

EUSEBIO BABANTO, PETITIONER, VS. HONORABLE MARIANO A. ZOSA, PRESIDING JUDGE, BRANCH III, COURT OF FIRST INSTANCE OF MISAMIS OCCIDENTAL, ET AL., RESPONDENTS.

G.R. No. L-32895. February 28, 1983

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

The petitioner who had been charged with the offense of rape punishable under Art. 335 of the Revised Penal Code questions the decision of the Court of First Instance of Misamis Occidental convicting him of the lesser offense of qualified seduction.

The complaint states:

"The undersigned complainant after being duly sworn to in accordance with law, accused Eusebio Babanto of the crime of Rape, committed as follows:

That on or about the 24th day of October, 1969, in the town of Oroquieta, province of Misamis Occidental, Philippines, and within the jurisdiction of this Honorable Court, the said accused abusing his position as a policeman of Oroquieta and taking advantage of the night time and of the fable-minded (sic) condition of the complainant who is of tender age of 13, with the use of his service firearm and by means of violence and intimidation, did then and there willfully, (sic) unlawfully and feloniously have carnal knowledge of the undersigned complainant Leonida Dagohoy, against her will inside the ABC Hall which happen to be darked. (sic)

Contrary to Art. 355 of the Revised Penal Code as amended by Republic Act No. 4111, with the aggravating circumstances of (a) night time and (b) abuse of public position." (Original Records, p. 1).

The trial court did not find the accused guilty of the rape charged. Instead, it found him guilty of the lesser offense of qualified seduction. The trial court opined that considering the evidence on record, accused Babanto actually had sexual intercourse with complainant Leonida Dagohoy but that such sexual intercourse was not committed through the use of any violence or intimidation. The dispositive portion of the decision reads:

". . . the Court finding the accused guilty beyond reasonable doubt of the crime of Qualified Seduction, he is hereby punished to suffer imprisonment of from SIX (6) MONTHS and ONE (1) DAY to FOUR (4) YEARS and TWO (2) MONTHS of Prison Correccional in its minimum and medium periods; to indemnify the offended girl in the amount of P3,000.00; to recognize the offspring which may be born out of the crime committed, there being no positive proof that he was castrated, and if castrated the castration was successful, his uncorroborated statement was not enough; to suffer the other accessory penalties provided for by law; and to pay the costs. His dismissal from the service is strongly recommended." (Original Records, p. 94).

A motion for reconsideration filed by the accused-petitioner was denied by the trial court. Hence, this petition.

The Solicitor General in a manifestation filed on February 6, 1971 before this Court shares the petitioner's view

that under the complaint, quoted earlier, the petitioner could not be legally convicted of the lesser offense of qualified seduction.

We agree with this statement of Justice Felix Q. Antonio, the then Solicitor General.

Under Article 337 of the Revised Penal Code, the elements of qualified seduction are: (1) the offended party is a virgin; (2) she must be over 12 and under 18 years of age; (3) the offender has sexual intercourse with her; and (4) the offender is a person in public authority, priest, house servant, domestic, guardian, teacher, one entrusted with the education or custody of the offended party, or a brother or ascendant of the latter.

The complaint alleged that the accused abused his position as a policeman, that Leonida Dagohoy was of the tender age of 13, and that the accused had carnal knowledge of the complainant. However, there is no allegation that the complainant was a "virgin". It is true that virginity is presumed if the girl is over 12 and under 18 years of age, is unmarried and of good reputation. The presumption notwithstanding, virginity is still an essential element of the crime of qualified seduction and must be alleged in the complaint.

A conviction for the crime of qualified seduction without the allegation of virginity would violate the petitioner's right to be informed of the nature and cause of the accusation against him. (Sec. 1[c], Rule 115, Rules of Court; Sec. 1[17], Art. III, 1935 Constitution; Section 1(19), Art. IV, Constitution; *People v. Castro*, 58 SCRA 473; *People v. Ramirez*, 69 SCRA 144).

In the same manifestation, the Solicitor General however recommends ". . . that the merits of the case be certified to the proper appellate court for review as the evidence may sustain a finding of guilt of the crime of RAPE."

