

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. RODOLFO DISNEY Y BUGAY AND ALFREDO FERNANDEZ Y BUGAY, ACCUSED, ALFREDO FERNANDEZ Y BUGAY, APPELLANT.

G.R. No. L-41336. February 18, 1983

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

This is an automatic review of the judgment of the Court of First Instance of Rizal, at Quezon City (in Criminal Case No. Q-2981), condemning Rodolfo Disney y Bugay and Alfredo Fernandez y Bugay to death for the crime of "multiple rape qualified by the use of deadly weapon and committed by two or more persons (Article 335, as amended by Republic Act 4111, People vs. Obtinolia, L-30190, April 30, 1971)."

The Information filed against said accused and two others charged them with Robbery with Rape as follows:

"The undersigned Assistant City Fiscal accuses RODOLDO DISNEY Y BUGAY, ALFREDO FERNANDEZ Y BUGAY, JOHN DOE AND RICHARD DOE, true names and present whereabouts of the last two accused, have not as yet been ascertained, of the crime of ROBBERY WITH RAPE, committed as follows:

That on or about the 8th day of January, 1973, at night time purposely sought, in Quezon City, Philippines, the above-named accused, conspiring together, confederating with and mutually helping one another, with intent of gain and by means of force upon things, did then and there, wilfully, unlawfully and feloniously rob the residence of one SY KIM an inhabited house located at 165 Don Manuel, this City, in the manner as follows: on the date and at the place aforementioned, the said accused pursuant to their conspiracy, went to the residence of the said SY KIM and upon arrival thereat scaled the fence and forcibly detached a piece of iron grill from the dining room window and slashed the screen wire, thereby creating an opening not intended for entrance or egress and once inside their house, all the said accused armed with .45 caliber pistol and kitchen knives, by means of violence and intimidation, rob, took and carted away the following personal properties, belonging to the said Sy Kim:

- one (1) gold ring
- one (1) rado wrist watch
- cash money of different denominations
- Post dated and blank checks of China and Gen. Bank
- 4 wrist watch
- one diamond earring
- one jade ring
- two bracelets
- five mahjong sets
- one graduation ring
- one earring
- one radio phone
- one tape recorder

one Sanyo radio
one portable typewriter
two pekinese dogs

totally valued at P15,000.00 Philippine Currency; that on the occasion of said robbery, all the above-named accused, conspiring together, confederating with and mutually helping one another, by means of force and intimidation, did, then and there, wilfully, unlawfully and feloniously have carnal knowledge on the person of PACITA TEE, daughter of the complainant SY KIM, inside her room, by then and there tying her mouth, hands and feet, after which all the said accused had carnal knowledge on her person, against her will and consent, to her damage and prejudice; that thereafter all the accused fled away with their loots in the car valued at P13,000.00 of said Sy Kim, to the damage and prejudice of the said owner thereof, in the total amount of P28,000.00 Philippine Currency.

That the crime of Rape was committed with the following aggravating circumstances:

- by taking advantage of superior strength;
- that the crime was committed at the dwelling of the offended party;
- that it was committed after an unlawful entry and
- that means were employed to weaken the defense and that circumstances were brought about which added ignominy to the natural effects of the crime of rape,

to the damage and prejudice of the said PACITA TEE in such amount as may be awarded to her under the provisions of law."

Upon arraignment, Rodolfo Disney and Alfredo Fernandez pleaded not guilty. At the continuation of the hearing for the presentation of evidence for the defense on October 17, 1973, the warden reported to the Court that the two accused had escaped while being escorted back to jail. The lower Court considered the case submitted for decision pursuant to Article IV, Section 19 of the 1973 Constitution. Alfredo Fernandez was subsequently recaptured and taken to Court for promulgation of judgment, while Rodolfo Disney has remained at large.

The evidence for the prosecution follows:

VIRGINIA DEL VALLE, 21, married, housemaid, testified that she and her husband live in the house of her employer at 165 Don Manuel St., Sto. Domingo, Quezon City. On January 8, 1973, she was awakened at about 3 a.m. by persons claiming to be P.C. soldiers knocking at her bedroom door. She did not open the door. But when she heard the voice of Trining, another housemaid, telling her to open the door, she did so. With Trining were Cristina, a daughter of her employer, and three men. Two of the three men had handkerchiefs covering their faces below the eyes, while the other who was not wearing a mask, was holding a gun and wearing a jacket. Virginia, Trining and Cristina were brought by the three men to a room where Virginia saw her employer and other members of the family, tied. Then, the three men tied their hands and feet and stuffed their mouths with torn blankets. Two of the men then took Pacita Tee, the elder daughter of her employer, to another room. Virginia could not identify those two persons.

