

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. ARSENIO TOLEDO SR.,
JOHN DOE AND PETER DOE, ACCUSED, ARSENIO TOLEDO SR.,
APPELLANT.**

G.R. No. 139961. May 09, 2001

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

After carefully reviewing the records of this case and the arguments raised by the parties, this Court cannot fault the trial court for its assessment of the evidence and the credibility of the witnesses. However, it erred in convicting appellant of murder, because the qualifying circumstance of treachery had not been alleged in the Information. Without such qualifying circumstance, the crime committed was only homicide.

The Case

Arsenio Toledo Sr. appeals the July 23, 1999 Decision[1] of the Regional Trial Court of Midsayap, Cotabato, Branch 18, in Criminal Case No. 97-044, finding him guilty of murder and sentencing him to reclusion perpetua.

In an Information dated February 18, 1997, Assistant Provincial Prosecutor Rolando Y. Deiparine charged appellant with rape with homicide allegedly committed as follows:

"That on or about January 9, 1997, in the morning in the Municipality of Pikit, Province of Cotabato, Philippines, the said accused, in company with JOHN DOE and PETER DOE, whose real identities are still unknown and [who are] at large, [by] conspiring, confederating and mutually helping one another, did then and there [--] willfully, unlawfully and feloniously with the use of force and intimidation [-- succeed] in having carnal knowledge [of] LAILA ROSE B. ARCO, minor, five (5) years old, against her will[;] that on said occasion, the above-named accused, with intent to kill, choke[d] and thereafter threw her to the pond near the Purok, which is the direct and immediate cause of her death thereafter." [2]

With the assistance of counsel,[3] appellant pleaded not guilty when arraigned on April 28, 1997. After trial, the RTC rendered its Decision, the dispositive portion of which reads:

"WHEREFORE, judgment is hereby rendered finding ARSENIO TOLEDO, SR. guilty beyond reasonable doubt of the crime of [m]urder under Article 248 of the Revised Penal Code and therefore sentences him to suffer the penalty of reclusion perpetua with the accessories provided by law.

"The accused is further ordered to indemnify the heirs of victim Laila Rose Arco in the amount of P70,000.00; to pay them P50,000.00 moral damages and P30,000.00 exemplary damages; and to pay the cost.

"As the accused is presently under detention in the Provincial Jail, Amas, Kidapawan City, he is ordered committed to the Davao Penal Colony, Carmen, Davao del Norte."

Hence, this appeal.[4]

The Facts

Version of the Prosecution

In its Brief,[5] the Office of the Solicitor General summarized the prosecution's version of the facts as follows:

"Sometime on the morning of January 9, 1997, Ronnie Cabamungan, then . . . a Grade (I)[6] pupil of Pikit Central Elementary School, Cotabato, was ordered by his teacher Mrs. Cabana to return some plates to her house. He was accompanied by Jerry Saac, also a pupil of the same school. (pp. 8-10, TSN, July 2, 1997). While on their way to return the plates, Ronnie saw Laila Rose Arco urinating near a coconut tree at the 'bungtod' or a higher portion of a land or a small hill. While Laila Rose was urinating, Ronnie saw appellant grab Laila Rose by carrying her head with his left hand as her feet were held by appellant with his right hand (pp. 11-12, TSN, Ibid.). Appellant brought Laila Rose inside the 'purok' or a small hut where Ronnie noticed two other unidentified companions of the appellant waiting. Laila Rose shouted 'tabang' (meaning help) but to no avail because appellant strangled ('tuok') her and covered her mouth. Thereafter, appellant came out of the hut and threw her body into a pond, and, together with his companions, ran away (pp. 12-16, TSN, Ibid; 29-39, TSN, Ibid).

