

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
PAULINO MABAG Y LABADO ALIAS “PAULING”;
DEFENDANT-APPELLANT.**

G.R. No. L-38548. July 24, 1980

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is an automatic review of the death sentence imposed on Paulino Mabag y Labado by the Court of First Instance of Samar, Branch IX in Criminal Case No. 497.

The facts as found by the trial court are:

"That Engracia Baclas is the wife of Bartolome Baclas and Romulo Mendova is the stepson of Bartolome. All of these three persons were living in a house located at Sitio Biga, Bo. Mabini, municipality of Basey, Samar. In the afternoon of November 7, 1973 at about 5:00 o'clock, Engracia Logada went to the house of her sister-in-law, wife of one Paran a brother of Bartolome, to visit her who had recently given birth. Returning home in the same evening at about 8:00 o'clock she met on the way near their coconut plantation five persons whom she did not recognize due to darkness. One of them asked her from where she came and further asked her also if she had tuba for drink in the house. She told him that there is none. When Engracia arrived home both her husband and her son Romulo were already asleep. She woke up her husband and informed him that she met on the way five persons whom she did not recognize.

"A short while thereafter, these five persons arrived at their house. She recognized only two of them namely, the accused herein Paulino Mabag who is known to them as Pauling and also his brother Enying. Pauling asked her for food but she answered that she did not know if there is some food left by her husband as she did not eat her supper in the house. Thereupon, Paulino Mabag asked instead for water to drink. The accused then was carrying a pistol and his four companions had bolos and pistols. After giving them water the accused herein demanded money for fare alleging that they were going to Mindoro. She told him that they had no money but the accused herein insisted that they had money as they are the only ones in the vicinity who are reputed to have money. Then these three persons, Paulino Mabag, his brother Enying and one whom she did not recognize went upstairs. The other 2 persons stayed outside the house. Paulino Mabag was carrying then a pistol while his brother was pointing a pistol at her, and the third person whom she did not recognize also with a pistol was following her demanding money.

"Immediately, Bartolome and Romulo were hogtied by these three persons and were pushed to the door delivering them to the two companions who were outside the house. Then, the three persons including the accused herein opened her trunk and found cash of P2.50. After that, these three persons Paulino Mabag, Enying or Erning Mabag and the third person whom she did not recognize dragged her inside the bedroom and once inside each one of them alternated in having sexual intercourse with her. The first one to have sexual intercourse with her was Enying Mabag followed by the accused Paulino Mabag and lastly by the third person whom she did not recognize. Vainly, she struggled to free herself from them.

"After these dastardly acts, these three persons again demanded money threatening to kill all of them if they

fail to give them money. Hearing these threats Bartolome begged of the two persons guarding him outside the house to allow him to go upstairs and talk to his wife. Bartolome and Romulo still hogtied were allowed to go upstairs. Then Bartolome said, 'Gracia (Engracia) give that money! Which do you prefer our lives or money?' So, Engracia got the money amounting to P789 in bills and coins wrapped in a cellophane bag kept inside a rice bin. This amount was their savings from their farm produce. After receiving this amount the five persons divided the money among themselves. Aside from this money they got also a bolo, 2 fighting roosters, clothes and pants and shirts, all in all valued at P439. The total amount of the money and things robbed of them, therefore, amounted to P1,228.

"Engracia and Bartolome Baclas knows Paulino Mabag and his brother Enying or Erning very well because they live in the same place. The accused used to go to their house. After this the accused and his companions went away. For fear that these people will come back the spouses went behind their house and stayed in the bushes until dawn.

"In the morning following the robbery, Engracia reported the robbery and rape to the police department and she submitted herself to a physical examination at the Basey Emergency Hospital located at the poblacion of Basey and Dr. Erdulfo J. R. Canto who examined her issued the following certificate:

'PHYSICAL INJURIES REPORT

Living Case Report

No. _____

Nov. 8, 1973

NAME: Engracia Logada Baclas AGE: 59 SEX: F STATUS: Married

Address: Sitio Vega, Bo. Mabini, Basey Occupation: Housekeeper

Alleged Case: allegedly robbed and raped.

Place of Alleged Commission: Sitio Vega, Bo. Mabini, Basey, Samar

(1) Date: Nov. 7, 1973 (2) Time: 8:30 PM

Place of Examination: Basey Emergency Hospital

(1) Date: Nov. 8, 1973 (2) Time: 9:30 AM

Purpose of Examination: _____

Requesting Officer: Chief of Police, Basey, Samar.

