

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MARIANO ENTES, ACCUSED-APPELLANT.

G.R. No. L-50632. February 24, 1981

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

The trial court imposed the death penalty on the appellant, Mariano Entes; hence his case is before Us on automatic review.

On April 12, 1977, Rosa Entes filed a verified complaint for rape against her father, Mariano Entes. When Mariano waived his right to the second stage of a preliminary investigation, the case was elevated to the Court of First Instance of Palawan for trial on the merits. The information filed therein reads:

"The undersigned [Provincial Fiscal Felix B. Mintu], upon prior complaint filed by the offended party ROSA ENTES, accuses MARIANO ENTES of the crime of 'RAPE', committed as follows:

That on or about the 10th day of December, 1976, at Barrio Balading, Municipality of Cuyo, Province of Palawan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, by means of force, violence, threats and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of the complainant ROSA ENTES, his daughter, without her consent and against her will.

CONTRARY TO LAW and committed with the aggravating circumstance of nighttime and the alternative circumstance of relationship, the offended party being the legitimate daughter of said accused."

After trial wherein Dr. Alberto Sandoval, Chief of the Cuyo General Hospital, Rosa Entes, the complainant, and Mercedes Palay-Revillas, aunt of Rosa, testified for the prosecution while Mariano Entes alone testified in his defense, the court rendered the following judgment:

"WHEREFORE, this Court finds the accused, Mariano Entes guilty of the crime of rape beyond reasonable doubt as defined and penalized under Article 335 of the Revised Penal Code, as amended. The offense having been committed with the use of a deadly weapon, and with the attendance of two other aggravating circumstances of night time and relationship, and without the attendance of any mitigating circumstance, the said accused is hereby sentenced to the extreme penalty of death by electrocution. The said accused is also ordered to indemnify Rosa Entes, in the sum of Twelve Thousand (P12,000.00) Pesos."

The facts as given in the brief of the appellant and which the Solicitor General has adopted as his own are:

"The offended party Rosa Entes is one of the four children of the herein accused, Mariano Entes and Gloria Palay. Gloria Palay died in December, 1970 leaving her children in the care of her surviving husband, Mariano Entes. Before and even after Gloria Palay's death, the family had and still resides at Bo. Bisucay, Municipality of Cuyo, Palawan. The family being poor, their small house which measures 4 meters long and 3 meters wide more or less, is made of nipa and bamboos. The family rests and sleeps in the same room. Their nearest neighbor is about 20 meters distant.

Born on August 8, 1959 at Bisucay, Cuyo, Palawan, the complainant is the second eldest of four children. She has only reached Grade VI in her elementary education. Her eldest brother, Ruben who is 2 years older than her is not usually in the house because he works in a fishing boat (fleet). Thus, the only occupants of the house most of the time are the accused, his eldest daughter who is the complaining witness, and his two other younger children. When the complaining witness testified in Court on March 21, 1978, Reynaldo, a brother next younger to her was only 14 years old and Erlic, the youngest (sister) was only 10 years old.

On December 10, 1976 at about midnight, when all the children which includes the complainant were already asleep, the said complainant was awakened as she felt some weight over her body. When she woke up, she saw her father who is the accused herein kneeling upon her thighs. She pushed away the accused but was not able to succeed. She struggled to free herself but her father threatened to kill her with a bolo which she felt on her side placed there by her father. Then the accused held her, and covering her mouth to prevent her from making noise, her father was able to remove her panty. Cf. Testimony of Rosa Entes, TSN: 3-21-78, pp. 1-10: 18-20.

With the persistence of the accused in his lewd designs despite the resistance of the complainant, the former was able to insert his penis in the complainant's vagina. The latter felt pain, and as her father's penis was inside her vagina, the complainant also felt some liquid flowing to her vagina. Cf. TSN: Ibid, pp. 20-21.

Three days thereafter, the accused again abused his daughter. He repeated it for the third time after about a week from the second intercourse. And all these three sexual encounters were committed in his (accused's) house at Sitio Balading, Bo. Bisucay, Cuyo, Palawan in the middle of the night.

