

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ALBERTO “TOTOY” TIRONA, ACCUSED-APPELLANT.

G.R. No. 128907. December 22, 1998

Ponente: VITUG, J.

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VITUG, J.:

Found guilty of rape and sentenced to suffer the extreme penalty of death, accused-appellant ALBERTO "TOTOY" TIRONA is now before this Court pleading for a reversal of his conviction by the trial court which has concluded thus:

"WHEREFORE, in view of the foregoing, accused Alberto 'Totoy' Tirona y Morona is found guilty beyond reasonable doubt of having committed the crime of rape provided in Article 335 of the Revised Penal Code as amended by Republic Act 7659, Section 11, 4. against one Vanessa Julia D. Gil and is sentenced to suffer the penalty of death. Accused is likewise ordered to indemnify the private complainant in the sum of P50,000.00 as moral damages and to pay the costs." [1]

The information filed against accused-appellant, dated 11 July 1994, to which he entered a plea of "not guilty" upon arraignment read:

"That sometime (sic) between June 1993 to May 1994, in the Municipality of San Juan, Metro Manila, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused by means of force and intimidation, did then and there wilfully, unlawfully and feloniously have carnal knowledge with VANESSA JULIA D. GIL, who is six (6) years of age, against her will and consent." [2]

During the twelve-month period stated in the information, i.e., between June of 1993 up until May of 1994, accused-appellant Alberto Tirona was the family driver of the Gil family. His daily work routine would find him driving to and from St. John Academy in San Juan, Metro Manila, six-year old Vanessa Gil where she was a Kinder III pupil. A long-time friend and "kumpadre" of Alejandro Gil, Vanessa's father, accused-appellant enjoyed the full trust and confidence of the Gil family.

Sometime in November 1993, the nursemaid of the Gils told Vanessa's mother, Sylvia, that Vanessa's underwear appeared to be unexplainably "dirty and yellowish" in color. Sylvia did not pay much attention to it. Two months later, or around January of 1994, Sylvia recalled that Vanessa had begun to show reluctance in being with appellant and expressed preference in having her father bring her to and fetch her from school. When Sylvia asked Vanessa why the sudden change in her attitude towards accused-appellant, the latter just shook her head. Sylvia first heard Vanessa complain about vaginal pains in March 1994. Sylvia examined Vanessa and suspecting that the pain was only caused by rashes, she applied simple medication to her genitalia. During the second week of May 1994, Vanessa again complained of similar pains. It convinced Sylvia this time to have Vanessa undergo a medical check up.

Dr. Victoria Lim examined Vanessa and found a reddening of the perineal area and some rashes around the perineum.[3] She would in time testify that the reddening of the perineal area was likely due to lack of proper

hygiene,[4] but, to be certain, she recommended another examination by Dr. Restituto Buenviaje. The latter conducted his own examination. He found Vanessa to have suffered a laceration of the hymen. He advised Sylvia to bring Vanessa to the National Bureau of Investigation ("NBI").[5] Dr. Aurea Villena, a medico-legal officer at the NBI, after examining Vanessa, concluded that the child's vestibular mucosa, an area surrounding the hymen, was congested. Later, in her testimony, she would state, thus:

"Q.

Then vestibular mucosa, congested?

"A.

In my report, this is the most significant finding.

"Q.

Will you explain to the court?

"A.

Normally, the vestibular muscosa is that area which surrounds the hymen and normally, this is pinkish. But in this case, there was congestion, meaning there was redness on the vestibular mucosa.

"Q.

So, of what medical importance or significance is that finding that there is redness?

"A.

Firstly, we can consider hygiene. Being a child, maybe the child keeps on scratching her private part. And secondly, may be someone inserted something elongated and hard which touches the mucosa that makes it red.

"Q.

This thing that you said which could be inserted by someone, could it be a human finger?

"A.

Possible, Sir.

"Q.

Could it be a male penis?

"A.

Possible, sir."[6]

While Dr. Villena clarified that she had found the hymen of Vanessa intact, she stressed, nevertheless, that the preservation of physical virginity would not necessarily mean that there had been no penetration into the genital organ of the victim.[7]

The young Vanessa Gil herself testified in court; the salient portions of her testimony taken down during the trial would sum up her narration of the events that took place.

"Q.

Now, you said that you were being brought from your house to the school by means of a car. My question is,

who was then driving that car bringing you from your house to the school?

"A.

Totoy.

"Q.

How about coming from the school going back to your house, how do you go back to your house?

"A.

‘Hinahatid ako.’

