

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELEE, VS. ANTONIO GAJETAS, ACCUSED-APPELLANT.

G.R. No. L-38325. February 24, 1981

Ponente: PER CURIAM: This is an automatic review of a death sentence imposed by the Court of First Instance of Romblon on Antonio Gajetas for the crime of attempted rape with homicide. The following facts as narrated by the trial court are admitted by the appellant in his brief, to wit: "The facts which are not in dispute are: Between 8 to 12 o'clock in the evening of January 6, 1972, Panchita Fosana Ramilo met her death through foul means. At about the time of her demise inside her own house in sitio Canlumay, barrio Tumingad, Odiongan, Romblon, only her two small daughters, the oldest aged 4 years and the youngest 1 year and 3 months, were her companions. Her husband, Gerundio Ramilo, was then in Batangas, having left for said place on December 9, 1971. The heinous deed was discovered at around 6 o'clock in the morning of January 7, 1972, when Miguel Ramilo, younger brother of Gerundio, was about to pass the house of the latter after coming from a place situated uphill and beyond said house, where he tethered his carabao to graze. Surprised at seeing bloodstains under the house, Miguel called out twice to his sister-in-law. There was no response from her. Instead, Miguel heard the voice of his niece, Necy Ramilo, the oldest daughter of the deceased, stating that her mother was already dead. He could not believe what he heard, so that he hurried upstairs and saw Panchita sprawled on her belly on the floor of the bedroom. He dared not touch the deceased. He immediately left the house to inform his wife and father about his discovery. Thereafter he proceeded to the municipal building to report the matter to the authorities. Policeman Manuel Fabroa was immediately ordered to conduct an investigation at the scene of the killing. Fabroa thus went to sitio Canlumay, accompanied by policemen Freddie Fojas and Miguel Ramilo. After reaching the site of the killing he made a rough sketch of what he saw, which served as the basis of the final sketch marked Exh. B. He also saw strands of hair, Exh. C. During his investigation, Fabroa learned from Necy that two persons went up the house the preceding night and that one of the intruders was afflicted with a skin disease locally called 'garit.' Necy did not, however, name names. "From Canlumay the deceased was brought to the house of her sister, Patria Fetalvero, at sitio Mainit, where a post-mortem examination was conducted by Dr. Julian Ornum in the afternoon of the same day, January 7th. This witness identified the certificate of death which he issued, marked Exh. A in the record. According to said document, the deceased died of 'Hemorrhage, due to Lacerated wounds on the right side of the neck.' The reverse side of Exh. A shows the post-mortem certificate stating that the late Panchita Fosana Ramilo sustained: 'Lacerated wound on the left deltoid muscles, measuring 1-1/2 inches long, one inch depth and 2 inches wide. Lacerated wound on the base of the right side of the head and upper part of the neck measuring 5 inches long, one inch depth and 1 inch wide. Lacerated wound on the middle right side of the neck measuring 6 inches long and 2-1/2 inches depth and 1-1/2 inches wide, cutting the cervical vertebrae, muscles and great vessels of the right side of the neck.' He testified that the most fatal injury is that located on the right side of the neck; and that a bolo or a scythe could have been used in inflicting the injuries above described." (Appellant's Brief, pp. 3-5; rollo, pp. 58-60.) On January 11, 1972, a complaint for "Attempted Rape with Double Murder" was filed against Antonio Gajetas and Francisco Gajetas in the Municipal Court of Odiongan, Romblon. After the preliminary investigation, first stage, was conducted Antonio and Francisco were arrested. During the second stage of the preliminary investigation the accused entered pleas which were recorded in Exhibit X as follows: "From the Municipal Jail the two accused ANTONIO GAJETAS and FRANCISCO GAJETAS were brought before this Honorable Court for arraignment. Before this Honorable Court, they were assisted by their counsel who was appointed Counsel de oficio. "The complaint was read and translated in the local dialect to the accused. They were asked and informed if they understand the complaint as read and translated and each of them responded in the affirmative. They were then asked one by one to enter their plea. "1. Accused Francisco Gajetas entered the plea of NOT GUILTY. "2. Accused Antonio Gajetas entered the following plea: (a) He admit to have killed Panchita Fosana but there was no

