

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
FRANCISCO BUENAVENTURA, PEDRO HERRERA (APPEAL DISMISSED
JUNE 28, 1971) FILOMENO MUYA, AND IÑIGO BUENAVENTURA,
DEFENDANTS-A...**

G.R. No. 22414. September 23, 1982

Ponente: CONCEPCION JR., J.

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CONCEPCION JR., J.:

In the afternoon of October 2, 1958, at the Municipality of Lambunao, Iloilo, Roque Lastrado suffered several stab wounds on different parts of the body that caused his death shortly thereafter.[1]

As a result, on January 22, 1959, the Provincial Fiscal of Iloilo filed an information charging Francisco Buenaventura, his son Iñigo Buenaventura, and the tenants of Francisco, Pedro Herrera and Filomeno Muya, of Murder, as follows:

"The undersigned Provincial Fiscal accuses the above-named defendants of the crime of MURDER, committed as follows:

"That on or about October 2, 1958, in the municipality of Lambunao, province of Iloilo, Philippines, and within the jurisdiction of this Court, the said accused, conspiring and working together, with evident premeditation, intent to kill, with abuse of superior strength, by means of treachery, armed with bolos and tuba gatherer's scythe (sanggut), did then and there willfully, unlawfully and feloniously attack, assault and strike Roque Lastrado with the weapons with which they were armed causing wounds on the different parts of the body of said Roque Lastrado which caused his death shortly thereafter.

"Contrary to Law."[2]

After arraignment, plea of not guilty,[3] and trial on the merits, the trial court in its Sentence dated August 6, 1963, convicted the accused as follows:

"After considering the evidence presented by the prosecution as well as that presented by the defense, defendants (1) Francisco Buenaventura, (2) Pedro Herrera, (3) Filomena Muya, and (4) Iñigo Buenaventura are hereby held guilty beyond reasonable doubt as principals by direct participation of the consummated crime of murder qualified by treachery. Under Article 248 of the Revised Penal Code, they shall be punished by reclusion temporal in its maximum period to death. There being neither aggravating nor mitigating circumstances, judgment is rendered sentencing defendants and each of them to reclusion perpetua with the accessories of the law and to jointly and severally indemnify the heirs of the deceased Roque Lastrado in the amount of P6,000.00 and to pay the costs. Let Exhibits C-bolo; D-short bolo; E-long bolo; and F-scythe, be confiscated in favor of the government to be disposed of in accordance with law. Pedro Herrera who has been detained shall be credited with 1/2 the period of his preventive imprisonment.

"SO ORDERED."[4]

All of the accused appealed the judgment of conviction.[5] This Court in the resolution dated June 28, 1971, dismissed the appeal of accused-appellant Pedro Herrera when he jumped bail and remained at large.[6]

Pending the transmittal to this Court of the transcript of stenographic notes taken in this case, this Court issued a resolution dated July 8, 1964, as follows:

"It appearing that a deputy clerk (Ernesto Dayot) of the Court of First Instance of Iloilo, on one hand, and stenographer Pedro Equia, on the other, accuse each other of having lost the untranscribed stenographic notes in L-22414 (People vs. Francisco Buenaventura, et al.); that the deputy clerk quotes from the record of the criminal case certain notes written by one of his subordinates attesting to Equia's having received the said notes; on the other hand, Equia insists that there cannot be a receipt signed by him acknowledging his possession of the notes, THE COURT RESOLVED to require the parties to move, within 10 days from notice hereof, in the premises."[7]

Acting on the aforesaid resolution, the Solicitor General, on July 28, 1964, moved that the Court of First Instance of Iloilo be directed to reconstitute the testimony of witnesses, the untranscribed stenographic notes of whose testimonies had been lost. Without objection of the defense, this Court handed down a resolution dated September 1, 1964, as follows:

"In view of the conformity of the three lawyers of the four defendants to the request of the Solicitor General, let the records of case L-22414, (People vs. Francisco Buenaventura, et al.) be referred to the Court of First Instance for reconstitution of the testimonies of the witnesses the notes of which were lost."[8]

On September 7, 1964, the First Deputy Clerk of Court of this Court sent a letter to the Clerk of Court, Court of First Instance, Iloilo City, as follows:

"In accordance with the resolution of this Court dated September 1, 1964, a copy of which is attached, I am herewith forwarding to you the record in criminal case No. 7259 of your Court (G.R. No. L-22414, People vs. Francisco Buenaventura, et al.), consisting of the following folders:

- (1) Two pieces of transcript of Q. Buenaflor, Jr., with 14 and 15 pages;
- (2) One piece of Original Record with 74 pages, and
- (3) One piece of exhibits A, B, C, H-1, and I, I-A; I-B, 6, 7, 7-A, 8, 9, with 9-A (Buenaventuras), I; I-A, I-B, 2, 2-B, and 3 (Muya) - 22 pages."[9]

In the trial court, during the proceedings of the retaking of the testimonies of witnesses as directed by this Court, and acting upon the manifestation of the Provincial Fiscal of Iloilo dated February 17, 1971, said trial court (presided by Judge Valerio A. Rovira) issued an order dated March 18, 1971, considering the retaking of the testimony of the witnesses for the prosecution as closed. The testimony of the witnesses for the defense were retaken, and the records returned to this Court, without the testimonies of supposed prosecution eyewitnesses Antonio Lastrado and Virginia Lastrado. The Court order dated March 18, 1971, is fully quoted as:

"ORDER

"When this case was called for the retaking of the testimony of the witnesses of the prosecution and defense, Atty. Ricardo Gerochi, counsel for the accused Francisco Buenaventura and Iñigo Buenaventura, called the attention of the manifestation of the prosecution:

"1. That the present case is called for the re-taking of the testimonies on the part of the prosecution, its witnesses, namely, Antonio Lastrado, Virginia Lastrado, Patrolman Paterno Acana, Claudio Linantud and Dr. Mateo Solidarios, the Rural Health Physician who conducted the autopsy of the body of the deceased Roque Lastrado;

"2. That the testimonies of the witnesses for the government, Dr. Solidarios and Patrolman Acana were already retaken;

"3. That the testimonies of the witnesses for the prosecution Virginia Lastrado and Antonio Lastrado can no longer be retaken on the ground that after several subpoenas and warrant of arrest have been issued for them to appear, some of which have been served thru the Office of the Provincial Commander of this province, the whereabouts of said witnesses cannot be located. The return of said subpoenas as found on the records will show that said Virginia Lastrado and Antonio Lastrado transferred their residence to Mindanao without designated addresses left behind;

"4. That prosecution witness Claudio Linantud who, at the time of the incident which gave rise to the present case was a member of the Police Force of Lambunao, Iloilo, is no longer connected with the service. The subpoenas issued for him to testify so that his testimony may be retaken show that he can no longer be contacted in Lambunao, Iloilo, his present address likewise still unknown.

"RESPECTFULLY SUBMITTED.

"Iloilo City, February 17, 1971.

"BENJAMIN A. DEFENSOR

Provincial Fiscal

"BY:

(SGD.) JULIO L. GONZALES

Asst. Provincial Fiscal

"Considering that the quoted manifestation of the Fiscal are in consonance with the order of this Court dated February 16, 1971, the retaking of the testimony of the witnesses of the prosecution is hereby closed and the defense whose witnesses are not available may if they so desire, present their witnesses whose testimony will be retaken.

"SO ORDERED." [10]

Appellee agrees on what happened in the proceedings for reconstitution of testimony of available witnesses, as follows:

"Record shows loss of untranscribed stenographic notes taken of the testimonies of some of original witnesses. As responsibility cannot be pinpointed, this Court resolved 'to require the parties to move in the premises'. In compliance, we asked 'to reconstitute the testimonies of witnesses, the untranscribed stenographic notes of those testimonies that had been lost'. After the case was remanded below, the original testimonies of prosecution witnesses, Dr. Solidarios and Pat. Acana, were retaken, while those of Virginia Lastrado, Antonio Lastrado and Claudio Limantud, who failed to appear in court, were not retaken. For the defense, retaken were the original testimonies of Luis Latorre, Johnny V. dela Fuente, Iñigo Buenaventura and Francisco Buenaventura, while those of Ramon Alcayaga, Estelita Herrera (missing direct examination), Pedro Herrera, Benigno Lorilla and Federico Balano were not retaken. Intact were testimonies of Estelita Herrera, Juana Jardiolin, Dr. Piamonte, Judge Vacante, Mayor Quidoriagao and Fidel Ahumada.

