

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. VICENTE TY AND CARMEN TY, ACCUSED-APPELLANTS.

G.R. No. 121519. October 30, 1996

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

Vicente Ty AND Carmen Ty were charged with the crime of kidnapping and failure to return a minor in an information filed by 2nd Assistant City Prosecutor of Kalookan City Rosauro J. Silverio, the accusatory portion of which reads:

That on or about the month of April 1989, in Kalookan City, Metro Manila, and within the jurisdiction of this Honorable Court, the above-named accused, being then the owners, proprietors, managers and administrators of Sir John Clinic and as such said accused had the custody of Arabella Somblong, a minor, conspiring together and mutually helping one another and with deliberate intent to deprive the parents of the child of her custody, did then and there willfully, unlawfully and feloniously fail to restore the custody of said Arabella Sombong to her parents by giving said custody of subject minor to another person without the knowledge and consent of her parents

Contrary to Law.[1]

Both accused were arrested, and then arraigned on October 27, 1992 when they pleaded not guilty to the crime charged.

After trial, on May 31, 1995, a decision was rendered by the Regional Trial Court of Kalookan City, Branch 123, the decretal portion of which disposes as follows:

WHEREFORE, this Court finds both accused Spouses Vicente Ty and Carmen Ty guilty beyond reasonable doubt of the crime of kidnapping a minor and failure to return the same as defined and penalized by Article 270 of the Revised Penal Code and hereby sentences them to suffer imprisonment of reclusion perpetua. The accused are hereby ordered to pay the private complainant the sum of P100,000.00 by way of moral damages caused by anxiety, by her being emotionally drained coupled by the fact that up to this date she could not determine the whereabouts of her child Arabella Sombong.

SO ORDERED.[2]

The accused now interposes this appeal alleging the ensuing assignment of errors, viz:

I

THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS ‘DELIBERATELY FAILED TO RESTORE THE CHILD TO HER MOTHER,’ AND CONVICTING THEM UNDER ART. 270 OF THE REVISED PENAL CODE, AND SENTENCING THEM TO ‘RECLUSION PERPETUA’;

II

THE TRIAL COURT ERRED IN NOT HOLDING THAT THE CRIME COMMITTED, IF ANY, IS THAT DEFINED AND PENALIZED UNDER ART. 227 OF THE REVISED PENAL CODE;

III

THE TRIAL COURT ERRED IN NOT RECOMMENDING EXECUTIVE CLEMENCY PURSUANT TO PRECEDENT IN 'PEOPLE vs. GUTIERREZ,' 197 SCRA 569; and

IV

THE TRIAL COURT ERRED IN AWARDING 'COMPLAINANT THE SUM OF P100,000.00 BY WAY OF MORAL DAMAGES.'[3]

The relevant antecedents surrounding the case are as follows:

On November 18, 1987, complainant Johanna Sombong brought her sick daughter Arabella, then only seven (7) months old, for treatment to the Sir John Medical and Maternity Clinic located at No. 121 First Avenue, Grace Park, Kalookan City which was owned and operated by the accused-appellants. Arabella was diagnosed to be suffering bronchitis and diarrhea, thus complainant was advised to confine the child at the clinic for speedy recovery. About three (3) days later, Arabella was well and was ready to be discharged but complainant was not around to take her home. A week later, complainant came back but did not have enough money to pay the hospital bill in the amount of P300.00. Complainant likewise confided to accused-appellant Dr. Carmen Ty that no one would take care of the child at home as she was working. She then inquired about the rate of the nursery and upon being told that the same was P50.00 per day, she decided to leave her child to the care of the clinic nursery. Consequently, Arabella was transferred from the ward to the nursery.[4]

Thereafter, hospital bills started to mount and accumulate. It was at this time that accused-appellant Dr. Ty suggested to the complainant that she hire a "yaya" for P400.00 instead of the daily nursery fee of P50.00. Complainant agreed, hence, a "yaya" was hired. Arabella was then again transferred from the nursery to the extension of the clinic which served as residence for the hospital staff.[5]

From then on, nothing was heard of the complainant. She neither visited her child nor called to inquire about her whereabouts. Her estranged husband came to the clinic once but did not get the child. Efforts to get in touch with the complainant were unsuccessful as she left no address or telephone number where she can be reached. This development prompted Dr. Ty to notify the barangay captain of the child's abandonment.[6] Eventually, the hospital staff took turns in taking care of Arabella.[7]

Sometime in 1989, two (2) years after Arabella was abandoned by complainant, Dr. Fe Mallonga, a dentist at the clinic, suggested during a hospital staff conference that Arabella be entrusted to a guardian who could give the child the love and affection, personal attention and caring she badly needed as she was thin and sickly. The suggestion was favorably considered, hence, Dr. Mallonga gave the child to her aunt, Lilibeth Neri.[8]

In 1992, complainant came back to claim the daughter she abandoned some five (5) years back.

