiscal preparatory to this prosecution. It appears that after the witnesses above mentioned had been examined in court for the prosecution, they were turned over to the attorney for the accused and were by him fully cross-examined. Later, when the giving of testimony for the prosecution had been concluded, the defense proceeded to introduce sundry witnesses who were examined in due course. After four had thus testified, and immediately before the accused was placed upon the stand in his own behalf, his attorney made the request that the declarations or statements above referred to should be produced. The attorney for the prosecution objected on the ground that one party cannot be compelled to produce evidence in favor of the other. The court was of the opinion that the written declarations the production of which was sought were of a privileged nature and accordingly overruled the motion. We are of the opinion that the court was not in error in refusing to compel the production of the documents in question. They were not original or independent evidence of such a character as to give the accused an unqualified right to compel their production, and no proper basis was laid in the cross-examination of the witnesses who had made those statements to justify their production with a view to the impeachment of the declarants. The request was of course based upon the supposition or expectation that if the statements of the witnesses before the fiscal were produced, they might be found to contain something different from what was contained in their testimony given in court.

We know of no rule of practice which sustains the contention of the appellant. The statements in question were not the sworn declarations of witnesses taken in conformity with the requirements of section 13 of General Orders, No 58, and which are commonly attached to the "expediente" transmitted by the committing magistrate to the Court of First Instance. In the case at bar the preliminary examination before the committing magistrate was waived by the accused, and the declarations of the witnesses for the prosecution were therefore not taken before the magistrate. The declarations referred to were, on the contrary, taken in an investigation conducted by the fiscal

under the authority of section 1687 of the Administrative Code. This section authorizes the fiscal, if he deems it wise, to conduct an investigation into the matter of any crime or misdemeanor for the purpose of instituting or carrying on a criminal prosecution. It is expressly declared that this section shall not be construed to authorize a provincial fiscal to act as a justice of the peace in any preliminary investigation. The proceeding here contemplated is of an administrative character, and the information thereby acquired is intended for the use of the fiscal in the conduct of the prosecution. Such declarations therefore pertain to the official file in the office of the public prosecutor and are not subject to production at the mere request of the attorney for the accused where no ground therefor had been laid.

In order that we may not be misunderstood, as well as for the purpose of clarifying the practice in such matters, a few words may here be properly said in respect to the proper mode of proceeding in a case where a party wishes to get before the court contradictory statements made by a witness who is testifying for the adversary party. For instance, if the attorney for the accused had information that a certain witness, say Pedro Gonzales, had made and signed a sworn statement before the fiscal materially different from that given in his testimony before the court, it was incumbent upon the attorney when cross-examining said witness to direct his attention to the discrepancy and to ask him if he did not make such and such statement before the fiscal or if he did not there make a statement different from that delivered in court. If the witness admits the making of such contradictory statement, the accused has the benefit of the admission, while the witness has the opportunity to explain the discrepancy, if he can. On the other hand, if the witness denies making any such contradictory statement, the accused has the right to prove that the witness did make such statement; and if the fiscal should refuse upon due notice to produce the document, secondary evidence of the contents thereof would be admissible. This process of cross-examining a witness upon the point of prior contradictory statements is called in the practice of the American courts "laying a predicate" for the introduction of contradictory statements. It is almost universally accepted that unless a ground is thus laid upon cross-examination, evidence of contradictory statements are not admissible to impeach a witness; though undoubtedly the matter is to a large extent in the discretion of the court.

We wish to add that in a case of this kind, if the accused had, by affidavit or otherwise, made it appear to the satisfaction of the court that the witnesses named had made statements in their declarations before the fiscal materially at variance with their statements in court and that the production of said declarations was necessary or even desirable, in the interests of justice, the court would have had ample power to order their production. No such showing, or intimation, was made in this case; and the attorney who made the motion was merely angling at random to discover something that might prove to be favorable to his client. To put a court in error for refusing to entertain such a motion would encourage frivolous delays and tend to embarrass the speedy and proper administration of justice.

The last assignment directed to supposed error of law in the action of the trial court is to the effect that the judge made his decision without hearing the assessors who acted at the trial. In this connection it appears that at the request of the accused two assessors were appointed in accordance with the provisions of sections 153-161 of Act No. 190, which provisions were extended to criminal causes by Act No. 2369 of the Philippine Legislature. The record does not show that the assessors in the case before us were in fact consulted by the judge, and the decision of the court makes no mention of them. We are of the opinion that, the irregularity, if such it be, is immaterial. The functions of the assessor are purely advisory, and the responsibility for the decision rests exclusively with the judge. The statute does not require that the opinions of the assessors shall be recorded except where two or more assessors are of the opinion that the court's findings of fact are wrong. In the silence of the record it is to be presumed not only that the functions of the assessors were properly performed but that they agreed with the findings of the court. This presumption is borne out in the case before us by the circumstance that after the records of the case had been sent up to this court, the clerk of court of Bataan forwarded as part of said records

certifications signed by the assessors who had sat in the case, stating that they had read the decision rendered by the court and that they concurred in the findings of fact made therein. It is not necessary that the record should affirmatively show that the judge consulted the assessors before making his decision, as in the absence of a showing to the contrary it is to be presumed that he did so.

From the preceding discussion it is apparent that, in the view sustained by the majority of the members of this court, no material error was committed by the trial judge either in the mode of conducting the trial or in the qualification of the crime and fixing the penalty attendant thereupon. However, as one of the Justices of this court is not in accord with the majority with regard to the propriety of the imposition of the death penalty, the penalty imposed must, in conformity with the requirements of Act No. 2726 of the Philippine Legislature, be reduced from death to *cadena perpetua* with the accessory penalties prescribed in article 54 of the Penal Code. As thus modified the judgment appealed from is affirmed, with costs against the appellant. So ordered.

Arellano, C.J., Torres, Johnson, and Avanceña, JJ., concur.

Malcolm, J., was not present at the argument, and did not take part in the disposition of the case.

Moir, J., voted with the majority of the court for the affirmance of the judgment, but on account of his absence at the time of the promulgation of this opinion his name does not appear signed thereto. (Sgd.) C.S. ARELLANO.

DISSENTING

ARAULLO, J.,

I dissent from the foregoing opinion of the Justices in regard to the classification of the crime committed by the accused Jose I. Baluyot and the penalty which ought to be imposed upon him.

After a careful study of the case, in my opinion the death of Governor Conrado Lerma of the Province of Bataan caused by Baluyot in the morning of August 3, 1918, cannot be qualified by *alevosia* (treachery), and consequently the crime committed by said accused is that of homicide. Wherefore, the penalty corresponding to said crime should have been imposed.

There is treachery (*alevosia*) when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk to himself arising from the defense the offended party might make. (Art. 10, par. 2, of the Penal Code.)

It is a doctrine upheld repeatedly by the courts that the circumstances which qualify the homicide, converting same into murder, ought to be proven by the prosecution like the homicide itself, to wit, beyond a reasonable doubt, before the same may be qualified as murder and the corresponding penalty imposed; that in order that the crime of murder may be considered established, it is requisite that there appear proved in a manner evident and undisputable one of the circumstances enumerated in article 403 of the Penal Code; that mere presumptions and hypothetical deductions do not suffice for their appraisal and justification. It has also been held repeatedly that before treachery can be considered as a qualifying circumstance of the crime of homicide, it is requisite that there appear as clearly proven that regarding it no doubt whatever presents itself, arising from suppositions founded on facts which may have been the subject matter of the evidence at the trial.

It was proven: First, that the accused Jose I. Baluyot, between 10 and 11 a. m. of August 3, 1918, finding himself in the room or office of the provincial governor of Bataan, Conrado Lerma, alone with the latter, with a revolver which he was carrying fired, first, two shots at short intervals at said governor—the first shot while the governor was seated in front of his writing desk, the second while he, having stood up, was in the act of betaking himself to

a little passage-way leading to a corridor adjoining the office— and afterwards a third, the said Lerma then being behind the door of a closet, wherein he took refuge, fleeing from his pursuer who aimed said third shot through said door; second, that the projectile of the first shot entered the frontal region of Lerma's right shoulder blade, that is to say (as Dr. Mencias, who examined him five minutes after the incident has stated), the region below the upper right clavicle, passing through the said part of the body, the back of the chair in which Lerma was sitting and lodging itself in the wall of the room behind the chair; third,, that the projectile of the second shot also entered the same part of Lerma's body but about one or two inches from the first, passed through the body and, like the first, came out of the shoulder blade on the same side—said wounds not being necessarily mortal except in case of complications; and fourth, that the projectile of the third shot penetrated the panel of the door behind which the deceased had taken refuge, struck him in the right temporal region, coming out of the left eye and destroying same, this wound being necessarily mortal and serious for the cerebrum was penetrated, the result being that the wounded Lerma, without being able to say a word and without recovering consciousness, died at 2.35 p. m. of that same day, or approximately three hours after having been wounded.

Governor Lerma and the accused Baluyot being alone in the governor's office when Baluyot, making use of the revolver which he was carrying, began the attack; and nobody having witnessed what occurred between them before the one began the attack upon the other or during the same; and the one attacked having died without being able to say a word, on account of the gravity of the wound caused by the last shot; it is undeniable that no one, with the exception of the accused himself, has been in a position to relate what took place then between him and the deceased.

It is said in the majority decision that the accused, in the morning of the third day of August aforesaid, was awaiting Governor Lerma in the recorder's office, a sort of anteroom to the governor's office; that on the governor's arrival about 11 o'clock a. m. after an exchange of friendly greeting and handshaking the accused was invited first by the governor into said office, in preference to another caller called Aranjuez who was also waiting; that the accused entered and, the two remained alone in said office for 3 or 4 minutes, but as it appeared to the governor that the interview would be longer, he requested the accused to go out a minute in order to confer with said Antonino Aranjuez. The accused did so, Aranjuez entered the governor's office and had a few minutes conference. As soon as this was over, the accused reentered the governor's office and that was when the aforementioned three shots fired successively by the accused, were heard.

Referring to what took place then between him and Governor Lerma, the accused said that he came that morning from Orion to Balanga where he had been during the first hours of the same morning occupied in shipping his wife's piano to Manila, his purpose being to have an interview with the Representative of said province, Reyes, and Governor Lerma, to talk over certain things with them and to bid them good-bye before leaving for Cebu as he intended to do, but as Representative Reyes was not in town then, his interview was only with the governor; that the first time he met the governor in his office telling him the object of his visit, Lerma said: "I can almost guess what you want to say to me;" that he answered: "So much the better. That will save me time. There is not the least doubt but that you have defeated me, just as it is also almost undeniable that in all of my misfortunes as these documents I have in my hands prove, you have had very important and direct participation;" that the governor then replied: "You come with the same complaint, Mr. Baluyot, but, are we not enemies ? If we were, friends, not quite so bad. If you were in our place you would have done the same, as you have done with my friend (compadre) Velez who has just been discharged from the National Guard;" that after having denied that he had any thing to do with Captain Velez's discharge the governor asked him if his interview would be long and if he would be willing to grant Aranjuez, who was waiting in the recorder's office, his turn with whom he (governor) would have a short interview that in compliance with the governor's suggestion he withdrew to the recorder's office and, Aranjuez's interview with the governor being over, he reentered said office and resumed the previous

conversation in the following words:

"GOVERNOR LERMA. Where do you say you are going, Mr.. Baluyot?

"BALUYOT. I am thinking of going to Cebu and residing there for some time with my brother-in-law.

"GOVERNOR. But you will not be able to do so very soon, perhaps not until after several months.

"BALUYOT. That's not true. On my return to Manila I'll prepare for my trip and go to Cebu.

"GOVERNOR. I believe you will not be able to carry that out, because Judge Concepcion will detain you.

"BALUYOT. Why?

"GOVERNOR. Well, Judge Concepcion has sentenced you for estafa to four months, and I don't know how many days;" that when he heard this he lost-his head, as he was in high hopes of winning the case or of being acquitted in the prosecution; that the governor continued saying to him; "Truly that is a good idea, to change residence in a place so full of people as Cebu, where nobody knows you, perhaps you may be able to cheat (estafar) better; that then he got up from his seat and addressed the governor in these words: "It appears to me that your revolver and mine have the same calibre;" that the governor answered: "No, sir; mine is 32;" that to this he replied: "So is mine. Be prepared because one of us must die;" that upon saying this he opened his coat and drew his revolver; that then the governor raised his right hand putting it right on the shelf where there was a sword (cris), but on seeing the revolver out of its case he cried out: "Oh! Mother! guard!;" that he (the accused) fired the first shot; that the governor having fallen towards the East, he again pulled the trigger of the revolver, but having missed his shot while he was fixing the trigger, the governor got up grabbing him in order to reach his right hand with which he was fixing the trigger, and after this struggle he (governor) fled starting to run towards the corridor; that he then approached the door of the closet, wherein the governor had taken refuge, with the trigger raised, and when he tried to push said door the revolver went off, the accused not knowing whether it was the third or fourth shot; that after this shot the door was half-opened; that on pushing it, the governor got up in an attitude to embrace him, and he then believed that the governor was trying to struggle with him, but the governor took one step backward and fell prostrated completely on the floor; that he was immediately arrested afterwards by the constabulary to whom he voluntarily surrendered; and that before this he threw from the window his revolver with the cartridges remaining in order that the constabulary soldiers in front of said window should take charge of them.

