

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ERNESTO ABARRI Y BATTING, CLEMENTE CAWALING Y CIRINIO, CONRADO ESTRADA Y CAWALING, JOSELITO PAJALAGO Y GONZALES & RONNIE ANDAL...

G.R. No. 90185. March 01, 1995

Ponente: QUIASON, J.

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QUIASON, J.:

This is an appeal from the decision of the Regional Trial Court, Branch 124, Kalookan City in Criminal Case No. C-31521, finding accused Ernesto Abarri y Batting, Clemente Cawaling y Cirinio, Conrado Estrada y Cawaling, Joselito Pajalago y Gonzales and Ronnie Andales y Romiroso guilty beyond reasonable doubt of robbery with rape and sentencing each of them to suffer the penalty of reclusion perpetua.

I

The information filed against the accused reads as follows:

"That on or about the 14th day of October 1988, in Kalookan City, Metro Manila, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring together and mutually helping one another with intent to gain and by means of force, threats and intimidation upon the person of GREGORIA GAN y LIM, that is by poking a knife at the latter, did then and there willfully, unlawfully and feloniously take, rob and carry away the following articles, to wit:

one (1) Chinese gold ring ---- P5,000.00

one (1) lady's wristwatch ---- 2,000.00

Cash money amount (sic) to ---- 250.00

TOTAL P7,250.00

belonging to said Gregoria Gan y Lim, to the damage and prejudice of the latter in the aforementioned total amount of P7,250.00; and on the occasion thereof, said accused with the use of force, violence and intimidation and with lewd designs, have sexual intercourse with one GREGORIA GAN y LIM, against the latter's will and without her consent" (Rollo, p. 7).

Upon arraignment, all the accused entered a plea of not guilty.

On May 22, 1989, the trial court rendered its decision convicting all appellants of the crime of robbery with rape, the dispositive portion of which reads:

"WHEREFORE, in view of the foregoing, this Court finds the accused ERNESTO ABARRI Y BATTING, CLEMENTE CAWALING Y CIRINIO, CONRADO ESTRADA Y CAWALING, JOSELITO PAJALAGO Y GONZALES and RONNIE ANDALES Y ROMIROSA guilty beyond reasonable doubt as co-principals in the special complex offense of robbery with rape as described and penalized under paragraph 2 of Article 294 of the Revised Penal Code, as amended. This Court appreciates the presence of the aggravating circumstance of nocturnity and there being no appreciable mitigating circumstance, this Court sentences each of the accused to suffer imprisonment of reclusion perpetua. This Court likewise hereby orders the five accused to indemnify the victim, jointly and severally, the amount of P20,000.00 as consequential damages; to return the amount of P250.00, the Seiko watch and the Chinese gold necklace, subject matter of the robbery, and if unable to do so, to pay the value thereof, jointly and severally, in the amount of P7,250.00; and to pay the costs.

The accused shall be credited in the services of their sentences with full time the accused have undergone preventive imprisonment, pursuant to the provisions of Article 29 of the Revised Penal Code, as amended" (Rollo, p. 32).

Hence, this appeal.

II

On October 14, 1988, at around 7:30 P.M., while Gregoria Gan was walking along 4th Avenue, Kalookan City on her way home, Ernesto Abarri and Ronnie Andales stopped her and each poked a knife at her neck. Abarri then grabbed Gan's bag and warned: "Kung gusto mong mabuhay, huwag kang sisigaw." Gan was dragged by the two and brought inside a fenced, vacant lot strewn with garbage and covered with tall grass. Clemente Cawaling, Conrado Estrada and Joselito Pajalago followed them inside the vacant lot. Cawaling and Estrada were former employees of Gan.

Once inside the vacant lot, Abarri, with the use of a "balisong," tore the upper portion of Gan's blouse. The other accused then started tearing the rest of the blouse and pulling down her pants. The torn blouse was used to tie her mouth, hands and feet. When she was completely naked, the accused started touching her private parts.

Abarri opened Gan's handbag and took a bunch of keys, which included the key for her store at Carmen Planas Street in Binondo, Manila. He also got her watch valued at P2,000.00, necklace valued at P5,000.00 and wallet containing P250.00.

After robbing Gan, appellants left except Andales. Before leaving, Cawaling told Andales: "Nognog, (referring to Andales) bahala ka na, sampung taon na rin na hindi nakakatikim 'yan, makatas pa 'yan."

Andales then dragged Gan to a dark spot and after loosening the tie on her legs, raped her twice. After satisfying his lust, Andales left.

Gan waited for about 20 minutes before she started to roll over to the middle of the lot. In the process, the tie on her mouth loosened and she was able to shout for help. Responding to her cries, neighbors came and untied her hands.

Meanwhile, at around 8:30 P.M. of the same day, Barangay Captain Anita Alejo was informed by a resident that somebody was opening the store of Gan. Repairing at the place, Alejo saw Abarri and Estrada. She noticed that the door of the store had been partly opened. When she asked the two what they were doing there, Abarri answered that Gan instructed them to get the latter's pants. Alejo brought them to the barangay hall for investigation. Upon further questioning, Abarri admitted to forcibly bringing Gan to a vacant lot and binding her

arms and legs. Alejo turned over the two to the custody of the police detachment in Binondo.

