

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. HEINRICH S. RITTER, ACCUSED-APPELLANT.

G.R. No. 88582. March 05, 1991

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

The appellant challenges his conviction of the crime involving a young girl of about 12 years old who had been allegedly raped and who later died because of a foreign object left inside her vaginal canal.

Heinrich Stefan Ritter was charged with the crime of rape with homicide under an information which reads:

"That on or about the tenth (10th) day of October, 1986 in the City of Olongapo, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with lewd design and with intent to kill one Rosario Baluyot, a woman under twelve (12) years of age, did then and there wilfully, unlawfully and feloniously have carnal knowledge of said Rosario Baluyot and inserted a foreign object into the vaginal canal of said Rosario Baluyot which caused her death shortly thereafter, to the damage and prejudice of her relatives." (66)

When arraigned, the accused pleaded "Not Guilty". Thereafter, the case was set for trial on the merits.

To prove the guilt of the accused, the prosecutor presented the following witnesses, namely: (1) Jessie Ramirez, (2) Maria Burgos y Turla, (3) P/Cpl. Mariano Victoria, (4) Policarpio Baluyot, (5) Dr. Reino Rosete, (6) Sumulong Daniel, (7) Jessica Herrera, (8) Sister Eva Palencia, (9) Conrado Salonga, (10) Dr. Devonne Loop, (11) Dr. Leo Cruz, (12) Paul Maclor, (13) Aida Sarmiento, (14) Patricia Prollamanta, (15) Mel Santos, (16) Lorna Limos, (17) Eduard Lee Bungarner, (18) Ronaldo Marquez, (19) Tom Bonte, (20) 2nd Asst. City Fiscal Nini Alcala, (21) 1st Asst. City Fiscal Dorentino Z. Floresta, (22) Corazon Caber, (23) Rodolfo Mercurio and (24) Fe Israel.

On the other hand, the defense offered in evidence Exhibits "1" to "24" and the testimonies of (1) Heinrich S. Ritter, (2) Father Roque Villanueva, (3) Angelita Amulong, (4) Gaspar Alcantara, (5) Dr. Val Barcinal and (6) Dr. Pedro C. Solis.

The facts of the case upon which the lower court based its finding of guilt beyond reasonable doubt are summarized in its decision, as follows:

"The people's evidence show that on October 10, 1986 about midnight, accused Heinrich Stefan Ritter brought a boy and girl namely: Jessie Ramirez and Rosario Baluyot inside his hotel room at MGM Hotel along Magsaysay Drive, Olongapo City. These two (2) children were chosen from among a bunch of street children. Once inside the hotel room accused told them to take a bath. Jessie Ramirez, alias 'Egan', was the first to take a bath and when he came out Rosario Baluyot went to the bathroom to do the same. While Rosario Baluyot was inside the bathroom, accused Ritter took out some pictures depicting dressed up young boys, and put them on top of the table. Other things which were taken out and placed on top of a table were three (3) other objects which he described as like that of a vicks inhaler. One of these objects the accused played with his hands and

placed it on his palms. The color of which is grayish blue which turned out later to be the foreign object which was inserted inside the vagina of Rosario Baluyot. The other objects were later established to be anti-nasal inhalers against pollution purchased by the accused in Bangkok when he went there as a tourist. While Rosario was in the bathroom, accused told Ramirez to lay down on bed, and so did the accused. He then started masturbating the young boy and also guided the boy's hand for him to be masturbated, so that they masturbated each other, while they were both naked, and he gave Jessie Ramirez an erection. When Rosario Baluyot came out of the bathroom, she was told to remove her clothes by accused and to join him in bed. The accused then placed himself between the two (2) children and accused started fingering Rosario.

At this time, Ramirez was already sleepy, but Rosario touched him to call his attention. He looked, and he saw accused placing his penis against the vagina of Rosario and that he was trying to penetrate the vagina but it would not fit. After what he saw, Ramirez did not anymore bother to look because he was sleepy and fell asleep.

The following morning, the accused, whom the juveniles described as an 'American, paid Ramirez alias 'Egan' P200.00 and Rosario P300.00. He then left them in the hotel. After the American left, they went downstairs, and Rosario told Egan that the American inserted something in her vagina. But they could not do anything anymore, because the American had already left, and neither did they report the matter to the police. Sometime the following day, Jessie saw Rosario and he asked her whether the object was already removed from her body and Rosario said 'Yes'. However, Jessie Ramirez claimed that on the evening of that same date, he saw Rosario and she was complaining of pain in her vagina and when Egan asked her, she said that the foreign object was not yet removed. Then there was another occasion wherein Jessie was summoned and when he came he saw Rosario writhing in pain and when he tried to talk to Rosario she scolded him with defamatory remarks. Thereafter, he did not see Rosario anymore because he already went home to his aunt's house who resided at Barrio Barretto and resumed his studies in the primary grades.

On May 14, 1987, Gaspar Alcantara, a defense witness, while garbage scavenging at Lot 21, near the gate of the U.S. Naval Base saw Rosario at Magsaysay Drive near the Happy Bake Shop near Lot 21, being ogled by people because Rosario's skirt was bloodied and she was unconscious and foul smelling. Since nobody helped Rosario, he took pity on her condition and brought her to the Olongapo City General Hospital in an unconscious condition, via jeepney. He went to the Information desk and he was the one who gave the personal circumstances of Rosario as to her name, age, her residence as Nagbakulaw, Lower Kalaklan, and Gaspar Alcantara signed as 'guardian' of Rosario, while Rosario was already in the emergency room. Although Gaspar Alcantara denied that he did not know the name of Rosario Baluyot when he brought her to the hospital, this is belied by the testimony of the Information clerk Lorna Limos, who was then on duty. Limos testified that it was Alcantara who supplied the personal circumstances of Rosario. The Court gives more credence to the testimony of Miss Limos as against Gaspar Alcantara who became a defense witness, for the reason that through his own testimony, Gaspar Alcantara claimed that even prior to May 14, 1987, he had already known Rosario Baluyot for more than one (1) year, because he has seen the said girl go to the house of his twin brother, Melchor Alcantara, who is his immediate neighbor. Rosario used to visit a girl by the name of 'Nora' who was then in the custody of his brother. His brother Melchor was also living with their mother, brother and sister-in-law and their two (2) children in his house. Rosario as per Gaspar's testimony even stays for one week or a few days at his brother's house when she visits Nora. So the Court can safely assume that of all the more than one (1) year that he had regularly seen Rosario at his brother's house, he must have already did come to know the name of Rosario Baluyot including her age. In his testimony in Court he stated that he even asked Rosario for movie and softdrinks money which can safely be concluded that he knows her very well. It is against normal behavior especially to a Filipino who have a characteristic of curiosity not to have found out the real name of the girl he claims to know only as 'Tomboy'.

While Rosario Baluyot was confined at the Olongapo City General Hospital, nobody was attending to her since she is a street child, having stowed away from the custody of her grandmother. Three (3) good samaritans who

belong to religious and civic organizations, in the persons of Jessica Herrera, Fe Israel and Sr. Eva Palencia, in one of their missions in the hospital chanced upon Rosario Baluyot who was all alone with no relatives attending to her and after finding out that she was only 12 years old decided to help her. After a short interview with Rosario, regarding her name and age only because she clamped up about her residence and her relatives, they decided to help her by providing her the medicine she needed during her confinement in readiness for an operation. It was Fe Israel who was able to get the name and age of Rosario Baluyot from Rosario Baluyot herself when he saw her for the first time. For Fe Israel, the age of Rosario Baluyot was an important factor because their program assisted only indigent patients from infants up to 13 years old.