confederacy nor conspiracy in killing her; (b) That there was no treachery nor premeditation in the commission of the offense; (c) That he does not enter the plea of guilty to the Double Murder nor to the qualifying circumstances stated in the complaint. "That both accused waive their rights to the preliminary investigation (2nd stage) and respectfully request the Court to remand the case to the Court of First Instance of Romblon for immediate trial on the merits. "Odiongan, Romblon, Jan. 22, 1972. WITNESS TO THUMBMARK: (SGD.) ROGELIO FAJARITO Clerk His Thumbmark FRANCISCO GAJETAS (SGD.) ANTONIO GAJETAS Assisted by: (SGD) NEMESIO F. GANAN Counsel de Officio of both accused" When the case was elevated to the Court of First Instance, the following information was filed: "The undersigned, Assistant Provincial Fiscal of Romblon, accuses ANTONIO GAJETAS and FRANCISCO GAJETAS of the crime of Attempted Rape with Homicide committed as follows: "That on or about the 6th day of January, 1972, at around 9:00 o'clock in the evening, at sitio Canlumay, barrio Tumingad, municipality of Odiongan, province of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating with one another, by means of force and intimidation and with a scythe did then and there wilfully, unlawfully and feloniously embrace, attack and assault one Panchita Fosana Ramilo, a pregnant woman, with intent of having carnal knowledge of her, against her will, thus commencing the commission of the felony of Rape directly by overt acts but did not perform all the acts of execution which should have produced that crime by reason of some cause or accident other than their own spontaneous desistance. "That the accused did not succeed in their evil intent on account of the resistance offered by the offended party for which reason and in that occasion, the accused attacked and assaulted her with that deadly weapon, inflicting upon her, mortal injuries in different parts of her body that resulted in her death. "That the commission of the complex crime was attended with the aggravating circumstance that the offense was committed in the dwelling of the offended party, the latter not having given any provocation." When arraigned on June 1, 1972, both accused pleaded not guilty. However, on June 21 in the same year, Antonio offered to plead guilty provided that Francisco be excluded from the charge but the offer was not accepted by the prosecution so trial was held and thereafter the court rendered the following judgment: "WHEREFORE, the Court finds accused Antonio Gajetas guilty beyond reasonable doubt of the special complex crime of attempted rape with homicide, and pursuant to Article 335 of the Revised Penal Code, as amended, sentences him to death penalty, to indemnify the heirs of Panchita Fosana Ramilo in the amount of P12, 000.00, without subsidiary imprisonment, and to pay one-half of the costs. "The other accused, Francisco Gajetas, is hereby acquitted for failure of the prosecution to prove his guilt beyond reasonable doubt, with one-half of the costs charged de oficio, and his immediate release from custody hereby ordered." The only eye-witness to the crime who was presented by the prosecution was Neco Ramilo, a 3 to 4-year old daughter of the deceased. However, the evidence given by Neco was not given any weight by the trial court because, in its own words, "It is the considered opinion of this Court that this witness of tender years cannot be relied upon to prove the guilt of the herein accused. Firstly, there is no showing that this child witness understood the obligation of an oath; moreover, she was not sworn before she testified. Secondly, and more important, she has committed contradictions during the cross-examination." Nonetheless, the trial court convicted the accused on the basis of his extra-judicial confession which was corroborated by evidence of corpus delicti despite the protestations of the accused that his confession was involuntary and he had an alibi. The extra-judicial confession of Antonio consists of two pages. Page one is marked as Exhibit D and contains his signature on the left hand margin while page 2 is marked as Exhibit D-1 and contains his signatures at the bottom and also on the left hand margin. Reproduced in full, it reads as follows "STATEMENT OF ANTONIO GAJETAS TAKEN BY MSGT FORTUNATO T. TOME AT ODIONGAN, ROMBLON ON JANUARY 8, 1972 IN THE PRESENCE OF CPL PABLO FAMAITGA AS INTERPRETER: - QUESTION: You are being apprised your rights under the Constitution of the Philippines and after which you testify under oath as follows. Do you understand? ANSWER: Yes, sir. Q: - Do you voluntarily submit yourself for investigation without fear or favor? A: - Yes, sir. Q: - State your name and other personal circumstances? A: - Antonio Gajetas, 29 years of age, married, Grade II, farmer and a resident of Sitio Igcalape, Tumingad, Odiongan, Romblon. Q: - Why are you here in the Office of the Chief of Police at Odiongan, Romblon? A: - I went here, sir. Q: - Why did you come here? A: - To surrender, sir. Q: - Why are you surrendering? A: - Because I have killed Panchita Fosana. Q: - Why and where did you kill her? A: -

