

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EDUARDO HERNANDEZ, MERLITO HERNANDEZ AND MAXIMO HERNANDEZ ALIAS "PUTOL"; ACCUSED-APPELLANTS.

G.R. Nos. 67690-91. January 21, 1992

Ponente: NARVASA, C.J.

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NARVASA, C.J.:

At about eleven o'clock in the evening of May 28, 1979, the people in the house of the spouses Eligio Mendoza and Eustaquia de Rosales at barrio Bukal Norte, Candelaria, Quezon, had all retired. With said spouses in their house were their sons, Buenaventura, Narciso and Marino; Elena Magararo, Buenaventura's wife; and a visitor, Donato Tabanao, who had been invited to spend the night.

Then a male voice was heard from outside the house saying: "Tao po, kami ay alagad ng batas, puede ba kaming makapagtanong?" Elena got up to rouse her husband, Buenaventura but saw that he was already up. She saw him open a window in the living room and look out, but he immediately shut the window. Suddenly two gunshots rang out. Buenaventura fell. She started towards him but other gunshots came in a burst, and she dropped to the floor in terror. She saw her brother-in-law, Narciso, also fall.

The shooting stopped. Elena heard a voice from outside say, "Eddie, tayo na, patay na sila." She thereupon went to her husband who was lying on the floor, covered with blood. Buenaventura asked for water and she gave him some. Then she asked him if he recognized the persons who had shot him. Buenaventura said he had glimpsed the brothers, Merlito and Eduardo Hernandez, and had seen that the one who had the gun was Maximo Hernandez. Again Buenaventura had another drink of water after which he expired. His brother, Narciso Mendoza, had been hit in the breast and died instantly. The Mendozas' house guest, Donato Tabanao, was slightly wounded.

The police investigators recovered a number of empty bullet shells of a cal. 30 carbine scattered on the ground just outside the Mendozas' home, and slugs of the same caliber inside the house. They also noted several bullet holes in the front part of the house, in its interior partition or divider, as well as in a mosquito net and the victims' clothes.

The post-mortem examination conducted by Dr. Domingo Alcala disclosed that Buenaventura Mendoza had been hit by a bullet fired from a caliber .30 rifle which penetrated his right lung and caused his death from internal hemorrhage secondary to that gunshot wound. The autopsy performed by the same physician on Narciso Mendoza revealed that he had been shot in the chest and in the right shoulder also by a caliber .30 rifle, and death had also resulted from the bullet wound in the chest which had injured one of his lungs. The slightly upward trajectory of the bullets indicated that the rifle-wielder had been standing at a lower level than his victims.

The persons identified by Buenaventura shortly before he died were known to Elena. As she later testified, Eduardo and Merlito Hernandez had once been their neighbors at Barangay Cabatang, Tiaong, Quezon; and she had become acquainted with Maximo Hernandez at the house of Eduardo, also in the town of Candelaria, Quezon.

Having found adequate basis to indict the Hernandez brothers, Eduardo and Merlito, and their uncle, Maximo, for the killings, the Provincial Fiscal filed two separate informations for murder against them in the Regional Trial Court of Lucena. Both informations alleged that the accused had acted in conspiracy, and that their felonious assaults were aggravated by alevosia and evident premeditation.

All three accused entered pleas of innocent when arraigned. They were thereafter tried jointly.

Elena Mendoza was the Prosecution's first witness. Apart from confirming the events set out in the first two paragraphs of this opinion, she told the Trial Court of other facts from which a motive for the killings might be ascribed to the accused siblings: revenge. According to her, five months earlier, or more precisely on December 27, 1978, at Barangay Cabatang, Tiaong, Quezon, Leonides Mendoza, a brother of Buenaventura, had killed a brother of the defendants, Carlos Hernandez. The killing was recorded in the police blotter; but no prosecution in court ever took place because the Mendozas paid the Hernandez family the sum of P4,600.00 in settlement. Elena learned, however, that the Hernandezes had simply deposited this amount of P4,600.00 in a bank with the intention of returning it to the Mendozas at a later time; and she claimed that the "amicable settlement" notwithstanding, the Hernandezes had been waiting for her husband, Buenaventura --- "inaabangan" --- near the spring where he normally fetched water, at Bukal Norte, Candelaria, Quezon.

