

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE CODERES, BASILIO CLARK AND JULIUS CLARK, ACCUSED-APPELLANTS.

G.R. Nos. L-32509-11. April 27, 1981

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PER CURIAM:

For automatic review under Rule 122, Section 9 of the Rules of Court is the decision of the Court of First Instance of Zambales, Branch I, Olongapo City, finding accused-appellants guilty of the crime of rape as principals and co-principals and sentencing each of them to suffer three (3) death penalties, to pay the offended party the sum of P5,000.00 as moral and exemplary damages, to be subsidiarily liable for the individual civil liability of each of his co-accused, to recognize the offspring that may be born as a consequence of the rape committed in accordance with Article 283 of the New Civil Code and to pay the costs proportionately.

Accused-appellants were indicted in three separate informations for the crime of rape allegedly committed as follows:

"That on or about the 13th day of January, 1970, in Olongapo City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with force, violence and intimidation, conspiring together, confederating and mutually helping one another with the accused Jose Coderes on top of the victim Rosie de Villa and the accused Basilio Clark and Julius Clark holding her legs, arms, hands and mouth to prevent Rosie de Villa from shouting for help, did then and there wilfully, unlawfully and feloniously have sexual intercourse with said Rosie de Villa against her will.

CONTRARY TO LAW, with the aggravating circumstances of night time and advantage taken of superior strength."[1]

Accused were arraigned on January 21, 1970. Through counsel, they waived the reading of the information and entered a plea of NOT GUILTY.

During trial, the prosecution sought to establish the guilt of the accused by presenting five witnesses, namely: Rosie de Villa, the victim of the alleged rape; Jose Dumlao, Jr., who corroborated the victim's testimony on all salient points; Patrolman Roberto Barnes of the Olongapo City Police Department who took the written statements of the offended party and that of prosecution witness Jose Dumlao, Jr.; Fiscal Abraham Anonas of the Olongapo City Fiscal's Office who conducted a preliminary investigation of the criminal complaints for rape against the accused; and Dr. Basilia Beltran, resident physician of the Olongapo City General Hospital who conducted the physical and internal examination of Rosie de Villa.

The testimony of Rosie de Villa, the victim who was then 15 to 16 years at the time of the alleged rape, is summarized by the court a quo thus:

"On January 13, 1970, at about 2:00 in the morning, she and Shirly de Lara were eating at the Saulog Canteen located at Barrio Pagasa, Olongapo City, having come from the Jade East Night Club where she worked as an ago-go dancer. On their way out of the canteen, they met the three accused, one of whom named Jose Coderes,

who offered to bring her home. When Rosie refused the offer, the three accused hailed a taxicab and Julius Clark forced her inside the cab. The taxicab was already occupied by a passenger. The three accused joined her inside the taxicab. Inside the vehicle, she was boxed on the stomach by Jose Coderes. Rosie asked the accused to bring her to Reno Hotel where she lived, but upon reaching the hotel the taxicab did not stop and instead the vehicle speeded away towards the Tourist Spot. Rosie did not shout for help on the way because her mouth was covered by Basilio Clark. When they reached the Tourist Spot, Julius Clark dragged her out of the taxicab. The two other accused also alighted from the vehicle. Then the driver drove the vehicle away with the unidentified passenger. After the taxicab left Basilio Clark threw Rosie down face up on the ground, and despite her screams, he placed himself horizontally on top of her and succeeded in having sexual intercourse with her with the assistance of Julius Clark, who held her legs, and of Jose Coderes, who held her hands. After Basilio Clark has finished with her, one of the accused boxed her and then Jose Coderes also raped her, aided in the dastardly act by Julius, who held her hands, and Basilio, who held her legs. After Coderes was through, Julius Clark took his turn and while he was having sexual intercourse with her, Basilio held her two legs and Coderes took hold of her hands. (When Rosie was narrating how she was raped in succession by the three accused, she was crying.) Just then a man whom she came to know later as Jose Dumlao, Jr. arrived at the scene and he fired a shot. After Dumlao fired the shot, Julius Clark and Jose Coderes stood up and attempted to escape but Dumlao fired at them, stopping them on their way up. Dumlao then turned his flashlight on the two accused and then on Rosie, who was still lying on the ground naked from the waist down. Rosie then stood up to put on her "jean". While Rosie was dressing up, Dumlao noticed Basilio Clark lying among the grasses on a prone position and so he ordered Basilio to get up and join his co-accused. Then Dumlao ordered the three accused to go to the road where he flagged down a passenger jeepney and he instructed the driver to call for the police. A few minutes thereafter, a patrol jeep of the Olongapo City Police Department arrived and she and the three accused were directed to ride on the vehicle and they were brought to the Olongapo City police headquarters, where she filed charges of rape against the three accused. Upon arrival at the police headquarters, Rosie went to the comfort room of the police headquarters and she washed her vagina because she was afraid she might get pregnant. After washing her genital organ, she returned to the office of the Chief of Police to whom she gave an account of the rapes committed at Half-Moon Beach. In the afternoon Rosie was interrogated by a police investigator to whom she gave a written statement marked Exhibit "C". She was also examined at the Olongapo City General Hospital by a lady physician and she was furthermore issued a medical certificate marked Exhibit "E". During the preliminary investigation of the case, she was threatened with bodily harm by one Luis Midnat, a companion of the accused, if she testified against the accused. She was also maltreated by the other companions of the accused, and in this connection, she showed to the Court the black marks below her eyes where she was boxed. Accused's companions also threatened Rosie with further maltreatment if she continued to prosecute the criminal cases against the accused. She went to the notary public to sign an already prepared document which she did not even read because she was intimidated by the companions of the accused."[2]

Corroborating the testimony of Rosie de Villa, Jose Dumlao, Jr., a deputy sheriff of the Olongapo City Court and a resident of Half-Moon Beach, Olongapo City, gave a narration of the incident as follows:

"His residence at Half-Moon Beach is just 50 meters below a place known as Tourist Spot. At about 2:30 in the morning of January 13, 1970, Dumlao, who was inside his house, heard woman's screams coming from the direction of the Tourist Spot. Without delay he took his gun and flashlight and went to the place where the shouts came from. Dumlao moved cautiously to where the woman was shouting, and he saw on a small clearing inside the premises of the Tourist Spot a person who was later identified as Julius Clark having sexual intercourse with a girl whose name he came to know afterwards as Rosie de Villa, while another named Jose Coderes held her feet. After Julius Clark was through, Jose Coderes raped Rosie de Villa, while Julius Clark held her feet. Five minutes later Dumlao fired his gun three times in the air, and then he turned his flashlight on the two accused and motioned them to move to the left with his flashlight, as he approached Rosie de Villa. Julius Clark and Jose Coderes complied with Dumlao's signal, and when Dumlao moved towards Rosie, he

saw her half-naked lying on the ground face upwards. Rosie de Villa had no jean or panty on, and she was wearing only a T-shirt. She was crying and she tried to cover her naked body with her hands. Dumlao instructed Rosie to put on her dress. At this time, Dumlao saw Basilio Clark lying prostrate on the ground among the tall grasses, about 2 meters away from where the girl lay. However, Basilio was not doing anything to the offended party when Dumlao saw him. Dumlao told Basilio to join the other two accused, and Basilio complied. Dumlao ordered the three accused to move on to the road. On the road Dumlao stopped a passing passenger jeepney and told the driver thereof to call for the police. Thereafter, Pat. Ayunque and another policeman arrived riding in an Olongapo City Police patrol jeep. Dumlao delivered custody of the three accused to the policemen and he also informed the policemen that he is willing to testify in the criminal case which Rosie may file against them. Rosie de Villa joined the accused inside the police jeep. In the afternoon of the same date, Dumlao was interrogated by Patrolman Roberto Barnes of the Olongapo City police to whom he gave a statement marked Exhibit "A". Threats of bodily harm were hurled at Dumlao should he testify against the accused who are members of the dreaded Bahala na Gang, and so he hid in Manila and then in San Narciso, Zambales. However, he gathered enough courage to appear before the Fiscal during the preliminary investigation. At the investigation before the Fiscal, Dumlao had occasion to talk to Rosie de Villa and she informed him that she too was threatened by the companions of the accused. Dumlao prepared a sketch marked Exhibit "B" showing the scene of the crime, and he indicated therein by mark Exhibit "B-1" the spot where Rosie was raped and by mark Exhibit "B-2" where he was when he witnessed the incident. Exhibit "B-1" was illuminated by lights of passing vehicles and also by those coming from the United States naval installations at Cubi Point and from the ships anchored in Subic Bay."^[3]

The testimony of Patrolman Roberto Barnes of the Olongapo City Police Department, desk sergeant on the date of the incident, disclosed that he took the written statement of prosecution witness Jose Dumlao, Jr. as well as the statement of Rosie de Villa.

