

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
DOMINADOR GAVARRA Y GARRA, DEFENDANT-APPELLANT.***G.R. No. L-37673. October 30, 1987*

Ponente: YAP, J.

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On October 4, 1972, the Assistant Provincial Fiscal of Sorsogon filed an information in the Court of First Instance of Sorsogon, charging the accused Dominador Gavarra with the crime of Rape with Murder, alleged to have been committed as follows: That on or about August 19, 1972, in the municipality of Matnog, Sorsogon, the said accused, by means of violence and intimidation, had sexual intercourse with one Celerina Lepiten Leyco, an eight year old girl, by forcibly dragging her to an uninhabited place, and after having sexual intercourse with her against her will, the said accused, with treachery and evident premeditation, hacked her with a bolo, inflicting upon her injuries which caused her instant death.

Upon arraignment on November 15, 1972, Gavarra entered a plea of not guilty. After trial, the court rendered judgment, dated September 24, 1973, finding him guilty of the complex crime of attempted rape with homicide and sentencing him to "the supreme penalty of death; to indemnify the heirs of the deceased Celerina Lepiten Leyco in the amount of Twelve Thousand (P12,000.00) Pesos; and to pay the costs."

This case is before us on automatic review in view of the death penalty imposed by the court.

From an examination of the record, it appears that in the afternoon of August 19, 1972, at about 2:00 o'clock in the afternoon, Celerina Leyco, nicknamed "Baby," an eight year old, Grade 1 pupil, was sent by her elder sister Elizabeth Leyco Gabelo to fetch water from a well near the house of one David Garcia about 100 meters away. To get to the well, she had to take a foot path crossing and Lamawan river, whose bed at that time was dry.

On that same afternoon, Fe Garcia, wife of David Garcia, while answering the call of nature near her house, saw Celerina pass by on her way to the well carrying an empty pail. About five minutes later, while looking around, she saw the accused, Dominador Gavarra, up a coconut tree some 35 to 40 meters from the path taken by the victim. Thereafter, Fe sat on the stairs of her house and she again saw Celerina on her way home, carrying the pail filled with water.

Meanwhile, after about an hour of waiting for Celerina, Elizabeth Gabelo got worried and wondered why she had not yet returned. She called out for her sister to come home, but no response from her was heard. Elizabeth then proceeded to the house of David Garcia and inquired from Fe if she had seen Celerina. Fe informed Elizabeth that she saw Celerina already on her way home but that she lost sight of her when she reached the river because of the bushes.

Elizabeth called for her husband Eleno Gabelo who was then gathering coconuts with David Garcia, the husband of Fe. After informing them that Celerina could not be found, the three of them started searching for Celerina along the path taken by the latter. While searching thus, they came upon the appellant sitting on a stone inside a

clearing cultivated by him. Eleno inquired from the appellant whether he saw Celerina. Appellant answered in the negative. Upon being asked to join the search appellant refused, saying that he had work to do. They continued their search until late in the afternoon, but without success.

The matter was eventually reported to the authorities, and the search resumed the following morning. This time it was with the help of Barrio Captain Jose Bitonio of Paghuliran, Rudy Gillego, Nilo Castillo and Salvador Gacis. Upon the suggestion of Bitonio, the group combed the thick growth in the nearby land of Atty. Joaquin Pagdagdagan in Sitio Lamawan. And it was there at about 1:00 o'clock in the afternoon of August 20, 1972 that Bitonio discovered the lifeless body of a little girl, whom Elizabeth Gabelo and her husband Eleno identified as that of Celerina Leyco. The spot where the body was found was only about five arms length from the stone where Dominador Gavarra was seen sitting when approached by Eleno Gabelo the previous afternoon. Bitonio decided not to have the body moved until after the arrival of the police whom he sent Eleno Gabelo to fetch. In the meantime, Bitonio called Dominador Gavarra upon the strength of the information given by Eleno that the accused was seen in that vicinity the day before at the time Celerina was reported missing. Bitonio confronted Dominador at David Garcia's house and asked him about his" reported presence in the vicinity the day before. The accused admitted having gathered coconuts in the property of Atty. Pagdagdagan about ten meters away from the spot where the body was found. The barrio captain then advised the accused to be very careful in his statements before the police authorities because he might be implicated in the incident.

