

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ABUNDIO TOLENTINO, ACCUSED-APPELLANT.

G.R. No. 130514. June 17, 1999

Ponente: DAVIDE, JR., C.J.

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DAVIDE, JR., C.J.:

This case is before us for the automatic review[1] of the decision[2] of 19 May 1997 of the Regional Trial Court (RTC) of Macabebe, Pampanga, Branch 55, in Criminal Case No. 96-1763, in view of the death penalty imposed on accused-appellant Abundio Tolentino (hereafter TOLENTINO).

TOLENTINO was charged with the crime of rape in an information[3] which reads:

That during the period from May 1, 1995 to July 1995, in Masantol, Pampanga, and within the Jurisdiction of this Honorable Court, accused ABUNDIO TOLENTINO, step father of nine (9) year old Rachelle Parco, the former being the common-law spouse of the latter's mother, Teresa David, by taking advantage of his moral ascendancy over Rachel Parco, then eight (8) years old, did then and there, willfully, unlawfully and feloniously thru force and intimidation, had carnal knowledge of the said minor Rachel Parco, against her will and consent.

The facts as synthesized by the Office of the Solicitor General (OSG) in the Appellee's Brief,[4] which we hereby quote and adopt as our own for being fully in accord with the transcript of stenographic notes of witnesses, are as follows:

On May 1, 1995, at past noon, Rachelle Parco, 8 years old, was inside one of the two bedrooms at the second floor of the house of her grandmother, which was located at San Nicolas, Masantol, Pampanga (TSN, January 22, 1997). Rachelle was arranging the clothes while in the room (Ibid, p. 7).

Suddenly, Abundio Tolentino, the stepfather of Rachelle Parco, entered the same room and closed the door (Ibid). Abundio Tolentino ordered Rachelle Parco to stand up and lie down on the bed (Ibid, pp. 7-8). When Rachelle Parco was already on the bed, Abundio Tolentino removed his short pants and the short pants of Rachelle Parco (Ibid, p. 8).

Abundio Tolentino placed his sex organ on Rachelle Parco's genitals and bumped (binubundol-bundol) hers with his (Ibid). At that moment, Rachelle Parco remained silent, because she was afraid and did not know what Abundio Tolentino was doing to her (Ibid, pp. 8-9). Abundio Tolentino's carnal act lasted only for three minutes, because Rachelle Parco's brother knocked at the door and ask money from Abundio (Ibid, p. 9). Abundio Tolentino told Rachelle's brother to ask money from Lola Iding (ibid). Thereafter, Abundio Tolentino put on his short pants and hers and went down the house (Ibid).

Abundio Tolentino repeatedly did the same thing to Rachelle Parco at least three to four times a week in May, June, and July 1995 (Ibid, pp. 11-12). Rachelle Parco was overc[o]me by fear that she did not tell anyone about what Abundio Tolentino was doing to her.

When the family [of] Rachelle Parco transferred residence to Taguig, because Masantol became flooded, it was

then that Rachelle Parco mustered enough courage to tell her mother, Maria Teresa David, about Abundio Tolentino's bestial behavior (Ibid, pp. 12-13). Upon learning her daughter's sad flight, Maria Teresa David accompanied her on May 20, 1996, to the National Bureau of Investigation, Manila, to file a complaint against Abundio Tolentino (TSN, February 10, 1997, p. 14).

The victim, Rachelle Parco (hereafter RACHELLE) was likewise subjected to a physical examination, the result of which revealed that she was still a virgin and that her hymen was still intact and its orifice was 0.5 cm. in diameter "as to preclude complete penetration by an average-sized adult Filipino male organ in full erection without producing any genital injury." [5]

In his defense, TOLENTINO interposed alibi, claiming that it was impossible for him to be in Masantol on 1 May 1995 because as a taxi driver he would come home to Masantol every Sunday only, which was his rest day. He also claimed that the incident was a concoction of Cecille Yabut, the grandmother of RACHELLE, as she was opposed to his relationship with her daughter Ma. Teresa David. [6]

On 19 May 1997, the trial court rendered judgment convicting TOLENTINO of the crime of rape and sentencing him to suffer the penalty of death and indemnify RACHELLE in the sum of P100,000.

