

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GENEROSO JO, FELIPE LAPITAN, VIRGILIO ROCA, DELMA SOLEDAD ROCA, CEFERINO LOPEZ, LUZVIMINDA SERRANO LOPEZ AND ANING LIPAYON, AC...

G.R. No. 69236. August 19, 1986

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Accused Virgilio Roca appeals from the Decision of the Regional Trial Court, Branch VII, Palo, Leyte, finding him guilty of Kidnapping and Serious Illegal Detention under Article 267 (4) of the Revised Penal Code, sentencing him to suffer the penalty of reclusion perpetua, and ordering him to indemnify complainant in the amount of P10,000.00, and to pay 1/6 of the costs. His co-accused Generoso Jo, Delma S. Roca and Luzviminda S., Lopez were acquitted for insufficiency of evidence, while Felipe Lapitan and Ceferino Lopez had remained at-large and did not stand trial.

The evidence for the prosecution is aptly synthesized in the People's Brief as follows:

"Complainant Elisa Casal Jo was married to accused Generoso Jo on July 27, 1969. They begot three children, namely, Eligen, Allan and Riza, whose ages at the time of the subject incident were 9 years old, 7 years old and 6 years old, respectively. They were then living together in La Paz, Leyte (pp. 11-12, t.s.n., March 11, 1981).

"Sometime in December 1975, the couple separated. Generoso then began living with his mistress, Rosemarie Fabro, at San Victoray, La Paz, Leyte (p. 12, t.s.n., March 24, 1982). On the other hand, complainant Elisa and her three children stayed with her mother in La Paz, Leyte. On March 1, 1976, Elisa filed a complaint for support against Generoso. The case was decided by the JDRC of Leyte in favor of Elisa on September 1, 1976. Generoso thus was compelled to give monthly support to her. In that same year, 1976, Elisa filed a complaint for concubinage against Generoso and Rosemarie. When the subject incident occurred, the said complaint was still pending in the Fiscal's Office (pp. 6-7, t.s.n., July 10, 1981; pp. 2-6, t.s.n., July 9, 1984).

"On July 26, 1980, at about 9:00 o'clock in the morning, Elisa who had just arrived home in La Paz, Leyte, from Tacloban City, was informed by her mother that appellant herein Virgilio Roca, who was Elisa's former townmate and high school classmate, had come to see her on an important matter and that he (Roca) would be back (pp. 13-15, t.s.n., March 11, 1981). By 10:00 o'clock, Roca returned and told Elisa that a relative of Elisa's father had just arrived from Cebu and would like to see them in Tacloban City. Upon further inquiries by Elisa's mother, however, Roca revealed that Elisa's husband, accused Generoso Jo, had hired somebody from Tacloban City to kill Elisa through 'barang' (sorcerer or witchcraft) and that it would be better for them to find out. Upon the prodding of Roca, Elisa's mother, Mrs. Guillerma Luya Casal, went with Roca to Tacloban City to investigate the matter. Elisa, on the other hand, immediately went to her sister, Lourdes C. Sia, in La Paz, and informed her of the alleged plot to kill her (pp. 14-17, t.s.n., March 11, 1981; p. 23, t.s.n., Sept. 30, 1981).

"At 6:00 o'clock in the evening of the same day, July 26, 1980, the mother of Elisa arrived home from Tacloban City. She narrated to Elisa that she was able to meet in Tacloban City the witch-doctor from Daram, Samar, by the name of Felipe Lapitan, who had confirmed to her that Generoso had indeed hired the said witch-doctor to kill Elisa by sorcery or 'barang', and that in order to avoid the effect of 'barang', it was necessary for them to see the said person (pp. 19-20, t.s.n., March 11, 1981).

