PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ERLINDO MAKILANG, ACCUSED-APPELLANT.

G.R. No. 139329. October 23, 2001

Ponente: SANDOVAL-GUTIERREZ, J.

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SANDOVAL-GUTIERREZ, J.:

Appeal from the decision[1] dated December 28, 1998 of the Regional Trial Court (Branch 25), Biñan, Laguna, in Criminal Case No. 9624-B, finding Erlindo Makilang guilty of the crime of rape and sentencing him to suffer the penalty of reclusion perpetua, and to pay the victim, his 12-year old daughter Evelyn Makilang, P100,000.00 by way of moral damages.

The Information[2] against accused Erlindo Makilang reads:

> "That on or about July 30, 1996, in the Municipality of Biñan, Province of Laguna, Philippines and within the jurisdiction of this Honorable Court, accused Erlindo G. Makilang, with lewd design and by means of force, violence and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of said Evelyn Makilang y Corino, a twelve (12) years old, against her will and consent.
>
> "CONTRARY TO LAW."

When arraigned, accused pleaded "not guilty."[3] Thereafter, trial commenced. The prosecution presented as evidence the testimony of Evelyn Makilang and the NBI Medico-Legal Report.

The version of the prosecution as summarized by the Solicitor General in the appellee's brief is reproduced hereunder:

> "On July 29, 1996, Evelyn Makilang, daughter of appellant, grade six in the elementary school and twelve years old at that time, accompanied her mother, Salve (appellant's live-in partner) to Biñan, Laguna. Appellant's family maintained their residence in Parañaque, but since appellant was employed in the Olivarez Tri-Cinema construction project in Biñan, Salve, who was engaged in selling cooked food, decided to do business there for a few days. Evelyn went along to help her cook and sell food (pp. 9-10, 29 33, tsn, June 10, 1997).
>
> "Evelyn and Salve, just like in their past visits with appellant, stayed with him in the construction `barracks'. The barracks is a small sleeping quarter for workers who were temporarily working there. Except for appellant and his family, there were no other persons inside the structure on the day of the incident (pp. 10, 33, Ibid). They slept on the floor, with Salve in the middle of appellant and the victim (p. 43, Ibid).
>
> "It had been the appellant's habit, when he goes home to Parañaque, to transfer to his daughter's side, after his wife (who is an early riser) leaves their sleeping quarters. Appellant would then embrace Evelyn. This behavior was not lost to Salve, who was always worried whenever appellant goes home. Evelyn's maternal grandmother likewise noticed appellant's action. She had warned Evelyn and Salve that something untoward might happen. Still trusting at that time, Evelyn simply ignored her (pp. 34, 38-40, Ibid).

"In the morning of July 30, 1996 at around five o'clock, Evelyn awoke when she felt someone was going on top of her. It was appellant and he was naked (p. 12, tsn, June 10, 1997). She realized that she no longer had her cycling shorts and underwear which she had worn the night before. Her bra, which opens in front and not at the back, was already opened, exposing her breasts. With one hand, appellant mashed her breasts, with the other, he fingered her vagina (pp. 11-15, tsn, June 20, 1997; pp. 48-55, June 17, 1997). Evelyn felt appellant's finger on her vagina for 9-10 seconds (p. 2, tsn, June 17, 1997). She felt pain. She tried to fight appellant off by pushing him with her hands. Appellant simply tightened his grip on her hands (pp. 6-13, tsn, June 17, 1997).

"Appellant then held his penis with his hand to insert it inside Evelyn's vagina. She felt pain at the entrance of her vagina. After subsiding for a while, a more severe pain was felt by her, when appellant once more tried to insert his penis (pp. 12-14, tsn, June 17, 1997). At this point, Evelyn was able to summon her strength and gave a hard push to appellant who was thrown off to his side. Seizing the chance, Evelyn hurriedly put her cycling shorts, but without her panties, on (p. 13, tsn, June 10, 1997).

"Evelyn slipped away from the barracks and ran towards her mother who was about 20 meters away. Salve had already been up since four in the morning preparing the food she would sell (pp. 41-43, tsn, June 10, 1997). Evelyn told her mother what appellant had done to her. Salve scolded appellant. Mother and daughter immediately went back to Parañaque (p. 11, tsn, June 17, 1997)."[4]

The results of the medico-legal examination conducted by Dr. Annabelle L. Soliman of the NBI Medico-Legal Division disclosed the following findings:

"General Physical Examination:

Fairly nourished, conscious, coherent, cooperative, ambulatory. Breast, developed, hemispherical, doughy. Areolae, brown, measures 3.5 cm. in diameter. Nipples, brown, protruding, measures 0.5 cm. in diameter. No extragenital physical injury noted.

