

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
EMERITO MENDEZ ALIAS EMER AND PATERNO LESULA ALIAS
PATING, ACCUSED-APPELLANTS.**

G.R. No. L-35491. May 27, 1983

Ponente: AQUINO, J.

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AQUINO, J.:

Emerito Mendez and Paterno Lesula appealed from the decision of the Court of First Instance of Bohol, finding them guilty of robbery with double rape, sentencing each of them to reclusion perpetua and ordering them to pay solidarily P5,000 each to Rufa Sombrio and Susana Sombrio as damages and P2,100 to the spouses Saturnino Pacomios and Julia Lanzaderos as the value of the objects taken during the robbery (Criminal Case No. 389).

The prosecution sought to prove that in the evening of July 7, 1971, Rufa Sombrio and her two younger sisters, Susana and Rosalina, were in the house of their grand parents, Saturnino Pacomios and Julia Lanzaderos, in Barrio Genomoan, Loon, Bohol. The grandchildren slept on the floor of the dining room while the grandparents slept on the floor of the kitchen.

At about eleven o'clock in that evening, two men, one fair and tall and the other dark and short, each armed with a gun and provided with a flashlight, and without wearing any disguise at all, entered the house. They intimidated the five occupants and hogtied them with strips of cloth torn from blankets.

They ransacked the house. They were able to get cash and other objects which were evaluated by the trial court at P2,100.

Rufa Sombrio, 24, a college student, testified that the tall man took her to the sala, while her hands were hogtied, and by means of threats to kill her, forced her to lie down and raped her. She remembered his features because they were revealed by the flashlight and by the kerosene lamp in the altar of the sala.

Susana Sombrio, 17, a high school student, testified that the short man took her to one of the rooms, gagged her, forced her to lie down, and raped her while her hands were hogtied. She remembered his face because it was lighted by the lamp in the sala through which they passed.

Rufa and Susana were examined on the following day, July 8, 1971, by a lady physician. She found fresh lacerations of the hymen at the 3, 5, 6, 9 and 10 o'clock positions, congested vaginal mucosa and the presence of whitish mucoid discharge. There were spermatozoa smears in their vaginas which each admitted a finger easily. (Exh. A, B and B-1).

The crime was reported to the police of Loon. The culprits remained unidentified. Then, on July 26, 1971 (about two weeks after the incident), Rufa and Susana, with their uncle Emiliano Antiola, while standing at the junction in Barrio Catagbacan, Loon, waiting for a truck, saw a person named Paterno Lesula alias Pating standing at the corner of the junction. They pointed Lesula to their uncle.

On August 1, 1971, at a police lineup, Rufa Sombrio identified Emerito Mendez as the tall man who robbed her grandparents' house and raped her. Rufa and Susana executed affidavits charging Mendez and Lesula (the short man) with robbery with double rape (Exh. C, C-1, E and E-1). The two accused did not present evidence at the preliminary investigation. During the trial Rufa and Susana unhesitatingly pointed to Mendez and Lesula as their respective rapists.

Even during the preliminary investigation, Susana Sombrio declared: "We not have any slight doubt because we had clearly seen their faces when they robbed and raped us and we will never forget their faces and will stand firm before the court" (p. 20, Folder of Exhibits).[*]

Appellants contend in this appeal that the trial court erred in convicting them in spite of the fact that their identity was not proven beyond reasonable doubt. They assert that "the prosecution have miserably failed to show that the two accused, Mendez and Lesula, are the very persons" who committed the robbery with double rape.

Counsel admits the corpus delicti but insists that in the absence of any extrajudicial confession the complicity of the appellants in the crime has not been proven.

Mendez, 31, married and a resident of Barrio Cantumogcad, Loon (previously charged with robbery before the municipal court of Inabanga, Bohol) offered the alibi that when the incident happened he was with his foster-mother, Placida Vistal, at Inabanga.

Lesula, 24, married and a resident of Sitio Handig, Barrio Catagbacan, Loon, testified that he was in his home when the incident took place.

