

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. RAMWELL LOMIBAO, ACCUSED-APPELLANT.

G.R. No. 135855. August 03, 2000

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

This is an automatic review of the Judgment[1] dated August 24, 1998 of the Regional Trial Court (RTC) of Davao City, Branch 17 in Criminal Case No. 38,507-97 finding the accused, Ramwell Lomibao (LOMIBAO), guilty beyond reasonable doubt of the crime of rape.

On February 21, 1997, an Information[2] for rape was filed against the accused as follows:

"That sometime in the month of August 1996, in the City of Davao, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with violence and intimidation, willfully, unlawfully and feloniously had carnal knowledge with Marissa Cañon, who is 11 years of age, against her will."

Upon arraignment, the accused with the assistance of counsel entered a plea of not guilty.[3] Thereafter, trial ensued.

The trial court stated the facts as follows:

"On August 23, 1996, complainant went to the house of her natural father at Sitio Soriano, Catalunan Grande, Davao City, to asked (sic) money from him but because her father has (sic) no money, she returned home at about 11:00 a.m., and fell asleep in the room of her mother and accused since her mother was not there at that time, doing laundry work at Montemaria, about five meters away. Her step-father was not in the house when she arrived but she noticed later, when she was awakened, he was already on top of her, after removing her shorts and panty.

The accused told her not to shout. Her panty was hanging at her knee.

The accused then removed his own pants and his red brief only up to his knee, then placed himself on top of her.

Before putting himself on top of her, he told complainant not to shout while holding a knife and told her further not to move.

Then he inserted his penis at (sic) her vagina and despite her movement the accused was able to insert his penis inside her vagina.

She felt pain when accused's penis got inside her vagina and despite her struggling and told accused to stop, the latter did not stopped (sic), instead remained on top of her for about three times.

After molesting her, accused told complainant to dress up and warned her not to tell what happened to her mother.

Despite the warning of accused, complainant told her mother about what accused did to her but her mother

said, never mind, 'I will just tell him.'

After sometime, her mother aside from confronting accused (sic) what happened never reported the incident with the police.

Upon inaction of her mother about her complaint, she reported the incident with (sic) her natural father and he told her to come back to report the incident with (sic) the police.

Actually before the incident, she was sleeping on a bench inside the room of her mother and accused, where there is a bed where she sleep (sic) on that occasion because they were not there at that time and moreover, there was a (sic) fresh air near the bed and she was very tired at that time and so she felt (sic) asleep.

The room was not locked at that time.

She felt sleepy even at 11:00 at that time because she was tired and hungry because her father did not gave (sic) her money.

After the incident, she submitted herself for medical examination, conducted by Dr. Ledesma, shown by the medical certificate, marked as Exh. "E" for the prosecution.

The father of the complainant, Ramon Cañon with his legal wife Juliana Cañon, showed the birth certificate of complainant, marked Exh. "A" for the prosecution.

The incident, on August 23, 1996, was reported to him by his daughter in his own house at Catalunan Grande, Davao City, about (sic) his daughter was rape (sic) by accused only on November 22 or 23, 1996.

Upon report of his daughter, he confronted his wife about it but she told him that the report was not true.

They went to the barangay captain to report the complaint of his daughter but he was referred to the Talomo police station. At the Talomo police station, he was referred with the CYRS office of said police station. At the CYRS, the complaint of his daughter was blotted by a certain Mateo Lagunsad of the CYRS.

He executed his affidavit and that of his daughter marked Exh, "D" for his daughter Marissa Cañon, for the filing of the case."

On August 24, 1988 the RTC rendered a decision finding the accused guilty beyond reasonable doubt of the crime of rape, the dispositive portion of the decision reads:

"WHEREFORE, finding the evidence of the prosecution more than sufficient to prove the guilt of accused of the offense charged beyond reasonable doubt, accused RAMWELL LOMIBAO, is sentenced to suffer the supreme penalty of DEATH, pursuant to Art. 335 of the Revised Penal Code as amended by Rep. Act 7659, Sec. 11, par. 8, by lethal injection under Rep. Act 8176, in the manner therein provided.

Moreover, accused is furthermore ordered, to pay complainant, MARISSA CAÑON, the amount of Fifty Thousand (P50,000.00) Pesos, as moral damages and another amount of Twenty-Five Thousand (P25,000.00) Pesos, as exemplary damages by way of civil indemnity, for all the sufferings, humiliation and dishonor done to her person, she will carry throughout her life because of the acts committed by accused.