In his Appellant's Brief, TOLENTINO submits this lone assignment of error:

THE COURT A QUO ERRED IN FINDING THE GUILT OF HEREIN ACCUSED APPELLANT OF THE CRIME CHARGED HAS BEEN PROVEN BEYOND REASONABLE DOUBT

First, TOLENTINO raises the issue of Jurisdiction of the trial court. He maintains that the alleged rape was committed in Taguig, Metro Manila, and hence the trial court had no jurisdiction thereon. We are not persuaded. RACHELLE testified that she was sexually abused by TOLENTINO in their residence in Barangay San Nicolas, Masantol, Pampanga. [7]

TOLENTINO likewise asserts that the prosecution failed to prove with moral certainty that rape had been committed because the physical examination disclosed no genital or extragenital injuries on RACHELLE; her hymen was intact, and the orifice was so small as to "preclude penetration by an average-size adult Filipino male organ in full erection without producing any genital injury." If there had been penetration as claimed by RACHELLE, there would have been injuries to her genitals, considering her age and the number of times the incident allegedly took place. RACHELLE's testimony in the vernacular that "binundul-bundol ang kanyang ari" by TOLENTINO does not conclusively prove that rape was committed, to the exclusion of other offenses, in light of the aforesaid medical findings; besides, that testimony is subject to different interpretations and will not lead to the conclusion that TOLENTINO's intent was to have carnal knowledge of her.

Lastly, TOLENTINO faults the trial court in not considering that the incident was concocted by his mother-in-law, who was against his relationship with her daughter, the victim's mother.

In its Appellee's Brief, the OSG supports the appealed judgment and asks us to affirm the death penalty imposed by the trial court.

Rape is committed even with the slightest penetration of the woman's sex organ. It is enough that there is proof of the entrance of the male organ within the labia of the pudendum of the female organ. Penetration of the penis by entry into the lips of the vagina, even without rupture or laceration of hymen, suffices to warrant a conviction for rape. Thus, a finding that the victim's hymen is intact and has no sign of laceration does not negate a finding that rape was committed. [8]

Pertinent portions of the findings [9] of Dr. Armie M. Soreta-Uniel, Medico-Legal Officer of the NBI, are as

follows:

GENITAL EXAMINATION:

Pubic hair, no growth. Labia majora and labia minora, coaptated. Fourchette, tense, vestibular mucosa, pinkish. Hymen, short, thin, intact. Hymenal orifice, measures 0.5 cm. in diameter. Vaginal walls and Rugosities cannot be reached by the examining finger.

CONCLUSIONS:

- No evident sign of extragenital physical injuries noted on the body of the body of the subject at the time of the examination.
- Hymen, intact and its orifice small (0.5 cm. in diameter) as to preclude complete penetration by an average-sized, Adult, Filipino male organ in full erection without producing any genital injury.

In light of these findings of the medico-legal officer, a rigorous scrutiny of the testimony of RACHELLE must perforce be made to determine whether there was evidence of the entrance of TOLENTINO's male organ within the labia of the pudendum or the lips of the vagina of RACHELLE, without necessarily reaching either the orifice or the hymen. The following is RACHELLE's testimony:

Q You said that on May 1, 1995, you were inside this room. What were you doing then?

A I was folding clothes, sir.

Q While you were folding clothes, what happened next?

A Abundio Tolentino entered the room, sir.

Q Where did he enter the room?

A in the place where I was situated, sir.

Q Did he pass through a window or through the door of the room?

A He entered through the door, sir.

Q After Tolentino entered the room, what happened next?

A When he entered the room, he closed the door, sir.

Q After he closed the door, what did Abundio Tolentino do, if he did anything?

A He told me to stand up.

Q What did you tell him?

A I did not tell him anything. I just stood up.

Q Did you stand?

A Yes, sir.

Q And then what happened?

A Then he told me to lie down on the bed.

Q What happened next?

A He removed his shorts, sir.

Q And then what happened?

A He removed my shorts also, sir.

Q When Abundio Tolentino removed his shorts as well as yours, what transpired next?

A He placed his sex organ to my sex organ, sir.

Atty. Gutierrez:

May we request that the words used by the witness, "binubundul-bundol ang kanyang ari" be placed on the records, your Honor.

Court:

Granted.

Pros. Datu:

Will you please explain what you mean by the word "binubundul-bundol"?

A He was trying to force his sex organ into mine, sir.

Q How long did that take?

A Around three (3) minutes, sir.

Q What did you do, if you did anything, when the accused was forcing his sex organ into yours?

A I did not do anything, sir. I remain[ed] silent.

Q Why did you remain silent?

A I was afraid, sir.

Q

Why were you afraid?

A Because I did not know what he was doing.

Q What was your reaction when Abundio Tolentino was trying to force his sex organ into yours?