While the foregoing facts were taking place in the governor's office manner stated by the accused, in the adjoining recorder's office were the recorder himself (Pedro Gonzalez), Antonino Aranjuez who had a few moments before left the governor's office, and Gregorio de Guzman, the provincial assessor, who were produced at the hearing as witnesses for the prosecution.

Pedro Gonzalez testified that, while seated in his office chair, that is in front of the table marked No. 9 in the prosecution's plan, Exhibit B, and shortly after the accused entered the governor's office a.fter Antonino Aranjuez's interview had come to an end, he heard one pistol shot, that the time from the moment the accused entered the aforesaid office until he (the witness) heard said first shot was enough for the accused to go from the witness' office to the governor's desk or about two seconds, calculating the distance between his desk and the governor's to be only some ten steps; that having left his office, going towards the engineer's office in order to ask for help and being in front of said office, he heard a second shot; that the time which elapsed between the first and second shots was about 20 or 30 seconds, the distance between his office and that of the engineer being about 15 or 20 meters; that having immediately gone to the auditor's office, in the lower story of the building, he heard the third shot, more than a minute aifter the second.

The second witness, Antonio Aranjuez, testified that after he had been some two minutes only in the governor's

office, talking with the governor, who said he would be appointed chief of police of the municipality of Limay, he left the governor in his chair, went to the adjoining office of the recorder and there, to a question of the accused, replied that his interview with the governor was now over; that then the accused entered the governor's office; and he (witness) was not yet seated in a chair in the recorder's office, in the place marked with the letter Y in the said Exhibit B, and was in the act of picking up a penholder, when he heard the accused Baluyot say "governor" and immediately afterwards a shot; that on hearing said shot, he ran towards the door opening into the governor's office, reached the side of a screen next to said door, and from there saw the accused fire a second shot with his revolver at the governor; that he then began to run first towards the warden's office, in the lower part of the building, in order to ask for help and afterwards towards the Constabulary barracks; that just as he was about to go out of the front door of said provincial building, he heard the third shot fired from the same place as the two other shots; that the time from the moment the accused entered the governor's office until he heard the first shot was 9 or 10 seconds; that from the first to the second shot was 5 or 6 seconds; and that from the second to the third shot was 3 or 4 minutes, more or less.

The third witness, Gregorio de Guzman, the provincial assessor, testified in turn that when the accused Baluyot entered the governor's office, he was very near the recorder's desk and approximately one meter from the door which was between the governor's office and that of the recorder; that at the moment he was saying good-bye and leaving the recorder's desk to go to his own office, he heard the accused Baluyot asking the governor for his revolver saying: "I would like to see your revolver," that as he was taking hold of the door to go out of the recorder's office, he could not understand the other words of the accused, who was then talking in a natural tone without any indication of a quarrel; that he heard the aforementioned words on going out towards the corridor, and for this reason he could not say whether or not the governor answered; that Baluyot spoke those words as soon as he (Baluyot) was in front of the governor, because Baluyot entered the governor's office while the witness was in the recorder's office; that the distance between the recorder's desk and that of the governor was some 9 meters, more or less; that after leaving and while in front of the engineer's office, he heard a pistol shot coming from the place where he had been; that the time from the moment he heard Baluyot's words addressed to the governor until he heard said shot was, according to his opinion, 9 or 11 seconds; that the distance between the recorder's office and that of the engineer was 10 to 11 meters, more or less, and he was then walking naturally; that upon returning to the recorder's office because he had heard the shot coming from that place and supposed it was an accidental one, he could not enter said office for, when he was about to enter he heard a second shot, and he saw coming out, Antonino Aranjuez, who said that Baluyot had fired at the governor; that the time from the first to the second shot was about 5 or 6 seconds; that after hearing the second shot and seeing Aranjuez, he went to the provincial guard room, called the guards from the steps of the building, and then to the warden to tell him what was going on upstairs; that after loading his revolver and after asking the warden if he would go to help the governor, and while he was on the stairway, he heard another shot; that finding nobody there, and having entered the auditor's office, which was open, and in which were the provincial assessor and an employee of the treasurer's office, he heard another pistol shot fired from the governor's office; and that the time from the second to the third shot was about 2 or 3 minutes.

And, finally, said three witnesses for the prosecution declared that they had not noted nor heard any dispute, altercation, quarrel by words or blows between Governor Lerma and the accused from the time the latter entered the governor's office and before the first shot was heard.

Now then, if, according to the recorder, Pedro Gonzalez, only some two seconds elapsed from the moment the accused entered the governor's office until he reached the governor's desk and fired the first shot, said witness made it clearly understood that the accused had no time enough to hold with the governor the dialogue related by said accused in his testimony, but suddenly, unexpectedly and instantaneously fired his first revolver shot at the

governor as soon as he was near him. But it is not explained nor is it comprehensible, unless said witness has not told the whole truth, why the second witness, Antonino Aranjuez (who was going to take a seat at a table in the very end of the same recorder's office which, according to plan Exhibit B, is 5 meters and 96 centimeters long and away from the recorder's table approximately this same distance, as is shown in said plan) heard the accused, after having entered the governor's office, say "governor" before hearing the first shot, and affirmed also that the time that passed from the moment the accused entered the governor's office until he heard said first shot was 9 to 10 seconds. Neither does one understand how the recorder, Gonzales, heard the first shot fired by the accused two seconds after the latter entered the governor's office and as soon as he had reached the governor's desk, without making mention of having heard the accused say some word to the governor, when the third witness Gregorio de Guzman, the provincial assessor, (who was precisely at the side of the recorder and next to the door separating the office of the latter and that of the governor; i. e., in the same place where the recorder was) heard the accused say, upon entering the governor's office, "Governor, I would like to see your revolver." But, it is far more incomprehensible that when the aforementioned witness Guzman heard the accused utter the aforesaid words he was taking leave of the recorder, as he testified, and leaving the table of the former bound for his own table (that belonging to the provincial assessor) but that he heard the first shot only when he was in front of the door of the engineer's office which was about 10 or 11 meters from the recorder's office and only after 9 or 11 seconds after having heard Baluyot ask the governor for his revolver; i. e., the witness being already outside of the recorder's office and having walked a distance of about 10 or 11 meters from this office to the engineer's, a distance much greater than that intervening between the door of the recorder's office and where the governor's table was, as may be seen in the plan Exhibit B.

It is evident that the three witnesses having referred to the same act, having been placed under similar condition so as to have been advised of what the accused may have said to the governor before firing the first shot, and having heard the first shot, no one of them ought to have failed to have perceived that which the others heard from the accused when the latter talked to the governor. If the object of the prosecution in presenting these witnesses was to prove that Governor Lerma was unsuspectingly and suddenly assaulted by the accused immediately on having placed himself in front of the former, firing at him the first shot which caused a wound in his right shoulder blade, and immediately thereafter the second shot which struck exactly the same part of his body, one or two inches from the first, and to prove also that between the accused and the governor no words were exchanged nor did the said dialogue ever take place, it is evident that said object has not been obtained. The discrepancy and contradiction in the testimony of the two witnesses, Antonino Aranjuez and Gregorio de Guzman, on the one hand, and that of the other witness, Pedro Gonzalez, on the other hand, is so evident that one is unable to infer from their respective testimony what took place between Governor Lerma and the accused while the two were alone in the office of the former, before the accused assaulted the governor, and at the time the first shot was fired followed immediately by the second is a positive and proven fact.

However, in the foregoing decision the majority say that, from the testimony given by the aforementioned three witnesses, they consider irrefutably established that the first shot was fired within 9 or 10 seconds after Baluyot reentered the governor's office, and that the interval which intervened was scarcely more than sufficient to allow Baluyot to reach the governor's desk.

I do not believe that¹ the evidence warrants such a conclusion. Aside from the fact that for the reasons already set forth absolute credit cannot be conceded said three witnesses in all that each has stated regarding the particulars already mentioned, it is indisputable that, if it be accepted as an established fact that the first shot was fired within 9 or 10 seconds, it cannot be accepted at the same time as certain that the interval which intervened after the accused reentered the governor's office or, better said, went to this office from the recorder's was hardly more than sufficient to allow the accused to reach the governor's desk, for the simple reason that what is deduced from the

testimony of Antonino Aranjuez and Gregorio de Guzman regarding the first point is an evident contradiction of what the recorder, Gonzalez, said regarding the second or last point. The recorder said that the distance between his desk and that of the governor was only some 10 paces and that the time intervening from the moment the accused entered the governor's office until he (the witness) heard the first shot was some two seconds or the time sufficient, according to said witness, to reach the governor's desk from that office. But according to the affirmations of Aranjuez the first shot was fired within the 9 or 10 seconds after the accused had reentered the governor's office, and according to De Guzman from 9 to 11 seconds elapsed after Baluyot was heard saying to the governor that he would like to see his (the governor's) revolver (words that Baluyot uttered upon arriving in front of the governor) until the first shot was heard, said witness being then in front of the engineer's office. Wherefore it cannot be affirmed that what the recorder Gonzalez told about the particulars in question is not true, because, as anybody, watch in hand, can prove it, the distance of 10 steps between two points cannot be covered walking at natural pace and not hurriedly, in 2 seconds only; but from 8 to 9 seconds. Regarding the other two witnesses, one cannot deny that the basis for their computation of the time intervening from one moment to another was only reliable in a small degree and easily fallible when before-hand (i. e., from the first moment) there had been no intention to determine it, and, even so, any calculation is not able always to come out exact. These two witnesses could have just as well said that the time intervening from the moment stated by each respectively in this affirmation until they heard the first shot was from 20, 30, 50, seconds or one minute more, without anybody contradicting them and without their giving any reason justificative of said computation, as they have said that it was from 9 to 10 or 11 seconds. It is to be noted also that said Aranjuez and De Guzman have come to agree in their computations regarding the first shot, the first saying it was from 9 to 10 seconds the second from 9 to 11; and also regarding the time which transpired from the first shot to the second, the two saying it was some 5 or 6 seconds—coincidence which is rather strange as far as it reveals complete identity in the computation made by the two, and rather unnatural and unexpected, especially if there is taken into consideration the circumstances in which are unrolled the events to which said computation refers. And so much the more strange as the other witness, Gonzalez, has not coincided with the other witnesses in the computation which concerns the first shot as much as the second, for according to said witness between the first and the second shot passed not 5 or 6 seconds, but 20 or 30 seconds.

Therefore, in my judgment, the aforementioned conclusion cannot be reached by means of the testimony of the witnesses who were in the secretary's office, i. e., of the three witnesses above named; nor can it be conclusively deduced from same, as is also stated in the same decision, that, immediately upon asking the governor about his revolver, and discovering that he was defenseless, Baluyot drew his own revolver and fired.

However, in order to arrive at said conclusion, the majority has had under consideration various facts and circumstances which are related in the same decision indicative of the purpose then conceived, according to the majority, by the accused to kill treacherously Governor Lerma.

In fact it is said in the majority decision that the governor, upon being informed that Baluyot had gone there to have an interview with him, invited Baluyot to pass into his office; but Baluyot hesitated, having noted the presence of another caller, and asked if the latter did not have a prior right to an interview with the governor.

What follows from the evidence regarding this particular is that: First, according to the recorder, Pedro Gonzalez, who was then in his office, when Governor Lerma arrived and saw Baluyot he greeted the latter and invited him to pass into his office and that Baluyot went in; second, according to Antonino Aranjuez, when the governor arrived in the recorder's office, he greeted everybody, saying "good morning," that they, in turn, greeted him, that Baluyot shook hands with the governor who then invited Baluyot to enter his office saying: "Come here, friend, pass in," and then Baluyot asked: "Which of us two, Mr. Aranjuez or myself, is the one who ought to enter first?"

and the governor answered: "You ought to enter first," and, in fact, the governor and Baluyot entered into the former's office; and third, according to the same accused, Baluyot, in that morning he was in the recorder's office where he found an employee typewriting; that the recorder Gonzalez and Aranjuez arrived after he did; that when the governor arrived all greeted each other as usual; that the governor having invited him, saying: "Come in," he (the accused), before entering the governor's office, asked the recorder who of those waiting for the governor had the prior right to enter, that the recorder said: "He who had arrived first ought to enter first," then he (the accused) entered the governor's office; the accused added furthermore, in his testimony (rec, 236) that the provincial assessor, Gregorio de Guzman, having entered the recorder's office while Aranjuez was in the governor's office, he (the accused) said to the recorder the following: "Mr. Gonzalez, I give you notice that the next turn is mine and not Mr. Gregorio de Guzman, who has just come," and De Guzman answered: "Yes, I give my turn to you," and that after Antonino Aranjuez had come out of the same he (the accused) then entered the governor's office.