Olongapo City Fiscal Abraham Anonas declared that he conducted the preliminary investigation of the criminal complaints for rape filed by Rosie de Villa.

Dr. Basilia Beltran, resident physician of the Olongapo City General Hospital testified that together with Dr. Servando Gutierrez (who had already left the service), she treated Rosie de Villa who complained that she was raped; that she took her case history; that she conducted physical and internal examinations on Rosie de Villa by using the cervical smear method; that her findings negated Rosie's having had a recent sexual contact, although she found her to have had previous sexual experience; that if a female did vaginal washing before examination, it is possible that the male sperm cells inside the vagina would be removed; that even if the sexual intercourse took place ten to twelve hours before the medical examination, it is possible that male spermatozoa would still be present inside the vagina; and that the abrasions found on Rosie's body may have been caused by her stumbling on the ground.

The prosecution reinforced its position by offering in evidence the following exhibits:

Exhibit A - a written statement of prosecution witness Jose Dumlao, Jr. executed on January 13, 1970 before Patrolman Roberto Barnes of the Olongapo City Police Department;

Exhibit A-1 and A-2... signatures of Jose Dumlao, Jr. appearing on Exhibit "A";

Exhibit B - a sketch of the scene of the crime prepared by Jose Dumlao, Jr.;

Exhibit B-1 - a spot on Exhibit B where the rape was allegedly committed;

Exhibit B-2 - the place on Exhibit B where Jose Dumlao, Jr. hid himself before arresting the three accused;

Exhibit C - a sworn statement dated January 13, 1970 of Rosie de Villa given to Pat. Barnes;

Exhibit D - the criminal complaint filed by Rosie de Villa in Criminal Case No. 13;

Exhibit D-1 - the criminal complaint filed in Criminal Case No. 14;

Exhibit D-2 - the criminal complaint filed in Criminal Case No. 15;

Exhibit E - a medico-legal certificate dated January 14, 1970 issued by Dr. Servando M. Gutierrez of the Olongapo City General Hospital;

Exhibit F - picture depicting Rosie de Villa and Shirley de Lara;

Exhibit F-1 - picture of Shirley de Lara;

Exhibit F-1a - picture of Shirley de Lara shown in Exhibit F;

Exhibit F-1b - tattoo mark on right leg of Shirley de Lara; and

Exhibit G - certification issued by deputy police chief of Olongapo City of the list of cases filed against Shirley de Lara.

Evidence for the accused consisted of their testimonies as well as the statements given at the witness stand by Drs. Sixto Lemque, Ernesto Castillo and Vicente Bacay, Atty. Leonardo Gonzales and one Shirley de Lara.

Dr. Sixto Lemque, resident physician of the Olongapo City General Hospital and in charge of the Obstetrics and Gynecology Department of the hospital declared that he handled several rape cases and that he was a witness in two such cases in court; that he did not conduct any examination on Rosie de Villa; that while there are 150 to 300 million sperm cells per male ejaculation, it is highly improbable for sperm cells to be removed from the vagina with soap and water.

Dr. Ernesto Castillo, in charge of the Laboratory Section of the same hospital, testified that he had a hand in the preparation of Exhibit "E" by releasing the result of the laboratory examination after his confirmation; that by way of verification of the results of the examination by Dr. Basilia Beltran of Rosie de Villa, he examined by means of the direct smear and the staining methods specimen materials given by Dr. Beltran which she allegedly took from the vagina of Rosie de Villa, for the purpose of determining the presence of male sperm cells; that while there are from 40 to 120 sperm cells in a cubic centimeter of seminal fluid, the normal release of a male genital organ being from 2 to 6 cubic meters of seminal fluid per ejaculation, he found no sperm cells in the material he examined; that while it is possible to remove all sperm cells from the vagina by washing it with soap and water, it is not conceivable to take out all sperm cells from the cervical canal. He admitted, however, that he did not conduct vaginal or cervical examination of Rosie de Villa.

Dr. Vicente Bacay, rural health physician of Olongapo City, corroborated the testimony of Dr. Castillo to the effect that it is difficult to remove all sperm cells from the vagina by washing after emission because a few may still be hidden in the crevices of the vaginal canal.

Atty. Leonardo Gonzales declared that while he prepared an affidavit of desistance marked Exhibit "1" which was signed by Rosie de Villa in his law office, he never talked with Rosie before the preparation of said exhibit; that it was one Rudy Villa (no relation of Rosie) who asked him to prepare the document; that paragraphs 2 and 3 of Exhibit "1" are his own words and they were formulated in accordance with certain patterns of affidavits of desistance in his law office.

Shirley de Lara, 17 years old, single, a dancer and a resident of New Ilalim, Olongapo City, professed having known Rosie de Villa about 5 months before the incident. She testified she was with Rosie up to 11:00 p.m. on January 12, 1970 and that they were both drunk at 10:00 earlier that evening at the Jade East Night Club but

disclaimed having been with her at 2:00 in the morning of January 13, 1970 at the Saulog Canteen. Shirley, likewise, declared that she and Rosie lived in Reno Hotel, but Rosie did not sleep at the hotel in the night of January 12, 1970; that Rosie informed Shirley of her having filed criminal complaints against the three accused but admitted that she was drunk when the incident happened; that Jose Dumlao, Jr. brought Rosie and Shirley from Reno Hotel to the 007 Hotel for Rosie's protection and Dumlao paid for their board and lodging; that Dumlao visited Rosie when they were at the 007 Hotel; that for reasons not known to her, Rosie ceased to work at the Nautilus Night Club; that when Rosie was at Sta. Rita on February 15, 1970, she was maltreated by the companions of her common-law husband because she was drunk and they hit her on the eyes. Shirley admitted that the wife of Julius Clark requested her to testify in court.

The accused who are all fishermen residing in the same place, made a blanket denial of the commission of the crime. However, they admitted their presence at the Tourist Spot at the time the offense was allegedly committed.