Rosario's first ailment at the Olongapo City General Hospital was loose bowel movement and vomiting, which was first suspected as gastro-enteritis, but which came out later as symptoms of peritonitis due to a massive infection in the abdominal cavity. Subsequently, on May 17, 1987, after she was examined by the physicians at the hospital, it was found out that there was a foreign object lodged in her vaginal canal and she had vaginal discharge tinged with blood and foul smelling odor emanating from her body. One of the doctors who attended to her was Dr. Barcinal, an OB-GYNE. Dr. Barcinal tried to extract the foreign object by means of a forceps, but several attempts proved futile because said object was deeply embedded in the vaginal canal and was covered by tissues. Her abdomen was enlarged, tender and distended, symptoms of peritonitis. The patient was feverish and incoherent when she was scheduled for operation on May 19, 1987, after the first attempt for an operation on May 17 was aborted allegedly because the consent of Dr. Reino Rosete, the hospital director was not obtained. The surgeon who operated on her was Dr. Rosete himself. He testified that Rosario had to be operated even in that condition in order to save her life. Her condition was guarded. This was corroborated by Dr. Leo Cruz, the anesthesiologist during Rosario's operation. It was in the evening of May 19 at about 7:00 p.m. when Dr. Rosete opened her abdomen by making a 5 inch incision on her stomach. He found out that the fallopian tubes were congested with pus, and so with the peritoneum, and the pelvic cavity, and patches of pus in the liver, although the gallbladder and kidney appeared to have septicemia, poisoning of the blood. The peritonitis and septicemia were traced to have been caused through infection by the foreign object which has been lodged in the intra-vaginal canal of Rosario. The foreign object which was already agreed upon by both parties that it is a portion of a sexual vibrator was extracted from the vagina of Rosario while under anesthesia. Said object was coated with tissues, pus and blood. Dr. Rosete gave it to the assisting surgical nurse for safekeeping and gave instructions to release it to the authorized person. This object was shown by the nurse to Dr. Leo Cruz. Dr. Rosete considered the operation successful and the patient was alive when he left her under Dr. Cruz. Dr. Cruz stayed with said patient in the ward for about 30 minutes and thereafter he left. The following day, Rosario got serious and it was Dr. Leo Cruz who pronounced her death at 2:00 to 2:15 in the afternoon of May 20, 1987.

Thereafter, a death certificate was prepared under the direction of Dr. Cruz which was indicated therein that the cause of death was cardio-respiratory arrest, secondary to septicemia caused by the foreign object lodged in the intra uteral vaginal canal of Rosario Baluyot.

The foreign object was washed by nurse Obedina, then placed it in a transparent small jar and labelled "Rosario Baluyot". Jessica Herrera asked the nurse for the foreign object, and it was given to her under proper receipt. Herrera then showed the same to the persons who helped financially Rosario's case, and afterwards she gave it to Sister Eva Palencia. Sis. Palencia was in custody of the said object until Mr. Salonga came and asked her for the object.

After Rosario Baluyot died, Sis. Palencia and a companion went to Gaspar Alcantara to ask him in locating the relatives of Rosario. They were able to trace Rosario's grandmother, Mrs. Maria Burgos Turla, and informed her that her granddaughter was already dead and lying in state at St. Martin Funeral Parlor. Mrs. Turla went there with her son, who shouldered all the burial expenses for Rosario.

Subsequently, Sis. Palencia, Fr. Cullens and Mr. Salonga came to her residence at Sta. Rita and asked her if she was interested in filing a case against the person who caused the death of her granddaughter. Of course she

agreed. Hence, she was brought to the Fiscal's (City) Office to file the same.

After the case was filed against the herein accused, Atty. Edmundo Legaspi with his messenger came to her house and told her that the accused was willing to settle the case, but that accused Ritter had only P15,000.00. The old woman did not accept it because she knows that the accused is liable to pay damages anyway. After that, she received a letter from Atty. Legaspi telling her to get a lawyer for her case. By this time, Mrs. Turla, who wanted to have the case settled once and for all giving the reason that she can no longer bear the situation, sent her nephew, Conrado Marcelo to Atty. Legaspi. Her nephew obliged and told her that she will be paid at the office of Atty. Legaspi. On a date not clear in the records, she went with her nephew Conrado Marcelo, and Roberto Sundiam, an assistant barangay tanod of Sta. Rita, and while they were there, she saw Ritter arrive at the law office. Ritter and Atty. Legaspi talked at the office near the bathroom, and thereafter Ritter left. After he left, Atty. Legaspi told Rosario's grandmother that they are willing to settle for P20,000.00, but that Ritter left only P15,000.00, so she received the money with the understanding that there was a balance of P5,000.00 yet. She was made to sign a statement, and she was asked to change the age of her granddaughter Rosario. With the document prepared, she and the lawyer's messenger went to the Fiscal's office to have it subscribed, and was subscribed before an assistant city fiscal. But the balance of P5,000.00 was not paid, because later on Atty. Legaspi became the OIC of Olongapo City and he could no longer attend to it. Atty. Legaspi, during one of the hearings before the Court even apologized to her.

As to the case, P/Cpl Marino Victoria, as criminal investigator of Station "A", was directed by Col. Daos, Station Commander of the Olongapo Police Department to make a follow up of the case of Rosario Baluyot. On the other hand, since the suspect who inserted the foreign object inside Rosario's vagina was said to be an American, the NISRA, Subic Naval Base also conducted its investigation headed by criminal investigator Agent Conrado Salonga. Coordinating with the local police and with Sister Eva Palencia, since Rosario was a street child at Magsaysay Drive, they rounded up about 43 street children and from some of them they learned that Rosario Baluyot was with Jessie Ramirez with an American at the MGM Hotel when the foreign object was inserted in her vagina. After finding Jessie Ramirez, they asked him about Rosario Baluyot. They found out that indeed he was with Rosario Baluyot sometime before Christmas of 1986 with an American, who brought them to the said hotel. Jessie Ramirez was taken inside the U.S. Naval Base, Olongapo City and took his statement. Then he was brought to Mr. Edward Lee Bungarner, a cartographer, and out of the description supplied by Ramirez, a composite drawing was photocopied and copies thereof were distributed to the local police and to the sentries at the gate of the U.S. Naval Base. Some American servicemen who had resemblance to the composite drawing were photographed and these were shown to Jessie Ramirez, but the result was negative. Aside from the physical description by Ramirez about the appearance of the suspect, he also described him as having the mannerisms of a homo-sexual.

After obtaining information that foreign homo-sexuals frequented Ermita, Manila, and thinking that the so-called American may be European or Australian national, the team composed of Agent Salonga, Mr. Heinsell, P/Cpl Marino Victoria and P/Cpl Andres Montaon, Jessie Ramirez and Michael Johnson, another juvenile, proceeded to Manila. They first went to the Manila NISRA Office, and thereafter checked in a hotel. That was on September 23, 1987. On the first night, they went to Luneta Park where foreign homo-sexuals were said to be frequenting, but the result was negative. Then on September 25, at about 11:00 p.m., while they were standing at the corner of A. Mabini and M.H. del Pilar Street, a male caucasian who looked like a homo-sexual stopped by admiringly in front of the two (2) juveniles, Ramirez and Johnson. Jessie Ramirez then reported to Mr. Salonga that this foreigner had a similarity with the American suspect, so the two minors were instructed to follow the foreigner and to strike a conversation. They did, and when they returned, Jessie Ramirez told them that indeed the said foreigner was the one who brought him and Rosario Baluyot to the MGM Hotel. Bobby Salonga told Ramirez that this foreigner had no beard while the one previously described by Ramirez had a beard. Jessie Ramirez told them that maybe he have just shaved it off. The said caucasian then entered a bar, and after several minutes he came out, and Jessie Ramirez upon his signal with his thumbs up, as a signal to confirm that the said foreigner is the suspect, arrested Ritter and brought him to the Manila

Western Police District. It could be mentioned at this stage that in this operation they were accompanied by two (2) policemen from the Western Police District. The foreigner was hand cuffed and was told that he was a suspect for Rape with Homicide. After the arrest, they first went to the pension house of the suspect in Ermita, Manila to get his shoulder bag which contained his personal belongings, and from there they brought him to the Western Police Department. At the said police headquarters, they were allowed a permissive search by the foreigner of his clutch bag and his small shoulder bag and confiscated his passport, I.D., 3 inhalers, money in the form of dollars and travelers checks amounting about \$1,500.00 and about P100.00, all duly receipted for. From the passport they learned that the suspect's name was Heinrich Stefan Ritter, an Austrian national. During the questioning of Ritter, Salonga and his team already left the headquarters and went to their hotel, because at this time Jessie Ramirez was already shaking with fear after he identified the accused.