Genital Examination:

Pubic hair, fine, short, scanty. Labia majora and minora, coaptated. Fourchette, tense. Vestibular mucosa, pinkish. Hymen moderately thick, moderately tall, intact. Hymenal orifice, measures 2.0 cm. in diameter. Vaginal walls, tight. Rugosities, prominent.

Conclusions:

- No evident sign of extra genital physical injury noted on the body of the subject at the time of examination.

- Hymen intact and its orifice small (2.0 cm. in diameter) as to preclude complete penetration by an average-sized adult male organ in full erection without producing hymenal injury."[5]

Erlindo Makilang denied committing the crime charged, claiming that he could not have raped his daughter in the morning of July 30, 1996 at Biñan, Laguna because he was then at the construction site of a project in Tagaytay City.[6] It was only later, or on August 10, 1996, after the completion of the Tagaytay project, when he transferred to Biñan.[7] On that day, he visited his family in Parañaque and gave money to his children. Without his knowledge, his wife Salve and daughter Evelyn followed him to Biñan to confront Beng, his live-in partner. Evelyn attacked Beng with scissors, so he pushed her (Evelyn) by hitting her buttocks with a piece of wood. Enraged, Salve shouted at him, uttering "we will not stop until and unless you are incarcerated." He surmised that this incident could have motivated Salve and Evelyn to file the instant complaint against him.[8]

Gemma Makilang, accused's sister-in-law, testified that he worked as a mason in a construction project in Tagaytay City from March 1995 to August 1996. During that period, he lived with her at the barracks near the project site. On July 29, 1996, the accused spent the night there.[9] Then, at six o'clock the next morning, she

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asked money from the accused because her youngest daughter was sick.[10] It was only on August 10, 1996 when they transferred to Biñan, Laguna.[11]

On December 28, 1998, the trial court rendered a decision,[12] the dispositive portion of which reads:

> "WHEREFORE, finding accused ERLINDO MAKILANG GUILTY beyond reasonable doubt of the crime of RAPE defined and penalized under Article 335 of the Revised Penal Code, without any mitigating and aggravating circumstance, hereby sentences him to suffer the penalty of RECLUSION PERPETUA, and to pay the victim the sum of ONE HUNDRED THOUSAND (P100,000.00) PESOS as moral damages.
>
> "No pronouncement as to costs.
>
> "The Provincial Warden is hereby directed to commit the person of accused Erlindo Makilang to the New Bilibid Prison, Muntinlupa City, immediately upon receipt hereof.
>
> "SO ORDERED."[13]

Appellant now interposes the instant appeal, assigning to the trial court the following errors:

> "I. THE COURT A QUO ERRED WHEN IT FAILED TO DISCREDIT THE TESTIMONY AND QUESTION THE CREDIBILITY OF THE COMPLAINANT, EVELYN MAKILANG; and
>
> "II. THE COURT A QUO ERRED WHEN IT FAILED TO APPLY THE PROVISION OF THE REVISED PENAL CODE THAT PARDON BY THE OFFENDED PARTY IS ONE OF THE WAYS OF BARRING CRIMINAL PROSECUTION."[14]

After a meticulous and thorough evaluation of the records of this case, we find no compelling reason to depart from the trial court's finding on appellant's culpability of the crime charged.

Evelyn's testimony is plausible in its entirety, narrating chronologically how appellant committed the dastardly act complained of, thus:

> "Q Now, at that point in time while you were sleeping at Olivarez Tri-cinema with your father, where was your mother?
>
> A She was cooking the rice, sir.
>
> Q Where was she cooking at the time?
>
> A The place where she was cooking was far from the barracks, sir.
>
> x x x
>
> Q Now, aside from your father and you, was there any other person inside the barracks at 5:00 o'clock in the morning of July 30, 1996?
>
> A None, sir.
>
> Q Now, you said you were sleeping at that time. Do you recall if there was any unusual incident that happened while you were at the barracks on July 30, 1996 at about 5:00 o'clock in the morning?
>
> A Yes, sir.
>
> Q What was that unusual incident?
>
> A When I was sleeping, I felt somebody was on top of me, sir.
>
> Q Now, when you felt that there was somebody on top of you, what did you do?

A I looked at it, sir.

Q What did you see after you looked?

A I saw my father with his hands mashing my breasts, sir.

Q Why, what were you wearing at the time Madam witness when you felt that somebody was on top of you?

A I was wearing a blouse, sir.

Q What about your lower portion, what were you wearing?

A None, sir.

Q You mean to say you do not have panty at the time you felt that somebody was on top of you?