Pursuant to Sec. 22 of Rep. Act 7659, par. 2 thereof, the Branch Clerk of Court of this court, is ordered to immediately forward and elevate the entire records of this case with the Supreme Court, Manila, for automatic review of this decision and appropriate action, pertinent to Art. VIII, Sec. 5 of the 1987 Philippine Constitution.

SO ORDERED."[4]

In view of the imposition of the death penalty, the case is now before this Court on automatic review.

In this appeal, the accused-appellant raises the following errors committed by the RTC:

"I

THE TRIAL COURT GRAVELY ERRED IN GIVING FULL WEIGHT TO THE INCREDIBLE TESTIMONY OF THE RAPE VICTIM.

II

THE TRIAL COURT GRAVELY ERRED IN IMPOSING THE DEATH PENALTY DESPITE THE ABSENCE OF ANY QUALIFYING CIRCUMSTANCES IN THE CHARGE SHEET."[5]

In support of his appeal, the accused-appellant maintains that the trial court mistakenly accepted the testimony of the victim, Marissa Cañon (MARISSA) as credible. The accused-appellant claims that MARISSA was not conversant with the exact date or dates of the commission of the alleged rape yet she remembered events in her life, i.e. the exact date when she was visited by her mother in Balay Danguan; the time when her mother lived with the accused-appellant; and the fact that her mother hid the accused-appellant after the latter allegedly raped her, which were of less importance. The accused-appellant claims that a victim of such a bestial act would not soon forget the details thereof if it were in fact true. Moreover, the testimony of her father, Ramon Cañon (RAMON) contradicts her testimony since the latter stated that the accused-appellant merely mashed her nipple.

The accused-appellant further claims that even assuming that the trial court was correct in convicting him, the said court improperly relied on the qualifying circumstance of relationship to convict him of qualified rape since said circumstance was not alleged in the information. He can therefore only be convicted of simple rape for the reason that even if the relationship between MARISSA and LOMIBAO was proven at the trial, the failure to allege the said circumstance in the information cannot change the nature of the crime.[6]

After a careful review of the records, we resolve to affirm the judgment of conviction.

The accused-appellant's main defense is that of alibi and denial.

The defense of denial is unavailing.

The defense of alibi is the weakest of all defenses for it is easy to contrive and difficult to prove.[7] A positive identification of the accused made by an eyewitness prevails over such a defense.[8] The denial of the accused-appellant cannot prevail over the categorical testimony of MARISSA that he raped her. There was no showing that she was motivated to falsely implicate the accused in the commission of such a heinous crime. The absence of convincing evidence showing any improper motive on the part of the principal witnesses for the prosecution strongly tends to sustain the conclusion that no such improper motive exists, and that their testimonies are worthy of full faith and credit.[9] In her testimony, MARISSA clearly narrated the manner by which she was raped by the accused-appellant and positively identified him as follows:

"Q:

In your affidavit, dated November, 1996, you said, you were still 11 years old. Please tell us if you can remember, what is your date of birth?

A:

April 17, 1985.

Q:

And who is your natural mother?

A:

Juliana Cañon.

Q:

How about your natural father.

A:

Ramon Cañon.

Q:

If you know, are they legally married?

A:

Yes, sir.

Q:

Do you know the accused in this case Ramwell Lomibao?

A:

Yes, sir.

Q:

Why do you know the accused Ramwell Lomibao?

A:

Because he is the paramour of my mother.

Q:

What happened to the relationship of your parents, on August, 1996?

ATTY. SANGO:

Leading and no basis.

FISCAL:

That was already basis because according to her, there is a paramour. I want to know from the witness, what happened to the marriage of her natural parents.

COURT:

Answer that.

WITNESS:

A:

Because of the fact, that prior to that date, on August, 1996, my father had no work and my parents always quarrel that's why my mother separated with (sic) him, and after that, she met this Ramwell Lomibao.

Q:

Can you identify Marissa, the accused if he is in court?

ATTY. SANGO:

No basis.

FISCAL:

Why not, being the step-father?

COURT:

Answer.

WITNESS:

A:

He is the one. (witness pointing to accused Ramwell Lomibao.

xxx xxx xxx

Q:

Sometime in August, 1996, Marissa, what unusual incident if any happened in your house?

