

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. NEMESIO TUANDO, ACCUSED-APPELLANT.

G.R. No. L-47720. May 20, 1987

Ponente: SARMIENTO, J.

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SARMIENTO, J.:

On November 21, 1974, the Court of First Instance of Leyte (now the Regional Trial Court of Leyte), Branch IV, sentenced Nemesio Tuando to the supreme penalty of death for the crime of rape under the third paragraph of Article 335 of the Revised Penal Code.[1] He was also ordered to indemnify the offended party the sum of SIX THOUSAND (P6,000.00) PESOS, without subsidiary imprisonment in case of insolvency, and to pay the costs. This case is now before us on automatic review.

In an Information dated December 9, 1975, Nemesio Tuando was charged as follows:

That on or about the 29[th] day of August, 1975, in the Municipality of Jaro, Province of Leyte, Philippines, within the jurisdiction of this Honorable Court, the above-named accused, by means of force and intimidation and with the use of a deadly weapon, a bolo, did then and there wil-fully, unlawfully and feloniously have carnal knowledge with Panfila C. Maningo, a woman of 50 years of age, against her will and without her consent and to her damage and prejudice.

Contrary to Article 335 of the Revised Penal Code, as amended by Rep. Act No. 4111, with the aggravating circumstances of dwelling and nighttime.[2]

Nemesio Tuando pleaded "Not Guilty" when he was arraigned on December 23, 1975.

According to the prosecution, the complainant Panfila C. Maningo, at the time of her sexual assault, was a sickly[3], fifty (50) year-old woman living with her common-law husband of five years, Guillermo Regis, in Barrio Uguiao, Jaro, Leyte. They used one-half portion of a copra dryer hut as their dwelling, with no windows, only a mat "hanged" on a string serving as their door.[4]

Panfila Maningo testified that on August 29, 1975, at around 4:30 o'clock in the afternoon, Lucila Regis, her sister-in-law, went to their house and invited her and her husband for supper in her (Lucila's) house more than a kilometer away. Guillermo Regis accepted the invitation but she declined "(B)ecause there was nobody that would be left in our house because we are only two (they are childless) and nobody will tend to our pet fowls" and pigs. She ate her supper alone at around 7:00 o'clock P.M. and went to bed at about 7:30 that evening. It was while she was sleeping at around 9:00 o'clock by her estimate, that the accused sexually attacked her. Complainant told the trial court that she was sleeping when she was awakened by the weight of someone on top of her and having sexual intercourse with her. His male organ was "inside my vagina," she declared categorically. At first, she did not mind it thinking that it was her husband. However, when she noticed the smell of the man having sexual intercourse with her to be different from that of her husband and that "there was something poked at my side and I found out it was a bolo," she opened her eyes and she discovered it was another man and not her husband who was having sexual congress with her. By the light of a kerosene lamp which was above her on top of

a bench, she recognized the man to be Nemesio Tuando, a twenty-five (25)-year old farmer and a neighbor; whereupon, immediately, she pushed him saying "you are not my husband." "I moved around so that his male organ will be expelled from my vagina but his male organ was not expelled so he finished the sexual act." [5]

She shouted for help but the accused covered her mouth with his left hand, while his right hand was holding a bolo, "about eight inches long," pointed to her side, warning threateningly "do not make a noise. I will kill you if you do so." [6] Because she was a sickly woman and she was frightened by the accused who was pointing a bolo at her side, the accused was able to accomplish his dastardly act in two minutes. Accused then left but not before warning the complainant not to tell her husband about it or else he would return to kill her. After Tuando left, she "opened the door of our house and seated myself at the door of the house and waited for my husband to come home." When her husband arrived she told him "I was sexually abused by Nemesio Tuando." [7] Her husband rightfully got mad. [8] He wanted to confront the accused on the same night but he was prevented by the complainant from doing so for fear of bloodshed. [9] The next day, August 30, the complainant and her husband went to the poblacion of Jaro to file a case with the police department. Upon the advice of Pat. Benito Navarra of the Jaro police, she submitted herself to a physical examination by the Municipal Health Officer of Jaro, Leyte, Dr. Prudencio Fevidal, Jr., who prepared the proper medical certificate, Exhibit "A". After her physical examination by the doctor, she went back to Pat. Benito Navarra before whom she executed her statement in "Question And Answer" form. She signed and swore to the truth and veracity of the same statement, Exhibit "B", also on that day, before the Municipal Mayor of Jaro, Leyte, in the absence of the municipal judge. [10] On September 16, 1975, her complaint for rape was signed and the same was sworn to before the Acting Municipal Judge of Jaro, Leyte on September 23, 1975. [11]