As a matter of correct procedure, this case should have been raised to the Court of Appeals in a regular appeal, instead of the accused coming to the Supreme Court directly.

As pointed out by the Solicitor General in the manifestation filed on February 6, 1971, "after all, by this Petition for Review, petitioner in effect is appealing from the judgment of conviction." The then Solicitor General, Justice Felix Q. Antonio quoted the court's impressions of the testimonies of witnesses as follows:

"(a) Antonia Simbajon Dagohoy

". . . On further investigation, she was able to pry from her that she was sexually abused by a man, a certain policeman by the name of Eusebio Babanto.

"(b) Sida Ranudo

"Sometime after January 15, 1970, Eusebio Babanto passed by her house and dropped in and asked her what the girl (Leonida) told her. She told Babanto that Leonida said that he brought her to the ABC Hall and had her sit while he (Babanto) placed his gun on the second tier of the grandstand; spread papers on the cement floor and let her lie on the paper, while he (Eusebio Babanto) took off his trousers. When the penis of Babanto stood erect, Babanto mounted her and she exclaimed ouch! ouch!

"Babanto admitted this narration to be true. In fact she told Babanto if it is true; why did he not surrender and confess. Babanto in turn told her that he will not. It would be shameful as he is a police officer.

"(c) Leonida Dagohoy (victim)

"At dawn of October 24, 1969 she was in the market of Oroquieta sitting leisurely. While thus sitting, Eusebio Babanto, a policeman, came and held her by the right hand at the same time saying: 'I will bring you to the municipal building.' She accompanied and went along with him because she was being held. But they did not reach the municipal building because Eusebio Babanto brought her to the ABC Hall. The hall was empty and there was nobody in. It was dark. In the ABC Hall, Eusebio Babanto made her lie down face upward. Then he

lifted her dress and pulled down her pantie. She felt pain in her vagina when his penis penetrated her sexual organ. She cried. He completed the act, stood up and left her; told her that if she tells her parents, he will shoot her. Eusebio Babanto was in uniform and with a side arm.

"She did not shout because he held her mouth. After Babanto left her, she put on her pantie back and felt her vagina was bleeding. She was then wearing a blue dress. When morning came, she took a bath and washed her pantie.

"When Babanto left her that dawn in the ABC Hall, she went to the seashore. She did not report to her parents because she was afraid of Eusebio Babanto when he said that he will kill her if she tells her parents. But eventually her parents came to know of what happened to her that she was abused because they investigated her. Ultimately, she confessed to them. So, they brought her to the hospital and had her examined by a doctor."

When the accused filed his brief on April 2, 1971, he ignored the factual considerations raised by the Solicitor General and insisted on an acquittal based on the error in his conviction for qualified seduction.

Considering that the penalty for rape is reclusion perpetua which is within our appellate jurisdiction and that no useful purpose would be served by referring this case to the Court of Appeals only to have it return to us from that court, we decided to fully review the entire records, which we ordered transmitted from the trial court, and to go into all aspects of the case.

On June 4, 1971, the Solicitor General repeated his earlier stand that the petitioner cannot be convicted for the crime of qualified seduction under the information filed against him, however under the circumstances of the case, he can be convicted of rape. The Solicitor General recommended "that the merits of the criminal case be certified for review by the proper appellate court and petitioner-accused be not discharged and instead be made to pursue his Petition for Review in the form of an ordinary appeal."

On June 22, 1971, we issued a Resolution informing the petitioner that "he may file a reply to the said memoranda (of the Solicitor General) within 10 days from notice hereof, if he so desires."

The petitioner opted to be silent.

The records show that complainant Leonida Dagohoy was a thirteen year old girl at the time of the commission of the alleged rape. Leonida was not a normal 13 year old girl because, while she was able to reach Grade One, she was of considerably low mentality. She also had a peculiar trait of going out during nighttime without her parents' consent. As a child, her mother said that "she used to go out during night just to pick up some fruits falling from our neighbors. When she is already matured she used to go with me to the public market alleging that she will help me watch my store. (TSN, March 10, 1970, p. 4) She would escape from their house from 2:00 o'clock AM until dawn. (TSN, March 10, 1970, p. 5) Because of this peculiarity, her mother built a cage for Leonida to prevent her from going out. (TSN, March 10, 1970, p. 5.)