As it appears from the foregoing facts, the accused did not hesitate to enter into the governor's office because he had noted the presence of another caller. The truth is that, upon having been invited by the governor into his office, the accused went in but before entering, he showed himself disposed to enter after Aranjuez if his turn was not prior, having first asked the recorder whose turn it was of those who were waiting for the governor. Certainly, it cannot be said from this that the accused should have shown hesitation then because he should want to be alone with the governor in his office, as it seems to be given to infer in the majority decision. And it is so much the more certain that the accused did not hesitate to enter the governor's office inasmuch as when Gregorio de Guzman was also in the office, he reminded the recorder, that he had a prior right to enter the governor's office than De Guzman, who had only recently arrived.

In my judgment, the conclusion in the majority decision that "The fact that Baluyot had already been called into the office upon the governor's first arrival and had withdrawn for a few moments to permit another person to have an interview was also calculated to put the governor off his guard at the moment Baluyot reentered the office" must also be rectified. From the evidence, it does not appear that the initiative or the idea of withdrawing from Governor Lerma's office at that moment had come from Baluyot but, on the contrary, it was the governor himself, as the majority decision says verbatim, who "requested Baluyot to withdraw long enough for the governor to confer with Antonino Aranjuez, the other caller to whom reference has been made," in view of its having occurred to the governor that the interview which he was then having with the accused might be more extended than he had expected. Moreover, in his testimony (rec. 215) relative to this incident, the accused said that, in his first interview with the governor after having protested that he had nothing to do with Captain Velez' separation from the National Guard, the governor asked him: "Is our interview going to be very long, Mr. Baluyot? Do you wish to give your turn to Mr. Aranjuez who has a short interview?" and he answered he had no objection to this; that in view of the governor's suggestion, he went out of the office to say so to Aranjuez almost at the same time that the governor was calling him; and that he passed into the recorder's office.

Baluyot did not then of his own free will withdraw from the governor's office in order that in the meanwhile Antonino Aranjuez should enter in said office and have a short interview with the governor. Nor can it be inferred that the governor was off his guard the moment the accused reentered his office from the fact that said accused had withdrawn from the same office for a few moment. The inference is exactly the contrary because, the governor knowing the accused was waiting in the recorder's office so that Aranjuez should finish his interview, he must have been aware that the accused was going to return in his office as soon as Aranjuez should go out. In a word, the governor must have been waiting for Baluyot in his office, immediately after Aranjuez departed therefrom.

In the same decision it is said that in the testimony given by Baluyot, mention is "made of a circumstance

seemingly to the majority of importance regarding Governor Lerma's defenselessness when Baluyot, after asking him for his revolver, drew his own and fired. According to the decision, Baluyot said, "That while he was sitting in the recorder's office, awaiting the arrival of Governor Lerma, Paulo Venegas, a guard attached to the provincial jail, came up and after speaking in a low voice with the recorder, entered the governor's office and presently emerged bringing a revolver and some cartridges. Baluyot noticed that the revolver was discharged and remarked to the person having it in hand that an unloaded revolver is less useful even than a cane. The guard replied that he was not the person charged with loading it, but was going to take it out to be cleaned, whereupon he disappeared carrying the revolver with him." And the majority infer that, naturally, from the foregoing fact Baluyot must have supposed that the revolver seen by him was a weapon commonly kept in the governor's office and that the latter upon arrival would be unarmed in his office* unless he should possibly bring a revolver upon his person, and they concluded that this circumstance showed that the word directed to Governor Lerma immediately before the fatal attack against him were intended to discover whether Governor Lerma was in fact unarmed, and that, upon discovering that Governor Lerma did not have his weapon at hand, the accused at once drew his own weapon and fired, and that Baluyot therefore knew Governor Lerma to be unarmed and practically defenseless, and it is plain that attack was not begun until the assailant was fully assured upon this point.

In fact, it appears in evidence, from the testimony of the accused, that after narrating the conversation which took place between him, the recorder, and the other people in the office of the latter and what he saw and observed at that moment while he was in said office and before Governor Lerma's arrival, he said that Paulo Venegas, the warden of the provincial jail, entered the aforesaid office where they were, and after whispering some words to the recorder, the latter went into the governor's office returning therefrom with a revolver and some cartridges which he delivered to said warden; that as the latter stayed for a while near them, pulling the trigger of the revolver which was discharged, he remarked to the warden that an unloaded revolver is less useful even than a cane, and the warden replied that he was going to take out said weapon to be cleaned. But in his testimony as witness for the prosecution, and before the accused had testified in these terms in his own behalf, (for he testified when the defense offered their evidence) the recorder Gonzalez himself said (rec, 83) that in that morning the warden of the jail took from him a revolver, before the accused first met or interviewed the governor; and that the accused was present when he delivered the revolver to the warden; and (in answer to a question propounded upon him by the court) that said revolver belonged to the warden, because when the latter and the governor returned from Manila, it was left in his care.

It follows, therefore, that, if the accused saw or believed to have seen the recorder taking the revolver from the governor's office before delivering it to the warden, the truth was that the recorder had in his care the revolver which did not belong to the governor but to the warden, who took it with him upon leaving the recorder's office to have it cleaned, as the warden himself has testified. From the fact that the warden, upon leaving the recorder's office, took with him said revolver, which he had received from the former (as said warden testified that it was given to him) even if the accused must have supposed that said revolver was a weapon commonly kept in the governor's office, it cannot be said that same accused might have also supposed that the governor upon arrival would be unarmed in his office; because, as the same decision says the governor could have possibly brought, a revolver upon his person, and Baluyot could have very well believed this since he was also carrying his. Moreover, what must be inferred from the very fact that the accused had mentioned in his testimony this circumstance (that he had seen a revolver given by the recorder to the warden which, according to the accused himself, the recorder took from the governor's office) without having been questioned upon this fact but which he spontaneously gave when he referred, among other things, to the conversation which took place between him and the people in the recorder's office and to the things he saw therein while waiting for the governor, appears to be that the accused did not take advantage nor tried to take advantage of what he had seen; i. e., that the revolver,

which the warden took out with him was not in the governor's office at the time he attacked the latter; because, if it had been so, he would not have made mention of said revolver in his testimony, nor that the recorder took it from the governor's office and gave it to the warden, as he was not examined upon this point when he was testifying. Said statement was spontaneously and voluntarily made by him, and it is natural and even common sense that, if he wanted to take advantage of what he had seen and he was sure that said revolver was no longer in the governor's office, he would not have asked the governor any/ more of his revolver (as the witness Gregorio de Guzman has said) before firing his own revolver at him. This shows that he had not been aware of that fact, otherwise he would have hidden and denied it in his testimony even if he had been examined about it, instead of referring to it spontaneously and voluntarily as he did.

In narrating the facts which took place between the governor and the accused while they were alone in the office of the former when said accused fired his revolver at said governor, already mentioned, the majority decision says that the second shot should apparently have entered from behind the victim. And although same decision goes on to say that this point is of little importance, inasmuch as it is obvious that Baluyot was the aggressor throughout and that the second shot was fired at an unarmed man whose only purpose was to effect an escape to a place of safety, the consideration of such a circumstance has undoubtedly influenced the mind of the majority (as the other circumstances mentioned in said decision) in determining that the means and methods employed by the accused in attacking and killing Governor Lerma were treacherous. It is beyond all doubt that Governor Lerma was sitting in the chair which was in front of his desk (marked with the number 2 in the plan Exhibit B) somewhat reclining backwards in said chair, and that when the accused fired the first shot he was in front of the governor who must have also immediately stood up from his seat, directing himself towards the corridor which was on the left side of the seat or chair where he was sitting. The first shot struck the superclavicular region or the frontal region of the right shoulder blade of the victim, passing through the aforesaid part of the body (as the majority decision says), and penetrating the back of the chair in which the governor was sitting.

According to Antonino Aranjuez who, upon hearing the first shot, entered the governor's office, placing himself at the side of a screen which was before the door of said office, (marked with the letter "m" in the plan Exhibit B) from said place he saw the accused fire the second shot with his revolver at the governor who was at this moment fleeing towards the corridor, and was at the point marked with the letter "n" in said plan, with his right hand raised to his right shoulder, the accused being then at the point marked with the letter "n" in same plan, and the governor's face was turned in the direction of his flight, towards the corridor or the southeastern part of the building, just by and towards the right side of the accused who was in front of the governor, and he (Aranjuez) thought that the governor could have seen what Baluyot was doing. The majority decision says, regarding this particular, that the witness Aranjuez makes it clear that as the matter presented itself to his eye, the governor was fleeing with his right side, rather than his front, exposed to Baluyot.

Dr. Bonifacio Mencias, the sanitary official of Bataan, who examined the governor's wounds five minutes after they were inflicted and while the victim was yet living, says, in the medical certificate which he gave on that same day, August 3, that he found in Governor Lerma's body the following wound: "Two wounds inflicted with a firearm in the region of the upper-right clavicle coming out of the region of the right shoulder-blade a wound coming out (?) in the region of the right temple. The first two wounds are not mortal, but the third was mortal, it having penetrated the cerebrum." At the hearing same Doctor Mencias, testifying for the prosecution, said that Conrado Lerma had three perforating wounds and were located: one in the head entering the right temple and coming out of the left side, and the other in the right shoulder coming out of the shoulder-blade of the same side. In this same testimony he went on to say that Governor Lerma's two wounds in the right shoulder had entered from in front and had come out from the region of the shoulder-blade (rec, 19) ; that in his judgment the shots which the governor received in his right shoulder were fired in front of him (rec, 27) ; that one of said wounds

must have been received by the governor while he was sitting; that one of said wounds was one and one-half inches from the other (rec, 28). In explaining why there was but one hole at the back of the chair (c) of the plan Exhibit B, where the governor was sitting in spite of the fact that near the governor's right shoulder there were two wounds with four holes (two exit wounds and two entrance wounds), the same Doctor Mencias said that he believed that one of the wounds in the right shoulder must have been inflicted upon the governor when he arose from his chair. And when he was asked by the court "You testified that those two wounds in the right shoulder could have been inflicted from the governor's front, what do you mean in using the word front?" he answered: "I mean to say that he received the wounds while he was in front of the assailant" (rec., 29).

From an examination of the plan Exhibit B, it appears that if the accused was at the point marked with the letter (n) and Governor Lerma was going towards the corridor being at the point marked with the letter (n) when the former fired the second shot at the latter, (as it has been said Aranjuez had seen it), the projectile of the second shot could not have entered in the region of the upper-right clavicle or the region in front of the right shoulder-blade and coming out of the region of the shoulder-blade (scapula) or the victim's back of the same side, but just the reverse, for according to the position in which the governor was at that moment (facing the corridor towards which he was going, as it was stated by Aranjuez), a straight line drawn from the point (n), where the accused was, (according to Aranjuez himself) to the point (n) where the governor was (according to same witness), must terminate, not in front or in the front part of the victim, but precisely in the right side of his back or the back part, and therefore the bullet of the first shot must have entered here and must have come out of the region of the upper-right clavicle or the front part of the body of said victim. Moreover, each of the holes where the projectiles entered, according to an express testimony of Doctor Mencias, was in the region of the upper-right clavicle or the region in front of the right shoulder-blade, near the right shoulder, in front of the victim; and each one of the holes where said projectiles passed out was in the rear part of same shoulder or the region of the right shoulder-blade, with the circumstance, furthermore, that between the two wounds in said region of the upper-right clavicle, or the region in front of the right shoulder-blade, there was a distance of one or two inches (according to the majority decision, when it mentioned the wound produced by the second shot). These are very evident proofs that the first two shots were fired by the accused when Governor Lerma was in front of him.

However, the majority decision says that the inspection made by this doctor may have been superficial, and his opinion may have been partly a matter of mere inference from his information as to the general features of the tragedy, and that at any rate he does not state any particular from which it could clearly be discovered that the second shot entered the front. I do not believe that more details are necessary, nor that there are clearer details than those given by Doctor Mencias in this inspection (rec, 2) and in his statements found and can be seen in the cited pages of his testimony. It is also evident that the inspection of the doctor aforesaid has not been superficial; nor is there any reason to believe that it has been so; nor is there any evidence to support such a supposition; and it cannot be supposed that his opinion may have been partly a matter of mere inference from his information as to the general features of the tragedy, because, as has already been said, said opinion has been the result of a material inspection of the victim's body and the wounds themselves conducted by said doctor; i. e., what his eyes have seen. This inference or supposition could have better been applied to Aranjuez' testimony because same was in open contradiction with the reality and referred to an instance when said person was not in possession of a serene spirit sufficient to understand that which his eyes saw. In fine, the following is the testimony of Aranjuez in answer to the questions of the Court respecting the particular in point, as it appears in the stenographic notes (rec, 126) :

"COURT. But, at the moment the second shot was fired, what part of the body of the accused was facing towards Governor Lerma and what part of the body of the latter was facing towards the accused?

