

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOSE MUSA Y VILLARAZA, ACCUSED-APPELLANT.

G.R. No. 143703. November 29, 2001

Ponente: MENDOZA, J.

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MENDOZA, J.:

This case is here on automatic review of the decision,[1] dated April 25, 2000, of the Regional Trial Court of Legazpi City, Branch 6, finding accused-appellant Jose Musa guilty beyond reasonable doubt of the crime of rape and sentencing him to suffer the penalty of death and to pay the victim, Vanessa Rochelle Musa, P75,000.00 as indemnity, P50,000.00 as moral damages, P20,000.00 as exemplary damages, and the costs.

The information against accused-appellant charged--

That on or about October 5, 1997 at around 1:00 o'clock in the afternoon, more or less, at Barangay Bongabong, Municipality of Camalig, Province of Albay, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with lewd and unchaste design and with the use of force, threat and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge with VANESSA ROCHELLE MUSA, who is his niece and only 12 years of age, against the latter's will and consent, to her damages and prejudice.

ACTS CONTRARY TO LAW.[2]

When arraigned on March 3, 1998, accused-appellant pleaded not guilty to the charge, whereupon he was tried.

The prosecution presented as its witnesses Vanessa Rochelle Musa, Ariel Musa, Lolita Musa, SPO4 Rico Nocillado, and Dr. Melvyn Orbe. Their testimonies established the following facts:

Vanessa Rochelle Musa is the daughter of Lolita Musa and Arturo Musa, while accused-appellant is the latter's brother.[3] At the time of the commission of the crime, Vanessa was around 12 years old, having been born on July 9, 1985.[4]

On October 5, 1997, Vanessa Rochelle and her six-year old brother, Ariel, were left alone in their house in Bongabong, Camalig, Albay by their parents who went to Camalig to deliver handicrafts. At around 1 o'clock in the afternoon of that day, accused-appellant, referred to as Tata Jose by the children,[5] arrived at the house. He gave Ariel P1.00 and told him to go out, even as he ordered Vanessa Rochelle to go inside the bedroom.

Once inside, accused-appellant made Vanessa Rochelle lie on the bed and removed her clothes. After he had undressed himself, accused-appellant went on top of Vanessa Rochelle and had sexual intercourse with her. Vanessa Rochelle asked accused-appellant to stop as he was hurting her, but her pleas went unheeded. After accused-appellant was through, Vanessa Rochelle saw a whitish substance coming out of his penis. Accused-appellant left afterward, but not before warning Vanessa Rochelle not to tell her mother or anyone else what he had done to her.

The incident was seen by Ariel Musa, who was on the porch, through a hole in the wall. When her parents arrived that night, Vanessa Rochelle did not tell them what had happened to her because she was afraid of what accused-appellant might do if she did.[6] But, on November 24, 1997, while Lolita Musa and her children were feeding the hogs, Ariel, upon seeing accused-appellant, blurted out, "Tata Ote is already crazy." When asked what he meant, Ariel said that accused-appellant did something wrong to Vanessa Rochelle. Ariel told his mother that accused-appellant gave him P1.00 to make him play outside, but, through a hole in the wall, he saw accused-appellant lie on top of Vanessa Rochelle and have sexual intercourse with her.

Lolita then confronted Vanessa Rochelle and asked her if what her brother had said was true. She also asked Rowena, another daughter, if the same thing had happened to her. When her daughters confirmed what accused-appellant had done, Lolita took them to the health center for medical examination. They then proceeded to the Philippine National Police (PNP) station in Camalig, Albay[7] and filed a complaint for rape against accused-appellant.[8]

Dr. Melvyn Orbe, the municipal health officer of Camalig, Albay, conducted the physical examination of Vanessa Rochelle Musa and prepared a report, dated November 28, 1997, which contained the following finding: "Hymen intact with slight discharges (purulent)."[9] In his testimony in open court, he explained that Vanessa Rochelle complained of hypogastric pain and itchiness in the vaginal area, for which reason he conducted a urinalysis and an internal examination of the victim. Dr. Orbe testified that the urinalysis conducted revealed the presence of pus in the urine. He found that Vanessa had a slight purulent discharge from her vagina, indicating a secondary bacterial infection. Dr. Orbe also found multiple healed vaginal lacerations which were caused by the forcible penetration of an object, such as a finger or a penis, into the vagina. As these lacerations were healed, he concluded that the cause for the same occurred sometime before the examination.