Accused Jose Coderes, 24 years old, single, staunchly denied having ravished the offended party. His version of the incident is summarized by the court a quo, thus:

"At about 2:00 in the morning of January 13, 1970, he and his co-accused saw Rosie de Villa dead-drunk lying on a wooden catwalk behind the Saulog Canteen at Barrio Pagasa, Olongapo City. He had already known Rosie for about a month because she used to work as a dancer at the Jade East Night Club. Julius Clark approached Rosie de Villa and asked what happened, and Rosie upon recognizing Julius requested him to bring her home. Julius was at first hesitant, and he agreed to bring Rosie home only when somebody called for a taxicab. When the vehicle arrived, Coderes and his co-accused, all of whom were living in the same house, helped Rosie inside the taxicab in order to bring her to her residence. Rosie told Coderes and his co-accused to bring her to Midway Hotel, but upon reaching the hotel she changed her mind and she asked instead to be driven to the Reno Hotel. But upon arriving at Reno Hotel, Rosie again requested that she be brought to Subic, and so they proceeded to that town. On their way to Subic and while they were nearing the Half-Moon Beach Resort, Rosie become apprehensive when she noticed that her keys and ring were missing. She was assured by the accused, however, that they did not have the articles in their possession. After passing by the said beach resort, Rosie asked the taxicab driver to stop the vehicle because she wanted to urinate, and so the taxicab stopped on the left side of the road. Rosie was helped down the taxicab. While she was urinating, three gun reports were heard. Basilio Clark became apprehensive, and so he lay prostrate on the ground. A man whom they came to know later to be Jose Dumlao, Jr. approached them. Coderes was then sitting on the ground while Julius was urinating. Two meters away from them was the taxicab which Coderes and his co-accused rode on. When Julius tried to get a cigarette from his pocket Dumlao fired at him. Dumlao questioned the driver of the taxicab, and when the latter denied knowledge of the incident, Dumlao told the driver to leave, after he had already told a jeepney driver to call the police. The taxicab left after Basilio and Coderes paid their fare amounting to P2.00. Dumlao threatened to charge Coderes and his co-accused with rape. A few minutes later a police jeep arrived and Coderes and his companions were arrested. Dumlao reported to the policemen that the three accused raped Rosie. Rosie was helped into the jeep because she was still drunk. Inside the police jeep Rosie complained of the loss of her ring and keys. At the police headquarters, Rosie found difficulty in answering the questions of the police because she was still drunk. She did not leave the investigation room and she waited the whole morning inside the room. Coderes did not give any written statement to the police. Before the incident happened, there was no misunderstanding between Dumlao or Rosie, on one hand, and Coderes and the other accused on the other."[4]

Basilio Clark, the second accused, 23 years old, married, also denied raping Rosie de Villa. Resume of his testimony is reflected in the decision of the trial court, thus:

"At about 2:00 in the morning of January 13, 1970, on their way home after having a drinking spree with his co-accused, they saw Rosie dead-drunk lying on a wooden catwalk behind the Saulog Canteen at Barrio Pagasa. When Rosie saw Julius she called him and Julius approached her and helped her get up. A taxicab was

called and they helped Rosie into the taxicab. Inside the taxicab, Basilio sat in the front seat with the driver, while Rosie lay down on the laps of Julius and Coderes because she was drunk. At her request, she was brought to the Midway Hotel. But she was refused admittance at that hotel, and so she asked to be driven to the Reno Hotel. When they reached the hotel, Rosie refused to alight from the taxicab and she asked instead to be brought to Subic, Zambales. When they reached the Tourist Spot on their way to Subic, Rosie went down the taxicab in order to answer the call of nature. When Rosie went down to urinate, Basilio also got out of the taxicab and he leaned on the vehicle, waiting for Rosie to finish urinating. His brother Julius Clark helped Rosie to the spot where she said she would answer the call of nature, which place is covered with tall grasses and is about 3-1/2 meters away from the national road. When Basilio was standing near the taxicab, he heard gun reports and seized with fear, he ran towards the cogon grasses and lay prostrate thereon. Suddenly, the man who fired the shots emerged from same tall grasses. The one who fired the shots was a stranger to Basilio. He came to know the man's identity later on as Jose Dumlao, Jr.. Dumlao arrested Julius Clark and Coderes. Basilio was also arrested by Dumlao and when he protested innocence, Dumlao advised him to relate his story to the police. After investigating the driver of the taxicab Dumlao told him to leave, and then Dumlao directed the three accused to move on to the national road, where Dumlao stopped a jeepney and asked the driver to call for the police. Later on the police arrived and the three accused and Rosie de Villa were brought to the police headquarters for investigation. None of the accused gave statement to the police. Basilio was mauled when he and his co-accused were brought inside the detention cell, but he was not treated by a doctor and he did not tell Fiscal Anonas about the maltreatment during the preliminary investigation. Rosie was still drunk when they arrived at the police headquarters. She could not talk clearly nor walk by herself. There was no misunderstanding between Rosie and the three accused before the incident took place."[5]

The third accused, Julius Clark, brother of Basilio Clark, 27 years old, single but with a common-law wife, likewise disclaimed any participation in the alleged rape of Rosie de Villa. The trial court gave his version of the incident, thus:

"On his way home together with his co-accused he saw Rosie de Villa dead-drunk lying down on a wooden catwalk surrounded by several persons. Julius approached Rosie and when she recognized him among the crowd, she asked him to bring her home. So Julius helped Rosie get up and then he hailed a taxicab which he and his co-accused rode on, and, at her request, they drove her to Midway Hotel. Upon reaching Midway Hotel, however, Rosie changed her mind and she asked to be brought instead to Reno Hotel. But when they reached Reno Hotel Rosie refused to get out of the taxicab and she again asked them to bring her to Subic, Zambales, to which request the accused acceded. At a place past Half-Moon Beach, she stopped the taxicab in order to urinate. Julius helped Rosie get out of the taxicab and he aided her to a place where she would urinate because she was still drunk. The place where she answered the call of nature, which is about 3-1/2 meters away from the national road, is covered with some talahib grasses about 1/2 meter tall. Coderes and Basilio also alighted from the taxicab and they stayed about one-arm length away from Rosie, while Basilio was far from them. Suddenly, Julius heard three gun reports, and a few minutes thereafter a person who was identified later as Jose Dumlao, Jr. appeared from some tall grasses. Dumlao also fired at Julius as the latter tried to get a cigarette from his pocket. When Dumlao saw Basilio lying prostrate on some talahib grasses two arms length away from Rosie, Dumlao also fired at Basilio, and so Basilio stood up and, upon Dumlao's order, Basilio joined his co-accused. Then Dumlao approached Rosie and helped her stand up. Dumlao ordered the accused to go to the highway and he helped Rosie to the road. Julius and his co-accused were brought to the police headquarters in a police car which was called by Dumlao. Rosie did not give any statement to the police because she was still drunk when she arrived at the headquarters. When the accused were investigated by the police, Rosie went out of the room. Before the incident happened, Dumlao is not known to Julius. Although Julius has known Rosie for quite some time, there was no previous misunderstanding between them."[6]

The following exhibits of the defense were all admitted in evidence:

Exhibit "1" - an affidavit of desistance allegedly executed by Rosie de Villa;

Exhibit "2" - the same as Exhibit "E" (medico-legal certificate dated Jan. 14, 1970 issued by Dr. Servando M. Gutierrez of the Olongapo City General Hospital);

Exhibit "2-a" - a portion of Exhibit "2" regarding internal examination findings.

Recalled as rebuttal witness for the prosecution, Rosie de Villa negated Shirley de Lara's testimony that Jose Dumlao, Jr. paid for her expenses at the 007 Hotel and asserted that she herself paid such expenses. She also denied Shirley's insinuation that she had intimate relations with Jose Dumlao, Jr. Rosie, likewise, belied Shirley's statement regarding the injuries she suffered on both eyes, asserting that they were inflicted by members of the Bahala Na Gang to which the three (3) accused belonged. She averred that Shirley is herself a member of the Bahala Na Gang as evidenced by the gang's tattoo on her thigh. Rosie further stated that she did not notice any ejaculation from the three (3) accused during their sexual intercourse with her but that she is, however, sure that there was penetration of the penis of the accused in her genital organ.