"The following day, July 27, 1980, at about 4:00 o'clock in the afternoon, Elisa, her three children and her mother, went to Tacloban City and proceeded to the house of appellant Virgilio Roca. Inside the house, they met Felipe Lapitan (the witch-doctor) as well as Virgilio Roca and his wife Delma Soledad Roca. Lapitan told Elisa that Generoso had hired him to kill her; that he had already set in motion the evil spirit which would put an end to her life in a few days; and that the effect of the evil spirit would be averted if she would submit herself for treatment. Lapitan likewise told her that in order to convince her husband that she is already dead, a black mourning cloth should be placed in front of their house in La Paz (pp. 19-23, t.s.n., March 11, 1981).

"Helpless and not knowing what to do, Elisa believed the witch-doctor and consented to submit for treatment. Lapitan conducted an 'oracion' or strange prayer on her and then let her drink a glass of water concoction containing some small pieces of paper with writings thereon. In the afternoon of that same day, July 27, 1980. Elisa's mother and Lapitan went to La Paz and placed a black mourning cloth in front of their house. Elisa and her three children, on the other hand, were instructed by Lapitan not to leave the house of appellant Roca in order that they would not be seen by Generoso, and to insure that the effect of treatment on her would be successful (pp. 23-27, 31-33, t.s.n., March 11, 1981).

"Because of fear for her life, Elisa and her three children stayed in the house of Virgilio Roca in Tacloban City. In the evening of July 29, 1980, Lapitan returned to Roca's house and informed Elisa that he was able to collect P1,500.00 from Generoso, and that it was even Rose Fabro, Generoso's mistress, who gave him the money. On July 30, 1980, after breakfast, Lapitan told Elisa that he is taking her three children to Daram, Samar. Elisa objected and told him he could not bring her children without her. Lapitan did not say anything and after a while he called Virgilio and Delma Roca inside a room for a huddle. After five minutes, Delma came out of the room. She then asked Elisa and Elisa's mother to help her wash some clothes at the back of the house. Elisa and her mother obliged as the Roca family had been feeding them there. After an hour, Elisa noticed strange silence in the house. She rushed inside and found her three children already gone. Virgilio Roca and Felipe Lapitan were also not there anymore. She immediately asked Delma where the children could have gone to. Delma answered that probably they were brought by Virgilio for a stroll in the Children's Park near the Tacloban Wharf (pp. 27-45, t.s.n., March 11, 1981).

"Unknown to Elisa, while she and her mother were washing clothes at the back of the house of Virgilio Roca, accused Felipe Lapitan and Virgilio Roca took her three children on a jeep to the Tacloban Wharf. Lapitan made them board a motorboat with him while Virgilio Roca sent them off. The boat left for Samar before noon and they arrived the town of Talalora, Samar, at about three o'clock in the afternoon. From there they took a pumpboat and at four o'clock they reached Daram. From the shore they walked about two kilometers in land along a muddy path abounding with bladed grass to the house of Felipe Lapitan on a corn field in a small hill. They stayed in the house of Lapitan for five (5) days. Lapitan's wife and children were there. Lapitan did not permit Elisa's children to go out of the house. A certain Luzviminda Lopez was watching Elisa's children. The said children were not well fed. They slept on a mat on the floor of the house (pp. 24-39, t.s.n., June 2, 1982).

"Meanwhile, Elisa had become apprehensive as she dread-ed the loss of her children. After about 2 or 3 hours from the time Elisa noticed the absence of her children, Virgilio Roca returned and told her that her three children were brought by Lapitan to Daram, Samar. She pleaded to Virgilio to accompany her to Daram to get her children, but Virgilio refused, claiming he is busy with work. Elisa then told him she wanted to go home to La Paz, but Virgilio warned her not to leave because she might not be well yet as the antidote or water concoction given to her by Felipe Lapitan to counteract the evil spirit sent out to kill her might not work (pp. 3-7, t.s.n., April 15, 1981).

"On August 1, 1980, at about 10:00 o'clock in the morning, Elisa's sister, Mrs. Lourdes C. Sia, visited her in Roca's house to see why they have not returned home to La Paz. Elisa thus asked Virgilio to allow them to go home but again Virgilio refused. When they were not allowed to leave, Mrs. Sia returned to La Paz alone. In the evening of the same day, Benedicto Sia, husband of Lourdes, went to Roca's house and asked Virgilio to permit Elisa and his mother-in-law to go home, otherwise he will report the incident to the Philippine Constabulary (PC). Appellant Roca requested. Virgilio not to report anymore to the PC as he would fetch Elisa's children from Daram, Samar. With the said promise of Virgilio, Benedicto left (pp. 8-11, t.s.n., April 15, 1981).