The following day, they brought the accused to Olongapo and was detained at the Olongapo City Jail. The case for Rape with Homicide was filed against him at the City Fiscal of Olongapo. At the preliminary investigation, accused was assisted by his own counsel. The private complainant was Maria Burgos Turla because it was she who had custody of Rosario Baluyot after her mother Anita Burgos died on January 12, 1982, and their father Policarpio Baluyot had left them under her custody. When this case was filed, the father's whereabouts was unknown, and he only appeared when the trial of this case before the Court was already in progress. And upon his (Policarpio Baluyot) own admission, he only learned about the death of his daughter Rosario Baluyot from the newspaper, long after Rosario was already gone.

The defense tried to dislodge the case by claiming that there could be no crime of Rape with Homicide because the suspect was described as an American while Ritter is an Austrian. Also advanced by the defense is that, it is a case of mistaken identity. That Rosario Baluyot was at the time of the commission of the offense, already more than 13 years old, she having been born on December 26, 1973 as per baptismal certificate, wherein it appears that Rosario Baluyot was baptized on December 25, 1974 and was born on December 26, 1973 as testified to by Fr. Roque Villanueva of St. James Parish Church who issued the Baptismal Certificate, having custody and possession of the book of baptism for the year 1975, but admitted that he had no personal knowledge about the matters or entries entered therein. Likewise, the defense's stand is that the accused cannot be liable for Homicide because a vibrator is not a weapon of death but it is a thing for the purpose of giving sexual pleasure, and that the death of Rosario Baluyot was due to the incompetence of Dr. Rosete, the surgeon and Director of the Olongapo City General Hospital, who operated on her." (Rollo, pp. 109-116)

On March 29, 1989, the trial court rendered its decision. The dispositive portion of the decision reads as follows:

"WHEREFORE, IN VIEW OF ALL THE FOREGOING, the Court holds, that the prosecution has established the GUILT of the accused beyond reasonable doubt for the crime of Rape with Homicide as defined and penalized in Art. 335 No. 3 of the Revised Penal Code, and hereby sentences HEINRICH STEFAN RITTER to a penalty of RECLUSION PERPETUA, to indemnify the heirs of the deceased in the sum of SIXTY THOUSAND PESOS (P60,000.00) Philippine Currency, and TEN THOUSAND PESOS (P10,000.00) by way of attorney's fees to the private prosecutors and to pay the costs." (Rollo, p. 126)

The accused now comes to this Court on the following assigned errors allegedly committed by the trial court:

I

THE TRIAL COURT GRAVELY ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE ALLEGED OFFENSE WAS COMMITTED ON OCTOBER 10, 1986 AND THAT IT WAS ACCUSED-APPELLANT WHO COMMITTED IT.

II

THE TRIAL COURT GRAVELY ERRED AND ABUSED ITS DISCRETION IN FINDING THAT ROSARIO BALUYOT WAS LESS THAN TWELVE (12) YEARS OLD WHEN THE ALLEGED OFFENSE

WAS COMMITTED AND IN HOLDING THAT THERE WAS RAPE WITH HOMICIDE.

III

THE TRIAL COURT GRAVELY ERRED AND ABUSED ITS DISCRETION IN GIVING CREDENCE TO AND NOT REJECTING THE PROSECUTION'S EVIDENCE AND IN NOT UPHOLDING THAT OF THE DEFENSE AND ACQUITTING THE ACCUSED.

Inasmuch as it is the bounden duty of this Court to affirm a judgment of conviction only if the guilt of the accused has been proved beyond reasonable doubt, it behooves us to exert the most painstaking effort to examine the records in the light of the arguments of both parties if only to satisfy judicial conscience that the appellant indeed committed the criminal act (See *People v. Villapaña*, 161 SCRA 73 [1988]).

The appellant was convicted by the trial court of the crime of rape with homicide of a young girl who died after the rape because of a foreign object, believed to be a sexual vibrator, left inside her vagina.

As stated by the trial court one crucial issue in this case is the age of the victim - whether or not Rosario Baluyot was less than twelve (12) years old at the time the alleged incident happened on October 10, 1986. The age is important in determining whether or not there was statutory rape. Article 335 of the Revised Penal Code defines the third type of rape as having carnal knowledge of a woman under 12 years of age, in which case force, intimidation, deprivation of reason or unconscious state do not have to be present.

The trial court found that Rosario was below 12 years old when she was sexually abused by the accused and, therefore, rape was committed inspite of the absence of force or intimidation.

In resolving the issue, the trial court put great weight on the testimonies of the victim's grandmother and father who testified that she was born on December 22, 1975. These oral declarations were admitted pursuant to then Rule 130, Section 33 of the Rules of Court where, in the absence of a birth certificate, the act or declaration about pedigree may be received in evidence on any notable fact in the life of a member of the family. Since birth is a matter of pedigree within the rule which permits the admission of hearsay evidence, oral declarations are therefore admissible as proof of birth (Decision, p. 54)

The grandmother, Maria Burgos Turla, testified that she remembered Rosario's birth date because her brother died in Pampanga and her daughter, Anita (Rosario's mother) was the only one who failed to attend the funeral because the latter has just given birth allegedly to Rosario (T.S.N. p. 8, Jan. 13, 1988).

The father likewise testified that as far as he could remember, Rosario was born on December 22, 1975 (T.S.N., p. 4, Jan. 27, 1988) and he was certain that Rosario was more than one (1) year old when she was baptized (T.S.N., p. 45, Jan. 27, 1988).

The trial court further added that their testimony is supported by the clinical record and the death certificate indicating that she was 12 years old when she was admitted at the Olongapo City General Hospital for treatment. The age was supplied by Rosario's alleged guardian, Gaspar Alcantara to the hospital's clinical record clerk, Lorna Limos. Fe Israel, a social worker who interviewed Rosario Baluyot also testified that she was told by Rosario that she was 12 years old. The trial court accepted this as adequate evidence of the truth. Moreover, Jessie Ramirez, the principal witness in this case declared that he was born on September 5, 1973 and that he was older than Rosario Baluyot. Therefore, since he was 13 years old in 1986, Rosario must have been less than 12 years old in 1986. (Decision, p. 55)

The trial court concluded that the oral declarations of the grandmother and father supported by other independent evidence such as the clinical record, death certificate and the testimonies of Fe Israel and Jessie Ramirez, rendered

the baptismal certificate presented by the defense without any probative or evidentiary value. (Decision, p. 55)

The findings of the trial court with respect to Rosario Baluyot's age cannot stand the application of evidentiary rules.