"On January 9, 1997, at around 11:00 o'clock in the morning, Jimmy Arco, who was then driving a 'triscad', received information that his daughter (Laila Rose) was found drowned. He went to the Llaguno Medical Clinic where his daughter was being revived by nurses and attendants. The clinic personnel were pressing their hands over his daughter's breast to resuscitate her. Thinking that Laila Rose was still alive, he helped the nurses and the attendants in pressing his daughter's breast. While resuscitating Laila Rose, Jimmy noticed a blackened mark on her neck with what appeared to be three fingernail marks (pp. 12-16, TSN, July 1, 1997). After Laila Rose was pronounced dead, her body was brought to the National Bureau of Investigation (NBI).

"Dr. Tammy Uy, Senior Medico Legal Officer of the NBI in Cagayan de Oro City, conducted a post mortem examination (Exhibit 'F' to 'F-9') at about 8:20 p.m. of January 9, 1997 on the cadaver. The results of her examination showed that the genital[ia] had fresh complete lacerations at 3:00 o'clock, 6:00 o'clock and 9:00 o'clock position[s] with fibrin and with edematous congested edges. The cause of death [was] asphyxia, secondary to strangulation. Her autopsy showed the following:

'fresh hymenal lacerations are noted on the subject at the time of examination, ages of which are compatible with the alleged date and time of death on January 9, 1997 between 7:30 a.m. and 11:00 a.m. (pp. 4-10, TSN, April 21, 1997).'

"Dr. Uy stated that the presence of fibrin [indicated] that the injuries were sustained by the victim while she was still alive. The abrasions and lacerations at the posterior could have been caused by a hard, blunt object like an erect penis or anything that was forcibly inserted on Laila Rose's vagina (pp. 4-23 TSN, July 21, 1997).

"Dr. Uy further testified that she found three abrasions, toughly linear with fresh scabs located at the right side, mid aspect and left side in the adam's apple. The first group of abrasions [were] found on the right side of the neck, the second group at the thyroid region of the neck and the other abrasion [was] .5 x .2 centimeter. The fourth abrasion [was] located at [the] right side of [the] chest below the nipple. The depressed fracture[d] body of the thyroid cartilage, anterior aspect, bilateral lined, [were] caused by strong pressure applied. Likewise, the application of strong pressure cause[d] the hemorrhages in the thyroid region.

"The doctor also noted 'Tardieu spots' on the body of Laila Rose. This meant that there was petechial hemorrhage, extensive, subpleural, bilateral and subepicardial, which could have made it impossible for Laila Rose to breath[e] or inhale oxygen leading to hemorrhage on the surface of the lungs and of the heart. Laila Rose's heart chamber was likewise full of dark fluid and clotted blood, indicati[ng] that there was no external blood loss and no bleeding. Dr. Uy opined that Laila Rose's death was caused by manual strangulation because the abrasions on her neck were linear, and possibly caused by human fingernails.

"Baltazar Cabamungan, [who was] the older brother of Ronnie Cabamungan and who was 26 years old at the

time of the trial, testified that sometime after lunch, in January, 1997, he accompanied his younger brother Ronnie [to] the 'cockpit'. Ronnie pointed to the appellant Antonio Toledo, Sr., as the person who killed Laila Rose. Ronnie emphatically stated 'Kuya mao na Siya' (Kuya, this is the one). The two brothers then went to the police station where they reported the matter to police authorities. The chief of police conducted an on the spot investigation (Exhibit 'I', pp. 32-35, TSN, Ibid.). During the trial, Baltazar identified appellant as the person his brother Ronnie earlier pointed to as the perpetrator of the crime (pp. 23-30, TSN, November 11, 1997).