The police investigators and the medical expert also gave testimony respecting the findings made by them within their respective fields of competence, already above outlined. Finally, Gelacio Mendoza, a Brother of the slain victims, was called to the witness stand.

Gelacio Mendoza deposed that at the time in question --- about 11 P.M., May 28, 1979 --- he heard his dog barking. He had peered through a hole in the wall of his house and seen three (3) men walking by the northern side of his house. He could not make out their faces as they passed but, by the light of the moon, was nonetheless able to identify two of them, by their build or general physical appearance, as his former neighbors, Eduardo Hernandez and Merlito Hernandez. He kept his eyes on the three men and saw them proceed toward the west and then directly south, in the direction of his parents' house, about 150 meters away from his own. From that direction, he heard gunfire some five minutes later. Not long afterwards, his brother, Marino, came to tell him that his other brothers, Buenaventura and Narciso, had been shot in their parents' house. He had immediately gone there and found his brothers dead. From his sister-in-law he learned of Buenaventura's identification of the three Hernandezes as the killers. And like her, he also theorized that revenge was the motive for the killing.

The defendants denied all complicity in the crime. They claimed that at the time of its commission, they were somewhere else.

Maximo Hernandez testified that he had gone to Sitio Quinti, Barrio Masalukot II, Candelaria, Quezon, at 8:00 o'clock in the evening of May 28, 1979 to act as one of the judges in an amateur singing contest held there as part of the celebrations of the town fiesta; that he was at that contest continuously from 9:00 o'clock that night up to 2:00 o'clock the following morning, together with the other judges, Roberto Burgos and Serapio Macasaet, and the master of ceremonies, Carlito Teseco; and that after the contest, he, his wife and children, had gone to the house of his friend, Roberto Cantos, on the latter's invitation, and there they had all passed the night.

Maximo's alibi was confirmed by the testimony of the emcee of the singing contest, Carlos Teseco, who was the barangay captain of Barrio Masalukot II. Confirmation of the alibi was also made on the witness stand by the Chairman of the Board of Judges of the singing contest, Roberto Burgos, a municipal councilor of the place. Burgos, however, admitted on cross-examination that Sitio Quinti is only two or three kilometers distant from the scene of the crime, that the distance could be negotiated by a one-hour walk, and that during the intermission he could not recall whether or not Maximo had left the place because he had been very busy.

Eduardo Hernandez, for his part, testified that at the time of the murders, he and his brother, Merlito, were in Barangay Bulagsong, Catanauan, Quezon, having gone there to help in the harvest of the palay on the land of Camelo Morales, Eduardo's father-in-law, land which was irrigated but untenanted. His testimony is that he had left his home at Bilirang Buli, Lagalag, Tiaong, Quezon, at about 5:00 o'clock in the morning of May 28, 1979, together with his wife, Lucila Morales, his small child, and his brother, Merlito. They rode on a bus and arrived at Lucena City at around 10:00 o'clock that morning. They then boarded a small bus which brought them to Catanauan, arriving there at 4:00 o'clock in the afternoon. Finally, they took a tricycle which deposited them at Camelo Morales' house at Barangay Bulagsong an hour later, at about 5:00 o'clock. They stayed at Barangay Bulagsong for about a month, and did not return to Bilirang Buli until the harvest had been completed.

Merlito Hernandez gave evidence to the same effect.

To corroborate the brothers' alibi, four persons were called to the witness stand by the defense.

The barangay captain of Lagalag, Tiaong, Quezon, Leodegario Isles, deposed that he met Eduardo and Merlito Hernandez in the morning of May 28, 1979 on the path leading from their barrio to the highway. With the brothers were Eduardo's wife and small child. At the highway, while he was awaiting transport to Tiaong, he asked the Hernandezes where they were going and was told they were on their way to Catanauan. A few days afterwards, he saw Eduardo's wife at Lagalag; she told him she had returned from Catanauan to get some things from their house which she had forgotten.

