

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ORLANDO FRAGO, ACCUSED-APPELLANT.

G.R. Nos. 104492-93. May 31, 1994

Ponente: BELLOSILLO, J.

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BELLOSILLO, J.:

ORLANDO FRAGO was charged before the court a quo with rape and attempted rape, docketed as Crim. Cases Nos. 9144 and 9145, respectively.

In Crim. Case No. 9144, the Information states that in the early morning of 26 September 1990, at about four o'clock, in the poblacion of Quezon, Palawan, the accused Orlando Frago -

x x x entered the sleeping room of the house belonging to Fortunato Moral where JICELYN LANSAP was sleeping, thereby Jicelyn Lansap was bodily carried by accused Orlando Frago to a nearby house belonging to Dado Andor and with lewd design did then and there willfully, unlawfully and feloniously lay with and have carnal knowledge with said Jicelyn Lansap who at that time was deeply asleep, against her will and without her consent, to the damage and prejudice of Jicelyn Lansap.

In Crim. Case No. 9145, the Information alleges that in the early morning of 26 September 1990, at about three forty-five, in the poblacion of Quezon, Palawan, the accused Orlando Frago -

x x x entered the room of the dwelling house of Philip Pastera where one RONALYN PASTERA, a girl 9 years of age, was sleeping, and once inside the room, with lewd design did then and there willfully, unlawfully and feloniously hold her head and bodily carry said Ronalyn Pastera, thus commencing the commission of a felony of Rape directly by overt acts but did not perform all the acts of execution which would produce the said felony by reason of causes other than the spontaneous desistance of the accused, that is, Ronalyn Pastera was awakened and shouted for help, thus forcing the accused to release Ronalyn Pastera and ran away.

On 1 October 1991, after trial, the court a quo rendered its decision finding the accused guilty of rape in Crim. Case No. 9144 and sentenced him to reclusion perpetua with the accessory penalties of civil interdiction for life and perpetual absolute disqualification, to pay Jicelyn Lansap P30,000.00 for moral damages, and to pay the costs.

In Crim. Case No. 9145 for attempted rape, the accused was acquitted on "reasonable doubt occasioned by lack of clear and convincing evidence that the accused Orlando Frago indeed performed against Ronalyn Pastera overt acts constituting commencement of the commission of the crime of rape."

In view of the acquittal of the accused in Crim. Case No. 9145, we are here called upon to review only his conviction in Crim. Case No. 9144 for rape.

In holding appellant liable for rape, the trial court based its decision mainly on its finding that the accused was positively identified by his victim, complaining witness Jicelyn Lansap, and that there was no ill motive on her part to testify against him.

Jicelyn Lansap, a 15-year old high school student, was boarding in the house of one Fausto Morales in the poblacion together with her cousins Susan and Adea Bansil. The version of the prosecution is that before proceeding to the boarding house of Jicelyn Lansap, the accused, an ice cream vendor, first went to the residence of Ronalyn Pastera at around three forty-five in the morning and surreptitiously entered Ronalyn's bedroom where she was sleeping. He fanned her face with his handkerchief and then lifted her bodily from the floor. He was about to take her out of the room when she suddenly woke up and screamed for help thus prompting her father to respond immediately by switching on the lights. As a consequence, the accused had to drop Ronalyn on the floor and run out of the house. The prosecution would seem to infer that from the house of Ronalyn where he failed in his alleged attempt to defile her, the accused next went to the boarding house of Jicelyn some fifty meters away.

According to Jicelyn, she and her cousins went to bed at about eight o'clock in the evening of 25 September 1990. Then at around five-thirty the following morning, she was awakened by appellant who was already strangling her. She shouted for help so that he immediately ran away. She felt pain all over her body, more particularly in her private part, and discovered that she was no longer wearing her skirt and underwear. To her consternation, she found herself in the vacant house of a certain Dado Andor. So she lost no time looking for her way home. Upon reaching her boarding house, she narrated her harrowing experience to her cousins who in turn related the incident to her mother.

At eight o'clock that morning, Jicelyn and her mother went to the hospital where she was examined by Dr. Marcela Remegio who found Jicelyn with "Labia Majora and Minora still coaptated and with sign of external struggle x x x contusion, abrasion all over face x x x around neck x x x scratch marks on both medial surface of thigh x x x vulva swollen x x x presence of fresh hymenal laceration at six o'clock x x x [e]xamination for the presence of spermatozoa was positive x x x physical virginity lost." [1]

On the same day, Ronalyn's father and Jicelyn reported the incidents to the police authorities. Both Ronalyn and Jicelyn identified the accused as their attacker in the police line-up on 28 September and 8 October 1990, respectively, and then filed their formal complaints against him.

On his part, appellant seeks sanctuary in the alcove of denial and alibi. He claims that at nine o'clock in the evening of 25 September 1990, he was already asleep with his wife and children. He woke up at six o'clock the following morning. He was very tired that night because he was vending ice cream in the poblacion the whole day.

In his appeal, appellant imputes error to the trial court in convicting him on the basis of an identification which was made without the assistance of counsel and according credence to the story of Jicelyn, which he considers fantastic, thereby denying his constitutional right to be presumed innocent until proved guilty beyond reasonable doubt.

