

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ORLANDO LUTAO Y LOBOS AND JULIO MEDERA Y TURCIDO, ACCUSED-APPELLANTS, BATING NAZA, JOHN DOE, AND PETER DOE (AT LARGE), ACCUSED.

G.R. No. 107798. November 16, 1995

Ponente: PUNO, J.

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PUNO, J.:

Bad elements of the Civilian Armed Forces and Geographic Unit (CAFGU) again take centerstage in the case at bar. ORLANDO LUTAO and JULIO MEDERA, members of the CAFGU, were convicted of Robbery in Band with Multiple Rape[1] in a Decision[2] of the Regional Trial Court of Catarman, Northern Samar. They were sentenced to suffer the penalty of reclusion perpetua, and to indemnify the amount of P30,000.00 to Lourdes Siervo or a total of P60,000.00 and to pay spouses Siervo jointly and severally the amount of P4,060.00 corresponding to the stolen money plus the costs of the suit. They insist on their alibi in their appeal to this Court. We reject their pretended innocence.

The Amended Information against the five (5) accused - Orlando Lutao, Julio Medera, Bating Naza, John Doe, and Peter Doe reads:

"That on or about the 29th day of December, 1991, at around 10:00 o'clock in the evening, in Sitio Camarino, Barangay Malobago, Municipality of San Roque, Province of Northern Samar, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, armed with M-14 and M-1 (Garand) rifles, conspiring with, and confederating together with two (2) persons (John Doe and Peter Doe) whose true names, identities and present whereabouts are still unknown, and mutually, unlawfully and feloniously, with intent of gain and by means of force, violence and intimidation take, rob and carry with them a cash money in the amount of FOUR THOUSAND SIXTY (P4,060.00) PESOS, Philippine Currency, belonging to spouses Arturo M. Siervo and Lourdes Siervo, against their will and this was committed inside their residence in the above-mentioned place, to the damage and prejudice of said owners in the aforesaid sum of FOUR THOUSAND SIXTY (P4,060.00) PESOS, Philippine Currency; that in the commission of the said offense the above named accused, Orlando Lutao, Julio Medera, Bating Naza, John Doe, and Peter Doe, with lewd design, conspiring, confederating together and mutually helping one another did then and there willfully, unlawfully and feloniously by means of force, violence and intimidation took turns in lying down with and having carnal knowledge of Lourdes Siervo against her will and consent while accused Julio Medera stood guard and threatened with the use of his M-14 rifle the husband of Lourdes Siervo and thereafter watched his companions raped Lourdes Siervo.

With the aggravating circumstance that accused Orlando Lutao had been sentenced by the Court of Appeals on January 22, 1987 to suffer imprisonment of 8 years and one day to 14 years, 8 months and one day in Criminal Case No. 323 for Murder.

CONTRARY TO LAW."[3]

Accused-appellants Lutao and Medera pleaded not guilty. Accused Bating Naza, John Doe, and Peter Doe remained at large.

At the pre-trial, the parties agreed that the accused-appellants on trial are Orlando Lutao y Lobos and Julio Medera y Turcido, both members of the CAFGU under the command of Lt. Arismindo Dayaon of the Philippine Army and stationed in Barangay Malobago, Municipality of San Roque, Northern Samar.

At the trial, the evidence of the prosecution was given by witnesses ARTURO SIERVO,[4] LOURDES SIERVO,[5] and DR. MELODIA NERIDA.[6]

The spouses Arturo and Lourdes Siervo lived in a one-room house with a floor area of two and a half (2 1/2) meters by three (3) meters. Their house is located in an isolated farm and about six (6) kilometers by feeder road from the poblacion of Barangay Malobago, San Roque, Northern Samar. On December 29, 1991, they and their four (4) children, ages two (2) to eight (8), went to bed at 7:00 p.m. They slept on the bamboo flooring with Arturo near the doorway. A sack draped at their door served as its shutter.