The trial court relied on Section 33, Rule 130 (now Section 40 of Rule 130 of the 1989 Revised Rules of Court).

For oral evidence to be admissible under this Rule, the requisites are:

- (1) That the declarant must be dead or outside of the Philippines or unable to testify;
- (2) That pedigree is in issue;
- (3) That the person whose pedigree is in question must be related to the declarant by birth or marriage;
- (4) That the declaration must be made before the controversy occurred or ante litem motam; and
- (5) That the relationship between the declarant and the person whose pedigree is in question must as a general rule be shown by evidence other than such act or declaration."

These requirements were not satisfied by the evidence for the prosecution nor do the declarations fall within the purview of the rule.

The victim's grandmother and father whose declarations regarding Rosario's age were admitted by the trial court are both alive, in the Philippines and able to testify as they both did testify in court. Their declarations were made at the trial which is certainly not before the controversy arose. The other witnesses who testified on Rosario's age are not members of the victim's family. The testimonies of Rosario's relatives must be weighed according to their own personal knowledge of what happened and not as hearsay evidence on matters of family history.

At this point, we find the evidence regarding Rosario's age of doubtful value.

The trial court justified the admissibility of the grandmother's testimony pursuant to the ruling laid down in *U.S. v. Bergantino*, (3 Phil., 118 [1903]) where the Court accepted the testimony of the mother that her daughter was 14 years old and 4 months old. The mother stated that she knew the age because the child was born about the time of the cholera epidemic of 1889. This was not hearsay, but came from one who had direct knowledge of the child's birth.

It is, however, equally true that human memory on dates or days is frail and unless the day is an extraordinary or unusual one for the witness, there is no reasonable assurance of its correctness. (*People v. Dasig*, 93 Phil. 618, 632 [1953])

With respect to the grandmother's testimony, the date of the brother's death or funeral was never established, which indicates that the day was rather insignificant to be remembered. The father's declaration is likewise not entirely reliable. His testimony in court does not at all show that he had direct knowledge of his daughter's birth. He was certain though that she was more than one (1) year old at the time she was baptized.

The other witnesses are not at all competent to testify on the victim's age, nor was there any basis shown to establish their competence for the purpose. The clinical records were based on Gaspar Alcantara's incompetent information given when he brought the victim to the hospital. Alcantara came to know her only about a year before her death. He had absolutely no knowledge about the circumstances of Rosario's birth. The death certificate relied upon by the trial court was merely based on the clinical records. It is even less reliable as a record of birth.

All the evidence presented by the prosecution showing that Rosario Baluyot was less than 12 years old at the time of the alleged incident are not adequate to establish the exact date of birth, much less offset a documentary record

showing a different date.

The defense presented Rosario Baluyot's baptismal certificate which the trial court rejected as being hearsay and of no value. As against the oral declarations made by interested witnesses establishing Rosario's age to be less than 12 years old, the evidence on record is more convincing and worthy of belief. (See *Filinvest Land, Inc v. Court of Appeals*, 183 SCRA 664, 673 [1990]).

By virtue of a subpoena duces tecum and ad testi ficandum, issued by the lower court to the St. James Parish Church, Subic, Zambales, Fr. Roque Villanueva a Roman Catholic priest testified and stated that he is the head of said parish. He brought with him Baptismal Register No. 9 entitled "Liber Baptisnorum", a latin term for baptismal book or record. On page 151, No. 3 of the said Registry Book, there appears the name of Rosario Baluyot who was baptized on December 25, 1974, and born on December 26, 1973. Parents are Policarpio Baluyot and Anita Burgos, residents of Subic, Zambales. Edita R. Milan appears as the only sponsor with Olongapo City as her address.

In the case of *Macadangdang v. Court of Appeals* (100 SCRA 73 [1980]), we held that:

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"In our jurisprudence, this Court has been more definite in its pronouncements on the value of baptismal certificates. It thus ruled that while baptismal and marriage certificates may be considered public documents, they are evidence only to prove the administration of the sacraments on the dates therein specified - but not the veracity of the status or declarations made therein with respect to his kinsfolk and/or citizenship (*Paa v. Chan*, L-25945, Oct. 31, 1967). Again, in the case of *Fortus v. Novero* (L-22378, 23 SCRA 1331 [1968]), this Court held that a baptismal certificate is conclusive proof only of the baptism administered, in conformity with the rites of the Catholic Church by the priest who baptized the child, but it does not prove the veracity of the declarations and statements contained in the certificate that concern the relationship of the person baptized. Such declarations and statements, in order that their truth may be admitted, must indispensably be shown by proof recognized by law." (At pp. 84-85)

In the same light, the entries made in the Registry Book may be considered as entries made in the course of business under Section 43 of Rule 130, which is an exception to the hearsay rule. The baptisms administered by the church are one of its transactions in the exercise of ecclesiastical duties and recorded in a book of the church during the course of its business. (*U. S. v. de Vera*, 28 Phil. 105 [1914]) Hence, the certificate (Exhibit "22") presented by the defense that Rosario Baluyot was baptized on December 25, 1974 may be admitted in evidence as proof of baptism. Policarpio Baluyot, the victim's father testified that he had in his possession a baptismal certificate different from the one presented in court. However, no other baptismal record was ever presented to prove a date different from that brought by the official custodian. Since the baptismal certificate states that Rosario was baptized on December 25, 1974, it is therefore highly improbable that Rosario could have been born on December 22, 1975. She could not have been baptized before she was born. Exhibit "22" may be proof only of baptism but it puts a lie to the declaration that Rosario was born in 1975. With the father's assertion that Rosario was more than one (1) year old when she was baptized, we are then more inclined to agree that Rosario was born in 1973 as stated in the Baptismal Registry.

In the case of *People v. Rebancos* (172 SCRA 425 [1989]), the Court stated:

xxx xxx xxx

"x x x Although no birth certificate was presented because her birth had allegedly not been registered, her baptismal certificate, coupled by her mother's testimony, was sufficient to establish that Mary Rose was below twelve years old when she was violated by Rebancos." (At. p. 426)

Unfortunately, in the instant case, nobody could corroborate the date on a more reliable document as to Rosario's birth which could serve as sufficient proof that she was born on December 26, 1973. Therefore, she was more than 12 years old at the time of the alleged incident on October 10, 1986.

Moreover, it is not incumbent upon the defense to prove Rosario's age. The burden of proof lies on the prosecution to prove that Rosario was less than 12 years old at the time of the alleged incident in a charge of statutory rape. The prosecution failed in this respect.

Since Rosario was not established to have been under 12 years of age at the time of the alleged sexual violation, it was necessary to prove that the usual elements of rape were present; i.e. that there was force or intimidation or that she was deprived of reason or otherwise unconscious in accordance with Article 335 of the Revised Penal Code.

We agree with the defense that there was no proof of such facts. On the contrary, the evidence shows that Rosario submitted herself to the sexual advances of the appellant. In fact, she appears to have consented to the act as she was paid P300.00 the next morning while her companion, Jessie Ramirez was paid P200.00 (T.S.N. p. 50, January 6, 1988). The environmental circumstances coupled with the testimonies and evidence presented in court clearly give the impression that Rosario Baluyot, a poor street child, was a prostitute in spite of her tender age. Circumstances in life may have forced her to submit to sex at such a young age but the circumstances do not come under the purview of force or intimidation needed to convict for rape.

In view of these clear facts which the prosecution failed to refute, no rape was committed. But was Ritter guilty of homicide?

The trial court justified its ruling by saying that the death of the victim was a consequence of the insertion of the foreign object into the victim's vagina by the appellant.

We now ask "Was the appellant responsible for the sexual vibrator left inside Rosario's vagina which led to her death?"