Because she refused to submit to me her body and I killed her at her house in Sitio Canlumay, Tumingad, Odiongan, Romblon. Q: - When did you kill Pansing Fosana? A: - At about 9:00 o'clock in the evening of January 6, 1972. Q: - Who was your companion if any? A: - Francisco Gajetas. Q: - What is your relation with Francisco Gajetas? A: - My younger brother, sir. Q: - Will you explain to this investigator how did you kill Pansing Fosana? A: - I went up the house together with my brother Paco and while inside the house I approached Pansing and asked from her to have a sexual intercourse but she refused so that I embraced her and kissed her. She wanted to free herself from my hold and right thereafter she ran to the window and took a bolo so that I rushed at her and took possession of the bolo. I then scythe her on her right neck. She fell down on the floor. I observed her no longer moving and believed already dead so that we left her. Q: - While you were kissing and asking for a sexual intercourse with Pansing Fosana, where was Francisco Gajetas? A: - At the door of the house. Q: - What if any did Francisco Gajetas do when you scythe Pansing Fosana on her neck? A: - Francisco Gejetas stabbed Pansing Fosana with a bolo hitting her on her left arm. Q: - Showing to you a scythe with blood stains on it, what has this to do with the scythe you have used in killing Pansing Fosana? A: - That is the same scythe sir. Q: - Who owned this scythe? A: - It is mine, sir. Q: - What kind of trouser were you wearing when you killed Pansing Fosana? A: - Khaki pants (burlington) Q: - If that pants of yours be shown to you can you still recognize it? A: - Yes, sir. Q: - Showing to you a khaki burlington long pants with bloodstains on it, what has this to do with the pants you wore when you killed Pansing Fosana? A: - Yes, sir. Q: - Why did you kill Pansing Fosana after you were not able to have sexual intercourse with her inspite of the force you have applied to her? A: - I fear that if she is still alive, she will report the matter to her husband. Q: - What was your plan before killing Pansing Fosana? A: - To abuse her only, sir. Q: - Do you know that Pansing Fosana is a married woman and if so who is her husband? A: - Yes, sir. Her husband is Gerondio Ramilo. Q: - And why did you plan to abuse her when you have already known that she is a married woman? A: - Because the husband is not around, sir. Q: - Do you want to tell us that before you left your house your intention was to go to the house of Pansing Fosana and abuse her, I am right? A: - Yes, sir. Q: - Who were in the house of Pansing Fosana aside from her that evening? A: - Her two (2) children. Q: - Was there a light inside the house when you killed Pansing Fosana? A: - Yes, sir, coming from the kerosene lamp. Q: - While you were holding, embracing and kissing Pansing Fosana, what was Francisco Gajetas doing, if any? A: - He was just looking at us. Q: - Where was he? A: - At the door, sir. Q: - Were you able to have sexual intercourse with Pansing Fosana that evening and if so, for how many times? A: - I was not able to have a sexual intercourse with her because she was moving. Q: - After you have scythe her and she fell down on the floor, did you not take advantage of her being injured already? A: - No more, sir. Q: - Are you willing to sign this statement of your free and voluntary will consisting of two (2) pages? A: - Yes, sir. (SGD) ANTONIO GAJETAS "SUBSCRIBED AND SWORN to before me this ___ day of January 1972 at Odiongan, Romblon. (SGD.) Illegible " To prove that his extra-judicial confession was extracted through violence and intimidation, Antonio testified that he and Francisco were brought by Sgt. Fortunato Tome to the PC barracks in the afternoon of January 7, 1972, where they were investigated; that when he and his brother refused to admit the crime, Tome struck him on the neck; that afterwards Tome brought him to a corner where he was severely beaten and then he and his brother were ordered to dance naked on top of a table and when they refused they were beaten with a 3-inch wide belt, hit with fist blows on the chest and kicked on several parts of the body; that he was forced to drink one-half glass of gin mixed with one-half glass of salt; that he was also ordered to swallow a lighted cigarette butt; that the beatings continued so he told the PC that to avoid punishment he was willing to admit having committed the crime although he was innocent; that he was then brought to the municipal building and lodged in its jail; that when he was asked if he committed the crime and answered in the negative he was repeatedly beaten by Patrolmen Manuel Fabroa and Freddie Fojas and five other persons who were drunk; that these atrocities caused him to admit the commission of the crime; and that when he appeared before Municipal Judge Cezar Maravilla he could not complain because he was being watched by Sgt. Tome. On the defense of alibi, Antonio testified that in the evening of January 6, 1972, he was at home together with his seven children and Francisco; that neither he nor Francisco left the house that night; that Francisco joined him in order to cut timber which was their occupation. Francisco corroborated Antonio's testimony and additionally Renato Gajetas, Antonio's 10-year old son testified that he, his father and brothers and his uncle