Likewise, Jose Dumlao, Jr. was recalled as rebuttal witness for the prosecution. Corroborating Rosie de Villa's assertion that Shirley de Lara is a member of the Bahala Na Gang, he declared that Shirley has a string of criminal cases as evidenced by the certification marked Exhibit "G". Denying Shirley's allegation that he paid Rosie's hotel bills and the imputation of intimate relationship with Rosie, he declared that he would file a perjury charge against Shirley although he had no misunderstanding with Shirley before he took the witness stand.

After a careful study and consideration of the evidence extant in this case, the court a quo found the accused guilty of the crimes of rape with the attendance of two aggravating circumstances - nighttime and uninhabited place - without any mitigating circumstance and to each of the accused, having been found to have cooperated as co-principals in the consummation of rape committed by each of the other accused, for each information filed in the Court, the supreme penalty of death was imposed.

Seeking reversal of the judgment of conviction, accused-appellants, through counsel de oficio, assail the trial court's decision, assigning the following errors:

I. The trial court erred in holding that the controlling consideration in deciding this case is the testimony of the complainant.

II. The trial court erred in its findings of fact of the case, the same being directly and clearly in conflict with the evidence adduced at the trial.

III. The trial court erred in considering against the accused the aggravating circumstances of "nighttime" and "uninhabited place".

IV. The trial court erred in convicting accused-appellants of rape as charged in the informations, the evidence on record not being sufficient to prove the essential elements of the crime.

I. On the first assignment of error

Appellants insist that it was error for the court a quo to have relied primarily on the testimony of offended party Rosie de Villa in deciding the case against them. To buttress their stance, they call attention to Shirley de Lara's denial of Rosie de Villa's claim that in the early morning of January 13, 1970, at around 2:00 a.m., she was eating with Shirley at the Saulog Canteen. Appellants stress that there was no reason for Shirley de Lara to abjure the declaration of the complaining witness that they were together; that there was no showing that they had any quarrel as to impel Shirley de Lara to falsely testify against Rosie; and that Shirley was not called upon by the prosecution to lend credence to Rosie de Villa's testimony that the accused took her by force and against her will.

Appellants' assertion clearly lacks merit. We quote with approval the categorical answer of the Solicitor General:

"(W)hat Rosie de Villa testified was: That she was with Shirley de Lara at the Saulog Canteen at around 2:00 in the morning of 13 January 1970; that after a while, she left, and at a distance of 28 meters away from the canteen, she met the appellants ... Then the latter called for a taxicab and they forced her to ride in it (pp. 2-3, 77 and 82, t.s.n., 24 February 1970). She did not state that when she was forcibly taken by the appellants, Shirley de Lara was still with her. Therefore, she could not and did not cite her as a witness to the incident. As a matter of fact, de Villa testified that at the time she was forced into the taxicab (p. 74, t.s.n., *ibid.*), there were no longer any customers at the Saulog Canteen (p. 75, t.s.n., *ibid.*), and the vicinity was already deserted (p. 81, t.s.n., *ibid.*). This was what she obviously meant when she said she was already alone at that time at the Saulog Canteen, as was quoted in the appellants' brief (p. 8, Appellants' Brief). She did not necessarily admit as appellants would want to imply, that Shirley de Lara was not after all with her, as she had testified.

While it is true that Shirley de Lara and Rosie de Villa had no quarrel between them, this is no reason why de Lara could not have lied in her testimony denying that she was with De Villa at 2:00 in the morning of 13 January 1970. It has been shown during the trial that she is a member of the Bahala-Na-Gang to which the appellants belong. This was proved by her picture, Exhibit F-1, showing the tattoo marks "BNG" on her right thigh, Exhibit F-1-B (p. 70, rec. of Criminal Case No. 13). It is therefore, natural to expect that her sympathies are with the appellants who are her gangmates. Furthermore, she did not wait for a subpoena to testify in court (p. 19, t.s.n., 24 February 1970). As per her admission, she was requested by the wife of Julius Clark to testify (p. 20, t.s.n., *ibid.*), and she made insinuations about an illicit relation developed later between Rosie de Villa and Jose Dumlao, Jr. in an attempt to discredit them (p. 8, t.s.n., *ibid.*). Her police record shows that she has been apprehended and/or convicted in a long line of criminal cases, including two apprehensions for vagrancy (Exh. G, p. 71, rec. of Criminal Case No. 13)."

Shirley de Lara is undoubtedly a biased witness. Biased witnesses tend to exaggerate. Although they may be honest, they cannot, while human nature remains unchanged, overcome the tendency to distort, magnify or even minimize as their interest persuades, the incidents which they relate. Shirley de Lara is a gangmate, a friend, of the accused-appellants. The claims of friendship between a witness and a party are frequently as powerful an influence in shaping such witness' testimony as any mercenary motive could be. The influence of the interest of a friend, or of the society of which the witness is a member, is also most as strong as original self-interest; and it is more insidious, because we are not so careful to guard against it, inasmuch as it bears the semblance of a virtue.[7]

Appellants also underscore the inconsistencies and contradictions in the testimony of the prosecution witnesses. They dispute Dumlao's averments that he did not see Basilio Clark do anything to Rosie de Villa; that he witnessed Julius followed by Jose having sexual consort with the complaining witness; that he did not see Basilio while Julius and Jose were making their erotic intercourse with Rosie contending that Dumlao's testimony contradicts Rosie de Villa's claim that Basilio Clark was holding her legs while Jose Coderes and Julius Clark were allegedly having sexual intercourse with her and that it was Basilio who first raped her followed by Jose and finally by Julius. Appellants thus conclude that the glaring inconsistencies in the prosecution witnesses' testimony can mean only one thing - that there is no truth to what complainant Rosie de Villa stated regarding the commission of the alleged crime of rape.

To appellants' allegation of inconsistency in the testimony of prosecution witnesses, the Solicitor General's answer is impressed with merit and We quote:

"While we admit that there are some inconsistencies in the testimonies of Rosie de Villa and Jose Dumlao, Jr. regarding the chronological order in which the appellants raped the complaining witness, and as to who of them held her arms and legs while one of them was raping her (pp. 8-12, Appellants' Brief), yet we do not agree with the appellants' contention that these inconsistencies can only mean one thing, and that is, "that there is no truth to what complainant Rosie de Villa said regarding the commission of the alleged crime." For such

contradictions and inconsistencies indicate veracity rather than prevarication (*People vs. Viñas*, 25 SCRA 683, 28 October 1968), and they do not necessarily affect the credibility of the witnesses (*People vs. Hamtig*, 29 SCRA 14; *People vs. Gensola*, 29 SCRA 483). It is precisely in such circumstances as would reveal some little variation in details that testimonies would deserve weight (*People vs. Pascual, et al.*, G. R. No. L-4801, 30 June 1953).

Besides, the said inconsistencies can be explained. As has already been pointed out, that morning of the incident was the first time Jose Dumlao, Jr. ever set eyes on the appellants. He did not know them by their names and he came to know of their identities only later on. The same is true with Rosie de Villa, who was not at the time well familiar with the appellants. When she gave her story to the police, she did not identify the appellants by their names, as can be shown by her statement, Exhibit C (p. 18, rec. of Crim. Case No. 15). She only pointed them out to the investigator, as what she did when she testified in court (pp. 2-3, 62 & 63, t.s.n., 24 February 1970). This, coupled with the fallibility of the human memory, can very well explain why these two witnesses could not dovetail in all the details of their respective narrations, particularly in pointing out the order in which the three appellants had raped Rosie de Villa. Both witnesses, however, were consistent and corroborative on the main and essential fact: that Rosie de Villa was raped, and that the appellants herein were the perpetrators ... (T)he mere possibility that there was variance in the testimonies of De Villa and Dumlao as to the order in which the former was raped and as to who was holding her arms and legs at the time, will not necessarily destroy the established fact that she was raped in succession by the appellants..."

