STEALING JUSTICE WITH AIR QUOTES*

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Upon hearing the *Ampatuan* verdict, I said to myself, "It almost got away from us." It felt like we stole the case—that's why I placed in the title "with air quotes." It could have gone another way, if not for a judge who put aside her ambitions of getting promoted for 10 years and stuck with the case despite the difficulties. In the words of the court, "[t]he Ampatuans were in full command of the waylaid convoy that proceeded to Masalay, Ampatuan."[1] Judge Solis Reyes meticulously laid out the conditions as she found them, based on testimonies, photos, and documents. There was no option and no way out—this was the road that led to nowhere.

She then goes on to describe, "[t]here were more than 50 vehicles carrying hundreds of passengers. [There was a] lead car, and then the rest of the vehicles of the followers of Ampatuan."[2] It was a long convoy, without anyone being afraid of being detected or stopped. They had full control and they had planned for this—they were not afraid to be caught—a classic image of impunity. Judge Solis Reyes relies on quotes and statements attributed to the primary accused, who said, "[w]e have to do this carefully because we might get caught. But if we do this carefully, then it would involve killing everyone and burying them."[3] Very clearly, this was not an act of impulse or passion, but rather a deliberate and meticulous plan.

From the decision, we can see how far back the first meeting was in 2008. There was a plan prior to November 23, 2009; both direct and corroborative evidence point toward this conclusion. The court had to start

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[1] People v. Ampatuan, Jr. [hereinafter "Ampatuan"], Crim. Case No. Q-09-162148072 (RTC-Branch 221, Quezon City, Dec. 19, 2019).

[2] *Ampatuan,* at 40.

[3] *Id.* at 34. There was no clear statement in the *Ampatuan* decision that these were the words used. Most of the testimony consists of the perpetrators repeatedly saying, *"[d]apat malinis ang pagkagawa kasi kung nagkataon, makulong tayo lahat."*

with this finding because it had to determine which penalties would be attributed to which persons. Looking at the court's methodology, Judge Solis Reyes started with the alleged 58th victim, Reynaldo Momay, and then proceeded in reverse to the 57th, and so on.

I. THE SIX CLASSES OF PARTICIPANTS

Judge Solis Reyes's first finding was that there was a clear act of conspiracy.[4] The act of one was therefore the act of all. Despite this finding, she came up with six classifications for the participants.[5] *First*, those with prior knowledge of the plan and fired at the victims at Sitio Masalay. *Second*, those with prior knowledge and performed other acts outside of Sitio Masalay. *Third*, those with prior knowledge but did not perform any overt act. *Fourth*, those without prior knowledge but fired at victims. *Fifth*, those without prior knowledge but performed other acts. *Sixth*, those without prior knowledge and did not perform any overt acts. Judge Solis Reyes looked at the evidence and lumped together those who belonged to each classification.

As to the first class of the accused, they are clearly guilty as principals by direct participation.[6] It is indubitable that the Ampatuans are considered principals by direct participation: their acts were deliberate and in pursuit of their plan to kill Esmael "Toto" Mangudadatu or whoever would have filed his certificate of candidacy. The accused were positively identified and seen by witnesses as having participated in the shooting of the 57 victims.[7] Judge Solis Reyes set forth all the things they did—how the victims were actually shot, who shot first based on witness accounts, what guns were used, and so on. This recounting was detailed and complete.

As to the second class, they are also principals by direct participation. Notwithstanding their absence at the *locus criminis*, their actuations had furthered the attainment of their common objective of committing the unlawful act.[8] Judge Solis Reyes traced their participation back to the initial meetings and the subsequent meetings during the planning stage. This is where she took into account the quotations attributed to Zaldy Ampatuan, Datu Ampatuan Sr., and Datu Ampatuan Jr. This is significant because they

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[4] *Id.* at 634.
[5] *Id.* at 624-42.
[6] *Id.*
[7] *Id.* at 626.
[8] *Ampatuan*, at 629.

were identified by witnesses as knowledgeable of the murder plot, and they performed overt acts relevant to the crimes.

The Judge then proceeded to discuss their defenses, particularly of those who were not present at the scene.[9] As to the defense of alibi of Zaldy Ampatuan, she went into a discussion on the standards of alibi. According to the decision, "[t]he proof shown allude to the locations of the accused but not to his actual and fixed confinement at a certain place that would have supported his alibi."[10] Judge Solis Reyes ruled that it was not enough to show that one was away—it should be clear that it was not possible for one to go back.