Francisco did not leave the house in the evening of January 6, 1972. Like the trial court, we cannot accept the claim of the appellant that his confession was not freely given and that he was elsewhere when the crime was committed. On the extra-judicial confession, both Sgt. Fortunato Tome and Pat. Manuel Fabroa testified that no force, intimidation or violence was used in the taking of the confession. No less than a defense witness, Corporal Pablo Famatiga declared that the accused gave their statements voluntarily. The relevant portion of his testimony is reproduced as follows: "Q. Did Antonio Gajetas and Francisco Gajetas voluntarily give their statements? A. Yes, sir. Q. Why do you say that they voluntarily gave their statements? A. When I was in the Office Sgt. Tome investigated and propounded the questions and they answered, 'yes, sir.' Q. Did Sgt. Tome exert force or violence to extract the statements from Antonio Gajetas and Francisco Gajetas? A. I have not seen or heard any threatening words or maltreatment. Q. What about from the side of Antonio Gajetas and Francisco Gajetas did you not hear them making any complaints about the way they are being investigated or treated by Sgt. Tome? A. Nothing. I am through with the witness. (pp. 11-12, t.s.n., Nov. 13, 1972.)" Moreover, we have Exhibit X, reproduced supra, where the appellant admitted having killed the deceased Panchita Fosana Ramilo. It has to be stressed that Exhibit X was signed by the appellant with the assistance of his counsel, Atty. Nemesio F. Ganan who did not ask that his clients be medically examined if it were true that they were coerced in giving their confessions. Then we have the appellant's offer to plead guilty provided that Francisco be dropped from the charge. And finally, the confession of the appellant shows no signs of suspicious circumstances which tend to cast a shadow on its integrity. It is replete with details which only the appellant could have supplied. All these circumstances belie the appellant's claim that his extra-judicial confession was not given voluntarily. As to the defense of alibi, it has to fail not only because it is contradicted by the appellant's confession which has been shown to be voluntary but also because it was not impossible for him to have committed the crime. For as the trial court said: "There is ample evidence to prove that the house of the deceased is only around 3-1/2 kilometers away from the houses of Antonio Gajetas, and that the distance can be negotiated in less than one hour by walking. There was therefore no physical impossibility for the accused to be at the scene of the crime at the time of its commission (People vs. Manabat, 100 Phil. 603; People vs. Limpo, L-13058, Jan. 28, 1961; People vs. Divinagracia, L-10611, Mar. 13, 1959; People vs. Raquel, 12 SCRA 441)." The killing of Panchita Fosana Ramilo by Antonio having been established there only remains to be considered his claim that he did not attempt to rape the deceased. The appellant claims that the first "requisite of an attempted felony, namely: That the offender commits overt acts to commence the perpetration of the felony (Aquino, The Revised Penal Code, 1961 ed., p. 90) was not present. He supports this claim by stating: "The information merely states '- - - embrace, attack and assault one Panchita Fosana Ramilo, a pregnant woman, with intent of having carnal knowledge of her against her will - - -' Embracing is not an overt act that commences the perpetration of rape or intent to have carnal knowledge of the victim. "Even the purported extra-judicial confession exhibits "D" and "D-1" only stated, '- - - I approached Pancing and asked from her to have a sexual intercourse but she refused so that I embraced her and kissed her - - -' Asking her to have a sexual intercourse is a mere showing of a desire, a mental expression not within the realm of Criminal Law. Embracing and kissing are not overt acts commencing the perpetration of rape. In order that the overt act may be considered as commencing the perpetration of a felony there must be a direct relation and intimate connection between the overt act and the felony intended to be committed. If the intention is to rape a woman the overt act may be putting the woman flat on bed or on the floor, or raising her dress, or forcibly removing her panty if she had one or mounting on top of her, or touching delicate parts of her body or exposing his private part or the like but not merely embracing and kissing because these are only unjust vexation or at most acts of lasciviousness which are still far from and cannot be considered as overt acts commencing the perpetration of rape." (Appellant's Brief, pp. 9-10; rollo, pp. 64-65.) The trial court did not err in considering appellant's act of embracing the victim with intent of having carnal knowledge of her against her will as an overt act commencing the perpetration of the crime of rape. For, were it not for the resistance offered by the victim, said act of the appellant would have naturally ended up with the consummation of his criminal objective of having carnal knowledge of the victim against her will which he expressly admitted in his extra-judicial confession. The offender's act need not be one of those mentioned by the appellant in order to be considered as an overt act commencing the perpetration of the crime of rape when the criminal objective of having carnal knowledge of the victim against her will is admitted or is sufficiently established and said act would naturally

end up with the consummation of said criminal objective unless frustrated by some external cause or by offender's voluntary desistance. Furthermore, even the mentioned acts would not be considered as overt acts commencing the perpetration of the crime of rape when it is sufficiently established that the man had no intention of having sexual intercourse with the woman without her consent. Of vital importance, therefore, is the criminal objective in performing the act. Was there intent to commit rape? The evidence shows there was. Hence the trial court correctly convicted the appellant of the crime of attempted rape with homicide. WHEREFORE, finding appellant Antonio Gajetas guilty beyond reasonable doubt of the crime of Attempted Rape with Homicide, the judgment under review is hereby affirmed in all respects. Costs de oficio. SO ORDERED. Barredo, Makasiar, Aquino, Concepcion, Jr., Fernandez, Guerrero, Abad Santos, De Castro and Melencio-Herrera, JJ., concur. Fernando, C.J., concurs with the separate opinion of Justice Teehankee that the penalty imposed should be reclusion perpetua. Thus the vote required for the imposition of the death penalty is insufficient. Accordingly, the accused Antonio Gajetas is sentenced to reclusion perpetua. SEPARATE DISSENTING OPINION TEEHANKEE, J.

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PER CURIAM:

This is an automatic review of a death sentence imposed by the Court of First Instance of Romblon on Antonio Gajetas for the crime of attempted rape with homicide.