Our jurisprudence is replete with cases giving weight and credence to prosecution witnesses' testimonies, although characterized by minor inconsistencies or contradictions but absent improper motives. To cite the more recent cases, We have *People v. Bagsican*, L-13486, 31 October 1962, 6 SCRA 400, where great stress was laid by the defense upon the differences in narration of details by some of those who testified for the government. And, for those contradictions, the rule in *falsus in uno falsus omnibus* was vehemently invoked. It was ruled that it would be unreasonable for the Court to sustain appellants' position with respect to those differences in details into which, truly, on occasions, some of the prosecution witnesses lapsed ... that it is quite obvious that said contradictions were inconsequential. They did not touch upon any matter of significance. They were such minor differences as naturally were bound to arise from truthful descriptions of things past. Had their testimonies been so perfect, so flawless, so completely accurate in details, would they not only then have offered themselves to serious suspicion that the testimonies they gave were fabricated and rehearsed?

In *People v. Alcantara*, L-26867, June 30, 1970, 33 SCRA 812, where We adjudged as a truism that the most candid witness oftentimes commits mistakes and incurs inconsistencies in his declarations, but such honest lapses do not necessarily impair his intrinsic credibility. Far from being evidence of falsehood they could justifiably be regarded as a demonstration of good faith and a confirmation of the fact that the witness was not a rehearsed witness;

In *People v. Resayaga*, L-23234, December 26, 1973, 54 SCRA 350, which considered that inconsistencies, even improbabilities, in the testimony of a witness, especially on minor details or collateral matters is a common phenomenon; that it is not unusual to have accounts of witnesses regarding the same occurrence as contradictory on certain details; that there is no perfect or omniscient witness because there is no person with perfect faculties or senses;

In *People v. Pacala*, L-26647, August 15, 1974, 58 SCRA 370, where We pointed out the rule that inconsistencies in the testimony of prosecution witnesses with respect to minor details and collateral matters do not affect either the substance of their declaration, their veracity or weight of their testimony; and

In *People v. Sangalang*, L-32914, August 30, 1974, 58 SCRA 737, where We ruled that inconsistencies or discrepancies in the declarations of prosecution witnesses which are not glaring, strengthen their credibility and

show that their testimonies were not coached or rehearsed. The discrepancies may be attributed to deficiencies in observation and recollection, or misapprehension of the misleading and confusing questions during cross-examination, or to the defective translation of the questions and answers but they do not necessarily indicate a wilful attempt to commit falsehood (citing *People v. Selfaison*, 110 Phil. 839).

Appellants likewise point to the improbability of rape having been committed as complaining witness declared that she did not notice any ejaculation from any of the accused. To discredit Rosie de Villa's credibility, appellants point to the following circumstances negating the commission of rape: (1) complainant's admission that this occasion is not exactly her first sexual experience as she came to know of this when she cohabited with a man; and (2) the medico-legal certificate showed that she is a non-virgin and that despite the alleged sexual experience, there were no abrasions found around her vaginal cleft, no congestion, and vaginal mucosa smooth, no abrasions. And they question why she should wash her "private part" at the police station to avoid getting pregnant.

Rosie de Villa, in answer to a question from the court, testified that she did not notice any ejaculation from the appellants because she was afraid. Significantly, this statement of Rosie de Villa reveals more than what the defense has bargained for. It bolsters, rather than destroys the theory that at the time Rosie de Villa was being raped by three men, one after the other, she was fighting against it with all her might, and that it was very much against her will; she was not concentrating on the act; that she was being subjected at the same time to physical violence, such as fist blows on her stomach; and that she did not give any cooperation at all to the sexual act, much less derived any enjoyment from it, as the appellants would want to imply. We do not agree, however, that because she did not notice any ejaculation, she would no longer be in a position to narrate the circumstances under which she was raped, because there is no showing that she had lost all consciousness at the time. Neither is this circumstance inconsistent with Rosie de Villa's testimony that she washed her private parts at the police station to avoid getting pregnant. She washed as a precautionary measure. Even if she did not notice any ejaculation, she could not be sure that the appellants had not in fact ejaculated.

There is no truth to the allegation of the appellants that Rosie de Villa has admitted that the concept of ejaculation is not exactly new to her. It is clear from her testimony that the time the multiple rape in question occurred, she did not yet know what ejaculation means, and it was only during the trial that she learned about it. Considering that she was then only about 15 years of age, just a little more than a child, her testimony on this point can easily be believed.

Appellants maintain that rape could not have been committed considering that the alleged scene of the crime is near the public highway and at a place where motor vehicles continually passed. The prosecution counters by pointing out that the scene of the occurrence was surrounded by tall grasses such that a person in prone position could be hidden from view unless one crawled near the place as witness Jose Dumlao, Jr. did. Aside from this, one must consider that the accused who are members of the Bahala Na Gang are three in number - Basilio, Julius and Jose - three young men at the peak of their vigor and strength, being then 23, 27 and 24 years of age, respectively; three stalwart and energetic young men in their prime and have been exposed to the rigors and adversities of life being fishermen by occupation. It is not surprising, therefore, if they acted with boldness, daring and intrepidity because they could easily overpower and silence their young victim.

Appellants would also want to give the impression that because Rosie de Villa was an ago-go dancer and she admitted having drunk liquor before the incident, she might have consented to the rape committed against her. This posture is highly improbable and utterly incredible. On all fours with the case at bar on this point is the case of *People v. Soriano*, 35 SCRA 633, 30 October 1970, wherein We ruled, thus:

"Indeed, no woman would have consented to have sexual intercourse with two men - or three - *** in the presence of each other, unless she were a prostitute or as morally debased as one. Certainly, the record before

us contains no indication that Formacita, a 14-year old, *** can be so characterized. *** In fact, appellants could not even suggest any reason why Formacita would falsely impute to them the commission of the crime charged."

In the case at bar, there is not an iota of evidence to show that Rosie de Villa ever sold herself to the public. The fact that she is an ago-go dancer in a night club does not militate against her for ago-go dancing is merely dancing in the modern manner as seen every night in TV shows. It is undisputed that this girl of 15 did not even dance with customers. Besides, if she had consented to have sexual intercourse with the accused, then why should she be shouting "Tulungan n'yo ako, ayaw ko," to which cry Dumlao responded? The defense never attempted to explain why Dumlao appeared in the scene and why he apprehended them.

In their brief, the appellants quote a portion of the testimony of the complaining witness wherein she testified that she was not conscious of what was going on at the time the appellants allegedly committed the alleged sexual intercourse, which testimony they claim as casting more doubt on her credibility. Suffice it to state, however, that in her answer to the next succeeding question of the defense counsel, the point was clarified beyond all doubt, thus:

"Q. And if you do not know what are those things going on, how come that you testified before this Honorable Court that the three of them had used you one after the other?

A. Well, when they spank my abdomen that was the time I became conscious and I noticed the removal of my panty." (p. 63, t.s.n., 13 April 1970)

The appellants assail the testimony of prosecution witness Jose Dumlao, Jr. on the ground that if it is true that rape was being committed by Julius Clark followed by Jose Coderes, why did he have to wait until Coderes was through before he helped the girl? Jose Dumlao, Jr. satisfactorily explained this in his testimony. In answer to questions propounded by the court, he testified:

"Q. Why did you have to wait for Coderes to have sexual intercourse with the girl? Why did you not fire your gun after June Clark stood up?

A. I would like to see also what they are doing.

Q. But I thought you said a while ago that you responded to the call for help?

A. I responded but not immediately. For seeing that they are in the actual performance and I am single, I would like to see what they are doing." (pp. 28-29, tsn, 23 February 1970)

We believe that the above testimony of Dumlao is honest enough and is at the same time credible. He is indeed single and it was natural for him to be curious of what was going on. Appellants' contention that his actuations belie his alleged good intentions is beside the point, for whatever Dumlao's motives were, We cannot see how they would detract from the fact that he actually saw the two appellants rape the girl.