The trial court convicted the accused based on circumstantial evidence. Unfortunately, the circumstances are capable of varying interpretations and are not enough to justify conviction.

Jessie Ramirez, the principal witness did not actually see the object inserted in Rosario's vagina. Neither could he identify the object (Exhibit "C-2") taken from Rosario as the same object which the appellant was holding at that time of the alleged incident.

In his sworn statement given to the police investigator on September 4, 1987, he answered that:

xxx xxx xxx

"T.

Habang kayo ay nasa loob ng kuwarto ng otel, mayroon ka bang napansin na inilabas ng kano sa kanyang dala-dalahan kung mayroon man?

S.

Ang Amerikano ay may dala-dalang shoulder bag na kulay itim, at napansin ko na may inilabas siya sa kanyang bag na parang vicks inhaler, na kanyang inamay-amoy habang nasa otel kami at pagkatapos niya ay

inilapag niya sa lamiseta.

T.

Ilarawan mo nga sa akin ang bagay na nakita mong inilabas ng Amerikano?

S.

Ito ay may habang tatlong pulgada at ang takip nito ay may habang dalawang pulgada. Iyong takip ay bilog na patulis at may tabang mga kalahating pulgada. Hindi ko napansin ang hugis ng dulo ng bagay na may takip dahil natatakpan ng kamay at ilong ng Amerikano.

T.

Ipinakikita ko sa iyo ang isang larawan. Tignan mong mabuti ang larawang ito at sabihin mo nga sa akin kung makikilala mo ang mga bagay na nasa larawang ito, na may kinalaman sa nakita mong kinuha ng Amerikano sa kanyang bag?

S.

Napansin ko na ang kulay asul na bagay sa larawan ay katulad na katulad noong takip ng bagay na inilabas ng Amerikano sa kanyang bag. Kaya lang ay bakit naging kulay asul gayong ng makita ko ito ay kulay puti? (Exhibit "A", 2; Underlining Supplied)

Presumably, what Jessie Ramirez saw was merely the Vicks inhaler which the appellant does not deny having possessed at that time. He was certain that the object was white. (T.S.N. p. 91, January 6, 1988)

Later, Ramirez retracted and corrected himself. He said that it was grayish in color with color blue (Medyo kulay abo na may kulay na parang blue). (T.S.N. p. 92, January 6, 1988) The inconsistency of the witness testimony casts doubt as to the veracity of the statements made especially when he answered on additional cross-examination that the reason why he concluded that Exhibit "C-2" was the same object being held by Ritter was because it was the only one shown to him by the prosecution (T.S.N. pp. 109-110, January 6, 1988). Jessie Ramirez was not all certain about the sexual vibrator because he did not actually see it in the possession of the appellant.

What he merely remembers is the revelation made by Rosario the next morning that the foreigner inserted something inside her vagina. The trial court admitted such statement as part of the *res gestae*. In a strained effort to accept such statement as part of *res gestae*, the trial court focused the test of admissibility on the lapse of time between the event and the utterance. For the average 13 years old, the insertion of a mechanical device or anything for that matter into the vagina of a young girl is undoubtedly startling. For Rosario and Jessie, however, there must be more evidence to show that the statement, given after a night's sleep had intervened, was given instinctively because the event was so startling. *Res gestae* does not apply. (Section 42, Rule 130, Rules of Court)

Even if it were established that the appellant did insert something inside Rosario's vagina, the evidence is still not adequate to impute the death of Rosario to the appellant's alleged act.

Jessie Ramirez testified that Rosario was able to remove the object inserted in her vagina. We quote:

“Q.

Now, you also stated on direct examination that later on Rosario even categorically admitted to you that she was already able to remove the object allegedly inserted inside her vagina, is that correct?

A.

Yes, sir.

xxx xxx xxx

ATTY. CARAAN:

Q.

Will you kindly tell to this Honorable Court the exact words used by Rosario Baluyot later on when you met her when you asked her and when she told you that she was already able to remove that object from her vagina?

A.

"Oy, Jessie, natanggal na," she told me that. I asked her, "Was it already removed?" And she answered, 'Yes, it was removed.' But the same night, she again complained of pain of her stomach. She sent one of her friends to call for me. And as a matter of fact, Tomboy was uttering defamatory words against me as she was groaning in pain." (TSN, Jan. 6, 1988, pp. 72-73)

This encounter happened on the night of the day following the day after both children were invited by the foreigner to the hotel. (T.S.N. p. 73, January 6, 1988). Rosario was said to be groaning in pain so we can just imagine the distress she was undergoing at this point in time. If the device inserted by the appellant caused the pain, it is highly inconceivable how she was able to endure the pain and discomfort until May, 1987, seven (7) months after the alleged incident. Evidence must not only proceed from the mouth of a credible witness but it must be credible in itself such as the common experience and observation of mankind can approve as probable under the circumstances. (People v. Patog, 144 SCRA 429 [1986]).

At this juncture, we find Dr. Pedro Solis' testimony rather significant. Dr. Pedro Solis, a witness for the defense is considered an expert witness. (A Doctor of Medicine and a graduate of the State University in 1940, a degree of Bachelor of Laws and member of the Bar 1949, and a graduate of the Institute of Criminology University. He was awarded Post Graduate Diploma in Criminology in 1963, and also a graduate of United Nations Asia and Far East Asia Institute on the Prevention of Crimes in Tokyo Japan 1965. He was appointed Medico Legal Officer of the National Bureau of Investigation in 1940 until 1944. He became Chief Medico Legal Officer in 1970 and became the Deputy Director of the NBI up to 1984. He is at present a Professorial Lecturer on Legal Medicine at the UP, FEU, UE, and Fatima College of Medicine; a Medico Legal Consultant of the PGH Medical Center, Makati Medical Center, UERM Medical Center, MCU Medical Center. He has been with the NBI for 43 years. He has attended no less than 13 conferences abroad. He is the author of the textbooks entitled "Legal Medicine" and

"Medical Jurisprudence".) With his impressive legal and medical background, his testimony is too authoritative to ignore. We quote the pertinent portions of his testimony:

Q.

Now Dr. Solis, would you kindly go over this object marked as Exh. 'C-2' which object was described as a part of a sexual vibrator battery operated. Now, given this kind of object, would you kindly tell us what would be the probable effect upon a 12 years old girl when it is inserted into her vagina?

A

Well, this vibrator must be considered a foreign body placed into a human being and as such be considered a foreign object. As a foreign object, the tendency of the body may be: No. 1 - expel the foreign body - No. 2. - The tendency of the body is to react to that foreign body. One of the reactions that maybe manifested by the person wherein such foreign body is concerned is to cover the foreign body with human tissue, in a way to avoid its further injury to the body.

Now, the second reaction is irritation thereby producing certain manifest symptoms and changes in the area where the foreign body is located.

In severe cases, the symptoms manifestation might not only be localized but may be felt all over the body, we call it systemic reaction. Now, considering the fact that this foreign body as shown to me is already not complete, this shows exposure of its different parts for the body to react. If there is mechanism to cause the foreign body to vibrate, there must be some sort of power from within and that power must be a dry cell battery. [The] composition of the battery are, manganese dioxide ammonium, salts, water and any substance that will cause current flow. All of these substances are irritants including areas of the container and as such, the primary reaction of the body is to cause irritation on the tissues, thereby inflammatory changes develop and in all likelihood, aside from those inflammatory changes would be a supervening infection in a way that the whole generative organ of the woman will suffer from diseased process causing her the systemic reaction like fever, swelling of the area, and other systemic symptoms. x x x. (TSN., pp. 13-15, October 19, 1988)

xxx xxx xxx

Q

Now, given this object, how long would it take, Doctor before any reaction such as an infection would set in, how many days after the insertion of this object in the vagina of a 12 year old girl?