In all these occasions, Ruben Entes, the eldest son of the accused or eldest brother of the said complainant was not in the house and whenever the accused's two younger children were already fast asleep. The complainant had resisted her father's advances by pushing him away, biting and kicking him continuously but the accused, using force and intimidation was able to consummate his bestial desires on her, by inserting his penis into the complainant's vagina, making a 'push and pull movement' while on top of her. The complainant was not able to make the noise or ask assistance because her younger brother and sister were already asleep and her father had always covered her mouth with the piece of cloth, threatening to kill her with the bolo which he always brought with him and placed beside her. And each of these three assaults would last for an hour, more or less. Cf. Testimony of Rosa Entes, TSN: Aug. 18, 1978, pp. 10-15; Testimony of Rosa Entes, TSN: Aug. 15, 1978, pp. 2-7.

As a result of what the accused did to the complainant, the latter's menstruation had not come thereafter and she became pregnant. Cf. Testimony of Rosa Entes, TSN: March 31, 1978, pp. 13-14.

The prosecution's evidence further shows that the complainant because of her background as a country girl was confused and did not know what to do. Except with her younger brother and sister who live with her and the accused in their house, her aunt Mercedes Palay-Revillas lives in Sitio Pampang, which, although a part of Bo. Bisucay, Cuyo is one and one-half hour walk away. The accused herein had also prevented her not to go away during the day or tell her aunt of the unfortunate incidents involving her. The said complainant, until she was seen by her aunt, had lived in state of fear from her father. Cf. Testimony of Rosa Entes, TSN: Aug. 19, 1978, pp. 9-10: 18-20.

When words had reached Mercedes Palay- Revillas that her niece Rosa Entes appeared to be pregnant the former investigated the latter. Having been informed by the complainant of what the accused did to her, the said Mercedes Palay-Revillas reported the matter to the PC Detachment at Cuyo. The accused was immediately summoned to town for an investigation. Cf. Testimony of Mercedes Palay-Revillas, TSN: Aug. 19, 1978, pp. 22-29.

Rosa Entes was also brought to the Cuyo General Hospital where she was examined on April 12, 1976 by Dr. Wenceslao Romero, a resident physician therein. Because of the purpose of the examination, and the subsequent issuance of a medical certificate, the complainant was also examined by the Chief of said hospital Dr. Alberto Sandoval. Drs. Romero and Sandoval concurred on their findings which were stated in the medical certificate (Exhibit A) signed by them. The examination having been done after a few months from the attack made by the accused of the offended party, the lacerations found on complainant's vagina had appeared to be old. Cf. Testimony of Dr. Alberto Sandoval, October 10, 1977, p. 14. The signs of violence on her vagina were also no longer visible. Cf. *ibid*, p. 17.

The doctors however gave their findings and conclusions as follows: '1. Old lacerations of the hymen at 3:00 o'clock and 9:00 o'clock. 2. Vagina admits two fingers freely; 3. Cervix is closed; 4. Uterus enlarged to 1" below the level of the umbilicus; 5. No foetalheartbeat is presently appreciable. Based on the above-findings it could be presumed 4 to 5 months.' Cf. Exh. A; Testimony of Dr. Alberto Sandoval, TSN: Oct. 10, 1977, pp. 3-13.

As a result of her father's sexual assault on her, and Rosa Entes having become pregnant, she gave birth to a child on September 8, 1977 in the island municipality of Cuyo. Her physical condition as a result of having just given birth to her child as well as the financial situation of her aunt with whom she was living after the case was brought to the attention of the proper authorities had caused the postponements of several scheduled hearings of instant case. Because of these, she; and the other prosecution witness, Mercedes Palay-Revillas could not easily come to Puerto Princesa City where this Court is sitting. It was only after the death of the child born of the complainant that the latter was able to come to Puerto Princesa. Cf. Testimony of Rosa Entes on March 21, 1978, p. 22.

In the course of the trial, and at a time when complainant Rosa Entes was about to wind up her testimony, Ruben Entes, the eldest son of the accused appeared to have exerted pressure on his sister, the complainant

herein to forgive their father, assuring her that the accused will leave them (complainant and her brothers and sister) and the island of Cuyo. Confused, the complainant consulted her aunt, Mercedes Palay-Revillas who reluctantly conformed to the idea. It now appears however that they have signed their separate affidavits wherein it was stated that they are forgiving the accused. Cf. Exhibits 1 and 2; Testimony of Mercedes Palay-Revillas, TSN: Aug. 19, 1978, pp. 27-28.