"Except as against appellant Francisco Buenaventura, there is lack of sufficient evidence finding appellants Iñigo Buenaventura and Filomeno Muya guilty, as co-principals by direct participation, of the killing of Roque Lastrado, considering the loss of untranscribed stenographic notes of the original testimonies of some prosecution witnesses particularly, Virginia Lastrado and Antonio Lastrado, which the fiscal considered as 'very material'; for failure to retake such testimonies; and paucity, in general, of the prosecution evidence." [11]

In the absence of the testimonies of Virginia Lastrado, Antonio Lastrado, and Claudio Limantud which could no longer be retaken, as notwithstanding diligent efforts these witnesses could no longer be located, the prosecution adopted the version of the defense. In substance, therefore, both versions of the prosecution and the defense are identical.[12]

In the morning of October 2, 1958, at Barrio Sibañgan, Lambunao, Iloilo, appellant Francisco Buenaventura and appellant Filomeno Muya went to that place for the purpose of measuring palay in his farm to pay a debt for wages owed by Francisco to Filomeno Muya. They arrived at Barrio Sibañgan at about 9:00 a.m. and there were people harvesting the standing crop of palay on the land of appellant Francisco Buenaventura tenanted by Luis Latorre. Among those people were the defense witnesses Estelita Herrera; Edad, the wife of the victim Roque Lastrado; the mother of the victim; and others. Francisco Buenaventura and Filomeno Muya went to the house of accused Pedro Herrera. Appellant Filomeno Muya stayed in that house, while appellant Francisco Buenaventura went around to cut bushes in his property.

At around 4:00 p.m. appellant Francisco Buenaventura instructed the harvesters of his tenant Luis Latorre to gather the bundles of harvested palay and to pile them in a designated place so that proper sharing could be done. A few moments later, tenant Luis Latorre informed appellant Francisco Buenaventura that the mother and wife of victim Roque Lastrado did not pile the palay they had harvested at the designated place but instead brought the said palay to their respective houses. Upon being informed, appellant Francisco Buenaventura instructed Luis Latorre to continue partitioning the harvested palay and giving the shares of the harvesters, as Francisco would proceed to the poblacion of Lambunao to get policemen to settle the matter reported by Luis Latorre.[13]

On the way to the poblacion, appellant Francisco Buenaventura was confronted by Roque Lastrado who said "So you are going to town?" Before appellant Francisco Buenaventura could answer, Roque Lastrado who was then armed with two bolos in both hands which were unsheathed,[14] boloed Francisco with his right hand. Appellant Francisco Buenaventura was able to step backward so he was not hit. Roque Lastrado delivered another bolo blow with his left hand which Francisco was able to parry with his own bolo which was by then unsheathed. Then Roque boloed Francisco with his right hand. Again, Francisco parried the blow with his left forearm which was wounded. When Francisco was hit on his left forearm, his sight momentarily blurred. Realizing that Roque Lastrado was still in front of him, Francisco gave him a bolo thrust and thereafter repeatedly hacked Roque because Francisco feared that Roque would kill him. These successive bolo blows felled and killed Roque Lastrado. Francisco suffered two injuries, one on his left forearm and another of about 3/4 inch in diameter on his right forearm.[15]

Upon seeing that Lastrado was already dead, Francisco picked up the bolos and went to the house of Pedro Herrera where Francisco's wounds were bandaged by Pedro Herrera. Francisco requested Pedro Herrera to go to the poblacion to inform the authorities of the incident. Francisco saw appellant Filomeno Muya and requested the latter to assist him in going to the road. They went to the poblacion, and there Francisco surrendered to a policeman and turned over the bolos.[16]

Appellant Francisco was examined by a private physician, Dr. Gonzales, because the rural health physician, Dr. Solidarios, was then in Janiway, Iloilo. Francisco was brought to the St. Paul's Hospital. He was confined for about a week because his bone on his right forearm was cut. After that, he was confined for five months at the Iloilo Provincial Hospital.

The autopsy examination[17] on the body of the victim Roque Lastrado disclosed the following:

"Wound No. 1 - an incised wound, measuring 2 inches long by 1/2 inch deep, on the right frontal region of the head.

"Wound No. 2 - an incised wound about 4 inches long by 1/4 inch deep, starting below the right ear curving downward to the right chin.

