EN BANC

G.R. No. 174471 – PEOPLE OF THE PHILIPPINES, Plaintiff-Appellee, **v. JERRY PEPINO y RUERAS and PRECIOSA GOMEZ y CAMPOS,** Accused-Appellants.

Promulgated:

January 12, 2016

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DISSENTING OPINION

LEONEN, *J.*:

Due to reasonable doubt, I vote for the acquittal of Preciosa Gomez y Campos (Gomez).

Premature media exposure of suspected criminals affects the integrity of the identification made by a witness. Law enforcers fail to prevent undue influence and suggestion when they present suspects to the media before the actual identification by a witness. An irregular out-of-court identification taints any subsequent identification made in court.

Two men and a woman forcibly took the victim, Edward Tan (Edward), from his workplace at Kilton Motors in Parañaque City on June 28, 1997.[1] One of Edward's kidnappers, eventually identified as Jerry Pepino y Rueras (Pepino), contacted Edward's father and Edward's wife to ask for a ₱40 million ransom.[2] After negotiations, the kidnappers agreed to the ransom of ₱700,000.00 in exchange for Edward's liberty.[3] Four (4) days after Edward's taking, the kidnappers received the money and released Edward from his detention.[4]

Five (5) months after the incident, Edward and his wife Jocelyn were invited to the National Bureau of Investigation (NBI) to identify Edward's kidnappers among the individuals in the custody of the NBI.[5] The identification procedure involved a line-up of seven (7) individuals: five men and two women.[6] Both Edward and Jocelyn identified Pepino,[7] while only Edward identified two others: Gomez and a certain Mario Galgo

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1 TSN, January 14, 1999, pp. 4–10; TSN, January 28, 1999, pp. 5–15.
2 TSN, January 14, 1999, pp. 13–14.
3 Id. at 15–20.
4 TSN, January 14, 1999, pp. 13–23; TSN, January 28, 1999, pp. 17–20.
5 RTC records, p. 24, Edward Tan's Sinumpaang Salaysay.
6 Id. at 143, 145, and 147, photographs of the line-up.
7 TSN, January 14, 1999, pp. 6–7 and 45–48; TSN, January 28, 1999, p. 22.

(Galgo).[8]

Only Pepino and Gomez were arraigned for the kidnapping of Edward.[9] After trial, the Regional Trial Court convicted both accused for the crime charged.[10]

Both Pepino and Gomez filed appeals before the Court of Appeals and this court.[11] Pepino moved to withdraw his appeal,[12] which we granted.[13] Only Gomez's appeal is pending resolution with this court.

In her Appellant's Brief[14] dated March 12, 2001 and Reply Brief dated January 24, 2005,[15] Gomez argued that her guilt could not be proven beyond reasonable doubt.[16] Since Edward's eyes were covered while he was on board the metallic green Toyota Corolla, there was no certainty that Edward recognized that the woman on the front seat was Gomez.[17] In addition, she argued that even if it were shown that Edward recognized her as the woman inside the car, her mere presence in the car did not show that she was part of the conspiracy to commit the offense.[18]

Gomez also insisted that there were irregularities when the sole eyewitness identified her as a perpetrator to the kidnapping. She noted that Edward "did not make any report to the law enforcement authorities after he [had been] kidnapped."[19] Rather, he reported it to one Teresita Ang See, a civilian.[20] There were no affidavits made on the kidnapping, descriptions of the perpetrator, or a cartographic sketch based on the narration.[21] Hence, there was no official record that the law enforcement authorities could rely upon to begin investigation on the identity of Edward's abductors.[22]

Gomez insisted that the most irregular incident was when she and other individuals were presented to the media as kidnappers on December 8,

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8 TSN, January 28, 1999, pp. 21–22. Mario Galgo executed a Sinumpaang Salaysay (RTC records, pp. 51–55) dated December 7, 1997, naming both Pepino and a certain "Fe" Gomez ("Fe" is Preciosa Gomez's alias according to other NBI documents) as perpetrators of the "Kilton Motors" kidnapping (Id. at 53 and 132). However, when subpoenaed by the Regional Trial Court, Galgo did not appear to testify (Id. at 241 and 243).

9 CA *rollo*, p. 17.

10 Id. at 16–31. The case was docketed as Crim. Case No. 97-946. The Decision dated May 15, 2000 was penned by Judge Zosimo V. Escano.

11 Id. at 49–59, Preciosa Gomez's Appellant's Brief, and 118–153, Jerry Pepino's Appellant's Brief.

12 *Rollo*, p. 147, Jerry Pepino's Urgent Motion to Withdraw Appeal.

13 Id. at 246, Supreme Court Resolution dated June 10, 2014.

14 CA *rollo*, pp. 49–59.

15 Id. at 224–234. However, the document was received by this court on January 24, 2006.

16 Id. at 54–58, Preciosa Gomez's Appellant's Brief, and 225–228, Preciosa Gomez's Reply Brief.

17 Id. at 54–55, Preciosa Gomez's Appellant's Brief.

18 Id. at 55.

19 Id. at 225, Preciosa Gomez's Reply Brief.

20 Id.

21 Id. at 225–226.

22 Id. at 226.

1997 at the Department of Justice.[23] On the following day, December 9, 1997, Edward identified her as a suspect to the kidnapping.[24] This made "the identification . . . at the NBI . . . highly suspect because at that time, the appellant had already been presented to the public and branded as kidnappers, and viewed by all and sundry before national television networks, in violation of her constitutional right to be presumed innocent[.]"[25] For Gomez, there was high probability that Edward already saw her in the media reports, thus making it easier for him to identify her as an abductor.[26]

Gomez further argued that her constitutional rights were breached. Her right to be presumed innocent was violated when she was presented to the media as a person responsible for the kidnapping.[27] Further, her right to due process was violated when she was subjected to the line-up without counsel. Since she was already presented before the media as a kidnapper and treated by the police as a suspect, it was just proper that she should have had a counsel during the line-up.[28]

For Gomez, the lack of a prior description and the prejudicial media exposure should be considered. There was reasonable probability that "these circumstances [caused] erroneous identification, and . . . resulted in [her] wrongful conviction[.]"[29]

Only Edward identified Gomez during the investigation and the trial.[30] The line-up that facilitated Gomez's identification was conducted by the NBI more than five (5) months after the kidnapping incident.[31]

On appeal, Gomez questioned the identification procedure that identified her as an accused in this kidnapping case on the ground that she was already presented to the media as a suspect a day before the police line-up.[32]

I

Witnesses, during criminal investigations, assist law enforcers in narrowing their list of suspects. In many instances, the perpetrator is not personally known to a witness but can be reasonably identified. Identifying

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23 Id.
24 Id.
25 Id.
26 Id. at 227.
27 Id. at 229.
28 Id. at 229–230.
29 Id. at 230.
30 Id. at 225.
31 Id. at 226.
32 Id. at 226–227.

perpetrators is not limited to knowing their names. Familiarity with the facial and physiological features of the perpetrator is enough.[33]

There are two modes of out-of-court identifications. One mode of out-of-court identification is the police line-up where the witness selects a "suspect from a group of persons lined up[.]"[34] Another mode of identification is the show-up. In show-ups, only one person is presented to the witness or victim for identification.[35] Show-ups are less preferred and are considered "an underhanded mode of identification for 'being pointedly suggestive, generat[ing] confidence where there was none, activat[ing] visual imagination, and, all told, subvert[ing]"[36] the reliability of the eyewitness.