The accused also feebly claimed that they were the victims of a political frameup. Laxity in law enforcement was an issue against the reelectionist mayor of Loon. He sought to pin the crime in question on the accused in order to improve his image.

The trial court disregarded the alibis of the accused, ruled that Rufa and Susana had no ulterior motive for framing up the accused and found that the accused were sufficiently identified. It said:

"The evidence on record shows that the male factors did not wear any mask. They used their flashlights when they ransacked the trunk which was only about one (1) meter from the offended parties. While thus ransacking, they found inside the trunk the big flashlight with three new batteries owned by their old grandparents which the malefactors used in further ransacking the trunk.

"With the use of this big flashlight, the facial features of the malefactors were, therefore, very well lighted up. That the malefactors did not wear any mask is believable because, as admitted by both accused on the witness stand, they did not know personally the offended parties. Hence, they naturally had no fear of being recognized by the inmates of the house that they robbed.

"Moreover, the living room (sala) of the house was well lighted with kerosene lamp (lamparilla) which was placed at the altar. When accused Emerito Mendez sexually assaulted Rufa Sombrio in the living room, it is improbable that the latter, with the kerosene lamp on, could not have clearly and positively identified the face of her sexual assailant which, as to be expected, was only a few inches from her face.

"The same opportunities for observation hold true with Susana Sombrio who categorically declared that the face of accused Paterno Lesula was positively clear to her when the face of the latter was well lighted up when she and Paterno Lesula crossed the lamparilla-lighted living room in going to the bedroom to which she was brought by the said accused and sexually assaulted."

With respect to Mendez, the trial court observed that he did not tell the chief of police that he was in Barrio Lutao, Inabanga, when he (Mendez) was first apprised that he was charged with robbery with rape. He just kept silent.

We agree with the trial court that the identity of the accused as the perpetrators of the robbery with double rape has been established beyond reasonable doubt. The special complex crime was aggravated by dwelling and nocturnity.

As shown in *People vs. Carandang*, L-31012, August 15, 1973, 52 SCRA 259, and *People vs. Perello*, L-33064, January 27, 1982, 111 SCRA 147, the Court has always been divided on the question of whether the robbery with qualified rape should be punished with death or reclusion perpetua or whether article 294 (2) (before it was amended) or article 335 of the Revised Penal Code should be applied.

In this case, for lack of necessary votes, the death penalty cannot be imposed. Therefore, the lower court's judgment is affirmed.

SO ORDERED.

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

Makasias, J., Death penalty should be imposed on both appellants.

Melencio-Herrera, J., I concur, with the observation that in *People vs. Cabural et al.* (L-34105) promulgated on February 4, 1983, This Court, by a decisive vote of ten (10) ruled that it is Art. 294(2), not Art. 335 of the Revised Penal Code, that calls for application in the crime of Robbery with Rape.

Relova, J., did not take part.

[*] Other statements of Rufa and Susana as to the identity of the malefactors are quoted below.

Rufa Sombrio declared in her affidavit:

"I was standing, then, he pushed me to have me sit down on the floor and when I was already sitting, he pushed me to lie on the floor with my back down. He then lay down on me and his other hand embraced me while he uncovered the lower part of my body with his other hand and removed my underwear. He also unzipped his pants and had his organ out and he forced me to part my legs and did his carnal desire and his carnal desire was consummated.

"And I felt that my sex organ was wet. He stood up and let me stand up with his aid, we went back to the place where we used to sleep at the dining room. Susana and I arrived at the same time to the dining room and she was also aided by the other man who pulled her." (Exh. C-1, p. 10, Folder of Exhibits).

"While he was still down on me, he embraced me and kissed my face, cheek, my neck and touched my mammary organs with his other hand but I could not do anything to resist because as I said my hands were bound at the back and I felt the pain because of my weight and of his weight who was down on me, my hands and shoulders felt pain and uneasiness. According to my own calculation, his carnal desire lasted for three minutes." (Exh. C-1, p. 10, Folder of Exhibits).