Another barangay captain, Segundino Diaz, of Bulagsong, Catanauan, Quezon told the Court that he had seen Eduardo and Merlito Hernandez on May 28, 1979, at about 4:00 o'clock in the afternoon, at the house of Camelo Morales. He saw them again in the same house that evening, an occasion which he particularly recalled because it happened to be the siyaman, the ninth day of the novena prayers offered for the deceased mother-in-law of Camelo Morales. He saw the Hernandez brothers a third time the following day. Segundino Diaz admitted that Eduardo Hernandez is his nephew, in fact he was giving evidence at the request of Eduardo's mother; that Camelo Morales, Eduardo's father-in-law, paid his fare to Lucena City where the courthouse was situated; that at Lucena City, he had taken his meal and slept in the house of Eduardo's uncle; and that he had disclosed the matters testified to by him for the first time only to the defendants' attorney.

Camelo Morales was called to the stand but could not confirm the alibi of his son-in-law, Eduardo Hernandez, his testimony being that it was not in 1979 but in 1981, that Eduardo and Merlito Hernandez had gone to his place to help him harvest palay, and that the ninth day of the prayer offering for his deceased mother-in-law fell on a day in May, 1981 and the prayers were said from 4:00 P.M. to 7:00 P.M. that day.

The fourth defense witness, Rolando Latorre, recalled having seen the two Hernandez brothers at around 8:00 o'clock in the morning of May 28, 1979, alighting from a vehicle at Candelaria, Quezon; that since as it turned out they were all going to Catanauan, they rode on the same bus up to Lucena City, and then on another bus to Catanauan which they reached at about 4 P.M.

The prosecution presented one rebuttal witness: Alejandro Cruz, team leader of the Ministry of Agrarian Reform stationed at Catanauan, Quezon, whose primary duties included the survey of landholdings planted to rice and corn. He declared that of his personal knowledge, borne out by his official records, there was no irrigated riceland at all at Bulagsong, contrary to the claim of the Hernandez brothers that Camelo Morales' land was irrigated.

The Trial Court found that the evidence established the guilt of the accused beyond reasonable doubt. It rendered judgment on March 8, 1984 the dispositive part of which reads as follows:

“WHEREFORE, viewed in the light of the foregoing, the Court finds the accused Eduardo Hernandez, Merlito

Hernandez and Maximo Hernandez, alias 'Putol,' guilty beyond reasonable doubt of the crime of MURDER in both Criminal Cases Nos. 2620 and 3375, and hereby sentences the said accused ** ** each to suffer a prison term of Life Imprisonment (Reclusion Perpetua) for the death of victim Buenaventura Rosales Mendoza in Crim. Case No. 3375; and

2. In Crim. Case No. 2620 for the death of Narciso Rosales Mendoza, accused Eduardo Hernandez, Merlito Hernandez and Maximo Hernandez, alias 'Putol,' each to suffer a prison term of Life Imprisonment (Reclusion Perpetua) and to indemnify proportionately the heirs of the two victims in the amount of Twenty Four Thousand (P24,000.00) Pesos, without subsidiary imprisonment in case of insolvency by virtue of the penalty imposed, with all the accessories of the law, and to pay the costs."

The Trial Court's Clerk of Court, opining that "the penalties (of reclusion perpetua) imposed ** in both cases call for automatic review by the Hon. Supreme Court," transmitted the record including the transcripts of stenographic notes, the minutes of the proceedings and the exhibits, to this Court's Clerk of Court. Although such a transmittal was erroneous, considering that an automatic review is authorized by law only when the penalty of death has been imposed, this Court nevertheless accepted the appeal.[1] Briefs were thereafter filed in due course for the appellants. One was filed in behalf of Maximo Hernandez;[2] that for the other two (2) appellants was filed by another counsel.[3]

The appellants argue that it was error for the Trial Court to

- 1) have rejected Exhibits 1 and 2 of the defense;
- 2) have admitted and accorded full credit to the dying declaration of Buenaventura Mendoza (on the basis of the "uncorroborated, unreliable and unbelievable testimony of Elena Mendoza");
- 3) rule that there was sufficient circumstantial evidence proving the appellants were the perpetrators of the crime;
- 4) have taken account of revenge as motive although there was no direct evidence pointing to the appellants as authors of the crime; and
- 5) have refused "due credence to the duly corroborated and reliable testimonies of appellants ** and their witnesses."