Both the line-up and the show-up are referred to as corporeal identification:[37] the body of the suspect is there for identification. Out-of-court identifications are not limited to corporeal identifications. Police can use photographs or mug shots to identify the perpetrator.

Eyewitness identification is affected by "normal human fallibilities and suggestive influences."[38] Courts use the **totality of circumstances test** to ensure the reliability of any of the modes of out-of-court identification. The test was originally used in the United States[39] but was introduced in this jurisdiction in the 1995 case of *People v. Teehankee, Jr.*[40] In determining the validity of the out-of-court identification, the following factors are considered:

> (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at that time; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and, (6) the suggestiveness of the identification procedure.[41]

Teehankee, Jr. involved a high-profile murder. One of the eyewitnesses was the surviving victim who identified the accused, first,

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33 *People v. Verzosa*, 355 Phil. 890 (1998) [Per J. Kapunan, Third Division]: "Identification of a person is not established solely through knowledge of the name of a person. Familiarity with physical features particularly those of the face, is actually the best way to identify a person. One may be familiar with the face but not necessarily the name." (Id. at 904).

34 *People v. Teehankee, Jr.*, 319 Phil. 128, 180 (1995) [Per J. Puno, Second Division].

35 *People v. Escordial*, 424 Phil. 627, 653 (2002) [Per J. Mendoza, En Banc].

36 Id. at 658–659, *citing People v. Niño*, 352 Phil. 764, 771–772 (1998) [Per J. Vitug, First Division].

37 Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26–65 (1965).

38 *People v. Teehankee, Jr.*, 319 Phil. 128, 179 (1995) [Per J. Puno, Second Division].

39 *Stovall v. Denno*, 388 U.S. 293, 302 (1967) originally used the term "totality of the circumstances." This was reiterated in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) where it identified factors to be considered in the "totality of circumstances."

40 319 Phil. 128 (1995) [Per J. Puno, Second Division].

41 Id. at 180.

through mug shots while he was still at the hospital[42] and, second, through a line-up of several individuals.[43] The accused claimed that the line-up was irregular because it was conducted in a private residence and not at the NBI. He also argued that the witness already saw the pictures of the accused in media reports tying him to the crime, and that the witness' initial description of the perpetrator was never put in writing. Finally, he argued that the witness only had five minutes of exposure time to the perpetrator and was inebriated by alcohol at the time of the crime.[44]

This court ruled that the identification still passed the totality of circumstances test. First, the location of the line-up did not create an irregularity to the actual line-up. Second, during his testimony in court, the eyewitness stated that since he was hospitalized from the time of the shootings until the photographic identification, he did not see news reports regarding the shootings. Third, the NBI could not obtain the witness' testimony at an earlier time because the witness' tongue was injured then, and no rule in evidence requires the rejection of a testimony if it was not previously reduced to writing. Finally, this court ruled that the witness had ample opportunity to see the perpetrator because the area was well-lit, there was close proximity between the witness and the perpetrator, and the incident occurred for five whole minutes.[45]

The motives of the witness were also considered by this court in *Teehankee, Jr.* The absence of an ill motive for the witness to testify against an accused and the ability to be "unshaken" during vigorous cross-examination lend to the credibility of the witness.[46] This concept of the absence of an ill motive to testify was also used in *People v. Verzosa.*[47]

Several cases have since used the totality of circumstances test in determining the veracity of an out-of-court identification made by a witness. In light of the events in this case, it is proper to review each circumstance with depth.

Courts have paid close attention to *the witness' opportunity to view the criminal at the time of the crime* and *the witness' degree of attention at that time*. Courts make an assessment of a witness' credibility based on the conditions of visibility and the amount of time the witness was exposed to the perpetrators. In *People v. Pavillare*:[48]

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42 Id. at 181.
43 Id. at 151.
44 Id. at 178–179.
45 Id. at 180–182.
46 Id. at 182.
47 355 Phil. 890, 905 (1998) [Per J. Kapunan, Third Division].
48 386 Phil. 126 (2000) [Per Curiam, En Banc].

> Both witnesses had ample opportunity to observe the kidnappers and to remember their faces. The complainant had close contact with the kidnappers when he was abducted and beaten up, and later when the kidnappers haggled on the amount of the ransom money. His cousin met Pavillare face to face and actually dealt with him when he paid the ransom money. The two-hour period that the complainant was in close contact with his abductors was sufficient for him to have a recollection of their physical appearance. Complainant admitted in court that he would recognize his abductors if he s[aw] them again and upon seeing Pavillare he immediately recognized him as one of the malefactors as he remember[ed] him as the one who blocked his way, beat him up, haggled with the complainant's cousin and received the ransom money. As an indicium of candor the private complainant admitted that he d[id] not recognize the co-accused, Sotero Santos for which reason the case was dismissed against him.[49]

The majority in this case also cited *Pavillare* because it is instructive of the opportunity to adequately see and remember the facial features of a perpetrator not personally known to the victim or witness.[50] In *Pavillare,* the witness' several opportunities for interaction with the perpetrators of the crime meant that the witness would remember what the perpetrators looked like. In *Teehankee, Jr.,* the five-minute incident on a well-lit street in the evening was deemed as sufficient time for the witness to remember the face of the perpetrator.