"Q.

Also by car?

"A.

Yes, sir.

"Q.

And who drives you from the school going back home?

"A.

‘Totoy’

"Q.

Now, this Totoy that you have been mentioning, if you see him, would you be able to identify him?

"A.

Yes, sir.

"Q.

Will you please look around this court and see if that Totoy that you have been referring to is present in court?

"A.

Yes, sir.

"Q.

Will you point to him?

"A.

(Witness pointing to the man in yellow t-shirt who identified himself as Alberto ‘Totoy’ Tirona, the accused.)

"Q.

Are you a friend of Totoy?

"A.

No. sir.

"Q.

You said that you are not a friend of Totoy. Did you have any fight with Totoy?

"A.

Yes, sir.

"x x x x x x x x

"Q.

You said that you had fight with Totoy. Could you tell the court where this fight or those fights took place?

"A.

In a car.

"Q.

You mean the car that was being used and driven by Totoy to bring you to school from home and from school back to home?

"A.

Yes, sir.

"Q.

When you said the fight took place in the car, was the car moving?

"A.

No, sir.

"Q.

Could you tell the court in what part or portion of the car where the fight or fights took place?

"A.

In a parking lot in Jollibee.

"Q.

Now, this fight, did it take place inside the car?

"A.

Yes, sir.

"Q.

Which part of the car?

"A.

In front.

"x x x x x x x x

"Q.

In the fight that you had with Totoy, do you remember if that fight has something to do with the human finger?

"A.

Yes, sir.

"Q.

Now, the fight that you are telling the court with Totoy, does that fight also have something to do with fingers?

"A.

Yes, sir.

"Q.

Now, when you said the human fingers have something to do with your fight, is it your fingers or is it the fingers of Totoy?

"A.

Fingers of Totoy.

"Q.

What did Totoy do with his fingers? Are you ashamed to say that?

"A.

Yes, sir.

"Court:

"You can ask the child if she want to continue the hearing in chamber.

"Atty. Subido:

"Q.

You said that you are ashamed to say what Totoy did with his fingers. Would you like that we go inside the room of the judge and it is there where you will tell what Totoy did with his fingers?

"A.

I want to tell it in chamber.

"Court:

"What if you would agree so that she would not be ashamed with only the counsels, she, I, the stenographer and the interpreter. Atty. Mallares, are you amenable to that arrangement?

"Atty. Mallares:

Yes, your Honor.

(At this point, the hearing continued inside the chamber.)

"x x x x x x x x

"Q.

Now, you were mentioning about the fingers of Totoy a while ago. Would you tell the court what did Totoy do with his fingers?

"A.

Pinapasok po niya sa pekpek ko.'

"Q.

When you say 'pekpek', where is that 'pekpek'?

"A.

(Witness pointing to her private part).

"x x x x x x x x

"Q.

Now, when you were there at the NBI, do you remember that there was a woman who asked you some questions?

"A.

Yes, sir.

"Q.

And after the questions, you remember that you signed your name in a paper there at the NBI?

"A.

Yes, sir.

"Q.

Now, I would like you to go over this signature appearing on page 2 of a document already marked as Exhibit E. My only question is this, would you be able to identify or to tell the court whose writings of a name appearing in the typewritten name which I will not even mention?

"A.

My signature.

"x x x x x x x x

"Q.

Now, in this Exhibit E, you remember that you mentioned the words 'buntot ni Totoy'?

"A.

Yes, sir.

"Q.

And where is that 'buntot ni Totoy' located or found?

"A.

'Dito' (witness pointing to her front portion, private part).

"Q.

This 'buntot ni Totoy', does it have something to do with your fight with him?

"A.

Yes, sir.

"Q.

Could you tell the court what did Totoy do with his 'buntot'?

"A.

'Pinasok rin po niya dito.'

"Court:

"Q.

What do you mean by 'dito'?

"A.

'Pinasok niya sa pekpek ko'.

"Atty. Subido:

"Q.

Now, could you tell the court how many times did this fight of yours with Totoy take place?

"A.

Yes, sir.

"Q.

How many times?

"A.

(Witness raising her right hand and spreading her five fingers).

"Court:

"Before you continue.

"Q.

When you said five times, did Totoy use his 'buntot' or his fingers?

"A.

His fingers.

"Atty. Subido:

"Q.

How about the 'buntot', how many times?

"Atty. Mallares:

"Already answered, Your Honor. She said five times.

"Atty. Subido:

"That's why it is now a follow-up question in consequence to the question of the Honorable Court.