On the other hand, the accused interposed the defense of alibi. He related on the witness stand that in the evening of August 29, 1975, at around 8:00 P.M., he was in his house with several other persons for the yearly prayer for their departed relatives. He testified that among those present were Panfila Chavez, Eustaquio Maningo, Lydia Tuando, Pablito Chavez, and Leopoldo Canona. The prayers which started at 8:00 o'clock ended at around 9:00 o'clock P.M. Thereafter, the guests partook of the food prepared for that occasion. The visitors began leaving at 10:00 o'clock P.M., but the accused and his male visitors had a drinking session over tuba up to dawn the following day. The accused swore he never left his group except to urinate and even then, while urinating, he could be seen by his companions from where they were drinking. [12]

He charged that the spouses Guillermo Regis and Panfila Maningo have ill-motives in filing this case against him. The spouses are mad at him because he was the one tenanting the coconut farm of his uncle Gregorio Tuando and as a matter of fact, at about 4:00 o'clock in the afternoon of August 29, 1975, Guillermo Regis, or Tuando as he prefers to call him, challenged him (accused- appellant) to a fight. However, the accused-appellant did not accept the challenge because they would have a novena on that night. According to the testimony of the accused-appellant, to show the vindictiveness and evil motives of the spouses (Guillermo and complainant), Guillermo Regis killed the accused's uncle, Frisco Tuando, sometime in May, 1976, when the latter was made a tenant by Gregorio Tuando to replace the accused-appellant who was then in jail because of this case. [13]

He averred that he is happily married to Dominga Darantinao with whom he has three (3) children. Two of his children died while he was in prison. His wife left him for Manila sometime in September, 1976, to look for work and that before his wife left for Manila, he had good relations with her. [14]

He came to know for the first time that Panfila Maningo was charging him of rape when on September 1, 1975, he received a subpoena from the Chief of Police. [15]

The trial court found the accused-appellant guilty, and convicted him, thus:

WHEREFORE, finding the accused Nemesio Tuando guilty beyond reasonable doubt of the crime of rape with the use of a deadly weapon defined and penalized by Art. 335 of the Revised Penal Code, as amended by Republic Act No. 4111, and there being aggravating circumstances in the commission of the crime without the attendance of any mitigating circumstance, the court hereby sentences him to death to be meted out upon the accused in accordance with existing law, to indemnify the offended party, Panfila Maningo, in the sum of Six Thousand Pesos (P6,000.00), without subsidiary imprisonment in case of insolvency, and to pay the costs.

SO ORDERED.[16]

The accused here assails the decision. In his Brief he assigned a lone error, to wit:

That the lower court erred in finding that complainant Panfila Maningo was raped and in convicting the accused Nemesio Tuando therefor.[17]

He posits the following issues:[18]

- I. Is complainant Panfila's testimony of rape credible?
 - A. Was she awake?
 - B. Is sexual congress possible in the position she ascribed to the man?
 - C. Was she in fact really intimidated?
 - D. Can a woman under rape conditions achieve orgasm in two minutes?

II. Assuming Panfila was raped, was accused the perpetrator?

The accused's version is not impressed with merit. We, therefore, affirm his conviction by the trial court. His guilt has been proven beyond reasonable doubt by the established facts.