On the other hand, in *People v. Gamer*,[51] the crime occurred at 8:30 p.m., and the prosecution's evidence was inconsistent on whether the crime scene was lit or not. Hence, this court ruled that the out-of-court identification was not reliable.[52]

Aside from exposure time, extraordinary capabilities of the witness in recalling events should also be considered. In *People v. Sanchez*,[53] this court took note of important details about the witness that indicated his capability to recall. *Sanchez* involved the theft of an armoured car, and the witness, a trained guard, was presumed to have the ability to be alert about his surroundings during an attack.[54]

The importance of the attentiveness of a witness was underscored by Associate Justice Antonio T. Carpio's Dissenting Opinion in *Lumanog, et al. v. People*.[55] The case involved an ambush.[56] The witness, a security guard,

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49 Id. at 144.
50 Ponencia, p. 9.
51 383 Phil. 557 (2000) [Per J. Quisumbing, Second Division].
52 Id. at 569–571.
53 318 Phil. 547 (1995) [Per J. Kapunan, First Division].
54 Id. at 557–558.
55 644 Phil. 296 (2010) [Per J. Villarama, Jr., En Banc].
56 Id. at 332.

was instructed by one of the perpetrators to stay low.[57] Nevertheless, the witness testified to have seen the incident and identified in court six (6) perpetrators.[58] The majority affirmed the credibility of the witness.[59] However, in Justice Carpio's Dissenting Opinion, he stated:

> We agree with the accused that the swiftness by which the crime was committed and the physical impossibility of memorizing the faces of all the perpetrators of the crime whom the witness saw for the first time and only for a brief moment under life-threatening and stressful circumstances incite disturbing doubts as to whether the witness could accurately remember the identity of the perpetrators of the crime.[60]

II

Advances in cognitive psychology and studies on eyewitness testimonies show that the degree of a witness' attentiveness in perceiving an event is influenced by various factors, including exposure time, frequency of exposure, level of violence of the event, the witness' stress levels and expectations, and the witness' activity during the crime.[61]

The level of violence of the event tends to influence the witness' stress levels. One area of continuous psychological research is the effect of the presence of a weapon on the attention of an individual to an incident. Since the 1970s, psychologists hypothesized that the presence of a weapon captures a witness' attention and reduces the witness' ability to pay attention to peripheral details (such as the facial features of the individuals brandishing the weapon).[62] The research model often involves two groups: a group that witnesses an incident where a gun is used, and another group that sees the same incident but with no weapon used (usually a pencil or syringe is used in lieu of a gun). Both groups are asked to identify the perpetrator in a line-up. Results would show that the presence of a weapon makes a statistically significant difference in the accuracy of eyewitness identification:[63]

> [T]he influence of [a weapon focus] variable on an eyewitness's performance can only be estimated post hoc. Yet the data here do offer a rather strong statement: To not consider a weapon's effect on eyewitness performance is to ignore relevant information. The weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible. Identification

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57 Id. at 351.
58 Id. at 351–352.
59 Id. at 397–402.
60 J. Carpio, Dissenting Opinion in *Lumanog, et al. v. People*, 644 Phil. 296, 451 (2010) [Per J. Villarama, Jr., En Banc].
61 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 23–51 (1996).
62 Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW AND HUMAN BEHAVIOR 413, 414 (1992).
63 Id. at 420. The author surveyed research material that used this methodology.

> accuracy and feature accuracy of eyewitnesses are likely to be affected, although, as previous research has noted . . . there is not necessarily a concordance between the two.[64]

The results of these scientific studies conducted on weapon focus have not yet permeated into some of this court's decisions. In *People v. Sartagoda*:[65]

> [T]he most natural reaction for victims of criminal violence [is] to strive to see the looks and faces of their assailants and observe the manner in which the crime was committed. Most often the face of the assailant and body movements thereof, create a lasting impression which cannot easily be erased from their memory.[66]

We should now start taking greater caution in applying *Sartagoda* and other related cases that proclaim that victims have a natural propensity to remember the faces of their assailants. The stress experienced by victims and witnesses during the commission of a crime might not always affect their perception positively. Hence, it is important for courts to evaluate the totality of circumstances in the identification process.

Aside from the opportunity and ability of the witness to perceive the crime and the identifying features of the assailant, the *accuracy of any prior description given by the witness* to investigators must be considered by courts. A witness is considered more credible when his or her initial description of the accused, either through words or through a cartographic sketch, matches the actual appearance of a suspect selected during a photograph or corporeal line-up. This court, however, has exercised leniency in testing this condition.

In *Lumanog, et al.*, this court allowed discrepancies between the description provided by the main prosecution witness in an affidavit executed immediately after the crime and the actual appearance of the suspects. This court stated that estimate of age cannot be made accurately. It was possible that the accused was exposed to sunlight due to his occupation, which was why he appeared to the witness older than his actual age. The majority also accepted the explanation of the prosecution that the reason why the other accused was fair-skinned, contrary to the initial description of the witness that he was dark-skinned, was because of the prolonged incarceration of the accused before trial.[67]

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64 Id. at 421.
65 G.R. No. 97525, April 7, 1993, 221 SCRA 251 [Per J. Campos, Jr., Second Division].
66 Id. at 257.
67 *Lumanog, et al. v. People*, 644 Phil. 296, 400–401 (2010) [Per J. Villarama, Jr., En Banc].

Another circumstance to be considered is the *level of certainty demonstrated by the witness at the identification.* The level of certainty must be demonstrated at the *initial identification* made by the witness during investigation. It is not the certainty of the witness during trial that courts should pay attention to.

Certainty of the witness is often tested during cross-examination. Thus, in many cases, this court finds a witness credible because of a straight and candid recollection of the incident that remains unhampered by the rigors of cross-examination.[68]

However, this circumstance should never be evaluated in a vacuum. A witness who is certain about seeing the crime but uncertain about the facial features of its perpetrators may sound certain about both the crime and the identity of the perpetrator during trial. This is because by the time a witness takes the witness stand, he or she has already narrated the incident to the police, the public prosecutor and, at times, private prosecutors and members of the press. *He or she becomes "certain" not because of the ability to perceive at the time of the incident, but because he or she has become an experienced storyteller of the narrative and has already confronted questions that may arise during cross-examination with rehearsed answers. The ability of the witness to consistently identify the perpetrator throughout trial does not necessarily mean that he or she correctly identified the perpetrator at the start of the investigation.*

Another circumstance that is evaluated is the *length of time between the crime and the identification.* People's memories tend to fade through time.[69] It is ideal that prosecution witnesses identify the suspect immediately after the crime. An identification made two (2) days after the criminal incident is found to be acceptable.[70] This court found that a corporeal identification made five and a half months might not be as reliable.[71]

Memory is not affected only by the mere passage of time. It is also affected by the interactions of the witness with other individuals relating to the event.[72] *Information acquired by the witness after the incident can reconstruct the way the witness recalls the event.* According to Elizabeth F. Loftus, a cognitive psychologist, "[p]ost[-]event information can not only enhance existing memories but also change a witness's memory and even

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68 *People v. Ramos*, 371 Phil. 66, 76 (1999) [Per Curiam, En Banc]; and *People v. Guevarra*, 258-A Phil. 909, 916–918 (1989) [Per J. Sarmiento, Second Division].

69 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 53 (1996): "It is by now a well-established fact that people are less accurate and complete in their eyewitness accounts after a long retention interval than after a short one."

70 *People v. Teehankee, Jr.*, 319 Phil. 128, 152 (1995) [Per J. Puno, Second Division].