"WITNESS. I saw Governor Lerma running towards the corridor in this position. (The witness arises from his

seat, looks towards the southeastern part of the building or the court room and continues saying) When the accused fired the second shot at the governor he was looking at him, so that the accused was facing the governor.

"COURT. What the court wants to say and wants to know is: when the accused fired the second shot at the governor, in what position was the latter in relation with the former—was he in front, sideways or at the back?

"WITNESS. He was almost sideways and he was on Captain Baluyot's right side which was facing the governor."

So Antonino Aranquez first said that when the accused fired the second shot, he was facing and looking at the governor, but afterwards, when the court asked him the second question in a very clear and precise term, as it appears, he answered what has already been said, namely that the governor was almost sideways and over the right side of the accused which was facing the governor. These contradictory answers give the measure of credit which such a witness for the prosecution deserves. And it is very clear that from his testimony it cannot be inferred that the second shot must have manifestly entered from the governor's back, as it is stated in the majority decision, but that it must have entered in accordance with the result of the examination conducted by Doctor Mencias and what the latter had clearly and explicitly testified to at the hearing, namely, that the second shot entered from the front of the victim about one or two inches from the wound inflicted by the first.

Expressing himself why he wanted to have an interview in the morning of the aforementioned day, August 3, with Representative Reyes and Governor Lerma, the accused said that he wanted to take leave with them and to tell them that he has given up the fight between them and to pray them that, if possible, they should leave him in peace and stop persecuting him when he shall have settled in Cebu. According to the accused when he first met Governor Lerma that morning, the first question he asked the latter was whether Representative Reyes was in Bataan, to which the governor answered that he did not think so; that he wanted to avail himself of the presence of Representative Reyes in order to take leave from them at the same time; that the governor asked him why he intended to leave and he answered that he was planning to have a trip but that above all he wanted to tell them some words, and then the governor said that which has already been mentioned before, "I can almost guess what you want to say to me," and the dialogue continued between the two until at the request of the governor, who thought that the conference between them would continue longer than what he has expected, he (the accused) retired back to the recorder's office in order that Antonino Aranquez could confer with the governor, and to resume the conversation between them after Aranquez should have finished.

The wife of the accused as well as the accused himself must have knowledge of the projects of the latter touching upon what was convenient for the common interest and for the particular interest of each of them. In No. 152 of the daily newspaper, *La Vanguardia*, dated August 7th, 1918, which was presented at the hearing as Exhibit 2 for the defense, one of the reporters of said paper, Eusebio Reyes (the same man, who having been in the jail at Balanga at the first hours of August 5, published, in Nos. 150 and 151 of said paper, corresponding to Monday, the 5th, and Tuesday, the 6th, of the aforementioned month, which have been presented as evidence for the defense, a report of the different details of the crime of which Governor Lerma was the victim) amplifying said report, mentioned the conversation he had with the wife of the accused Baluyot in the house where she was living in this capital concerning the incident and, among other things, according to said report, said wife told him, as it appears on the 4th page of said paper, the following:

"His trip (Baluyot's) to Bataan would have been the last at present until after a long time, for we had been planning to reside in Cebu with my brother."

When Baluyot's wife expressed herself in these terms to the reporter Reyes, she has not seen her husband after the

lamentable incident happened and the accused has been arrested and imprisoned in the provincial jail at Bataan, for according to her own statement to the reporter aforementioned she had only known what happened between her husband and Governor Lerma thru the report published before in the same newspaper La Vanguardia and she wanted (while she was talking with the reporter) to be at the side of her husband so that she could give him a bed, food, and whatever he needed to the end that the lonesome hours of his imprisonment might not be very bitter to him, especially when she heard that her husband's hands and feet were chained as if he were a common felon and that he was not allowed to talk to anybody. This is an evident proof of the truth of the statement of the accused regarding his proposed trip to Cebu, which impelled his desire to have an interview with Representative Reyes and Governor Lerma in the morning of August 3, because when the wife of the accused made that statement to the reporter Reyes, she has not yet been in communication with the accused, nor has she talked with him. And if the report (given in Nos. 150 and 151 of the newspaper La Vanguardia by the reporter Eusebio Reyes, as a result of his interview with the accused in the jail at Balanga and with the recorder Gonzalez and others who were afterwards called as witness for the prosecution) has been presented by the latter in evidence, it is not reasonable nor just to disregard what appears in the statement made by the wife of said accused to the same reporter, Reyes (and which appears in No. 152 of the aforesaid paper, presented as evidence for the defense), concerning their proposed trip to Cebu—a fact which, on the other hand, has not been contradicted at the hearing.

It cannot, therefore, be affirmed, as the majority decision does, that no very satisfactory explanation has been given by the accused as to the reason for his trip to Orion and especially to Balanga that morning. And even supposing it as true that the accused must have been entertaining a thirst for vengeance and resentment towards the governor for the motives mentioned in the majority decision, and for which the accused has given a sufficient idea when he referred to the dialogue which took place between him and the governor at the time he first entered the office of the latter, nevertheless from said motives it cannot be inferred that the conclusion is irresistible that he was carried to Balanga by a thirst for vengeance or that he has determined to kill the governor, (as is stated in the majority decision), when he went into said office in that morning.

In order to arrive at such a conclusion the majority have also taken into consideration the fact that on July 14, 1918, being, says the majority decision, fully imbued with the idea that Governor Lerma was persecuting him and attributing to the machinations of said governor his prosecution for the crime of estafa in the Court of First Instance of the city of Manila and his having been requested to resign from the position of captain in the National Guard, the accused in the course of a conversation with one Pedro Magajes, a friend of his, had said to the latter that Governor Lerma would pay for the misfortunes that were befalling him (Baluyot) ; and that also, on a Friday in the month of August, prior to the commission of the crime, the accused met his compadre, called Domingo Lintag, and upon shaking hands he (the accused) squeezed his hand tightly and said: "May be this is the last time that we would shake hands."

Upon testifying, Pedro Magajes in fact said that, when he met the accused on the aforementioned day, July 14, in the railroad car which was bound from Manila to Guagua with the object of afterwards going to Balanga, he asked the accused what had become of the charge of the National Bank against him for the crime of estafa, and the accused told him that it was going on well and that he admired the conduct of Lerma, Sr., (or of the governor's father), and that he detested the conduct of Lerma, Jr., (or of said governor) ; that the governor did not know that he (the accused) was still worth something in Bataan, and that some day said governor would pay for the things that have befallen upon him. Moreover, when the fiscal examined said witness he answered the following:

"Q. Who is still worth something in Bataan ?—A. Sr. Baluyot.

"Q. And who will pay some day?—A. According to my belief, it is Mr. Conrado Lerma.

"Q. And why would Mr. Conrado Lerma pay?—A. I thought it was a political question and that the accused

would, work against Governor Lerma, because said accused said, 'Governor Lerma does not know how much I am still worth in Bataan and for the things that he is doing against me he will pay some day;' and afterwards I changed the conversation because Mr. Baluyot was somewhat grieved.

"That's all." (Rec, p. 169.)

In his testimony, Domingo Lintag also said that on a Friday, the 2nd of said month of August, he met the accused in Orion, and that when they shook hands the accused said, "May be this is the last time that we would shake hands," squeezing his hand tightly. Moreover, after the witness had been cross-examined by counsel for the defense in order to impugn his credibility, said counsel asked that it be made a part of the record that said witness, upon leaving the witness stand, had approached him on passing by his side, and had said in a loud voice these words, "In fact I don't know anything." The judge immediately replied that he had not heard the witness say these words, and denied counsel's petition, adding, however, that the witness could be recalled and asked new questions if counsel for the defense so desired. When Domingo Lintag was recalled, he answered in the following terms the crossquestions asked then by the same counsel and the new questions of the Fiscal:

"ADDITIONAL CROSS-QUESTIONS BY ATTORNEY SOTTO.

"Q. I'll talk to you slowly so that you may understand well. Tell us whether it is true or not that when you went down from the witness stand upon passing by my side you told me in a loud voice 'Wala po akong talagang nalalaman,' which in English is, In fact I don't know any thing.'—A. Yes, Sir.

"That's all."

"NEW QUESTIONS BY FISCAL TUASON.

"Q. What do you mean by that?—A. That I don't know all the questions propounded to me.

"Q. To what questions do you refer?—A. That I don't know anything more than what I have said. "That's all." (Rec., p. 182).

From the foregoing, the accused, in his conversation with Pedro Magajes on the occasion referred to by the latter in his testimony, did not utter any threat of death nor of any personal injury upon Governor Lerma, but that, when he said that some day Governor Lerma would have to pay for the things that have been befallen upon him, he meant, as said witness understood it, that there were political questions between him (the accused) and said governor and that he (the accused) would work against the latter because he was still worth something in, Bataan. Certainly, what the accused then said in connection with the governor can not be given other interpretation or different meaning than that given by the witness aforementioned. Concerning the other witness, Domingo Lintag, he has been very explicit and definite upon answering the additional cross-question of the counsel for the accused and the new questions of the fiscal propounded, on him at the end of his testimony and inserted above. First, he answered in the affirmative to the question whether or not it is true that when he went down from the witness stand he told said counsel upon passing by his side in tagalog, "In fact I don't know anything/" And afterwards when the fiscal tried to make clear said answer, he said that he did not know all the questions propounded on him, that it is almost unnecessary to deal with, nor to give any importance of, what he himself has testified to, to the effect that the accused told him that perhaps -(referring to the date when he met the accused in Orion) it was the last time that they would shake hands. From the testimony of this witness, nothing in reality can be inferred which may be useful for the object of the prosecution and for the object he has been presented, because the fiscal himself did not secure from said witness an answer other than that he did not know anything more than what he had, said, in spite of the effort on his (fiscal's) part to neutralize the effect of the answer given to the last cross-question of the counsel for the accused and to the last-mentioned question of the fiscal, wherein said witness showed ignorance of everything.

But even admitting that in fact the accused, squeezing tightly his hand, said to the aforesaid Domingo Lintag, on the occasion mentioned by the latter, that perhaps that was the last time that they would shake hands, and that, according to the majority, it showed that the accused contemplated some occurrence which would have grave consequences to him, nevertheless it is clear that it can also be interpreted with greater reason in the sense that having proposed to go to Cebu and because in that same morning he was going to take leave from Governor Lerma and Representative Reyes, the accused was also taking leave with his compadre, Domingo Lintag. In conclusion, from what has been stated by said witness nothing definite and conclusive can be inferred for the purpose of considering as proven that in that morning the accused had conceived the idea, of killing Governor Lerma when he went into the latter's office. There is not a single evidence to show that the accused (as the majority decision says), for several days prior to the perpetration of this murder, had determined to seek an interview or encounter with Governor Lerma regardless of consequences. This conclusion has no other basis than mere inferences from the testimonies before mentioned and, from the fact, also mentioned in the majority decision, that the accused asked more than one person with whom he had met that morning and several days before if they thought he was in Bilibid intimating also that such a rumor had been circulated by Governor Lerma. May be the mind of the accused, as the majority say, was fixed upon Governor Lerma as the supposed author of his wrongs. But the fact is that before August 3 the accused had not told anybody that he wanted or had decided to have an interview with the governor, and only on said day did he communicate such idea to the people who were in the recorder's office that morning. If several days before he had intended to meet the governor, the accused did not show any exterior sign of that intention, much less was he determined to seek that interview regardless of consequences. On the contrary, according to the recorder, while he (the accused) was waiting for Governor Lerma in the recorder's office, he was in good humor, and according to same recorder and. Antonino Aranjuez, who were also in said office while the accused was with them, he continued to be in good humor before his first interview with the governor as well as after it, when he retired to allow Aranjuez to enter and have a short interview with said governor and before he reentered said office. Upon the governor's arrival in the recorder's office that morning he and the accused greeted each other in a friendly manner by shaking hands. No one noted any change nor alteration in the face or attitude of the accused then; and during the two hours, approximately, that he was in the recorder's office, from his arrival until he reentered Governor Lerma's office, the accused showed no impatience either because he wanted to stay with the governor in his office or because he wanted to have with the latter the interview he desired; for, as has been said before, he agreed to yield his turn for a moment to Antonino Aranjuez at the request of the governor himself.

In fine, there is nothing in the record to show or to point out that the accused (even admitting that his mind was fixed upon the governor as the supposed author of his wrongs, as it is stated in the majority decision) was intending at those moments to execute any aggressive act against said governor.