Leonida narrated the incident of October 24, 1969 wherein accused petitioner allegedly raped her as follows: At dawn of October 24, 1969, she was seated in the market located at Oroquieta City, when the accused petitioner Babanto, a policeman approached her and held her right hand. Babanto told her that they will go to the municipal building and she went with him because he held her. However, she was not brought to the municipal hall. Instead Babanto brought her to the ABC Hall. There was no one in the ABC Hall and it was dark. When they arrived at the ABC Hall, Babanto made her lie down with her face upward. While she was in this position, Babanto lifted up her dress and took away her panty. While Babanto was lifting her dress and removing her panty, she kicked him but he held her down. Then Babanto exposed his penis, laid down on top of her and commenced the sexual act. She felt pain in her vagina as his penis penetrated. She could not shout when she was being abused because Babanto covered her mouth, Leonida then cried. After the sexual act Babanto told her that if she was going to tell

her parents he was going to shoot her. Thereafter, Babanto left her. While putting back her panty, she noticed her vagina "bloodbleeding." The following morning she took a bath and washed her panty smeared with blood. She did not report the incident to her parents because of the threat on her life by Babanto. At the time of the incident, Babanto was in uniform with a sidearm. Leonida knew him well. She said that Babanto's daughter was her friend. (TSN, April 1, 1970, pp. 63-70).

Leonida's mother who, after observing her to be weak and quite feverish while in the cage where she was placed, asked her "if she was not abused by any man." According to her mother, she had to ask her for the second time before Leonida admitted that she was abused sexually by a man whom she identified as a certain policeman, Eusebio Babanto. (TSN, March 10, 1970, pp. 5-6)

Leonida's mother then informed her husband about Leonida's story. They decided to have Leonida medically examined. Leonida was examined on October 27, 1969 by Dr. German Garcia, Chief of the Provincial Hospital who issued a medical certificate, (Exh. "B") with the following findings:

"old healed lacerations of Hymen at nine and three o'clock. Vaginal opening easily admit one finger but admit two fingers with ease."

The accused-petitioner denied the rape charge. His own version of the incident of March 24, 1969 is as follows: On the night of March 24, 1969, he together with Patrolman Apos was assigned to patrol Washington Street from 12:00 to 6:00." While on patrol, at about 1:00 o'clock a.m., he and Apos noticed a girl and a boy going to the public market coming from the Filipino bakery. They followed the said boy and girl to find out who those persons were. They reached up to the police station where they saw the girl sitting there alone without the boy. The girl turned out to be Leonida Dagohoy, the complainant. They investigated the girl—asked her name and her address. The girl however, did not answer but instead she lowered her hand. They decided to bring Leonida to the municipal building because she is only roaming and in order that she can be protected. While they were walking side by side, Babanto asked her again as regards her name, residence, name of her parents, but she did not answer and instead she would only lower her hand. At this time they were within the premises of the Southern Capital Colleges with Patrolman Apos behind them, about "five fathoms (sic) from them." While walking towards the municipal building, they met a patrol car. In the patrol car were Patrolman Tabamo and Sgt. Bongabong of the police force of Oroquieta City. The patrol car stopped in front of Patrolman Tabamo (sic) and they "were conversing and I who was a bit ahead stopped with the intention to listen to what they were conversing." Leonida proceeded to walk and he followed her. At this time Babanto was four fathoms more or less behind Leonida. Leonida proceeded to the ABC Hall. Since the accused was not able to overtake her, he proceeded to the municipal building. Upon reaching the municipal building Babanto verified from the guard, a certain Saniel if a girl passed by there. Saniel told him there was none. Patrolman Apos who arrived later asked also about the girl. He then, recorded the "event" in the police blotter, after which he together with Apos went back on patrol. They never saw Leonida during the duration of their assignment. Babanto said that before this incident, he never knew complainant Leonida (TSN, April 27, 1970, pp. 96-102).

Babanto's foregoing testimony was corroborated by Patrolman Apos. Patrolman Saniel, the guard at that time in the municipal building and Ricardo Sambo, a detained prisoner at the municipal building confirmed that at about 1:00 o'clock dawn of October 24, 1969, Babanto, arrived at the municipal building and reported about a girl (Leonida) whom he arrested in the public market with Patrolman Apos but who was able to run away.