71 *People v. Rodrigo*, 586 Phil. 515, 536 (2008) [Per J. Brion, Second Division].

72 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 54–55 (1996).

cause nonexistent details to become incorporated into a previously acquired memory."[73]

Hence, the last circumstance of *suggestiveness of the identification procedure* should have a great influence whether courts should admit an out-of-court identification. Both verbal and non-verbal information might provide improper suggestions to a witness:

> A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos. . . . If the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when he says, "Tell us whether you think it is number one, two, THREE, four, five, or six," the witness's opinion might be swayed.[74]

In evaluating suggestiveness of the out-of-court identification, this court considers prior or contemporaneous[75] actions of law enforcers, prosecutors, media, or even fellow witnesses.

In *People v. Baconguis*,[76] an accused to a murder was acquitted because the identification was tainted by improper suggestion.[77] The witness was made to identify the suspect inside a detention cell where only the accused was the detainee.[78] However, in *People v. Algarme, et al.*,[79] even though the identification was also made inside the detention cell rather than through a formal line-up, this court upheld the propriety and reliability of the identification since there were a number of detainees inside the cell.[80]

In *People v. Escordial*,[81] the crime involved was robbery with rape.[82] The rape victim and her companions were blindfolded during the entire ordeal.[83] However, the rape victim felt a "rough projection"[84] on the back of the perpetrator. The perpetrator also spoke to the victims, so his voice was familiar to them.[85] The narration of facts included the investigative process in bringing the perpetrator to custody. After interviewing a few

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73 Id. at 55.
74 Id. at 73–74.
75 *People v. Algarme, et al.*, 598 Phil. 423, 444 (2009) [Per J. Brion, Second Division].
76 462 Phil. 480 (2003) [Per J. Carpio Morales, En Banc].
77 Id. at 490 and 496.
78 Id. at 494.
79 598 Phil. 423 (2009) [Per J. Brion, Second Division].
80 Id. at 443.
81 424 Phil. 627 (2002) [Per J. Mendoza, En Banc].
82 Id. at 633.
83 Id. at 635.
84 Id. at 639.
85 Id.

individuals, the investigating police officer had an idea of who he was supposed to look for. He "found accused-appellant [in a] basketball court and 'invited' him to go to the police station for questioning."[86] The rape victim was already at the police station. After seeing accused-appellant enter the station premises, the rape victim requested to see the back of the accused-appellant. The accused-appellant took his shirt off. After examining the back of the accused-appellant and seeing a "rough projection" on it, the rape victim talked to the police and confirmed that the accused-appellant was the man who attacked her. The police brought in the other witnesses to identify the accused. Four of the witnesses were brought to the jail cell where the accused-appellant was detained, and the witnesses pointed consistently to accused-appellant despite his being with four other individuals in the jail cell.[87]

This court found that the show-up (with respect to the rape victim) and the line-up (with respect to the other witnesses) in *Escordial* were irregular, and the out-of-court identification could have been subject to objections for inadmissibility. However, these objections were not raised during trial.[88]

Despite the objections in the out-of-court identification not being raised during trial, the majority in *Escordial* found reasonable doubt and acquitted the accused.[89] The rape victim was blindfolded throughout her ordeal. The reliability of her identification was diminished by her own admission that she could only recognize her perpetrator through his eyes and his voice. This court reasoned that given the exposure of the rape victim to the perpetrator, it would have been difficult for her to identify the person immediately. It was the improper suggestion made by the police officer that might have aided the witness to identify the accused-appellant as the perpetrator.[90] The Decision cited a journal article to explain:

> *Social psychological influences.* Various social psychological factors also increase the danger of suggestibility in a lineup confrontation. Witnesses, like other people, are motivated by a desire to be correct and to avoid looking foolish. By arranging a lineup, the police have evidenced their belief that they have caught the criminal; witnesses, realizing this, probably will feel foolish if they cannot identify anyone and therefore may choose someone despite residual uncertainty. Moreover, the need to reduce psychological discomfort often motivates the victim of a crime to find a likely target for feelings of hostility.
>
> Finally, witnesses are highly motivated to behave like those around them. This desire to conform produces an increased need to identify someone in order to show the police that they, too, feel that the criminal is in the lineup, and makes the witnesses particularly vulnerable to any clues

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86 Id.
87 Id.
88 Id. at 652–654.
89 Id. at 665.
90 Id. at 659–662.

> conveyed by the police or other witnesses as to whom they suspect of the crime.[91] (Emphasis in the original)

In *People v. Pineda*,[92] six perpetrators committed robbery with homicide inside a passenger bus.[93] One of the passengers recalled that one of the perpetrators was called "Totie" by his fellow felons. The police already knew that a certain Totie Jacob was a member of the robbery gang of Rolando Pineda. At that time, Rolando Pineda and another companion were detained for another robbery. The police brought the photographs of Rolando Pineda and his companion to the witness, and the witness positively identified the two as involved in the robbery with homicide.[94]

This court found that the identification procedure in this case was unacceptable.[95] It introduced the two rules for out-of-court identifications with the use of photographs:

> The first rule in proper photographic identification procedure is that a series of photographs must be shown, and not merely that of the suspect. The second rule directs that when a witness is shown a group of pictures, their arrangement and display should in no way suggest which one of the pictures pertains to the suspect.[96]

Without compliance with these rules, any subsequent corporeal identification made by the witness may not be from the recollection of the criminal incident. Rather, it will simply confirm false confidence in the suggestive identification of the photograph shown to the witness.

Pineda also introduced a list of 12 danger signals that might indicate erroneous identification. The list is not exhaustive but complements the totality of circumstances rule. These danger signals are:

> (1) the witness originally stated that he could not identify anyone;
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> (2) the identifying witness knew the accused before the crime, but made no accusation against him when questioned by the police;
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> (3) a serious discrepancy exists between the identifying witness' original description and the actual description of the accused;

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91 Id. at 659, *citing* Frederic D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV 969 (1977).

92 473 Phil. 517 (2004) [Per J. Carpio, En Banc].