The police brought Abarri and Andales to the crime scene. However, Gan was no longer there when they arrived. The police proceeded to Gan's house where the latter positively identified the two as among those persons who robbed her.

The findings of NBI Medico Legal Officer Roberto Garcia were as follows: (1) there were physical injuries outside the victim's genitals, the age of which was consistent with the alleged time of commission of the crime at about 7:30 P.M. of October 14, 1988; (2) the victim's hymen had old healed lacerations; (3) the opening of the hymen was big enough to accommodate or to allow the penetration of an average-sized adult male organ in erection without producing any new injury to the hymen.

III

The defense rests on denial and alibi. All of the accused claim that they were not at the scene of the crime as each of them was somewhere else.

Abarri testified that at around 8:00 P.M. of October 14, 1988, he and Estrada were on their way home from work.

While walking in Pulgueras Street in Binondo, Manila, they were accosted by some barangay tanod who accused them of breaking into a store. At first they denied their involvement. But after they were mauled at the Binondo Police Station, they were forced to admit their involvement in the robbery.

Estrada corroborated the version of Abarri as to their whereabouts on the night of the robbery. He further testified that he and Cawaling were former employees of Gan.

Cawaling, Pajalego and Andales all claimed that they were at their respected homes that night when the crime was committed. Cawaling claimed that he was coerced by the police to admit his complicity. Andales claimed that he came to know his co-accused only at the city jail.

We have consistently ruled that for alibi to prosper as a defense, two requirements must be satisfied - that the accused was not at the scene of the crime at the time it was committed and that it was physically impossible for him to be at that place and time (*People v. Gaguban*, G.R. No. 96287, April 25, 1994). The requisites of time and place must be strictly met (*People v. Empleo*, 226 SCRA 454 [1993]).

In the case at bench, appellants failed to show that it was physically impossible for them to be at the scene of the crime when it was committed.

The defense posits that no direct evidence on the conspiracy was established by the prosecution.

A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Proof of the agreement need not rest on direct evidence, as the agreement itself may be inferred from the conduct of the parties disclosing a common understanding among them with respect to the commission of the offense (*People v. Uy*, 206 SCRA 270 [1992]; *People v. Dela Cruz*, 190 SCRA 328 [1990]).

The common intent of robbing the victim and committing the acts of lasciviousness can be inferred from their behaviors.

Abarri and Andales each poked a knife at Gan's neck and forcibly brought her to the vacant lot. The other appellants followed them and watched while Abarri divested the victim of her valuables. After robbing the victim, Abarri with the use of a "balisong," tore the upper portion of the victim's blouse and all the other appellants participated in removing her clothes, pawing her and biting her nipples.

The presence or absence of lewd designs is inferred from the nature of the acts themselves and the environmental circumstances (People v. Balbas, 129 Phil. 358 [1967]). We find that the acts of appellants in striping naked and hogtying the victim and touching her private parts constitute lewd designs.

However, in the case of Andales, the acts of lasciviousness committed by him culminated in the raping of the victim when he was left alone with her. Nothing in the records show that the other accused had knowledge or were aware of the rape committed by Andales. Consequently, he alone is guilty of robbery with rape (People v. Hamiana, 89 Phil. 225 [1951]).

Likewise, we do not regard the remarks made by Cawaling to Andales as sufficient to make him a principal by inducement or a co-conspirator. Before a remark can produce such an effect, the same must be of a nature and uttered in such a manner as to become the determining cause of the crime (People v. Canial, 46 SCRA 634 [1972]). The inducer must have such an overpowering moral ascendancy over the actor (People v. Balderama, 226 SCRA 537 [1993]), as to make the utterance a command from a superior to a subordinate. In the case at bench, it appears that the decision of Andales to rape the victim had been made before Cawaling uttered the remarks. Cawaling was then leaving the place with Abarri, Estrada and Pajalago while Andales purposely stayed behind with the victim. There is not even a showing that Cawaling had any moral influence over Andales.

The trial court, therefore, erred in convicting all the appellants of the crime of robbery with rape. In view of the fact that the charge of rape includes abusos dishonestos, the appellants, other than Andales can be found guilty of committing the crime of robbery with abusos dishonestos.

WHEREFORE, the decision appealed from is MODIFIED. Ernesto Abarri, Clemente Cawaling, Conrado Estrada and Joselito Pajalago are GUILTY beyond reasonable doubt of the separate crimes of robbery and acts of lasciviousness. This Court sentences each of them to an indeterminate penalty of SIX (6) MONTHS of arresto mayor as minimum to SIX (6) YEARS of prision correccional as maximum for the crime of acts of lasciviousness, and to indemnify Gregoria Gan jointly and severally in the amount of P10,000.00 as moral damages. For the crime of robbery, they are sentenced to suffer the indeterminate penalty of FOUR (4) YEARS and 2 MONTHS of prision correccional as minimum to TEN (10) YEARS of prision mayor as maximum and to indemnify jointly and severally Gregoria Gan in the amount of P7,250.00 as actual damages.

Ronnie Andales is FOUND GUILTY of the crime of robbery with rape. He is sentenced to suffer the penalty of reclusion perpetua, to indemnify Gregoria Gan in the amount of P30,000.00 as moral damages, and jointly and severally with the other appellants, the amount of P7,250.00 as actual damages.

SO ORDERED.

Padilla, (Chairman), Davide, Jr., Bellosillo, and Kapunan, JJ., concur.

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