Virginia came to know later that the man, who was armed with a gun and whose face was not covered, was Alfredo Fernandez, when she identified him in a line-up in the Quezon City detention cell two weeks later. In her sworn statement (Exhibit "C"), Virginia stated that four men had entered and robbed their residence.[1]

PACITA TEE, 24, single, student, residing at 165 Don Manuel St., Sto. Domingo, Quezon City, testified that on January 8, 1973 between 1 to 5 a.m., four robbers armed with guns entered their house while she was sleeping.

The occupants of the house were taken to her room on the ground floor and were bound hands and feet. Her hands, too, were tied at the back, her ankles bound, and a piece of cloth was stuffed into her mouth. Then, two men carried her to another room where she was laid down on a bed. The man, whom she identified as Rodolfo Disney, ripped off her pajama and panty and removed the piece of cloth in her mouth. He also removed the handkerchief covering his face, thus enabling her to recognize him because the lights were on, and then he began kissing her on the lips. As she was shaking her head, he boxed her. She did not shout because he threatened to kill the other family members if she did. He then removed his pants and underwear and with his hands he held her knees, parted her legs and inserted his penis into her vagina. He was on top of her for more than thirty minutes. When he had finished, he told his companion that it was his turn. The second man, whom she "does not know", took a shorter time than the first in having carnal knowledge of her. The two men then went outside, leaving her alone. The same men came back and raped her a second time. Thereafter, they took her watch, gold ring and money, and before they left they covered her with a blanket. Her mother untied her later on. She submitted herself to physical examination by an NBI physician two days thereafter. She also declared that before the incident, she was a virgin.

She further stated that when the policemen came to investigate, they saw the window grill destroyed, one horizontal iron bar removed, giving enough space for a person to get through. A picture of the window and grill was taken (Exhibit "B"). She stressed that they had closed the doors of the house before they went to bed that evening.[2]

RICARDO IBARROLA, Medico-Legal Officer, National Bureau of Investigation, examined Pacita Tee two days after the incident and submitted a Living Case Report (Exhibit "A") with the following findings:

"GENITAL EXAMINATION:

Pubic hairs, fully grown and moderate, Labia majora, gaping. Labia minora, coaptated. Fourchette, moderately tense. Vestibular mucosa, pinkish. Hymen, moderately thick, wide, with healing, deep lacerations at 3 o'clock and 9 o'clock positions, corresponding to the face of a watch, edges contused, edematous, with fibrin formation and bleeds on manipulation. Hymenal orifice, originally annular and admits a tube 3.1 cm. in diameter with moderate resistance, Rugosities, prominent and vaginal walls, moderately tight.

PHYSICAL INJURIES:

Contusions, bluish-purple, 1.2 x 2.0 cm., mid-superior aspect mammary region, left side; 2.5 x 4.0 cm., mid-inferior aspect, knee left.

CONCLUSIONS:

- The above described physical injuries were noted on the body of the subject at the time of examination.
- She could have had sexual intercourse with a man on or about the alleged date of commission, Jan. 8, 1973."

Dr. Ibarrola testified that the contusions resulted from forcible contact with a hard blunt object; that the woman had been deflowered recently, as shown by the lacerations of the hymen, which were healing. He stated that no semen could be found in the woman's private parts, but this did not mean that there had been no sexual intercourse, as the woman may have douched herself. He could not determine from his examination how many men committed nor how many times the sexual act was performed.[3]

SY KIM, 50, married, housewife, residing at 165 Don Manuel St., Sto. Domingo, Quezon City, testified that between midnight and 1 a.m. of January 8, 1973, while in her bedroom sleeping with her husband, she was awakened by a man pointing a gun at her and ordering her to remove her jewelries, which she did and which she handed to them. The man's companion was beating her husband. She and her husband were then bound hands and

feet and brought downstairs to her daughter Pacita's room. She heard her two daughters and son crying. The robbers untied her when her children pleaded with them that she was suffering from a heart disease. Two men bodily carried Pacita, her eldest daughter outside. When they returned, she begged them to bring her daughter back. They took with them her second daughter, although she was not sure if they were the same men who took Pacita. After that, they brought in the househelpers, tied them up and ordered them to lie down, face on the floor. When they went out of the room, she ran and closed the door. She, however, opened the door when four men came and one of them stood by the window with a gun threatening to shoot. She was tied again. After a long while, at around 4:30 in the morning she heard a car leaving. Her maid struggled free from her bonds and untied her. She went immediately to Pacita whom she found crying on a bed, her pajama top torn open, her panty pulled down in shreds, and who revealed that she had been raped.