When her pleas allegedly went unanswered, she filed a petition for habeas corpus against accused-appellants with the Regional Trial Court of Quezon City. Said petition was however denied due course and was summarily dismissed without prejudice on the ground of lack of jurisdiction, the alleged detention having been perpetrated in Kalookan City.

Thereafter, the instant criminal case was filed against accused-appellants.

Complainant likewise filed an administrative case for dishonorable conduct against accused-appellant Dr. Carmen Ty before the Board of Medicine of the Professional Regulation Commission. This case was subsequently dismissed for failure to prosecute.

On October 13, 1992, complainant filed a petition for habeas corpus with the Regional Trial Court of Quezon City, this time against the alleged guardians of her daughter, namely, Marietta Neri Alviar and Lilibeth Neri. On January 15, 1993, the trial court rendered a decision granting the petition and ordering the guardians to immediately deliver the person of Cristina Grace Neri to the complainant, the court having found Cristina to be the complainant's child. On appeal to the Court of Appeals, however, said decision was reversed on the ground that the guardians were not unlawfully withholding from the complainant the rightful custody of Cristina after finding that Cristina and complainant's daughter are not one and the same person. On January 31, 1996, this Court in *Sombong v. Court of Appeals*[9] affirmed the Court of Appeals' decision.

In this appeal, accused-appellants would want us to take a second look and resolve the issue of whether or not they are guilty of kidnapping and failure to return a minor. Accused-appellants of course contend that they are not guilty and the Solicitor General agrees. In its Manifestations and Motion in lieu of Appellee's Brief, the Office of the Solicitor General recommends their acquittal.

We agree.

As we have mentioned above, this Court in *Sombong v. Court of Appeals*[10] affirmed the decision of the Court of Appeals reversing the trial court's ruling that complainant has rightful custody over the child, Cristina Grace Neri, the latter not being identical with complainant's daughter, Arabella. The Court discoursed, thusly:

Petitioner does not have the right of custody over the minor Cristina because, by the evidence disclosed before the court a quo, Cristina has not been shown to be petitioner's daughter, Arabella. The evidence adduced before the trial court does not warrant the conclusion that Arabella is the same person as Cristina.

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x x x

x x x

In the instant case, the testimonial and circumstantial proof establishes the individual and separate existence of petitioner's child, Arabella, from that of private respondents' foster child, Cristina.

We note, among others, that Dr. Trono, who is petitioner's own witness, testified in court that, together with Arabella, there were several babies left in the clinic and so she could not be certain whether it was Arabella or some their baby that was given to private respondents. Petitioner's own evidence shows that, after the confinement of Arabella in the clinic in 1987, she saw her daughter again only in 1989 when she visited the clinic. This corroborates the testimony of petitioner's own witness, Dra. Ty, that Arabella was physically confined in the clinic from November, 1987 to April, 1989. This testimony tallies with her assertion in her counter-affidavit to the effect that Arabella was in the custody of the hospital until April, 1989. All this, when juxtaposed with the unwavering declaration of private respondents that they obtained custody of Cristina in April, 1988 and had her baptized at the Good Samaritan Church on April 30, 1988, leads to the conclusions that Cristina is not Arabella.

Significantly, Justice Lourdes K. Tayao-Jaguros, herself a mother and the ponente of the herein assailed decision,

set the case for hearing on August 30, 1993 primarily for the purpose of observing petitioner's demeanor towards the minor Cristina. She made the following personal but relevant manifestation:

The undersigned ponente as a mother herself of four children, wanted to see how petitioner as an alleged mother of a missing child supposedly in the person of Cristina Neri would react on seeing again her long lost child. The petitioner appeared in the scheduled hearing of this case late, and she walked inside the courtroom looking for a seat without even stopping at her alleged daughter's seat; without even casting a glance on said child, and without even that tearful embrace which characterizes the reunion of a loving mother with her missing dear child. Throughout the proceedings, the undersigned ponente noticed no signs of endearment and affection expected of a mother who had been deprived of the embrace of her little child for many years. The conclusion or finding of undersigned ponente as a mother, herself, that petitioner-appellee is not the mother of Cristina Neri has been given support by aforestated observation xxx.