"Later, two policemen went to Baltazar Cabamungan's residence to interview Ronnie Cabamungan. Ronnie told SPO2 [Rudolfo] Milagrosa that he and his classmate, Jerry Saac saw an old man carrying Laila Rose while she was urinating. Ronnie said that the old man brought Laila Rose to the cottage (purok). Ronnie stated that he frequently saw the old man in the cockpit arena in their place with his fighting cock. The next day, Milagrosa requested four people, namely Atty. Samuel Perenal, Mayor Ong, the Principal of Pikit Elementary School, Mr. Gomez and Atty. Roberto Mellendez to observe the conduct of the investigation. As a result, an affidavit was executed by Ronnie Cabamungan which was witnessed and signed by the four witnesses aforementioned (pp. 18-27, TSN, Ibid.)." [7]

Version of the Defense

On the other hand, appellant's version of the facts, as summarized by the trial court in its Decision, is as follows:

"Accused Arsenio Toledo, Sr. denied having grabbed Laila Rose Arco, brought her to the purok, strangled her, covered her mouth and thr[own] her into the pond. He denied also having raped her.

"He testified that on January 9, 1997, he left his house at 8:20 in the morning to go to his farm at Calawag, about 3 ½ kilometers or [a] 15-minute ride. He did not proceed because he passed by the house of Todo to buy [a] cock because Todo [was] also a cock breeder. However, he did not buy the cock because the classification of the cock [was] not suitable to him. At 9:30, a military man, Captain Leonardo Songcaya, with four men, arrived looking for Todo. At 10:30, M/Sgt. Pedro Cuisin arrived. He conversed with Capt. Songcaya who left at 11:00. He and Pedro Cuisin left the house of Todo at 12:00 noon. He went home because he was hungry. After taking his lunch, he slept and woke up at 1:00 and checked up his jeep until 5:00 o'clock in the afternoon (TSN, April 8, 1998, pp. 16-24).

"To buttress his denial that he had not grabbed Laila Rose, brought her to the purok, strangled her, covered her mouth and thr[own] her into the pond, Jerry Saac was presented.

"While Jerry admitted that he and Ronnie Cabamungan were requested by their teacher to return the plates to her house, he, however, denied that he saw Laila Rose urinating, that Toledo, Sr. grabbed her, brought her to the purok, strangled her, and threw her into the pond (TSN, December 17, 1997, pp. 22-23).

"Eleanor Toledo, Toledo Sr.'s wife, did not believe that the testimonies of the prosecution witnesses against her husband [were] true (TSN, April 6, 1998, p. 85). She testified that her husband [was] innocent of the crime charged (Ibid., p. 89).

x x x x x x x x

"Witnesses Vena[n]cio Gabales, Joey Raul Unson, Florencio Mamites, Rosalina Saac and Remus Unson were presented by the defense to prove that the police framed-up Toledo, Sr.

"Vena[n]cio Gabales testified that the police forced him to testify against Arsenio Toledo, Sr. (TSN, January 6, 1998, pp. 11 and 16).

"Joey Raul Unson testified that Rudy Milagrosa wanted him to testify against Arsenio Toledo, Jr. as the person who raped and killed Laila Rose in the purok (TSN, February 18, 1998, p. 18).

"Florencio Mamites testified that Rudy Milagrosa requested him to testify against Arsenio Toledo, Jr. as the

rapist of Laila Rose Arco (TSN, February 18, 1998, p. 39) and that he was offered [a] P70,000.00 reward if he [would] testify against Toledo, Jr. (Ibid., p. 41).

"Rosalina Saac testified that the police told her son, Jerry Saac, to point Arsenio Toledo, Sr. appearing in the picture shown to him as the person who raped Laila Rose (TSN, April 16, 1998, p. 7).

"Remus Unson testified that the police wanted his son, Joey Raul Unson, to testify against Arsenio Toledo, Jr. as the person responsible for the death of Laila Rose (TSN, April 6, 1998, p. 39)."

Ruling of the Trial Court

The trial court gave credence to the testimony of prosecution Eyewitness Ronnie Cabamungan, whom it found to have testified in a categorical, straightforward and spontaneous manner. It disregarded Jerry Saac's testimony after finding that aside from being radically contradictory to the Sworn Statement he had previously executed, it was rehearsed and fabricated.