On cross-examination, Dr. Orbe testified that the multiple lacerations on the vagina of the victim could not have been caused by menstrual flow or riding a bike. He opined that the most proximate cause of the lacerations was the insertion of the penis because of the presence of the infection and the lacerations. He admitted that the insertion of a finger or a hard object, such as the mouth of a bottle, could also bring about infection and lacerations. But, he explained, the lacerations produced by the insertion of the mouth of a bottle would be massive and would cause bleeding. He said that the lacerations could occur at the hymen or in the vagina itself. The fact that the lacerations were found in the vaginal area did not necessarily mean that the same would also be found on the hymen. Upon further questioning by the trial court, Dr. Orbe explained that the hymen of the victim was intact because it was so elastic that the same could not have been lacerated if the penetration was done slowly.[10]

The defense presented the testimonies of accused-appellant and his sister, Charlina Musa. They testified that on October 5, 1997, from 8 o'clock in the morning until 5 o'clock in the afternoon, they were at the Freedom in Christ Christian Ministry in Tula-Tula, Camalig, Albay, preparing for the arrival of 19 missionaries from Australia. They had their lunch inside the church and did not leave the same until the end of the service. Charlina, however, admitted that the distance from the church to the house of the victim could be covered in 30 minutes by foot. Charlina likewise admitted that Vanessa Rochelle was her niece, the latter's father, Arturo Musa, being her brother. Charlina testified that Vanessa Rochelle, together with her mother, her sister, Rowena, and her younger brother, attended the church services that day.[11]

On April 25, 2000, the trial court rendered a decision, the dispositive portion of which states:

WHEREFORE, premises considered, the accused Jose Musa is hereby found guilty beyond reasonable doubt of the crime of rape of [his] 12 year old full blooded niece, Vanessa Rochelle Musa, a relative within the third degree of consanguinity. Accordingly, he is hereby sentenced to suffer the supreme penalty of death, to pay Vanessa Rochelle Musa the sum of P75,000.00 as indemnity, P50,000.00 as moral damages, P20,000.00 as

exemplary damages and the costs.

SO ORDERED.[12]

Hence this appeal. Accused-appellant contends--

- THE COURT A QUO ERRED IN SENTENCING THE ACCUSED-APPELLANT TO DEATH NOTWITHSTANDING THE FACT THAT THE QUALIFYING CIRCUMSTANCE OF AGE OF THE VICTIM WAS NEVER DULY ESTABLISHED BY THE PROSECUTION, NOR THE EXACT DEGREE OF CONSANGUINITY ANENT THE QUALIFYING CIRCUMSTANCE OF RELATIONSHIP.

- THE COURT A QUO ERRED IN CONVICTING THE ACCUSED-APPELLANT OF RAPE ALTHOUGH THE TESTIMONY OF THE ALLEGED VICTIM HERSELF AND THE FINDINGS OF THE DOCTOR DO NOT SUPPORT THE SAME.[13]

First. To begin with, it is settled that the accused may be convicted on the sole testimony of the victim in a rape case, provided that such testimony is credible, natural, convincing, and consistent with human nature and the normal course of things.[14] In this case, both complainant and her brother Ariel testified against their uncle, herein accused-appellant. Their testimonies are confirmed by the results of the medical examination of complainant.

Accused-appellant, however, questions the credibility of Vanessa Rochelle and claims that her lack of resistance belies her claim of rape. The trial court found that the testimony of Vanessa Rochelle sufficiently proved the commission of the crime of rape. We have time and again held that the determination of the competence and credibility of a child to testify lies primarily with the trial court, which had the opportunity to observe the demeanor and intelligence of the witness on the stand. The findings of the trial court are thus entitled to great weight and credit, unless it has overlooked certain facts and circumstances of substance and value which, if properly considered, would alter the outcome of the case.[15]

Vanessa Rochelle testified in this wise:

Q

Now, where were you then on October 5, 1997 at about 1:00 o'clock in the afternoon when you said you did not go to school because there was no classes being Sunday?