93 Id. at 522.

94 Id. at 526.

95 Id. at 540.

96 Id. at 540, *citing* Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 74 and 81 (1965).

(4) before identifying the accused at the trial, the witness erroneously identified some other person;

(5) other witnesses to the crime fail to identify the accused;

(6) before trial, the witness sees the accused but fails to identify him;

(7) before the commission of the crime, the witness had limited opportunity to see the accused;

(8) the witness and the person identified are of different racial groups;

(9) during his original observation of the perpetrator of the crime, the witness was unaware that a crime was involved;

(10) a considerable time elapsed between the witness' view of the criminal and his identification of the accused;

(11) several persons committed the crime; and

(12) the witness fails to make a positive trial identification.[97]

Pineda emphasized that "[t]he more important duty of the prosecution is *to prove the identity* of the perpetrator and not to establish the existence of the crime."[98] Proving the identity of the perpetrator is a difficult task because of the overreliance of our criminal procedure on testimonial evidence rather than physical evidence. Testimonial evidence is often tainted by improper suggestion. Legal scholar Patrick M. Wall observes that improper suggestion "probably accounts for more miscarriages of justice than any other single factor[.]"[99] Marshall Houts, who served the Federal Bureau of Investigation and the American judiciary, agrees with Patrick M. Wall and considers eyewitness identification as "the most unreliable form of evidence[.]"[100]

People v. Rodrigo[101] presented the same circumstance as *Pineda.* The police presented a single photograph to the eyewitness for identification of the perpetrator of a robbery with homicide. The witness tagged the man in the photo as one of the perpetrators. This court stated that despite the in-court identification made by the witness, it was influenced by the impermissible suggestion through the photographic identification that had preceded the trial. This court ruled that a suggestive identification violates

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97 Id. at 547–548, *citing* Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 90–130 (1965).

98 Id. at 548.

99 Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).

100 Marshall Houts, FROM EVIDENCE TO PROOF 10–11 (1956).

101 586 Phil. 515 (2008) [Per J. Brion, Second Division].

the right of the accused to due process because the accused becomes denied of a fair trial:[102]

> The greatest care should be taken in considering the identification of the accused especially, when this identification is made by a sole witness and the judgment in the case totally depends on the reliability of the identification. This level of care and circumspection applies with greater vigor when, as in the present case, the issue goes beyond pure credibility into constitutional dimensions arising from the due process rights of the accused.
>
> . . . .
>
> The initial photographic identification in this case carries serious constitutional law implications in terms of the possible violation of the due process rights of the accused as it may deny him his rights to a fair trial to the extent that his in-court identification proceeded from and was influenced by impermissible suggestions in the earlier photographic identification. In the context of this case, the investigators might not have been fair to Rodrigo if they themselves, purposely or unwittingly, fixed in the mind of Rosita, or at least actively prepared her mind to, the thought that Rodrigo was one of the robbers. Effectively, this act is no different from coercing a witness in identifying an accused, varying only with respect to the means used. Either way, the police investigators are the real actors in the identification of the accused; evidence of identification is effectively created when none really exists.[103]

This court was unanimous in both *Pineda* (En Banc) and *Rodrigo* (Second Division). However, it was divided in the highly publicized case of *Lumanog, et al.*[104] *Lumanog, et al.* involved the ambush of the former Chief of the Metropolitan Command Intelligence and Security Group of the Philippine Constabulary, Colonel Rolando N. Abadilla.[105] During investigation, a security guard became the principal prosecution witness.[106] The police showed a man's photograph to the guard and asked him if the man was among the several men who conducted the ambush. The guard refused to identify the perpetrator without seeing him in person.[107] A police line-up was conducted, and the guard identified two of the perpetrators.[108]

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102 Id. at 529.

103 Id. at 528–530.

104 The Decision was penned by Associate Justice Martin S. Villarama, Jr. and concurred in by Chief Justice Renato C. Corona and Associate Justices Presbitero J. Velasco, Jr., Teresita J. Leonardo-de Castro, Arturo D. Brion, Diosdado M. Peralta, Lucas P. Bersamin, Mariano C. Del Castillo, and Jose Perez. Associate Justice Lucas P. Bersamin rendered a Concurring Opinion. Associate Justice Jose C. Mendoza was the Presiding Judge in the Regional Trial Court during the trial of the case, although he was not the judge that rendered the conviction. He and Associate Justice Antonio Eduardo B. Nachura, who signed a pleading as former Solicitor General, inhibited from the case. Associate Justices Antonio T. Carpio, Conchita Carpio Morales, Ma. Lourdes P. A. Sereno (now Chief Justice), and Roberto A. Abad dissented from the majority, with Associate Justices Antonio T. Carpio and Roberto A. Abad rendering their respective Dissenting Opinions.

105 *Lumanog, et al. v. People*, 644 Phil. 296, 331–332 (2010) [Per J. Villarama, Jr., En Banc].

106 Id. at 350.

107 Id. at 353.

108 Id. at 339.

One of the accused claimed that the line-up was only composed of the accused and police officers who were in their uniforms, making the line-up grossly suggestive to the accused.[109]

This court, with a majority of nine, voted to affirm the conviction of the accused in *Lumanog, et al.* It ruled that the positive identification made by the guard passed the totality of circumstances test. The irregularities in the line-up were corrected by the independent in-court identification.[110]

In his Dissenting Opinion, Justice Carpio emphasized that the identification of the accused was tainted with impermissible suggestion since the guard-witness had been shown a single photograph of the accused before he pinpointed the same man on the photograph as one of the perpetrators.[111] According to Justice Carpio, "the police primed and conditioned"[112] the witness in identifying the accused, which was a violation of the right of the accused to due process.[113]

Justice Carpio's Dissenting Opinion also discussed the effect of media exposure on conditioning the memory of the witness.[114] In *Lumanog, et al.* all of the perpetrators were presented to the media 11 days after the crime. The news made headlines because the police proudly reported that the case had been closed.[115] According to Justice Carpio:

> [T]he police arrested the accused, and allowed the media to take their pictures with their names written on boards around their necks. The media promptly published these pictures in several newspapers. Thus, at that time, the faces of the accused were regularly splashed all over the newspapers and on television screens in news reports. **Alejo could not have missed seeing the faces of the accused before he identified them in court. To rule otherwise strains credulity.**
>
> Alejo, as the star witness in this case, must naturally be interested to look, or even stare, at the faces of the alleged killers to make sure he identifies them in court. Assuming Alejo failed to personally see the faces of the accused in the newspapers or television, which is highly improbable, if not totally impossible, his family and friends, if not the police, would have provided him with photographs of the accused from the newspapers for easier identification later in court. Surely, Alejo had ample time to memorize and familiarize himself with the faces of the accused

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109 Id. at 398.
110 Id. at 398–399.
111 J. Carpio, Dissenting Opinion in *Lumanog, et al. v. People*, 644 Phil. 296, 440 (2010) [Per J. Villarama, Jr., En Banc].
112 Id.
113 Id. at 443–444.
114 Id. at 454–456.
115 Id. at 454–455.

