

## PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GREGORIO O. DIGNO JR., ACCUSED-APPELLANT.

*G.R. No. 108958. November 23, 1995*

Ponente: BELLOSILLO, J.

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### BELLOSILLO, J.:

"Children are truly blessed in the eyes of God x x x that His kingdom belongs to their kind." [1] The spirit of this message of St. Luke now seems to be vanishing in the midst of the rampant neglect, exploitation, rape and maiming of defenseless little ones. With the alarming increase of crimes against the youth, the State must now, more than ever, act as *parens patriae* and launch a relentless campaign for the protection of the rights of children and the promotion of their moral values to ensure their full development and social well-being.

This is a heinous crime. [2] Gregorio O. Digno Jr. was convicted by the trial court for raping his 4-year old niece and sentenced to reclusion perpetua and to pay her P50,000.00 for moral damages. [3]

The accused appeals his conviction.

The trial court found that the rape was committed inside the rented room of appellant in a house at Doña Aurora St., Pinagbuhatan, Pasig, Metro Manila. The victim, Sharon Deresma, is the niece of the wife of the accused. The wife worked as a seamstress during the day while her husband was left at home to do the household chores. Sharon's family lived in a room adjacent to them. Her father was the breadwinner of the family while her mother stayed home to care for her brood.

On 9 October 1991, at about half-past twelve noon, Sharon was playing with her three (3) friends inside the room of the accused. Her mother Susan was in their room breast-feeding her youngest sister. Suddenly Susan heard Sharon cry. [4] She rushed out to investigate. Susan found Sharon lying on the floor crying and holding her genitalia. Susan immediately embraced her daughter and asked why she was crying. Sharon replied: "Mama, si kuya Gregorio, ipinasok ang titi niya sa kiki ko," which means, "Mother, kuya Gregorio inserted his penis into my vagina." [5] Upon this revelation Susan pulled down Sharon's panties and saw her sexual organ bleeding. She also noticed a white substance on her daughter's light blue underwear which stunned Susan. This caused her to feel dizzy and eventually to lose consciousness.

Teodora Estrada, a resident of the same house, also heard Sharon cry inside the room of the accused. When she entered the room she saw Sharon on the floor anguishing while holding her bleeding private part. Estrada observed a white substance which appeared to her to be spermatozoa on the victim's panties and all over her buttocks. [6]

The incident was immediately reported to the police. PO3 Fernando Cebrero, Barangay Captain Rodrigo Asilo, and members of the barangay security force went to the residence of the accused. They found him in his room. They immediately brought him to the Pasig Police Station for investigation. [7] Sharon was also summoned to give her statement on the incident. [8]

Upon being apprised of the incident Salvador Deresma, father of Sharon, went to the police station and lodged a complaint against the accused. After she gave her sworn statement Sharon was brought to the PNP Crime Laboratory at Camp Crame for physical examination. Dr. Jesusa O. Nieves who examined her made the following findings:[9]

Genital: There is absence of pubic hair. Labia majora are full, convex and coaptated with the pinkish brown labia minora presenting in between. On separating the same is disclosed a congested and fleshy-typed hymen with deep fresh laceration at 3 o'clock. External vaginal orifice admits the tip of index finger.

Conclusion: Subject is in a non-virgin state physically. There are no external signs of recent application of any form of violence.

On 14 October 1991 accused Gregorio O. Digno Jr. was indicted for rape before the Regional Trial Court of Pasig.[10]

Appellant claims that between ten and eleven in the morning of 9 October 1991 he did his laundry then prepared lunch. While cooking three (3) persons entered his room and arrested him. He was taken to the Pasig Police Station where he was investigated for rape. He was detained at the Rizal Provincial Jail. He denies having had sexual intercourse with Sharon. He claims that Sharon never entered his room that morning. He maintains that the parents of the victim charged him with rape to force his separation from his wife.[11] He further contends that the testimony of the victim should be stricken off the record because he was deprived of his right to cross-examine her thus violating his right to confrontation.[12]

