

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
FERNANDO PERELLO, JR. (AT LARGE), JOSE MALIBIRAN, ALMARIO
HILARIO AND EXEQUIEL AUSTIN B. JOHNSON, JR., III, DEFENDANTS,
EX...**

G.R. No. L-33064. January 27, 1982

Ponente: AQUINO, J.

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AQUINO, J.:

Exequiel Austin Biliar Johnson, Jr., III, appealed from the decision of the Court of First Instance of Rizal, Makati Branch XV, convicting him of robbery with rape, sentencing him to death and ordering him to pay an indemnity of forty thousand pesos to the offended woman (Criminal Case No. 112-M [17303]).

Jose Malibiran and Almario Hilario, who in the same decision were convicted of robbery only, withdrew their appeal. The withdrawal was granted in this Court's resolutions of July 28, 1971 and January 4, 1977 (pp. 143 and 382, Rollo).

Prior to December 2, 1967, Remedios Vengco-Lim, 40, had met in her house at 926 Pasay Road, San Lorenzo Village, Makati, Rizal Leticia del Rosario, Zenaida Huergas and Carmen Navarro in connection with the sale of jewelry. At about noontime on that date, Carmen and Zenaida went to her residence supposedly to buy certain pieces of jewelry but because she was taking her afternoon nap, the two left without being able to talk with her.

The persons staying with Mrs. Lim in her residence were her six children, five house helpers and a driver. At about two-thirty in the afternoon Josefina Cabral came to deliver to her cousin, Mrs. Lim, the proceeds of the sale of jewelry. She talked with Mrs. Lim in the sala. Her children with their visitors were watching television in the adjoining studyroom.

While Mrs. Lim and Mrs. Cabral were engaged in conversation, the doorbell rang. Fermina Vibar, 16, a housemaid, opened the gate and saw a man who told her that he was a meter reader of the Manila Electric Company. She returned to the house and apprised Mrs. Lim that there was a Meralco employee at the gate.

In fact, the man (who was later identified by Mrs. Lim and Mrs. Cabral as Exequiel Austin B. Johnson, Jr., III, since he was called by his companion as Johnny) had followed Fermina and entered the house. He took a gun from an envelope which he was carrying and pointed it at Mrs. Lim and Mrs. Cabral and he warned them not to move because he was staging a holdup. He directed them to enter the studyroom on the left side of the sala and at the same time he waved at somebody outside. The second man entered the sala. He was brandishing a gun. He ordered the persons in the studyroom to lie down on the floor face down (pinadapa). Then, he disconnected the telephone.

Johnson asked Mrs. Lim to show him the safe. She led him to the master's bedroom on the second floor where the cabinet containing the safe was placed. He poked his gun at her back. She opened the safe at Johnson's behest. He took therefrom jewelry worth P33,000 and cash amounting to P7,000.

When Mrs. Lim was about to leave the bedroom, Johnson held her left arm, closed the door and at gunpoint ordered her to undress ("maghubad ka"). She refused to comply, knelt before Johnson and begged for mercy. He did not relent. He repeatedly kicked her on the left thigh, cocked his gun ("ikinasa"), pulled down her dress and panties, forced her to lie down and had sexual congress with her while his gun was pressed against her forehead (Exh. N. See p. 7, Record).

After the consummation of the coition, Johnson ordered Mrs. Lim to go to the ground floor and lie face down on the floor together with the other persons herded there who were guarded by Johnson's companion. He got from her the ring which she was wearing.

At that juncture, Mrs. Lim's driver and gardener, whom she had priorly requested to go to the Goldilocks Bakeshop to buy merienda, returned. They encountered at the gate Fernando Perello, Jr. who brought them to the studyroom (Exh. P and Q). Some minutes later, the driver and maids of her daughter's visitor arrived. They were also brought to the studyroom. Perello and Malibiran divested the persons inside the studyroom of their valuables.

After warning Mrs. Lim and the others not to move and not to report the incident to the authorities, the malefactors left. When Mrs. Lim's laundrywoman entered the studyroom, it was only then that she realized that the malefactors had gone. She went upstairs and discovered that the drawers and cabinets and her daughter's jewelry box had been ransacked. Clothes and other personal properties were scattered on the floor.

Since the telephone had been disconnected, Mrs. Lim repaired to the house of Mrs. David Serrano, her neighbor, and recounted to the latter what happened. Mrs. Serrano and Mrs. Lim reported the incident to the Makati police. Her statement was taken at five-forty-five in the afternoon of the same day, December 2.