The defense of the accused. - The accused denied the version of the prosecution. He denied having assaulted his daughter, the complainant herein and the paternity of his daughter's child. For all the three occasions wherein the prosecution claimed that he was able to force his intentions on the complainant, the said accused stated in his testimony that he, being a fisherman was always out to sea fishing. Cf. Testimony of Mariano Entes, TSN: Oct. 2, 1978, pp. 2-9."

Notwithstanding his disclaimer during the trial which we find to be devoid of merit because of the positive testimony of Rosa, the appellant's lone assignment of error constitutes an admission that he did in fact rape his own daughter. The error alleged to have been committed is:

"THE COURT A QUO ERRED IN NOT CONSIDERING THE AFFIDAVITS OF DESISTANCE OF THE COMPLAINANT AND HER AUNT AS A GROUND FOR DISMISSAL OF THE COMPLAINT OR AS A MITIGATING CIRCUMSTANCE."

The assignment of error poses two questions, namely: (1) do the affidavits of desistance justify the dismissal of the complaint?; and (2) can they be considered as a mitigating circumstance?

We hold that the affidavits of desistance cannot justify the dismissal of the complaint. While it is true that under Art. 344 of the Revised Penal Code it is stipulated in part that "the offenses of seduction, abduction, rape or acts of lasciviousness, shall not be prosecuted except upon a complaint filed by the offended party or her parents, grandparents, or guardian, nor, in any case, if the offenders has been expressly pardoned by the above named persons, as the case may be," the pardon, to justify the dismissal of the complaint should have been made prior to the institution of the criminal action. (People vs. Miranda, 57 Phil. 274 [1932].) Here the so-called pardon of the appellant by Rosa and her aunt (Exhibits 1 and 2) was made after the institution of the action. Exhibits 1 and 2 were executed on August 18, 1978 or more than six (6) years after the action was instituted on April 12, 1971 and while Rosa was about to complete her direct testimony in the Court of First Instance. In fact the appellant does not appear to be serious about this point for in the prayer of his brief all that he asks is that the appealed decision "be modified by reducing the death penalty to life imprisonment."

The appellant invokes People vs. Coronel, L-19091, June 30, 1966, 17 SCRA 509, to justify his claim that the affidavits of desistance should be considered as mitigating his crime. He quotes the following from Coronel:

"xxx While the accused entered a plea of guilt, he did it only during the continuation of the trial so that this circumstance may not, under the law, be considered, to mitigate the liability of the accused. We feel, though, that such an admission of guilt indicates his submission to the law and a moral disposition on his part to reform." (At p. 513.)

The Coronel case is inapplicable for the simple reason that the affidavits of desistance did not constitute an admission of guilt by the appellant which manifested a disposition to submit himself to the law for on the contrary even as he invoked the affidavits he claimed that he was fishing when he was supposed to have raped his

daughter.

However, the appellant's plea for commutation has to be granted on another ground. For as the Solicitor General states:

"We concur with the trial court in considering the use of deadly weapon in the commission of the crime for the reason that no objection was made to the introduction of evidence thereon even if the same was not alleged in the criminal complaint and information. We submit, however, that the same be treated only as an ordinary aggravating circumstance and not as a qualifying circumstance to raise the ordinary penalty of rape to reclusion perpetua to death under paragraph 5 of Article 335 of the Revised Penal Code. For, a qualifying aggravating circumstance to be so considered, it must be expressly alleged in the criminal complaint or information; otherwise, it can only be taken into account as an ordinary aggravating circumstance, which merely raises the penalty to be imposed in its maximum period."

WHEREFORE, with the modification that the penalty which should be imposed is reclusion perpetua, not death, the judgment appealed from is hereby affirmed in all other respects. Costs de officio.

SO ORDERED.

Fernando, C.J., Teehankee, Barredo, Makasiar, Aquino, Concepcion, Jr., Fernandez, Guerrero, De Castro and Melencio-Herrera, JJ., concur.

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