The following facts as narrated by the trial court are admitted by the appellant in his brief, to wit:

"The facts which are not in dispute are: Between 8 to 12 o'clock in the evening of January 6, 1972, Panchita Fosana Ramilo met her death through foul means. At about the time of her demise inside her own house in sitio Canlumay, barrio Tumingad, Odiongan, Romblon, only her two small daughters, the oldest aged 4 years and the youngest 1 year and 3 months, were her companions. Her husband, Gerundio Ramilo, was then in Batangas, having left for said place on December 9, 1971. The heinous deed was discovered at around 6 o'clock in the morning of January 7, 1972, when Miguel Ramilo, younger brother of Gerundio, was about to pass the house of the latter after coming from a place situated uphill and beyond said house, where he tethered his carabao to graze. Surprised at seeing bloodstains under the house, Miguel called out twice to his sister-in-law. There was no response from her. Instead, Miguel heard the voice of his niece, Necy Ramilo, the oldest daughter of the deceased, stating that her mother was already dead. He could not believe what he heard, so that he hurried upstairs and saw Panchita sprawled on her belly on the floor of the bedroom. He dared not touch the deceased. He immediately left the house to inform his wife and father about his discovery. Thereafter he proceeded to the municipal building to report the matter to the authorities. Policeman Manuel Fabroa was immediately ordered to conduct an investigation at the scene of the killing. Fabroa thus went to sitio Canlumay, accompanied by policemen Freddie Fojas and Miguel Ramilo. After reaching the site of the killing he made a rough sketch of what he saw, which served as the basis of the final sketch marked Exh. B. He also saw strands of hair, Exh. C. During his investigation, Fabroa learned from Necy that two persons went up the house the preceding night and that one of the intruders was afflicted with a skin disease locally called 'garit.' Necy did not, however, name names.

"From Canlumay the deceased was brought to the house of her sister, Patria Fetalvero, at sitio Mainit, where a post-mortem examination was conducted by Dr. Julian Ornum in the afternoon of the same day, January 7th. This witness identified the certificate of death which he issued, marked Exh. A in the record. According to said document, the deceased died of 'Hemorrhage, due to Lacerated wounds on the right side of the neck.' The reverse side of Exh. A shows the post-mortem certificate stating that the late Panchita Fosana Ramilo

sustained: 'Lacerated wound on the left deltoid muscles, measuring 1-1/2 inches long, one inch depth and 2 inches wide. Lacerated wound on the base of the right side of the head and upper part of the neck measuring 5 inches long, one inch depth and 1 inch wide. Lacerated wound on the middle right side of the neck measuring 6 inches long and 2-1/2 inches depth and 1-1/2 inches wide, cutting the cervical vertebrae, muscles and great vessels of the right side of the neck.' He testified that the most fatal injury is that located on the right side of the neck; and that a bolo or a scythe could have been used in inflicting the injuries above described." (Appellant's Brief, pp. 3-5; rollo, pp. 58-60.)

On January 11, 1972, a complaint for "Attempted Rape with Double Murder" was filed against Antonio Gajetas and Francisco Gajetas in the Municipal Court of Odiongan, Romblon. After the preliminary investigation, first stage, was conducted Antonio and Francisco were arrested. During the second stage of the preliminary investigation the accused entered pleas which were recorded in Exhibit X as follows:

"From the Municipal Jail the two accused ANTONIO GAJETAS and FRANCISCO GAJETAS were brought before this Honorable Court for arraignment. Before this Honorable Court, they were assisted by their counsel who was appointed Counsel de oficio.

"The complaint was read and translated in the local dialect to the accused. They were asked and informed if they understand the complaint as read and translated and each of them responded in the affirmative. They were then asked one by one to enter their plea.

"1. Accused Francisco Gajetas entered the plea of NOT GUILTY.

"2. Accused Antonio Gajetas entered the following plea:

- (a) He admit to have killed Panchita Fosana but there was no confederacy nor conspiracy in killing her;
- (b) That there was no treachery nor premeditation in the commission of the offense;
- (c) That he does not enter the plea of guilty to the Double Murder nor to the qualifying circumstances stated in the complaint.

"That both accused waive their rights to the preliminary investigation (2nd stage) and respectfully request the Court to remand the case to the Court of First Instance of Romblon for immediate trial on the merits.

"Odiongan, Romblon, Jan. 22, 1972.

WITNESS TO THUMBMARK:
(SGD.) ROGELIO FAJARITO
Clerk

His Thumbmark
FRANCISCO GAJETAS

(SGD.) ANTONIO GAJETAS

Assisted by:

(SGD) NEMESIO F. GANAN
Counsel de Officio of both accused"

When the case was elevated to the Court of First Instance, the following information was filed:

"The undersigned, Assistant Provincial Fiscal of Romblon, accuses ANTONIO GAJETAS and FRANCISCO GAJETAS of the crime of Attempted Rape with Homicide committed as follows:

"That on or about the 6th day of January, 1972, at around 9:00 o'clock in the evening, at sitio Canlumay, barrio Tumingad, municipality of Odiongan, province of Romblon, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating with one another, by means of force and intimidation and with a scythe did then and there wilfully, unlawfully and feloniously embrace, attack and assault one Panchita Fosana Ramilo, a pregnant woman, with intent of having carnal knowledge of her, against her will, thus commencing the commission of the felony of Rape directly by overt acts but did not perform all the acts of execution which should have produced that crime by reason of some cause or accident other than their own spontaneous desistance.