On the following day, she reported the robbery with rape to Colonel Robustiano A. Joven of the Constabulary Metropolitan Command at Camp Crame (7 tsn February 14, 1968). She was examined by a Constabulary medico-legal officer, Doctor Miguel G. Zarraga, twelve days after the incident. He found that she had ecchymosis on the left arm and left thigh and contusion on the left thigh (Exh. W). However, she did not inform her husband immediately that she had been raped because she did not want to exacerbate his hypertension. He had suffered a stroke previously.

Suspects Perello and Malibiran were arrested on December 13, 1967. Police investigation disclosed that Almario Hilario was the driver of the Buick car which was used by the malefactors. He was arrested in the evening of December 13. On the basis of the statements taken by the police, Perello, Malibiran, Johnson, Hilario, Zenaida Huergas, Carmen Navarro and Leticia del Rosario were charged with robbery with rape. Johnson was arrested only on March 3, 1968.

While the trial was in progress, Perello jumped bail. His bond was confiscated. He has remained at large. Carmen Navarro is also at large. After the prosecution had rested its case, Leticia and Zenaida filed demurrers to the evidence. The trial court dismissed the case as to them for lack of evidence.

Johnson, 29, a jobless individual, testified that in the morning of March 4, 1968, or one day after his arrest, Makati policemen brought him to the South Cemetery and tortured him. He was brought back to the Makati police station in the afternoon and again subjected to third degree to make him confess to the crime imputed to him by Mrs. Lim. He was allegedly forced to sign his extrajudicial confession without having read it (Exh. V or 3-Johnson). Then, the police coerced him to ride in a jeep and he was brought to the house of somebody before whom he swore to his confession. (It was sworn to before Provincial Fiscal Benjamin H. Aquino).

When his sister visited him, he told her in the Visayan dialect that he had placed a letter inside his dirty pants. He stated in that letter that he signed his confession because he could no longer endure the maltreatment (Exh. 4).

Johnson testified that in the afternoon when the robbery with rape was committed in San Lorenzo Village he was in his house located at 2036 Manuel Araullo Street, Sta. Mesa, Manila. He denied any complicity in the robbery with rape.

Captain Gabriel Paile, the chief of the special operations group of the Makati police charged with the apprehension of the culprits, denied the alleged maltreatment imputed to him and his men by the accused.

The trial court regarded as voluntary the confessions of the accused (Exh. S, T and V). It did not give credence to the alleged maltreatment.

In Johnson's case, the trial court observed that the fifty-six questions and answers contained in his confession could be answered by him only, meaning that the answers could not have been fabricated by the investigator.

Furthermore, the trial court reasoned out that if it was true that Johnson told his brother, a doctor of medicine, that he was outrageously maltreated, then it was quite strange that the brother did nothing to secure redress for the tortured victim. The trial court said:

"Not even the father of the accused Johnson, who is connected with Kodak Philippines, had taken any step in behalf of his accused son. This attitude of the Johnson family proves that the accused Johnson III is an incorrigible and a black sheep, reason for which he was forsaken by the family and never even have been visited by his father in jail."

The trial court disbelieved Johnson's alibi. Without citing the legal provision applied, the trial court sentenced Johnson to death.

In this appeal, Johnson contends that the trial court erred in admitting his extrajudicial confession, in giving credence to Mrs. Lim's testimony on the alleged rape, in not holding that he had no motive to rob and rape Mrs. Lim, in using against him the supposed apathy of his family to his fate or plight, in not holding that he was not sufficiently identified by the prosecution witnesses nor implicated by his co-accused and in not holding that his guilt was not proven beyond reasonable doubt.

These contentions do not deserve serious consideration and do not warrant a reversal of the judgment of conviction.

Appellant, relying on *Miranda vs. Arizona*, 16 L. ed. 2nd 694, argues that his extrajudicial confession has no probative value because it was taken during custodial interrogation when he was not informed of his rights to remain silent and to have counsel and, moreover, it was given under duress.

The rule laid down in the *Miranda* case is now found in section 20 of the Bill of Rights which provides that "any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right", that "no force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him" and that any confession obtained in violation of section 20 shall be inadmissible in evidence.

We have repeatedly ruled that section 20 does not retroactively apply to confessions obtained prior to January 17, 1973 when the Constitution took effect (*Magtoto vs. Manguera*, L-37201-02, March 3, 1975 and two other cases, 63 SCRA 4; *People vs. Page*, L-37507, June 7, 1977, 77 SCRA 348, 352; *People vs. Peña*, L-36435, December 20, 1977, 80 SCRA 589, 595).