At about 10:00 p.m., Arturo was awakened by a voice yelling, "Toring, Toring. Where is the trail going to Inanasan?"[7] He did not hear the question well and he asked, "What is that?" The man repeated the question: "Where is the trail going to Inanasan, we are lost in our way." [8] Arturo recognized the voice of Julio Medera, who used to be a buyer of their chicken.

A "pa-agahan" (kerosene lamp) hanged at the corner of their house.[9] With its light, Arturo saw Julio Medera, Orlando Lutao, Bating Naza, and their two (2) other companions who were unknown to him.[10] Medera and Lutao were armed with an M-14 rifle and M-1 garand, respectively. They wore military uniforms. Arturo groped his way to the doorway and asked them where they came from. Medera responded by dragging him downstairs. At the ground, Medera poked his gun at Arturo and ordered him to kneel while the others stood guard.

Lutao then barged into the house, shook the left shoulder of Lourdes with his gun, and announced a "hold--up." He demanded money from Lourdes. Lourdes begged him to spare their money which was earmarked for the medical treatment of their child. Lutao answered her plea by hitting her chest with the butt of his gun.[11] Stricken with fright, Lourdes yielded the leather wallet under her pillow containing four thousand sixty pesos (P4,060.00) realized from the sale of their copra and pig. She handed it to Lutao who threw the coins on the floor.

Then, Lutao's lust was aroused. He pulled down the skirt and panty of Lourdes and ordered her to lie down. Lourdes begged not to be abused because she was menstruating. Lutao ignored her pleas and poked a gun at her.[12] He shed off his fatigue jacket, maong pants, and green brief and forced his lust upon her. Lourdes' resistance was futile. Medera, Naza, and their two other companions joined the sexual orgy. They raped Lourdes in succession. Lourdes' youngest child awoke and cried unaware of his parents' harrowing experience.[13]

Arturo, was a meter away when Lourdes was violated by the accused. Throughout the unfortunate ordeal of his wife, he was furious but helpless. The accused guarded him.

Their lust satisfied, the accused set to flee. But before fleeing, Medera pointed his gun at Arturo and ordered him to run. Arturo rushed towards the bushes about fifteen (15) brazas away from his house. The malefactors then fled to Inanasan.

Lourdes who passed out regained consciousness. Her abusers were no longer around and so was her husband. She cried and her weeping awakened her other children. Still shaking with fear, she and her four (4) children walked and sought immediate refuge at the house of Fausto Acero. The house of Acero is ten (10) kilometers away from her house.[14]

Daylight broke. Arturo came out from the grasses and searched for his family. They were united at Acero's house. It was then that they revealed to Acero their ordeal.

Initially, the spouses hesitated to report the incident to the police authorities for fear of reprisal from Lutao and Medera who were CAFGU members. They finally mustered courage and reported the crime to the Mondragon Police Station on December 31, 1991.[15] They named Orlando Lutao, Julio Medera, and Bating Naza as the culprits. Two (2) days thereafter or on January 2, 1992, they retold their story to the San Roque Philippine National Police Headquarters.[16] Petrified by the incident, the Siervo family abandoned their house and farm in Barangay Malobago and lived with Arturo's mother in Barangay Bantayan. Their physical and emotional disturbance were beyond doubt.

Dr. Melodia Nerida, the Medical Officer of Northern Samar General Hospital, certified that there was no trace of irritation, sperm cells, and sexual coition in the genitalia of Lourdes. She, however, opined that the victim's menstrual flow could have washed-out the semen.[17] She added that it was difficult to detect the sexual assault since the victim's organ already experienced four (4) pregnancies and childbirth.

Accused-appellants Medera and Lutao denied their involvement in the crime and anchored their defense on alibi.

Medera testified that on December 29, 1991, Lt. Arismindo Dayaon ordered them on "red alert" because of an imminent raid by the New People's Army (NPA).[18] His tour of duty to guard the 19th IB Detachment Camp, Charlie Company, Philippine Army was from 10:00 to 12:00 p.m. He was relieved by Lutao at twelve midnight.