"Court"

"I will allow it.

"Atty. Mallares:

"She answered only five times fight. The ones used in all this occasion is the 'daliri'

"Atty. Subido:

"May we be allowed, you Honor, to clarify this because there are now two incidents being referred to.

"Court:

"Go ahead.

"Atty. Subido:

"Q.

A while ago, you said that in your fight with Totoy he used his fingers five times. Is that correct?

"A.

Yes, sir.

"Q.

A while ago, you said also that Totoy inserted or 'pinasok' his 'buntot'. Now, my question is, how many times did Totoy insert his 'buntot' to you?

"A.

(Witness raising her right little finger and said one time).

"Court:

"Q.

When you said one time that Totoy used his 'buntot', are you saying now that he inserted this in your 'pekpek'?

"A.

Yes, Your Honor."[8]

Accused-appellant assiduously argues that the trial court has grossly erred in convicting him of the crime charged in the face of the declaration made by NBI medico-legal officer, Dr. Villena, to the effect that Vanessa's physical virginity has been preserved. This fact, accused-appellants adds, precludes his alleged carnal knowledge of the complainant. In a long line of cases, this Court in this respect has uniformly held:

"As for the intact hymen, this is no proof that no rape had been committed. A broken hymen is not an essential

element of rape, not even where the victim is an innocent child x x x. As the trial court correctly observed: "The fact that the hymen has not been lacerated is of no moment. The victim being of tender age, the penetration of the male organ could go only as deep as the labia. In any case, for rape to be committed, full penetration is not required. It is enough that there is proof of entrance of the male organ within the labia or pudendum of the female organ. Even the slightest penetration is sufficient to consummate the crime of rape. Perfect penetration, rupture of the hymen or laceration of the vagina are not essential for the offense of consummated rape. Entry, to the least extent, of the labia or lips of the female organ is sufficient. Remaining a virgin does not negate rape." [9]

Accused-appellant bewails the denial of his motion for new trial by the trial court. Invoking the case of *People vs. del Mundo*, [10] accused-appellant insists that the rule in motions for new trial should be liberally construed in order to assist the parties in obtaining a just and speedy determination of their rights. The invocation is unacceptable. Under Section 2, Rule 121, of the Rules of Court, a new trial may be granted only on the basis of any of the following grounds:

- (a) That errors of law or irregularities have been committed during the trial prejudicial to the substantial rights of the accused;
- (b) That new and material evidence has been discovered which the accused could not with reasonable diligence have discovered and produced at the trial, and which if introduced and admitted, would probably change the judgment;

For newly discovered evidence to be a ground for new trial under paragraph (b) above, it is required that i) the evidence is discovered after trial; ii) such evidence could not have been discovered and produced at the trial even with the exercise of reasonable diligence; and iii) the evidence is material, not merely cumulative, corroborative, or impeaching, and of such weight that, if admitted, would probably change the judgment. [11] There is nothing on record to indicate that these requisites have at all been met.

The Court, however, finds merit in accused-appellant's argument that, there being no clear indication on the exact date of commission of the offense, the death penalty should not be imposed in this particular case. Prior to the enactment, and effectivity on 31 December 1993, of Republic Act. No. 7659 ("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"), the governing provisions in the Revised Penal Code on the offense of rape read:

"ART. 335. When and how rape is committed. " Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

"1. By using force or intimidation;

"2. When the woman is deprived of reason or otherwise unconscious; and

"3. When the woman is under twelve years of age or is demented.

"The crime of rape shall be punished by reclusion perpetua.

"Whenever the crime of rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death.

"When by reason or on the occasion of the rape, the victim has become insane, the penalty shall be death.

"When the rape is attempted or frustrated and a homicide is committed by reason or on the occasion thereof, the penalty shall be reclusion perpetua to death.

"When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death (As amended by Rep. Act No. 2632, approved June 18, 1960, and Rep. Act No. 4111, approved June 20, 1964.)"

Relative to the death penalty; Section 19, paragraph (1) of the Bill of Rights, in the 1987 Constitution, has expressed, thus:

"Sec. 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

Under the above Constitutional mandate, the imposition of the death penalty has thereby been suspended until Congress would have provided otherwise on the terms aforesaid. Republic Act No. 7659, amending Article 335 of the Revised Penal Code, has now prescribed otherwise. The new law ordained the mandatory penalty of death when, among other instances, the rape victim is a "child below seven (7) years" of age. The amendatory law states:

"SEC. 11. Article 335 of the same Code is hereby amended to read as follows:

"`Art. 335. When and how rape is committed. - Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

‘1. By using force or intimidation;

‘2. When the woman is deprived of reason or otherwise unconscious; and

‘3. When the woman is under twelve years of age or is demented.