A:

First of all, during that time, I went to my father to asked (sic) money and because he had no money at that time, so I went home.

Q:

Whose father are you referring to?

A:

My true father.

Q:

Why, where is he staying?

A:

In our old house.

Q:

What (sic) is that old house located?

A:

At Sittio Sorian.

Q:

You want to ask money from your father and because he has no money you went home? When you went home, what happened?

A:

Upon arrival, I slept and I do not know that he arrived and I only became aware when he was already on top of me.

Q:

What time was that during the day if you can recall?

A:

About 11:00 a.m., when I went to sleep.

Q:

Where was your mother at that time?

A:

She was doing laundry.

Q:

Where?

A:

At Monetemaria.

Q:

How far is that place from your house?

A:

It was just nearby, about 5 meters away.

Q:

How about your step-father at that time, what was he doing when you arrived from the place of your father?

A:

At that time, when I arrived, I did not see him.

Q:

You said that when you were awoken (sic), your step-father was already on top of you? What actually did your step-father did (sic) to you at that time?

A:

He removed my shorts, panty and sando.

Q:

And what else did the accused do?

A:

He said, do not moved (sic) and do not shout Leng.

Q:

When you said, he removed your panty and shorts was it actually removed?

A:

Up to my knee.

Q:

And when your panty was removed as well as your shorts, what did the accused do next?

A:

He also removed his pants and his brief and placed himself on top of me and he molested me.

Q:

What was he actually wearing at that time, long or short pants?

A:

He was wearing a (sic) pants.

Q:

How about his brief, do you recall the color of his brief?

A:

Red.

Q:

Was he able to completely removed (sic) his pants and brief?

A:

He was able to removed (sic) all, together (with) his pants but his brief was only up to his knee.

Q:

At what point in time did he tell you not to shout and not to move?

A:

Before he removed my shorts, panty and sando.

Q:

Considering that it was day time and your mother was just according to you not so far away, please tell the court, why did you not shout?

A:

Because at that time, he was holding a knife and he said, he told me not to move and not to shout.

Q:

When he was on top of you, without any brief and panty and after removing your panty, what happened next?

A:

He inserted his penis to my vagina and he kept on moving and he again told me not to moved (sic) and held my wrist hand.

Q:

Why were you moving at that time?

A:

Because he inserted his penis to my vagina.

Q:

Did his penis, what actually happened to his penis when he inserted it to your vagina?

A:

Yes, it entered.

Q:

What was your reaction when he inserted his penis to your vagina?

A:

I felt pain.

Q:

And aside from feeling pain, what did you do?

A:

I kept on struggling and said, Ramwell stop.

Q:

Did he stopped? (sic)

A:

No.

Q:

How long, did you estimate how long did he do that act to you?

A:

I think, about 3 minutes only.

Q:

After 3 minutes, what happened next?

A:

After that, he told me do not tell your mother what I did to you. You now dress up

Q:

Despite the truth, did you report it to your mother considering that she was just around?

A:

I reported the incident to my mother and told her, Ma, Ramwell molested me and she answered, leave it to me, I will tell him not to do it again to you.

Q:

Sometime in August, 1996, when this incident happened, how many times did your step-father molested (sic) you?

ATTY. SANGO:

Immaterial.

FISCAL:

Q:

What action was taken by your mother?

A:

She just confronted Ramwell and told her to report to the police but she declined to report the incident to the police.

Q:

Who declined to report to the police?

A:

My mother.

Q:

When she declined to report to the police, what did you do?

A:

So, I proceeded to my father and reported the incident to him.

Q:

And what action was taken by your father?

A:

When I went to him, he asked me whether I was molested and I said yes and I came back to report to the police."^[10]

Accused-appellant attempts to discredit MARISSA's testimony by claiming that MARISSA was not familiar with the precise date of the commission of the offense and the time of its occurrence. This fact does not convince us that she was not raped by him. First, the date of the commission of the rape is not an essential element of the crime.^[11] Further, her inability to account for the precise time the rape occurred cannot be taken against her inasmuch as before the rape, she had just been awakened by the accused-appellant and could have been disoriented.^[12] Second, it is well established in this jurisdiction that determination of the competence and credibility of a child to testify rests primarily with the trial judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, as well as his understanding of the obligation of an oath.^[13] The findings of the trial court on the credibility of witnesses and their testimonies are accorded great respect unless the court a quo overlooked substantial facts and circumstances, which if considered, would materially affect the result of the case.^[14] The evaluation or assessment made by the trial court acquires greater significance in rape cases because from the nature of the offense the only evidence that can oftentimes be offered to establish the guilt of the accused is the complainant's testimony.^[15] In the present case, we find no cogent and legal basis to disturb the trial court's finding disregarding the testimonies of the defense witnesses and upholding the credibility of the complainant MARISSA who, despite undergoing a rigorous cross-examination from an antagonistic counsel, withstood a barrage of questions, stood firm on her assertions and remained unfaltering in her testimony on the unfortunate incident.