Upon the arrival of the policeman, the body of Celerina was placed in a mat and transported to the municipal building of Matnog, where the municipal health officer, Dr. Adolfo J. Camposano conducted an autopsy of the body and made the following report of his findings:

FINDINGS: All wounds with maggots present.

At the forehead: 4 cm. incised wound — gaping with slightly swollen surroundings, horizontal and 2 cm. from the hairline. Large and extensive incised wound, the medial end of which is an inch below the lateral cantus of the left eye passing the upper root of the left ear, mastoid process, down towards the middle or the nape, slicing portions of the skull.

Large and extensive incised wound starting from the left jaw, passing the root of the left ear and across the lower neck downward to the right of the neck below the lateral end of the right jaw cutting all structures therein including portions of the Throat-Neck almost severed.

Large incised wound — left shoulder cutting the shoulder bone joints up to the left cantus of the scapula and very deep.

Incised wound left wrist — 3 cm. — horizontal.

GENITALS: Labia mgora (sic) — Firm elastic, well contoured — slightly congested, lying in close opposition with each other covering the labia minora.

Vaginal canal — Resistance to insertion of right finger. V-shaped sharpness of fourchette present.

CAUSE OF DEATH: Blood loss, severe secondary to multiple, deep incised wounds.

Later that night of August 20th, the day the body of Celerina was recovered, the vice-mayor Guillermo So and two policemen went to the house of Gavarra and arrested him and brought him to the municipal building, where he was detained and investigated. Gavarra's father and uncle were also brought to the municipal building but were later released.

In the afternoon of the following day, August 21, 1972, Gavarra was brought to the office of the municipal judge,

Mayorico Gallenosa, at the second floor of the municipal building, before whom he signed an extrajudicial confession taken before T/Sgt. Nestor Bontigao, the non-commissioned officer-in-charge (NCOIC) of the Matnog Police Department. In his written statement, appellant admitted that on August 19, 1972, at about 2:00 o'clock in the afternoon, he was climbing coconut trees near the river in Lamawan, Matnog, Sorsogon which was also near the house of David and Fe Garcia; that he saw "Baby" carrying a plastic pail which was like blue in color; that he approached her and took her to the thicket near the river which was also near the coconut tree that he just climbed; that he abused her but his "penis could not penetrate the vagina"; that after that, he hacked her until she stopped breathing; that he remembered that he hacked her two times on the head and on the neck; that he had a companion by the name of Roger Gavarra who was climbing the coconut trees further up the slope from those which he climbed; that he used a bolo in hacking the victim; that he knew beforehand that the girl always fetched water from the well near the house of David Garcia as he could see her below from his clearing.

On August 23, 1972, the municipal judge issued a warrant of arrest against Dominador Gavarra, with no bail recommended for his provisional liberty. On August 24, 1972, the municipal judge, without conducting the second stage of the preliminary investigation, transmitted the records of the case, together with the person of Gavarra, to the clerk of court of the Court of First Instance of Sorsogon at Gubat, Sorsogon. But the absence of a preliminary investigation was not raised by the accused in this case and therefore deemed waived by him.

It is obvious from a careful examination of the records that the testimonial evidence presented by the prosecution is wholly circumstantial in character, which tended merely to establish the presence of the accused in the vicinity of the crime at around the time it took place. Because of this, he became a prime suspect and was arrested by the police and brought to the municipal building for investigation. The prosecution could not present any evidence directly linking him to the commission of the offense, except his extrajudicial confession. Without such confession, his conviction cannot be sustained.

At the trial, the accused repudiated his extrajudicial confession alleging that he was forced to sign it. Courts are slow to accept extrajudicial confessions when they are subsequently disputed, unless they are corroborated by other evidence. The question of the admissibility of extrajudicial confession is necessarily addressed, in the first instance, to the judge, and since such discretion must be controlled by all the attendant circumstance, the courts have wisely forborne to mark with absolute precision any rule limiting the admission or exclusion of such confession.

