

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. EDGARDO NESICIO, ACCUSED-APPELLANT.

G.R. No. 102008. December 28, 1994

Ponente: ROMERO, J.

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ROMERO, J.:

Before this Court once again is one of those heinous crimes made punishable effective December 31, 1993 by Republic Act No. 7659 with a higher penalty. Rape, an atrocious crime in itself, is rendered doubly vile when the offender senselessly employs violence to kill the victim whom he has ravished, an eleven-year old girl who was utterly helpless to defend herself from the vicious attack on her person and honor.

We cannot use words strong enough to condemn such mindless, cruel acts which are an outrage upon a Christian society's sensibilities and high moral scruples.

On February 21, 1990 at around two o'clock in the afternoon, eleven-year old Geraldine Cuevas, accompanied by her younger brother Lindo and their young cousin Lino Lindio went out into the sloping trail covered by bushes and madre de cacao trees not far from her house in Antugan, Compostela, Alegria, Cebu to remove the bark gathered from a local tree known as "siapo," which they intended to sell as firewood. A few hours later, Lindo Cuevas arrived home alone and was surprised when his mother Justina anxiously inquired about his elder sister Geraldine, who was supposed to have left for home ahead of him.

When Geraldine did not show up at 7:00 o'clock in the evening, her alarmed mother solicited the help of several neighbors who promptly formed a search party headed by barangay councilman Cresente Homecillo. Using lamps and torches, the group scoured a wide area until about 4:30 next morning but failed to find the missing girl.

Geraldine's lifeless body was found much later amidst the bushes near a madre de cacao tree in the afternoon of February 22, 1990, a pathetic picture of a young virgin brutally ravished and slain, lying on the sack where she kept the gathered "siapo" and bathed in her own blood with her face chopped and hacked.

Dr. Samson de la Peña who performed an autopsy on the girl's cadaver and submitted a report thereon found that Geraldine suffered multiple hack wounds which injured her brain and fractured her facial bones; that her hymen was ruptured with lacerations at 9:00 o'clock position and that there were contusions in the vulva indicative of sexual assault.[1] He likewise noted some blood and fluid in the vaginal canal which, upon laboratory examination, were found positive for spermatozoa. Dr. de la Peña concluded that the girl was sexually assaulted before she was slain and that the injuries were inflicted with considerable force, with one wound almost splitting her face in two.

Investigation by the police led to the filing of an Information for rape with homicide against Pablo Bacalso and Edgardo Nescio, which reads as follows:

"That in the afternoon of the 21st day of February, 1990 in Sitio Antugan, Barangay Compostela, Municipality of Alegria, Province of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said

accused, conspiring and confederating together and mutually helping one another by means of force and violence, wilfully, unlawfully and feloniously take turns in having carnal knowledge with Geraldine L. Cuevas, a minor 11 years of age; that on the occasion of the said rape and in pursuance of their conspiracy, the said accused did then and there attack, assault and use personal violence upon the said Geraldine L. Cuevas, thereby inflicting upon her multiple hacked wounds and as a direct result of all of which said minor Geraldine L. Cuevas died.

Contrary to law."

Upon arraignment, both accused pleaded not guilty. On June 21, 1990, the trial prosecutor filed a motion to discharge co-accused Pablo Bacalso in order to utilize him as a state witness. The proposed testimony in affidavit form was attached to the said motion. When required to comment thereon, Edgardo Nescio opposed the motion and filed his own, insisting that he should be the one to be discharged and used as a state witness, without however submitting a sworn statement in support of his motion.

The Court granted the prosecutor's motion and ordered the discharge of Pablo Bacalso. Trial proceeded against the only remaining accused, with Bacalso testifying for the prosecution.