A Yes, sir.

Q You said that you saw your father on top of you mashing your breasts. What was he wearing at that time while she was mashing your breasts while on top of you?

A None, sir.

Q When you said he was mashing your breasts, what did you do next, if any?

A I pushed him, sir.

Q Why did you push him?

A Because, he was mashing my breast and he wanted to insert his organ to my organ, sir.

Q Why did you say that your father was trying to insert his penis to your vagina?

A I felt it, sir.

Q What did you feel when you say you felt it?

A I just felt pain, sir.

Q When you said organ, Madam witness, you are referring to your private part or vagina?

A Yes, sir.

Q How long your father tried to insert his penis to your vagina?

A At around five (5) minutes, sir.

Q Now, when this incident was happening, what was the light condition at that time inside the barracks?

A There was light, sir.

x x x

Q You said that you pushed him after your father was trying to insert his penis to your vagina. What happened to him when you pushed him?

A He went to the side, sir.

Q What did you do after pushing your father?

A I wore my shorts even though it is not a panty, sir.

Q After that what happened next, Ms. Witness?

A I went downstairs and looked for my mother, sir."[15] (Emphasis ours)

From the foregoing testimony of Evelyn, there was indeed no full penetration of appellant's penis into her vagina. Nonetheless, appellant, undoubtedly, tried to gain penile penetration at the entrance of her vagina for "around five (5) minutes." That explains why Evelyn complained of having "felt pain" in her private part. She repeatedly complained of this pain, thus:

"FISCAL

Q Just one question your honor. You said Lady Witness, that your father was trying to insert his penis in your vagina, my question is, what did you feel?

A I felt pain sir because he was forcing his penis into my vagina, sir.

Q On what part of your body you felt pain when your father was trying to insert his penis to your vagina?

Atty. ARELLANO

We Object your honor. That is improper to redirect your honor. This should have been done during the examination in chief.

COURT

Witness may answer.

A At the entrance of my vagina, sir.

COURT

Q How many times did you feel the same?

A Twice your honor.

Q Are you telling this Court that your father attempted to insert his penis inside your vagina for two (2) times?

A What I mean to say your honor is that, in the first instance that he wanted to insert his penis to my vagina we were in the position that he was holding my right hand by his left hand and he was trying to insert his penis, then I felt pain. And then the pain was gone, and then again, I felt pain when he tried again to insert his penis into my vagina, sir.

Q And when your father was trying to insert his penis inside your vagina for the second time, that was the time when you pushed him very hard?

A Yes your honor.

Q Because you felt pain once more?

A Yes your honor."[16] (Emphasis ours)

The intense pain Evelyn suffered could be nothing but the result of penile penetration "into the labia of her pudendum," or "the bombardment of the drawbridge" sufficient to consummate rape.[17] Jurisprudence abound that full or complete penetration of the vaginal orifice is not required to consummate rape, for what is essential is the introduction of the male organ into the labia of the pudendum, no matter how slight.[18] In People v. Villanueva,[19] this Court emphasized: "In order that the crime of rape may be consummated, the successful penetration by the rapist of the female's genital is not indispensable. Penile invasion, it has often been held,

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necessarily entails contact with the labia and even the briefest of contacts under circumstances of force, intimidation or unconsciousness, even without laceration of the hymen, is deemed to be rape in our jurisprudence."

Coming now to the first assigned error, appellant maintains that the rape story was merely concocted by Evelyn and her mother, who both despise him for being a womanizer. To discredit the value of Evelyn's testimony, he questions her moral character claiming that her daughter "is not a young ordinary lass whose story no one could doubt."[20] He cited the following testimony of Evelyn:

> "ARELLANO (appellant's counsel):
>
> x x x
>
> Q Now, immediately after you woke up and you felt your father was on top of you, what was your father doing immediately after you woke up?
>
> A He was mashing my breasts and he fingered my vagina, sir.
>
> Q How did you learn this `fingering my vagina' at your tender age?
>
> A I heard that word from adults especially from men, sir.
>
> Q You were telling us, you were mingling with men talking about fingering?
>
> FISCAL:
>
> Misleading your honor.
>
> COURT:
>
> Witness may answer.
>
> WITNESS:
>
> A I have male friends but they were not the ones talking about fingering, sir. I have male friends because we are playing basketball."[21] (Emphasis ours)
>
> x x x
>
> ARELLANO
>
> Q Because of that, you hated your father?
>
> A I have forgiven my father, sir, because it is natural for a man to have concubine as long as he will not neglect his family."[22] (Emphasis ours)

Appellant argues that Evelyn's familiarity with lustful and immoral acts like "fingering" of the vagina and maintaining a "concubine" as being "natural for a man," unveiled her corrupted morals.[23] As such, appellant submits that the court a quo erred in giving credence to Evelyn's testimony.