It should be apparent that the entire case of the prosecution turns upon the identification of the appellants verbally made to Elena Mendoza by her husband shortly before he died from the gunshot wounds received by him moments earlier. It is therefore essential to ascertain if the dying man's statements were indeed correctly received as a dying declaration in accordance with the Rules of Court,[4] and also, since those ante-mortem statements were testified to by Elena Mendoza, to analyze carefully the latter's testimony respecting them and determine how much credit should be accorded to it, if at all.

The requisites for the admissibility of a dying declaration, as an exception to the hearsay rule, are well known. It is necessary that (1) the declaration be made by the deceased under the consciousness of his impending death; (2) the deceased was at the time competent as a witness; (3) the declaration concerns the cause and surrounding circumstances of the declarant's death; and (4) it is offered in a criminal case wherein the declarant's death is the subject of inquiry.[5]

The decisive factor is that the declaration be made under the consciousness of impending death. It is this which imparts trustworthiness to the essentially hearsay character of the declaration – -hearsay, because it is some person other than the deceased declarant (of course) who testifies to the same. A declaration made with awareness of imminent demise, it has often been said, is "made in extremis, when the party is at the point of death and when

every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice." [6] The idea, more succinctly expressed, is that "truth sits on the lips of dying men."

In a well known work on evidence, [7] the following theory is advocated, viz:

"When death supervenes speedily after the declaration is made, the inference that the declarant realized his condition may be obvious. In a case in which the declarant died immediately after stating who had attacked him, his declaration was admitted (*People v. Gallos*, 47 Phil. 994). In another case where the declarant was seriously wounded and died a few minutes after stating the name of his assailant, the statement was held admissible (*People v. Chan Lin Wat*, 50 Phil. 182)."

The theory is not quite correct; it is not justified by the jurisprudence cited. *Gallos* did not involve the dying-declaration rule; the statement of the dying victim was mentioned only in passing, there being other evidence quite adequate to sustain conviction. And in the *Chan* case, the declaration of the expiring victim was admitted not because death came soon after he had been wounded, but because the circumstances were such as to generate a reasonable inference that he knew he was shortly going to die; i.e., he had fallen into so weakened a condition while being interrogated by the police that the doctors had to ask that the questioning be stopped on that account, and indeed, he died within minutes thereafter.

It may be that when death takes place immediately after a dying person makes a declaration, the inference that he knew he was dying when he made the declaration is not far-fetched. The inference is however not one that necessarily follows. For it may also be that a gravely wounded individual may express hopes of recovery while making statements as to the cause and surrounding circumstances of his injury, and die immediately thereafter, within minutes after being hurt; and it is clear that in this situation, the declaration is not admissible. The correct principle then is that it is not so much the rapid eventuation of death as the decedent's consciousness that his demise is at hand, that invests his utterances in the premises with admissibility by way of exception to the hearsay rule. Not speediness of dissolution from injury, but realization of the imminence of that dissolution, is what controls.

Now, whether or not such a consciousness of the imminence of death is present in any given case is, of course, a matter of proof. It may be proven by the very statements of the decedent himself, as when he says he knows he is dying, [8] or there is no hope of recovery for him, [9] or that he should be brought to the hospital because his wounds were serious, [10] or contrariwise, it is futile to bring him to a hospital, or that a priest should be called to administer the last rites to him or so that he may make his peace with God prior to meeting him, or asks his spouse to look after their children or makes provisions respecting his property and personal affairs, [11] etc. It may be established by his acquiescence, express or tacit, to apprehensions made known by his physicians or other persons that no hope could be held out for him, [12] or to suggestions that a priest be called to make him ready to meet his Creator. It may also be inferred from the nature and extent of the decedent's wounds, or other relevant circumstances. [13] The important thing, to repeat, is that there be some persuasive evidence of the decedent's consciousness that death impended from his wounds, regardless of whether he actually dies very quickly after being wounded, or there is an appreciable lapse of time between his wounding and his dying. [14]

The record of *Elena Mendoza's* testimony is unfortunately barren of any circumstances from which a reasonably reliable ascertainment might be made of whether or not her husband, *Buenaventura*, had made the identification of the appellants under the consciousness of impending death. In the *People's* brief, *Elena's* relevant testimony on the point is reproduced, as follows:

"Q After the gunshots stopped, what happened next?

A I overheard a voice saying 'Eddie tayo na, patay na sila.'