"Wound No. 3 - an incised wound about 3-1/2 inches long by 3 inches deep, located at the left posterior shoulder directed inward and upward.

"Wound No. 4 - an incised wound 5 inches long by 5 inches deep, at the upper left buttocks.

"Wound No. 5 - an incised wound 4-1/2 inches long by 3-1/2 inches deep at the upper posterior left thigh.

"Wound No. 6 - an incised wound of the upper right, anterior, arm about 3-1/2 inches long by 2 inches deep.

"Wound No. 7 - an incised wound of the upper, right, lateral, arm 4 inches long by 2 inches deep.

"The above-mentioned lesions were caused by a sharp instrument, and the cause of death was severe hemorrhage due to multiple stab wounds. (Exh. G, p. 5, Folio of Exhibits)."[18]

The defense of appellant Iñigo Buenaventura is that of an uncontested alibi.[19] Iñigo claimed that on October 2, 1958, as an employee of the Philippine Manufacturing Company, Audio Visual Unit, with Mr. Johnny de la Fuente as his immediate superior, he was in the morning of that day in the District of Jaro selling P.M.C. products. At noon time up to 3:00 p.m. of the same day he attended a birthday party in the house of Mr. de la Fuente. Past 3:00 p.m., Iñigo, De la Fuente, and another companion, Mr. Tambanillo, proceeded to Cabatuan, passing the municipality of Pavia and Sta. Barbara, distributing products of the P.M.C. At about 4:20, p.m., in the municipality of Cabatuan they stopped to show a movie as part of the company's audio visual advertising. They obtained a permit from the town mayor to show their movie. The free show was made from 6:00 p.m. to 8:00 p.m., the appellant Iñigo attending to the movie projector. Past 8:00 p.m., they proceeded to Barrio Tiring, Cabatuan, where they again put up a movie show. They arrived at Jaro, Iloilo City, at about 11:00 p.m. When appellant Iñigo arrived at his residence that night, he was informed that his father had an incident at Barrio Sibacuñgan, Lambunao, Iloilo, with one Roque Lastrado and his father was at the St. Paul's Hospital. Appellant Iñigo was not able to go to the hospital that night for lack of transportation so he went there the next morning. This alibi was supported and corroborated by the testimonies of witnesses Mayor Jose Guidoriagao of Cabatuan and Mr. Johnny de la Fuente. Appellee agrees that this alibi cannot be assailed.[20]

Appellant Filomeno Muya denied any participation in the encounter and said that he was not present when the fight took place. Muya's version is not contested by the prosecution.[21]

Appellee agrees that "lack of direct evidence as to how Roque Lastrado was killed, justify a finding of non-guilt for appellants Iñigo Buenaventura and Filomeno Muya, x x x, considering the loss of the untranscribed stenographic notes in question, the absence of the original testimonies of Virginia Lastrado and Antonio Lastrado, or of any retaken of their testimonies, which the fiscal believed as very material." [22]

Stated otherwise, the appellee and the prosecution argue for the acquittal of appellants Iñigo Buenaventura and Filomeno Muya on the ground that there is no evidence to show their guilt of the crime they were charged.

Following the reasoning of the appellee in this case, it clearly appears that there is also no evidence presented against the accused Pedro Herrera who was similarly situated during the incident as appellant Filomeno Muya.[23] Accused Pedro Herrera was erroneously convicted by the trial court notwithstanding lack of evidence on his alleged participation in the crime. It is true that accused Pedro Herrera's appeal was dismissed on June 28, 1971, by this Court's resolution[24] when accused Pedro Herrera jumped bail and escaped, but to Our mind that cannot alter the truism that he was erroneously convicted without any evidence against him. We cannot ignore the clear fact that he was a victim of injustice. It is possible that he escaped because he knew he was innocent and he

mistakenly feared that he would obtain no justice after he was erroneously convicted. We have to consider his financial situation in life at the time he became the victim of injustice. Taking into consideration the circumstances of this case, We are constrained to set aside legal technicalities, take a course of action adherent to the principles of a compassionate society, consider his appeal as reinstated and declare him acquitted on the ground of lack of evidence. An innocent man must not be allowed to become the victim of an injustice by means of a legal technicality. We cannot in conscience affirm an erroneous judgment of conviction just because the appellant abandoned his appeal.