A

In the example given to me, considering that one of the ends is exposed, in a way that vaginal secretion has

more chance to get in, well, liberation of this irritant chemicals would be enhanced and therefore in a shorter period of time, there being this vaginal reaction.

Q

How many days or weeks would you say would that follow after the insertion?

A

As I said, with my experience at the NBI, insertion of any foreign body in the vaginal canal usually developed within a period of two (2) weeks xxx.

xxx xxx xxx

Q.

x x x [T]he subject in this case was allegedly raped, and a sexual vibrator was inserted in her vagina on October 10, 1986 and she was operated on, on May 19, 1987 the following year, so it took more than 7 months before this was extracted, would you say that it will take that long before any adverse infection could set-in inside the vagina?

A

Infection and inflammatory changes will develop in a shorter time. (TSN., Oct. 19, 1988, p. 18)

xxx xxx xxx

Q.

When you said shorter, how long would that be, Doctor?

A

As I said, in my personal experience, hair pins, cottonballs and even this lipsticks of women usually, there are only about two (2) weeks time that the patient suffer some abnormal symptoms.

Q

Now, considering that this is a bigger object to the object that you mentioned, this object has a shorter time?

A

Yes, Sir shorter time." (TSN., Oct. 19, 1988, p. 20)

The trial court, however, ruled that "there is no hard and fast rule as to the time frame wherein infection sets in upon insertion of a foreign body in the vagina canal. For Dr. Solis, the time frame is not more than 10 months, and this case is still within the said time frame."

A more generous time interval may be allowed in non-criminal cases. But where an accused is facing a penalty of reclusion perpetua, the evidence against him cannot be based on probabilities which are less likely than those probabilities which favor him.

It should be clarified that the time frame depends upon the kind of foreign body lodged inside the body. An examination of the object gave the following results:

(1)

Color: Blue

Size : (a) Circumference - 3.031 inches (b) Length - approximately 2.179 inches.

Composition: Showed the general characteristics of a styrene-butadiene plastic.

(2)

The specimen can be electrically operated by means of a battery as per certification dated 01 June 1988, signed by Mr. Rodolfo D. Mercurio, Shipboard Electrical Systems Mechanics, Foreman II, SRF Shop 51, Subic (see attached certification).

(3)

No comparative examination was made on specimen #1 and vibrator depicted in the catalog because no actual physical dimensions and/or mechanical characteristics were shown in the catalog." (Exhibit "LL")

The vibrator end was further subjected to a macro--photographic examination on the open end portion which revealed the following:

"Result of Examination

Macro-photographic examination on the open end portion of specimen #1 shows the following inscription:

MABUCHI MOTOR JAPAN RE 14 PAT" (Exhibit "MM")

From the above results, the subject object is certainly not considered as inert and based on Dr. Solis' testimony, it is more likely that infection should set in much earlier. Considering also that the object was inserted inside the vagina which is part of the generative organ of a woman, an organ which is lined with a very thin layer of membrane with plenty of blood supply, this part of the body is more susceptible to infection. (T.S.N. p. 34, October 19, 1988)

The truth of Dr. Solis' testimony is more probable under the circumstances of the case. We see no reason why his opinions qualified by training and experience should not be controlling and binding upon the Court in the determination of guilt beyond reasonable doubt. (People v. Tolentino, 166 SCRA 469 [1988]).

Dr. Barcinal, another witness for the defense also testified that he examined Rosario Baluyot on May 17, 1986 as

a referral patient from the Department of Surgery to give an OB-GYN clearance to the patient prior to operation. (T.S.N. p. 6, September 28, 1988)

Q

And how many times did you examine this patient Rosario Baluyot on that day?

A

I examined her twice on that day?

Q

The first time that you examined her, what is the result of your findings, if any?

A

My first examination, I examined the patient inside the delivery room. The patient was brought to the delivery room wheel-chaired then from the wheel chair, the patient was ambulatory (sic). She was able to walk from the door to the examining table. On examination, the patient is conscious, she was fairly nourished, fairly developed, she had fever, she was uncooperative at that time and examination deals more on the abdomen which shows slightly distended abdomen with muscle guarding with tenderness all over, with maximum tenderness over the hypogastric area. (T.S.N. p. 5, September 28, 1988)

xxx xxx xxx

xxx xxx xxx

Q.

What about your second examination to the patient, what was your findings, if any?

A

In my second examination, I repeated the internal examination wherein I placed my index finger and middle finger inside the vagina of the patient and was able to palpate a hard object. After which, I made a speculum examination wherein I was able to visualize the inner portion of the vaginal canal, there I saw purulent foul smelling, blood tints, discharge in the vaginal canal and a foreign body invaded on the posterior part of the vaginal canal.

XXX XXX XXX

A

I referred back to Dr. Fernandez about my findings and he asked me to try to remove the said foreign object by the use of forceps which I tried to do so also but I failed to extract the same.

Q

All this time that you were examining the patient Rosario Baluyot both in the first and second instance, Rosario Baluyot was conscious and were you able to talk to her when you were examining her?

A

Yes, Sir.

Q

And did you ask her why there is a foreign object lodge inside her vagina?

A

Yes, Sir I asked her.

Q

And what did she tell you, if any?

A

She said in her own words that "GINAMIT AKO NG NEGRO AT SIYA ANG NAGLAGAY NITO."

Q

Did she also tell you when, this Negro who used her and who inserted and placed the foreign object on her vagina?

A

Yes, Sir I asked her and she said he used me three (3) months ago from the time I examined her.

Q

Now, you said that you referred the patient to the ward, what happened next with your patient?

A

To my knowledge, the patient is already scheduled on operation on that date.

Q

Meaning, May 17, 1987?

A

Yes, Sir I was presuming that the patient would undergo surgery after that? (TSN, Sept. 28, 1988, pp. 8-9; Emphasis supplied)

The trial court debunked Dr. Barcinal's testimony considering Rosario's condition at that time. It ruled that it is inconceivable that she would be striking a normal conversation with the doctors and would be sitting on the examination table since Gaspar Alcantara stated that when he brought Rosario Baluyot to the hospital, she was unconscious and writhing in pain.

It was not improbable for Rosario Baluyot to still be conscious and ambulant at that time because there were several instances testified to by different witnesses that she was still able to talk prior to her operation:

(1) Fe Israel, a witness for the prosecution and a member of the Olongapo Catholic Charismatic Renewal Movement testified that as a member of this group she visits indigent children in the hospital every Saturday and after office hours on working days.

On the Saturday prior to Rosario's death which was May 17, she was still able to talk to Rosario Baluyot. In fact, one of her groupmates helped Rosario go to the comfort room to urinate. (T.S.N., pp. 16-19, May 25, 1988)

(2) Angelita Amulong, a witness for the defense is another para social worker who worked at Pope John 23rd Community Center under Sister Eva Palencia. In one of her hospital visits, she encountered Rosario Baluyot in the month of May, 1987. She actually saw a child who happened to be Rosario Baluyot seated on the cement floor and when she asked why she was seated there, she was told that it was too hot in the bed. She saw Rosario Baluyot for about 2 or 3 days successively, T.S.N. pp. 10-13, September 7, 1988)

(3) Gaspar Alcantara, the person who brought Rosario to the hospital actually testified that she was conscious (T.S.N. p. 36, September 14, 1988) but writhing in pain. He took pity on her so he brought her to the hospital (T.S.N. p. 12, September 14, 1988)

From the above testimonies, it is clear that Rosario was still conscious and could still answer questions asked of her although she was complaining of stomach pains. Unfortunately, the medical attention given to her failed to halt the aggravation of her condition. The operation on May 19 was too late.