Ordinarily, a confession, as proof of a high order, is admissible in evidence because it is presumed to be voluntary. Before a confession can be set aside, both the confession and the reasons or motives given for its repudiation should be carefully scrutinized. It would be unsound practice to disregard a confession simply because

the accused repudiates it during the trial. (People vs. Dorado, L-23464, October 31, 1969, 30 SCRA 53, 57-58. See ruling in People vs. De los Santos, 93 Phil. 83, 92-93 that the law does not reject a confession when by force or violence an accused is compelled to tell the truth. That rule was followed in People vs. Villanueva, 98 Phil. 327, 335 and People vs. Prias and Flores, 109 Phil. 48, 56).

The planning and the commission of the robbery with rape are detailed in this manner in Johnson's confession, four signed copies of which were presented as Exhibits V, AA, BB and CC:

"Ito po (the crime) ay plinano ng mga babae, sina Zeny Huergas, si Susima Cortez, si Menchu at si Letty. Sila ang kumausap kay Fernando Perello, Jr. para huldapin ang bahay ni Mrs. Lim.

"Ako naman ay kinausap ni Fernando Perello, Jr. sa kalye Malabon, Manila, para panhikin ang bahay ni Mrs. Lim. Ang kinausap niya sa kalye Malabon ay ako, si Totoy Rubio, si Dodong. Pagkatapos naming pagusapan ang nakawang ito, ay pinuntahan namin si Mario Hilario para ipaalam sa kanya dahilan sa siya ang may sasakyang magagamit.

"Pumayag si Mario at kami ay nagkainuman pa sa bahay ni Mario. Dito namin plinano kung papaano namin gagawin ang nakawan. Napagkayarian namin na kami ay magpapanggap na taga Meralco.

"Nuong ika-2 ng Disiembre, 1967, isinagawa nga namin ang pagnakaw sa bahay ni Mrs. Lim. Kami ay sumakay sa kotse ni Mario pagkatapos niyang daanan kami sa kalye Malabon. Tumuloy na kami sa San Lorenzo Village, Makati, Rizal, at iniwan namin ang kotse sa di kalayuan sa bahay ni Mrs. Lim.

"Si Mario ay naiwan sa kotse at si Totoy. Ang pumunta sa bahay ni Mrs. Lim ay ako, si Dodong at si Perello. Si Junior Perillo ang siyang kumatok sa pinto na may bakal. Pagbukas ng pinto ay sinabi ni Junior Perillo na kami ay taga Meralco at titingnan lang namin ang metro.

"Pinapasok naman kami, at nang nasa loob na kami ay sinabi naming holdap ito sabay labas ng baril ni Junior Perello. Ako naman ay sumunod nang pumasok sa loob. Nagkanya-kanya na kaming trabaho. Ako ay pumanhik sa itaas na kasama si Mrs. Lim. Ang sabi ko sa kanya ay ilabas niyang lahat ang kanyang mga alahas. Pagkatapos ko siyang pilitin ay inilabas din niya ang mga alahas sa kabinet. (Answer to Question No. 9).

"Sinabihan ko si Mrs. Lim na humubad (maghubad) baka ikako nasa loob ng katawan niya ang mga alahas. Tumanggi siya, ngunit napilitan na siya (ng) suntukin ko siya sa hita. Tinanggal niya ang kanyang damit pambahay. Nawala ako sa aking sarili nang makita ko ang kanyang katawan. Sinabi ko na tanggalin niya ang kanyang pantie.

"Una ay tumanggi siya, pero sinuntok ko siya uli sa hita. Kaya tinanggal naman niya. Siya ay paupo na ang ayos. Bigla ko siyang kinabayo, matapos kong ibaba ang pantalon ko at panloob. Ipinasok ko ang aking pag-aari sa loob ng kanyang pag-aari.

"Naramdaman ko na lang na parang ako ay nabalik sa aking sarili. Tumayo ako at nauna ako sa kanyang umalis at bumaba. (Answer to Question No. 13)."

The above confession jibes in vital details with the testimonies of the prosecution witnesses on the perpetration of the robbery with rape.