Appellee however maintains that the failure of the defense counsel to cross-examine the complaining witness amounted to a waiver of the right of confrontation. It submits that the right to meet a witness face to face is personal and can be waived, expressly or impliedly, citing *Fulgado v. Court of Appeals*. [13] In that case the Court held that the right is a personal one which may be waived expressly or impliedly by conduct amounting to a renunciation of the right to cross-examine. Thus where a party had the opportunity to cross-examine a witness but failed to avail himself of it he necessarily forfeits the right to cross-examine and the testimony given on direct examination of the witness will be received or allowed to remain in the record.[14]

The prosecution belittles the claim of appellant that the parents of the victim had an ulterior motive to charge him with rape because the victim was in fact sexually abused. Besides Sharon positively identified the accused in open court as the person who raped her.[15]

We affirm the conviction with the modification that appellant is not merely guilty of simple rape but of statutory rape, under par. 3, Art. 335, of The Revised Penal Code.[16]

The records show that victim was sexually violated as confirmed by Dr. Jesusa Nieves, Medico-Legal Officer, who testified that the hymen of the victim was ruptured. Dr. Nieves also noted that the laceration was deep and still fresh when examined. She opined that the wound could have been caused by a man's penis and not by a hard and blunt object as suggested by the defense.

Appellant tried to capitalize on the absence of spermatozoa and external marks on the body of the victim in pressing for his acquittal. But this was sufficiently explained by Dr. Nieves when she said that the rapist could have removed his penis prior to ejaculation, and the fact that the victim had no telltale signs on her body could be because she did not resist her aggressor, a conduct admittedly not unusual when the rape victim is a child of tender age.[17]

We agree with the medico-legal expert. We have no reason to doubt her competence and credibility. This Court

has declared on several occasions that the absence of sperm in the vaginal canal of the victim does not preclude the commission of rape.[18] Neither is it essential that force or violence be employed by the accused nor is resistance from the victim necessary. More so in statutory rape where consent, although at times apparent, does not avail.[19]

This Court lends credence to the testimony of Sharon who, although only four (4) years old when sexually assaulted, appears to have testified in a clear, plain and straightforward manner, narrating in court each ugly detail of her ordeal thus[20] -

Fiscal:

(To the witness) Sharon, do you know, by the way, your Honor, before we proceed, we would like to ask the witness leading questions because of her tender age, your Honor.

Court:

Granted.

Fiscal:

Thank you your Honor.

Q:

Sharon, do you know a person by the name of Tito Jun? Tito Jun or Junior?

A:

Yes, Ma'am.

Q:

That person is he here today?

A:

Yes, Ma'am.

Q:

And will you kindly point to him?

A:

Yes Ma'am. There he is.

Interpreter: (Witness at this juncture is pointing to a person who when asked answered to the name of Gregorio Digno, Jr.

Fiscal:

What did Tito Junior do to you?

A:

He inserted his penis into my vagina, Ma'am.

Q:

And, when he inserted his penis into your vagina, what do (sic) you feel?

A:

I was hurt, Ma'am.

Q:

And, did you bleed?

A:

I bleed (sic), Ma'am.

Q:

And, when you were hurt, did you cry?

A:

Yes, Ma'am.

Fiscal:

We would like to put it on record that the witness aside from saying "Yes", she was also nodding her head, your Honor.

Court:

Noted.

Fiscal:

And what else did he do to you? Did he tell you to lay (sic) down?

Atty. Naoe: We would like to make it on record that the witness cannot answer such simple question, your Honor.

Fiscal:

We would also want to make it on record that the witness although cannot answer is looking at the accused with stagger (sic) look, your Honor. Now, Sharon, what else did he do to you?

Atty. Naoe: The same manifestation, your Honor.

Fiscal:

Did the accused remove your panty?