Absence was also used as a defense. As stated in the decision, "[w]hile it is admitted that the accused was not at the *locus criminis*, this will not *ipso facto* exonerate him from criminal liability, given that aside from said utterances, witness narrations show that Zaldy said these words. He did not just offer to give all his guns, but agreed to go to Manila to avoid being implicated."[11] It was significant that the court took into account the statements of the accused himself in quotes. This is because it did not just examine their state of mind—their *mens rea* or criminal intent—but it also established and gave perspective to their actions. Why was he not there? Clearly, he decided not to be there so he would not be implicated. The court used his words against him.

The accused gave moving utterances that elicited further responses and actions from the groups who attended the meetings. He could have prevented the other cohorts from acting in furtherance of their plot to kill. The court underscored that the initiative to undertake the murders came from Zaldy—he was the one who gave the reason for the massacre because the Mangudadatus refused to give way in their candidacy. The whole idea behind the killings was just to prevent someone from running in the election for Governor.

To be exonerated, the conspirator must have performed an overt act to detach himself from the conspiracy to commit the felony and prevent the commission thereof.[12] Admittedly, Anwar Ampatuan Sr. was not at the scene of the crime—no witness identified him.[13] However, this does not exonerate him, it appearing that in the November 16 meeting, he uttered the suggestion

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[9] *Id.* at 630.
[10] *Id.*
[11] *Id.* at 632.
[12] *Id., citing* People v. Readores, G.R. No. 206839, July 22, 2015.
[13] *Id.* at 635.

"*[P]atayin natin mga Mangudadatu pati mga sasakyan nila. Ilibing na natin yan.*"[14] This was one of the moving factors that impleaded their other cohorts in carrying out their wicked plan.

As pointed out by the prosecution, the suggestions were carried out to the letter. Absence was not considered a valid defense.[15] Being tantamount to mere denial, the defense of Anwar's absence will crumble in light of the positive and categorical identification by the witnesses that he indeed attended the meetings to discuss their plot to kill.

Moreover, Anwar's absence becomes irrelevant since in a conspiracy, the act of one is the act of all. It must be noted that in relation to some high profile accused who were acquitted but were also included in the meetings, the court used the same standard. Mere attendance in the meetings does not implicate a person, unless it is proven that the person actually performed some act that showed he had a common intent with the conspirators in the plan.[16]

As to the third class—those with prior knowledge but no overt acts—their presence in the meetings, but without having uttered any words of encouragement that served to influence and embolden the others in carrying out the plan, is wanting so as to make them liable as conspirators.[17] Based on the testimonies, the court appreciated that aside from being present, there was no other evidence to show that Sajid Islam Ampatuan and Akmad "Tato" Ampatuan actually contributed to the conspiracy, other than his being present at the meetings.

As to the fourth class—those without prior knowledge but are actual assailants—they are guilty as principals by direct participation, but no longer part of the conspiracy.[18]

As to the fifth class—those without prior knowledge but performed overt acts—they should be made liable as accessories and as public officers.[19] These were the police and some of the military who were present at the scene. Their liabilities were as accessories because they came into the plan only after

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[14] *Id.* at 36. The literal translation is "Let us kill all the Mangudadatus, including their vehicles (sic). Let us bury them." A contextual translation would be "Let us kill and bury the Mangudadatus in their vehicles."

[15] *Id.* at 636.

[16] *Id.* at 637. *See also* People v. Patano, G.R. No. 129306, Mar. 14, 2003.

[17] *Id.* at 636.

[18] *Id.* at 637.

[19] *Id.* at 639-40.

the meetings and they performed no acts that would classify them as principals.

As to the sixth class—those without prior knowledge and not at all identified by witnesses to have been present at the scene—they are totally innocent.[20] Some of the members of the groups of accused were assigned to the checkpoints and, admittedly, some cars of the convoy passed through these checkpoints. However, it is unrefuted that they were not aware who the passengers of the convoy were. Therefore, while they would have heard the burst of gunfire from the scene, their failure to respond or report should not be taken against them, "given that burst[s] of gunfire is considered a normal occurrence in their place, [and] that [the] peace and order situation [has been] a major problem since time immemorial."[21]

One might ask: Is this a matter subject of judicial notice? Does the peace and order situation not need to be proven because since "time immemorial," gunfire is heard in Mindanao?