Husband: Bartolome Baclas

F I N D I N G S

1. Vaginal & Cervical smear - Positive.
2. No appreciable laceration on Vulva.
3. Vagina easily admits 2 fingers.

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CONCLUSION:

Healing time under normal conditions, barring complications both external and internal not apparent during the period of examination, treatment and confinement will require medical attendance for a period of not more than ____ DAYS/MONTHS.

(SGD.) ERDULFO J.R. CANTO, M.D.

(Attending Physician)

Chief of Hospital

(Title)'

"The accused Paulino Mabag after his arrest executed on November 22, 1973 an affidavit marked in the trial as Exhibit "A" and is hereby reproduced:

'STATEMENT TAKEN FROM ONE PAULINO LABADO MABAG, 22 YEARS OF AGE, MARRIED, RESIDENT OF BO. VEGA, BASEY, SAMAR. IN THE OFFICE OF THE CHIEF OF POLICE, ON THE 22ND DAY OF NOVEMBER 1973. AT ABOUT 2:00 O'CLOCK IN THE AFTERNOON MORE OR LESS, IN CONNECTION WITH A ROBBERY IN BAND AND MULTIPLE RAPE INCIDENT.

X- ----- X

'After having been appraised of your constitutional rights you are not compelled to answer questions profounded in this investigation for your answers to questions in this investigation might be used in any Court of Justice in the Philippines, for or against you.'

QUESTION - Do you fully understand?

ANSWER - Yes I do.

Q -

Will you tell the whole truth and nothing but the truth?

A -

Yes I will.

Q -

What is your name, age, and other personal circumstances?

A -

PAULINO MABAG Y LABADO, 22 years of age, married, resident of Bo. Vega, Basey, Samar, farmer by occupation.

Q -

On the 7th day of November 1973, at about 4:00 o'clock in the afternoon more or less, where were you?

A -

I was at the house of one EGOY TALISAY, dine in a drinking spree together with ERNING MABAG, WILLY MABAG, EGOY TALISAY, and three persons who were unknown to me.

Q -

How many gallons of tuba were consumed by you and what time did you stop drinking?

A -

We were able to consume two gallons of tuba and we stop our drinking spree at about past six o'clock in the

evening more.

Q -

After consuming that two gallons of tuba where did you go then?

A -

After those two gallons of tuba was consumed by us I then decided to go home and was about to leave when this two ERNING MABAG and WILLY MABAG hold me by my hand and told me not to leave for according to them we must have to buy more tuba, and while we were already on the path, this man Erning Mabag told me to accompany them while I was then at gunpoint, and further inquired from me the house of this ENGRACIA (Gasyang) that fearing them I then told them where the house of this woman was located arriving at the yard of this house they commanded me to call the occupants, that I heeded them too, and when the husband of this Gasyang opened the door I asked a cooked rice but was just downstairs but the other one who was unknown to me got inside the house, then grabbed the man and hogtied him and his son downstairs then demanded money, and three persons ERNING MABAG, WILLY MABAG and a companion of ours who was also unknown to me took turns in having sexual intercourse with the old woman, and after raping the said woman they told her that if she will not give them money they will kill all of them, that this woman handed all her money, and on the yard they shared the amount, handling me only five pesos and told me not to tell anybody regarding the incident.

Q -

Do you mean to say that all who were dined on that drinking spree went into the house of this Engracia alias Gasyang?

A -

Only Egoy Talisay, didn't go with us.

Q -

While dined in a drinking spree did this persons planned what they had done and succeeded?

A -

No I did not hear any conversation regarding that matter.

Q -

So you were just forced, and threatened to go with them?

A -

Yes, I was.

Q -

How about your brother was he with you, this INYING LABADO?

A -

No he was not with us.

Q -

Do you personally know this men ERNING MABAG and WILLY MABAG?

A -

I know them only by the given name, but their family name was only known to me during our drinking spree when they inquire from me my family name.

Q -

So you had just known that your family name and this two Erning and Willy, were the same?

A -

Yes on that time only.

Q -

During this investigation were you fairly treated?

A -

Yes I was besides that this is my own free and voluntary will to expose what I know.

Q -

Will you sign this affidavit to attest the truth?

A -

Yes will just affix my thumbprints for I do not know how to write.

IN WITNESS HEREOF I have hereunto affixed my signature this 22nd day of November 1973, at Basey, Samar, Philippines.

(Thumbmarked) PAULINO LABADO MABAG
Affiant

Witness to Mark:

(SGD.) MANUEL L. TARCE
(SGD.) TARCE LA AGUILAS

SUBSCRIBED AND SWORN to before me this 22nd day of November 1973, at Basey, Samar.