Rosario died because of septicemia, which in layman's language is blood poisoning, and peritonitis, which is massive infection, in the abdominal cavity caused by the foreign object or the cut sexual vibrator lodged in the vagina of the victim. This led to the infection from the uterus to the fallopian tubes and into the peritoneum and

the abdominal cavity.

The trial court convicted the accused citing the rationale of Article 4 of the RPC.

"He who is the cause of the cause is the cause of the evil caused."

But before the conviction is affirmed, we must first follow the rule as stated in the case of *Urbano v. Intermediate Appellate Court* (157 SCRA 1 [1988]) to wit:

"The rule is that the death of the victim must be the direct, natural and logical consequence of the wounds inflicted upon him by the accused. And since we are dealing with a criminal conviction, the proof that the accused caused the victim's death must convince a rational mind beyond reasonable doubt." (Underlining supplied)

In *People v. Tempongko, Jr.*, (144 SCRA 583, 592 [1986]), we explained that:

xxx xxx xxx

"The basic principle in every criminal prosecution is that accusation is not synonymous with guilt. The accused is presumed innocent until the contrary is proved by the prosecution. If the prosecution fails, it fails utterly, even if the defense is weak or, indeed, even if there is no defense at all. The defendant faces the full panoply of state authority with all "The People of the Philippines" arrayed against him. In a manner of speaking, he goes to bat with all the bases loaded. The odds are heavily against him. It is important, therefore, to equalize the positions of the prosecution and the defense by presuming the innocence of the accused until the state is able to refute the presumption by proof of guilt beyond reasonable doubt." (At p. 592)

The evidence for the accused may be numerically less as against the number of witnesses and preponderance of evidence presented by the prosecution but there is no direct and convincing proof that the accused was responsible for the vibrator left inside the victim's vagina which caused her death seven (7) months after its insertion. What the prosecution managed to establish were mere circumstances which were not sufficient to overcome the constitutional presumption of innocence. While circumstantial evidence may suffice to support a conviction it is imperative, though, that the following requisites should concur:

- (a) There is more than one circumstance;
- (b) The facts from which the inferences are derived are proven; and
- (c) The combination of all the circumstances is such as to produce a conviction beyond reasonable doubt. (Rule 133, Sec. 4 Revised Rules of Court)

For the well-entrenched rule in evidence is that "before conviction can be had upon circumstantial evidence, the circumstances proved should constitute an unbroken chain which leads to one fair and reasonable conclusion pointing to the defendant, to the exclusion of all others, as the author of the crime (*People v. Subano*, 73 Phil. 692 [1942]; Underlining supplied). It must fairly exclude every reasonable hypothesis of innocence (*Dorado v. Court of Appeals*, 153 SCRA 420, 433 [1987]). In this case the circumstantial evidence presented by the prosecution does not conclusively point to the liability of the appellant for the crime charged. (*People v. Tolentino*, supra).

We are aware of the wide publicity given to the plight of Rosario Baluyot and how her death exemplified starkly the daily terrors that most street children encounter as they sell their bodies in order to survive. At an age when innocence and youthful joys should preponderate in their lives, they experience life in its most heartless and inhuman form. Instead of nothing more than gentle disappointments occupying their young minds, they daily cope with tragedies that even adults should never be made to carry.

It is with distressing reluctance that we have to seemingly set back the efforts of Government to dramatize the death of Rosario Baluyot as a means of galvanizing the nation to care for its street children. It would have meant a lot to social workers and prosecutors alike if one pedophile-killer could be brought to justice so that his example would arouse public concern, sufficient for the formulation and implementation of meaningful remedies. However, we cannot convict on anything less than proof beyond reasonable doubt. The protections of the Bill of Rights and our criminal justice system are as much, if not more so, for the perverts and outcasts of society as they are for normal, decent, and law-abiding people.

The requirement of proof which produces in an unprejudiced mind moral certainty or conviction that the accused did commit the offense has not been satisfied.

By way of emphasis, we reiterate some of the factors arousing reasonable doubt:

1. The evidence on Rosario Baluyot's baptism creates reasonable doubt about her being less than 12 years old when the carnal knowledge took place. If the evidence for the prosecution is to be believed, she was not yet born on the date she was baptized.
2. Since the proof of Rosario's being under 12 years of age is not satisfactory, the prosecution has to prove force, intimidation, or deprivation of reason in order to convict for rape. There is no such proof. In fact, the evidence shows a willingness to submit to the sexual act for monetary considerations.
3. The only witness to the fact of Ritter's placing a vibrator inside the vagina of Rosario was Jessie Ramirez. This witness did not see Ritter insert the vibrator. The morning after the insertion, he was only told by Rosario about it. Two days later, he allegedly met Rosario who informed him that she was able to remove the object. And yet, Ramirez testified that on the night of that second encounter, he saw Rosario groaning because of pain in her stomach. She was even hurling invectives. Ramirez' testimony is not only hearsay, it is also contradictory.
4. It was improbable, according to expert medical testimony, for a foreign object with active properties to cause pain, discomfort, and serious infection only after seven months inside a young girl's vaginal canal. Infection would have set in much earlier. Jessie Ramirez recalled that the incident happened in December of 1986. (TSN., January 6, 1988, pp. 15-17) The evidence, however, shows that the appellant was not here in the Philippines that December. As per the Commission on Immigration Arrival and Departure Report, Heinrich Ritter arrived in the Philippines on October 7, 1986 and left on October 12, 1986. He never returned until September 23, 1987 (Exhibits "DD" and "EE"). The incident could have happened only in October, but then it would have been highly improbable for the sexual vibrator to stay inside the vagina for seven (7) months with the kind of serious complications it creates.
5. The gynecologist who attended to Rosario during her hospital confinement testified that she told him "Ginamit ako ng Negro at siya ang naglagay nito." The accused is not a black.

Noteworthy is the fact that nothing was mentioned about Rosario's activities after the hotel incident. Considering Dr. Barcinal's testimony indicating that she was "used" by a "Negro" three (3) months prior to admission in the hospital and Rosario's unfortunate profession, there is always the possibility that she could have allowed herself to be violated by this perverse kind of sexual behavior where a vibrator or vibrators were inserted into her vagina between October, 1986 and May, 1987.

Moreover, the long delay of seven (7) months after the incident in reporting the alleged crime renders the evidence for the prosecution insufficient to establish appellant's guilty connection with the requisite moral certainty. (See *People v. Mula Cruz*, 129 SCRA 156 [1984]).

The established facts do not entirely rule out the possibility that the appellant could have inserted a foreign object inside Rosario's vagina. This object may have caused her death. It is possible that the appellant could be the guilty person. However, the Court cannot base an affirmance of conviction upon mere possibilities. Suspicions and possibilities are not evidence and therefore should not be taken against the accused. (*People v. Tolentino*, supra)

Well-established is the rule that every circumstance favorable to the accused should be duly taken into account. This rule applies even to hardened criminals or those whose bizarre behaviour violates the mores of civilized society. The evidence against the accused must survive the test of reason. The strongest suspicion must not be allowed to sway judgment. (See *Sacay v. Sandiganbayan*, 142 SCRA 593 [1986]). As stated in the case of *People v. Ng*, (142 SCRA 615 [1986]):

"x x x [F]rom the earliest years of this Court, it has emphasized the rule that reasonable doubt in criminal cases must be resolved in favor of the accused. The requirement of proof beyond reasonable doubt calls for moral certainty of guilt. It has been defined as meaning such proof 'to the satisfaction of the court, keeping in mind the presumption of innocence, as precludes every reasonable hypothesis except that which it is given to support. It is not sufficient for the proof to establish a probability, even though strong, that the fact charged is more likely to be true than the contrary. It must establish the truth of the fact to a reasonable and moral certainty - a certainty that convinces and satisfies the reason and the conscience of those who are to act upon it.'" (Moreno, *Philippine Law Dictionary*, 1972 Edition, p. 379, citing *U.S. v. Reyes*, 3 Phil. 3). x x x"

In the instant case, since there are circumstances which prevent our being morally certain of the guilt of the appellant, he is, therefore, entitled to an acquittal.