The fact that MARISSA did not shout although she was not prevented from shouting when she was allegedly

raped is understandable. The failure of a victim to physically resist does not negate rape when intimidation is exercised upon the victim and the latter submits herself, against her will, to the rapist's assault because of fear for life and personal safety.[16] In the instant case, MARISSA, on cross-examination, categorically described how the accused-appellant employed force and intimidation by the use of a knife during the sexual assault, which prevented her from shouting as follows:

"ATTY. SANGO:

Q:

You want to tell the court that you did not pushed (sic) away your step-father?

A:

As I said, at that time, I really struggled but he held my both hands.

Q:

Is it not the fact that you told him that Ramwell ayaw?

A:

Yes, sir.

Q:

So, he held your two hands?

A:

Yes, sir.

Q:

So, when he held your two hands, you just told him, Ramwell ayaw?

A:

Yes, sir.

Q:

You did not shout?

A:

How can I shout when I was threatened by a knife?

Q:

Did you not tell a while ago that accused held both of your hands? Tell the truth?

A:

Actually, during that time when he held my both hands, he transferred one of my hands and held it with one hand and held the knife with another hand.

Q

Did you not tell awhile ago, that both of your hands were held by his two hands? You are a liar?

FISCAL:

Witness is trying to explain what actually happened.

COURT:

Do not say any remarkable (sic) words.

ATTY. SANGO:

It is against logic. How can he do that when she already admitted that both her hands were both held by the accused?

COURT:

Explain that.

WITNESS:

A:

As I said, after he held my both hands, he transferred my other hand and together in one, held it with his one hand and took hold of the knife that was near my head and pointed it to my face.

Q:

You changed your testimony because you said that both of your hands were held by the accused, is that correct?

FISCAL:

Already explained.

COURT:

Explained already."[17]

We cannot sustain the accused-appellant's contention that MARISSA's testimony contradicts that of her father RAMON. In his testimony, RAMON said that MARISSA told him that the accused-appellant merely mashed her nipple. The appellee correctly points out that RAMON was referring to the event on November 23, 1996 and not to that which occurred in the month of August as clearly indicated in MARISSA's affidavit.[18] There is therefore no contradiction in their testimonies.

Finally, accused-appellant claims that Dr. Danilo Ledesma's testimony on the findings contained in the Medico-Legal Report[19] was inconclusive with respect to whether MARISSA was indeed raped, viz:

"Q:

Going into the genital examination you conducted which you reported that as indicated therein, is this the result of your personal findings?

A:

Yes, sir.

Q:

You concluded in your report that there is no evident sign of extra genital physical injuries at the time of the examination?

A:

Yes, sir.

Q:

And then you also concluded the hymen is intact but distensible to allow complete penetration by an average sized male organ in erection without causing hymenal injury, please explain?

A:

What (sic) I examined the hymen of the patient, it was found out that the hymen is elastic and could allow an average sized male organ in erection to enter, by using the test tube in this case it allows 2.5 cm. in diameter test tube which is also the average sized of a male organ erected.

Q:

In your medical opinion, considering that the girl is a minor, 11 yrs. old, does that apply to your findings, considering that she is a minor?

A:

Yes, sir.

Q:

In your medical opinion, it is possible that the penis of a man may have penetrated without causing laceration, is that what you mean?

A:

Yes, sir."^[20]

We do not agree. The absence of any extragenital injuries on MARISSA is easily explainable. Dr. Ledesma conducted his examination on MARISSA on November 25, 1996 or three months after she was raped and not immediately thereafter. Neither does the fact that MARISSA's hymen was intact create a reasonable doubt as to the accused-appellant's guilt inasmuch as a broken hymen is not an essential element of rape, not even when the victim is an innocent child.^[21] Besides, Doctor Ledesma categorically stated that the hymen of MARISSA was elastic so as to allow the penetration of a penis without causing any lacerations.