"In the evening of August 2, 1980, Virgilio Roca went out of his home. The following day, August 3, 1980, at about 6:00 o'clock in the morning, Virgilio told Elisa that he was going to Daram to get her children. At about 9:00 o'clock in the morning, Elisa and her mother were allowed to leave the Roca's house and they went home to La Paz after getting an assurance from Delma Roca that they would be informed of the development (pp. 11-13, *ibid.*).

"On August 4, 1980 at 2:30 o'clock in the afternoon, Elisa left for Tacloban and proceeded to the Roca's house. When she arrived there, she was happy to see her three (3) children already there. Her eldest daughter told her that they were brought to Daram, Samar by Felipe Lapitan and that their companions in coming back were Felipe Lapitan, Virgilio Roca and Luzviminda Lopez. The latter three however were not in Roca's house anymore as Delma had told them that they might be arrested by the PC. Abounding with joy upon seeing her three children, Elisa brought them back to La Paz. They arrived home at 6:00 o'clock in the evening (pp. 14-18, t.s.n., *id.*).

"On August 9, 1980, Capt. Angelo Marcos, Station Commander of the La Paz Police Station filed a criminal complaint for kidnapping of minors against Felipe Lapitan, Virgilio Roca and Ceferino Lopez. This was amended on August 28, 1980 to include Mrs. Delma Roca, Mrs. Luzviminda Serrano Lopez (wife of Ceferino Lopez) and one Aning Lipayon. Virgilio Roca surrendered to the PC on August 28, 1980; his wife Delma on September 2, 1980; and Luzviminda Lopez was arrested on August 29, 1980. The other defendants (particularly Felipe LAPITAN) eluded arrest (p. 2, Decision dated July 17, 1984).

"On January 21, 1982, after due reinvestigation, the information filed in court was amended to implead Generoso Jo, alleged principal by induction, as another defendant. He was released on bail on February 10, 1982 (p. 4, *ibid.*)."[1]

The accused ROCA, 29, married, a construction laborer, residing in Barangay 63, Sagkahan, Tacloban City, denied having had any participation in taking the children to Daram, Samar, nor in fetching them from there on August 4, 1980. He averred that ELISA knew of her children's trip thereto with LAPITAN and that she even provided them with a live pig, tuba, and beef loaf. ROCA also denied any acquaintanceship with LAPITAN stating that he came to know the latter only on July 27, 1980 when ELISA JO, who was his classmate in the elementary grades in 1968 in La Paz and her mother, Guillerma Luya, went to their home looking for a house for rent because ELISA was coughing and needed treatment by LAPITAN, a quack doctor, and allegedly a nephew of Guillerma Luya; that it was only then that LAPITAN was introduced to him; that because ROCA and his wife pitied ELISA they accommodated her and her family in their house for five days. ROCA further denied having met Benedicto Sia, ELISA's brother-in-law, who according to the prosecution evidence had threatened to report to the police if the children were not returned to the mother.

Allan, the second child of the Jo spouses, 7 years old at the time of the incident, who was already in the custody of his father during the criminal proceedings in 1982-1983, testified that he and his two sisters were not kidnapped; that his mother and grandmother told them to go to Daram, Samar, with LAPITAN and that they even brought clothes, canned goods and a live pig; that they were there on vacation; that LAPITAN had asked for his mother's permission to go to Samar; that his mother and grandmother were very near the jeep which they boarded to go to

the wharf; that ROCA did not see them off; and that it was LAPITAN who accompanied them back to Tacloban while ROCA was left behind in LAPITAN's house in Daram, Samar.

After assessing the conflicting testimonies, the Trial Court adjudged ROCA guilty, as heretofore stated.