After dealing with the assertions and conclusions which has already been mentioned, the majority decision says that the conclusion of the trial court that the offense was characterized by known premeditation is by no means without support in the evidence. However, same decision states, that, as an express ruling on this point is unnecessary to the disposition of the case, the Justices subscribing said decision concede to the accused the benefit of the possible doubt, and accordingly they refrain from making any express finding as to the presence of said element. Supported by the evidence in the case, it can be affirmed in this dissenting opinion, for the reasons already mentioned, that the offense is not characterized by known premeditation and, to the writer's regret, the absence of an express finding as to the presence of said element in the crime and the majority's concession to the accused of the benefit of the possible doubt as to the presence of said element, in spite of the assertions and conclusions assigned in said decision relative to this particular, constitutes another reason for not considering that in the commission of the crime there has been present the qualifying circumstance of alevosia (treachery). And the

reason is obvious. If the accused has been entertaining a rooted rancor and resentment in his mind against Governor Lerma, and for several days prior to the perpetration of this murder, has been determined, according to the majority, to seek an interview or encounter with him regardless of consequences, upon his interview in the morning of August 3 when he then killed said governor, the natural and logical thing was or should be that he would have employed means, methods, or forms that were intended to insure the execution of said object without any risk to himself arising from the defense which Governor Lerma could make in that interview. If the preconceived, deliberate, and premeditated design for the perpetration of this murder at said interview is not considered as proven, or, at least, if the benefit of a possible doubt as to the presence of said design is conceded to the accused, necessarily it has to be recognized that it is also doubtful that the accused had intended to insure by any means the execution of his criminal design without any risk to himself arising from the defense which the offended party could make. In the estimation of the existence of the aggravating circumstances of known 'premeditation and alevosia (treachery) in the instant case, there is such a relation in the facts adduced in evidence at the hearing for the determination whether or not said circumstances were present in the commission of the crime imputed upon the accused, and it is so clearly gathered from all that has been said and argued in the majority decision upon dealing with said facts, that it is difficult, if not impossible, to conceive that the accused had acted treacherously in killing Governor Lerma, without having premeditated, deliberated and reflected upon said act before its execution. If there was then no known premeditation, there could not be alevosia. This does not mean that in all cases where the first of said circumstances is not present in the commission of the crime, the second should not or cannot be considered as present; but it is undeniable that there are cases where, the former not being present, the latter cannot be considered as present. Such has been recognized by this court in its decision in the case of *United States vs. Balagtas and Jaime* (19 Phil. Rep., 164), holding the following:

"MURDER; ESSENTIAL ELEMENTS OF 'ALEVOSIA.'—When the record contains no evidence showing that the accused had, prior to the moment of the killing, resolved to commit the crime, or any proof that the death of the victim was the result of meditation, calculation or reflection, the alleged qualifying circumstance of alevosia can not be considered."

This holding is exactly applicable to the instant case.

The first meeting between the governor and the accused having been suspended, not by the latter's will but by the request of the former to whom it occurred that the interview between them might be more extended than he had expected, it is natural that, upon seeing each other again in the office, they would have resumed the conversation which was interrupted moments before. Therefore, it is probable that the governor might have begun asking Baluyot where he said he would go, and that the dialogue mentioned by the accused in his testimony might have taken place between them, a dialogue which, as it can be tested with a watch on hand, could not have lasted one minute or more. On the contrary, it is improbable that when the accused reentered the governor's office and as soon as he reached the governor's desk (coming from the recorder's office, covering in two seconds the distance of 10 paces of between said offices, as the recorder Gonzalez has said) and without saying any word to said governor, he fired the first shot at him, a fact which has been contradicted by Antonino Aranjuez and Gregorio de Guzman, who were then with said Gonzalez in his office and heard Baluyot call out to the governor before the first shot—one of them heard Baluyot call out "governor," and other, "governor, may I see your revolver?". The testimony of these two witnesses, especially that of the last, is another reason for believing with some foundation that the governor and the accused then talked of something, or, what is amount to the same thing, that there might have been between them a short dialogue, and, that in view or as a consequence of it, that sad and unfortunate event took place. That Aranjuez, De Guzman and Gonzalez, who were in the latter's office had not heard said dialogue, or had not heard what the governor and the accused were talking about, is no proof that same had not taken place, because as it can be seen on the plan Exhibit B, from the door of the recorder's office to the place

where Governor Lerma and the accused were, there was a distance of 8 meters and 30 centimeters, or all the length of the governor's office; from the place where Antonino Aranquez was, or that marked with the letter Y in the plan, to the place where Governor Lerma and the accused were, there was distance equal to the length of the governor's office, 8 meters and 30 centimeters plus the length of the recorder's office, 5 meters and 96 centimeters, according to same plan, which, to be sure, has been traced by the provincial assessor himself, Gregorio de Guzman, making a total of 14 meters and 26 centimeters. And that, according to this same witness, when he heard the accused call out to the governor "May I see your revolver?" he was taking leave with the recorder and was leaving the latter's desk bound for his office, and as he was going towards the door to leave the office, he did not understand the other words of the accused, who was then speaking in a natural voice, which showed no sign of alteration, adding that he heard those words when he was going out towards the corridor and for this reason he could not tell whether the governor answered the accised or not. With all these it should be added that (from what has been said by the recorder in his testimony, rec, p. 86) when he heard the first shot, the door between his office and that of the governor "was almost closed, because one-half of it was closed," a circumstance which should be taken into consideration in determining whether or not those who were at that moment in the recorder's office (the recorder, Aranquez, and De Guzman) were in such a condition as to have been able to hear what the governor and the accused were talking about. The one who was in a better condition for said purpose was precisely the recorder Gonzalez, because he was sitting by the desk in his office near the door of the governor's office, and from there he did not move until he heard, as he said, the first shot. Nevertheless, unlike Aranquez and De Guzman, who said that they have heard the accused utter the words already mentioned, Gonzalez did not make any mention about this, stating, on the contrary, that only two seconds elapsed from the moment that the accused reached the governor's desk coming from his office until he heard the first shot. So that, according to said witness, there was no sufficient time whereby there could have been an exchange of words between the governor and the accused. Necessarily, the recorder, Gonzalez, has not told the truth. His other two friends have contradicted him and there are sufficient reasons to believe that the former in turn, being able to tell the truth, have not said all that they knew, or that, because of the distance of the place where they were from that where the governor and the accused were talking, and because one-half of the door of the governor's office was closed, they could not hear other words than what, according to them, was uttered by the accused. In any way it cannot be denied that when the accused, being near Governor Lerma, called out "governor," as Antonino Aranquez heard it, and called out "governor, may I see your revolver," according to De Guzman, the governor and said accused must have been talking about something related to what they have been talking about moments before, or at the first interview. The word "governor," spoken by the accused in a high and dry tone, may mean, or could have been, an exclamation of the accused, as well as a call of the attention upon the governor to tell him something. It appears that the words "governor, may I see your revolver/" which De Guzman heard, must not have been spoken by the accused immediately after he has approached the governor's desk and prior to an exchange of words between them before, because the conversation which they must have then was a continuation of the former one which have been interrupted after the accused had protested that he had nothing to do with the separation of Captain Velez from the National Guard, which was/attributed to him by the governor. Those words could have also been spoken by the accused as a result or by reason of what he and the governor continued to talk about, namely, the governor's intervention upon the misfortunes of the accused as alleged by him and something connected thereto. For it is inconceivable why the accused would have been willing to see the governor's revolver, unless it is because he (the accused) wanted to challenge the governor, believing that the latter has offended him. According to the accused, when he rose from his chair as soon as he was offended by the governor, who said that he could cheat better in Cebu, he told the governor: "May be your revolver and mine have the same calibre." These words are, in some respects, similar to those which the witness De Guzman understood or heard spoken by the accused expressing his desire to see the governor's revolver. But, in any manner, what is certain and positive is

that the accuseds before firing the first shot at the governor, gave the latter a hint that he intended to do something which might have caused him (governor) some personal harm, and the governor must have also understood it in this manner, for he knew that they, the two, were enemies, as he himself had said to the accused moments before and that he had before him one whom he considered his enemy and with whom he had also behaved as an enemy. Therefore, the situation in which they were found at that moment was very clear to the governor as well as to the accused. If the accused was entertaining an ill feeling towards Conrado Lerma because the latter had been one of his competitors for governorship at the 1916 general elections and because he was then defeated by said Lerma, as well as because he thought that said Lerma was instigator of the criminal proceedings for estafa against him, Lerma in turn would not forget that the accused was one of his competitors in said election and, having been defeated by him, was a person dissatisfied to him in the province under his control, and as such could have some day planned to discredit or to cause him some damage. As a matter of fact he (Lerma) was attributing to the accused the separation of his eompadre Velez from the National Guard, for which reason he believed, as he made it appear to the accused, that everything he could have done against the latter was justifiable. Two enemies were face to face on that occasion, although socially they treated each other as friends—one, the vanquished, the humiliated Baluyot, and the other, the victor, Governor Lerma, the chief of the province, exercising authority in the place where they were and to whom, like Representative Reyes, the accused had come to implore that, if possible, they should leave him in peace and should not persecute him—which is certainly probable—and to bid them farewell for he was going to Cebu. From those circumstances, it is perfectly conceivable that a gesture, a look, any action whatever of Governor Lerma which the accused would have considered depreciatory and humiliating to him, would have been sufficient to provoke the anger of said accused and to impel him to attack the former, because it should not be overlooked that the accused in his testimony (rec, 225) has said the following: "When I warned him to prepare, he was sitting, speaking in that manner of his and laughing at me." There is nothing strange in that the accused, considering himself offended and humiliated by Governor Lerma upon seeing the attitude of the latter, his manner of speaking and that he was being laughed at, would endeavor to avenge on that same moment an offence which was being committed, upon him. When the accused, upon entering for the first time Governor Lerma's office, told the latter that he was going to take leave from him and Representative Reyes for he was going to Cebu and to implore them that, if possible, they should leave him in peace and should not persecute him in said province, Governor Lerma has expressed himself in the sense that, they being enemies, he (Lerma) was justified in his conduct towards him, thereby showing that the accused could not hope for the peace and tranquility which he was desiring. This expression shows that the governor was not accepting the request of the accused with benevolence, but that, on the contrary, he was refusing to make peace with the accused. And what has been said by the accused on this particular is verosimil. No one has contradicted it at the hearing, there being, instead, sufficient grounds for believing that it was true, because it was the cause of the interruption of the first interview between the governor and the accused at the request of the former, to be resumed afterwards, as in fact it was resumed, and it was a beginning of what must have taken place between them at the second interview.

The terms used by Governor Lerma in his conversation with the accused, even admitting that it was not true that he said to the latter that he could cheat better in Cebu, may be considered not of such a character as to justify that the accused has acted upon an impulse so powerful as naturally to have produced passion and obfuscation. But it is indisputable that they might have been such as to provoke the accused to execute an offensive act or an act of personal aggression against the governor. The two were on that occasion, commonly speaking, playing with fire (*jugando con fuego*), and a spark coming from any one of them was sufficient to cause a conflagration. Of this conflagration not only the accused must be blamed. His testimony, given at the hearing under oath when testifying as a witness, has as much value as that of any witness, and same must be taken into consideration in connection with the other evidence adduced at said hearing. The only persons who have testified to what took place between

the accused and the governor at the time when the two were alone in the office of the latter, are the recorder Gonzalez, Antonino Aranjuez, and the provincial assessor, Gregorio de Guzman. We are already acquainted with their testimonies limited, as has been seen, to the time, according to them, that elapsed between the moment the accused entered into the governor's office and that when they heard the first shot—testimonies in which two of them said that they have heard the accused call out to the governor and in which Aranjuez said that he has seen them (accused and governor) when he peeped into the governor's office after the first shot.

In reality, the testimonies of the said three individuals have not been useful in any manner whatever, as has been already shown, to prove that before the first shot was fired by the accused the conversation mentioned by the latter did not take place between him and the governor. All that said witnesses testified to, concerning this particular, has been based only upon a computation, as has already been said, made by each of them of the time intervening between one moment, and another, a computation which is inconceivable to serve as a basis for establishing the conclusion that the accused unexpectedly, suddenly, and instantaneously attacked Governor Lerma as soon as he approached him in his office, asked for his revolver and saw that he was defenseless, firing at him the first shot, i. e., that the accused made the attack treacherously.

The majority decision says that the offense committed in this case exhibits features markedly similar to those which characterized the crime which was the subject of prosecution in *United States vs. Gil* (13 Phil. Rep., 530) and, in the following lines, that the offense here committed was properly qualified by the trial judge as murder, in which was present the qualifying circumstance of *alevosia*. With this statement said decision has made it understood that what has been said and held by this High Court in that case is applicable to the present case on account of their similarity. The similarity between these two cases lies in that in one and the other the victim had been a provincial governor and the crime had been committed in a provincial building or in the place where said provincial authorities were exercising their functions. But in the case, *U. S. vs. Gil*, the latter, or the accused, alleged in his defense that, without the least provocation on his part, Governor Lopez, whom he asked for the favor of a license for the revolver he was carrying with him, answered him in an insulting manner, upbraiding him for his temerity in seeking a favor of a man who he had denounced to higher authority and that the governor having reached for the revolver, a struggle between them ensued during which the shots that wounded the governor were fired. Not having immediately died as a consequence of said wounds but after 24 days, Governor Lopez had the opportunity to contradict and did flatly contradict the accused, denying that he provoked and insulted the latter. This statement was made by the governor when about to breathe his last. And this dying declaration of the wounded man was taken into account by this High Court, in connection with the other evidence adduced in the case, in order not to give credit to whatever the accused had to say for his exoneration of all that happened between him and the governor when they were alone in the office of the latter and when said governor was attacked by said accused, Gil. In the decision of this High Court in the aforementioned case, the following is said:

"If the account of what occurred in the office of the deceased governor on the morning of the 27th of December, 1907, as told by the accused when testifying in his own behalf, be accepted as true, this testimony, taken together with the other evidence of record not in conflict therewith, would leave no room for doubt of his guilt of the crime of unlawfully taking the life of Benito Lopez, deceased, the commission of the crime being marked with certain extenuating circumstances, but unmarked either by 'treachery' (*alevosia*) or 'deliberate premeditation' (*premeditation conocida*) as charged in the information; and as the slayer was alone with his victim when the fatal shots were fired no eyewitness could be called to the stand to contradict the testimony of the accused as to what occurred in the office from the time he entered until the explosion of the pistol shots attracted the attention of the other occupants of the building. In our opinion, however, the ante-mortem statement of the deceased, taken together with the other evidence of record, conclusively establishes not only the falsity in all its essential details of the account of the tragedy given by the accused, but also the fact that the

crime was committed with treachery (alevosia) and deliberate premeditation (premeditation conocida)." (Page 533.)