There is no gainsaying the fact that the accused, a twenty-five (25) year-old farmer, had carnal knowledge of Panfila Maningo, his fifty (50) year-old relative and neighbor.

In the Brief filed by his counsel de oficio, fraught with florid language albeit otherwise well-written, the accused insists that the complainant was not only conscious but was fully awake when the alleged penetration commenced. He offers the conjecture that she also "quietly" and "passively welcomed" the coitus with the accused because her husband had long been amatorially wanting and her libido had been aroused.

No evidence of consent can be found in the records of this case. On the contrary, it is abundantly clear from the evidence that the complainant was very much asleep at the onset of the sexual penetration.

X X X X X X X X

Q.

How did Nemesio Tuando enter your house?

A.

I did not know how he entered the house because I was asleep. I only knew when he was already fucking me, having intercourse with me.[19]

X X X X X X X X

During her cross-examination, he complainant was firm that she was asleep when the sexual act was accomplished.

X X X X X X X X

Atty. Buban (defense counsel de oficio);

X X X X X X X X

Q

You stated that in the evening of August 29, 1975, the accused had sexual intercourse with you while you were asleep. Did I get you right?

A

Yes, sir.

Q

And at that time, the accused inserted his penis into your vagina, you were still asleep?

A

I was still asleep.

Q

You were asleep that is why you were not able to resist him?

A

Yes, sir. I was not able to resist him because I was still asleep.

Q

When were you awakened?

A

When I learned that there was somebody on top of me and I thought that he was only my husband, I did not open my eyes because I was thinking that the person having sexual intercourse with me was my husband.

Q

And when you were awakened the accused was already having sexual intercourse with you for sometime. Am I right?

A

Nemesio Tuando was having sexual intercourse with me for a little while already and I found out only that he was not my husband because of his smell which was not the smell of my husband and he was making it hurriedly unlike my husband who does it slowly and he was pointing a pointed thing on my side.[20]

x x x x x x x x

ATTY. BUBAN:

Q

And at the time the accused inserted his penis into your vagina, you did not feel any pain otherwise you would have been awakened?

A

I was only awakened, as I said before, when I smelled the odor which was not the odor of my husband and when I found out Nemesio Tuando was already on top of me and I learned that he was not my husband and so I pushed him, but when I pushed him he placed his left hand on my mouth and said: "Do not make a noise because I will kill you" and at the same time poking a pointed thing at my side with his right hand.

Q

So, it was not the insertion of the penis by the accused which awakened you but it was the smell?

A

That was the time when I was awakened as he was already performing the sexual act. He was making a push and pull movement.[21]

X X X X X X X X

It is clear from the above testimony that the penetration occurred when the complainant was still asleep. When awakened by the weight of someone on top of her, she did not at first resist thinking it was her husband having sexual intercourse with her. However, when she realized that the man exuded a smell different from that of her husband and that the man was performing the sexual act hurriedly, which style differed from that of her husband, who does it slowly, she opened her eyes. A kerosene lamp over her head illumined the room, and she recognized the man to be the accused Nemesio Tuando. She tried to push the man away from her, but the accused covered her mouth with his left hand and threatened to kill her if she made a noise. At the same time, the accused poked a bolo on her side; thus with such intimidation, he was able to consummate his dastardly act without the victim putting up an appreciable resistance or protest.

The decision of the lower court is also disputed by the accused who argues that rape is impossible from the position described by the complainant, which is, "kneeling on a stooping position," unless the complainant cooperated by raising her buttocks.

From the records we find that the "kneeling on a stooping position" was adopted by the accused after he was identified by the complainant, thus:

X X X X X X X X

Q

Did you shout?

A

Yes, sir, but my mouth was covered with his left hand while his right hand was holding the bolo pointed to me and he said, "do not make a noise. I will kill you if you do so."