The People's case rests on the discharged co-accused Bacalso's testimony that in the afternoon of February 21, 1990, he was in a farm in Antugan, Compostela, Alegria, Cebu where he met his co-accused Edgardo Nescio, Geraldine Cuevas, her brother Lindo and Lindo's friend Lino Lindio; that the two young boys left shortly thereafter; that as soon as the boys headed homewards, Nescio suddenly held Geraldine's hands, forcibly pulled down her panty, quickly took off his pants and laid on top of the girl; that Geraldine struggled to be free from Nescio's hold, shouting at the top of her voice, but her efforts proved futile because Nescio overpowered her and succeeded in having sexual congress with her; that Bacalso took pity on his cousin but was helpless because Nescio threatened to kill him with a bolo and swore that should he report the incident to anyone, he would surely be dead.[2]

The prosecution also presented Dr. Samson de la Peña who testified on his autopsy findings.[3] Another witness, Virgilio Cuevas, the victim's father, testified on the funeral expenses incurred, as well as damages suffered on account of the brutal rape-slay of his daughter.

While denying involvement in the incident, the accused did not deny the acts imputed to him by the state witness. He admitted that at about noontime on his way to lunch, he spotted the brothers Pablo and Patrick Bacalso with their cousins Geraldine and Lindo with Lindo's young friend Lino Lindio gathering "siapo" about two (2) kilometers farther. Instead of taking the short trail, he decided to negotiate the more circuitous and longer road to his house in order to pass through the trail where Geraldine's group was. However, he explained that he proceeded home and did not tarry with the group still gathering "siapo" because Councilman Cresente Homecillo and a companion were waiting for him so that he could account for the proceeds of a benefit dance recently held in their place; that at around 5:00 o'clock in the afternoon of the same day, he noticed Pablo Bacalso (who lived about 50 meters away from his house) smeared with blood; that Justina Cuevas eventually came to inquire about her daughter Geraldine; and that he himself joined in the search for the young girl together with his co-accused Bacalso.

Upon cross-examination, Nescio admitted that his farm in Samoyao, Compostela where he worked in the morning of February 21, 1990 was less than half a kilometer from where he lived. He also conceded that this was the same spot where the girl's cadaver was first found by Germano Homecillo, a member of the search party. It was also Nescio who explained that Geraldine's house was only about fifty (50) arms-length away from his.

Defense witness police patrolman Carlito Homecillo testified that although he conducted an investigation of the

incident, he did not reduce into writing the incriminating statements of both accused. His colleague, Pat. Juan Cordova, Jr. also took the witness stand to identify the Joint Affidavit which he executed with Pat. Homecillo, alleging that Bacalso told them that after the younger boys left for home, Edgardo Nescio who was secretly admiring Geraldine while she was preoccupied with the task of gathering "siapo" bark, suddenly held her in both hands, threatening her with his bolo if she resisted, then pushed her to the ground. As she lay there in shock, Nescio placed himself on top of her, quickly removed his pants and succeeding in ravishing her. After the rape, Geraldine rolled downwards, unconscious. The Joint Affidavit also stated that Pablo Bacalso, in a fit of passion, then took his turn at raping his cousin. He then heard Nescio shout: "Kill her!" and even as he hesitated, Nescio threatened to kill him, forcing affiant Bacalso to hack the girl's face and neck instantaneously.

It was however established during trial that the alleged verbal extrajudicial statements of Pablo Bacalso were made without the assistance of counsel.

Other witnesses for the defense were Bgy. Captain Arturo Jamio, Jr. who testified that he was the one who brought Bacalso's bolo which was left in Cresente Homecillo's house, to the station commander. Lino Lindio, the last witness, testified that he left the group ahead and when he was homeward bound, Geraldine was still with Edgardo Nescio and Pablo Bacalso amongst the bushes.

On March 14, 1991, the judge of Regional Trial Court, Branch 16, Cebu City, rendered a decision^[4] finding the accused guilty beyond reasonable doubt of the special complex crime of rape with homicide, sentencing him to suffer the penalty of reclusion perpetua and to indemnify the heirs of the victim in the sum of P30,000.00 by way of compensatory damages.