ROCA argues that the lower Court erred:

"I

"In completely disregarding the testimony of Allan Jo one of the alleged kidnapped minors.

"II

"In convicting the accused-appellant for the crime of kidnapping without the prosecution having been able to prove the essential elements of the crime charged and/or to prove that a crime was really committed.

"III

"In its findings grounded entirely on speculations, surmises and conjectures as to the motive of the accused-appellant in the alleged commission of the offense charged.

"IV

"In convicting the accused-appellant of a crime for which he is not charged."

The submittals lack merit.

We agree with the Trial Court that as between the testimonies of the eldest child ELIGEN, and the second child Allan, that of ELIGEN is deserving of more credence. ELIGEN was 9 and Allan was 7 at the time of the commission of the crime, and 12 and 10, respectively, when they testified three (3) years later. At his tender age of 7, Allan could not have had the correct perception of what was happening to them besides the fact that he was made to narrate the incident after the lapse of three years. ELIGEN, on the other hand, gave a written statement to the police soon after her return to La Paz. Furthermore, Allan was in the custody of his father, who was exercising moral ascendancy over him; while the likelihood of the mother coaching ELIGEN was remote as the mother was not with her children at Daram, Samar.

There should be no question that the minors were deprived of their liberty and actually restrained at Daram, Samar, at LAPITAN's house where they were kept for more than five days from July 30, 1980 to August 4, 1980. It was a solitary house in an isolated place which could be reached only by walking through a muddy path abounding with bladed grass.[2] As ELIGEN testified, on July 30, 1980, ROCA and LAPITAN took them away on a jeep, not to the children's park but to the pier after they were told that they already had permission to take them to their father.[3] They brought no clothes nor blanket with them nor any foodstuffs. From the Tacloban pier and, accompanied by LAPITAN alone since ROCA was left behind, they took a motor launch to Talalora, Samar, thence, a pumpboat to Daram, Samar, and then a banca to Barangay Cabak, Daram, Samar. After which, they walked approximately two (2) kilometers to LAPITAN's house where they were kept in his room and not allowed to go outside.[4] Sometimes, they were fed three times a day, at others, only once a day. All the while, Luzviminda Lopez kept watch over them and slept with them. LAPITAN's excuse to the children for keeping them indoors was so that harm would not befall them by way of 'barang' (witchcraft).[5] It was on August 4 and only because Benedicto Sia, Eliza's brother-in-law, had threatened to report the matter to the authorities, that ROCA fetched the children from Daram, Samar, and with LAPITAN and Luzviminda, they all returned to ROCA's house in Tacloban.

Was the crime of Kidnapping committed? Article 267 of the Revised Penal Code provides:

"ART. 267. Kidnapping and serious illegal detention. - Any private individual who shall kidnap or detain another, or in any other manner deprive him of his liberty, shall suffer the penalty of reclusion perpetua to death:

"1. If the kidnapping or detention shall have lasted more than five days.

"2. If it shall have been committed simulating public authority.

"3. If any serious physical injuries shall have been inflicted upon the person kidnapped or detained; or if threats to kill him shall have been made.

"4. If the person kidnapped or detained shall be a minor, female or a public officer.

"The penalty shall be death where the kidnapping or detention was committed for the purpose of extorting ransom from the victim or any other person, even if none of the circumstances above-mentioned were present in the commission of the offense. (As amended by Rep. Acts Nos. 18, and 1084, approved June 15, 1954)."

We find the essential elements of the crime proven. The kidnapping was directly participated in by ROCA and LAPITAN, both private individuals; the three children were deprived of their liberty for they could not leave LAPITAN's house at will; their detention was illegal there being no justification therefor; the detention lasted for more than five days; and the persons kidnapped were minors.

ROCA was not without motive for directly participating with LAPITAN in kidnapping the minors. As ELISA had testified, consideration was paid LAPITAN.[6]

In his last assigned error, ROCA contends that he was charged with Kidnapping and failure to return a minor under Article 270[7] of the Revised Penal Code but was convicted of Kidnapping and Serious Illegal Detention under Article 267 (4) [supra] of the same Code.