Given the two versions of the incident, the trial court gave credence to the prosecution's version. The trial court held:

"From the declaration of the girl, the Court can not conceive of any probability that the intercourse took place

with violence or intimidation although the Court believes that the accused had sexual relation with the complaining witness at the ABC Hall of Oroquieta, Misamis Occidental. The testimony of the girl herself who declared on the abuse is very clear that the accused at the public market on the pretext to protect her ordered her to come along with him to the municipal building but instead to the ABC Hall near the municipal building. By the way, the ABC Hall is an annex to the municipal building. In the ABC Hall the accused had sexual intercourse with her. The only intimidation that can be gathered from the declaration of the complaining witness is what the accused hurled at her that he will kill her if she tells her parents after the act.

It was very well said by Pacheco 'that rape is not to be presumed, Consent, not force, is the common origin of the act between man and woman. Strong evidence must be produced to prove rape.' In this instant case, the elements of rape were not proved although as stated above, the Court is positive that the accused had sexual intercourse with Leonida Dagohoy, a 13 year-old, feeble minded, illiterate girl, as cooperative and willing, who submitted herself to the desires of the accused as a police officer.

The Court does not give any credit whatsoever to the claim of the accused that he did not touch the girl, much less raped her. The fact is fully established that the accused brought the girl to the municipal building, or was on their way to the municipal building as testified to by Apos, a co-policeman, and witnessed by Sergeant Bongabong and Patrolman Tabamo. This collaborates in fact the claim of the complaining girl that she was ordered to come along to the municipal building but they turned to the ABC Hall where the accused consummated sexual intercourse with her.

Considering the circumstances of the case as adduced by the evidence of the prosecution and defense, the Court is of the opinion and so holds that the accused had sexual intercourse with the complaining girl although there was no violence nor intimidation which preceded the sexual intercourse. The Court, however, takes into consideration the observation it made on the complaining witness that she was 13 years old, a moron, who answers questions in monosyllables as truly reflected in the manifestation of the private prosecutor:

'Before we proceed with the examination of the complaining witness, we beg the kind indulgence of this Honorable Court to be patient and understanding in her demeanor. In her, we find her sometimes difficult to communicate. While she answers intelligently, she uses one, two or three words and she does not look at the examiner. If she is advised to speak louder, she will just continue which could tax the patience of the examining counsel. Oftentimes she does not answer questions at all and we have no way of knowing whether she understands the question at all. According to the mother this is the usual behavior of the complainant in their house.

In this connection, we pray that in same instance we be permitted to ask leading questions to this witness as she sometimes answer only by yes or no.'

"Although the complaining witness was, at the time of the alleged rape of the mentality she was then, that is moron and deeply unintelligent, the Court can not consider this as an element to define the act committed by the accused on the complaining witness within the purview of rape. At most, the accused is guilty, as the Court finds him, beyond reasonable doubt of the crime of Qualified Seduction punished under Article 337 which provides that the seduction of a virgin over 12 years and under 18 years of age, committed by any person in public authority, etc. etc., and the accused taking advantage of and having the girl in his custody, succeeded in having sexual commerce with her; . . ." (Original Records, pp. 92-94)

We agree with the trial court's findings that sexual intercourse took place between the accused-petitioner and complainant Leonida Dagohoy in the manner that Leonida narrated in court. It is inconceivable that a 13 year old mentally deficient girl could create such a story and implicate the accused-petitioner who at that time was a police officer and the father of a friend. There is no evidence on record which could show evil motive on her part that she could, despite her mental incapacity, accuse the petitioner of such a heinous crime as rape. The record shows

that the two of them, were really together just about the time the incident happened and that the ABC Hall, where the crime was committed was an annex of the municipal building. Hence, accused-petitioner could have easily gone to the municipal building after the incident, earlier than Patrolman Apos, who admittedly was behind Leonida and the accused-petitioner on their way to the municipal building.