> before he testified in court and identified Lumanog, Santos, Rameses, Joel, and Fortuna as the killers of Abadilla.
>
> . . . .
>
> . . . The media exposure of the accused casts serious doubts on the integrity of Alejo's testimony on the identification of the murderers. Such doubts are sufficient to rule that Alejo's in-court identification of the accused as the perpetrators of the crime is neither positive nor credible. "It is not merely any identification which would suffice for conviction of the accused. It must be positive identification made by a credible witness, in order to attain the level of acceptability and credibility to sustain moral certainty concerning the person of the offender."[116] (Emphasis in the original)

Generally, suggestiveness in the identification procedure should always be proven by evidence. If an allegation of suggestiveness is not proven, this court often affirms the conviction.[117] In *Pavillare*, this court ruled that the appellant who argued the impropriety of the police line-up should have presented during trial the police officers who conducted the line-up.[118]

However, when the suggestiveness is principally due to a premature media presentation of the accused coupled with the accusation by law enforcers, it is reasonable to assume that the subsequent identification is already tainted.

III

Adopting the totality of circumstances test and the arguments presented by Gomez and the Solicitor General, the prosecution witness, Edward, could not have positively identified Gomez beyond reasonable doubt.

Indeed, the danger signs discussed in *Pineda* are present in the out-of-court identification. First, the other witness in this case, Jocelyn, failed to identify Gomez. Second, Edward is Chinese-Filipino, a different race from Gomez, who is Malay-Filipino.[119] Cross-racial identification is often a problem due to the general observation in psychology that "people are better at recognizing faces of persons of their own race than a different race."[120] Third, a considerable amount of time, five months, had elapsed before

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[116] Id. at 455–456, *citing People v. Gamer*, 383 Phil. 557, 570 (2000) [Per J. Quisumbing, Second Division].

[117] *People v. Tolentino*, 467 Phil. 937, 955 (2004) [Per J. Quisumbing, En Banc]; *People v. Pavillare*, 386 Phil. 126, 145 (2000) [Per Curiam, En Banc].

[118] *People v. Pavillare*, 386 Phil. 126, 145 (2000) [Per Curiam, En Banc].

[119] RTC records, p. 170.

[120] Elizabeth F. Loftus, EYEWITNESS TESTIMONY 136–137 (1996).

identification was made. Fourth, several persons committed the crime, making it more difficult to remember faces.

As pointed out in the Decision, Edward might have had ample opportunity to observe the features of Gomez.[121] In his narration, he encountered Gomez three (3) times during the ordeal: first, when he was visited by the three perpetrators at Kilton Motors Corporation; second, when they boarded the vehicle that was driven away from Kilton Motors Corporation; and lastly, when he was released from captivity.

Edward first encountered the female kidnapper as a "customer" of his business selling trucks. As Edward narrated during his testimony:

> [ATTY. CHUA:]
> Q: Can you tell this Court how the kidnapping was initiated?
>
> [EDWARD TAN:]
> A: At around 1:00 o'clock in the afternoon, there were three persons who entered the office of Kilton Motors and pretended to be customers.
>
> Q: What was the gender of these three people that you are referring to?
>
> A: Two men and a woman.
>
> Q: After they pretended to be customers, tell us what happened?
>
> A: They told me they were going to pay but instead of pulling out money, they pulled out a gun.
>
> Q: How many people pulled out guns as you said?
>
> A: Only one, sir.
>
> Q: Will you look around this courtroom now and tell us if the person who pulled out a gun is in court?
>
> A: (WITNESS POINTED TO A PERSON AT THE RIGHT SECTION, SECOND ROW, WHO WHEN ASKED HIS NAME ANSWERED AS JERRY PEPINO)
>
> ATTY. CHUA:
> Now, you said that there were two men and a woman who went up the Kilton Motors office and you pointed to one of the men as Jerry Pepino, can you look around this courtroom and tell us if any of the two others are in court?

[121] Ponencia, p. 10.

A: (WITNESS POINTED TO A WOMAN INSIDE THE COURTROOM WHO WHEN ASKED HIS [sic] NAME ANSWERED AS PRECIOSA GOMEZ)

Q: What about the third person, is he in court?

A: He is not in court, sir.

Q: You said that Mr. Pepino pulled out his gun, what happened after he pulled out his gun?

A: He told me just to be quiet and go with him.[122]

Edward's first encounter with Gomez as an ordinary customer was in the presence of a weapon. *The presence of a gun throughout the ordeal at Kilton Motors makes it doubtful that Edward remembered peripheral details about the female kidnapper due to the weapon-focus effect.*

In the second encounter, Edward's sight was impaired. After he had boarded the vehicle, his eyes were covered with surgical tape and sunglasses:

[ATTY. CHUA:]
Q: After they boarded you in the car, how long did the car travel?

[EDWARD TAN:]
A: About two and a half hours.

Q: When they boarded you inside that car, what did they do to you, Mr. Witness?

A: They put surgical tape on my eyes and also sunglass.

Q: Do you remember how many people were in that car including yourself?

A: Around five, sir.

Q: Can you tell us who was in the driver's seat of that car?

A: I don't know the driver.

Q: What was the sex?

A: A male, sir.

Q: Who was at the passenger front seat of the car?

[122] TSN, January 28, 1999, pp. 6–9.

A: It was Preciosa Gomez.

Q: Where were you seated?

A: I was at the middle of the backseat.

. . . .

Q: But you said that you have surgical tape and sunglass in your eyes, how did you know that you were already in Quezon City?

A: It was just a taper sir, and so, when you close your eyes, you would be able to see.

Q: After you arrived in that particular house which you presumed to be in Quezon City, what happened?

A: We alighted the car, I was brought into a room, my handcuff was removed, as well as the surgical tape and the sunglass and a chain was put on my feet.

Q: What about your blindfold?

A: It was also removed.[123]

Edward declared during trial that despite the eye cover, he was still able to see when he squinted his eyes.[124] He was even able to identify the area surrounding the safehouse.[125]

Edward's third encounter with the female kidnapper was also under similar circumstances:

[ATTY. CHUA:]
Q: You said that you were released sometime on July 1, 1997 at around 6:00 P.M., Mr. Witness, can you describe to us how you were released by the kidnappers?

[EDWARD TAN:]
A: I was boarded on our car, a surgical tape and sunglass was placed on my eyes and we drove around for about thirty minutes.

Q: After thirty minutes, what happened?

A: We stopped and I was told to remove my blindfold after five minutes and drove my car in going home.

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[123] Id. at 11–15.
[124] Id. at 14.
[125] Id.

Q: What did you do after they instructed you to remove your blindfold after five minutes?

A: When I removed my blindfold, they were no longer there and so I drove home.

. . . .

Q: On the way from the house where they kept you to UP Diliman, do you remember how many people were with you inside the car?

A: We were also five.

Q: Do you remember how many men and how many women were in that car?

A: One female and three males.

Q: And who was that female that you were referring to?

A: Preciosa Gomez.

Q: How about the three men?

A: I don't know them.[126]

When Edward was released from his captivity, he narrated that he saw the kidnappers in the car. Whether this was before or after his eyes were covered was not clear.