Lutao corroborated Medera's testimony. He testified that on December 29, 1991, he guarded the camp from 12:00 p.m. till 2:00 a.m. He said he never left the barracks while on duty.[19]

Lt. Arismindo Dayaon, Cpl. Manuelito Anata, and Cpl. Celso Mabascog likewise corroborated the alibi of accused-appellants. Lt. Dayaon confirmed that he ordered accused-appellants to guard the barracks on December 29, 1991. Cpl. Anata and Cpl. Mabascog testified that they supervised the assignments of the accused-appellants on the said date.[20]

The trial court on June 30, 1992 convicted the accused-appellants of the crime of Robbery in Band with Multiple Rape.

In this appeal, accused-appellants assail the Decision of the trial court as follows:

"I

THE TRIAL COURT GRAVELY ERRED IN GIVING MORE WEIGHT AND CREDENCE TO THE EVIDENCE FOR THE PROSECUTION AND IN DISREGARDING THE EVIDENCE FOR THE DEFENSE.

II

THE TRIAL COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANTS GUILTY BEYOND REASONABLE DOUBT OF THE CRIME OF ROBBERY IN BAND WITH RAPE."

We affirm the conviction with modification.

We shall first rule on accused-appellants' argument that they were not identified in court by the spouses Siervo, and hence, should be acquitted. They rely on *People v. Hatton*,[21] where we held that pre-trial identification is not sufficient.

We reject accused-appellants' argument. The question of whether accused-appellants are the persons actually

accused in the case at bar is a non-issue. The issue was settled during the pre-trial of the case where the parties agreed that the accused-appellants on trial are Orlando Lutao y Lobos and Julio Medera y Turcido.[22] They were even described as members of the CAGU under the command of Lt. Arismindo Dayaon of the Philippine Army and stationed in Barangay Malobago, Municipality of San Roque, Northern Samar. By their admission that they are the Orlando Lutao and the Julio Medera accused of committing the crime at bar, the prosecution witnesses were relieved of the burden of making an in court identification of accused-appellants as the malefactors. Throughout the proceedings, they never claimed that their admission was an error. Indeed, they did not claim as defense that they are not the persons accused of the crime at bar. Their defense is alibi - that they were at another place when the crime was committed.

Quite clearly, accused-appellants cannot lean on the Hatton case. In Hatton, the accused did not admit he was the Hatton charged in the Information. During the trial, the witnesses for the prosecution failed to identify him. The prosecution tried to remedy the lapse by introducing the identification made by the victim of the accused in a police line-up, an out of court identification. The Court found this identification as infirmed as it was suggested by the police. It acquitted the accused, ruling: "The failure of the prosecution witnesses to positively identify the assailant in court is fatal to the prosecution's cause. Pre-trial identification is not sufficient." Hatton is, thus, distinguishable for in the case at bar, accused-appellants judicially admitted they are the persons charged with the offense.

It is also inaccurate to contend that accused--appellant, Julio Medera was not identified in court. Lourdes Siervo positively identified him in the course of her testimony. We quote the relevant part of her direct testimony, viz:

x x x x x x x x

"Q : If that Julio is in court, will you point to us where he is?

A : (Witness pointing to a person with blue t-shirt and when asked his name, answered Julio Medera)." [23]

Next, accused-appellants urge that the spouses Siervo should not be believed because of inconsistencies in their testimonies, viz:

x x x x x x x x

"(1) Lourdes Siervo, during her direct testimony, x x x point(ed) to x x x Julio Medera as the one who woke her up and demanded money. x x x (But) during her cross examination x x x she easily changed her answer from Julio Medera to Orlando Lutao x x x to conform with what she has declared in her affidavit.