Q Where was the voice coming from, if you know?

A Outside our house, sir.

Q After you heard the voice saying 'Eddie tayo na, patay na sila,' what happened next?

A I approached my husband, sir.

Q What did you do with your husband?

A I twisted his body and I saw his body was soaked with blood, sir.

Q What happened afterwards?

A My husband asked for some water, sir.

Q After drinking the water, what happened next?

A After he drank the water, I asked him if he recognized who shot him.

Q What was his answer?

A He said he recognized and he told me the names, sir.

Q What did your husband tell you regarding the persons who fired at him?

A The brothers Merlito and Eduardo Hernandez, and the one who was holding the gun was Maximo Hernandez alias 'Putol,' sir.

Q After your husband had identified his assailants, what happened next?

A I gave him water and after drinking, he passed away, sir.

(pp. 8-9, TSN, May 10, 1982)"

It seems therefore that, for lack of predicate, Buenaventura's statements may not qualify as a dying declaration. Nevertheless those statements may be admitted as part of the *res gestae* in accordance with Section 36, Rule 129 of the Rules,[15] which provision reads as follows:

"SEC. 36. Part of the *res gestae*. — Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof, may be given in evidence as a part of the *res gestae*. * * *."

The infliction on a person of a gunshot wound on a vital part of the body should qualify by any standards as a startling occurrence. And the rule is that testimony by a person regarding statements made by another as that startling occurrence was taking place or immediately prior or subsequent thereto, although essentially hearsay, is admissible exceptionally, on the theory that said statements are "natural and spontaneous, unreflected and instinctive, ** ** made before there had been opportunity to devise or contrive anything contrary to the real fact that occurred," it being said that in these cases, it is the event speaking through the declarant, not the latter speaking of the event. [16]

It seems entirely reasonable under the circumstances to conclude that Buenaventura's statements, made moments after receiving his fatal injury, were made without opportunity to devise or contrive, and under the influence of the occurrence.

The next question is whether the statements attributed to Buenaventura relative to the identity of his assailants were indeed uttered at the time and under the circumstances narrated by his widow in the witness chair.

The record shows that a barangay councilman, and three (3) police officers -- two of whom were known to the

widow as Casayuran and Atienza -- came to her home some seven hours after her husband's death; and they stayed for "several hours," surveying and studying the scene of the crime, taking photographs, collecting whatever physical evidence there was, and interviewing witnesses. Now, there can scarcely be any doubt that among the very first questions, if not indeed the most important question, that the police investigators asked at the time was, who was or were the perpetrators of the killing; or who had seen the foul deed being done and whether the person or persons doing it had been recognized or could be described. Certain it is that the widow and the victim's relatives (e.g., his brother Gelacio) would have been among those to whom this question would have been put, not once but several times and not only by the police but by other persons. And certain it is, too, that the widow would have forthwith responded by telling the police officers the names of the slayers as told to her by her husband, if it was in deed true that he had identified them to her in his dying moments. In fact the government's evidence is that this question was asked of her by one of her brothers-in-law, Gelacio Mendoza, before the three police investigators came, and she had thereupon confided to him the names of the culprits identified by her husband moments before his death.

But as they quite frankly admit, neither the widow nor her brother-in-law, Gelacio, ever divulged the victim's alleged "dying declaration" (spontaneous statements which are part of the *res gestae*) to the barangay councilman or any one of the three police investigators who came to said victim's home and stayed for several hours. It appears that the widow revealed her husband's statements for the first time only when she gave testimony at the trial of the persons charged with her husband's killing. Her reason for not making the revelation earlier was, in her own words, "I was confused at that time; ** there were so many persons who went to our place so I was not able to tell (banggit) those things **" Gelacio, too, appears to have kept quiet about the widow's disclosure to him (re the victim's identification of his assailants), and like his sister-in-law, made that disclosure public only when he testified at the trial of his brother's supposed killers. Conduct like this is passing strange. It is unnatural. It is incredible. It makes it extremely difficult to accord any credit to the testimony of either the widow or her brother-in-law with respect to the ante-mortem statements allegedly made by the deceased seconds before he expired from his gunshot wounds.