Sy Kim further testified that she did not see the faces of the four men since everytime she saw any one of them, his face would be covered with a handkerchief up to the bridge of his nose; besides, it was dark, although the stairs and the back of the house were lighted, and she had poor eyesight. She discovered later that these persons had entered her house through the window by prying apart the grill in the dining room window (Exhibit "B"); that their car which was used by the robbers was recovered, but not the stolen articles valued at P14,000.00 to P15,000.00.[4] She tried to call the police but found their telephone lines disconnected.[5]

For the defense, ALFREDO FERNANDEZ, the accused, 22, married, jobless, residing at 80 Kalakhan St., Doña Betang Subdivision, Pasig, Rizal, testified that on January 8, 1973, he was vacationing in Nueva Ecija with his wife, having left for that province on November 9, 1972; that on January 24, 1973 he was apprehended in his residence, a rented apartment, by Quezon City policemen in connection with a complaint for kidnapping with rape filed by his parents-in-law. His wife, sister-in-law, cousin, and his brother, Rodolfo Disney, were invited to go along with him to the police station. They waited in a small room for his parents-in-law. The complaint for kidnapping with rape was withdrawn, but he and his brother, Rodolfo Disney, were not permitted to go home; instead they were brought to a detention cell late in the evening. There he saw some persons talking with Pat. Ramirez and he believed that they were talking about them because Pat. Ramirez was pointing to him and Rodolfo Disney. He was not investigated with regard to robberies, and he denied any involvement in the robbery of which he has been accused.[6]

On November 16, 1973, the Trial Court rendered judgment, the dispositive portion of which reads:

"WHEREFORE, the Court finds the defendants, Rodolfo Disney y Bugay and Alfredo Fernandez y Bugay, guilty beyond reasonable doubt of the crime of multiple rape qualified by the use of a deadly weapon and by its commission by two or more persons, penalized under Article 335 of the Revised Penal Code, as amended by Republic Act 4111, and hereby sentences each of them to the penalty of DEATH.

The Court further sentences the defendants jointly and severally to indemnify Sy Kim the amount of P15,000.00; which is the value of the properties robbed, and to indemnify Pacita Tee jointly and severally in the amount of P10,000.00 for the rape committed against her; and to pay the costs."

This review concerns the accused Alfredo Fernandez y Bugay.

The participation of Alfredo Fernandez in the robbery is evident. He was positively identified by Virginia del Valle from among the inmates of the detention cell two weeks after the incident. Thus, in her sworn statement (Exhibit "C"), she stated:

"10. T :

Dito sa amin Custodial Quarters, QCPD, maraming tao na nakakulong ngayon diyan, nandiyan ba itong tao na sinabi mong iyong makikilala kapag iyong nakitang muli?

S : Nandiyan po.

11. T : Maituturo mo ba siya sa akin?

S :

Opo. Siya po. (At this instance, affiant points to the person of ALFREDO FERNANDEZ Y BUGAY, 21 years old, married, jobless, native of Iloilo and resident of No. 80 Doña Betang St., Pasig, Rizal who presently detained inside the Custodial Quarters of the Detective Bureau, QCPD)."

Her identification of Alfredo Fernandez remained unshaken in her testimony in open court, as the person wearing a jacket, holding a gun and whose face was not covered, whom she saw with two other masked men when she opened her bedroom door and who took her husband's money.[7]

However, that appellant was one of the two men who raped Pacita Tee has not been established, as correctly pointed out by counsel de officio, and admitted by the Solicitor General. Pacita Tee, while positively identifying Rodolfo Disney, could not identify Alfredo Fernandez. Following is her testimony:

"q Who removed your panty?

a They destroyed my panty, - the person who kissed me.

q You said 'they' who?

a (Witness points to RODOLFO DISNEY).

q Were you alone in that room when that thing happened?

a No, sir. He had a companion.

COURT:

q How many persons raped you?

a Two, sir.

q Who is the other one?

a I do not know the other person.

.....

ATTY. VILLA AGUSTIN:

q

You said that there were two persons inside your room when you were raped, will you be able to recognize him if you see him again?

a Yes, sir.

q

Will you inform the Honorable Court if that person that was inside that room is around?

a He is not here, sir."[8]

Sy Kim, Pacita's mother, was neither able to recognize the two robbers who carried her daughter to another room.[9] Virginia del Valle, for her part, simply declared, without positive identification, that two of the robbers, one wearing a mask while the other was not, took the daughter of her employer to another room of the house.[10]

In the absence of proof beyond reasonable doubt that Alfredo Fernandez had also raped Pacita Tee, he cannot be held liable therefor. Although the Information alleges that the robbery was committed by four armed men (more than three constitute a band), the same has not been indubitably established, the testimony of Virginia del Valle and Sy Kim being that only one was armed with a gun[11], while Pacita Tee testified that she saw four persons and they carried guns.[12] The element of band not having been proven, Article 296 of the Revised Penal Code providing that "any member of a band who is present at the commission of a robbery . . . shall be punished as principal of any of the assaults committed by the band unless it be shown that he attempted to prevent the same" is inapplicable. There is nothing in the records either to establish a conspiracy among the four malefactors to commit the crime of rape. What the evidence discloses is that they only conspired to commit robbery.