Their admissibility must depend in each case upon the facts and circumstances surrounding the same. In all cases, however, before such confessions are admissible, it must be shown that they were made freely and voluntarily, without compulsion or inducement or hope of reward of any sort.[1]

The extrajudicial confession in this case was made before the 1973 Constitution took effect, hence, the presence of counsel or its waiver was not required to make the confession admissible.

The trial court in this case took pains to satisfy itself that the extrajudicial confession of the accused was executed by him voluntarily. The court did not give credence to the testimony of the accused that his hand was forcibly guided by the police when he was made to sign the confession in front of the municipal judge, after he became unconscious from the blows inflicted upon him by the police when he refused to sign the confession. The court found such testimony incredible, especially that the signature of the accused appearing on the confession was "firm and regular in pressure, showing no evidence of tremor or inordinate dragging of the pen," and bears a striking resemblance to the signatures of the accused on the certificate of arraignment and the notice of trial found on pages 33 and 34 of the records. The court gave credence to the testimony of the municipal judge, Mayorico Gallanosa, who testified that he explained the contents of the statement to the accused before the latter affixed his

signature thereto. The judge further declared that he physically examined the accused and was convinced that no sign of physical punishment was present, and certified on the written confession itself "that upon physical examination of affiant, no visible injuries has (sic) been seen as a result of his voluntary confessions."

We are not inclined to disturb the findings of the trial court that the extrajudicial confession of the accused was executed by him voluntarily. True, there was indication in the instant case of the sadistic behavior of the police, as observed by the court, in that right after the accused signed the extrajudicial confession, the police put him on public display, hanging him at the door of the police station with "hands outstretched horizontally, each hand being just a few feet away from the post to which the rope was tied and drawn tight," and a crude placard placed on chest with the announcement in Bicol declaring that he was more than a beast, that he abused a girl and killed her and that the public should not imitate his deed.[2] The trial court, however, while strongly condemning what the police did and directing the Provincial Fiscal to investigate the incident so that the persons responsible could be made to answer for the "barbaric" deed, held that the same could not affect the admissibility of the extrajudicial confession as it came after and resulted from the confession.

However, we do not agree with its finding that the accused committed the complex crime of attempted rape, with homicide. In finding the accused guilty of attempted rape, the trial court said:

"In regard to the charge for Rape, the Court finds that it is not substantiated by evidence. The necropsy report (Exh. "A") clearly discounts the possibility of consummated rape; but because of the confession of accused Dominador Gavarra, taken jointly with the testimony of Dr. Adolfo J. Camposano that the slight congestion could have been caused by an attempt of a male organ to penetrate the vagina, we conclude that the crime of attempted rape was committed by the accused on the victim Celerina Layco."

In an attempted crime, the offender commences the commission of a felony directly by overt acts, but does not perform all the acts of execution by reason of some cause or accident other than his own spontaneous desistance. In the case at bar, the accused did not perform all the acts of execution by reason of his own spontaneous desistance. He could have committed the crime of rape had he not desisted from doing so. The physician, Dr. Antonio J. Camposano, who conducted the autopsy of the victim, declared that from the physical build of the victim, penetration of the penis would have been possible, although it would have caused laceration.[3] In other words, if the accused desisted from raping the victim, it was not because it was physically impossible for his penis to penetrate the vagina of the victim. His desistance was a voluntary act on his part, hence, he cannot be held guilty of attempted rape. According to Dr. Camposano, the slight reddish appearance of the labia majora of the victim could have been caused by contact with a hard object, like an erect penis, or "by the rubbing of the clothes against that portion of the body." [4] Moreover, as the evidence discloses, when the body of the girl was found, she had still her panty on.[5]

We hold that the only crime the accused can be found guilty of committing is murder. It is clear that in killing an 8-year old defenseless girl, he did so with treachery, taking advantage of his superior strength. He is therefore guilty of murder. In view of the abolition of the death penalty under Section 19, Article IV of the 1987 Constitution, the penalty that may be imposed for murder is reclusion temporal in its maximum period to reclusion perpetua. Since in the instant case, no aggravating or mitigating circumstances have been shown or proven, the penalty that should be imposed is reclusion temporal in its maximum period. Applying the indeterminate sentence law, the minimum term to which the accused may be sentenced should be within the range of the penalty next lower in degree, i.e., prision mayor in its maximum period to reclusion temporal in its medium period.