We come now to the imposition of the proper penalty.

The accused-appellant's claim that he cannot be punished for the crime of qualified rape under the information he is charged with is well taken.

The crime of rape is punished under Article 335 of the Revised Penal Code as amended by R.A. No. 7659. It reads:

"x x x

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

x x x

- 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.

xxx xxx xxx"

We have consistently held that the concurrence of the minority of the victim and her relationship with the offender is a special qualifying circumstance that must be both alleged and proved with certainty, otherwise the death penalty cannot be imposed.^[22] Both special-qualifying circumstances of minority and relationship must be alleged in the information.^[23] In the present case, although the fact that MARISSA was only eleven (11) years old on the date of the commission of the rape was alleged in the information and proved during trial, the fact that the accused-appellant was the common-law spouse of MARISSA's mother was not alleged. Thus, even if it were proved that the accused-appellant was the common law spouse of her mother, he can only be convicted of simple

rape under the second paragraph of Article 335 of the Revised Penal Code and should be sentenced to reclusion perpetua.[24]

An accused convicted of simple rape is ordered to pay the rape victim not less than P50,000.00 as indemnity in addition to P50,000.00 as moral damages for each count of rape.[25] The award of P25,000 as exemplary damages has no basis and must be deleted. Accordingly, we modify the award of the RTC and order the accused-appellant to pay MARISSA P50,000 as civil indemnity and P50,000 as moral damages.

WHEREFORE, we find the accused-appellant, RAMWELL LOMIBAO, guilty beyond reasonable doubt of the crime of rape. The appealed decision of the Regional Trial Court is hereby **AFFIRMED** with the **MODIFICATION** that the accused-appellant is sentenced to reclusion perpetua. He is further ordered to pay the victim, Marissa Cañon P50,000.00 as civil indemnity and P50,000.00 as moral damages.

Costs against the appellant.

SO ORDERED.

Davide, Jr., C.J., Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Purisima, Pardo, Buena, Ynares-Santiago, and De Leon, Jr., JJ., concur.
Bellosillo, J., abroad, on official business.

[1] Penned by Judge Renato A. Fuentes.

[2] Rollo, p. 6.

[3] Record, p. 11.

[4] Judgment, pp. 36-37.

[5] Brief for the Accused-Appellant, p. 1.

[6] Ibid. at pp. 5-9.

[7] People vs. Abdul, 310 SCRA 246, 254 (1999)

[8] Ibid.

[9] Ibid., 265.

[10] TSN, June 16, 1998, pp. 20-22; 23-28.

[11] People vs. Carullo, 311 SCRA 680, 691 (1999)

[12] Ibid., 690.

[13] People vs. Garigadi, G.R. No. 110111, October 26, 1999, 16.

[14] People vs. Cheng Ho Chua, 305 SCRA 28, 36 (1999)

[15] People vs. Alitagtag, 309 SCRA 325, 335 (1999)

[16] People vs. Tejero, 308 SCRA 660, 676 (1999)

[17] TSN, June 16, 1998, pp. 37-38.

[18] Record, p. 3.

[19] GENERAL PHYSICAL EXAMINATION:

Height: 141.5 cms. Weight: 41.0 kgs.

Fairly nourished, normally developed, conscious, cooperative, ambulatory subject.

Breasts: Developing, conical,, firm. Areola, dark brown, 2.4 cms. in diameter.

Nipples, dark brown, protruding, 0.9 cm. in diameter.

GENITAL EXAMINATION:

Pubic hair, no growth. Labia majora, gaping, Labia minora, coaptated. Fourchette, tense. Vestibule, pinkish, smooth. Hymen, thick, tall, intact, distensible. Hymenal orifice, annular, admits a tube, 2.5 cms. in diameter.

Vaginal walls, tight. Rugosities, prominent.

CONCLUSIONS:

1) No evident signs of extragenital physical injuries noted on the body of the subject at the time of examination.

2) Hymen, intact, but distensible (2.5 cms. in diameter), as to allow complete penetration by an average-sized male organ in erection without causing hymenal injury.

[20] TSN, June 17, 1998. pp. 8-9.

[21] People vs. Tirona, 300 SCRA 431, 439 (1998)

[22] People vs. Acala, 307 SCRA 330, 359-360 (1999)

[23] Ibid.

[24] Ibid.

[25] Ibid.

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