Now then, in the instant case Governor Lerma died approximately three hours after he has been wounded by the third shot fired by the accused, without having been able to regain consciousness before his death nor to articulate any word; i. e., he (the governor) did not contradict the accused Baluyot nor did he contradict the latter's account of what occurred between them in that morning during the short period of time that they were alone together in the office of said governor. There being then in this case no ante-mortem statement of the deceased Governor Lerma, which may be taken together with the other evidence of record, and if the testimony of the accused in his own behalf, taken together with said evidence, be accepted (if in the present case we apply, as it should be, the ruling mentioned by this High Court in the case *U. S. vs. Gil*), accepting at the same time, as we should, the account of what occurred in the office of Governor Lerma in the morning of the 3d of August, 1918, as told by the accused Baluyot, the guilt of the latter, as author of the crime of unlawfully taking the life of Conrado Lerma, deceased, leaves no room for doubt, but unmarked either by treachery (alevosia) or premeditation (premeditation) as charged in the information. Therefore, beside the fact that there is no complete similarity between the case of *U. S. vs. Gil* and the present case, and applying in this case the doctrine laid down by this court concerning the question of evidence in that case, it cannot be accepted as proved that the accused Baluyot acted treacherously and with deliberate premeditation in taking away Governor Lerma's life.

However, the accused Baluyot has been charged with some admissions alleged to have been made to the reporter of *La Vanguardia*, Eusebio Reyes, when the latter had an interview with the former in the provincial jail of Bataan in the morning of August 5th (an information which was published in the corresponding issues of said newspaper, marked Exhibits D and E of the prosecution) and to the lieutenant of the Constabulary, the commanding officer of Bataan Province, Angel Labayan, in the afternoon of the same day, August 3d, in order to prove that said accused attacked Governor Lerma knowing the latter to be disarmed and defenseless. The reporter, Reyes, affirmed that he has published in said newspaper, *La Vanguardia*, the information or news appearing in said two issues, after he had a conversation with the accused in the morning of the 5th of August; and that, among other things (as it can be seen in the issue of the 6th of August), the accused told him the following: "I asked Conrado about his revolver, but it is not true that he was reading when I fired at him, no. And that cannot be true because I told him: 'Governor, defend yourself as you may. I come to kill you.' And I fired the first shot, then the second, one after the other." Lieutenant Labayan, in turn, testified that in a conversation he had with the accused in the provincial jail, in the afternoon of August 3d, the latter related to him all that occurred, and, among other things, that after the accused told the governor "You are taking advantage of all the opportunities to render me completely useless/" to which the governor answered, "Were you, yourself, in our place, you would take advantage of all the opportunities to render an enemy useless," the accused, upon hearing this phrase, got mad and asked the governor: "What calibre has your revolver?" to which the governor answered that he did not bring his revolver, and then the accused, who was in an attitude of drawing out his revolver, said to the governor, "I will kill you now;" that the governor cried out calling the guard and for the scream (so says) the accused fired his revolver at the governor.

Without entering now upon the consideration (inasmuch as the majority does not say anything about it in their decision) of the question whether the information published in the press about an event subject of a suit or a prosecution before the courts of justice may be utilized as an evidence at the hearing, (which is what in reality has been done by the prosecution in presenting the reporter Reyes and in examining him about the information aforesaid) and admitting the testimony of said reporter as that made by any other witness, what in reality is inferred therefrom is that Governor Lerma was not reading when the accused, fired at him the first shot and that the accused, before firing said shot, warned the governor to defend himself as much as he could, because he was

going to kill him. From Lieutenant Labayan's testimony, it appears that the accused asked the governor about the calibre of his revolver and that the governor having answered that he did not bring his revolver, the accused, who was in an attitude of drawing out his revolver, told the governor that he would kill him and, when the governor cried out calling for the guard, fired his revolver. Above all it is rather strange that to the reporter Reyes, who was his friend (as they treated each other with familiarity) and who was interested in giving in the newspaper, *La Vanguardia*, the most complete information possible about that sad event, the accused would not tell that when he asked governor Lerma about his revolver he answered that he was not bringing it (as Reyes did not mention this particular in his testimony), while to Lieutenant Labayan, who did not know the accused prior to August 3d, (for he happened to know him only on that day and when he had with him a conversation in the afternoon of same day in the provincial jail of Bataan, conversation referred to by him in his testimony) the accused would have made a revelation which is so compromising against him as that he knew before he fired the first shot at the governor that the latter was not bringing with him his revolver. It should also be taken into consideration that when the reporter Reyes had an interview with the accused in the morning of August 5th, there were present then, according to him, the Lieutenant of the Constabulary, Pedro Navarro, the provincial warden and one constabulary soldier; and that when said Lieutenant Navarro was called to testify for the prosecution, he was not produced, as well as the other two individuals who witnessed the aforesaid conversation between the accused and the aforementioned reporter, and who could have testified to what they have then heard. In referring to that incident the accused said, as it will be remembered, that he told the governor, "It appears to me that your revolver and mine have the same calibre," and the governor answered, "No Sir, mine is 32," and that to this he replied, "It is the same and prepare yourself because one of us will have to die." The accused did not say that the governor answered him then that he was not bringing with him his revolver. And it appears more proper that when the accused asked the governor about the calibre of his revolver, as Lieutenant Ijabayan has said referring to the accused himself, the governor should have answered what the calibre of his revolver was, namely, that it was 32 calibre, for the question of the accused referred to this. The answer that the governor was not bringing with him his revolver would have been more appropriate to the question which, according to the reporter Reyes, referring to the accused, the latter asked to the governor, because it was referring only to the governor's revolver. In spite of this fact, the reporter Reyes v did not say that the accused had stated to him that the governor had given any answer to said question nor that the governor had said that he was not bringing his revolver. Lieutenant Labayan is then the only witness who testified (referring himself to the conversation between him and the accused in the provincial jail in the afternoon of the 3d of August), that the governor told the accused that he was not then bringing his revolver. By this testimony, said witness made it understood that the accused, before firing the first shot at the governor, knew that at that moment the latter was without said weapon with which to defend himself. However, taken together with that of the other witnesses who testified to said particular, his testimony is not sufficient to prove, beyond any doubt, that Governor Lerma answered the accused that he was not then bringing with him his revolver. But, taking due consideration to the testimony of the reporter Reyes as well as that of Lieutenant Labayan and that of the provincial assessor, Gregorio de Guzman, in connection with what the accused testified to about the revolver, it is indisputable that what in reality can be inferred and considered proven therefrom is that having asked the governor about his revolver and having then told him his desire to know the calibre of his revolver, the accused warned said governor, before firing the first shot, to prepare and defend himself as much as he could because one of them will have to die. In a word, before receiving the first shot fired at him by the accused, Governor Lerma was able to look for his defense, had the opportunity to make good his defense from the danger that was threatening him because the accused himself had warned him.

But, moreover, according to the testimony of the accused (rec, 219), while Governor Lerma was talking with him during the second interview, the former had his left hand on the table and with it he was playing a brass knuckle (Have inglesa). This brass knuckle was seen on the governor's table by Lieutenant Navarro of the Constabulary

(who was then in charge of said force in the absence of the provincial commander) when, immediately after the accused was arrested and imprisoned (whom he found between the door of the office of the recorder and that of the governor), he returned upstairs in order to learn something of the incident and to see what happened to the governor. Said brass knuckle was kept by Lieutenant Navarro and presented at the hearing when he testified to the particular aforesaid, and marked as Exhibit 1 of the defense. Although the recorder, Pedro Gonzalez, did not give a satisfactory explanation of the existence of said brass knuckle on the governor's table, having said, moreover, that he had never seen the governor use it, and it is said in the Attorney-General's brief that said weapon might have been placed on the governor's table by the accused himself as part of his plan for defense, the fact is that there is no proof about this allegation of the Attorney-General and that the brass knuckle was on the governor's table when Lieutenant Navarro (who arrested the accused bringing him to the prison and whose veracity there is no reason to doubt) immediately returned to the governor's office in order to see the latter and to learn what happened then (rec, 193-194).

It also appears from the evidence that when the tragedy occurred there was a long "cris" (dagger) on the top of the bookcase which was on the right side of the governor's table and of the chair in which the latter was sitting, a bookcase marked with the No. 3 in the plan Exhibit B. Lieutenant Navarro of the Constabulary so testified as well as the recorder Gonzalez, who said, moreover, (rec, 252) that said "cris" (which was presented by the defense at the hearing as Exhibit 4) belonged to Governor Lerma; that he (the witness) knew it and recognized it very well because it was placed on the governor's bookcase at the time he took possession of his office. The accused said in his testimony (rec, 219) that upon seeing him unbuttoning his coat and taking out his revolver after he told the governor (as has been mentioned already) to prepare because one of them will have to die, said governor raised up his right hand placing it on the bookcase where the "cris" was, but that when he saw that the case of his (the accused) revolver was opened, he cried out "ina ko po" (my mother) "guardia" (guard) and then he (the accused) fired the first shot. Upon being asked whether in that morning, when he saw the "cris" on top of the governor's bookcase, said "cris" was within the reach of the latter, Lieutenant Navarro, in turn, answered, "I believe that the court has been there and can tell by sitting in the chair whether it was within his reach or not" an answer with which the witness tried to show that he had no interest in expressing his own opinion about the question propounded upon him. Moreover, upon being asked again * * * "But as you found the 'cris' in that morning, same was within the governor's reach, if the governor were sitting in his chair," Navarro answered, "It seems so." And, finally, upon being asked "If Governor Lerma were in his chair where he used to sit, could he reach the 'cris'?" the recorder Gonzalez answered, "Sitting, he could not reach it, but standing, he could," adding, furthermore, that he did not know Governor Lerma's object in having said "cris" in his office on top of his bookcase, but that he knew that he had it there at the time he took possession of his office and that he never saw the governor use said weapon; and that, lastly, the governor had a revolver which he (the witness) had seen, but he did not know where this weapon was on that date, or when the incident took place, and that he (governor) seldom used it, bringing it with him only when making some inspection in some municipalities.

Now then, it being not proven, beyond all doubt that there is present in the commission of the crime in question the aggravating circumstance of known premeditation, for concerning this the majority themselves concede to the accused the benefit of a doubt and they have refrained from making any holding about it; it being not also proven beyond all doubt that the accused had made up his mind to kill Governor Lerma when he went into the office of the latter in the morning in question; on the other hand, it being proven, without the shadow of a doubt, (for such is the result of the testimony not only of the accused but also of the reporter Reyes, a witness for the prosecution) that before firing the first shot with his revolver followed immediately by the second shot, the accused warned the governor to be prepared, to defend himself as much as he could because he (the accused) was going to kill him; and, finally, the governor having means and opportunity to defend himself in any manner or to resist the attack

(for on the bookcase by his side there was a "cris," which can not be considered as an object for mere ostentation on that bookcase, because, if it was so, it should have been placed in the panoply in said office), and having been able to take said weapon, even if he were stooping a little or standing by his seat, and for which he had also enough time inasmuch as the accused unbuttoned his coat, took out his revolver from his belt and from the case where it was before firing the first shot, it is evident that it cannot be affirmed that the accused employed means, methods or forms in the execution of the crime which had tended directly to insure its execution without risk to himself arising from the defense which the offended party could have made. On the contrary, all of the acts executed by the accused (before firing the first two shots with his revolver at the governor while the latter was in front of him, taken together with the strained relation between them mentioned in the majority decision, or their enmity, and with their conversation in the first as well as in the second interview) are incompatible with the lawful existence of the circumstance of alevosia (treachery).