The ante-mortem statements being thus relegated to limbo, as it were, very little remains by way of evidence upon which to rest a verdict of conviction against the appellants. There is, to be sure, the attempt by the same Gelacio Hernandez to make an identification of the appellants by their build and general appearance. He testified that having been awakened by his dog's barking at about 11 o'clock in the evening of the day in question, he had looked out of his house and by the light of the moon had seen three (3) men walking by; that although he could not make out their faces as they passed, yet he was able to identify two of them, by their build or general physical appearance, as his former neighbors, Eduardo Hernandez and Merlito Hernandez; that he had seen the three men go toward the direction of his parents' house; that about five minutes afterward, he had heard gunfire; and soon afterwards he was told that his brothers, Buenaventura and Narciso, had been shot in their parents' house. This testimony, standing alone, cannot be deemed satisfactory proof of identification of the appellants as the killers.

What has been stated makes discussion and assessment of the appellants' alibis unnecessary. The Court will say, however, that there appears to be adequate evidentiary basis for those alibis.

WHEREFORE, the judgment of conviction rendered against the appellants by the Court a quo on March 8, 1984 is REVERSED AND SET ASIDE, and all three (3) appellants are, on reasonable doubt, ACQUITTED of the crime charged, with costs de officio.

SO ORDERED.

Cruz, Griño-Aquino, and Medialdea, JJ., concur.

[1] Resolution, July 9, 1984

[2] By Atty. Macario Espejo, Jr.

[3] Atty. Cesar D. Cabral

[4] Sec. 31, Rule 130, now Sec. 37, Rule 130 [Revised Rules of Evidence, eff. July 1, 1989]

[5] SEE *Peo. v. Nabor*, 185 SCRA 615; *Peo. v. Bocatcat, Sr.*, 188 SCRA 175; *Peo. v. Elizaga*, 167 SCRA 516; *Peo. v. Almeda*, 124 SCRA 486; *Peo. v. Balbas*, 122 SCRA 859

[6] Moran, *Comments on the Rules of Court*, 1980 ed., Vol. 5, p. 293, citing *U.S. v. Gil*, 13 Phil. 530, in turn quoting Lord Baron Eyre

[7] Moran, *op.cit.*, p. 299

[8] *Peo. v. Salahuddin*, 51 Phil. 840; *Peo. v. Ortiz*, 55 Phil. 993; *Peo. v. Guevas*, May 30, 1955; *Peo. v. Moises*, Sept. 23, 1958.

[9] *Peo. v. Babiera*, 52 Phil. 97

[10] *Peo. v. Muñoz*, April 18, 1951; *Peo. v. Tumale*, 53 O.G. 4540; *Peo. v. Ortiz*, 55 Phil. 933; *Peo. v. Logrono*, Feb. 28, 1955; *Peo. v. Macasilang*, 22 SCRA 699; *Peo. v. Antonio*, 34 SCRA 401 (1970)

[11] *Peo. v. Telan*, June 29, 1962; *Peo. v. Ancasan*; 53 Phil. 779

[12] *Peo. v. Pereja*, 47 Phil. 525; *Peo. v. Reyes*, 52 Phil. 538; *Peo. v. Sagario*, June 29, 1965; *Peo. v. Talledo*, Feb. 23, 1950

[13] *Peo. v. Abedosa*, 53 Phil. 788; *Peo. v. Serrano*, 58 Phil. 669; *Peo. v. De Gracia*, 18 SCRA 197 (1966); *Peo. v. Felipe*, Feb. 25, 1952; *Peo. v. Piamonte*; Jan. 28, 1954; *Peo. v. Muñoz*, April 18, 1951; *Peo. v. Ananias*, Mar. 28, 1955; *Peo. v. Cortez*, 6 SCRA 408; *Peo. v. Brioso*, 37 SCRA 336; *Peo. v. Obngayan*, 55 SCRA 465; *Peo. v. Macalino*, 177 SCRA 185; *Peo. v. Elefaño, Jr.*, 125 SCRA 702

[14] *Peo. v. Lara*, 54 Phil. 96; *Peo. v. Devaras*, 37 SCRA 127

[15] Now Sec. 42, Rule 130 [Revised Rules of Evidence, eff. July 1, 1989]

[16] SEE Moran, *op cit.*, pp. 346, 348, 349, citing cases

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