Nescio appealed from the judgment of the court a quo, alleging that it erred:

1. in discharging Pablo Bacalso who allegedly appears equally guilty and whose subsequent discharge from the information was invalid; and
2. in giving credence to Bacalso's testimony which is opposed to common human experience.

We find no merit in the appeal.

The trial prosecutor, upon being satisfied with the presence of the conditions stipulated in Section 9, Rule 119 of the 1985 Rules on Criminal Procedure, as amended, namely:

- "1. that there is absolute necessity for the testimony of the defendant whose discharge is requested;
2. that there is no direct evidence available for the proper prosecution of the offense committed, except the testimony of the defendant;
3. that the testimony of said defendant can be substantially corroborated in its material points;
4. that said defendant does not appear to be the most guilty; and
5. that said defendant has not at any time been convicted of any offense involving moral turpitude."

asked the court to direct the discharge of one of the accused to become a witness for the state, thus in effect, acquitting him.

The cited Joint Affidavit of Pfc. Homecillo and Pat. Cordova, Jr. was discarded by the trial court as inadmissible in evidence since the alleged extra-judicial confession of Bacalso was given during custodial investigation where he was not granted the assistance of counsel. Such "confession" was not merely verbal but was made five (5) days after the date of the incident, and, therefore, not made while the "startling occurrence" was taking place or

immediately subsequent thereto. The same cannot be considered part of the *res gestae*, particularly as Bacalso was still labouring under Edgardo Nescio's threats.

We are not persuaded by appellant's argument that Bacalso's testimony is contrary to human experience, in that he could have prevented the accused-appellant from pursuing his evil designs by brandishing his (Bacalso's) own bolo or stoning Nescio's head while he was pushing the victim down, thereby allowing her to escape.

The trial court clearly noted that when Bacalso took the witness stand, he testified in a straightforward, direct and positive fashion without any trace of hesitance or indecision. Being only a lad of fourteen years at the time, he was definitely smaller and afraid to make any move to help his eleven-year old cousin because his life was under threat by the accused who was a burly twenty-two year old adult with a bolo.

It is settled doctrine that the gravamen of the offense of statutory rape is the carnal knowledge of a girl under twelve (12) years of age. Force or intimidation which negates consent need not even be proved.

Moreover, the appellant did not categorically deny the acts imputed to him by Bacalso. Instead of squarely refuting the latter's positive and clear testimony that Nescio raped and killed Geraldine Cuevas, Nescio's lame alibi was that he had left earlier.

Alibi is not credible where the accused-appellant is only a short distance from the scene of the crime. The defense of alibi is further offset by the positive identification made by the prosecution's witness. Alibi, to reiterate a well-settled doctrine, is accepted only upon the clearest proof that the accused-appellant was not or could not have been at the crime scene when it was committed.[5]

In this case, there was every possibility that the accused-appellant was present at the scene of the crime during the killing although, according to his own testimony, he was half a kilometer away.

We note that as the victim rolled unconscious after she was ravished, appellant still hacked her, almost splitting her face in two. Such bestiality is a form of cruelty and perversity which aggravated the crime, it being unnecessary to the commission thereof, and manifestly an outrage on the victim's person.

WHEREFORE, the judgment of the court a quo finding accused-appellant EDGARDO NESICIO guilty beyond reasonable doubt of the crime of rape with homicide imposing upon him a prison term of reclusion perpetua is AFFIRMED. The appealed decision is however modified by increasing the indemnification to be paid to the victim's heirs from P30,000.00 to P50,000.00 in accordance with existing jurisprudence.

SO ORDERED.

Bidin, (Acting Chairman), Melo, and Vitug, JJ., concur.
Feliciano, J., on leave.

[1] TSN, August 23, 1990, pp. 5-9.

[2] TSN of August 30, 1990, pp. 3-17.

[3] Exhibits "A" and "B."

[4] Rollo, pp. 43-46.

[5] *People v. Claveria*, G.R. No. 94786, April 6, 1993, 221 SCRA 34; *People v. Vergara*, G.R. No. 103313, May 5, 1993, 221 SCRA 611.

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