A:

Yes, Ma'am.

Fiscal:

Considering that there are dates also set for this case, we would like to ask for postponement, your Honor, for us to present another witness, we are through with this witness, your Honor.

Court:

The witness is excused. Call the Court to adjourn.

Testimonies of child-victims are given full weight and credit. It is simply inconceivable that Sharon, at four, with

all her childhood naivete and innocence would make up stories against appellant and admit to her mother that she was ravished by her uncle if that was not true.[21] Such spontaneity was so overwhelming to be discredited by a mere denial of the accused. It is a well settled rule that an affirmative testimony is far stronger than a negative testimony, especially so when it comes from the mouth of a credible witness.[22] Appellant contends that the testimony of the complaining witness should be stricken off the record since she was not cross-examined by the defense. Appellant therefore invokes his constitutional right to confront the witness.

We refuse to yield. The Bill of Rights guarantees that in all criminal prosecutions the accused shall enjoy the right to meet the witnesses face to face.[23] In exercising this right the accused employs the tool of cross-examination to test the testimony of a prosecution witness and to allow the judge to observe his deportment. The uncompleted testimony of a witness may be rendered incompetent and therefore should be stricken off the record when the accused fails to cross-examine the witness due to causes not attributable to him.[24] However, when the failure to cross-examine, as in this case, is attributable to the adverse party's own fault, or by his actuations the opportunity to cross-examine was lost wholly or in part, the right to cross-examine is impliedly waived.[25]

What appears on record is that after she had completed her direct examination of the victim, Fiscal Linda Hornilla succinctly declared in court that she was through.[26] Atty. Naoe, the defense counsel who was then present, did not cross-examine the witness, much less did he invoke the right of his client to cross-examine the complaining witness or reserve his right to do so on the next scheduled hearing or to recall her at some future date. Moreover, there are no indications on record that the witness refused to be cross-examined or that she was physically or psychologically unfit for the purpose. For sure, there was no demand at all to cross-examine her. When the prosecution called its next witness the defense counsel did not alert the court on his right to cross-examine Sharon Deresma. He had an opportunity to exercise that right but, obviously, he chose to waive it. Under the circumstances, an actual cross-examination is no longer necessary as we held in *Fulgado*[27] -

"[I]t should be the counsel for the opposing party who should move to cross-examine plaintiff's witnesses. It is absurd for the plaintiff himself to ask the court to schedule the cross-examination of his own witnesses because it is not his obligation to ensure that his deponents are cross-examined. Having presented his witnesses, the burden shifts to his opponent who must now make the appropriate move. Indeed, the rule of placing the burden of the case on plaintiff's shoulders can be construed to extremes as what happened in the instant proceedings."

It may be observed that all the other five (5) prosecution witnesses were cross-examined. Only the offended party was not. Interestingly, the defense did not endeavor to assert its right to examine her at the proper time. It is only now, for the first time, that the admissibility of her testimony is being challenged. Indeed, this appears to be more than a mere procedural lapse on the part of the defense counsel; it borders on malicious design to strike out the victim's damaging testimony and then prevent her from subsequently testifying again. This, appellant can not do.

WHEREFORE, the judgment of the court a quo finding accused-appellant GREGORIO O. DIGNO JR. guilty of the crime of rape and imposing upon him the penalty of reclusion perpetua plus an indemnity of P50,000.00 to the victim Sharon Deresma is **AFFIRMED**, with the modification that the crime committed should be denominated **STATUTORY RAPE** under Art. 335, par. 3, of The Revised Penal Code. Costs against accused-appellant.

### **SO ORDERED.**

Padilla, (Chairman), Davide, Jr., Kapunan, and Hermosisima, Jr., JJ., concur.

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[1] Luke 18: 16-17, New Testament.