We disagree.

The victim was a hapless twelve-year old girl when her father raped her. She was not the loose and promiscuous girl appellant wants this Court to believe. Antithetically, Evelyn was an intelligent lass as shown by her sharp recollection of her harrowing experience. Unfortunately, she was already exposed to the dark realities of life at a tender age. And this she sadly learned and saw from her very own father. As aptly observed by the Solicitor General:

> "Moral depravity cannot be imputed against Evelyn simply because her juvenile though intelligent mind recognizes and adopts societal tolerance for men who maintain mistresses.
>
> "That young children are aware of this social phenomenon should not exactly be a source of great wonder, certainly, not in the face of late twentieth century more. Appellant himself is the major contributor to his daughter's untimely encounter with reality. He admitted that he has concubine (p. 13, TSN, July 19, 1997). From the records, he seems to have two or three more (p. 43, TSN, June 16, 1997).
>
> "He is not yet even married to Evelyn's mother, nor does he appear to be married to anyone at all (p. 7, TSN, July 19, 1997). All these were not hidden from Evelyn. It is thus perplexing as to how appellant could expect convent-bred innocence from his daughter when he is a regular destabilizer of conventional marital norms."[24]

That Evelyn spoke of "fingering" and "concubines" in the course of her testimony is not fatal so as to tarnish her credibility as victim-witness of her father's bestiality. To our mind, her being vocal about these matters portrays candid, albeit bold, admission of her flamboyant mind which all the more strengthens the veracity and spontaneity of her testimony. She could have deliberately veiled this personality if only to generate and ensure sympathy from the trial court. Yet, Evelyn remained sincere and outspoken on any question propounded to her. We note, with sadness and disdain, the proliferation of rape cases where fathers molest and defile the innocence of their own flesh and blood. Worse, they still have the audacity to malign and slight their daughter's reputation if only to exonerate themselves from their unspeakable deed, as in the case at bench.

We likewise reject appellant's theory that Evelyn and her mother fabricated the rape story. This Court has consistently held that no young and decent lass will publicly cry rape, particularly against her father, if such were not the truth.[25] Courts usually give greater weight to the testimony of a girl who is a victim of sexual assault, especially a minor, and particularly in cases of incestuous rape, because no woman would be willing to undergo a public trial, along with the shame, humiliation and dishonor of exposing her own degradation, were it not to condemn an injustice and to have the offender apprehended and punished.[26] Even when consumed with revenge, it would take a certain amount of psychological depravity for a young woman, like Evelyn, to concoct a story which would put her own father for most of his remaining life in jail, if not put him to his death, and drag herself and the rest of her family to a lifetime of shame.[27] Too, it is highly unnatural for a mother, virtuous or not,[28] to use her own daughter as "an engine of malice, especially if it will subject her daughter to embarrassment and even stigma."[29]

Neither are we persuaded by appellant's alibi. We have consistently held that for alibi to prosper, it is not enough for the accused to prove that he was elsewhere when the crime was committed, but he must also demonstrate that it would be physically impossible for him to be at the scene of the crime at the time of its commission.[30] Further, alibi must be supported by the most convincing evidence since it is an inherently weak defense which can easily be fabricated.[31]

Here, appellant utterly failed prove the physical-impossibility requirement of alibi. He insists that he was working at the project site in Tagaytay City when the crime was committed in Biñan, Laguna. But this fact does not preclude his presence at the locus criminis as revealed by his very own corroborating witness, Gemma Makilang. On cross-examination, she declared that appellant's employer also owned another project in Biñan, Laguna,[32] and that he was one of the workers frequently transferred to the Biñan project site when there were rush jobs to be done.[33] Significantly, she said that the distance between these two project sites can easily be negotiated in a matter of only over an hour by a public transportation, and when the company truck is used to transport the workers, the trip would only take one (1) hour.[34] Thus, it was not physically impossible for appellant to have been at the scene of the crime at the time of its commission. His defense of alibi becomes completely worthless

for he was positively identified by the victim as the author of her defloration.

Anent the second assigned error, appellant argues that assuming he committed the crime, he should nonetheless be entitled to an acquittal since Evelyn herself categorically declared that she had already forgiven her father.[35] Suffice it to state that in cases where the offended party is a minor, the pardon must be given by both the parents and the offended party.[36] Here, while it appears that Evelyn forgave appellant, the records are bereft of any similar act from her mother. Thus, appellant's plea that he was effectively pardoned must fail.