But even admitting that Governor Lerma was defenseless and that he did not suspect that he was going to be attacked by the accused in the manner that he was attacked, nevertheless it cannot be said that the crime was committed with alevosia, as a qualifying circumstance, because, beside the fact that said circumstance is of a subjective character, or that it is exclusively related to the accused and not to the condition of the offended party, there having been, in the first as well as in the second interview between the governor and the accused, an exchange of words which showed that there was an ill feeling between the two such that would have given rise to a personal attack by anyone of them against the other, it is not impossible that the one who is attacked would have to defend himself by some means. The supreme court of Spain has held so in its decision of January 19, 1907 (Vol. 78, Criminal Jurisprudence), in a case in which an individual fired a shot gun at two other individuals who were defenseless and who had no means to suspect that they would have been attacked by the assailant in the manner they were attacked, thereby killing them instantaneously. The court based its decision in that (1) alevosia being a circumstance of a subjective character, in order to consider its existence, it must be shown whether or not the accused employed means, methods, or forms in the execution of the crime which tended directly and specially to insure its execution without risk to himself arising from the defense which the offended party might make; and that (2) admitting that the deceased was defenseless and that they did not suspect that they would have been attacked by the accused in the manner they were attacked, this fact is not sufficient to show that the act was committed with alevosia which qualifies the crime as murder, inasmuch as the personal acts of the accused constituting the treacherous means employed are not specified, as well as it appears from the verdict that the shots were preceded by words and gestures indicative of the initial stage of a quarrel and exclusory, unless there appears facts to the contrary, of the impossibility that at any stage of the attack the offended party could have defended themselves, much more in dealing with an attack which, although not foreseen, was committed by a man who, on appearing at the place of the incident to recriminate upon the deceased, was carrying a shotgun with which he afterwards fired at them.

Moreover, in its double aspect as aggravating and qualifying circumstance in the crime against persons, alevosia requires for its juridical integration that, even if same arises at the moments of the execution of the crime, the election of the means tending to insure the accomplishment of the act without risk to the assailant arising from the possible defense of the offended party, be the product of the sound mind of the guilty person; for it is only when, says the Supreme Court of Spain in a decision of July 6, 1910 (Vol. 85, supra), by an act exclusive of the aggressor, the offended party is deprived of all the natural means of defense, that the special aggravating circumstance, aforementioned, exists.

The foregoing doctrine was applied by the Supreme Court aforementioned, in the decision (supra) of a case in which the accused, suddenly, unexpectedly and from behind, struck an individual with a club in the head from which he died, without risk to his person and knowledge on the part of the victim, who had challenged the

accused before the attack. The supreme court held that this fact (that the offended party had challenged the accused before the attack) altered and destroyed the element of alevosia and showed, strictly interpreting the verdict, that from the provocation and challenge of the one, the attack of the other followed without interruption, and that the external form of said attack only meant an accident peculiar to their reciprocal impetuosity at the moment.

In the instant case it is not proven that, when he went to see the governor in that morning, the accused Baluyot carried with him the revolver expressly and precisely to make use of said weapon against the former, in the same way that it is not proven that he then had deliberately and reflexively premeditated and resolved to kill the governor. On the other hand, from the testimony of the accused himself, who was an officer of the National Guard, it appears that he was accustomed to carrying with him said revolver whenever he used to leave the house to go from one place to another. Nor did the accused try to avoid all personal risks arising from the defense which the governor could have made. But, on the contrary, with the warning he made to the latter to be prepared, to defend himself as much as he could because he was going to kill him, he (the accused) ran the risk that the governor might have suddenly made use for his defense of the "cris" which he had by his side although, as has been already said, he could dispose of a short time. And it is not doubtful that on that occasion the governor was not deprived, by an act exclusive of the accused, of all the natural means for a defense. It is true that between the governor and the accused there was no quarrel, altercation, or dispute but there was an exchange of words of such meaning and sense as could have provoked, as has been already said, the anger of said accused. And certainly it is not necessary that said words should have been spoken in a loud voice or in an angry tone in order that same could have produced said effect, for it is well known that words gently spoken without any alteration can produce, according to the circumstances, same effect as if spoken in a loud voice and in an aggressive tone. It is undeniable that all of the foregoing circumstances exclude the idea that the accused treacherously fired the first two shots at the governor, and (as in the case decided by the supreme court of Spain in the decision aforementioned), the external form of the attack was only an accident peculiar to the reciprocal impetuosity of the governor and the accused at the moment. If Governor Lerma was strongly frightened (as it is natural) when he saw the revolver in the hands of the accused and heard the warning or the challenge of this, and had no sufficient will power to remain cool before the danger that was threatening him nor sufficient strength to defend himself from the attack of which he was going to be the object (to repel, or to resist it, making use of the means of defense which he had in hand or of the "cris," which was on the top of the bookcase by his side, or of a chair or of any other furniture which was near him, whereby the accused, by means of the first two shots, caused him two wounds, before the same governor could take refuge in the closet toward which he suddenly fled, pursued by the accused) it cannot be inferred therefrom that the latter acted treacherously in making said attack; for, as has already been said, alevosia (treachery) is a circumstance of a subjective character and in order to determine its existence in a case, the condition of the person attacked and what this would have done or left to have done should not be taken into consideration, but the acts of the accused himself.

There having been, then, no alevosia when the accused attacked the governor by firing the first two shots, we now pass on to the third.

This shot was fired by the accused when Governor Lerma, fleeing through the corridor after the second shot; took refuge in the closet which, as has been said, was at the end of said corridor. Once in the closet, the governor shut the door and placed himself, as the majority decision says, in a position to obstruct the entrance of his pursuer, who vainly attempted to open the door. In the same decision it is further said that the accused, judging the position of the governor's head from the direction of the sound emitted when same began to call aloud for help, fired his revolver in the direction indicated, the bullet passing through the panel of the door, struck the governor in the forward part of his head near and above the right temple. The wound was necessarily fatal and caused the

governor's death two or three hours after.

From the evidence it appears: (1) according to the reporter Reyes (rec, 39), that, referring to him what happened in connection with the third shot, "the accused told him that he (the accused) pursued the governor because he thought that the first two shots missed him, that the governor was able to reach the door of the closet and to sit behind it and, once within, called aloud, and from the sound thus emitted, he (the accused) was able to judge where the governor was and he then fired and observed a movement at the door, that he opened it and as he did so the body of the governor shot towards him as if in an attitude to embrace him, and he ran away from the body and it fell; (2) according to Lieutenant Labayan (rec, 152) that in an interview had between them in the afternoon of the same day of August 3d, the accused told him that the governor fled through the corridor and was able to enter in it and close the door of the closet, that then there was a struggle between the two in order to open the door and as the governor was calling aloud for a guard, he (the accused) knew from the governor's voice that the latter was sitting and, judging from said voice, he fired again, and after this shot the door was opened and the governor fell towards the window of the corridor.

Perhaps, it has been inferred from these two testimonies that before discharging the third shot, the accused had judged the position of the governor's head, as stated in the majority decision. But, in reality, what the accused meant by said testimonies was that he knew the governor's position behind the door. Whatever it may be, it is evident that when the accused fired the third shot, his object was to inflict a wound upon and consequently kill the governor. It is also true, as same decision says, that the victim in his effort to escape had been driven to take refuge in the closet, and with the door closed it was impossible for him to see what his assailant was doing, or to make any defense whatever against the shot directed through the panel of the door. But, in spite of all these and of the fact that, according to the majority opinion, the presence of *alevosia* in firing the third shot seems to be too patent of controversy that it requires no discussion whatever, in my judgment, dissenting from such a respectable opinion, the presence of said qualifying circumstance should not be taken into account in the acts aforesaid.

And the reason is very clear. The accused did not take advantage of the fact that the governor was behind the door of the closet and he was in front of it, or outside of said door; nor did he select this situation in order to prevent said governor from defending himself, so that without risk to his person arising from said defense, he might insure the execution of his criminal object. On the contrary, said situation was an obstacle against the realization of the object of the accused; was a means employed by the governor, under the desperate and sorrowful condition in which he was found, for his defense against the attack of which he was the object; was a difficulty encountered by the accused from continuing his attack upon the governor and making sure his aim at him with his revolver. The accused, after all, did not avail himself of these means or situation (that the door of the closet being closed) in order to make his victim a better and more accurate target, as is shown by the fact that only by judging the governor's position behind the door was he able to hit him with the third shot. And it is hereby convenient to rectify what appears in the decision of the lower court, namely, that one of the admissions made by the accused to the reporter Reyes and Lieutenant Labayan (at the interview they had in the jail with him relative to the third shot) was that when the accused knew the governor's position from the sound emitted when the latter called for help, he fired the third shot, placing the muzzle of his revolver against the door and at the place where he thought the -governor's head was. This is absolutely inaccurate. Neither Lieutenant Labayan nor reporter Reyes has said this. And it is not strange that (such an admission being found in the judgment of the trial court, which was reproduced by the Attorney-General in his brief, copying the whole of the respective paragraph of the judgment appealed from) the Attorney-General has invoked in his brief, as applicable in the instant case, the decision of the Supreme Court of Spain of December 10, 1884, cited in I Viada's commentaries 260, in order to maintain that the qualifying circumstance of *alevosia* was present when the third shot was fired. As it appears in the decision of the Supreme Court of Spain aforementioned, the case decided therein was: that a fight took place between the accused

and the inmates of a house; that after the accused had been ejected from said house and its door closed by those within, said accused fired his pistol, which he was carrying, through the crevice of the door; and that one of the persons inside the house was thereby killed. If in the present case (as has been inaccurately asserted in the judgment appealed from, referring to what has been testified by the reporter Reyes, an assertion accepted by the Attorney-General in his brief) Baluyot had placed the muzzle of his revolver against the door behind which was Governor Lerma and at the place or spot where he thought the governor's head was, or had, upon firing the third shot, previously placed said revolver against the wall of the door (as is also inaccurately mentioned in said judgment referring to Lieutenant Labayan), then the holding of the Supreme Court of Spain in its decision aforementioned would be in some way applicable, although not closely; for in the case aforementioned the agent or aggressor fired his revolver through the crevice of the door, i. e. he could easily aim at some of the persons behind the door, one of whom he wounded. But in the present case the accused Baluyot fired the third shot at the spot where the head of the deceased must have been merely according to his judgment of the victim's position, or his being seated, and of the sound emitted by him when he called out for help. As a consequence of said shot, he inflicted the mortal wound he had intended. Therefore, the difference between this case and the other one is very clear. Moreover, it must be also taken into consideration that the third shot was fired by the accused after the first two shots as a mere continuation of his attack upon the governor, and when he, being already excited and in the heat of anger, could not, naturally, be in a position to stop to aim his revolver with the necessary accuracy at exactly the head of the deceased—much more less because, from the testimony of the accused himself, the governor was calling out for Venegas, Aranjuez and a guard.

It is true, according to the majority decision, that the victim in his effort to escape had been driven to take refuge in the closet, and with the door closed it was impossible for him to see what his aggressor was doing, or to make any defense whatever against the shot directed through the panel of the door—the case being the same, according to the majority, as if the victim had been bound or blindfolded, or had been treacherously attacked from behind in a path obscured by the darkness of the night. It is indisputable that Governor Lerma was completely defenseless while taking refuge in the closet even if the door could have very well served to him, in any manner, as a means of defense (and he must have so understood when he pushed or held it from within to prevent the accused from entering said closet.) But in order to determine whether the means employed by the accused when he fired the third shot were treacherous or not, the condition and situation in which the victim was found must not be taken alone. Great consideration must also be had of the acts executed by the accused as constituting his unlawful aggression, because the qualifying circumstance of *alevosia* is subjective in character, as has been repeatedly said, or is specially connected with the aggressor. And it is evident that if Governor Lerma could be compared to a person bound and in defenseless conditions aforementioned, for the reason that the door being closed he could not see what his aggressor was doing, or make any defense whatever against the shot directed through the panel of the door, it was not due to any act of the accused because the latter was not the one who closed the door, or prevented it to be opened. On the contrary, it was the accused who tried to open it by pushing it persistently in order to continue his assault upon the unfortunate governor. And if Baluyot fired the third shot through the door, it is also indisputable that he did not take advantage of the door being closed, nor did he choose to fire said shot while it was thus closed in order to insure himself against any defense of resistance which could be made by the person attacked, or to insure the consummation of the criminal act he was executing, for the same reason that from his own actions he preferred to have the door opened before firing the third shot at his victim.