We find that even if appellant's confession is disregarded, the prosecution's evidence proves his guilt beyond reasonable doubt. Mrs. Lim's testimony on the robbery with rape appears to be credible to any unbiased and fair-minded person. It is corroborated in some particulars by the other prosecution witnesses. Considering Mrs. Lim's social standing, it is hard to believe that she would concoct a rape charge and needlessly expose herself and her family to scandal and disgrace, not to mention the humiliation of having her private organ examined by a

stranger.

Appellant points to some inconsistencies and discrepancies in the evidence of the prosecution. They deal with minor matters which do not nullify the basic facts that Mrs. Lim was robbed and raped and which do not impair her credibility.

Johnson's contention that he was not sufficiently identified cannot be taken seriously. The robbery with rape was committed in the afternoon. He did not resort to any disguise. There could be no doubt as to his identity. It should be noted that in the complaint for robbery with rape filed in the municipal court of Makati on December 14, 1967, one Boy Johnson was already included as an accused and it was alleged that one Johnny raped Mrs. Lim. Malibiran and Perello implicated Boy Johnson in the robbery with rape.

Appellant's last assignment of error is that the trial court erred in imposing the death penalty. He argues that the imposable penalty is reclusion perpetua because he was not armed. On that contention, the Court's opinion is not unanimous.

The prosecution's evidence is conclusive on the fact that Johnson was armed. The statement in his confession that Perello was the only one armed is not credible. Johnson could not have cowed Mrs. Lim and her companions if he was not armed. Without his gun, he would not have been able to consummate easily the robbery with rape.

The testimony of the housemaid, who opened the gate, that Johnson was not armed is correct because Johnson had concealed his gun inside an envelope. The concealment was part of his stratagem to enter Mrs. Lim's residence as an electric meter reader or ostensibly with a legitimate motive.

The trial court convicted Johnson of robbery with rape, which is penalized by article 294(2) of the Revised Penal Code by reclusion temporal medium to reclusion perpetua. Effective August 15, 1975 (or subsequent to this case) Presidential Decree No. 767 imposes the penalty of reclusion perpetua to death "when the robbery accompanied with rape is committed with the use of a deadly weapon or by two or more persons". That increased penalty cannot be retroactively applied to this case.

In imposing the death penalty on Johnson, the trial court applied to him the penalty for qualified rape in article 335 of the Revised Penal Code, as amended by Republic Acts Nos. 2632 and 4111. The crime was aggravated by dwelling and craft. Can article 335 be applied to robbery with rape?

The Chief Justice and the herein ponente are of the opinion that article 335 cannot be applied to robbery with rape and that that offense should be penalized under article 294(2) in which case reclusion perpetua should be imposed. As the accused was charged with a crime against property, he should not be convicted of a crime against chastity, a private offense. (See *People vs. Olden*, L-27570-71, September 20, 1972, 47 SCRA 45.)

Justices Teehankee, Barredo and Makasiar believe that article 335 should be applied to this case (See *People vs. Carandang*, L-31012, August 15, 1973, 52 SCRA 259; *People vs. Mabag*, L-38548, July 24, 1980, 98 SCRA 730; *People vs. Arias*, L-40531, January 27, 1981, 102 SCRA 303; *People vs. Boado*, L-44725, March 31, 1981, 103 SCRA 607; *People vs. Cañizares*, L-32515, September 10, 1981; *People vs. Pizarra*, L-35915, October 30, 1981).

For lack of necessary votes, the death penalty cannot be imposed on Johnson.

The trial court's judgment should be modified. Johnson is sentenced to reclusion perpetua and ordered to pay an indemnity of twenty thousand pesos to Remedios V. Lim for having raped her and to pay her (solidarily with Malibiran and Hilario) the sum of forty thousand pesos as the value of the objects taken during the robbery. Costs de oficio.

SO ORDERED.

Fernando, C.J., Fernandez, Guerrero, De Castro, and Escolin, JJ., concur.

Teehankee, J., votes for affirmance of the death penalty in line with the separate opinion in *People vs. Carandang* 52 SCRA at page 272 et seq. and in the other cases cited in the Court's opinion.

Barredo, J., votes with J. Makasiar and J. Melencio-Herrera.

Makasiar and Melencio-Herrera, JJ., vote for the imposition of the death penalty. Abad Santos, J., in the result.

Plana, J., votes for affirmance of the death penalty. Ericta, J., dissents with the affirmance of the death penalty imposed by the lower court for the reasons stated by *People vs. Obtenalia* 34 SCRA 651 and other similar decisions. Concepcion, Jr., J., on leave.

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