It is the appellants' contention that since Dumlao admitted that he was excited by the scene he saw, "then De Villa must have been cooperating all the way, otherwise, We cannot see why Dumlao would have to wait and enjoy the scene." Appellants lose sight of the fact that different individuals react differently to certain perceptions or even similar situations. To take an extreme example, some people are repelled by violence while others derive pleasure from it; some persons may manifest an aggressive or violent attitude while others may stalk away or cringe in mute fearful attitude. At any rate, in the instant case, although Dumlao testified that the rape was accompanied by the screams and struggles of the girl, the mere sight of sex and naked bodies would be sufficient to excite his sensibilities.

In the sum, appellants seek to impugn the credibility of the prosecution's witnesses by pointing out inconsistencies in the testimonies of the two (2) principal witnesses. The settled, long-standing rule where the issues raised hinge on the credibility of witnesses is for the appellate tribunal to give due respect to the assessment of facts made by the lower court,[8] said court having had the opportunity, not only of receiving the evidence, but also of observing the conduct and demeanor of the witnesses while testifying.[9] This rule should not be overturned unless there is a showing that in making the disputed factual findings, the trial court has overlooked or failed to consider certain facts of weight and importance that could have materially affected the conclusion reached in the case.[10]

In the instant case, there is no positive reason that would justify a reversal of the rule, the inconsistencies pointed as such appearing to be more apparent than real and absent any showing of motive that would have impelled the prosecution witnesses to testify falsely against appellants who are being indicted for a very serious and grave offense which might possibly send them to the execution chamber.

II. On the second assignment of error

Appellants state that the trial court erred in its findings of fact of the case, the same being directly and clearly in conflict with the evidence adduced at the trial. To prop this stance, appellants make an issue of the fact that the medico-legal certificate showed no findings of abrasions around the vaginal cleft, or spermatozoa inside the vagina thus negating the lower court's finding that rape was committed.

Appellants are in error. In the case of *People v. Cesario Salazar*, L-37701, October 30, 1979, where the appellant therein likewise emphasized the impossibility of the commission of the crime of rape because the medical certificate indicated that the hymen was negative for laceration or tear and the vaginal smear is negative for spermatocytes, We ruled that the absence of lacerations, abrasions or rashes in the genital organ of the victim that would indicate forcible sexual intercourse cannot definitely be a basis for concluding that a woman did not have sexual intercourse. As We said in the case of *People v. Canastre*, 82 Phil. 480, 483, "it is hard to believe that a young unmarried girl would make such a revelation and allow an examination of her private parts and thereafter permit herself to be the subject even of a public trial, if she was not motivated solely by a desire to have the culprits apprehended and punished. And the persuasive weight of this circumstance is such as to negative the importance of the testimony of Dr. Parreñas to the effect that there were no lacerations, abrasions or rashes in the genital organ of Benedicta that indicated forcible sexual intercourse."

Nor will the absence of spermatocytes from the specimen taken from the complainant's vaginal canal disprove the commission of the crime of rape. The important factor is not emission of the semen, but penetration. Well-settled is the rule in this jurisdiction that any penetration, however slight, and whether reaching the hymen or not, is sufficient to constitute the crime of rape.[11]

Appellants also assert that error was committed by the lower court in considering as evidence of the force committed on the person of complainant the abrasions found on her arms and waist. They stress the point that they found complainant lying on a wooden catwalk dead drunk and the abrasions on her body could have been caused by her falling on the ground.

Appellants' assertion finds no factual basis on the records. No evidence whatsoever appears in the records to show that Rosie de Villa ever sustained a fall, apart from the rape incident in question, at any time before she was medically examined. The appellants merely infer the same from their allegation that they found her "lying on a wooden catwalk" before they boarded her on the taxicab. This allegation not having been proven during the trial deserves no merit or consideration.

Conversely, Dr. Vicente C. Bacay, another expert witness presented by the defense, on cross-examination,

testified that the aforementioned abrasions found on the body of the complaining witness are vital findings which indicate that rape was committed:

"Q. And you also testify in the examination in chief that the first thing you do in the examination of the victim after securing her consent to the examination is to look for certain injury ... suffered on her person. In this particular case wherein the medical certificate issued by the attending physician there appears to be abrasions ... is that not one of the signs of rape which you have stated in your examination in chief?

A. As I said this is a vital finding in cases of rape especially those which are extra genital injury which an examining physician found is fresh in appearance.

ATTY. LLAMADO:

"Q. What is extra genital?

A. What we mean by extra genital, it does not mean it is confined around the area of the genital organ of a person. It would appear like the arm, the head, the front part of the body, the hip. Those are all the extra genital part of the human body, out of the genital organ." (pp. 53-54, t.s.n., 13 April 1970).

We, therefore, affirm as correct the finding of the trial court that the complaining witness sustained the aforementioned multiple abrasions on her arms and on her waist, which took five days to heal as per medical certificate, Exhibit "E", by reason of the force and violence inflicted upon her in the consummation of the multiple rapes committed against her.

III. On the third assignment of error

Appellants contend that the trial court erred in considering against them the aggravating circumstances of "nighttime" and "uninhabited place".

To buttress their particular stance that nighttime should not be considered against them, appellants maintain that the prosecution has not adduced evidence to prove that accused had planned to commit the alleged rape at the date and time of the incident; that no less than the complainant admitted she just met the accused; that nocturnity is not necessarily an aggravating circumstance in the commission of a crime; and where it is not evident that the defendant purposely sought nighttime, such circumstance should not prejudice the defendant.

The law provides that there are three (3) elements to be taken into account before the aggravating circumstance of nighttime and uninhabited place may be considered, to wit:

- (a) When it facilitated the commission of the crime; or
- (b) When especially sought for by the offender; or
- (c) When offender took advantage thereof for the purpose of impunity.

(U.S. vs. Billedo, 32 Phil. 574; People vs. Matbagon, 60 Phil. 887).

With respect to nighttime, the evidence adduced in the case at bar does not show that the scene or place of alleged crime facilitated commission of the crime. In the first place, there were houses within the 50-meter radius and that there were plenty of cars passing along and continuously illuminating the scene or place of alleged crime.

Similarly, accused could not have sought nighttime in committing the alleged crime if their purpose was to avoid being recognized or to save themselves against detection because it is clear from the evidence that the place where the alleged rape was committed was only four (4) meters from the road and there were plenty of cars passing at the time of alleged crime.

Appellants also strongly vociferate against the trial court's considering "uninhabited place" as an aggravating circumstance in the commission of the alleged crime. They contend that there is more than sufficient evidence and based on the testimony itself for the prosecution that the Tourist Spot or the place where the alleged rape was committed is not uninhabited because of the following facts established and uncontradicted:

- (1) There are houses within the 50 meter radius from the Tourist Spot.
- (2) Place where crime was allegedly committed only 4 meters from road and is continuously illuminated by cars oncoming from Subic and Olongapo City.
- (3) There were plenty of cars passing through during time of alleged crime.
- (4) Prosecution witness admits he was able to flag down a jeepney to call for a police right away. This is established by the fact that alleged crime was at 2:30 a.m. and testimony that at 3:00 a.m. parties were already at the Olongapo Police Station.