A

I was in the house.

Q

Where?

A

At Bongabong, Camalig, Albay.

Q

Now, while there in your house what were you doing then?

A

I was studying my lesson.

Q

You were doing your homework?

A

Yes, Madam.

Q

Now, at that time that you were in your house doing your homework on October 5, 1997 did you have any companion in the house?

A

Yes, Madam.

Q

Who were or who was your companion?

A

Ariel Musa.

Q

How is Ariel Musa related to you?

A

[He] is my brother.

Q

How about your father and your mother were they not in your house on October 5, 1997?

A

No, Madam.

Q

Do you know where were they?

A

They went to Camalig proper.

Q

What about Ariel what was he doing at that time while you were doing your homework on October 5, 1997?

A

He was playing.

Q

Where, inside the house or outside the house?

A

Outside the house.

Q

Where outside the house? Is it far from the house or just near the house?

A

At the porch.

Q

So, Ariel Musa who was playing at the porch of your house was also inside your house?

A

Yes, sir.

Q

Now, while you were doing your homework and Ariel Musa was playing at the porch of your house, do you recall if somebody came to your house?

A

Yes, sir.

Q

And who is this person who came to your house?

A

"Tata Jose."

Q

When you say, "Tata Jose", are you referring to Jose Musa. The accused in this case?

A

Yes, sir.

Q

Now, why do you call him "Tata Jose"?

A

Because he is the brother of my father.

Q

Now if this "Tata Jose" or Jose Musa is present here in court, will you please point to him?

A

(Witness pointing to a certain person who is inside the room and upon being asked of his name, stood up and identified himself as Jose Musa).

Q

All right, when this "Tata Jose" or Jose Musa arrived in your house on October 5, 1997 while you were doing

your homework and your brother was playing, what did this "Tata Jose" or Jose Musa do, if any?

A

He asked me to come with him inside.

COURT:

Q

Inside what?

A

Inside our room.

Q

Did you go with him inside the room?

A

Yes, Madam.

Q

Now, while inside that room what happened if any?

A

While there inside the room he let me l[ie] down and removed my clothes and then he also removed his clothes and lay on top of me and inserted his penis into my vagina.

COURT:

Q

When you say he removed your clothes what clothes were removed from you by Jose Musa?

A

My shorts and panty.

Q

What about your blouse if any or T-shirt?

A

It was also removed before he lay down on top of me.

Q

And when you say he also removed his clothes, what clothes were removed by him?

A

His shorts and brief.

COURT:

All right, continue Fiscal.

PROS. DE MESA:

Q

Now, you said that your "Tata Jose" after removing your shorts and panty and also after removing his shorts and brief lay on top of you, what did he do while on top of you?

COURT:

Already answered. He inserted his penis in her vagina. You clarify that point.

PROS. DE MESA:

Q

What do you mean by saying that he inserted his penis into your vagina?

COURT:

No, she may not understand your question. Was he able to insert it?

A

Yes, sir.

PROS. DE MESA:

Q

And after he inserted his penis into your vagina, what else was he doing with it?

A

He moved.

Q

What do you mean by he moved?

A

He moved up and down.

COURT:

Q

What was he moving up and down. What part of his body was moving up and down?

A

This part, sir.

INTERPRETER:

Witness pointing to her buttocks.

PROS. DE MESA:

Q

Now, after you were told to lay down, what else if any did the accused do to you after he has lay on top of

you?

A

I was lying down and then he raised my legs.

COURT:

Now where your legs raised?

INTERPRETER:

Witness demonstrating that while lying on her back opened her both legs up with the bend[ed] knees.

PROS. DE MESA:

Q

And while in that position the accused inserted his penis into your vagina?

A

Yes, Madam.

Q

Now, did he finish his moving up and down?

A

Yes, Madam.

Q

And after he finished what did you notice?

A

I felt pain.

Q

Felt pain where?

A

Inside my vagina.