A I was just looking at our aparador and remaining [sic] silent.

Q You said that the accused was doing this to you in a span of 3 minutes. What happened next?

A My brother knocked at the door, Sir.

Q What is the name of your brother?

A Mariel D. Parco, sir.

Q When Mariel Parco knocked at the door, what happened next?

A He was asking for some money from Abundio Tolentino, sir.

Q

Do you mean to say, Mariel was able to enter that room?

A No, sir, he was just near the door.

Q And what happened next?

A Abundio Tolentino told my brother to ask money from Lola Iding.

Q What happened next?

A Before he went down, he put on my shorts and also his shorts.[10]

There was nothing from RACHELLE's testimony that proved that TOLENTINO's penis reached the labia of the

pudendum of RACHELLE's vagina. As translated, she only said: "He placed his sex organ to my sex organ, sir." This was the translation of the word "binubundul-bundol." And when asked to explain what she meant by it, she answered: "He was trying to force his sex organ into mine, sir."

The prosecution did not ask her the appropriate questions to get some more important details that would demonstrate beyond any shadow of doubt that TOLENTINO's penis reached the labia of the pudendum or the lips of RACHELLE's vagina. It should have, for instance, asked whether TOLENTINO's penis was firm and erect or whether RACHELLE's legs were spread apart to bring us to the logical conclusion that, indeed, TOLENTINO's penis was not flabby and had the capacity to directly hit the labia of the pudendum or the lips of RACHELLE's vagina. There is paucity of evidence that the slightest penetration ever took place. Consequently, TOLENTINO can only be liable for attempted rape.

Under the law^[11] there is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance. In this case, there is no doubt at all that TOLENTINO had commenced the commission of the crime of rape by (1) directing RACHELLE to lie down, (2) removing his shorts and hers, and (3) "trying to force his sex organ into" RACHELLE's sex organ. But there is no conclusive evidence of the penetration, however slight, of RACHELLE's sex organ. The penetration was an essential act of execution to produce the felony. Thus, in the absence of a convincing evidence thereof, TOLENTINO should be given the benefit of the doubt and can be convicted of attempted rape only.

Under Article 51 of the Revised Penal Code, the penalty for an attempted felony is the "penalty lower by two degrees than that prescribed by law for the consummated felony." In this case, the penalty for the rape if it had been consummated would have been death, pursuant to Article 335 of the Revised Penal Code, as amended by R.A. No. 7659, since RACHELLE was eight years old and TOLENTINO was the common-law spouse of RACHELLE's mother. The last paragraph thereof provides:

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

- 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.

The information specifically alleges that RACHELLE was eight years old when the crime was committed and TOLENTINO was "the stepfather... being the common-law spouse of [RACHELLE's] mother, Teresa David." That allegation is inaccurate. TOLENTINO was not RACHELLE's step-father, for that relationship presupposes a legitimate relationship, i.e., he should have been legally married to Teresa David. A step-father is the husband of one's mother by virtue of a marriage subsequent to that of which the person spoken of is the offspring;^[12] or, a stepdaughter is a daughter of one's spouse by a previous marriage or the daughter of one of the spouses by a former a marriage.^[13] Nevertheless, since the information specifically alleges that TOLENTINO was the common-law-spouse of RACHELLE's mother and that RACHELLE was under eighteen years of age, we shall appreciate these special qualifying circumstances.

We disagree with the contention of the OSG that "relationship" is an aggravating circumstance in this case^[14] in that TOLENTINO was the step-father of RACHELLE. In the first place, as stated earlier, TOLENTINO was not the step-father of RACHELLE. Second, the alternative circumstance of relationship can be considered only "when the offended party is the spouse, ascendant, descendant, legitimate, natural or adopted brother or sister, or relative by affinity in the same degree of the offender."^[15] RACHELLE does not fit in any of the enumeration. At any

rate, the circumstance that TOLENTINO was the common-law spouse of RACHELLE's mother, together with the fact that RACHELLE was eight years old when the rape was committed, has already served as a special qualifying circumstance in this case.