II. QUALIFYING AND AGGRAVATING CIRCUMSTANCES

As to the qualifying circumstances of treachery, evident premeditation, and cruelty, the court found that the same were present in the killing of the 57 victims.[22]

With regard to treachery, the victims were unarmed and not in a position to defend themselves.[23] Taking into consideration the number of armed men—more than 100 men and with high-powered firearms at that—it was next to impossible for the victims to have defended themselves.

Evident premeditation is present because the prosecution was able to prove that from the time that the plot to kill was first hatched in July 2009, it was only in November 2009 that the execution was done and only after several

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[20] *Id.*

[21] *Id.* at 641.

[22] *Id.* at 645. *See, generally,* REV. PEN. CODE, art. 14(16), (13), (21).

[23] *Id.* at 645. *See* REV. PEN. CODE, art. 14(16). "There is treachery when the offender commits any of the crimes committed against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to ensure its execution, without risk to himself arising from the defense which the offended party might make."

meetings were held by Andal Ampatuan Jr. and his cohorts for purposes of discussing the mode and manner of its execution.[24]

The court was not convinced, however, that cruelty was involved in the killing. Evidence showed that the unnecessary shots or "finishing" shots were made by the offenders when the victims were already dead.[25] In any case, only one qualifying circumstance is necessary in order to characterize the act of killing as murder, and the prosecution had already proven two: treachery and evident meditation.

Six aggravating circumstances were alleged.[26] As to the allegation that the crime was committed in an uninhabited place, the court appreciated that such circumstance was present. The crime site—from the video footage, sketches, and testimonies of those who discovered the crime scene—had sparse and scattered cottages with great distances from each other.[27] Houses were few and wide apart. Surroundings were isolated. The crime scene was indeed an uninhabited place—a place where one could not expect to get help.

III. THE "58TH VICTIM"

The court went on to discuss the alleged 58th victim, photojournalist Reynaldo "Bebot" Momay. "[O]ne of the issues raised specifically pertain to the 58th information. The court deems it proper to tackle first this case—whether Reynaldo Momay was among those who died in the incident."[28] Among the findings of the court was that none of the witnesses extracted the cadaver of Momay in the mass grave site.[29] His live-in partner and relatives did not find his body in any of the funeral parlors in the surrounding cities. None of the documentary evidence included his death certificate. Neither did the denture recovered at the site prove that Momay was one of the victims

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[24] *Id.* at 645. *See* REV. PEN. CODE, art. 14(13); *see, for instance,* People v. Academia, Jr., G.R. No. 129251, Second Division (May 18, 1999): "for evident premeditation to be appreciated, there must be proof, as clear as the evidence of the crime itself, of the following elements thereof, *viz.*: 1) the time when the offender determined to commit the crime, 2) an act manifestly indicating that he has clung to his determination; and 3) sufficient lapse of time between determination and execution to allow himself to reflect upon the consequences of his act."

[25] *Id.* at 645. *See* REV. PEN. CODE, art. 14(21). "That the wrong done in the commission of the crime be deliberately augmented by causing another wrong not necessary for its commission."

[26] *Id.* at 646.

[27] *Id.* at 647. *See* REV. PEN. CODE, art. 14(6).

[28] *Id.* at 580.

[29] *Id.* at 582.

killed. The first element of murder, that a person was killed, is absent in this case. Hence, the 58th count of murder will not prosper for it lacks proof of the *corpus delicti.*

As a legal point, the court is correct, because this is a consistent ruling of the Supreme Court.[30] Thus, on the basis of pure case law, this would seem to be the correct decision. However, looking at the context, it is pretty much established that Momay was among those who were there with the convoy. It is established to this day that he has not resurfaced. Given the context, perhaps what the prosecution should have done was to prove his continuing disappearance. But again, the difficult point of law here is that we do not treat a disappeared person to have the same status as that of a person who is killed. So while we have the definition of a "disappeared" person as someone who has involuntarily disappeared,[31] we do not necessarily treat that person as someone who is killed. That is not the conclusion of law we arrive at and that is the difficulty with Momay.