"That the accused did not succeed in their evil intent on account of the resistance offered by the offended party for which reason and in that occasion, the accused attacked and assaulted her with that deadly weapon, inflicting upon her, mortal injuries in different parts of her body that resulted in her death.

"That the commission of the complex crime was attended with the aggravating circumstance that the offense was committed in the dwelling of the offended party, the latter not having given any provocation."

When arraigned on June 1, 1972, both accused pleaded not guilty. However, on June 21 in the same year, Antonio offered to plead guilty provided that Francisco be excluded from the charge but the offer was not accepted by the prosecution so trial was held and thereafter the court rendered the following judgment:

"WHEREFORE, the Court finds accused Antonio Gajetas guilty beyond reasonable doubt of the special complex crime of attempted rape with homicide, and pursuant to Article 335 of the Revised Penal Code, as

amended, sentences him to death penalty, to indemnify the heirs of Panchita Fosana Ramilo in the amount of P12, 000.00, without subsidiary imprisonment, and to pay one-half of the costs.

"The other accused, Francisco Gajetas, is hereby acquitted for failure of the prosecution to prove his guilt beyond reasonable doubt, with one-half of the costs charged de oficio, and his immediate release from custody hereby ordered."

The only eye-witness to the crime who was presented by the prosecution was Necy Ramilo, a 3 to 4-year old daughter of the deceased. However, the evidence given by Necy was not given any weight by the trial court because, in its own words, "It is the considered opinion of this Court that this witness of tender years cannot be relied upon to prove the guilt of the herein accused. Firstly, there is no showing that this child witness understood the obligation of an oath; moreover, she was not sworn before she testified. Secondly, and more important, she has committed contradictions during the cross-examination." Nonetheless, the trial court convicted the accused on the basis of his extra-judicial confession which was corroborated by evidence of corpus delicti despite the protestations of the accused that his confession was involuntary and he had an alibi.

The extra-judicial confession of Antonio consists of two pages. Page one is marked as Exhibit D and contains his signature on the left hand margin while page 2 is marked as Exhibit D-1 and contains his signatures at the bottom and also on the left hand margin. Reproduced in full, it reads as follows

"STATEMENT OF ANTONIO GAJETAS TAKEN BY MSGT FORTUNATO T. TOME AT ODIONGAN, ROMBLON ON JANUARY 8, 1972 IN THE PRESENCE OF CPL PABLO FAMAITGA AS INTERPRETER: -

QUESTION: You are being apprised your rights under the Constitution of the Philippines and after which you testify under oath as follows. Do you understand?

ANSWER: Yes, sir.

Q: - Do you voluntarily submit yourself for investigation without fear or favor?

A: - Yes, sir.

Q: - State your name and other personal circumstances?

A: - Antonio Gajetas, 29 years of age, married, Grade II, farmer and a resident of Sitio Igcalape, Tumingad, Odiongan, Romblon.

Q: - Why are you here in the Office of the Chief of Police at Odiongan, Romblon?

A: - I went here, sir.

Q: - Why did you come here?

A: - To surrender, sir.

Q: - Why are you surrendering?

A: - Because I have killed Pancing Fosana.

Q: - Why and where did you kill her?

A: - Because she refused to submit to me her body and I killed her at her house in Sitio Canlumay, Tumingad, Odiongan, Romblon.

Q: - When did you kill Pancing Fosana?

A: - At about 9:00 o'clock in the evening of January 6, 1972.

Q: - Who was your companion if any?

A: - Francisco Gajetas.

Q: - What is your relation with Francisco Gajetas?

A: - My younger brother, sir.

Q: - Will you explain to this investigator how did you kill Pancing Fosana?

A: - I went up the house together with my brother Paco and while inside the house I approached Pancing and asked from her to have a sexual intercourse but she refused so that I embraced her and kissed her. She wanted to free herself from my hold and right thereafter she ran to the window and took a bolo so that I rushed at her and took possession of the bolo. I then scythe her on her right neck. She fell down on the floor. I observed her no longer moving and believed already dead so that we left her.

Q: - While you were kissing and asking for a sexual intercourse with Pancing Fosana, where was Francisco Gajetas?

A: - At the door of the house.

Q: - What if any did Francisco Gajetas do when you scythe Pancing Fosana on her neck?

A: - Francisco Gejetas stabbed Pancing Fosana with a bolo hitting her on her left arm.

Q: - Showing to you a scythe with blood stains on it, what has this to do with the scythe you have used in killing Pancing Fosana?

A: - That is the same scythe sir.

Q: - Who owned this scythe?