As to the liability of appellant Francisco Buenaventura, the appellee argues that from the evidence the accused is only entitled to an incomplete self-defense, as there was no reasonable necessity for the means employed to repel the aggression.[25] The prosecution does not question the fact, that when the appellant was on his way to the poblacion to fetch a policeman to settle the trouble, the victim accosted the appellant and suddenly without any pro-vocation, attacked the appellant with two bolos held in both hands. The two elements of the justifying circumstances of self defense, unlawful aggression and lack of sufficient provocation immediately preceding the aggression are admittedly present.[26]

As to the reasonable necessity of the means employed to repel the aggression, the uncontested testimony of the appellant Francisco Buenaventura was that after he was able to successfully parry two bolo blows by stepping back and parrying the second blow with his own bolo, appellant in parrying the third blow was hit on his left forearm which momentarily blurred his sight. Realizing that the aggressor Roque Lastrado was still in front of him, Francisco gave a bolo thrust and thereafter hacked and hacked him for fear that Roque would kill him. It was these successive bolo blows that felled and killed Roque Lastrado.

We cannot see Our way clear to the appellee's argument that the appellant should not have given so many bolo blows to the victim causing his death, that the appellant should have measured his defensive moves to make it conform to what is reasonably necessary to repel the aggression. Under the circumstances of this case, the appellant was accosted by the victim and suddenly attacked without provocation, the victim holding two bolos in both hands. Roque Lastrado was bigger, taller and stronger than the appellant who was skinny and light in weight.[27] The appellant tried to avoid the two bolo blows delivered by the victim. It was only when the victim delivered the third bolo blow that wounded the left arm of the appellant and after his eyes blurred, that he made the bolo thrust against the victim and delivered the successive bolo blows. Having been wounded already, the appellant could not be expected to measure his defensive blows. Appellant was in mortal peril at that time. Being weaker and smaller defending against a stronger adversary armed with two bolos, there was no time for the appellant to measure his calculated counter blows to defend his life.

Under the proven circumstances of this case, the acts done by the appellant Francisco Buenaventura were reasonably necessary to repel the aggression and to save his life.

Complete self-defense having been proven in favor of appellant Francisco Buenaventura, he is hereby acquitted of the crime charged against him.

WHEREFORE, and by reason of the foregoing, the Sentencia, dated August 6, 1963, in Criminal Case No. 7259, rendered by the Court of First Instance of Iloilo, is hereby REVERSED and SET ASIDE, a new one entered instead ACQUITTING appellants Iñigo Buenaventura, Filomeno Muya and accused Pedro Herrera for lack of evidence against them; and ACQUITTING appellant Francisco Buenaventura on the ground of the proven justifying circumstance of complete self-defense, with costs de officio.

SO ORDERED.

Barredo, (Chairman), Guerrero, Abad Santos, De Castro, and Escolin, JJ., concur. Aquino, J., see attached dissent.

[1] p. 11, Rollo.

[2] p. 1, Original Record, Crim. Case No. 7259, CFI, Iloilo.

[3] pp. 3-4, Original Record.

[4] p. 50, Id.

[5] pp. 65-69, Id.

[6] p. 135, Rollo.

[7] p. 2, Appellants' Brief, Francisco and Iñigo Buena-ventura; Subject Index, Appellee's Brief.

[8] p. 3, Id.

[9] Appendix 5, Appellants' Brief.

[10] Appendix 6, Appellants' Brief.

[11] pp. i and ii, Subject Index, Appellee's Brief.

[12] pp. 6-11, Brief for Appellants Francisco and Iñigo Buenaventura; pp. 2-4, Appellee's Brief.

[13] pp. 14, 17-18, t.s.n., April 2, 1971.

[14] Exhibits "D" and "2"; "E" and "2-A".

[15] pp. 18, 20, 21, 30-31, t.s.n., April 2, 1971.

[16] pp. 22, 31, t.s.n., April 2, 1971.

[17] pp. 7-11, t.s.n., February 19, 1971.

[18] p. 3, Appellee's Brief.

[19] pp. 10-11, Appellee's Brief.

[20] p. 11, Appellees Brief.

[21] pp. 3-5, Brief for Appellant Filomeno Muya; pp. 12-13, Appellee's Brief.