The Solicitor General completely agrees with the accused's asseveration that the trial court erred in considering against them the aggravating circumstances of "nighttime" and uninhabited place." We quote with approval portions of the observations taken by the Solicitor General apropos this third assigned error:

"Nighttime":

It does not appear from the evidence of the prosecution that the appellants purposely sought nighttime for the perpetration of the crime, or took advantage of it in order to facilitate its commission, or for the purpose of impunity. Nowhere in the records does it appear that the appellants had decided to rape Rosie de Villa earlier in the day then waited for the darkness of the night in order to consummate it. Their meeting with Rosie de Villa at 2:00 in the morning outside the Saulog Canteen was only a casual encounter and was purely accidental.

x x x (I)n the case at bar, since there is no evidence to show that the appellants herein had premeditated to rape Rosie de Villa, it is safe to presume that they conceived of raping her only shortly before its commission, or at that precise moment when they saw her walking home alone, as demonstrated by their subsequent acts of forcing her into a taxi and bringing her to Tourist Spot against her will.

x x x That the appellants in the case at bar had not taken advantage of the darkness of the night to facilitate the crime of rape is further shown by the uncontroverted fact on record that Tourist Spot which is only four (4) meters from the national highway, was illumined, on one side, by vehicles which were continuously passing by even while the complaining witness was being raped; and that, on the other side, there was the reflection of lights coming from Cubi Point, from the ships that were anchored near, and from the fishing boats. This was established by the testimony of prosecution witness Jose Dumlao.

"Uninhabited Place":

It has been established through the testimony of prosecution witness Dumlao that Tourist Spot is not an uninhabited place. His house is only 50 meters away from it. The Tourist Spot was established and so named by the Rotarians for people to stand and view the scenery of Grande Island (p. 4, tsn, 23 Feb. '70). It is V-shaped surrounded by a fence, and there is a gap or a passage way on one side where people, particularly the witness, go up and down everyday (pp. 20 and 26, t.s.n., *ibid.*) Moreover, the Tourist Spot is only four meters away from the national highway coming from Olongapo City, and going to Subic, and where vehicles were continuously passing by, even as the crime was being committed.

The house of Dumlao was inhabited by four people at the time, including himself (p. 27, tsn, *ibid.*), and it was sufficiently near the Tourist Spot for him to hear the screams of the complaining witness which enabled him to go to her rescue. x x x"

Re: Nighttime (Nocturnity):

In *People v. Matbagon*, 60 Phil. 888, 893, which was decided as early as 12 November 1934, the Supreme Court laid down the doctrine that nocturnity should be considered as an aggravating circumstance only when it appeared that it was especially sought by the offender or that he had taken advantage thereof in order to facilitate the commission of the crime or for the purpose of impunity. The Supreme Court went on to state that taking advantage of nighttime in order to facilitate the commission of the crime must be coupled with an intention to do so; and it held:

"In the case at bar, the accused neither sought the nighttime nor took advantage of it to commit the crime with greater facility or to escape. If he had hidden behind the tree and attacked the deceased without warning or availed himself of the darkness to prevent his being recognized or to escape, then nocturnity would have been an aggravating circumstance. If the accused in this case did not take advantage of the nighttime to commit the crime or to escape, then the darkness did not facilitate the commission of the offense. To take advantage of a fact or circumstance in committing a crime clearly implies an intention to do so, and one does not avail himself of the darkness unless one intended to do so." (Italics supplied)

Of equal relevance is the case of *People v. Boyles*, L-15308, May 29, 1964, 11 SCRA 89, where We ruled:

"The lower court appreciated nocturnity against the appellants solely on the basis of the fact on record that the crime was committed at about 5:00 o'clock in the morning. This particular finding can stand correction. By and of itself, nighttime is not an aggravating circumstance. It becomes so only when it is especially sought by the offender and taken advantage of by him to facilitate the commission of the crime to insure his immunity from capture (*People v. Alcala*, 46 Phil. 739; *People v. Matbagon*, 60 Phil. 887; *People v. Pardo*, 79 Phil. 658). Stated differently, in default of any showing or evidence that the peculiar advantages of nighttime was purposely and deliberately sought by the accused, the fact that the offense was committed at night will not suffice to sustain nocturnidad. It must concur with the intent or design of the offender to capitalize on the intrinsic impunity afforded by the darkness of night.

In the case presently on appeal, We note that other than the time of the crime, nothing else whatsoever suggests the aggravating circumstance of nighttime. Not one of the prosecution evidence, oral or documentary, makes the slightest indication that the protection of night's darkness was deliberately availed of by the appellants. In view of this deficiency in the case for the Government, We are constrained to disallow the said circumstance even as technically, it may have been accepted by them when they pleaded guilty on arraignment."

The above ruling that nocturnidad (to be appreciated as an aggravating circumstance) "must concur with the intent or design of the offender to capitalize on the intrinsic impunity afforded by the darkness of the night," was subsequently reiterated in *People vs. Condemena, et al.*, L-22426, May 29, 1968, 23 SCRA 910, and *People vs. Apduhan, Jr., et al.*, L-19491, August 30, 1968, 24 SCRA 798.

It is thus succinctly clear that absent any showing that the accused in the case at bar took advantage of nighttime in order to facilitate the commission of the crime of rape and failure of the prosecution to demonstrate that the accused intended to capitalize on the intrinsic impunity afforded by the darkness of the night, the appreciation of the aggravating circumstance of nighttime against the three accused must necessarily fail.

Re: Uninhabited Place (Despoblado):

Uninhabited place is aggravating when the crime is committed in a solitary place, where help to the victim is difficult and escape of the accused is easy, provided that solitude was purposely sought or taken advantage of to facilitate the commission of the felony.

In the case of *People v. Laoto*, 52 Phil. 402, the aggravating circumstance of uninhabited place which the court a

quo appreciated against the accused was rejected by Us for the reason that from the house of the deceased, "the place where the boat was could be seen, and his voice could be heard therein."

Likewise, the aggravating circumstance of uninhabited place was not accepted in the case of *People v. Aguinaldo*, 55 Phil. 610, as there was lack of evidence to show that the appellant sought the solitude of the place in order to better attain his purpose and that the place where the crime was committed was about 1 kilometer away from the house.

The case of *People v. Deguia*, 88 Phil. 520 also repudiated the appreciation of uninhabited place against the accused even when the nearest house to that of the offended party was 1 kilometer away because the appellants did not select the place where to better attain their objective without interference, or to secure themselves against detection and punishment.

In the light of the foregoing decisions and in the presence of uncontradicted evidence that the alleged scene of the offense is not uninhabited, there rises the inevitable conclusion that the aggravating circumstance of uninhabited place cannot be considered against the three accused-appellants in the case at bar.

IV. On the fourth and last assignment of error

Appellants contend that the trial court erred in convicting them of rape as charged in the informations, the evidence on record not being sufficient to prove the essential elements of the crime. They contend that, upon the evidence presented, the element of carnal knowledge has not been established so as to support a conviction beyond any reasonable doubt for not only were the testimonies of the principal prosecution witnesses contradictory and improbable but that complainant herself admits (a) she was not conscious of what was going on at the time of the alleged rape; (b) she did not notice any ejaculation; and (c) she was drunk at the time. Likewise, appellants assert that while it is true that in cases of rape rupturing of the hymen is not indispensable for conviction, it is, however, essential that there must be proof of some degree of entrance of the male organ within the labia of the pudendum and this, the prosecution clearly failed to do. Appellants maintain that the prosecution should establish the essential requisites of rape by clear and positive evidence not on inferences or dubious evidence.

Refuting the assertion of appellants, the Solicitor General emphatically states that all the elements of the crime of multiple rape have been proved beyond reasonable doubt against the appellants, to wit:

That the three appellants, Basilio Clark, Julius Clark, and Jose Coderes had carnal knowledge of Rosie de Villa, in succession and helping one another, employing force and intimidation, and against the consent of the complaining witness. To avoid repetitious arguments, they adopt their refutations to the first and second assignments of error in support of their stand.