Q

By the way, while he was lying on top of you and inserting his penis into your vagina what if any did you tell your "Tata Jose"?

A

I told him "di mo Tata Jose, masanit" or "Don't, Tata Jose, its painful."

Q

And what did he tell you?

A

He said, "Di mo sana", or don't mind.

Q

And after that what else did you see, if any?

A

I saw white fluids coming from his penis.

Q

And then what did he do with this white fluids or whitish substance?

A

He wiped it out and also those found in my vagina.

Q

And after your Tata Jose finished doing what you described to us what else happened if any?

A

Before he went home he told me not to tell my mother about it.[16]

Thus, as Vanessa Rochelle testified, accused-appellant inserted his penis into her private parts, causing her great pain, and succeeded in having sexual intercourse with her. This belies accused-appellant's argument that Vanessa Rochelle felt pain because of the bacterial infection of her vagina and not because of sexual intercourse. In fact, it appears that such infection was caused by the penetration of her private parts. There is no showing that Vanessa Rochelle had bacterial infection prior to the rape. Vanessa Rochelle was positive that accused-appellant had carnal knowledge of her without her consent. Her testimony on this point is straightforward and consistent despite grueling cross-examination by accused-appellant's counsel. We thus see no reason to doubt Vanessa Rochelle's testimony.

Indeed, no young girl would falsely accuse her uncle of a heinous crime, willingly undergo an examination of her private parts, and expose herself to a public trial, unless she is motivated by a desire to seek justice for the wrong committed against her.[17] In the case of Vanessa Rochelle, she had no reason to make false charges against accused-appellant. Where no evidence has been shown that the victim had improper motive to falsely implicate the accused in the commission of the crime, the presumption is that no such ill motive exists and her testimony is worthy of full faith and credence.[18]

Neither can the absence of hymenal lacerations discredit Vanessa Rochelle's testimony. Although hymenal lacerations are considered to be the most telling and irrefutable physical evidence of penile penetration, they are not necessary to establish the commission of rape, where other evidence is available to prove its consummation. Even the slightest contact of the penis with the labia under the circumstances of force, intimidation, or unconsciousness is deemed to be rape in our jurisprudence. Thus, neither the penetration of the penis beyond the lips of the vagina nor the rupture of the hymen are indispensable in proving the crime of rape.[19] And where a woman, particularly a minor, says that she has been raped, she says in effect all that is necessary to show that rape has been committed.[20] In any event, the medical examination of the victim and the medical certificate are merely corroborative in character and are not always necessary to sustain a conviction for rape.[21] However, contrary to the claims of the defense, the medical certificate and the testimony of Dr. Orbe in fact corroborate Vanessa Rochelle's testimony that she has been raped. Dr. Orbe explained that the absence of hymenal lacerations

on Vanessa Rochelle was due to the fact that the latter's hymen was so elastic that penetration, if done slowly, would not have ruptured the same. However, he testified that he found lacerations in the vagina of the victim consistent with penile invasion. Where the victim's testimony of her violation is corroborated by the physical findings of penetration, there exists sufficient basis for concluding that sexual intercourse did take place.[22]

Nor can the apparent silence and lack of resistance of Vanessa Rochelle be interpreted as consent on her part. The law does not impose upon a rape victim the burden of proving resistance, particularly when intimidation is exercised upon the victim and the latter submits herself to the accused's advances out of fear for her life or personal safety.[23] The test remains to be whether the threat or intimidation produces a reasonable fear in the mind of the victim that if she resists or does not yield to the desires of her attacker, the threat would be carried out. It is thus not necessary for the victim to have resisted unto death or to have sustained physical injuries in the hands of the accused. So long as the intercourse takes place against the victim's will and she submits because of genuine apprehension of harm to her and her family, rape is committed.[24]

In this case, the victim was a 12-year old minor while her assailant was her uncle. Accused-appellant can thus be said to have exercised his moral ascendancy, not to mention physical superiority, over his victim.[25] This is sufficient to prove the presence of intimidation during the rape. For in rape committed by a close kin, moral ascendancy takes the place of violence and intimidation.[26]