A: - It is mine, sir.

Q: - What kind of trouser were you wearing when you killed Pancing Fosana?

A: - Khaki pants (burlington)

Q: - If that pants of yours be shown to you can you still recognize it?

A: - Yes, sir.

Q: - Showing to you a khaki burlington long pants with bloodstains on it, what has this to do with the pants you wore when you killed Pancing Fosana?

A: - Yes, sir.

Q: - Why did you kill Pancing Fosana after you were not able to have sexual intercourse with her inspite of the force you have applied to her?

A: - I fear that if she is still alive, she will report the matter to her husband.

Q: - What was your plan before killing Pancing Fosana?

A: - To abuse her only, sir.

Q: - Do you know that Pancing Fosana is a married woman and if so who is her husband?

A: - Yes, sir. Her husband is Gerondio Ramilo.

Q: - And why did you plan to abuse her when you have already known that she is a married woman?

A: - Because the husband is not around, sir.

Q: - Do you want to tell us that before you left your house your intention was to go to the house of Pancing Fosana and abuse her, I am right?

A: - Yes, sir.

Q: - Who were in the house of Pancing Fosana aside from her that evening?

A: - Her two (2) children.

Q: - Was there a light inside the house when you killed Pancing Fosana?

A: - Yes, sir, coming from the kerosene lamp.

Q: - While you were holding, embracing and kissing Pancing Fosana, what was Francisco Gajetas doing, if any?

A: - He was just looking at us.

Q: - Where was he?

A: - At the door, sir.

Q: - Were you able to have sexual intercourse with Pancing Fosana that evening and if so, for how many times?

A: - I was not able to have a sexual intercourse with her because she was moving.

Q: - After you have scythe her and she fell down on the floor, did you not take advantage of her being injured already?

A: - No more, sir.

Q: - Are you willing to sign this statement of your free and voluntary will consisting of two (2) pages?

A: - Yes, sir.

(SGD) ANTONIO GAJETAS

"SUBSCRIBED AND SWORN to before me this __ day of January 1972 at Odiongan, Romblon.

(SGD.) Illegible "

To prove that his extra-judicial confession was extracted through violence and intimidation, Antonio testified that he and Francisco were brought by Sgt. Fortunato Tome to the PC barracks in the afternoon of January 7, 1972, where they were investigated; that when he and his brother refused to admit the crime, Tome struck him on the neck; that afterwards Tome brought him to a corner where he was severely beaten and then he and his brother were ordered to dance naked on top of a table and when they refused they were beaten with a 3-inch wide belt, hit with fist blows on the chest and kicked on several parts of the body; that he was forced to drink one-half glass of gin mixed with one-half glass of salt; that he was also ordered to swallow a lighted cigarette butt; that the beatings continued so he told the PC that to avoid punishment he was willing to admit having committed the crime although he was innocent; that he was then brought to the municipal building and lodged in its jail; that when he was asked if he committed the crime and answered in the negative he was repeatedly beaten by Patrolmen Manuel Fabroa and Freddie Fojas and five other persons who were drunk; that these atrocities caused him to admit the commission of the crime; and that when he appeared before Municipal Judge Cezar Maravilla he could not complain because he was being watched by Sgt. Tome.

On the defense of alibi, Antonio testified that in the evening of January 6, 1972, he was at home together with his seven children and Francisco; that neither he nor Francisco left the house that night; that Francisco joined him in order to cut timber which was their occupation. Francisco corroborated Antonio's testimony and additionally Renato Gajetas, Antonio's 10-year old son testified that he, his father and brothers and his uncle Francisco did not leave the house in the evening of January 6, 1972.

Like the trial court, we cannot accept the claim of the appellant that his confession was not freely given and that he was elsewhere when the crime was committed.

On the extra-judicial confession, both Sgt. Fortunato Tome and Pat. Manuel Fabroa testified that no force, intimidation or violence was used in the taking of the confession. No less than a defense witness, Corporal Pablo Famatiga declared that the accused gave their statements voluntarily. The relevant portion of his testimony is reproduced as follows:

"Q. Did Antonio Gajetas and Francisco Gajetas voluntarily give their statements?

A. Yes, sir.

Q. Why do you say that they voluntarily gave their statements?

A. When I was in the Office Sgt. Tome investigated and propounded the questions and they answered, 'yes, sir.'

Q. Did Sgt. Tome exert force or violence to extract the statements from Antonio Gajetas and Francisco Gajetas?

A. I have not seen or heard any threatening words or maltreatment.

Q. What about from the side of Antonio Gajetas and Francisco Gajetas did you not hear them making any complaints about the way they are being investigated or treated by Sgt. Tome?

A. Nothing.

I am through with the witness.

(pp. 11-12, t.s.n., Nov. 13, 1972.)"