When Edward and Jocelyn were at the NBI office to identify the kidnappers, there were only two female suspects in the line-up.[127] The line-up, therefore, had all the suggestive features of a show-up.

Gomez argues that the identification procedure was tainted because she had been exposed to the media immediately before the day Edward identified her as his kidnapper.[128]

Defense witness Reynaldo Pepino testified during cross-examination that after their arrest, they were presented to the media as "kidnappers":

ATTY. CORONEL:

Q. Do you remember approximately what time were you brought to the DOJ?

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[126] Id. at 19–21.
[127] RTC records, pp. 143, 145, and 147, photographs of the line-up.
[128] CA *rollo*, p. 226, Preciosa Gomez's Reply Brief.

A. Morning ma'am.

Q. Of December 8?

A. Yes ma'am.

Q. And who were with you when you were brought to the DOJ?

A. With Preciosa ma'am.

Q. With Preciosa only?

A. There were others ma'am but I can not remember them.

Q. How about your brother, was he brought with you to the DOJ?

A. No he was not with us at that time ma'am. He was with the NBI at that time.

Q. So at that time you were allegedly presented to the media as kidnappers, it was only you and Preciosa whom you knew?

A. No. I said only two (2) of us from Camp Crame and my brother came from the NBI. *And all of us were presented to the media, at the DOJ.*

Q. So at that time that you were presented at the DOJ, your brother Jerry was already with you?

A. Yes ma'am. They were already there ahead of us.[129] (Emphasis supplied)

The prosecution did not present countervailing evidence to show that this prejudicial exposure to the media did not take place. Hence, there was a presumption that media reported the appearances of these arrested "kidnappers" and were immediately featured in the news across varying media platforms. At that time, high media attention was given to the crackdown of kidnapping, which was a prevalent social ill.[130]

The appearance of the alleged kidnappers could have influenced their memories on the kidnapping incident. On the day of the identification, December 9, 1997, Tuesday, kidnap-for-ransom-related news were featured

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[129] TSN, September 15, 1999, pp. 39–42.

[130] Edward's kidnapping was included in the following newspaper articles: Romie A. Evangelista, *Ong kidnapping suspect arrested*, MANILA STANDARD, December 8, 1997, at 1, 4; Romie A. Evangelista, *PNP officers doubt kidnappers' arrests*, MANILA STANDARD, December 9, 1997, at 1, 4; and Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested*, PHILIPPINE DAILY INQUIRER, December 9, 1997, pp. 1, 18. Pepino and Gomez were mentioned in those articles; however, there were no photographs published.

in the headlines for the broadsheets.[131] In the Philippine Daily Inquirer, the article included a photograph with the caption: "SUBDUED kidnap-for-ransom gang member Diosdado Avila and other members of his gang at the Department of Justice Monday."[132] The photograph did not feature all of the kidnapping suspects arrested at that time. However, other visual reports, such as a television broadcast, might have featured all of those who were arrested for kidnapping, including Pepino and Gomez.

Unlike in *Teehankee, Jr.* where the witness categorically testified not seeing media reports before the out-of-court identification, Edward did not make a similar testimony.

The probability that Edward saw the news reports before the line-up identification exists. The prejudicial media exposure is enough to create reasonable doubt on the identification of Gomez. The image of Gomez being labelled as a kidnapping suspect by the press makes an impression on its viewers. The influence or suggestiveness of this impression is subtle and unconscious.[133] It is the same kind of influence that the photographs in *Pineda* and *Rodrigo* made to the mind of the witnesses, which tainted with infirmity the subsequent police line-up. The witnesses in these cases were conditioned to associate the faces on the photographs to the crime.

Teehankee, Jr. introduced the totality of circumstances test as the standard for evaluating out-of-court testimonies because this court recognized that "corruption of *out-of-court* identification contaminates the integrity of *in-court* identification[.]"[134] In *Gamer,* the witness' identification failed on the first level since the conditions at that time did not grant the witness ample opportunity to observe and remember the appearance of the accused. Hence, this court stated that "the in-court identification of the appellant . . . could have been tainted by the out-of-court (police line-up) procedure[.]"[135]

However, this court have also held that irregularities in out-of-court identifications are cured through in-court identifications.[136] In *People v.*

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131 Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested*, PHILIPPINE DAILY INQUIRER, December 9, 1997, pp. 1, 18; Romie A. Evangelista, *PNP officers doubt kidnappers' arrests,* Manila Standard, December 9, 1997, pp. 1, 4.

132 Raymond Burgos and Cynthia D. Balana, *Mastermind in Ong kidnapping arrested*, PHILIPPINE DAILY INQUIRER, December 9, 1997, p. 18. The article discussed the kidnapping of Ignacio Earl Ong, Jr. but also reported that authorities arrested 28 suspects belonging to different major kidnapping syndicates, which included the "Pepino group." Diosdado Avila, Jr. and his gang, as featured on the photograph, belonged to the "Blue Tiger group."

133 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 142 (1996): "[U]nconscious transference [is] the term used to refer to the phenomenon in which a person seen in one situation is confused with or recalled as a person seen in a second situation."

134 *People v. Teehankee, Jr.*, 319 Phil. 128, 180 (1995) [Per J. Puno, Second Division].

135 *People v. Gamer*, 383 Phil. 557, 569 (2000) [Per J. Quisumbing, Second Division].

136 *People v. Macam*, G.R. Nos. 91011–12, November 24, 1994, 238 SCRA 306, 314–315 [Per J. Quiason, First Division]; *People v. Pacistol*, 348 Phil. 559, 578 (1998) [Per J. Vitug, First Division]; *People v. Lapura*, 325 Phil. 346, 358 (1996) [Per J. Vitug, First Division].

Macam,[137] despite finding the illegality of the line-up, this court stated that since the appellants did not object during trial, the prosecution did not need to show that the in-court identification was made independently from the invalid line-up.[138]

It is more rational to maintain the presumption that a tainted out-of-court identification corrupts the in-court identification. The in-court identification of a witness—unless he or she has two separate brains—is certainly influenced by a preceding out-of-court identification, unless the prosecution can show that there has been an independent in-court identification.[139]

Convictions can be sustained even when there is illegal identification as long as there are other evidence tying the crime to the accused. In *People v. Ibañez*,[140] the witness who identified the accused in the line-up died during the trial.[141] Only the NBI agent testified without providing details regarding the line-up. Hence, this court found that the out-of-court identification was unreliable.[142] Despite this pronouncement, the conviction was affirmed due to the presence of circumstantial evidence.[143]

No other evidence on the record can prove the guilt of Gomez. This court notes that during investigation, Edward identified Pepino, Gomez, and Galgo. The original Information[144] included Pepino and Gomez, but not Galgo. A perusal of the records shows that Galgo executed a Sinumpaang Salaysay[145] dated December 7, 1997, naming Pepino, Gomez, and others as perpetrators of the "Kilton Motors" kidnapping. However, when subpoenaed by the court, Galgo did not appear to testify.[146] His Sinumpaang Salaysay cannot be considered by this court for being hearsay.[147] Hence, this court is left to rely on the identification made by Edward.