The trial court ruled that the prosecution failed to prove the commission of rape beyond reasonable doubt. Finding only that Laila Rose Arco, then only five years old, was killed by strangulation, it convicted appellant of murder qualified by treachery.

Assignment of Errors

In his Brief, appellant imputes to the trial court the following alleged errors:[8]

"1. The trial court erred in finding appellant Arsenio Toledo, Sr. guilty [of] the crime of [m]urder under Article 248 of the Revised Penal Code of the Philippines;

2. The trial court erred in not appreciating the factual, logical and natural issues relevant to the evidence presented by the [d]efense."

In the main, appellant questions (1) the credibility of the prosecution's eyewitness and (2) the trial court's disregard of Jerry Saac's testimony. The issue of whether rape was also committed is raised by the Office of the Solicitor General.

The Court's Ruling

The appeal is partially meritorious. Appellant is guilty only of homicide; but the penalty, pursuant to RA 7610, is still reclusion perpetua inasmuch as the victim was five years old.

Main Issue: Credibility of the Prosecution Eyewitness

In a long line of cases, the Court has declared that "the assessment of the credibility of witnesses and their testimony is a matter best undertaken by the trial court because of its unique opportunity to observe the witnesses firsthand and to note their demeanor, conduct and attitude under grilling examination. A trial court's findings on the credibility of witnesses carry great weight and respect and will be sustained by the appellate courts unless the trial court overlooked, misunderstood, or misapplied some facts or circumstances of weight and substance which will alter the assailed decision or affect the result of the case." [9] Upon examining the transcript of stenographic notes and the records of this case, we see no reason to disturb the trial court's finding that Eyewitness Ronnie Cabamungan's testimony was credible.

Ronnie Cabamungan was steadfast in testifying that appellant grabbed Laila Rose, brought her to the purok, strangled her and then threw her into the pond. Despite attempts of the defense to mislead him and shake his story during cross-examination, he remained steadfast. His spontaneity and consistency gave his testimony the ring of truth.

Circumstances Surrounding the Crime

Appellant also asserts that the testimony of Ronnie was inherently improbable. He insists that the circumstances existing at the crime scene -- broad daylight, full view of many persons inside the school compound, presence of inhabited houses around the purok -- were such that a crime could not be committed.

For a number of reasons, we find no merit in this contention. First, appellant's premise that there were many persons in the school compound is not supported by the evidence on record. Second, crimes are known to have been committed in broad daylight within the vicinity of inhabited houses. Third, although it would be illogical and unreasonable for normal persons in full control of their faculties to commit a crime under such circumstances, the same does not hold true for all, especially those under the grip of criminal impulses. We cannot expect the mind of such persons to work within the parameters of what is normal, logical or reasonable, as the commission of a crime is not normal, logical or reasonable. Hence, the circumstances present in this case do not rule out appellant's commission of the crime.

Furthermore, the medicolegal officer's testimony ruled out accidental drowning, because no water was found in Laila Rose' stomach.[10] Considering this testimony, the indubitable facts of death -- the fractured thyroid cartilage and fingernail marks on Laila Rose's neck -- prove beyond reasonable doubt that Laila Rose was strangled; hence, a crime was committed.

Identification of Appellant

Appellant also asserts that Ronnie's identification of him as the malefactor was improbable and unbelievable.

Such assertion is devoid of merit. The records bear out that Ronnie saw a man strangling Laila Rose. At that time, he already knew the face, though not the name, of the man. Previously, that man had often been seen by Ronnie going to the cockpit arena near the latter's place. But at the time he testified in court, Ronnie already knew the man's name to be Arsenio Toledo. This was because after Laila Rose' death, he had been accompanied by his Kuya Junjun to the cockpit arena, where he saw and pointed out to the latter the man whom he had seen strangle Laila Rose. Junjun then informed him that the man's name was Arsenio Toledo.