Moreover, we have Exhibit X, reproduced supra, where the appellant admitted having killed the deceased Panchita Fosana Ramilo. It has to be stressed that Exhibit X was signed by the appellant with the assistance of his counsel, Atty. Nemesio F. Ganan who did not ask that his clients be medically examined if it were true that they were coerced in giving their confessions. Then we have the appellant's offer to plead guilty provided that Francisco be dropped from the charge. And finally, the confession of the appellant shows no signs of suspicious circumstances which tend to cast a shadow on its integrity. It is replete with details which only the appellant could have supplied. All these circumstances belie the appellant's claim that his extra-judicial confession was not given voluntarily.

As to the defense of alibi, it has to fail not only because it is contradicted by the appellant's confession which has been shown to be voluntary but also because it was not impossible for him to have committed the crime. For as the trial court said: "There is ample evidence to prove that the house of the deceased is only around 3-1/2 kilometers away from the houses of Antonio Gajetas, and that the distance can be negotiated in less than one hour by walking. There was therefore no physical impossibility for the accused to be at the scene of the crime at the time of its commission (People vs. Manabat, 100 Phil. 603; People vs. Limpo, L-13058, Jan. 28, 1961; People vs. Divinagracia, L-10611, Mar. 13, 1959; People vs. Raquel, 12 SCRA 441)."

The killing of Panchita Fosana Ramilo by Antonio having been established there only remains to be considered his claim that he did not attempt to rape the deceased.

The appellant claims that the first "requisite of an attempted felony, namely: That the offender commits overt acts to commence the perpetration of the felony (Aquino, The Revised Penal Code, 1961 ed., p. 90) was not present. He supports this claim by stating:

"The information merely states ' - - - embrace, attack and assault one Panchita Fosana Ramilo, a pregnant woman, with intent of having carnal knowledge of her against her will - - - ' Embracing is not an overt act that commences the perpetration of rape or intent to have carnal knowledge of the victim.

"Even the purported extra-judicial confession exhibits "D" and "D-1" only stated, ' - - - I approached Pancing and asked from her to have a sexual intercourse but she refused so that I embraced her and kissed her - - - ' Asking her to have a sexual intercourse is a mere showing of a desire, a mental expression not within the realm of Criminal Law. Embracing and kissing are not overt acts commencing the perpetration of rape. In order that the overt act may be considered as commencing the perpetration of a felony there must be a direct relation and intimate connection between the overt act and the felony intended to be committed. If the intention is to rape a woman the overt act may be putting the woman flat on bed or on the floor, or raising her dress, or forcibly removing her panty if she had one or mounting on top of her, or touching delicate parts of her body or exposing his private part or the like but not merely embracing and kissing because these are only unjust vexation or at most acts of lasciviousness which are still far from and cannot be considered as overt acts commencing the perpetration of rape."

(Appellant's Brief, pp. 9-10; rollo, pp. 64-65.)

The trial court did not err in considering appellant's act of embracing the victim with intent of having carnal knowledge of her against her will as an overt act commencing the perpetration of the crime of rape. For, were it not for the resistance offered by the victim, said act of the appellant would have naturally ended up with the consummation of his criminal objective of having carnal knowledge of the victim against her will which he expressly admitted in his extra-judicial confession.

The offender's act need not be one of those mentioned by the appellant in order to be considered as an overt act commencing the perpetration of the crime of rape when the criminal objective of having carnal knowledge of the victim against her will is admitted or is sufficiently established and said act would naturally end up with the consummation of said criminal objective unless frustrated by some external cause or by offender's voluntary desistance. Furthermore, even the mentioned acts would not be considered as overt acts commencing the perpetration of the crime of rape when it is sufficiently established that the man had no intention of having sexual intercourse with the woman without her consent. Of vital importance, therefore, is the criminal objective in performing the act. Was there intent to commit rape? The evidence shows there was. Hence the trial court correctly convicted the appellant of the crime of attempted rape with homicide.

WHEREFORE, finding appellant Antonio Gajetas guilty beyond reasonable doubt of the crime of Attempted Rape with Homicide, the judgment under review is hereby affirmed in all respects. Costs de oficio.

SO ORDERED.

Barredo, Makasiar, Aquino, Concepcion, Jr., Fernandez, Guerrero, Abad Santos, De Castro and Melencio-Herrera, JJ., concur.

Fernando, C.J., concurs with the separate opinion of Justice Teehankee that the penalty imposed should be reclusion perpetua. Thus the vote required for the imposition of the death penalty is insufficient. Accordingly, the accused Antonio Gajetas is sentenced to reclusion perpetua.

SEPARATE DISSENTING OPINION

TEEHANKEE, J.:

I grant the accused the benefit of the doubt. His extra-judicial confession constitutes the only basis for his conviction and his statements therein indicate that he spontaneously desisted from his intent to abuse her for even after he had felled her with a scythe and she had fallen down on the floor he "did not take advantage of her being injured already" (at page 8, main opinion). He should therefore be convicted only for the simple crime of homicide (not the complex one of attempted rape with homicide) and sentenced accordingly with the benefits of the Indeterminate Sentence Act.

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