

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE ABING, DEFENDANT-APPELLANT.

G.R. No. L-49858. March 15, 1982

Ponente: AQUINO, J.

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AQUINO, J.:

Jose Abing appealed from the decision of the Court of First Instance of Zamboanga del Norte, Dipolog City Branch I, convicting him of rape, sentencing him to an indeterminate penalty of six years and one day of prision mayor as minimum to fourteen years, eight months and one day of reclusion temporal as maximum and ordering him to pay complainant Norma Banagua the sum of four thousand pesos as indemnity and to support his illegitimate child, Joselito Banagua (Criminal Case No. 4712).

Norma Banagua was born on November 5, 1953 (5 tsn, July 28, 1967). She was the daughter of the spouses Piano Banagua and Pelicula Bulay. When Norma was about seven months old, Pelicula, already a widow, entrusted her to the spouses Jose Abing and Ruperta Banagua, Piano's sister.

The Abing spouses brought up Norma as their foster daughter. They sent her to school. She reached Grade six. In 1963, when Pelicula resided with the Abing spouses at their house in Senaman, Dipolog, Zamboanga del Norte, Abing had illicit relations with her. They begot a child. Pelicula left the house with her baby and stayed in Tanjay, Negros Oriental.

Norma testified that after midnight or in the early morning of Christmas day, December 25, 1966, while she was sleeping in an unlocked room of Abing's house in Senaman, he entered the room, covered her mouth with his hand, thereby almost suffocating her, removed her panties with his other hand and placed himself on top of her.

She resisted the assault and struggled to free herself from his clutches but because of his superior strength (he was a fifty-six-year-old farmer and she was then only thirteen years old) he was able to insert his penis into her vagina and to make push-and-pull movements. The sexual congress caused her much pain. She cried.

After the carnal intercourse, he warned her that he would kill her if she revealed what had been done to her. Abing left the room and slept in the sala.

On that occasion, her aunt Ruperta, Abing's wife, was in Galas, Dipolog, having been fetched by her brother, Martin Banagua. She returned to the house at about noontime.

Abing repeated the sexual assault in the evening of January 1, 1967, when Ruperta was again in Galas because it was New Year's day. Abing once more threatened to kill her if she would squeal.

Norma's last menstruation was on December 7, 1966. When she did not menstruate in January, 1967, she reported that fact to Abing and his wife. They made Norma drink several times the bitter juice of mashed "handilib-on" leaves in order to induce her menstruation, a fact admitted by Abing. She did not menstruate.

As Norma's abdomen became bigger because of pregnancy, her uncle, Martin Banagua, brought her to his house

in Galas. Norma disclosed to him that she was abused by Abing. She was taken to a physician who gave her twelve injections of an unspecified drug so that she would menstruate. The injections did not work.

In the meantime, her mother was apprised of what had happened to Norma. She left Tanjay and went to Dipolog. Norma was examined by a doctor of the Rizal Memorial Hospital in Dapitan City on April 3 and May 5, 1967. She was found to be five months pregnant (Exh. B). She gave birth to a baby boy on September 19, 1967 (Exh. A).

A complaint for rape was filed on May 10, 1967 in the municipal court of Dipolog by Norma's mother. It was supported by the affidavits of mother and daughter. After Abing's arrest, he waived the second stage of the preliminary investigation. The case was remanded to the Court of First Instance.

On June 14, 1967, the provincial fiscal filed a single information charging Abing with two rapes. After trial, the lower court rendered the judgment already mentioned. Abing appealed to the Court of Appeals which certified the case to this Court on the ground that the imposable penalty should be two reclusion perpetuas.

Abing's sole assignment of error is that the trial court erred in not acquitting him. He assails Norma's credibility, imputes the rape to his nephew, Luciano Engito, and argues, in the alternative, that if there was sexual intercourse between him and his foster daughter, it was with her consent.

Abing also contends that complainant's mother concocted the rape charge in retaliation against Abing's supposed misdeed in having illicit intercourse with Norma's mother. To show the improbability of the alleged rape, Abing wonders why Norma did not leave his house after she was ravished. He said that it was unbelievable that the rapes were committed in the morning of Christmas day and in the evening of New Year's day when Abing's wife would be in their house.

These contentions, which were ably refuted in the Solicitor General's brief, are flimsy, puerile and conjectural. The trial court found Norma's testimony to be credible and trust-worthy. Abing in his testimony did not deny the rape committed on New Year's day. His fabricated version of what happened on December 24 and 25, 1966 only served to strengthen Norma's testimony.

Abing and his wife testified that Norma left their house on November 5, 1966 and returned in January, 1967 and that they slept in their barn or granary on the night of December 24, 1966 in order to guard their palay. The barn was about five hundred meters away from their house.

That version is diametrically opposed to the version of Victoria Quisel, a defense witness, that on the night of December 24, 1966, Norma slept on the floor of Abing's house beside Victoria while Victoria's husband, Luciano Engito, slept on the other side of Victoria and that at about two o'clock in the morning of December 25, Victoria discovered that Luciano was on top of Norma, making "push-and-pull" movements.

The contradictory testimonies of Victoria Quisel and Abing indicate that Abing had no tenable defense to the rape charge. On the other hand, it is noteworthy that if the offended girl had not suffered a grievous outrage in the hands of Abing, she would not have been provoked to charge him with rape, considering that she owed a lot to the Abing spouses for having brought her up and spent for her subsistence for more than thirteen years.

Moreover, it should be borne in mind that Abing's wife is Norma's aunt. There is no reason why Norma would frame up Abing. The circumstance that Abing had begotten a child with Norma's mother is not a sufficient motive to induce Norma to fabricate a charge of rape against her benefactor.

We hold that Abing's commission of two rapes was proven beyond reasonable doubt. The trial court erred in convicting him of only one rape and in imposing upon him the penalty of reclusion temporal and not reclusion

perpetua, which is the penalty applicable to this case under Republic Act No. 4111.

However, considering the circumstances of the case, particularly Abing's old age and the fact that his constant association with his niece-in-law and his propinquity to her had tempted him to lust after her, had weakened his moral fiber and scruples and undermined his self-control, we are impelled, under article 5 of the Revised Penal Code, to recommend to the Chief Executive, through the Minister of Justice, that after Abing had served an additional term of his two life sentences consistent with the demands of retributive justice, executive clemency may be extended to him.

WHEREFORE, the judgment of conviction is affirmed but the lower court's decision is modified by sentencing accused-appellant Jose Abing to two reclusion perpetuas, subject to the forty-year limit, and ordering him to pay Norma Banagua two indemnities of five thousand pesos each, or a total indemnity of ten thousand pesos, in addition to the support of his child, Joselito Banagua. Costs against the appellant.

SO ORDERED.

Barredo, (Chairman), Concepcion, Jr., Abad Santos, De Castro, and Ericta, JJ., concur.
Escolin, J., no part.

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