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Since we hold that petitioner has not been established by evidence to be entitled to the custody of the minor Cristina on account of mistaken identity, it cannot be said that private respondents are unlawfully withholding from petitioner the rightful custody over Cristina. At this juncture, we need not inquire into the validity of the mode by which private respondents acquired custodial rights over the minor, Cristina.

X X X

X X X

X X X

Under the facts and ruling in Sombong, as well as the evidence adduced in this case accused-appellants must perforce be acquitted of the crime charged, there being no reason to hold them liable for failing to return one Cristina Grace Neri, a child not conclusively shown and established to be complainant's daughter, Arabella.

The foregoing notwithstanding, even if we were to consider Cristina Grace Neri and Arabella Sombong as one and the same person, still, the instant criminal case against the accused-appellants must fall.

Before a conviction for kidnapping and failure to return a minor under Article 270 of the Revised Penal Code can be had, two elements must concur, namely: (a) the offender has been entrusted with the custody of the minor, and (b) the offender deliberately fails to restore said minor to his parents or guardians. The essential element herein is that the offender is entrusted with the custody of the minor but what is actually punishable is not the kidnapping of the minor, as the title of the article seems to indicate, but rather the deliberate failure or refusal of the custodian of the minor to restore the latter to his parents or guardians.[11] Said failure or refusal, however, must not only be deliberate but must also be persistent as to oblige the parents or the guardians of the child to seek the aid of the courts in order to obtain custody.[12] The key word therefore of this element is deliberate and Black's Law Dictionary defines deliberate as:

Deliberate, adj. Well advised; carefully considered; not sudden or rash; circumspect; slow in determining. Willful rather than merely intentional. Formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, as a deliberate judgment or plan. Carried on coolly and steadily, especially according to a preconceived design; given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; slow in action; unhurried; characterized by reflection; dispassionate; not rash. *People v. Thomas*, 25 Cal. 2d 880, 156 P. 2d 7, 17, 18.

By the use of this word, in describing a crime, the idea is conveyed that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon; that he carefully considers all these, and that the act is not suddenly committed. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by deliberation and the consideration and weighing of motives and consequences.[13]

Similarly, the word deliberate is defined in *Corpus Juris Secundum* as:

DELIBERATE.

As a Verb

The word is derived from two Latin words which mean literally ‘concerning’ and ‘to weigh,’ it implies the possession of a mind capable of conceiving a purpose to act, and the exercise of such mental powers as are called into use by the consideration and weighing of the motives and the consequences of the act; and has been defined as meaning to consider, reflect, take counsel, or to weigh the arguments for and against a proposed course of action; to consider and examine the reasons for and against, consider maturely, ponder, reflect upon, or weigh in the mind; to reflect, with a view to make a choice; to weigh the motives for an act and its consequences, with a view to a decision thereon.

As an Adjective

The word, used adjectively, implies action after thought and reflection, and relates to the end proposed; indicates a purpose formed in a mind capable of conceiving a purpose; and is based upon an intention accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design. It has been defined as meaning carefully considered; circumspect; entered upon after deliberation and with fixed purpose, formed after careful consideration, and fully or carefully considering the nature or consequences of an act or measure; maturely reflected; not sudden or rash, carefully considering the probable consequences of a step; premeditated; slow in determining; weighing facts and arguments with a view to a choice of decision; well-advised.

Under some circumstances, it has been held synonymous with, or equivalent to, ‘intentional,’ ‘premeditated,’ and ‘willful.’

Under other circumstances, however, it has been compared with, or distinguished from, ‘premeditated,’ ‘sudden,’ and ‘willful.’[14]

Essentially, the word deliberate as used in the article must imply something more than mere negligence; it must be premeditated, obstinate, headstrong, foolishly daring or intentionally and maliciously wrong.

In the case at bar, it is evident that there was no deliberate refusal or failure on the part of the accused-appellants to restore the custody of the complainant’s child to her. When the accused-appellant learned that complainant wanted her daughter back after five (5) long years of apparent wanton neglect, they tried their best to help herein complainant find the child as the latter was no longer under the clinic’s care. Accused-appellant Dr. Ty did not have the address of Arabella’s guardians but as soon as she obtained it from Dr. Fe Mallonga who was already

working abroad, she personally went to the guardians' residence and informed them that herein complainant wanted her daughter back. Dr. Ty testified as follows:

Q:

Now, since you said a while ago that when you placed the child under the (sic) guardianship, you are (sic) aware that the natural mother will get back the child, why did you not return the minor to the natural mother?

A:

During that time mam, the resident physician who will (sic) discharged the baby was not present because she was abroad.