[22] p. 7, Appellee's Brief.

[23] p. 12, Appellee's Brief.

[24] p. 135, Rollo.

[25] pp. 9-10, Appellee's Brief.

[26] pp. 7-8, Id.

[27] p. 3, Sentencia Crim. Case No. 7259, p. 13, Rollo.

DISSENTING OPINION

AQUINO, J.:

I dissent. The trial court based the judgment of conviction on the testimonies of the eyewitnesses, Virginia Lastrado, 24, and Antonio Lastrado, 15, who, according to Judge Pantaleon A. Pelayo, testified with sincerity and frankness and in simple and plain language and, therefore, the veracity of their testimonies could not be doubted.

The trial court found that on the afternoon of October 2, 1958, Roque Lastrado was working in his seedbed located at Barrio Sibacungan, Lambunao, Iloilo. While he was in a sitting position, pulling out palay seedlings from the seedbed for transplanting to the adjoining ricefield, Francisco Buenaventura, his son Iñigo Buenaventura and his two tenants Filomeno Muya and Pedro Herrera unexpectedly assaulted Roque with their bladed weapons (Exh. C, D, E and F). Roque tried to defend himself. He wounded Francisco in the arm. Roque's bolo fell on the ground. When he tried to retrieve it, his four assailants continued their assault. Roque died on the spot.

He sustained seven incised wounds located on the head, right ear to the chin, left posterior shoulder, upper left buttock, upper posterior left thigh and right arm (two wounds) (Exh. G).

The motive for the killing was to prevent Roque from planting palay on the ricefield, a piece of property that had been in litigation between Roque and Francisco. The latter allegedly had won the case in court.

The trial court noted that Francisco claimed self-defense for the double purpose of saving himself and exculpating his co-accused. The claim of the accused that Roque was gathering the palay harvested by his wife and mother was considered incredible by the trial court because it was not harvesttime in Barrio Sibacungan. It was the planting season.

Francisco testified that while defending himself against the supposed unlawful aggression initiated by Roque, he wounded Roque in the abdomen. That was a falsehood, according to the trial court, because it is an undisputed fact that Roque did not sustain any wound in the abdomen.

The trial court noted that Francisco's demonstration as to how he acted in self-defense "was lousy, unconvincing and did not impress the court" because he "acted as though he was not in the mood" or was "unwilling to make the demonstration". Francisco's demeanor on the witness stand indicated that he was not speaking the truth.

In this appeal, the testimonies of Virginia and Antonio cannot be taken into account because they had not been transcribed. The stenographic notes were lost. Their testimonies could not be retaken because they had gone to Mindanao.

However, their affidavits, sworn to before the justice of the peace and presented by the defense as Exhibits 1-Muya and 2-Muya, are in the record.

Virginia declared in her affidavit that at about five-thirty in the afternoon of October 2, 1958 while she was in the ricefield being cultivated by her elder brother, Roque, she saw Francisco, his son Iñigo and his tenants Herrera and Muya, all armed, arriving at the seedbed where Roque was pulling rice seedlings (See sketch, Exh. A).

Francisco called Roque and when the latter stood up, Francisco struck him with his bolo on the right arm. Roque drew his bolo and struck Francisco but the latter returned the blow and again hit Roque on the right arm. As a result, Roque's bolo fell on the ground. As Roque stooped to pick up his bolo, Francisco hit him on the buttock with such force that "Roque never rose from the ground". While Roque was sprawled on the ground, Iñigo, Herrera and Muya struck him (Exh. 1-B-Muya, p. 19, Folder of Exhibits).

Antonio corroborated his sister's affidavit (Exh. 2-A-Muya).

I am of the opinion that on the basis of the said affidavits, whose affiants were cross-examined by the defense during the trial, and considering the findings of the trial court, the guilt of the four accused, as co-conspirators, was proven beyond reasonable doubt. They are guilty of homicide and should be sentenced to an indeterminate penalty of ten years of prision mayor medium as minimum to seventeen years of reclusion temporal medium as maximum and to pay solidarily an indemnity of P12,000 to the heirs of the victim.

The miscarriage of justice, sought to be effected by means of the destruction of the stenographic notes, was frustrated by the existence of the said affidavits which have the same probative value as the affiants' testimonies. The truth ultimately prevails.

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