Considering that Ronnie is a child of tender years, it is understandable that he cannot qualify and explain the above in one instance, as appellant seemingly wants. The process by which the latter was identified as the malefactor becomes clear, however, when the testimony of Ronnie is considered together with the testimonies of Baltazar Cabamungan (also referred to as Junjun) and Rodolfo Milagrosa.

Ronnie Cabamungan testified during direct examination as follows:

"Q: You said you saw Arsenio Toledo actually grabbing the girl clearly going to the purok and strangulating her[. D]o you know Arsenio Toledo?

A: Not yet, Ma'am.

Q: You mean that you did not know x x x yet that he [was] Arsenio Toledo during the time you saw him?

A: Yes, Ma'am.

Q: But you know him by face?

A: Yes, Ma'am.

Q: But later on did you know that he [was] Arsenio Toledo?

A: Yes, Ma'am."[11]

During cross-examination, he further declared as follows:

"Q: In fact that person whom you saw and whom you know as Arsenio Toledo, during that time you did not know that his name [was] Arsenio Toledo, is that correct?

A: Not yet, sir.

Q: In fact, Mr. Witness, you only know that person was Arsenio Toledo when the police told you, is that correct?

A: The one who told me that that person [was] Arsenio Toledo [was] my Kuya Junjun when he was with me in the cockpit, sir."^[12]

On the other hand, Baltazar Cabamungan, who was referred to by Ronnie as "Kuya Junjun," testified:

"Q: You said that the purpose of your going to the cockpit was for Ronnie to pinpoint the guy whom he had seen responsible for the killing of Laila Rose. Now when you reached the cockpit what did you do?

A: Upon reaching the cockpit he pointed to the person whom he saw as the one who killed Laila Rose and threw (her) into the water. He further said "kuya, mao na siya". Meaning, "[K]uya this is the one."

Q: So when he pointed to you the guy by saying ["K]uya, mao na siya,["] did you know the guy?

A: Yes sir... yes ma'am.

x x x x x x x x

Q: Who was that guy?

A: Arsenio Toledo, ma'am."

SPO2 Rodolfo Milagrosa further explained the circumstances surrounding the identification of appellant in this wise:

"Q: When all of these persons were interviewed by you, what did you do next?

A: [As a] result of the invitations that we conducted the six persons that we invited, I almost g[a]ve up [on] the investigation.

Q: What did you do then?

A: Good that the last approach I have made materialized.

Q: What was that approach you have made?

A: I went to the school campus particularly to the canteen 60 meters more or less from the crime scene. I bought Pop Cola and wait[ed] for sometime until the bell rang for recess.

Q: Could you estimate what time was that?

A: I am not sure but I think it was 9:30 to 10:00 o'clock.

Q: Now what did you do then while drinking [P]op [C]ola?

A: When it was already x x x recess, the pupils were already in their canteen, I ha[d] to go down to their level and I said: 'Dong, dong tan-awa tong bata didto crush to nimo no' and he answered 'Dili uy[.]'

Q: Why did you talk that way to the children? What was your purpose?

A: Because I ha[d] a hard time to approach them because the moment they knew that I [was] a policeman so I ha[d] to go down to their level first using that strategy and I said: `Wala gyoy nakakita ni Laila Rose no[,] kon unsay nahitabo[`]?

Q: When you asked [if] no one ha[d] seen [the incident], what happened?

A: Almost all of them answered in chorus `Naa sir, naa sir, Grade I naay duha ka buok.[`]

RTC INTERPRETER: Almost all of these pupils simultaneously said: Naa, sir, na [a] sir, meaning: There is, sir, there is, sir.

Q: What did they [chorus]?

A: Naa sir, naay duha ka buok.

RTC INTERPRETER: There [were] sir, there were two pupils who witnessed.

Q: Did they mention the names of these two children [who] they said in chorus x x x ha[d] seen the incident?

A: Yes, they answered that [they were] Ronnie Cabamungan and Jerry Saac.

Q: Upon knowing from these children that there were two children who ha[d] seen the incident involving Laila Rose Arco, what did you do?