However, supposing, but not admitting as true, that the third shot, which caused Governor Lerma's death, was fired by the accused under such circumstances as would justify the holding that the procedure then employed by said accused was treacherous, it cannot also be considered that the commission of the crime was attended by the qualifying circumstance of *alevosia* which raises it to the degree of murder. It is a fact recognized in the majority

decision that the entire assault upon Governor Lerma from the beginning must be considered continuous, i. e., there was no break of continuity in each of the three shots fired by the accused at the governor. So that said three shots constituted, in reality, one single attack or one single act. Since it cannot be considered as duly proven, beyond reasonable doubt or in any manner whatever (as it is not in the judgment of the undersigned, as has already been said), that the accused acted treacherously when he fired the first two shots at the governor (which caused the two wounds in the region of the right supra-clavicle) or when he commenced to execute the criminal act, there is no legal terminology whereby the qualifying circumstance of alevosia can be considered present after the assault has been commenced; because alevosia must necessarily embrace the entire assault constituting the crime. Such has been the holding of the Supreme Court of Spain in its decision of September 9, 1901, (VoL 67, Jurisprudencia Criminal), in a case in which the accused fired two gun shots at his victim, who thereby received four wounds, and when said victim was already lying on the ground the accused again delivered several blows with the butt of his gun on the victim's head, thereby inflicting upon the latter several other wounds of which he died shortly afterwards. It appears from the verdict that the first two shots were not fired by the assailant from behind his victim in order to insure in that manner the execution of the crime without any risk to himself arising from the defense which the deceased could have made, but that, in delivering the several blows with the butt of his gun in the head of the deceased while lying on the ground, the assailant employed means, methods or forms especially and directly tending to insure the victim's death without any risk to his person arising from any defense the deceased could have made; i. e., the assailant did not employ treacherous means at the beginning of the assault but only towards its end when he killed the victim. In reversing the decision of the Audiencia Provincial de Gerona qualifying the crime as murder and condemning the accused to death penalty, the Supreme Court aforementioned held the following:

"That treachery necessarily embraces the entire assault constituting the crime, so that treachery cannot be considered present when it was not present at the beginning of the unlawful assault, notwithstanding that said assault was consummated on account of the victim's inability to repel it; that, therefore, the Jury having found out that there was no treachery when the accused fired the two shots at the victim, and that, when the latter fell on the ground as a consequence of said shots, said accused delivered several blows with the butt of his gun in his head, treachery cannot be considered present, even if the act of delivering said blows were treacherous, as the victim was killed with the butt of the gun when he was already lying helpless on the ground."

The case decided in the foregoing decision, as it appears, is identical to the instant case, and the fundamental reason adduced therein by the Supreme Court aforementioned, consists in that, the assault being considered as indivisible and only one criminal act punishable by law, even if it was executed at different and successive stages, it cannot be considered that in the execution of said act there are present separate and distinct circumstances in connection with each of the facts embracing said act which constitute but one crime.

However, the majority decision maintains, by citing the decision of this court in the case of U. S. vs. Elicanal (35 Phil. Rep., 209), that even supposing that treachery (alevosia) had not been presented at the beginning of the assault, it would be necessary to find this element present from the manner and surrounding circumstances under which the crime was consummated. The foregoing decision of this court contains this syllabus:

"It is the doctrine of this court that where the person killed was in a helpless and defenseless condition at the time the fatal blow was given, the homicide was committed with alevosia notwithstanding that in the attack, which was continuous, and which finally resulted in the death there was no alevosia."

The facts in the foregoing case were:

That while the sailboat Cataluna under the command of her captain Juan Nomo, was on her trip along the coast of Iloilo, the chief mate of said sailboat named Guillermo Guiloresa told Eduardo Elicanal, the accused, and one of

the members of the crew, that he was going to kill the captain because he was very angry with him and asked him to assist him. But Elicanal paid no attention to this proposal because he thought that it was a joke; that the following day while the crew were engaged in their daily occupation, the same chief mate (Guillermo), finding the captain in his cabin, assaulted him attempting to seize and hold his hands and at the same time calling the crew to come forward and help him. The crew, with the exception of the accused, hastened to the spot where Guillermo was engaged in a hand to hand fight with the captain. At the request of Guillermo the crew seized the captain and tied him with rope. After he had been rendered helpless, Guillermo struck the deceased captain in the back of his neck with an iron bar, and then delivering the weapon to the accused, ordered him to come forward and assist in disposing of his victim. The accused thereupon seized the bar and, while the captain was still "struggling for his life, struck him the fatal blow in the head, which caused his death.

After a thorough consideration of the qualifying circumstances that should be taken into account in the commission of the crime, among which is that of alevosia, which the court took into consideration in qualifying the offense as murder and in sentencing the accused Elicanal to death penalty, in order to hold that in the case then at bar the qualifying circumstance of alevosia was present, the writer of the majority opinion, Justice Moreland, said:

"This court has held repeatedly that, even though the beginning of an attack resulting in the death of the deceased is free from treachery of any sort, nevertheless it will be found present if, at the time the fatal blow is struck, the deceased is helpless and unable to defend himself. While the writer of this opinion holds the view that, where there is not treachery in the attack which results in the death of the deceased, there can be no treachery which will qualify the crime as murder notwithstanding the fact that, at the time the fatal blow was struck, the deceased was unarmed and defenseless, but, the court having held so frequently the contrary, the writer accepts the doctrine so well established."

In acknowledging in the foregoing decision that the doctrine established in the case, *U. S. vs. Balagtas and Jaime* (19 Phil. Rep., 174 invoked by counsel for the defense to maintain that the qualifying circumstance of alevosia could not be taken into account in the commission of the crime inasmuch as it was not present at the beginning of the assault upon the captain of the vessel) was quite different from, if not directly, opposed to, that already stated as, therefore, the uniform holding of this court in former cases, the writer of said decision, Justice Moreland, again said that, inasmuch as the majority of the court being of the opinion that it was not the intention of the court in the case *U. S. vs. Balagtas and Jaime* to reverse the previous decision of this court and to set down a new doctrine, he accepted that view particularly in the face of the almost unbroken line of decisions on the subject now to be referred to. Then in the following lines Justice Moreland cited various cases decided by this court holding, as has been already stated, a uniform doctrine quite different from, if not opposed to, that established in the *Balagtas and Jaime* case aforementioned. The first of said cases was that of *U. S. vs. De Leon* (1 Phil. Rep., 163) wherein "it appeared," says same decision, "that the accused entered the house of the deceased, drew their bolos and compelled him to follow him. On arriving at a place called Bulutong, the deceased was bound and in that condition murdered. It was held that the fact that the deceased was bound at the time he was killed although there was no treachery at the beginning of the assault resulting in his death, the qualifying circumstance was present. The court said:

"From the evidence there appears the qualifying circumstance of treachery. To show this it is only necessary to mention the fact that the deceased was bound.

"The head note to that case says:

"The fact that the deceased was bound while killed constitutes the qualificative circumstance of alevosia and raises the crime to the degree of murder, * * * "

The various cases, fifteen in number, mentioned by Justice Moreland in the aforesaid decision, beside that of U. S. vs. De Leon, aforementioned, are cited in, same decision (35 Phil. Rep., 218), followed by, "For these reasons we are of the opinion that the crime was committed with treachery and that it was properly denominated murder instead of homicide."

Now then, as it appeared in the De Leon case, the accused began the attack by entering the house of the deceased, drawing their bolos and compelling him to follow them, and, on arriving at a certain place, the deceased was bound and in that condition murdered. Upon an examination of the fifteen cases cited in the same decision, it appears that the facts, leading to the prosecution of the respective accused and the classification of the crime as murder because of the presence of the qualifying circumstance of alevosia, were identical to those in the De Leon case, or, what amounts to the same thing, were, with some alterations, that after the offended parties had been kidnapped from their respective homes or sequestered and carried to another place and there bound by their aggressors, they were put to death while absolutely defenseless. The facts in one of the cases cited in the aforementioned decision, that of U. S. vs. Nalua and Cadayum (23 Phil. Rep., 1), were: two persons suddenly and unexpectedly leaped upon a third, and while one of them holds the victim's hands the other stabs him to death.

What was then mainly taken into account by this court in holding, in the case U. S. vs. Elicanal, that in the commission of the crime there is present the qualifying circumstance of alevosia, was that the captain of the sailboat Cataluna was tied with rope when the accused, by order of the chief mate, took the iron bar and with it struck a blow in the head of the deceased resulting in his death.

The special circumstance that, when the deceased captain was killed by Elicanal, he was tied with rope and was consequently helpless and defenseless is what, comparing said case with that of De Leon and the other cases cited therein, was taken into consideration by this Court in the aforementioned decision in holding that treachery was present when Elicanal killed the captain even though there was no treachery at the beginning of the struggle. Such was duly and thoroughly shown by the arguments in the same decision holding clearly that where the person killed is bound hand and foot when the aggressor killed him, the crime was committed with alevosia, even though the acts of the aggressor prior to the killing were not treacherous, or that in such a case any other consideration related to the former acts of the offender must be excluded and the act of said offender in killing the deceased must be considered treacherous. If in holding what it did in the Elicanal case the purpose of this court had been otherwise, useless would have been all that has been said by Justice Moreland in the decision of said case, citing as the ground for his concurrence with the majority (notwithstanding his holding a different opinion and the doctrine established in the Balagtas and Jaime case) the cases already mentioned (the De Leon case and the other 15 cases cited in same decision) and finally accepting the view of the majority in the sense that it was not the intention of the court in the Balagtas and Jaime case to reverse the previous decisions of this court and to set down a new doctrine in view of the uniform holding of this court upon the subject in question; i. e., those holdings in the aforementioned case of De Leon and the other fifteen.

The case at bar, as it clearly appears, has no analogy or similarity whatever with the cases cited above nor with the Elicanal case. In all these cases the acts complained of were that the victims had been tied by their respective murderers before they were killed. In the Elicanal case there was at the beginning of the attack a hand to hand fight in the course of which the chief mate Guillermo with an iron bar dealt a blow in the back of the neck of the deceased captain while the latter was tied with rope, before another blow was delivered by the accused Elicanal at the request of said Guillermo. Treachery was, therefore, present when Guillermo dealt the first blow and before Elicanal delivered the fatal one on captain Nomo, deceased. In the De Leon case and the other fifteen cases cited in the decision against Elicanal, the purpose, the principal object, of the offenders being to put to death the victims by them sequestered or kidnapped from their homes, their acts of tying said victims were simply preliminaries or

preparatory to the principal act committed by them at the time the offended parties were already bound and rendered completely defenseless. Treachery, therefore, cannot be present in the said preliminary acts, it being present only when the accused executed their principal object, or their intended purpose at the time they sequestered the offended parties. On the other hand, the case at bar (which is rather unnecessary to repeat) was that the accused Baluyot began attacking Governor Lerma by firing two pistol shots while said governor was in front of him thereby causing him two wounds; and that the deceased having taken refuge into the closet next to the corridor adjoining his office, the accused continued his attempt by firing another pistol shot which caused the death of the victim.

It is, therefore, evident that the case at bar has no application to the doctrine established in the Elicanal case and in those cases cited in the body of same case by the writer, Justice Moreland, and invoked in the opinion of the majority in order to hold that, even supposing that at the beginning of the assault upon Governor Lerma treachery was not present, it would be necessary to consider its presence in view of the form by which the crime was committed. On the contrary, the present case has an exact application to the doctrine established by the Supreme Court of Spain in its decision of September 9, 1901, already mentioned above, and expressive of the fact that "treachery must necessarily be present thruout the assault constituting the crime," because the present, case is identical to that decided by said Supreme Court in the aforementioned decision where the foregoing doctrine was established. The case at bar has also an exact application to the doctrine established in the Balagtas and Jaime case (*supra*), to wit:

"In order that alevosia may be considered, as a qualifying circumstance to raise the classification of the crime, or as an aggravating circumstance to augment the penalty, it must be shown that the treacherous acts were present and preceded the commencement of the attack which cause the injury complained of. After the commencement of such an attack, and before its termination, an accused may have employed means or methods which are of a treacherous character, and yet such means and methods would not constitute the circumstance of alevosia. One continuous attack cannot be broken up into two or more parts and made to constitute separate, distinct, and independent attacks so that treachery may be injected therein and considered as a qualifying or aggravating circumstance." (19 Phil. Rep., 164.)

The foregoing doctrine must be considered subsisting, and it is, in my own judgment, subsisting notwithstanding what has been said by this court in the cases already cited; to wit, *U. S. vs. De Leon*, *U. S. vs. Elicanal*, and the fifteen cases mentioned in the last one.

For the foregoing reasons and with due respect to the opinion of the majority of this court, I hereby dissent from same and am of the opinion that the crime committed by the accused, according to the evidence adduced at the hearing and their merits, is not murder but homicide, defined and punished under article 404 of the Penal Code; and that the fact that it was committed at the place where the deceased Conrado Lerma, Governor of Bataan, was exercising the proper functions of his office as such governor, a generic circumstance modifying the criminal responsibility incurred by the accused in the sense of aggravating same without the presence of any extenuating circumstance to compensate it, the accused must be sentenced to suffer the medium of the maximum degree of the corresponding penalty, i. e., 18 years, 2 months and 21 days of reclusion temporal with the accessories of article 59 of the same Code; but that if it be considered, as it was understood by the majority in their decision, that same criminal act executed by the accused in fact resulted in the perpetration of two crimes, one of them being the assault upon persons in authority defined in article 249 No. 2 of said Code, the accused must therefore be sentenced to suffer the penalty corresponding to the more serious crime, i. e.? that of homicide in its maximum degree, as provided for in article 89, or 20 years of reclusion temporal and the same accessories of article 59.

Judgment modified.

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