The Amended Information under which ROCA was charged reads:

"AMENDED INFORMATION

"The undersigned 3rd Assistant Provincial Fiscal accuses GENEROSO JO, FELIPE LAPITAN alias PEPE, VIRGILIO ROCA, DELMA ROCA, CEFERINO LOPEZ, and LUZVIMINDA LOPEZ of the crime of Kidnapping, committed as follows:

"That on or about the period comprised between July 27, 1980 to August 4, 1980, in the Municipality of La Paz, Province of Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused conspiring, confederating and acting in concert with each other, with Felipe Lapitan and Ceferino Lopez who are still at-large and their whereabouts still unknown, did then and there wilfully, unlawfully and feloniously with accused Virgilio Roca, Delma Roca and Felipe Lapitan in custody of minors Eligen C. Jo, 10 years old, Allan C. Jo, 8 years old and Riza C. Jo, 7 years old, respectively, and with Felipe Lapitan, kidnapping the aforesaid minors and bringing the minors to Brgy. Cabac, Daram, Samar against their will and depriving them of their liberty for a period of 9 days with the intended purpose of permanently separating the above-named minors from the custody of their mother, Elisa C. Jo.

CONTRARY TO ARTICLE 270 OF THE REVISED PENAL CODE."

While there is variance between the offense charged in the Information and that established by the evidence, it cannot be denied that the offense as charged, which is Kidnapping and Failure to Return a Minor under Article 270 of the Revised Penal Code, is necessarily included in the offense proved, which is Kidnapping and Serious Illegal Detention of a minor under Article 267 (4) of the same code, inasmuch as the essential ingredients of the offense charged constitute or form a part of those constituting the offense proved. Thus, deliberate failure to restore a minor under one's custody and kidnapping of a minor who is not in custody both constitute deprivation

of liberty. Consequently, ROCA can be convicted of the offense proved included in that which is charged.[8] Besides, there is authority to the effect that paragraph 1 of Article 270 might have been superseded by Article 267, as amended, which punishes as serious illegal detention, the kidnapping of a minor, regardless of the purpose of the detention.[9]

The Solicitor General calls attention to a last consideration. The Trial Court convicted ROCA of only one (1) crime of Kidnapping and sentenced him to only one (1) reclusion perpetua in the absence of any modifying circumstances. Actually, three kidnappings were committed as alleged in the Information and proved during the trial. Accordingly, ROCA should be sentenced for as many offenses as charged in the Information and proved during the trial or three (3) reclusion perpetua. It is to be noted that ROCA did not object to the Information charging more than one offense, so that, he is deemed to have waived the same.[10]

WHEREFORE, the appealed judgment is hereby modified and the accused-appellant Virgilio Roca hereby sentenced to three (3) penalties of reclusion perpetua for three separate crimes of Kidnapping and Serious Illegal Detention, provided that, pursuant to Article 70 of the Revised Penal Code, the maximum duration of the sentence shall not exceed forty (40) years. With 1/6 of the costs.

SO ORDERED.

Yap, (Chairman), Narvasa, Cruz, and Paras, JJ., concur.

[1] Brief for the plaintiff-appellee, pp. 2-10.

[2] T.s.n., June 2, 1982, p. 67.

[3] T.s.n., June 2, 1982, p. 24.

[4] *ibid.*, pp. 33, 37.

[5] *ibid.*, p. 39

[6] T.s.n., October 9, 1981, p. 24.

[7] "ART. 270. Kidnapping and failure to return a minor. - The penalty of reclusion perpetua shall be imposed upon any person who, being entrusted with the custody of a minor person, shall deliberately fail to restore the latter to his parents or guardians. (As amended by Rep. Act No. 18).

[8] Rule 120, sections 4 and 5, Rules of Court.

[9] Aquino, *The Revised Penal Code*, Vol. III, 1976 edition.

[10] Section 3, Rule 120, Rules of Court; *People vs. Miana*, 50 Phil. 771 (1927); *People vs. Masin*, 64 Phil. 757 (1937).

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