‘The crime of rape shall be punished by reclusion perpetua.

‘Whenever the crime of rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be reclusion perpetua to death.

‘When by reason or on the occasion of the rape, the victim has become insane, the penalty shall be death.

‘When the rape is attempted or frustrated and a homicide is committed by reason or on the occasion thereof, the penalty shall be reclusion perpetua to death.

‘When by reason or on the occasion of the rape, a homicide is committed, the penalty shall be death.

‘The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances:

‘1. when the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.

‘2. when the victim is under the custody of the police or military authorities.

‘3. when the rape is committed in full view of the husband, parent, any of the children of other relatives within the third degree of consanguinity.

‘4. when the victim is a religious or a child below seven (7) years old.

‘5. when the offender knows that he is afflicted with Acquired Immune Deficiency Syndrome (AIDS) disease.

‘6. when committed by any member of the Armed Forces of the Philippines or the Philippine National Police or any law enforcement agency.

“7. when by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation.”

The law became effective on 31 December 1993; in this regard, this Court ruled in *People vs. Godoy*;^[12] thus:

"Finally, we are constrained to reiterate here that Republic Act No. 7659 which reimposed the death penalty on certain heinous crimes took effect on December 31, 1993, that is, fifteen days after its publication in the December 16, 1993 issues of the Manila Bulletin, Philippine Star, Malaya and Philippine Times Journal, and not on January 1, 1994 as is sometimes misinterpreted."^[13]

The prosecution has been able to prove that on at least one occasion, accused-appellant has had carnal knowledge of the six-year old complaining witness. Neither the Information filed against accused-appellant nor the evidence introduced by the prosecution, however, is definite on the exact date of the actual commission of the crime. The Information charging the offense has merely stated that "sometime (sic) between June 1993 to May 1994," the accused "did then x x x willfully and unlawfully have carnal knowledge (of) Vanessa, who is six (6) years of age, against her will and consent." Since the evidence although sufficient to establish the fact of rape committed between the months of June 1993 and May 1994, has failed to account for the exact date of its commission,^[14] i.e., whether it took place prior to or on or after 31 December 1993, the doubt should be resolved in favor of accused-appellant, and the penalty of death imposed upon him by the trial court must perforce be reduced to reclusion perpetua.

Following recent pronouncements of this Court, accused-appellant should additionally be ordered to indemnify the rape victim in the amount of P50,000.00 as and in the concept of civil liability ex delicto.

WHEREFORE, the judgment of the court a quo finding accused-appellant ALBERTO "TOTOY" TIRONA guilty of the crime of rape and ordering him to indemnify the private complainant for moral damages in the amount of fifty thousand pesos is affirmed with the MODIFICATION (a) that the penalty to be imposed upon him shall be reclusion perpetua, instead of death, and (b) that an amount of P50,000.00 by way of civil liability ex-delicto shall likewise be paid by him to the victim, following the foregoing disquisition. Costs against appellant.

SO ORDERED.

Davide, Jr. C.J., Romero, Bellosillo, Melo, Puno, Kapunan, Mendoza, Panganiban, Martinez, Quisumbing, Purisima, and Pardo, JJ., concur.

[1] Rollo, p. 35.

[2] Rollo, p. 4.

[3] TSN, 16 February 1996, p. 4.

[4] TSN, 16 February 1996, p. 7.

[5] TSN, 15 March 1996, p. 6.

[6] TSN, 25 January 1996, pp. 8-9.

[7] TSN, 25 January 1996, pp. 9-12.

[8] TSN, 01 April 1996, pp. 4-12.

[9] *People vs. Salinas*, 232 SCRA 274, 278-279; See also *People vs. Castro*, 196 SCRA 679; *People vs. Ramos*, 245 SCRA 405; *People vs. Sapurco*, 245 SCRA 519; *People vs. Gagto*, 253 SCRA 455; *People vs. Echegaray*,

257 SCRA 561.

[10] 262 SCRA 267.

[11] People vs. Alviado, 247 SCRA 300.

[12] 250 SCRA 676.

[13] At p. 732.

[14] In People vs.. Bugayong, G.R. No. 126518, 02 December 1998, which ruled that an Information charging rape committed "before and until October 15, 1994 x x x several times" was sufficient, the precise date of its commission, unlike here, was neither an essential fact to prove the crime nor material determine the applicable penalty.

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