There is a gap in the law here. It is unreasonable to expect that someone who has been established to be part of the convoy but was also clearly established to have totally disappeared was not likewise killed. With the location of the crime scene having been so securely cordoned off that no outside element could tamper with the evidence, no other reasonable conclusion could be had except that he was killed along with the 57 other victims. The problem, as far as the court is concerned, is that it will look only at the evidence presented. If the only evidence found is a set of dentures—even assuming it is established to be his—without physical identifiable remains,[32] the court cannot act on the basis of such evidence.

IV. TAKEAWAYS FROM THE CASE

Many people are of the opinion that 10 years is a very long time to dispose of a case. I do not agree. We must note that this is only a partial decision. Why is it partial? There are still other accused who have not been tried. Imagine the 100 accused, each having one lawyer, each of them demanding their right to due process under the Constitution because each one

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[30] *See* Allado v. Diokno [hereinafter "Allado"], 232 SCRA 192, G.R. No. 113630, May 5, 1994.

[31] Rep. Act No. 10353 (2012), § 3. The Anti-Enforced or Involuntary Disappearance Act of 2012.

[32] *See Allado,* 232 SCRA 192.

of them is entitled to it. Ten years is already relatively quick for a case involving 58 dead and over 100 accused.

A. The Tone of the Decision

The first takeaway is that the tone of the decision was excellently written. It was organized, sober, and detached. I comment on this because this is just the first part of this whole case. This will still go to the Court of Appeals and the Supreme Court. I commend Judge Solis Reyes for writing a decision that is detached and devoid of emotion for she did not give the accused any more reason, for example, to denigrate the decision. If it were written in any other way, it would be very easy to challenge it and say that she was clearly biased and not the impartial judge the accused was entitled to. I am sure it was difficult for her to go through every piece of evidence and still write as dispassionately as she had done.

B. The Totality of the Circumstances

The one thing I did not see is the use of the "Totality of Circumstances" standard,[33] which is something the Supreme Court has used in order to look at everything that has happened to cast a broader net. In this case, the circumstances, as narrated by Judge Solis Reyes, showed that the Ampatuans were in full command of the convoy: there was no other way out, and even the backhoe used to dig up the mass grave was owned by the government. Looking at the "Totality of the Circumstances" and what had happened, a wider net could have been cast and it could have affected even those who were acquitted. But again, this is up for review so I will leave that up to the Court of Appeals and Supreme Court to address.

C. The Absence of Provisional Remedies

Another takeaway is that there was an absence of provisional remedies. I do not know if the prosecution asked for it, but I would have. Rule 127 of the Rules of Criminal Procedure states that provisional remedies are available in criminal cases, including, and especially, preliminary attachment.[34] One of the first questions I was asked when this decision came out was, "When are the relatives of the victims going to get the money?" My answer was and remains to be, it is not so much when, as *where*, because the hard part is that the accused are still very rich and powerful—one of the

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[33] *See In re* Petition for Radio and Television Coverage of the Multiple Murder Cases Against Maguindanao Governor Zaldy Ampatuan, et al., A.M. No. 10-11-5-SC, June 14, 2011.

[34] RULES OF COURT, Rule 127, §§ 1-2.

acquitted accused was even elected as vice mayor—so regardless of how the appeal goes in terms of the appellate courts, there is still the civil liability awarded by the court.

Could there not have been a way to secure the money awarded even before the judgment came out? Indeed, there was, in the form of Rule 127. This is something that could have been considered. This could have been a remedy that secured the judgment on the civil liability at the very least, so that no matter how long the case takes—and note that it could take another 10 years just to appeal the decision—the families of the victims could have some security.

D. The Lawyers Who Knew

There is another aspect of this case that troubles me. Of course, there were lawyers who were victims, but there were also lawyers who knew what was going on, and the court alludes to them in the decision.[35] During the meetings where the plans were hatched, there were lawyers present in various hotels in Manila.[36] The decision did not mention anything about them other than to name some of them. There have been no proceedings against them.

E. The Need to Amend the Revised Penal Code and the Rules of Court

There is a need to amend the Revised Penal Code and the Rules of Court to include an honest-to-goodness forensic investigation system. There should be less reliance on witnesses. In this case, if not for the state witnesses who were once the accused, we would not be talking about this decision.