Appellant argues that it was during his detention, when he was not assisted by counsel, that he was identified by Jicelyn. Thus he invokes *People v. Hassan* [2] where this Court affirmed the right of an accused to counsel at all stages of the proceedings, the most crucial of which is his identification, and denial thereof entitles him to acquittal.

We cannot sustain the argument. We quote hereunder the pertinent portions constituting the ratio decidendi in the Hassan case -

x x x x The manner by which Jose Samson, Jr., was made to confront and identify the accused alone at the funeral parlor, without being placed in a police line-up, was 'pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted his reliability as eyewitness. This unusual, coarse and highly singular method of identification, which revolts against the accepted principles of scientific

crime detection, alienates the esteem of every just man, and commands neither our respect nor acceptance' (citing *People v. Cruz*, No. L-24424, 30 March 1970, 32 SCRA 181, 186; *People v. Olvis, et al.*, G.R. No. 71092, 30 September 1987; *Chavez v. Court of Appeals*, No. L-29169, 24 SCRA 663, 679).

Moreover, the confrontation arranged by the police investigator between the self-proclaimed eyewitness and the accused did violence to the right of the latter to counsel in all stages of the investigation into the commission of a crime especially at its most crucial stage - the identification of the accused.[3]

While the infringement of the constitutional protection to the rights of the accused should result in the acquittal of the accused in proper cases as a matter of course, appellant's reliance on *Hassan* is misplaced and shows a deficient comprehension of our rationalization therein. We acquitted the accused in that case because, among other things, of its peculiar factual milieu. There was no line-up of suspects. There was only the accused. Thus, we observed:

As it turned out, the method of identification became just a confrontation. At that critical and decisive moment, the scales of justice tipped unevenly against the young, poor, and disadvantaged accused. The police procedure adopted in this case in which only the accused was presented to witness Samson, in the funeral parlor, and in the presence of the grieving relatives of the victim, is as tainted as an uncounselled confession x x x x (underscoring supplied)[4]

In contrast, Orlando Frago was singled out by Jicelyn in a police line-up composed of ten persons.[5] Some were stout while others were slim, but almost all of them were mustachioed and five were long-haired.[6] In *Gamboa v. Cruz*,[7] we were explicit -

The right to counsel attaches upon the start of an investigation, i.e., when the investigating officer starts to ask questions to elicit information and/or confessions or admissions from the respondent/accused. At such point or stage, the person being interrogated must be assisted by counsel to avoid the pernicious practice of extorting false or coerced admissions or confessions from the lips of the person undergoing interrogation, for the commission of an offense.

Any person under investigation must, among other things, be assisted by counsel. The above-cited provisions of the Constitution are clear. They leave no room for equivocation. Accordingly, in several cases, this Court has consistently held that no custodial investigation shall be conducted unless it be in the presence of counsel, engaged by the person arrested, or by any person in his behalf, or appointed by the court upon petition either of the detainee himself, or by anyone in his behalf, and that, while the right may be waived, the waiver shall not be valid unless made in writing and in the presence of counsel.

As aptly observed, however, by the Solicitor General, the police line-up (at least, in this case) was not part of the custodial inquest, hence, petitioner was not yet entitled, at such stage, to counsel. The Solicitor General states:

When petitioner was identified by the complainant at the police line-up, he had not been held yet to answer for a criminal offense. The police line-up is not a part of the custodial inquest, hence, he was not yet entitled to counsel. Thus, it was held that when the process had not yet shifted from the investigatory to the accusatory as when police investigation does not elicit a confession the accused may not yet avail of the services of his lawyer (*Escobedo v. Illinois* of the United States Federal Supreme Court, 378 US 478, 1964). Since petitioner in the course of his identification in the police line-up had not yet been held to answer for a criminal offense, he was, therefore, not deprived of his right to be assisted by counsel because the accusatory process had not yet set in. The police could not have violated petitioner's right to counsel and due process as the confrontation between the State and him had not begun. In fact, when he was identified in the police line-up by complainant he did not give any statement to the police. He was, therefore, not interrogated at all as he was not facing a criminal charge. Far from what he

professes, the police did not, at that stage, exact a confession to be used against him. For it was not he but the complainant who was being investigated at that time. He 'was ordered to sit down in front of the complainant while the latter was being investigated' (par. 3.03, Petition). Petitioner's right to counsel had not accrued (underscoring supplied).[8]

This ruling was reiterated in the recent case of *People v. Santos*.^[9] We similarly find in the case at bench. There is nothing in the records which shows that in the course of the identification from the police line-up the police investigator sought to extract any admission or confession from appellant. Thus far, we agree with the prosecution.

But we sustain the defense on the insufficiency of the identification of appellant Orlando Frago.

A careful dissection of the testimony of Jicelyn herself indubitably shows that she has no reliable basis for pointing to the accused as the person who raped her. She says that his face was covered; that he had long hair; that while the person who raped her had high nose (matangos) his nose is just "katamtaman"; that she did not have the opportunity to observe the height of the rapist; and, that the only evidence of sexual intercourse is the result of the medical examination.