X X X X X X X X

Q

You said that he poked a bolo at your right side; if he was on top of you, why is it that he was able to poke or point his bolo at your right side?

A

He was holding my mouth with his left hand while he was pointing a bolo held by his right hand while he was kneeling on a stooping position.[22]

X X X X X X X X

Accused also proffers the argument that since the complainant achieved orgasm in just a matter of two minutes, the commission of rape would be impossible. It is true that when the complainant was twice asked whether she achieved orgasm, she answered yes. However, when the term was explained to her by the trial judge she had this to say:

A

I only felt that I had some secretion. But I did not achieve orgasm. It did not come from within me.[23]

The absence of injuries on the complainant is further argued by the accused as belying rape. It is well-settled, however, that absence of injuries by itself does not negate rape.[24]

The accused likewise takes issue against the complainant for testifying that she recognized the rapist to be Nemesio Tuando through a light from a kerosene lamp on a bench. According to him, if there really was rape the accused would have naturally put out the light to ensure his anonymity. It should be noted, nevertheless, that from the testimony of the appellant himself and his sole witness, they had been drinking tuba. This state of drunkenness naturally made the accused unconcerned about whether or not he would be identified and thus unmindful about the lighted lamp illuminating the place. A drunken person is more aggressive and sexually capable.[25]

The accused further submits that the complainant has improper motives in charging him with rape. In the trial court the accused declared that the complainant charged him with rape to remove him as tenant of the landholding of Gregorio Tuando so that complainant's husband, Guillermo Regis, would take his place. In his Brief before us, however, the accused has adopted an entirely new theory, i.e., that the complainant consented to the sexual act but in order to obviate her husband's knowledge of the shameful incident and his consequent ire, she concocted her rape story. As correctly observed by the Solicitor General, a change of theory in the course of a proceeding is not only an admission of weakness but is also not allowed. The fact can not be over-emphasized that right after the complainant's husband returned to their home, she immediately and unhesitatingly complained to him of the disgrace inflicted upon her by the accused. Furthermore, both she and her husband wasted no time in reporting the incident to the authorities the morning after her attack.

If it is true that the complainant voluntarily submitted to his sexual advances, why did she lose no time in complaining to the authorities and file the charges against the accused? It is hard to believe that a woman would undergo the expense, trouble, and inconvenience of a public trial, not to mention the scandal, embarrassment, and humiliation it inevitably entails, and allow an examination of her private parts, if her motive was not to bring to justice the person who had abused her.[26] A barrio woman on whom no suspicion exists that she has a love affair with appellant and who lost no time in publicly denouncing the disgrace suffered by her, can not be deemed to have consented to the sexual intercourse in question.[27] A victim of rape will not come out in the open if her motive is not to obtain justice.[28] The motive ascribed to the complainant is too insignificant and trivial, compared to the great cost of exposing herself to the shame and scandal before the public.

Lastly, we find that the defense of alibi of the accused, that on that night there was a prayer meeting in their house attended by several persons and after the prayers he spent his time with the other men drinking until the following morning, is unworthy of belief and must be brushed aside. His house is only about 100 meters away from the complainant's and it is not impossible for him to be at the scene of the crime. Alibi, in order to be given full faith and credit, must be clearly established and must not leave any room for doubt as to its plausibility and verity. The accused must show, not only that he was not at the place where the crime was committed but that it was impossible for him to be there,[29] which the appellant failed to do. Suffice it to state that this Court, in rape cases, has consistently rejected alibi as a defense.[30]

The accused has been charged and convicted of the crime of rape under Art. 335, paragraph 3 of the Revised Penal Code, as amended by Republic Act No. 4111, to wit:

Whenever the crime of rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death.