Second. Accused-appellant sets up the defense of denial and alibi. Mere denial, unsubstantiated by clear and convincing evidence, is negative self-serving evidence which cannot be given greater evidentiary weight than the testimony of the complaining witness who testified on affirmative matters.[27] Between the consistent and categorical positive identification by the victim of the accused as her assailant and the latter's bare denial, the former generally prevails.[28] Furthermore, for alibi to prosper, the accused must not only prove that he was somewhere else at the time of the commission of the crime but that it was also physically impossible for him to have been at the scene when the crime took place.[29] In this case, accused-appellant failed to demonstrate the physical impossibility of his having committed the crime at that time. Charina Musa, a defense witness and accused-appellant's sister, admitted that the distance between the church, where accused-appellant supposedly worked on that day, and the victim's house could be traversed in 30 minutes by foot. It is thus not unlikely for accused-appellant to have left the church, gone to the victim's house, committed the crime, and returned to the church without being noticed considering that there were many people in the church on that day, being a Sunday.

For the foregoing reasons, we hold that the trial court correctly convicted accused-appellant of the crime of rape.

Third. Accused-appellant maintains that the death penalty cannot be imposed on him because the prosecution failed to prove with sufficient evidence the victim's minority and his relationship to her.

Under R.A. No. 7659, the penalty of death shall be imposed in the crime of rape "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." Being in the nature of qualifying circumstances, and not ordinary aggravating circumstances which merely increase the period of the penalty, minority and relationship must be specifically pleaded in the information and proved during trial with equal certainty as the crime itself.[30]

In this case, the minority of the victim, Vanessa Rochelle, was both alleged and proved. As shown by her birth certificate,[31] Vanessa Rochelle was born on July 9, 1985. Therefore, at the time the rape was committed on October 5, 1997, she was 12 years old. Her relationship to accused-appellant was likewise proved by the testimonies of Lolita Musa, the victim's mother, who said that accused-appellant was her brother-in-law,[32] and Charina Musa, accused-appellant's sister, who acknowledged that the victim was her niece.[33] Such acts and

declarations about pedigree, which includes relationship, constitute admissible hearsay under the rules.[34] Rule 130, §§ 39 and 40 provide that the reputation or tradition existing in a family previous to the controversy as regards the pedigree of any of its members may be received in evidence if the witness testifying thereon be also a member of the family. The term "pedigree" includes relationship, family genealogy, birth, marriage, death, and the dates and places when and where these facts occurred, respectively, and the names of the relatives.[35] Moreover, accused-appellant failed to object when the victim identified him in open court as her uncle, being the brother of her father.[36]

However, the information merely alleged that the victim was the niece of accused-appellant. In *People v. Ferolino*,[37] this Court has ruled:

In this case the allegation that FERLYN is ANTONIO's niece is not specific enough to satisfy the special qualifying circumstances of relationship. If the offender is merely a relation - not a parent, ascendant, step-parent, or guardian or common law spouse of the mother of the victim--it must be alleged in the information that he is a relative by consanguinity or affinity [as the case may be] within the third civil degree. That relationship by consanguinity or affinity was not alleged in the informations in these cases. Even if it was, it was still necessary to further allege that such relationship was within the third civil degree.

This being so, the penalty of death cannot be imposed on accused-appellant and he can only be convicted of simple rape, which has the commensurate penalty of reclusion perpetua. Accordingly, the award of indemnity in the amount of P75,000.00 should be reduced to P50,000.00 pursuant to current case law.[38] The award of moral damages in the amount of P50,000.00 must be sustained as it is in accord with our recent rulings.[39] Considering further that the aggravating circumstance of relationship, although insufficient to warrant the imposition of the penalty of death for lack of specificity in the allegation, has been alleged in the information and proven during trial, the award of exemplary damages is upheld with the modification that the same is increased to P25,000.00.[40]

WHEREFORE, the decision of the Regional Trial Court, Branch 6, Legazpi City is **AFFIRMED** with the **MODIFICATION** that accused-appellant is found guilty of simple rape and sentenced to suffer the penalty of reclusion perpetua and ordered to pay complainant, Vanessa Rochelle Musa, the amounts of P50,000.00 as civil indemnity and P25,000.00 as exemplary damages, in addition to the amount of P50,000.00 awarded as moral damages by the trial court, and the costs.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Vitug, Kapunan, Panganiban, Quisumbing, Pardo, Ynares-Santiago, De Leon, Jr., Sandoval-Gutierrez, and Carpio, JJ., concur.