Appellant argues that the "contusion, abrasion all over the face, around the neck, presence of scratch marks on both medial surface of thigh"^[10] did not necessarily indicate resistance on her part, contending further that it is a matter of judicial notice that passionate kissing and petting could normally produce "injuries." According to him, Jicelyn herself disclosed that she had a suitor for whom she had "feelings of affection," thus concluding that she may have submitted herself to him.

A rule of long standing in this jurisdiction, reverence to which remains undiminished to this day, is that the Court will not interfere with the judgment of the trial court in passing upon the credibility of opposing witnesses unless there appears in the record some fact or substance of weight and influence which has been overlooked or the significance of which has been misinterpreted. This is due to the fact that the trial court is in a better position to weigh conflicting testimonies, having heard the witnesses themselves and observed their deportment and manner of testifying.^[11]

There are indeed reasons to deviate from the general rule. We have examined carefully the entire transcript of stenographic notes and we do not hesitate to conclude that the exception to the rule must be applied. There was no positive identification of Orlando Frago by Jicelyn. Her testimony on direct examination supports this conclusion. While she would make it appear that she was able to positively identify the accused, her account of the incident proved otherwise.

There seems to be no question that, on the part of the Pastera sisters, they may have recognized appellant positively because their room was lighted with a wick/gas lamp^[12] and he was not wearing anything on his face.^[13] They identified him on 28 September 1990,^[14] whereas Jicelyn pointed him out only on 8 October 1990.^[15] The possibility that Jicelyn had conferred with the Pastera sisters regarding the identity of the accused before she testified is not remote because they were neighbors.^[16] As a consequence, when Jicelyn testified on 13 August 1991, she gave the same description of her attacker as that given by Ronalyn Pastera.

Under the circumstances, we are inevitably drawn to the conclusion that Jicelyn's identification of Orlando Frago was merely patterned after the identification made by the Pastera sisters. This is then a derivative, not positive, identification. The identification then of appellant by Jicelyn is doubtful.^[17] Her testimony, standing alone, does not satisfy that quantum of proof required to support a judgment of conviction. The material discrepancies therein engender perplexity as to its veracity and reliability.

Besides, it appears highly incredible that Jicelyn could be bodily lifted from her room in her boarding house and taken some three hundred meters away to the vacant house of Dado Andor where she was supposedly abused[18] without awakening her and her two cousins who were all sleeping side by side with her.[19] Moreover, we find the following observations of the Solicitor General decidedly speculative, hence, unacceptable -

x x x appellant's earlier act of fanning his handkerchief over the face of Ronalyn Pastera evidently shows that there was something in it, most likely drug, to induce her to remain sleeping. This same method was apparently employed by appellant to Jicelyn Lansap that kept her sleeping while being taken to another house and therein raped by him,[20]

because a mere reading of Ronalyn's testimony on cross-examination would indicate that she did not smell any substance emanating from her attacker.

Appellant's denial and alibi are inherently weak, but the prosecution cannot rely on their frailty to enhance its cause. The prosecution must draw its strength from its own evidence. As has been oft-repeated, every circumstance favoring the innocence of the accused must be taken into account and the proof against him must survive the test of reason. Only when the conscience is satisfied that the crime has been committed by the person on trial should the sentence be for conviction.[21] Unfortunately for the prosecution, its evidence has miserably failed to pass that conscience test.

WHEREFORE, the decision of the court a quo finding accused-appellant ORLANDO FRAGO guilty of rape in Crim. Case No. 9144 is REVERSED and SET ASIDE, and he is ACQUITTED as his guilt has not been proved beyond reasonable doubt. It appearing that he is detained, his immediate release from custody is ordered unless he is held for another cause.

Costs de officio.

SO ORDERED.

Davide, Jr., and Quiason, JJ., concur.

Cruz, (Chairman), and Kapunan, JJ., on leave.

[1] Exh. "A."

[2] G.R. No. 68969, 22 January 1988, 157 SCRA 261.

[3] *Id.*, p. 271.

[4] *Id.*, pp. 271-272.

[5] TSN, 13 August 1991, p. 53.

[6] *Id.*, pp. 64-65.

[7] G.R. No. 56291, 27 June 1988, 162 SCRA 642.

[8] *Id.*, pp. 648-649.

[9] G.R. Nos. 100225-26, 11 May 1993, 221 SCRA 715.

[10] See Note 1.

[11] *People v. Cordona*, G.R. Nos. 83373-74, 5 July 1993.

[12] TSN, 20 May 1991, pp. 6, 15; TSN, 21 May 1991, pp. 28-29.

[13] Id., pp. 6, 28.

[14] Id., p. 45.

[15] Id., p. 64.

[16] TSN, 21 May 1991, p. 31; 13 August 1991, p. 54.

[17] *People v. Domingo*, G.R. No. 68993, 26 September 1988, 165 SCRA 620.

[18] TSN 13 August 1991, p. 49.

[19] Id., p. 57.

[20] Rollo, pp. 74-75.

[21] *People v. Flores*, G.R. No. 65647, 30 August 1988, 165 SCRA 71.

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