(SGD.) FELIX J. DACUT
Municipal Judge'

"Judge Felix J. Dacut, Municipal Judge of Basey, Samar before whom this was sworn to testified that he read the contents of this affidavit in the dialect to the accused herein who understood the same and affirmed the truth of its contents. The defense admits this Exhibit "A" and in fact the defense introduced the same in evidence and marked the same as Exhibit "1". The accused himself on the witness stand admitted that the affidavit marked Exhibit "A" is his own affidavit and that the Justice of the Peace Felix Dacut read to him the contents of the same in the dialect and understanding the same affirmed the truth of its contents in an oath taken before the Judge."

Although five persons are mentioned in the decision as the perpetrators of the crime, only Paulino Mabag was apprehended and after he had waived his right to a preliminary investigation in the Municipal Court of Basey, Samar, the case was elevated to the Court of First Instance where the following information was filed:

"The undersigned, First Assistant Provincial Fiscal, accuses PAULINO MABAG y LABADO, of the crime of Robbery in Band With Multiple Rape, defined and penalized under Article 293 in relation to paragraph 2 of

Article 294 and Article 296 of the Revised Penal Code, committed as follows:

"That on or about November 7, 1973, at about 8:30 o'clock in the evening, more or less, at So. Biga, Bo. Mabini, Municipality of Basey, Province of Samar, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and confabulating together with Inying Labado, Erning Mabag, Willie Mabag Cajote, John Doe and Peter Doe, who are still at large, while all six accused were armed with guns and bolos which they provided themselves for the purpose, with deliberate intent of gain aforethought and with violence against and intimidation of person, did, then and there, wilfully, unlawfully, and feloniously enter the dwelling of one ENGRACIA BACLAS, and once inside, demand, take, steal, and carry away personal properties valued at FOUR HUNDRED THIRTY-NINE PESOS (P439.00) and cash in the amount of SEVEN HUNDRED EIGHTY-NINE PESOS (P789.00), all in the total amount of ONE THOUSAND TWO HUNDRED TWENTY-EIGHT PESOS (P1,228.00), without and against her consent, to the damage and prejudice of the said Engracia Baclas in the amount last stated, and accused in pursuance to their criminal conspiracy and during or on the occasion of the robbery, accused Erning Mabag, John Doe and Willy Mabag Cajote, by means of force and intimidation, did, then and there, wilfully, unlawfully, and feloniously have carnal knowledge with Engracia Baclas successively, one after the other, without and against her consent.

"That in the commission of the crime the following aggravating circumstances are present:

- Dwelling
- Use of an unlicensed firearm
- Nocturnity

"CONTRARY TO LAW.

"Basey, Samar, November 29, 1973."

After due trial where the evidence for the prosecution consisted of the testimony of Engracia and Bartolome Baclas and Judge Felix J. Dacut plus Exhibits "A" and "B" (the medical certificate) above-quoted, while the evidence for the defense consisted of the sole testimony of the accused plus Exhibit "A" which was also marked as Exhibit "1" the court rendered the following judgment:

"WHEREFORE, the Court hereby finds accused Paulino Mabag y Labado guilty beyond reasonable doubt of the crime of Robbery with Rape defined under Art. 294, par. 2 of the Revised Penal Code and penalized under Art. 335, par. 3 of the same code, and considering the aggravating circumstances of dwelling and that the crime was committed in band, without any mitigating circumstance to offset the same, hereby sentences said accused to DEATH and to suffer the accessory penalties provided by law. The accused is also sentenced to indemnify the spouses Bartolome Baclas and Engracia L. Baclas in the amount of P1,228.00 and to pay the costs of this case. Atty. Felisberto Avestruz, counsel de-oficio is hereby awarded P200.00 as his fees."

At this juncture we have to make certain observations concerning the extrajudicial confession of the accused which has been marked as Exhibit "A" for the prosecution and Exhibit "1" for the defense. It was executed on November 22, 1973, when Art. IV, Sec. 20 of the Constitution was already in effect and which reads:

"SEC. 20. No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence."

It is noted that although Paulino was informed of his constitutional right to remain silent, he did not clearly and

unequivocally waive it (see *People vs. Caguioa, et al.*, G.R. No. L-38975, Jan. 17, 1980), nor was he informed of his right to counsel. Paulino's counsel has made passing statements in his brief that the accused "gave his statement without benefit of counsel" (p. 2) and "gave his statement regarding a very serious offense without the benefit of counsel" (p. 6) but does not urge its inadmissibility for the simple reason that it has also been used as a defense exhibit. Moreover, the guilt of the accused can be established independently of the extrajudicial confession. In fact, appellant's counsel does not seem to be fully convinced of his client's innocence for his brief contains the following prayer: "that judgment be rendered reversing the decision dated February 19, 1974 rendered by the Lower Court thereby acquitting the accused-appellant and/or in the alternative, that at least the said Decision be modified."