As to the number of crimes committed by the appellants, each and everyone of them committed, and are guilty of three crimes of rape. Each of them is responsible, not only for the act of rape committed by the others, because each one of them cooperated in the consummation of the rape committed by the others, by acts without which it could not have been accomplished.

With regards to the participation of Basilio Clark, the complaining witness testified that he was the first one who raped her. That Dumlao testified that he did not see him do anything to the girl means that he did not see him rape her because at that time, he was still on his way up to the Tourist Spot. According to him, it took him around 30 minutes to reach the place because he was afraid, and he took precautionary measures. It is not true, however, that Dumlao stated that Basilio was not around while Julius and Jose were having intercourse with the girl, as appellants stated in their brief. Dumlao stated that he did not see Basilio Clark because of the tall grasses. He only

saw him when the two other appellants moved and he went closer to the girl. It is the contention of the Solicitor General, therefore, and to this We give our stamp of approval, that Basilio Clark is as guilty as his co-appellants herein.

The Solicitor General points to the existence of the generic aggravating circumstance of use of a motor vehicle which although not stated in the information was not objected to by the defense. It is undisputed that the accused brought the complaining witness to Tourist Spot in a taxicab. This was established by their declarations in court and also in their own admissions (pp. 94-98, 126-128, 147-149, t.s.n., 4 March 1971). The use of the motor vehicle facilitated the taking of the victim and her subsequent rape. Accordingly, the said aggravating circumstance should and must be considered and appreciated against the accused. (People vs. Collado, 60 Phil. 610; People vs. Cruz, 85 Phil. 577; People vs. Raquino, 17 SCRA 914; People vs. Jovellano, et al., 56 SCRA 156). We agree with the People's Counsel and hereby find that the generic aggravating circumstance of use of motor vehicle is present in the case and may be taken into account in the imposition of the penalty to the maximum period, absent any mitigating circumstance to offset the same.

In resume, We fully agree and, therefore, affirm the guilt and conviction beyond reasonable doubt of the three (3) accused for three separate crimes of rape committed by two or more persons charged under the three (3) informations filed against them jointly in Criminal Cases Nos. 13, 14 and 15, as defined under Article 335 of the Revised Penal Code as amended by Republic Act 2632 and Republic Act 4111 which provide for the penalty of reclusion perpetua to death. There being present the generic aggravating circumstance of use of a motor vehicle, the penalty that shall be imposed shall be the maximum period which is death.

The judgment of the court below now under automatic review which reads as follows:

"Wherefore, the court finds the accused Jose Coderes, Julius Clark and Basilio Clark guilty of rape committed by two or more persons, as defined and penalized under Article 335 of the Revised Penal Code, in Criminal Cases Nos. 13, 14 and 15, attended by the aggravating circumstance of nighttime and uninhabited place, and hereby sentences each of the said accused to suffer three (3) death penalties, to pay the offended party Rosie de Villa the sum of P5,000.00 as moral and exemplary damages and to be subsidiarily for the individual civil liability of each of his co-accused, to recognize the offspring that may be born as a consequence of the rapes committed in accordance with Article 283 of the New Civil Code, and to pay the costs proportionately.

SO ORDERED."

is hereby modified by eliminating or disregarding the aggravating circumstances of nighttime and uninhabited place, and in their place and stead consider and take into account the aggravating circumstance of use of a motor vehicle. The case against Julius Clark who, according to the records, died at the NBP Hospital in Muntinlupa during the pendency of this automatic review on July 17, 1979, is considered dismissed insofar as his criminal liability is concerned but his civil liability shall be taken from his estate.

In all other respects, the said judgment, being in accordance with the evidence and the law, should be affirmed.

WHEREFORE, IN VIEW OF ALL THE FOREGOING, the judgment imposed by the court a quo is hereby modified in that only the aggravating circumstance of use of a motor vehicle is attendant in the case, thereby imposing as it is hereby imposed upon the accused Jose Coderes and Basilio Clark the sentence of three (3) death penalties each. In view of the death of the accused Julius Clark, the case against him is hereby dismissed and he is discharged from criminal liability but his civil liability shall remain and be taken from his estate.

In all other respects, the judgment of the lower court is affirmed.

SO ORDERED.

Barredo, Makasiar, Concepcion, Jr., Fernandez, Guerrero, and De Castro, JJ., concur.

Fernando, C.J., concurs with the dissenting opinion of Justice Teehankee. In the absence of the required number of votes to affirm a death sentence, the penalty imposed must be three reclusion perpetuas. He likewise dissents from so much of the dispositive portion of the decision as would hold the estate of Julius Clark civilly liable.

Teehankee, J., dissents in a separate opinion.

Aquino, J., votes for the imposition of reclusion perpetua.

Abad Santos, J., on leave.

Melencio-Herrera, J., in the result.

[1] Information in Criminal Case No. 13 (People vs. Jose Coderes, et al.) Two (2) separate informations similar to this were filed against Basilio Clark and Julius Clark as principals by direct participation with Julius Clark and Jose Coderes, and Basilio Clark and Jose Coderes as principals by indispensable cooperation, respectively.

[2] Decision, Annex "A" of Appellant's Brief, pp. 1-2.

[3] Ibid., pp. 2-3.

[4] Ibid., pp. 4-5.

[5] Ibid., pp. 5-6.

[6] Ibid., pp. 6-7.

[7] Newton v. Carbery, 5 Cranch (C.C.) 626, 18 Fed. Cas. No. 10, 189 (at p. 128).

[8] People vs. Antonio, L-25845, Aug. 25, 1970, 34 SCRA 401; People vs. Bayongan, L-23658, April 26, 1967, 23 SCRA 237; People vs. Guevarra, L-24371, April 16, 1968, 23 SCRA 58; People vs. Diva, L-22946, April 29, 1968, 23 SCRA 332; People vs. Viñas, L-21756, Oct. 28, 1968, 25 SCRA 682; People vs. Sarangan, L-21757, Nov. 26, 1968, 26 SCRA 21; People vs. Pereto, L-20894, Dec. 29, 1967, 21 SCRA 1468; People vs. Alcantara, L-16832, Nov. 18, 1967, 21 SCRA 906.

[9] People vs. Pasiona, L-18295, Feb. 28, 1966, 16 SCRA 212, People vs. Pelago, L-24884, Aug. 31, 1968, 24 SCRA 1027; People vs. Ricaplaza, L-25856, April 29, 1968, 23 SCRA 374.

[10] People vs. Sales, L-29340, April 27, 1972, 44 SCRA 489; People vs. Dorado, L-23464, Oct. 31, 1969, 30 SCRA 53.

[11] People vs. Hernandez, 49 Phil. 980; People vs. Oscar, 48 Phil. 527.

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DISSENTING OPINION

TEEHANKEE, J.:

The evidence of record, to my mind, has not established the guilt of the accused beyond reasonable doubt. The testimony of the main eyewitness, Jose Dumlao, Jr. who took his time witnessing the two rapes allegedly committed by the roadside one after the other (and whose sensibilities were excited "by the mere sight of sex and naked bodies")^[1] before dramatically charging down the scene firing his gun three times in the air to apprehend the protagonists, is undeserving of credence. The complainant in turn was admittedly in an intoxicated state and not conscious of what was going on at the time of the alleged triple rape^[2], while her physical examination by the attending physician after the incident was negative of her having had "recent sexual contact"^[3] and of any abrasions or evidence of force as claimed by her.^[4] All this, plus evidence of some collusion and "intimate relations" between the complainant and her eyewitness to the rapes, Dumlao,^[5] entitle the accused to the benefit of the doubt and to an acquittal.

[1] Main opinion at pages 21-22.

[2] Idem, at page 21.

[3] Idem, at page 6.

[4] Idem, at page 19.

[5] Idem, at page 13.

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