A I called up my back-up PO3 Eramis to help me in locating these two children.

Q: Did you locate them?

A: Yes, we were able to reach the house of Mr. Baltazar Cabamungan.

Q: And then what happened when you reached the house of Mr. Cabamungan?

A: I requested x x x that I x x x be allowed to interview Ronnie Cabamungan.

Q: And were you able to interview Ronnie Cabamungan?

A: The mother was hesitant that their son be interviewed ma'am.

Q: What did Ronnie tell you?

A: He told me that he and Jerry Saac saw an old man [take] and carry Laila Rose Arco while she was urinating and [bring her] to the cottage.

Q: Now what else transpired after that? When Ronnie Cabamungan told you about what he saw[,] what else did you ask him?

A: I asked him if he [knew] the name of that old man he [was] referring to.

Q: And what did Ronnie Cabamungan tell you?

A: He told me that he did not know the name but he always saw this old man in the cockpit arena always bringing [a] fighting cock.

Q: Upon learning from Ronnie Cabamungan that the person who grabbed Laila Rose Arco was the very person whom he always saw in the cockpit bringing [a] fighting cock, what did you do?

x x x x x x x x

A: I requested and instructed his older brother Baltazar Cabamungan, Jr. to accompany his younger brother to the cockpit area.

Q: Did you go with them to the cockpit?

A: No. . . .

Q: In the cockpit what happened?

A: While I was already at the road, Baltazar Cabamungan, Jr. and Ronnie Cabamungan, left the place and Baltazar Cabamungan, Jr. told me that he pointed to Arsenio Toledo, Sr.

Q: Who pointed to Arsenio Toledo, Sr.?

A: Ronnie Cabamungan [pointed] to his brother and when I look[ed] x x x there I saw also Arsenio Toledo, Sr. in that area."[13]

Indeed, Ronnie positively identified appellant as the person who had strangled Laila Rose. "Positive [i]dentification where categorical and consistent and without any showing of ill motive on the part of the eyewitness testifying on the matter prevails over a denial." [14] "Where there is no evidence that the principal witness for the prosecution was actuated by improper motive, the presumption is that he was not so actuated and his testimony is entitled to full faith and credit." [15] There being no evidence to prove ill motive on the part of Ronnie, his identification of appellant as the killer prevails over the latter's denial.

Additional Evidence Submitted on Appeal

The Certification attached to the Appellant's Brief as Annex B, [16] which appellant wants to use to prove that Ronnie Cabamungan lied, cannot be considered at this late stage. It was not presented during the trial or offered in evidence before the trial court. In *Ong v. Court of Appeals*, [17] this Court stated:

"Section 34, Rule 132 of the Rules of Court, provides that "[t]he court shall consider no evidence which has not been formally offered." A formal offer is necessary, since judges are required to base their findings of fact and their judgment solely and strictly upon the evidence offered by the parties a[t] the trial. To allow parties to attach any document to their pleadings and then expect the court to consider it as evidence, even without formal offer and admission, may draw unwarranted consequences. Opposing parties will be deprived of their chance to examine the document and to object to its admissibility. On the other hand, the appellate court will have difficulty reviewing documents not previously scrutinized by the court below.

x x x x x x x x

. . . A document or an article is valueless unless it is formally offered in evidence, and the opposing counsel is given an opportunity to object to it and to cross-examine any witness called to present or identify it. Evidence not formally offered before the trial court cannot be considered on appeal, for to consider it at such stage will deny the other parties their right to rebut it."