This notwithstanding, the Court can not ignore the acts of the appellant on the children, Jessie Ramirez and Rosario Baluyot in October, 1986 at the MGM Hotel. In spite of his flat denials, we are convinced that he comes to this country not to look at historical sights, enrich his intellect or indulge in legitimate pleasures but in order to satisfy the urgings of a sick mind.

With the positive identification and testimony by Jessie Ramirez that it was the appellant who picked him and Rosario from among the children and invited them to the hotel; and that in the hotel he was shown pictures of young boys like him and the two masturbated each other, such actuations clearly show that the appellant is a pedophile. When apprehended in Ermita, he was sizing up young children. Dr. Solis defined pedophilia in his book entitled *Legal Medicine*, 1987 edition, as follows:

"Pedophilia - A form of sexual perversion wherein a person has the compulsive desire to have sexual intercourse with a child of either sex. Children of various ages participate in sexual activities, like fellatio, cunnilingus, fondling with sex organs, or anal sexual intercourse. Usually committed by a homosexual between a man and a boy the latter being a passive partner."

Ritter was prosecuted for rape with homicide and not pedophilia, assuming this is a crime by itself. Pedophilia is clearly a behavior offensive to public morals and violative of the declared policy of the state to promote and protect the physical, moral, spiritual and social well-being of our youth. (Article II, Section 13, 1987 Constitution) (*Harvey v. Defensor Santiago*, 162 SCRA 840, 848 [1989]). Pedophiles, especially thrill seeking aliens have no place in our country.

In this case, there is reasonable ground to believe that the appellant committed acts injurious not only to Rosario Baluyot but also to the public good and domestic tranquility of the people. The state has expressly committed itself to defend the right of children to assistance and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development. (Art. XV, Section 3 [2]) x x x (*Harvey v. Santiago*, supra). The appellant has abused Filipino children, enticing them with money. The appellant should be

expelled from the country.

Furthermore, it does not necessarily follow that the appellant is also free from civil liability which is impliedly instituted with the criminal action. (Rule III, Section 1) The well-settled doctrine is that a person while not criminally liable, may still be civilly liable. We reiterate what has been stated in *Urbano v. IAC*, supra.

"xxx While the guilt of the accused in a criminal prosecution must be established beyond reasonable doubt, only a preponderance of evidence is required in a civil action for damages. (Article 29, Civil Code). The judgment of acquittal extinguishes the civil liability of the accused only when it includes a declaration that the facts from which the civil liability might arise did not exist. (*Padilla v. Court of Appeals*, 129 SCRA 559).

The reason for the provisions of Article 29 of the Civil Code, which provides that the acquittal of the accused on the ground that his guilt has not been proved beyond reasonable doubt does not necessarily exempt him from civil liability for the same act or omission, has been explained by the Code Commission as follows:

"The old rule that the acquittal of the accused in a criminal case also releases him from civil liability is one of the most serious flaws in the Philippine legal system. It has given rise to numberless instances of miscarriage of justice, where the acquittal was due to a reasonable doubt in the mind of the court as to the guilt of the accused. The reasoning followed is that inasmuch as the civil responsibility is derived from the criminal offense, when the latter is not proved, civil liability cannot be demanded.

This is one of those causes where confused thinking leads to unfortunate and deplorable consequences. Such reasoning fails to draw a clear line of demarcation between criminal liability and civil responsibility, and to determine the logical result of the distinction. The two liabilities are separate and distinct from each other. One affects the social order and the other, private rights. One is for the punishment or correction of the offender while the other is for the reparation of damages suffered by the aggrieved party. The two responsibilities are so different from each other that article 1813 of the present (Spanish) Civil Code reads thus: 'There may be a compromise upon the civil action arising from a crime; but the public action for the imposition of the legal penalty shall not thereby be extinguished.' It is just and proper that, for the purposes of the imprisonment of or fine upon the accused, the offense should be proved beyond reasonable doubt. But for the purpose of indemnifying the complaining party, why should the offense also be proved beyond reasonable doubt? Is not the invasion or violation of every private right to be proved only by a preponderance of evidence? Is the right of the aggrieved person any less private because the wrongful act is also punishable by the criminal law?

For these reasons, the Commission recommends the adoption of the reform under discussion. It will correct a serious defect in our law. It will close up an inexhaustible source of injustice - a cause for disillusionment on the part of the innumerable persons injured or wronged."

Rosario Baluyot is a street child who ran away from her grandmother's house. Circumstances forced her to succumb and enter this unfortunate profession. Nonetheless, she has left behind heirs who have certainly suffered mental anguish, anxiety and moral shock by her sudden and incredulous death as reflected in the records of the case. Though we are acquitting the appellant for the crime of rape with homicide, we emphasize that we are not ruling that he is innocent or blameless. It is only the constitutional presumption of innocence and the failure of the prosecution to build an airtight case for conviction which saved him, not that the facts of unlawful conduct do not exist. As earlier stated, there is the likelihood that he did insert the vibrator whose end was left inside Rosario's vaginal canal and that the vibrator may have caused her death. True, we cannot convict on probabilities or possibilities but civil liability does not require proof beyond reasonable doubt. The Court can order the payment of indemnity on the facts found in the records of this case.

The appellant certainly committed acts contrary to morals, good customs, public order or public policy (see Article 21 Civil Code). As earlier mentioned, the appellant has abused Filipino children, enticing them with money. We can not overstress the responsibility for proper behavior of all adults in the Philippines, including the

appellant towards young children. The sexual exploitation committed by the appellant should not and can not be condoned. Thus, considering the circumstances of the case, we are awarding damages to the heirs of Rosario Baluyot in the amount of P30,000.00.

And finally, the Court deplores the lack of criminal laws which will adequately protect street children from exploitation by pedophiles, pimps, and, perhaps, their own parents or guardians who profit from the sale of young bodies. The provisions on statutory rape and other related offenses were never intended for the relatively recent influx of pedophiles taking advantage of rampant poverty among the forgotten segments of our society. Newspaper and magazine articles, media exposes, college dissertations, and other studies deal at length with this serious social problem but pedophiles like the appellant will continue to enter the Philippines and foreign publications catering to them will continue to advertise the availability of Filipino street children unless the Government acts and acts soon. We have to acquit the appellant because the Bill of Rights commands us to do so. We, however, express the Court's concern about the problem of street children and the evils committed against them. Something must be done about it.

WHEREFORE, the appealed judgment is REVERSED and SET ASIDE. Appellant HEINRICH STEFAN RITTER is ACQUITTED on grounds of reasonable doubt. The appellant is ordered to pay the amount of P30,000.00 by way of moral and exemplary damages to the heirs of Rosario Baluyot. The Commissioner of Immigration and Deportation is hereby directed to institute proper deportation proceedings against the appellant and to immediately expel him thereafter with prejudice to re-entry into the country.

SO ORDERED.

Fernan, C.J., (Chairman), Feliciano, Bidin, and Davide, Jr., JJ., concur.

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