The appellant argues that the trial court erred (1) in not giving credence to the testimony of the accused; and (2) in imposing the death penalty.

Anent the first assignment of error, the appellant asserts that being the only one of his companions known to the offended parties and the only one apprehended by the authorities, the witnesses for the prosecution, namely: Bartolome and Engracia Baclas, imputed to him all the acts alleged to constitute the special complex crime charged. Moreover, the Court disregarded his disclaimer of participation despite the fact that even without benefit of counsel he readily executed an affidavit in the police headquarters in all candor and simplicity admitting his presence at the scene of the crime because he was compelled at gunpoint to show the malefactors the residence of the offended parties.

We find the appellant's assignment of error devoid of merit. We have no reason to question the lower court's appraisal of the testimony of the witnesses, both for the prosecution and the defense. We cannot accept the appellant's suggestion that Bartolome and Engracia Baclas were influenced by the facts that he was the only one known to them and the only one apprehended by the police. He was positively identified by Bartolome and Engracia as one of the robbers who entered their house on the night of November 7, 1973. And there are a number of acts definitely and positively ascribed by the couple to Paulino who was the spokesman of the group. It was Paulino who asked for food; who asked for water when Engracia said she did not know if there was food in the house; who asked for money allegedly to go to Mindoro; who said (when Engracia denied having any money) "You don't have money. We have spied you and we found out you are monied people here." Further, it was Paulino, armed with a pistol, who entered the house together with his brother Enying and another companion also armed with a pistol, who with the help of his brother Enying and their other companions hogtied Bartolome Baclas and Romulo Mendova and brought them outside the house guarded by their other two companions in the yard; who was the second person to have sexual intercourse with Engracia and who helped pin down the shoulders of Engracia when the other two robbers took their turns in raping her. It was Paulino who ordered the robbers in the yard to kill Bartolome and Romulo Mendova; who took the money from Engracia; who took the fighting cocks, wristwatch, bolos, and other personal belongings of the couple valued at P439.00; and who gave the amount of P2.00 to Engracia when the latter complained that she had no more money to buy petroleum. Taken in their totality, these acts indubitably show the degree of participation of the appellant in the perpetration of the crime.

Bartolome and Engracia swore that they saw the faces of the three robbers who entered the house very clearly as the place was well-lighted by two wick lamps, one placed at the stairs and the other in the sala of the house. None of the robbers wore a mask or tried to hide his face to avoid recognition.

Furthermore, Bartolome and Engracia could not have been mistaken in their identification of Paulino as one of the robbers. They know him very well for Paulino married a woman from their Sitio Biga and took up his residence there. His voice is familiar to the couple as he used to go to their place and strike up conversations with them.

Paulino himself admitted in court that he knows the spouses Bartolome and Engracia personally and had known them for quite a long time. In fact, according to Paulino his house is only two kilometers away from the house of Bartolome and Engracia.

There is no motive on record that could have impelled the spouses to implicate Paulino who even testified that before the incident he was in good terms with them.

The raping of Engracia is not a tall tale. The findings of the physician who examined Engracia at the Basey Emergency Hospital in the morning of November 8, 1973, disclosed, "vaginal and cervical smear - positive." That Engracia was in fact raped has come from the mouth of Paulino himself who claims to have seen Erning Mabag, a person he did not recognize, and Willy Mabag raping her.

Paulino's defense may be described as one of "confession and avoidance." He admitted his presence at the scene of the crime but disclaimed any participation in it for he claimed he was coerced into accompanying the robbers-rapists. However, his disclaimer cannot prevail over the positive evidence for the prosecution and necessarily his first assignment of error has to be rejected.

As to the second assignment of error, the appellant claims that even assuming, without admitting, that he is guilty of the offense charged, he cannot be meted the death penalty because Arts. 293, 294, par. 2 and 296 of the Revised Penal Code which are mentioned in the information prescribe only the penalty of reclusion temporal in its medium period to reclusion perpetua when the robbery shall have been accompanied by rape, among other crimes. [Presidential Decree No. 767 which took effect on August 15, 1975 has amended Art. 294, par. 2 of the Revised Penal Code by adding the following: "PROVIDED, HOWEVER, THAT WHEN THE ROBBERY ACCOMPANIED WITH RAPE IS COMMITTED WITH THE USE OF A DEADLY WEAPON OR BY TWO OR MORE PERSONS THE PENALTY SHALL BE RECLUSION PERPETUA TO DEATH." This amendment cannot of course be given retroactive effect.]