TOLENTINO's allegation of ulterior motive cannot be sustained. We cannot believe that the grandmother would expose her granddaughter RACHELLE, a young and innocent girl, to the humiliation and stigma of a rape trial just to stop the relationship between TOLENTINO and her daughter, the mother of RACHELLE. There is, as well, no showing whatsoever that RACHELLE allowed herself to be manipulated by her grandmother to tell a lie just to satisfy the wishes of the latter. Granting arguendo that TOLENTINO and RACHELLE's grandmother did not get along well, we do not see how RACHELLE would be able to concoct a story of rape, risk public censure, and expose herself to the rigors and embarrassment of a public trial if her motive had been other than to secure justice.[16]

Besides, against RACHELLE's positive testimony, TOLENTINO had nothing to offer but denial and alibi. Settled is the rule that positive testimony is stronger than negative testimony.[17] Equally settled is that alibi is a weak defense, for it is easy to concoct and fabricate. It cannot prevail over, and is worthless in the face of, the positive identification by a credible witness that the accused committed the crime.[18] RACHELLE positively identified TOLENTINO as her rapist.

The penalty in this case should have been reclusion temporal, which is the penalty lower by two degrees than death. However, with the application of the Indeterminate Sentence Law, TOLENTINO may be sentenced to an indeterminate imprisonment penalty whose minimum shall be within the range of prision mayor and whose maximum shall be within the range of reclusion temporal in its medium period pursuant to Article 64 (1) of the Revised Penal Code.

And now on the damages which may be awarded to RACHELLE. There have been new developments in jurisprudential law on the matter. In *People v. Prades*, [19] we ruled that irrespective of proof thereof, the victim of consummated rape is entitled to moral damages of P50,000. In *People v. Victor*, [20] we also increased to P75,000 the indemnity in rape cases if the penalty of death is to be imposed.

The trial court awarded P100,000 as indemnity. Clearly, the award finds no support in the law and in our decisions. Since TOLENTINO is found guilty of attempted rape only, an indemnity of P50,000 and moral damages of P25,000 are in order.

WHEREFORE, judgment is hereby rendered modifying the appealed decision of 19 May 1997 of the Regional Trial Court of Macabebe, Pampanga, Branch 55, in Criminal Case No. 961763-M. As modified, accused-appellant ABUNDIO TOLENTINO is found guilty beyond reasonable doubt as principal of the crime of attempted rape, under Article 335, in relation to Article 51, of the Revised Penal Code, as amended; and, pursuant to the Indeterminate Sentence Law, he is hereby sentenced to suffer an imprisonment penalty ranging from ten (10) years of prision mayor as minimum to seventeen (17) years and four (4) months of reclusion temporal as maximum, and to pay the victim RACHELLE PARCO the sums of P50,000 as indemnity and P25,000 as moral damages.

With costs de oficio.

SO ORDERED.

Romero, Bellosillo, Melo, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Purisima, Pardo, Buena, Gonzaga-Reyes, and Ynares-Santiago, JJ., concur.

Puno, J., no part. On official leave.

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- [1] Article 47 of the Revised Penal Code, as amended by R.A. No. 7659.
- [2] Per Judge Reynaldo V. Roura, Rollo, 16-19.
- [3] Rollo, 7.
- [4] Rollo, 58.
- [5] Exhibit "D"; Original Record (OR), 16.
- [6] TSN, 14 May 1997, 4-8.
- [7] TSN, 22 January 1997, 5.
- [8] *People v. Tismo*, 204 SCRA 535, 556 [1991]; *People vs. Echegaray*, 257 SCRA 561, 573 [1996]; *People vs. Tabugoca*, 285 SCRA 312, 329 [1998]; *People vs. Luzorata*, 286 SCRA 487, 491 [1998].
- [9] Exhibit "D."
- [10] TSN, 22 January 1997, 7-9.
- [11] Article 6, Revised Penal Code.
- [12] BLACK'S LAW DICTIONARY, Sixth ed., 1413.
- [13] *People v. Dimapilis*, G.R. No. 128619-21, 17 December 1998.
- [14] Citing *People v. Lucas*, 232 SCRA 537 [1994].
- [15] Article 15, Revised Penal Code.
- [16] See *People vs. Joya*, 227 SCRA 9 [1993]; *People vs. Catoltol*, 265 SCRA 109 [1996]; *People vs. Bersabe*, G.R. No. 122768, 27 April 1998.
- [17] *People v. Antonio*, 233 SCRA 283, 299 [1994].
- [18] *People v. Lee*, 204 SCRA 900, 910 [1991]; *People v. Buka*, 205 SCRA 567, 584 [1992]; *People v. Florida*, 214 SCRA 227, 239 [1992].
- [19] G.R. No. 127569, 30 July 1998.
- [20] G.R. No. 127903, 9 July 1998; see also *People v. Bartolome*, G.R. No. 129054, 29 September 1998.

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