Buena, J., abroad on official business.

[1] Per Judge Vladimir B. Brusola.

[2] Records, p. 11.

[3] TSN (Lolita Musa), pp. 4-5, July 6, 1999.

[4] Exh. D; Records, p. 139.

[5] Ariel Musa calls accused-appellant "Tata Ote."

[6] TSN (Vanessa Rochelle Musa), pp. 6-14, Oct. 6, 1998; TSN (Ariel Musa), pp. 5-8, Jan. 26, 1999; TSN (Lolita

Musa), p. 5, July 6, 1999.

[7] TSN (SPO4 Rico Nocillado), p. 4, Dec. 13, 1999.

[8] TSN (Lolita Musa), pp. 7-11, July 6, 1999.

[9] Exh. A; Records, p. 2.

[10] TSN (Dr. Melvyn Orbe), pp. 6-16, March 31, 1998.

[11] TSN (Charlina Musa), pp. 5-15, Feb. 22, 2000; TSN (Jose Musa), pp. 16-18, Feb. 22, 2000.

[12] Decision, p. 4; Records, p. 152.

[13] Brief for the Accused-Appellant, p. 1; Rollo, p. 48.

[14] People v. Cuadro, G.R. No. 124704, Feb. 22, 2001.

[15] People v. Pajo, G.R. Nos. 135109-13, Dec. 18, 2000.

[16] TSN (Vanessa Rochelle Musa), pp. 6-13, Oct. 6, 1998.

[17] People v. Saladino, G.R. Nos. 137481-83 & 138455, March 7, 2001.

[18] People v. Belga, G.R. No. 129769, Jan. 19, 2001.

[19] People v. Tagaylo, G.R. Nos. 137108-09, Nov. 20, 2000.

[20] People v. Cristobal, 252 SCRA 507 (1996); People v. Brigildo, 323 SCRA 631 (2000); People v. De la Cruz, 321 SCRA 435 (1995); People v. Blazo, G.R. No. 127111, Feb. 19, 2001.

[21] People v. Lerio, 324 SCRA 76 (2000).

[22] People v. Segui, G.R. Nos. 131532-34, Nov. 28, 2000.

[23] People v. Sabalan, G.R. No. 134529, Feb. 26, 2001.

[24] People v. Dreu, 334 SCRA 62 (2000).

[25] People v. Zaballero, 274 SCRA 627 (1997).

[26] People v. Gonzales, 338 SCRA 678 (2000).

[27] People v. Itdang, G.R. No. 136393, Oct. 18, 2000.

[28] People v. Cambi, 333 SCRA 305 (2000).

[29] People v. Segui, G.R. Nos. 131532-34, Nov. 28, 2000.

[30] People v. Libo-on, G.R. No. 136737, May 23, 2001; People v. Francisco, G.R. Nos. 134566-67, Jan. 22, 2001.

[31] Exh. D; Records, p. 139.

[32] TSN (Lolita Musa), p. 5, July 6, 1999.

[33] TSN (Charina Musa), p. 15, Feb. 22, 2000.

[34] See People v. Silvano, 309 SCRA 362 (1999).

[35] See *People v. Gopio*, G.R. No. 133925, Nov. 29, 2000.

[36] TSN (Vanessa Rochelle Musa), p. 8, Oct. 6, 1998.

[37] 329 SCRA 719, 735 (2000) cited in *People v. Libo-on*, G.R. No. 136737, May 23, 2001 and *People v. Banihit*, 339 SCRA 86 (2000).

[38] *People v. Baniguid*, G.R. No. 137714, Sept. 8, 2000.

[39] *People v. Baltazar*, 329 SCRA 378 (2000).

[40] *People v. Lopez*, G.R. Nos. 135671-72, Nov. 29, 2000.

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