Jerry Saac's Testimony

The trial court was correct in not giving any weight to Defense Witness Jerry Saac's testimony, which appellant submits as more worthy of credence. It is on record that Jerry had previously given a Sworn Statement [18] that was totally inconsistent with his testimony in open court. The inconsistencies between the Sworn Statement and the testimony cannot be reconciled. "Jurisprudence forewarns that when serious and inexplicable discrepancies are present between a previously executed sworn statement of a witness and testimonial declarations with respect to one's participation in a serious imputation such as murder, there is raised a grave doubt on the veracity of the witness' account." [19]

Aside from this, during the previous preliminary examination [20] conducted by MCTC Judge Charito Untal, Jerry had also implicated Arsenio Toledo Sr. in the death of Laila Rose. Pertinent is the ruling in *People v. Peralta*, [21]

in which this Court stated:

"Besides, it is settled that where a witness testifies for the prosecution and retracts his testimony and subsequently testifies for the defense, the test to decide which testimony to believe is one of comparison coupled with the application of the general rules of evidence. The well settled rule is that retractions are generally unreliable and are looked upon with considerable disfavor by the courts. In the case before us, Siony testified during the preliminary examination conducted by Judge Paano that the appellant choked her mother to death. Her subsequent retraction was an afterthought and has no probative value at all."

In the same vein, we find that Jerry's testimony in open court has no probative value at all.

Alleged Frame-up

The trial court correctly found that the defense of frame-up was not proven. The fact that so many persons were investigated but not charged merely shows that the police investigators did a thorough job. They did it by listing the suspects and, as the investigation progressed, eliminating those they found to be probably not responsible for the crime. This fact was clearly explained by the prosecution rebuttal witness, SPO2 Rodolfo Milagrosa.

Rape

On the matter of rape, we again find no reason to disturb the trial court's finding. The only evidence presented by the prosecution to prove it consisted of the lacerations on Laila Rose' hymen. We must stress that there was no eyewitness account or any other evidence to establish this charge.

It is on record that the lacerations on Laila Rose' hymen could have been caused by any blunt hard object like a test tube or a penis. Since the hymen of a five-year-old girl admits a glass tube with a diameter of 1.5 centimeters with moderate resistance, if a hard blunt object with a 2.5-centimeter diameter (the average size of an erect adult male penis) had completely penetrated the victim's vagina it would have caused injuries so much more severe than those present in this case.

The record also shows that after Laila Rose was fished out of the pond that same morning, Dr. Edwin Crusado[22] tried to insert his little finger into her vagina[23] and, through other procedures,[24] found out that there was no spermatozoa. It must be noted that he did these before the medicolegal officer, Dr. Tammy Uy, conducted her own examination later in the evening of that same day and found the lacerations.

Although it is possible that the lacerations could have been caused by an incomplete penetration of an adult male's sex organ, there is also a reasonable possibility that they were caused by the examination and other procedures earlier performed by Dr. Crusado. This Court has consistently ruled that "if the inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with the innocence of the accused and the other consistent with his guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction." [25] Absent any other evidence, the presence of hymenal lacerations alone is not sufficient to establish rape in this case. In this light, we agree with the trial court that appellant cannot be held guilty of rape.

Crime and Punishment

The trial court, however, erred in appreciating treachery as a qualifying circumstance and in convicting appellant of murder. A cursory examination of the Information shows that the qualifying circumstance of treachery was not alleged therein. Following the settled rule that a qualifying circumstance cannot be appreciated unless alleged in the information,[26] appellant can be convicted of homicide only for the death of Laila Rose. The penalty imposable for homicide in this case, however, is reclusion perpetua. As explained in *People v. Cariquez*: [27]

"Previous to its amendment by R.A. 7610, the penalty for homicide under Article 249 of the Revised Penal

Code, was reclusion temporal. As amended by R.A. 7610, the penalty for homicide in cases where the victim is a child below twelve (12) years of age is reclusion perpetua. The second paragraph of Section 10 of Article VI of R.A. 7610 provides, as follows:

‘For purposes of this Act, the penalty for the commission of acts punishable under Articles 248, 249, 262, paragraph[s] 2, and 263, paragraph 1 of Act No. 3815, as amended, the Revised Penal Code, for the crimes of murder, homicide, other intentional mutilation, and serious physical injuries, respectively, shall be reclusion perpetua when the victim is under twelve (12) years of age. x x x.’”