"After these incidents, we were questioned by the chief of police if we are very sure of the identity of Paterno Lesula and Emer Mendez as the two persons who robbed and raped us but we do not have any slight doubt and we are firm and sure on our identity that the two persons identified by us were the ones who robbed and raped us and we are going to stand firm on our own conscience with no intervention or suggestions from others because we cannot forget their faces and structures when they lighted the flashlight of Tatay Tunik with a very strong light held by their hands with their faces without masks brightly reflected by the light while they were searching the two wooden trunks near our feet at my left side which position was directly in front of my head while I was still lying slightly face down. The taller person with white complexion was squatting with his hand holding the flashlight and the other hand searching the trunk." (Exh. C-1, p. 11, Folder of Exhibits).

Rufa Sombrio testified at the preliminary examination:

"The taller man who was white forced me to lie down. I was force to lie down with my two hands at my back because my hands were tied. As I was already lying down with my two hands at my back he lie down also above me. He kissed my face, my neck and embraced me. He held my two nipples. He removed my underwear and he opened the zipper of his pants.

"Then he forced me to part my two legs. He placed his penis inside my vagina. I was helpless, I could not move because my two hands were tied at my back. After three minutes he accomplished his carnal desire, and then remove his penis from my vagina. After accomplishing his carnal desire, he held me and brought me to the dining room where we were sleeping with my two hands still tied at my back." (Exh. D, testimony at the preliminary examination).

Susana Sombrio declared in her affidavit:

"Because they did not wear masks on their faces and the flashlight of Tatay Tunik which they used to light in searching the two wooden trunks and which was continuously lighted has a strong light. It took them ten minutes to search the two wooden trunks. I was lying with face down but my head was facing the left side in their direction, and has seen them." (Exh. E-1, p. 18, Folder of Exhibits).

"The one who was shorter and with a darker complexion was the one who pulled me and the one who has a whiter complexion and taller pulled Rufa towards the sala near the porch. Then he ordered me to open wide my mouth and bound it with a piece of cloth and I was made to enter the bedroom and he pointed his revolver towards my breast, that if I will resist his desire he would kill me.

"Then, he held my two shoulders and made lie down on the floor and he took off his pants and immediately lay on me. With one hand, he embraced me and with the other hand he took off my underwear, and he force me to part my legs. He had his sex organ out and inserted it into my sex organ while he kissed me on my cheek and neck and touched my mammary glands.

"As I was wearing a play boy (sic), he tore it so that it would be taken off because as I said my hands were bound at the back. Then, he was doing the act to satisfy his carnal desire and his carnal desire was consummated because I had nothing to do in order to resist him, my hands which were bound were painful because of the heavy weight, so with my arms, elbow and shoulders.

"After that, he made me stood up and dressed me the skirt of Nanay Julia and aided me in returning to the dining room, where we slept and Rufa and I returned at the same time to the dining room and we were ordered to lie down again." (Exh. E-1, pp. 18-19, Folder of Exhibits).

Susana testified at the preliminary investigation:

"Instead of answering him I asked him from where are you and your companion. Then, he answered that there is no need for you to ask because our barrios are adjacent to each other. After saying that he used his revolver aiming at my breast saying that if you will talk again I will kill you. Then, he took a piece of cloth and I was made to open my mouth and bound my mouth with the piece of cloth so that I could no longer talk.

"After that, he held my two shoulders and pushed me to lie down on the floor. As I was already on the floor lying he tore my playboy and my panty. Then he removed his pants leaving his underwear. He lie down above me, he kissed me, all parts of my face, he pressed my nipple and embraced me. As I could not move because my two hands were hogtied and I could not resist his force because he is bigger than me and I could not shout because my mouth was bound with a piece of cloth, so he order me to part my two legs.

"He placed his organ penis into my organ vagina. After he succeeded his carnal desire, he stood up. Then, he held me to stand and dress me with the skirt of my grandmother. Then, he brought me to the dining room

where we slept and also my sister Rufa Sombrio." (Exh. F, p. 22, Folder of Exhibits).

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