WHEREFORE, the appealed decision is hereby modified and the accused held guilty of the crime of murder and sentenced to suffer the indeterminate penalty often (10) years and one (1) day of prision mayor, as minimum, to

seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum, and to indemnify the heirs of the deceased Celerina Lepiten Leyco in the amount of Thirty Thousand (P30,000.00) Pesos. No costs.

SO ORDERED.

Teehankee, C.J., Fernan, Narvasa, Gutierrez, Jr., Cruz Paras, Feliciano, Padilla, Bidin, Sarmiento, and Cortes JJ., concur.

Melendio-Herrera, J., see attached dissent. Gancayco, J., on leave,

[1] U.S. v. De Leon, et at., 27 Phil. 506, 511.

[2] Rollo, pp. 39-40.

[3] T.S.N., February 13, 1973, pp. 11-12.

[4] Ibid., pp. 8, 11.

[5] Ibid., p. 17.

DISSENTING

MELENCIO-HERRERA, J.,

I find it difficult to agree with the majority opinion that no rape was committed. Neither do I agree with the finding of the Trial Court that only Attempted Rape with Homicide was perpetrated.

In the extrajudicial confession of the accused, which has been found to have been voluntarily executed, he admitted that he had abused the eight-year-old-girl but that his "penis could not penetrate the vagina." The fact that the accused's male organ could not so penetrate does not mean that he had not committed the crime of rape nor that his crime was merely an attempted one by reason of his own spontaneous desistance. Well-settled is the rule that in Rape, the slightest penetration even without emission is sufficient to consummate the crime (People vs. Felix, 62281-82, July 16, 1984, 130 SCRA 456; People vs. Bautista, L-49778, Jan. 27, 1981, 102 SCRA 483). Complete or total penetration of the female's private organ is not necessary (People vs. Aragona, L-43752, Sept. 19, 1985, 138 SCRA 569; People vs. Aballe, L-45087, Oct. 23, 1984, 132 SCRA 641). Neither is the rupture of the hymen essential (People vs. Aragona, supra, citing People vs. To Chiao, 61 Phil. 1060). It is enough that there is proof of entrance, of the male organ within the labia of the pudendum (People vs. Pastores, L-29800, Aug. 31, 1971, 40 SCRA 499; People vs. Velasco, L-31922, Oct. 29, 1976, 73 SCRA 574) to warrant conviction for rape. When the accused gave up completely penetrating the private organ of his little victim, rape had already been consummated.

There was no spontaneous desistance on the part of the accused. By his own admission he could not penetrate the little girl's private organ. By reason thereof "he hacked her until she stopped breathing." The testimony of the physician who conducted the autopsy that "from the physical build of the victim, penetration of the penis would

have been possible, although it would have caused laceration" was a statement of a theoretical possibility. It is not proof of voluntary desistance. The actual fact is that the male organ of the accused could not penetrate the vagina of the victim. "Proof of entrance of the male organ within the labia of the pudendum" is shown by the medical finding of "slight reddish appearance of labia majora" which, according to the same physician, "could have been caused by contact with a hard object like an erect penis, or by the rubbing of the clothes against that portion of the body." The fact that when the body of the girl was found, she still had her panty on does not disprove the commission of the crime. The above medical finding of "slight reddish appearance of labia majora" could only mean that the girl's panty had been removed and was put back on.

The crime committed is Rape with Homicide punishable by death (Art. 335, Revised Penal Code) but with the abolition of the death penalty, the imposable penalty is reclusion perpetua.

Compassion, indeed, has been shown the accused, but requital has been denied the innocent little 8-year-old girl whom the accused admitted having wronged.

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