Q:

But then madam witness, are you aware where the child was and to whom it was given?

A:

The exact address was not given to me, mam, before the resident physician left for abroad so, I asked the PAO to give me one month to have (sic) a long distance call to this doctor and asked her for the whereabouts(s) of the child.

Q:

And where you granted the thirty-day period by the Officer of the PAO?

A:

Yes, mam.

Q:

What happened if any during that thirty-day period?

A:

I was able to talk to Fe Mallonga in Bahrain and she told me the exact address of the guardian, mam.

Q:

Were (sic) you informed (of) the exact address of the guardian, did you informed (sic) the PAO?

A:

Yes, mam.

ATTY. WARD:

Q:

Then, what happened next, madam witness?

A:

I was the one who went to the address to be sure that the child was really there, mam.

Q:

And did you see the child?

A:

Yes, mam.

Q:

What did you do with the child?

A:

I just tell (sic) the child. 'Ay and laki mo na pala.' I just told the child like that and I've (sic) talked also to the guardian during that time, mam.

Q:

And what did you tell the guardian?

A:

I told the guardian that the rightful mother was claiming for the child and that we should talked (sic) with each other at the PAO for the decision, mam.

Q:

Did the guardian bring the child to the PAO's Office (sic)?

A:

No mam, she did not appear.

Q:

Why?

A:

They told me first that they are (sic) going to contact a lawyer but for (sic) several days, she did not respond anymore, mam.[15]

When the guardians refused to return the child, accused-appellant Dr. Ty sought the assistance of the National Bureau of Investigation (NBI) which conducted a conference among the parties but since a case was yet to be

filed, the custody of the minor remained with the guardians. This fact is evident from the following testimony, thus:

Q:

You testified on cross-examination that you located the whereabouts of the child sometime later, what steps did you take up (sic) after you found the child?

A:

I explained to the guardian that the verbal agreement between the supposed to be guardianship was only a plain guardianship and not as an adoption, sir.

Q:

You said you went to the NBI after you found the child, why did you go to the NBI?

A:

Because the guardian are (sic) not willing to surrender the child to the PAO's Office (sic). that is why I asked their help, sir.[16]

x x x

x x x

x x x

Q:

Now, when you informed the present custodian that the natural mother is now claiming the child, why were you not able to get the minor?

A:

I was not able to get the minor so I asked the help of the NBI to have the child surrender (sic), mam.

ATTY. WARD:

Q:

And what happened when you get (sic) the assistance of the NBI?

A:

They were the ones who asked the guardian to surrender the child, mam.

Q:

You stated a while ago that there was no written agreement between you or your hospital and the guardian of the minor, is that correct?

A:

Yes, mam.

Q:

For what reason if you know, why (did) the guardian did (sic) not follow you or obey you when you want (sic) to get back the child?

A:

I don't know of any reason, mam.[17]

The efforts taken by the accused-appellants to help the complainant in finding the child clearly negate the finding that there was a deliberate refusal or failure on their part to restore the child to her mother. Evidence is simply wanting in this regard.

It is worthy to note that accused-appellants' conduct from the moment the child was left in the clinic's care up to the time the child was given up for guardianship was motivated by nothing more than an earnest desire to help the child and a high regard for her welfare and well-being.

WHEREFORE, premises considered, the decision appealed from is hereby REVERSED and SET ASIDE. Accordingly, accused-appellant VICENTE TY and CARMEN TY are hereby ACQUITTED of the crime charged and are ordered to be released immediately unless they are being detained for other lawful causes. Costs de oficio.

SO ORDERED.

Padilla (Chairman), Bellosillo, Vitug and Hermosisima, Jr., JJ., concur.

[1] Rollo, p. 5.

[2] Id., at 31.

[3] Id., at 48.

[4] TSN, April 8, 1994, pp. 4-13.

[5] Ibid.

[6] Exhibit 8.

[7] See Note 4, *supra*, pp. 14-17.

[8] Id., at 16, 19-21.

[9] G.R. No. 111876, January 31, 1996.

[10] Ibid.

[11] Section 5 of Republic Act No. 18 amending Article 270 of the Revised Penal Code.

[12] Cuello Calon II, p. 701 cited in Gregorio, *Fundamentals of Criminal Law Review*, 1988, 8th Edition, p. 496.

[13] Black, Fifth Edition, 1979, p. 384.

[14] 26 C.J.S. 689-690.

[15] TSN, August 17, 1994, pp. 18-21.

[16] *Id.*, at 37.

[17] *Id.*, at 27-29.

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