The present case is covered by the above-quoted provision, the rape of the complainant having been committed through the use of a deadly weapon. In the imposition of the penalty, Article 63 (par. 1) is applicable there being present the aggravating circumstances of dwelling and abuse of superior strength. The aggravating circumstance of nighttime cannot be appreciated against the accused, since by and of itself, it is not an aggravating circumstance. Furthermore, there is no showing that nighttime was especially sought for by the accused to insure the commission of the crime or to facilitate its commission or for the purpose of impunity.[31] There being present two aggravating circumstances, dwelling and abuse of superior strength, and no mitigating circumstance, the greater penalty, which is death, should be imposed. However, due to the provisions of the 1987 Constitution such penalty must be reduced to reclusion perpetua.

WHEREFORE, the judgment appealed from is hereby **AFFIRMED** with the **MODIFICATION** that the penalty imposed is reduced to reclusion perpetua[32] and the indemnity is increased to **TWENTY-FIVE THOUSAND (P25,000.00) PESOS**. [33] With costs against the appellant.

SO ORDERED.

Teehankee, C.J., Yap, Fernan, Narvasa, Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Feliciano, Gancayco, Padilla, Bidin, and Cortes, JJ., concur.

[1] Judge Auxencio C. Dacuycuy, in Crim. Case No. 2137, Original Records, 124.

[2] Original Records, 14.

[3] Ts.n., session of July 29, 1976, Petilla, 24; Records, idem.

[4] T.s.n., session of July 20, 1976, Aguila, 4-5, 10; Records, 145-146, 151.

[5] Idem, Aguila, 5-14; Records, 146-155; id.; session of July 29, 1976, Petilla, 25-33; Records, id.

[6] T.s.n., session of July 20, 1976, Aguila, 13-14; session of July 29, 1976, Petilla, 13-15, 19-28; Records, id.

[7] Idem, 12, Aguila, 16; Records, 157; session of July 29, 1976, Petilla, 20-22; Records, id.

[8] T.s.n., session of July 20, 1976, Aguila, 17; Records, 158; session of July 29, 1976, Petilla, 29-30; Records, id.

[9] Idem, 30, Record, id.

[10] Original Records, 6, 4 and 5; t.s.n., session of July 20, 1976, 17-20, Aguila; Records, 158-161.

[11] Original Records, 2 and 3.

[12] T.s.n., session of September 28, 1976, 46-50, Petilla; Records, 46-50; t.s.n., session of May 17, 1977, 65-66; Records, 65-66.

[13] T.s.n., session of September 28, 1976, 50-52, Petilla; t.s.n., session of December 8, 1976, Aguila, Records, 168.

[14] Idem, 55-56; Records, 55-56.

- [15] T.s.n., session of December 8, 1976, Aguila, 14; Records, 176.
- [16] Original Records, 123-124.
- [17] Brief for the Appellant, 1; Rollo, 49.
- [18] Idem, 4; Rollo, 49.
- [19] T.s.n., session of July 20, 1976, Aguila, 9; Records, 150.
- [20] T.s.n., session of July 29, 1976, Petilla, 11-12; Records, idem.
- [21] T.s.n., session of July 29, 1976, Petilla, 13-14, Records, idem.
- [22] T.s.n., session of July 20, 1976, Aguila, 14-15; Records, 155-156.
- [23] T.s.n., session of July 29, 1976, Petilla, 20; Records, idem.
- [24] People v. Boado, 103 SCRA 607; People v. Manzano, 118 SCRA 705; People v. Alcantara, 126 SCRA 425.
- [25] People v. Capro, 126 SCRA 403.
- [26] People vs. Macatangay, 114 SCRA 743.
- [27] People vs. Torres, 133 SCRA 303.
- [28] People vs. Ignacio, 60 SCRA 11.
- [29] People v. Lumantas, 28 SCRA 764; People vs. Alcantara, 33 SCRA 812.
- [30] People v. Dadaeg, 137 SCRA 500.
- [31] U.S. v. Billedo, 32 Phil. 574; People v. Matbagon, 60 Phil. 887.
- [32] CONST., art. III, sec. 19 (1).
- [33] People v. Deus, No. L-63729, May 31, 1985, 136 SCRA 660 (1985).

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