x x x x x x x x

(2) The spouses Siervo reported (to the Mondragon police) that they were robbed and Lourdes Siervo was raped by x x x Pating Naza, Orling Lutao, Jerry Medera, and two unidentified companions. x x x (But) on January 2, 1992, the couple reported the incident before the San Roque (police) x x x that the two (2) of the five (5) malefactors were Orlando Lutao x x x and Julio Medera.

x x x x x x x x

(3) Arturo Siervo testified that x x x he ran to the bushes x x x because he was told by the five (robbers) to run. x x x Whereas in his affidavit x x x he stated that he ran to the bushes to hide." [24]

We hold that these inconsistencies are not malicious marks of falsehood. It is true that in her direct examination, Lourdes pointed to Medera as the one who announced the hold-up. On cross-examination, she changed her testimony and affirmed the content of her prior affidavit that it was Lutao who declared the hold-up. On questioning by the trial judge, Lourdes admitted her mistake, thus:

X X X X X X X X

"Q : When you asserted that it was Julio Medera who awakened you by shaking you by your shoulder it was by mistake because it was Orlando Lutao who did that?

A : Yes, sir."[25]

Lourdes was candid in admitting her mistake. It was an honest mistake. One honest mistake in the course of a long testimony cannot dilute her credibility. To be sure, Arturo corroborated the testimony of Lourdes that it was Lutao who roused his wife from sleep, announced the hold--up, and carted the money away.

There was also an initial confusion on whether the Medera involved in the case at bar was Jerry or Julio. We agree with the trial court's rationalization as it deflated the significance in the discrepancy of the names of Jerry Medera and Julio Medera, viz:

X X X X X X X X

"The initial identification by name Jerry Medera before the police in Mondragon given only by Arturo Siervo as one of the criminals, it being shown that Julio Medera has a brother by said name and who is also a member of the CAFGU in San Roque (Exhs. "5" and "6" in relation to Exh. "9") detracts nothing from Lourdes Siervo's spontaneous court room identification when she pointed out to the person of Julio Medera upon his name being mentioned in the course of an answer while 'Pating' Naza, instead of Bating Naza, as written in the police blotter (Exh. "9") is so innocuous an error that it should be attributable to inaccuracy of the hearing and/or pronunciation."[26]

Accused-appellants also claim that it was unnatural for Arturo to run to the bushes and abandon his wife who has just been raped. We do not agree. Arturo was under the gun. It would have been foolhardy for him to disobey the order for him to run. He would have been shot dead if he did not. Even his family would have been further endangered. He did not have any rational choice except to run.

The conduct of the Siervo spouses subsequent to the crime fortified their credibility. They promptly revealed their misfortune to Acero. They gathered their guts and reported the incident not only to the Mondragon police authorities but also to the San Roque police. Lourdes submitted herself to physical examination. These were all spontaneous actions. Indeed, it was far fetched for this rural couple, living in an isolated, unprotected house to falsely impute an atrocious crime against accused-appellants who were influential CAFGU members assigned in their barangay. They would not put their lives on the line except for a legitimate grievance.

In checkered contrast, Medera self-destructed when he testified. He unabashedly admitted in court that Lt. Dayaon did not order them on "red alert" from December 26, 1991 to January 1, 1992 for the perceived NPA raid.[27] He was with the other soldiers patrolling Barangay Malobago.[28]

Nor does the testimony of Cpl. Mabascog inspire credence. He testified that he remembered the December 29, 1991 assignments of accused-appellants because he reported that day after his Christmas vacation. His assertion was negated by Lt. Dayaon's testimony that when a camp is on "red alert," it meant maximum vigilance and all leaves and furloughs are cancelled.[29]

In addition, we cannot give full faith and credit to Exhibit "4" and Exhibit "5," the duty roster and guard detail, respectively, presented by accused-appellants. They were handwritten on papers when they should have been properly recorded in a logbook. The accused-appellants failed to explain this irregularity which was vital to the truth of their alibi.