In the present case, it was alleged in the Information and proven during trial that Laila Rose was only five (5) years old when she was killed. Thus, although appellant can be convicted of homicide only, the impossible penalty is still reclusion perpetua.

Civil Liability

Pursuant to current jurisprudence, the award of indemnity ex delicto is P50,000,[28] not P70,000 as determined by the trial court. The award of moral damages in the sum of P50,000, is backed up by evidence; we cannot, however, sustain the award of exemplary damages, absent any showing of aggravating circumstances.[29]

WHEREFORE, the appeal is partially GRANTED and the assailed Decision is hereby MODIFIED as follows: (1) appellant is CONVICTED of homicide, (2) the award of indemnity ex delicto is REDUCED to P50,000, and (3) the award of exemplary damages is DELETED. The Decision is AFFIRMED in all other aspects, including the penalty of reclusion perpetua.

SO ORDERED.

Melo (Chairman), Vitug, Gonzaga-Reyes, and Sandoval-Gutierrez, JJ., concur.

[1] Written by Judge Rasad G. Balindong; records, pp. 389-397.

[2] [Records, p. 6.]

[3] Atty. Jonathan Jocom; records, p. 49.

[4] The case was deemed submitted for resolution on February 8, 2001, when this Court received appellant's "Comment on Appellee's Brief."

[5] Signed by Sol. Gen. Ricardo P. Galvez, Asst. Sol. Gen. Karl B. Miranda and Sol. Grace Gliceria F. de Vera.

[6] TSN, July 2, 1997, p. 26.

[7] Appellee's Brief, pp. 3-8; rollo, pp. 124-129.

[8] Appellant's Brief p. 8; rollo p. 59. Appellant's Brief was signed by Atty. Jonathan M. Jocom of The Davao City Law Firm of Ilagan, Te, Escudero, Laguindam & Jocom.

[9] People v. Bragas, 315 SCRA 217, 222, September 24, 1999, per Pardo, J; citing People v. Banela, 301 SCRA 84, January 18, 1999.

[10] See People v. Ortega, 276 SCRA 166, July 24, 1997.

[11] TSN, July 2, 1997, pp. 16-17.

[12] TSN, July 2, 1997, pp. 39-40.

- [13] TSN, March 24, 1999, pp. 20-24.
- [14] *People v. Caisip*, 290 SCRA 451, May 21, 1998, Romero, J.
- [15] *People v. Alfeche*, 294 SCRA 352, August 17, 1998, per curiam.
- [16] A Certification purportedly issued by one Dadtungan G. Akmad, District Supervisor of DECS, Pikit, Cotabato. It states that Ronnie Cabamungan "was present in school the whole day on January 9, 1997."
- [17] 301 SCRA 387, 397-398, January 21, 1999, per Panganiban, J.
- [18] Exhibit K; records, p. 273.
- [19] *People v. Flores*, 320 SCRA 178, 183, December 8, 1999, per Puno, J.
- [20] Records, pp. 27-28.
- [21] 237 SCRA 218, 224-225, September 28, 1994, per Cruz, J.
- [22] Also spelled "Cruzado" in the transcripts.
- [23] TSN, February 19, 1998, p. 10.
- [24] *Ibid.*, p. 12.
- [25] *People v. Ale*, 145 SCRA 50, October 14, 1986, per Gutierrez Jr., J.
- [26] *U.S. v. Campo*, 23 Phil. 360; *People v. Sola*, 311 SCRA 301, July 28, 1999; *People v. Bragas*, 315 SCRA 216, September 24, 1999.
- [27] 315 SCRA 247, 264-265, September 27, 1999, per Davide Jr., CJ.
- [28] *People v. Ugiaban*, GR No. 132745, March 9, 2000; *People v. Cardel*, GR No. 105582, July 19, 2000.
- [29] Article 2230, Civil Code.

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