We will not disturb the trial court's imposition of the penalty of reclusion perpetua against appellant. The concurrence of minority of the victim and her relationship to the offender is a special qualifying circumstance which must be both alleged in the Information and proved during the trial with certainty.[37] True, the prosecution was able to establish the fact of minority of the victim as well as her relationship to the offender. However, while the circumstance of minority was specifically alleged in the Information, this was not so with respect to the fact of relationship between the offender and the offended party. Such defect in the Information is fatal and effectively bars conviction of the appellant for rape in its qualified form which is punishable with death.[38]

Finally, we rectify the error committed by the court a quo with respect to the award of damages. The victim was awarded P100,000.00 by way of moral damages. That is not in line with the prevailing jurisprudence,[39] which fixed the award of moral damages to P50,000.00. In addition, an amount of P50,000 should be awarded Evelyn as indemnity ex delito.[40] Since the fact of relationship between the offender and the victim is an aggravating circumstance, the award of exemplary damages in the amount of P25,000.00 is also in order.[41] the Court, speaking through Justice Jose C. Vitug, clarified that an aggravating circumstance, whether ordinary or qualifying, should entitle the offended party to an award of exemplary damages within the meaning of Article 2230 of the Civil Code.

WHEREFORE, the appealed decision convicting Erlindo Makilang of the crime of rape and sentencing him to suffer the penalty of RECLUSION PERPETUA is hereby AFFIRMED. Insofar as the civil aspect of the case is concerned, the appealed decision is MODIFIED. Appellant is ordered to PAY the victim, Evelyn Makilang, P50,000.00 as indemnity ex delito; P50,000.00 as moral damages; and P25,000.00 as exemplary damages. Costs against the appellant.

SO ORDERED.

Melo, (Chairman), and Panganiban, JJ., concur.
Vitug, J., on official leave.

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[1] Penned by Judge Hilario F. Corcuera.

[2] Rollo, p. 7.

[3] Records of the RTC, p. 24.

[4] Appellee's Brief, pp. 3-5; Rolo, pp. 78-80.

[5] Exhibit "C", records of the RTC, p. 11.

[6] Transcript of Stenographic Notes (TSN), August 19, 1997, pp. 3, 9.

[7] Ibid, p. 6.

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[8] Ibid, pp. 10-13.

[9] TSN, August 17,1998, p. 10.

[10] Ibid, p. 7.

[11] Ibid, p. 56.

[12] Records of the RTC, pp. 174-186.

[13] Appealed Decision, Rollo, p. 26.

[14] Appellant's Brief, Rollo, p. 43.

[15] TSN, June 10, 1997, pp. 9-14.

[16] TSN, June 17, 1997, pp. 12-13.

[17] People v. Campuhan, 329 SCRA 270, 282 (2000), citing People v. Escober, 281 SCRA 498 (1997) and People v. Quiñanola, 306 SCRA 710 (1999).

[18] People v. Bali-balita, G.R. No. 134266, September 15, 2000.

[19] 339 SCRA 482 (August 31, 2000).

[20] Appellant's Brief, Rollo, p. 45.

[21] Ibid., p. 44, citing TSN, June 10, 1997, pp. 50-51.

[22] Ibid., p. 45.

[23] Ibid., p. 44.

[24] Apellees Brief, Rollo, pp. 96-97.

[25] People v. Tabanggay, 334 SCRA 575, 597 (2000).

[26] People v. Diasanta, 335 SCRA 218, 226 (2000).

[27] People v. Alcala, 307 SCRA 330 (1999).

[28] People v. Deleverio, 289 SCRA 547, (1998).

[29] People v. Galleno, 291 SCRA 761, (1998).

[30] People v. Reduca, 301 SCRA 516, (1999).

[31] People v. Cantere, 304 SCRA 127 (1999).

[32] TSN, August 17, 1998, pp. 13-15.

[33] Ibid., p. 23.

[34] Ibid., pp. 18- 20.

[35] Appellant's Brief, p. 9; Rollo, p. 49.

[36] People v. dela Cruz, 224 SCRA 506, 522 (1993) and People v. Tudulan, 271 SCRA 233, 245 (1997).

[37] People v. Acala, 307 SCRA 330, (1999).

[38] People v. Ambray, 303 SCRA 697 (1999).

[39] People v. Prades, 293 SCRA 411 (1998); People v. Alba, 305 SCRA 811 (1999).

[40] People v. Poñado, 311 SCRA 529 (1999).

[41] People v. Tabion, 317 SCRA 126, 147 (1999).41 In People v. Catubig,[41][42] G.R. No. 137842, August 23, 2001.

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