But the applicable provision is Art. 335 of the Revised Penal Code the relevant portion of which reads: "Whenever the crime of rape is committed with the use of a deadly weapon or by two or more persons, the penalty is reclusion perpetua to death." And this is the provision mentioned in the dispositive portion of the lower court's decision quoted above. The fact that Art. 335 of the Revised Penal Code is not mentioned in the information is unimportant and did not deprive the appellant of his constitutional right to be informed of the accusation against him. As former Chief Justice Moran said:

"It has been held, however, that if the above requirement [Rule 110, Sec. 7, Rules of Court] is not complied with and no name has been given to the offense alleged to have been committed, the defect is merely of form which does not prejudice the substantial rights of the defendant. This is especially so where the facts pleaded are clearly constitutive of a specific offense. In such cases, the real nature of the crime charged is determined not by the title of the complaint, nor by the specification of the provision of the law alleged to have been violated, but by the facts recited in the complaint or information. This is so because 'from a legal point of view, and in a very real sense, it is of no concern to the accused what is the technical name of the crime of which he stands charged. It in no way aids him in his defense on the merits x x x. The real question is not did he commit a crime given in the law some technical and specific name, but did he perform the acts alleged in the body of the information in the manner therein set forth. If he did, it is of no consequence to him, either as a matter of procedure or of substantive right, how the law denominates the crime which those acts constitute x x x. In the designation of the crime, the accused never has a real interest until the trial has ended. For his full and complete defense, he need not know the name of the crime at all. It is of no consequence whatever for the protection of his substantial rights x x x. It is the province of the court alone to say what the crime is and what it is named.' Accordingly, the accused will not be permitted 'to stand by and watch the fiscal while he guesses as to the name which ought to be applied to the crime with which he charges the accused, and then take

advantage of the guess if it happens to be wrong, while the acts and omissions upon which that guess was made and which are the only real foundation of the charges against him are clearly and fully stated in the information.' Otherwise, it would 'change the battleground in criminal cases from issues to guesses and from facts to fancy.' (IV Moran, Rules of Court, pp. 22-23, 1970 ed.)

That the lower court did not err in applying Art. 355 of the Revised Penal Code is shown by the decision of this Court in *People vs. Obtinalia*, G.R. No. L-30190, April 30, 1971, 38 SCRA 651, where we said:

"The accused challenge the correctness of the lower court's judgment sentencing each of them to the penalty of death. It is claimed that having been accused of the crime of robbery in band with rape, which is penalized by reclusion temporal in its medium period to reclusion perpetua by Article 294 (2) of the Revised Penal Code, they can not be sentenced to the penalty provided under Article 335 of the same Code, as amended by Republic Act 4111.

"There is no merit in the contention. As pointed out by the trial Court, if a rape alone, when committed by two or more persons, is penalized with death, it would be highly illogical and irrational to hold that when such rape is committed with the addition of a robbery, the offense should only be punishable with life imprisonment. Thus the reclusion perpetua prescribed by Article 294 (2) of the Revised Penal Code, for robbery with rape, must be understood as limited to cases where there is a single rapist, and that in those cases where the rape on occasion of the robbery is committed by two or more persons, the death penalty provided by Republic Act No. 4111 must apply. All the more so because the crime was committed with the aggravating circumstances of its being perpetrated in the dwelling of the complainant victims, and with attendant ignominy, since the rapes were done in the presence of the woman's husband." (At pp. 661-662.)

The commission of the crime was attended by the aggravating circumstances of dwelling and band without any mitigating circumstance. There is no showing that nocturnity was purposely sought to facilitate the commission of the crime.

The writer of this opinion together with Justices Hermogenes Concepcion, Jr., Ramon C. Fernandez, Juvenal K. Guerrero and Pacifico P. de Castro are for the affirmance in toto of the lower court's decision. Justice Ameurfina A. Melencio-Herrera concurs with the aforementioned members of the Court and adds the observation "that even in a prosecution for Robbery with Rape, which can be prosecuted de officio, the offended woman should still file a complaint for Rape as a jurisdictional requirement (sec. 4, Rule 110; Art. 344, Revised Penal Code), and out of consideration for her. But if the rape victim herself testifies in open Court, as in this case, the purpose behind the requirement should be deemed as having been met, it being apparent that the victim, as in a complaint filed by her, has decided to expose in a public trial the outrage on her person." Justice Claudio Teehankee concurs in the imposition of the death penalty but believes that not one but three death penalties should be meted to the accused. He has filed a separate opinion to this effect. Justice Antonio P. Barredo's vote is "that appellant Paulino Mabag should be sentenced to three death penalties because as I have already explained in previous opinions, it is absurd to read Article 294 (2) of the Revised Penal Code without taking into account the latest amendment of Article 335. The construction of laws must never result in absurdity." Justice Felix V. Makasiar has filed a dissenting opinion to the effect that the accused should be convicted and sentenced to death for three separate crimes of robbery with rape. However, Chief Justice Enrique M. Fernando following his opinion in *People vs. Carandang*, L-31012, August 15, 1973, 52 SCRA 259, believes that the appropriate penalty is reclusion perpetua and so does Justice Ramon C. Aquino who has filed a dissenting opinion.