This is one of the systemic challenges we have. The courts rely too much on testimonial evidence, to the exclusion of all other evidence. The effect is that there is no encouragement for the courts to get better in terms of appreciating other evidence. How long has the Rule on Electronic Evidence been around? How many courts actually understand how to mark a text message? If courts rely too heavily on testimonial evidence, they will have to wait for witnesses to testify in court. The problem with that is that the longer you wait, the higher the possibility of attrition—witnesses will be bought, threatened, or killed. This has happened many times.

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[35] *Ampatuan*, at 610.

[36] *Id.* at 592.

What is a quick fix? Apply the Rules of Court—there are provisions that allow for evidence to be perpetuated.[37] Take depositions—make them admissible at the first instance. Train judges to look for depositions ahead of time. This case is extraordinary in that it is the only trial court case where the Supreme Court came out with special rules,[38] in recognition of the gravity of the case and the length of time it was taking for the judge to rule. The *Ampatuan* case gives us enough basis to rethink our attitude towards a case with multiple accused and multiple complainants. There should be a better way to dispose of testimonies.

The rule on successive service of sentences also needs to be reexamined because, in the long run, although the penalty is multiple *reclusion perpetuas*, once the three-fold rule is applied, the maximum service that can be done is merely 40 years[39]—that is effectively only one *reclusion perpetua* when there were supposed to be 57 *reclusion perpetuas*, one for each victim killed. In the end, how long will they serve? Their actual service will be merely 30 years—40 years of maximum service and 10 years less for preventive detention. There is something wrong here.

F. The Need for a Clear Investigation Protocol (for Crimes and Human Rights Violations)

We need a clear, consistent, and enlightened way of investigating. The first responders to the scene must understand what they are doing there. They are not only there to solve the crime; they are there to make sure that the perpetrators will be charged, sentenced, and punished. If all they assume is that they are there to solve the crime, then all they would look for would be names. The first responders will not be looking for evidence that would be presented five years down the line.

Currently, we have an unusual way of investigating and prosecuting evidence—there is a duplication of efforts involving two prosecutors.[40] There is a preliminary investigation with one prosecutor determining whether he or she can charge people in court, then there is another prosecutor in court who will prosecute the actual case during trial. There have been many instances when the two prosecutors do not agree. The investigating prosecutor, faced

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[37] RULES OF COURT, Rule 119, §§ 12, 13, 15.

[38] Ina Reformina, *SC issues additional rules for Maguindanao massacre trials*, ABS-CBN NEWS, Dec. 10, 2013, *at* https://news.abs-cbn.com/nation/12/10/13/sc-issues-additional-rules-maguindanao-massacre-trials

[39] REV. PEN. CODE, art. 70, ¶ 5.

[40] RULES OF COURT, Rule 112, Rule 119.

with a weak case, will not risk professional scorn by dismissing a case so he or she will just say, "Let them prove it in trial." Even if the investigating prosecutor already knows there is no proof beyond reasonable doubt, he or she will not dismiss it outright because people will ask, "Why are you dismissing cases left and right?" The investigating prosecutor will then just toss it to the court for the trial prosecutor to handle; the trial prosecutor will then ask, "Why is this case even here? There is no proof beyond reasonable doubt."

That is a problem. There is no clear investigation protocol. Prosecutors should not bring just any case—they should bring a case where there is enough evidence to convict. If there is not enough evidence to convict, investigate further, or dismiss.

G. The Use of Government Resources and the Human Rights Aspect

The court should have looked into the use of government resources in the perpetration of the crime. This was a local government, and so clearly, the use of government resources—considering the presence of public officers and the number of police officers and military men involved—show that this was state action.[41] The backhoe used was the property of the province. The use of government resources was manifest. That has implications, not just on the crime. Yes, the decision is a great start, but there is a long way to go. Maybe we can make out a case that this is state action against a set of people and this might fall under crimes against humanity, or even genocide.

H. The Effects on Impunity

While it is a good thing that we have a decision like this, this does not stop impunity. Maybe it would delay it a little, but until processes are streamlined, until things are made a bit clearer, and until we get our act together, things will continue. This decision is a great way to pause impunity, but it is a short pause. It does not stop impunity in its tracks. The only way to do so is to make sure that the systems are in place, the processes are logical and reasonable, rights are observed, judgments are stable and predictable regardless of personalities, and that sentences are actually carried out. This is

[41] *Ampatuan*, at 588-592.

the only way to make sure that people will be afraid to do this again, that there will never again be a report of a convoy that is stuck at a checkpoint and brought to the road that literally leads to nowhere.

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