It is true that in conspiracy the act of one is the act of all and each of the conspirators is liable for all the crimes committed in furtherance of the conspiracy.[13] But when the act done is not pursuant to the conspiracy nor a necessary and logical consequence of the intended crime, only the actual perpetrators are liable (People vs. De la Cerna, 21 SCRA 569 [1967]; People vs. Ompad, 26 SCRA 750 [1969]). In the case of People vs. Nopia, 113 SCRA 599, 605 (1982) we held:

"The evidence shows that the conspiracy among the accused covered only the crime of robbery and that the rapes were committed on the spur of the moment. Nopia, Avila and Satparam were impelled by their libidinous impulse to commit rape when they saw four girls in the bedroom.

It may be noted that homicide may unavoidably be committed in the course of the robbery, as when the victim fights the robbers or it becomes necessary to liquidate the witness to the robbery. But robbery may be consummated without necessarily committing rape. The two crimes are not interlinked."

The conclusion follows that each accused is liable only for his own act and that only Rodolfo Disney, who was positively identified by Pacita as having raped her, and his unidentified companion, are liable for the crime of Robbery with Rape. Alfredo Fernandez is liable only for the crime of Robbery wherein his participation has been established with legal and moral certainty. His alibi is unavailing in the face of Virginia del Valle's positive and unwavering identification.

Alfredo Fernandez is liable under Article 299 (a) (1) and (2) of the Revised Penal Code for Robbery committed by an armed person in an inhabited house, having entered the house through the dining room window, which was broken open, an opening not intended for entrance or egress, and the value of the property taken having exceeded P250.00.

We overrule the defense contention that since the evidence shows that the weapon carried by the offender was used to intimidate the occupants in the house, this circumstance is sufficient to remove the offense from the aforecited Article 299 (Robbery in an inhabited house by the use of force upon things) and to place it within the purview of Article 294 (5) (Robbery committed by means of violence against or intimidation of persons), which has a lower penalty.

It is true that violence and intimidation against persons were present in the commission of the robbery. Sy Kim testified that a man holding a gun pointed it at her and ordered her to hand over her wristwatch, earrings, and ring, while he took off her bracelet and pocketed all said items, while still another person beat her husband.[14] However, as this Court had ruled in *Napolis vs. Court of Appeals*, [15] which is almost on all fours with the case at bar, Article 294 applies only where robbery with violence against or intimidation of persons takes place without entering an inhabited house, under the conditions set forth in Article 299 of the Revised Penal Code. When the elements of both provisions are present, the crime is a complex one, calling for the imposition as provided in Article 48 of the Revised Penal Code, of the penalty for the most serious offense, in its maximum period, which is reclusion temporal in its maximum period. This penalty should, in turn, be imposed in its maximum period, from nineteen (19) years, one (1) month and eleven (11) days to twenty (20) years of reclusion temporal, owing to the presence of the aggravating circumstance of nighttime.[16]

WHEREFORE, modifying the penalty imposed by the Trial Court on Alfredo Fernandez y Bugay, he is hereby sentenced to an indeterminate penalty of ten (10) years and one (1) day of prision mayor, as minimum, to nineteen (19) years, one (1) month and eleven (11) days of reclusion temporal, as maximum; and to indemnify Sy Kim in the amount of P15,000.00, the value of the items robbed. He is absolved from payment of any indemnification to Pacita Tee.

Costs de officio.

SO ORDERED.

Fernando, C.J., Teehankee, Makasiar, Concepcion, Jr., Guerrero, De Castro, Plana, Escolin, Vasquez, Relova, and Gutierrez, Jr., JJ., concur.

Aquino, J., no part.

Abad Santos, J., reserves his vote.

[1] T.s.n., July 31, 1973, pp. 17-47.

[2] T.s.n., August 13, 1973, pp. 5-38.

[3] T.s.n., July 31, 1973, pp. 2-16.

[4] T.s.n., August 13, 1973, pp. 40-72.

[5] *Ibid.*, pp. 54-56.

[6] T.s.n., October 10, 1973, pp. 2-49.

[7] T.s.n., July 31, 1973, pp. 23-24, 28 & 30.

[8] T.s.n., August 13, 1973, pp. 11 & 19.

[9] *Ibid.*, p. 49.

[10] T.s.n., July 31, 1973, pp. 23-24, 33.

[11] T.s.n., July 31, 1973, p. 43; August 31, 1973, p. 53.

[12] Ibid., p. 62.

[13] People vs. Peralta, 25 SCRA 759 (1968); People vs. Tanjalali Gajali, 46 SCRA 130 (1972); People vs. Cortez, 57 SCRA 308 (1974).

[14] T.s.n., August 13, 1973, pp. 42 & 43.

[15] 43 SCRA 301 (1972).

[16] Ibid.

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