It thus appears that nine members of the Court are for the imposition of the death penalty in varying numbers, while two members are for reclusion perpetua only.

WHEREFORE, for lack of the necessary votes the decision appealed from is hereby modified in that the accused

shall suffer the penalty of reclusion perpetua but is affirmed in all other respects. Costs de officio.

SO ORDERED.

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

Teehankee, J., concurs in a separate opinion.

Makasiar and Aquino, JJ., dissents in a separate opinion.

SEPARATE CONCURRING OPINION

TEEHANKEE, J.:

I concur with the Court's decision insofar as it affirms the death sentence imposed on the accused-appellant, pursuant to the Court's ruling in *People vs. Obtinalia*, 38 SCRA 651 (1971) that "in those cases where the rape on occasion of the robbery is committed by two or more persons, the death penalty provided by Republic Act No. 4111 [amending Article 355 of the Revised Penal Code] must apply" and not the lesser penalty of reclusion temporal in its medium period to reclusion perpetua provided under Article 294 (2) of the Revised Penal Code for the crime of robbery with rape, since "it would be highly illogical and irrational to hold that when such rape is committed with the addition of a robbery, the offense should only be punishable with life imprisonment."

This is in consonance with my separate opinion in *People vs. Carandang*, 52 SCRA 259, 277 (1973) that "where robbery with rape is committed, but the rape is qualified by the use of a deadly weapon and is committed by two persons, either of these two factors (which the law considers abhorrent and has expressly singled out as warranting imposition of the death penalty) supplies the controlling qualification, so that the law to apply is Article 335 and not Article 294 of the penal code."

The discrepancy and illogic between the two cited articles of the penal code have now been removed since August 15, 1975 through Presidential Decree No. 767 which amended Article 294 (2) of the Revised Penal Code by providing the same increased penalty of reclusion perpetua to death "when the robbery accompanied with rape is committed with the use of a deadly weapon or by two or more persons."

It is sheer technicality to contend that since accused-appellant was charged in the information with robbery with rape under Article 294 (2), he could be convicted only under said article with the lesser penalty of reclusion perpetua and could not be meted the capital penalty provided for the duly charged and proven crime of qualified rape under Article 335, as amended by Republic Act 4111.

It is, after all established doctrine, as stressed in the Court's decision and in my separate opinion in *Carandang* that the real nature of the crime charged is determined not by the title of the information nor by the specification of the provision of the law or specific article of the penal code alleged to have been violated but by the facts recited in the information and duly proven at the trial. The courts are the final authority to adjudge what crime has been committed and penalty to impose therefor, and the prosecution's erroneous designation or determination thereof is of no binding effect.

Finally, I join the partial dissent of Mr. Justice Makasiar and the vote of Mr. Justice Barredo that the accused-appellant should be meted three death penalties for the three proven crimes of qualified rape committed by the accused-appellant, when he and two others helped each other in successively raping the victim. This is not a mere academic question, for the imposition of three separate death penalties stresses the enormous gravity of the crimes committed and in effect proscribes the grant of executive clemency.

DISSENTING OPINION

MAKASIAR, J.:

Conformably to my dissent in *People vs. Jose Pincalin, et al.* (L-38755 -- still to be re-discussed by the Banc) and to my concurrence in the opinion of Mr. Justice Teehankee in *People vs. Carandang* L-31012, August 15, 1973, 52 SCRA 259), herein appellant Paulino Mabag y Labado alias "Pauling", should be convicted of three separate crimes of robbery with rape; because herein appellant, Paulino, Enying or Erning Mabag, and a third person whom the victim did not recognize, actually ravished her during the robbery, with all three helping each other in raping her, and should be sentenced to death for each of the three crimes.

DISSENTING OPINION

AQUINO, J.:

I dissent. My opinion is that reclusion perpetua should be imposed on the accused pursuant to article 294(2) of the Revised Penal Code and not by virtue of article 335 of the same Code.

Defendant-appellant was charged with robbery with rape under article 294(2). Therefore, he should be convicted under article 294. He cannot be convicted of rape under article 335. He was charged with a crime against property. He cannot be convicted of rape, a crime against chastity, which is a private crime that can be prosecuted only upon complaint of the offended party (or the persons enumerated in article 344). That complaint is a jurisdictional requirement. (See sec. 4, Rule 120, Rules of Court.)