IV

Law enforcement agents must conduct their investigation properly to avoid instances when the line-up bears doubtful validity due to the presence

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137 G.R. Nos. 91011–12, November 24, 1994, 238 SCRA 306 [Per J. Quiason, First Division].

138 Id. at 315.

139 In *People v. Lapura*, 325 Phil. 346, 358 (1996) [Per J. Vitug, First Division], this court stated that "the inadmissibility of a police line-up identification of an uncounseled accused should not necessarily foreclose the admissibility of an independent in-court identification."

140 G.R. No. 191752, June 10, 2013, 698 SCRA 161 [Per J. Brion, Second Division].

141 Id. at 168.

142 Id. at 171–172.

143 Id. at 175–180.

144 RTC records, p. 1.

145 Id. at 51–55.

146 Id. at 241 and 243.

147 Bert Ignacio, *Victim tags his kidnappers from gallery*, MANILA STANDARD, December 13, 1997, at 1: A news article reported that Mario Galgo "squealed" on his companions. However, the news article did not provide enough information for this court to be able to take judicial notice.

of suggestive influences. For a line-up to be truly fair, it should be composed of individuals—including the suspect—who fit the description of the perpetrator as provided by a witness. If there is a high probability that a random individual merely relies on the prior description of the eyewitness to select a suspect from a line-up, this line-up is not fair.[148] A line-up is only balanced if, in a line-up of six individuals, the probability that the random individual identifies the suspect is not more than 1/6.[149]

To supplement the totality of circumstances test, courts must evaluate whether there are undue suggestions made during out-of-court-identification. The following rules should be considered by the courts:

First, courts must determine whether the police officers or NBI agents prevent members of the press from photographing or videotaping suspects before witness identification. Undue influence may be present if there is evidence that the witnesses were able to view the visual press coverage prior to identification.[150]

Second, courts must check if the line-up is composed of a sufficient number of individuals. As much as possible, it must be composed of *at least* five to six individuals.[151]

Third, if photographs are available, courts can also evaluate if the individuals in the line-up meet the minimum descriptions of appearance provided by the witness at the start of the investigation. If the police finds a suspect through investigating methods other than by the description given by the witness, members of the line-up should be of the same race or color,[152] age range, gender expression, build, and appearance[153] of the suspect.[154] No height markers should be placed.[155]

If there is more than one suspect, they should be subjected to separate line-ups composed of different individuals in order to reduce suggestiveness. If the police officers can conduct only one line-up, members of the line-up must have decoys of the same race or color, age range, gender expression, build, and appearance of the different suspects.

The general rule is that it should not be easy for the witness to single out a suspect.

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148 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 145–146 (1996).
149 Id. at 146.
150 *People v. Teehankee, Jr.*, 319 Phil. 128, 181 (1995) [Per J. Puno, Second Division].
151 Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 52–53 (1965).
152 Elizabeth F. Loftus, EYEWITNESS TESTIMONY 136–142 (1996).
153 Id. at 144.
154 Marshall Houts, FROM EVIDENCE TO PROOF 25 (1956); Patrick M Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 53 (1965).
155 *See* Marshall Houts, FROM EVIDENCE TO PROOF 25 (1956).

Fourth, if it is difficult to find individuals with the same build and appearance of the suspects, courts should still accept out-of-court corporeal identification as long as the outward appearance of the members of the line-up does not suggest who the suspects are. Hence, if police officers are needed to supplement the line-up composition, they must wear civilian clothes.[156] The suspected individual should not be handcuffed[157] or be in a detainee's uniform unless identification is made inside a jail cell occupied by other detainees.[158]

Fifth, courts must check if the police officers or NBI agents have communicated any information that may suggest that one of the individuals in the line-up is a suspect.[159]

Sixth, courts should be aware of how several witnesses identify the accused. Ideally, if there is more than one witness, witnesses should identify the perpetrator from the line-up one at a time. A witness should not be privy to the other witness' identification; otherwise, this may taint his or her perception.[160]

These rules will help courts determine if there has been suggestiveness in the out-of-court corporeal identifications. This court recognizes that not all out-of-court corporeal identifications are made through line-ups. While the witness is being interviewed and another individual is brought to the police station, the witness may immediately recognize the other individual as the perpetrator. There are no undue suggestions in this example because an individual being brought to the station can either be a suspect or witness, and no external influence prompts the witness to point at the individual as the perpetrator.

Prevalence of kidnapping instills fear among citizens, a type of fear that makes citizens curtail their own personal liberties to provide for their own security. However, the habit of presenting the accused to the media immediately after arrest poses an equal threat to the personal liberty—which

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156 We should avoid the prejudice created in *Lumanog, et al. v. People*, 644 Phil. 296, 398 (2010) [Per J. Villarama, Jr., En Banc], since the other members of the line-up were police officers who were still wearing their uniform.

157 *People v. Macam*, G.R. Nos. 91011–12, November 24, 1994, 238 SCRA 306, 315 [Per J. Quiason, First Division].

158 In *People v. Sanchez*, 318 Phil. 547, 559 (1995) [Per J. Kapunan, First Division], *citing People v. Padua*, G.R. No. 100916, October 29, 1992, 215 SCRA 266, 275 [Per J. Gutierrez, Jr., Third Division], this court stated that "[t]here is no law requiring a police line-up as essential to a proper identification. Identification can be made in a room in a police station even if it were not in a police line-up as long as the required proprieties are observed[.]" *See also People v. Macapanas*, 634 Phil. 125, 143 (2010) [Per J. Villarama, Jr., First Division] and *People v. Escote, Jr.*, 448 Phil. 749, 782–783 (2003) [Per J. Callejo, Sr., En Banc].

159 Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 47 (1965), *citing* Cecil Hewitt Rolph, PERSONAL IDENTITY 33 (1957).

160 Patrick M. Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 49–51 (1965).

is protected by our Constitution—of an individual who may be accused of committing a crime that he or she did not do. Police officers should improve their standards and protocols in order to improve the proper prosecution of those accused of committing deplorable crimes like kidnapping, as well as to balance the interests of victims and of the accused.

Gomez is entitled to an acquittal. On the other hand, Pepino's withdrawal of his appeal makes it unnecessary for this court to rule on his guilt. In any case, Pepino's involvement in the commission of the crime was established and he was identified by another witness.

ACCORDINGLY, I vote to **ACQUIT** Preciosa Gomez y Campos.

MARVIC M.V.F. LEONEN
Associate Justice