Except for Babanto's holding down the girl when she kicked him and covering her mouth when she was in pain there was no violence which accompanied the sexual intercourse. However, we find as erroneous the trial court's conclusion that under the circumstances, where no physical intimidation preceded the sexual intercourse an essential element which could qualify accused-petitioner's crime to rape is missing. In the case of *People v. Franco*, (114 SCRA 737) we interpreted intimidation for purposes of the crime of rape as follows:

" . . . And, at this juncture it is well to remember that a father exercises such strong moral and physical influence and control over his daughter that the force or violence, threat or intimidation upon her need not be of such nature and degree as would be required in other cases (*People vs. Rinion*, CA, 61 OG 4422, cited in Revised Edition, Reyes, *The Revised Penal Code*). It is not necessary that there be signs from Leonora that she put up a resistance, for a sexual act between father and daughter is so revolting that it would have submitted thereto if her will to resist had not been overpowered (*People vs. Alinea*, C.A. 45 OG Sept. 5, 1950). The force or violence necessary in rape is naturally a relative term, depending on the age, size and strength of the parties and their relation to each other (*People v. Savellano*, supra.)

.....

"It is a doctrine well settled by the courts that in order to consider the existence of the crime of rape it is not necessary that the force and/or intimidation employed in accomplishing it to be so great or of such character; it is only necessary that the force and intimidation used by the culprit be sufficient to consummate the purpose which he had in mind. . . ."

In the instant case, considering the age, mental abnormality, and deficiency of the complainant plus the fact that the accused-petitioner was at the time of the incident in uniform and with a side arm, there was sufficient intimidation to convict for rape. The fact that the complainant kicked the accused-petitioner while the latter was lifting her dress and removing her panty and that she cried afterwards negate any consent on her part to the sexual intercourse. Thus, we ruled in *People v. Burgos* (115 SCRA 767) a case involving the rape of a deafmute and demented girl:

"Because of the physical and mental condition of Dolores, she could not have given rational consent to the carnal intercourse—as correctly ruled by the trial court. It would have required a great deal of effort for a 13-year old deafmute to resist the sexual assault of the 5'8" market vendor especially so since the same was unexpected considering the place and time of its perpetration. And only a mind fully aware of the moral and social consequences of the consummation of such sexual assault could have given intelligent consent to gather the courage to put up the resistance necessary to repel such aggression. A rational consent to an act could only be given by one who has the ability to discern the consequences of said act. And Dolores certainly did not have such mental ability not only because of lack of formal education, but also because of her physical and mental deficiencies." (*Italics supplied*)

The evidence also shows that as a result of the sexual intercourse, complainant Leonida became pregnant as can be shown by a medical certificate (Exh. "C", Original Record, p. 112) issued by Dr. German Garcia. It should be noted that complainant Leonida had her first menstruation period on September 29, 1969, barely a month before the incident. In a last ditch effort to save himself, accused-petitioner testified that he was "caponized" or "castrated" sometime in 1958 at the clinic of Dr. Gedeon Quijano. According to Babanto, Dr. Quijano was then in Canada so he tried to secure a medical certificate attesting to the surgical operation from the doctor's clinic but he was refused ". . . because according to them it is already quite a long time and the records could not be found."

(TSN, June 3, 1970, p. 118) He further testified that during the operation he was attended to by a certain Mrs. Berenguel who told him that she could remember that I was being operated but that I could not remember the year." (TSN, June 3, 1970, p. 118) As a result of this operation Babanto said he never begot any child by his wife up to the present.

We do not give credence to the accused-petitioner's testimony as regards his surgical operation. There was no positive proof that he was castrated and if so, that the castration was successful other than his uncorroborated statement.

IN VIEW OF THE FOREGOING, the decision appealed from is hereby set aside. Petitioner is found guilty beyond reasonable doubt of the crime of rape as defined in Article 335 (1) as amended, of the Revised Penal Code and (1) is sentenced to suffer the penalty of reclusion perpetua; (2) to recognize the child which may have been born to Leonida as a result of the crime; (3) to indemnify Leonida Dagohoy in the sum of P12,000.00 as a moral damages, and (4) to pay the costs.

SO ORDERED.

Teehankee (Chairman), Melencio-Herrera, Plana, Vasquez and Relova, JJ., concur.

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