In this case, no complaint for rape was filed by the offended woman, Engracia Baclas. The complaint for robbery in band with multiple rape was filed by the chief of police in the municipal court of Basey, Samar on November 10, 1973. Thereafter, the provincial fiscal filed an information for the same offense in the Court of First Instance of Samar. The offense was prosecuted de oficio. Robbery with rape can be prosecuted even without a complaint of the rape victim since it is a public crime.

The imposition of reclusion perpetua on the accused, as prescribed in article 294(2), is supported by the ruling in *People vs. Olden*, L-27570-71, September 20, 1972, 47 SCRA 45, 147 Phil. 761 (per Makalintal, J.).

In the present state of the law, the prosecuting officer should treat robbery with rape as separate offenses. He should require the offended party to file a separate complaint for rape and he may file a separate information for robbery with violence or intimidation of persons.

An analogous situation exists with respect to kidnapping and forcible abduction. The kidnapping of a woman is a more serious crime than forcible abduction. The prosecuting officer, instead of filing a complaint for forcible abduction, should charge the accused with kidnapping or, better still, with the complex crime of kidnapping and forcible abduction.

The increase in the penalty for rape has created discordance between the crimes of rape and robbery with rape.

After Republic Act No. 4111 amended in 1964 article 335 of the Revised Penal Code by penalizing with the death penalty rape committed with the use of a deadly weapon or by two or more persons, a controversy has arisen as to whether robbery with rape, admittedly a more serious offense than rape, should be punished under article 335 rather under article 294(2).

There is a controversy because of the discrepancy between the penalty of reclusion temporal medium to reclusion perpetua for robbery with rape (Art. 294[2]) and the penalty of reclusion perpetua to death for multiple rape (Art. 335).

That discrepancy was partly remedied by Presidential Decree No. 767, which took effect on August 15, 1975 and which amended article 294(2). The amendment provides "that when the robbery accompanied with rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death". That is the penalty in article 335 when rape "is committed with the use of a deadly weapon or by two or more persons".

The amendment gives the impression that robbery with rape should be punished without taking into account the penalty for rape.

Robbery with rape is punished as a special complex crime on the theory that "cuando los malhechores no se contentan con robar, sino que a este delito (robo) agregan otros de igual entidad o consideracion, quiere el legislador que todos esos delitos se agrupen con el de robo y se aprecien como uno solo, en vez de distinguirlos y penarlos separadamente" (3 Viada, *Codigo Penal*, 4th Ed., p. 360).

The unity of the crime of robbery and rape committed on the same occasion cannot be broken: "el atentado contra la propiedad no sera penado separadamente del atentado contra la honestidad". "Respecto del delito complejo de robo acompaña-do de violacion, como acaba de decirse, no es posible penar separadamente ambos atentados, pues se quebrantaria el caracter indivisible de esta infraccion. Unicamente podria la violacion desconectarse del robo, penandose ambas infracciones de modo independiente, cuando el atentado contra el pudor constituye la finalidad a que tiende el delincuente, siendo el robo un mero accidente." (2 Cuello Calon, *Derecho Penal*, 12th Ed., pp. 804-805).

Rape used to be penalized with reclusion temporal while robbery with rape, indisputably a more serious offense, has always been penalized with reclusion temporal medium to reclusion perpetua. That situation did not create any incongruence between the two offenses.

But after liberation, rapes became more frequent. The boldness and depravity with which rapes were committed prompted the lawmaking body to increase the penalty for the offense. Republic Act No. 2632, which took effect on June 18, 1960, penalized with reclusion temporal maximum rape committed with the use of a deadly weapon or by two or more persons. That penalty is still consistent with the penalty for robbery with rape. The same amendment punished with reclusion perpetua to death the special complex crime of rape with homicide. It imposed reclusion perpetua for frustrated or attempted rape with homicide or where by reason or on the occasion of the rape the victim became insane.

Four years later, the lawmaking body, displaying justified concern over the rampancy of rapes, enacted Republic Act No. 4111 which, as already noted, punished with reclusion perpetua to death rape committed with the use of a deadly weapon or by two or more persons. It imposes the death penalty (a) when by reason or on the occasion of a consummated, attempted or frustrated rape, a homicide is committed and (b) when by reason or on the occasion of a rape the victim became insane.

The second amendment was effected without taking into account the necessity of amending the penalty for robbery with rape. The penalty of reclusion temporal maximum to reclusion perpetua for robbery with rape is incongruent with the penalty of reclusion perpetua to death because robbery with multiple rape committed with the use of a deadly weapon, as in the instant case, is more serious than rape only committed with the use of a deadly weapon or by two or more persons.