[2] R.A. 7659, otherwise known as "An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending

for that Purpose the Revised Penal Code, as Amended, Other Special Penal Laws, and for Other Purposes," which took effect on 1 January 1994, defines heinous crimes as being grievous, odious and hateful offenses and which, by reason of their inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society. This is not to give retroactive effect to R.A. 7659 as the case at bench took place on 9 October 1991, or long before the enactment of the law.

[3] Decision penned by Judge Eugenio S. Labitoria, Regional Trial Court, Pasig, Br. 161.

[4] TSN, 26 February 1992, p. 17.

[5] The word kuya seems to be taken here in the context of "uncle" or a sign of respect for an elder.

[6] Sworn Statement of Teodora Estrada executed before PNP Inspector Manuel A. Mendoza on 9 October 1991, Records, p. 74.

[7] Affidavit of P03 Fernando Cebrero, Records, p. 10.

[8] Salaysay executed by Sharon Deresma before PNP Inspector Manuel A. Mendoza on 9 October 1991, Id., p. 8.

[9] Medico-Legal Report No. M-1464 dated 10 October 1991, Id., p. 71.

[10] Id., p.1.

[11] TSN, 4 August 1992, pp. 5-11.

[12] Accused-appellant's Brief, Rollo, pp. 30-31.

[13] G.R. No. 61570, 12 February 1990, 182 SCRA 81.

[14] Plaintiff-appellee's Brief, Rollo, pp. 52-55.

[15] /d., pp. 55-60.

[16] In *People v. Sayat*, G.R. Nos. 102773-77, 8 June 1993, 223 SCRA 285, we held that "statutory rape is committed by having carnal knowledge of a woman below twelve years of age. In this specie of rape neither force by the man nor resistance from the woman forms an element of the crime and apparent consent thereto will be of no avail, any more than in the case of a child who may actually consent but who by law is conclusively held incapable of legal consent. The law presumes that the victim on account of her tender years does not and cannot have a will of her own. The heart of the matter is the violation of a child's incapacity to discern evil from good."

[17] TSN, 1 May 1992, p. 9.

[18] *People v. Magallanes*, G.R. No. 89036, 29 January 1993, 218 SCRA 109; *People v. Fortez*, G.R. No. 90643, 25 June 1993, 223 SCRA 619.

[19] *People v. Joaquin, Jr.*, G.R. Nos. 98007-08, 5 August 1993, 225 SCRA 179; *People v. Sayat*, G.R. Nos. 102773-77, 8 June 1993, 223 SCRA 285; *People v. Arnan*, G.R. No. 72608, 30 June 1993, 224 SCRA 37; *People v. Codilla*, G.R. Nos. 100720-23, 30 June 1993, 224 SCRA 104; *People v. Tayag*, G.R. No. 105803, 12 October 1993, 227 SCRA 169.

[20] TSN, 31 March 1992, pp. 3-4.

[21] *People v. Guibao*, G.R. No. 93517, 15 January 1993, 217 SCRA 64; *People v. Magpayo*, G.R. Nos. 92961-64, 1 September 1993, 226 SCRA 13; *People v. De La Cruz*, G.R. Nos. 91865-66 and 92439-40, 6 July

1993, 224 SCRA 506; *People v. Joya*, G.R. No. 79090, 1 October 1993, 227 SCRA 9.

[22] *People v. Buligon*, G.R. No. 94338, 4 February 1992, 205 SCRA 766; *People v. Andasa*, G.R. No. 101022, 27 February 1992, 206 SCRA 636; *People v. Pascual*, G.R. No. 88282, 6 May 1992, 208 SCRA 393; *People v. Sarence*, G.R. No. 97433, 20 October 1992, 214 SCRA 780.

[23] Par. (2), Art. III, 1987 Constitution.

[24] *Bachrach Motor Co., Inc. v. CIR*, No. L-26136, 30 October 1978, 86 SCRA 27.

[25] *Wigmore on Evidence*, Sec. 1390, p. 111.

[26] See Note 12.

[27] See Note 12.

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