Easy to concoct, alibi is a weak defense. It cannot prevail over the positive identification of an accused. It cannot

succeed when there is no showing that it is not physically impossible for the accused to be at the crime scene at the time of its commission.[30]

At the trial, accused-appellants admitted that they patrolled Barangay Malobago when the crime happened on December 29, 1991. Their camp can be negotiated in ten (10) to fifteen (15) minutes walk to the locus criminis. Since accused-appellants were in Barangay Malobago from 10:00 p.m. to 2:00 a.m., it was not physically impossible for them to be at the Siervo's house and commit the crime.

The probability that the Siervo spouses erred in identifying the accused-appellants is nil. Accused-appellants were not strangers to the spouses. They often patrolled Barangay Malobago. Medera was the couple's barriomate and a regular buyer of their chicken. There was also a kerosene lamp which illuminated the locus delicti. Accused-appellants wore no mask to hide their identity. Loose alibi must yield to and cannot prevail over the positive identification made by the spouses.[31]

The trial court, however, erred in denominating the crime committed by accused-appellants as Robbery in Band with Multiple Rape. In *People v. Precioso*, [32] we held that there is no such composite crime of robbery in band with multiple rape. The crime is robbery with rape, with band as a mere aggravating circumstance. It is penalized under Article 294 (2) of the Revised Penal Code, as amended by Republic Act No. 7659 imposing the death penalty. Since the crime charged was committed on December 29, 1991 prior to the effectivity of R.A. No. 7659 on December 31, 1993, the said law cannot be applied retroactively and the death penalty cannot be given to accused-appellants. The trial court correctly imposed the penalty of reclusion perpetua.

IN VIEW HEREOF, the appealed Decision dated June 30, 1992 is AFFIRMED with the MODIFICATION that accused-appellants are convicted of Robbery with Rape and ordered to pay in solidum Lourdes Siervo in the amount of fifty thousand pesos (P50,000.00) for moral damages and Arturo and Lourdes Siervo four thousand sixty pesos (P4,060.00) corresponding to the stolen money. With costs against accused-appellants.

SO ORDERED.

Narvasa, C.J., (Chairman), Regalado, and Mendoza, JJ., concur.
Francisco, J., on leave.

[1] Should be Robbery with Rape, *People v. Precioso*, G.R. No. 95890, May 12, 1993, 221 SCRA 748.

[2] Eight Judicial Region, Branch 19.

[3] Original Records, p. 22.

[4] Forty-two (42) years old, married, farmer, and a resident of Barangay Bantayan, San Roque, Northern Samar. He was formerly a resident of Barangay Malobago, San Roque.

[5] Twenty-six (26) years old, married, housekeeper, and a resident of Barangay Bantayan, San Roque, Northern Samar.

[6] Married, Medical Officer IV, Northern Samar, General Hospital, Catarman, Northern Samar.

[7] TSN of June 22, 1992, p. 10.

[8] *Id.*

[9] TSN of May 29, 1992, p. 7.

- [10] TSN of June 22, 1992, p.11.
- [11] TSN of May 29, 1992, p. 10.
- [12] Id., p. 12.
- [13] Id., p. 15.
- [14] Id., p. 16.
- [15] Exhibit "9."
- [16] Exhibit "B."
- [17] TSN of June 22, 1992, p. 4.
- [18] TSN of May 29, 1992, p. 39.
- [19] Id., p. 29.
- [20] Id., p. 47.
- [21] G.R. No. 85043, June 16, 1992, 210 SCRA 1.
- [22] Court Order dated May 26, 1992; Original Records, p. 34.
- [23] TSN of May 29, 1992, p. 9.
- [24] Rollo, pp. 109-110.
- [25] Id., p. 26.
- [26] RTC Decision, p. 8.
- [27] TSN of May 29, 1992, pp. 41-42.
- [28] Id., pp. 44-45.
- [29] RTC Decision, p. 7.
- [30] People v. Dalanon, G.R. No. 107458, October 14, 1994, 237 SCRA 607.
- [31] Id., People v. Dalanon at page 618.
- [32] Supra.

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