A similar discrepancy exists between the kidnapping of a woman, a capital offense (art. 267), on one hand, and forcible abduction (art. 342) and slavery (art. 272), on the other, and also between rebellion which absorbs murder (People vs. Geronimo, 100 Phil. 90), on one hand, and murder (art. 248) and sedition accompanied with murder (People vs. Cabrera, 43 Phil. 64 and 82), on the other.

In a per curiam decision, involving robbery with rape committed in 1968, it was observed that "if a rape alone, when committed by two or more persons, is penalized with death, it would be highly illogical and irrational to hold that when such rape is committed with the addition of a robbery, the offense should only be punishable with life imprisonment" (People vs. Obtinalia, L-30190, April 30, 1971, 38 SCRA 651, 662).

In the Obtinalia case, it was unmistakably indicated that the reclusion perpetua prescribed by article 294(2) for robbery with rape "must be understood as limited to cases where there is a single rapist, and that in those cases where the rape on occasion of the robbery is committed by two or more persons, the death penalty provided" in article 335 must apply.

That pronouncement was a sequel to the decision in People vs. Corpin, L-28356, January 30, 1970, 31 SCRA 354, involving robbery with rape committed by more than two persons on November 28, 1964 (about five months after qualified rape was made a capital offense by Republic Act No. 4111). In the Corpin case the two appellants, who were prosecuted for robbery with rape, were penalized under article 335, as amended by Republic Act No. 4111, instead of under article 294(2).

But as adverted to above, the holding in the Corpin and Obtinalia cases was not followed in the Olden case. (The decision in People vs. Otto, L-29631, January 31, 1973, 49 SCRA 306 applied article 294[2] to robbery with multiple rape committed on July 10, 1959 when rape was punished with reclusion temporal only).

The controversy was revived in People vs. Carandang, L-31012, August 15, 1973, 52 SCRA 259, which was also a prosecution for robbery with rape under article 294(2). In that case, it appears that on the occasion of the robbery, rape was committed by two persons who intimidated the victim with a gun, the kind of rape which is punished with reclusion perpetua to death under article 335.

Justice Fernando, the ponente, agreed with the trial court in imposing reclusion perpetua pursuant to article 294(2), a holding which is consistent with the Olden case.

Justice Teehankee opined that if the rape which accompanied the robbery is the qualified rape penalized in article 335, then the two offenses may be considered complex under article 48 of the Revised Penal Code and the penalty for the more serious offense of rape provided for in article 335 should be applied. He concluded that the death penalty should be imposed but inasmuch as the necessary ten votes could not be mustered, the lower court's judgment imposing reclusion perpetua "must stand pro hac vice". Justices Barredo, Makasiar and Esguerra concurred in Justice Teehankee's opinion.

Justice Castro took the view that the crime committed in the Carandang case is still robbery with rape but the penalty provided for rape in article 335 should be applied because that penalty had supplanted the penalty in article 294(2). He disagreed with the opinion that article 48 is applicable to the case. Chief Justice Makalintal (the ponente in the Olden case) concurred in Justice Castro's opinion.

In the instant case, I believe that article 294(2) should be applied and that the lower court's judgment should be affirmed because, as already observed, the appellant was prosecuted under article 294(2) and there was no complaint for rape filed by the offended woman.

If article 335 were to be applied, then in a prosecution for qualified piracy under article 123 of the Revised Penal

Code, wherein rape was committed, article 335 would have to be applied and not article 123.

When the prosecutor is confronted with a case of robbery with rape, he has a choice or discretion as to the crime or crimes which he should prosecute. He could file an information for robbery with rape or he could separate robbery and rape and prosecute the two offenses separately. Anyway, robbery and rape are unrelated offenses. The commission of rape is not indispensable to the commission of robbery and vice-versa (unless rape is viewed as robbery of a woman's honor).

A separate prosecution for rape requires the complaint of the offended party or the persons named in article 344 of the Revised Penal Code.

But once the choice is made, the corresponding legal provision should be applied. If the fiscal charges robbery with rape, then article 294(2) applies. If he files separate charges for robbery and rape then article 294 and 335 should be applied to the respective offenses. A choice having been made, the die is cast (*alea jacta est*). The mold or framework within which the prosecution should be conducted is irrevocably chosen. As the saying goes, criminal law is an island of technicality in a sea of discretion.

In the instant case, the prosecutor chose article 294(2). That choice is binding. It is article 294(2) that should be applied and not article 335, howsoever unjust to the victim that choice might be. The prosecutor's indiscretion or *faux pas* is irremediable.

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