

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ANTONIO FEROLINO A.K.A. FRANCISCO FEROLINO, ACCUSED-APPELLANT.

G.R. Nos. 131730-31. April 05, 2000

Ponente: DAVIDE JR., C.J.

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DAVIDE JR., C.J.:

In its consolidated decision[1] of 29 October 1997 in Criminal Case No. DU-5228 and Criminal Case No. DU-5229, the Regional Trial Court of Mandaue City, Branch 28, found accused-appellant Antonio Ferolino alias Francisco Ferolino (hereafter ANTONIO) guilty of rape, and sentenced him to suffer the penalty of death in each case and to pay the victim Ferlyn Dumaguit (hereafter FERLYN), his eight-year old niece, the sum of P50,000 as indemnity, P50,000 as moral and exemplary damages, as well as the costs of suit.

On the basis of FERLYN's sworn statement dated 31 July 1995, and the affidavit of her mother Lorelina, both of which were executed before the Commission on Human Rights (CHR), Region VII, Cebu City, a complaint for "Child Abuse-Rape under R.A. 7610" was filed against ANTONIO. After appropriate proceedings, two informations for rape dated 31 October 1995, were filed with the court below and docketed as Criminal Case No. DU-5228 and Criminal Case No. DU- 5229. The accusatory portions in both cases are similarly worded, thus:

That sometime in April, 1995, at Mandaue City, Philippines and within the jurisdiction of this Honorable Court, the above named accused, with deliberate intent and lewd design, did then and there wilfully, unlawfully and feloniously through force and intimidation commit sexual abuse and have sexual intercourse with his niece, an 8 year old girl, FERLYN DUMAGUIT.

CONTRARY TO LAW.[2]

The prosecution established the following facts:

Even before she was born on 14 December 1986,[3] FERLYN's family had already been living at the house of ANTONIO at Tipolo, Mandaue City. She grew up there with her mother Lorelina; her uncles, Emelito and Ferlo, and their families; and ANTONIO, whom she fondly called "Papa Tonio," his wife Fe, the sister of Lorelina's deceased husband, Femando, and their daughter Fely. FERLYN's family moved out from ANTONIO's house sometime in May 1995, after the occurrence of the incidents subject of these cases.[4]

Sometime in April 1995, FERLYN was taken by ANTONIO to a deserted building near his house on the pretext that FERLYN would pluck his gray hair. But once his niece entered, ANTONIO closed the door and immediately removed her underwear while she was standing. He then took off his own pants and made FERLYN lean on the wall of the building. ANTONIO parted her knees, thereby drawing her legs apart, and inserted his penis into her vagina.[5] In so doing, ANTONIO made a pushing motion which FERLYN demonstrated by clasping her hands and moving them forward. Due to the pain she felt, FERLYN shouted "Nay," for which she was instantly admonished by ANTONIO. The latter, however, told her that no one could hear her. He threatened to kill all the members of her family if she would report the incident to anybody. His dastardly deed accomplished, ANTONIO urinated, giving FERLYN the chance to flee. As may be expected of a girl her age, FERLYN did not disclose the

incident to her mother for fear that her Papa Tonio might harm the members of her family.[6]

The next day, using the same *modus operandi*, ANTONIO sought a repeat of the previous day's activity. FERLYN initially declined but her mother told her to go with her Papa Tonio and pluck his gray hair inasmuch as they were living in his house. Inside the building, ANTONIO took off her panty and his own short pants. He forced FERLYN to lie down on a bench, then immediately he went on top of her. Once more, the young girl felt pain in her vagina and body. He squeezed his penis twice, ejaculated, then stood up. At this point, his daughter Fely knocked on the door of the building. When he opened the door, FERLYN saw an opportunity to run back to the house. Again, remembering ANTONIO's threats, FERLYN remained silent.[7]

After one incident in April 1995, where ANTONIO was boxed by her Uncle Emelito for touching his wife Ana's private part, FERLYN finally recounted to her mother what ANTONIO had done to her. She told her mother, "Nay Papa Tonio is foolish." When asked why she replied, "Because Papa Tonio took off my panty and did like that to me with his penis." She demonstrated this by joining her hands and making a pushing motion.[8] FERLYN added that ANTONIO "even did this foolish thing to me twice, Nay, because the following day, after the first time, he again did it." [9] FERLYN explained that she did not immediately confide to her mother because ANTONIO had threatened to kill all of them. When asked when the incident occurred, she said (they, happened when she was "feeling very weak." Lorelina Dumaguít recalled that it was also in April 1995 when she brought FERLYN to a doctor because the latter felt weak and sick. FERLYN then complained of pain in her private part. When asked about it, she said she did not know.

Thus, Lorelina and FERLYN reported the matter to the Barangay Captain of Tipolo. During confrontation, Fe Ferolino said that because Lorelina had been a widow for a long time, her husband should have had intercourse with Lorelina instead of with FERLYN. From there, Lorelina and FERLYN proceeded to the local office of the Department of Social Welfare and Development (DSWD).[10] The DSWD referred FERLYN to the Don Vicente Sotto Medical Center in Cebu City, where she was examined on 26 July 1996 by Dr. Maria Louisa Baladjay-Catipon.[11] The latter's findings were incorporated in the Medical Certificate[12] issued on the same date, viz.:

Physical Condition: sthenic Mental state: conscious, coherent

Breast : infantile

Areolas : pinkish Nipple : pinkish

Height: Weight : 18.5 kg.

Last Menstruation: not applicable

Extra-Genital Injuries: (use diagram in addition) none

Genitalia: grossly female

Rubio Hairs: none

Labia Majora: firm, coaptated

Labia Minora: well-coaptated

Fourchette: v-shaped

Vestibule: pinkish

Hymen: intact

Orifice: admits tip of finger

Vagina: walls: no internal examination done

ruganities:

Uterus: no rectal examination done

Cervix:

Discharges:

Smears: sperm identification-negative

After that, Lorelina and FERLYN proceeded to the CHR Office in Cebu City, where their sworn statements[13] were taken. Thereupon, on 28 August 1995, a complaint subscribed by FERLYN was filed with the Office of the City Prosecutor.[14] Kycalr

For his defense, ANTONIO denied ever sexually molesting FERLYN. He testified that in 1995 he was a security guard at a warehouse leased to a certain Andrew Amadora. Alleging ill motive on the part of FERLYN and her family, he said Lorelina's son sought his help in gaining employment at the warehouse, but he could not do anything because there was no vacancy.[15] ANTONIO also declared that on 19 July 1995, he was mauled by the Dumaguits because he allegedly touched the private part of Ferlo Dumaguit's wife. Consequently, he filed a complaint for physical injuries against the Dumaguits. During the barangay conciliation proceedings in the physical injuries case, however, the Dumaguits intimated that should ANTONIO refuse to withdraw his complaint, they would charge him for rape.[16] Procopio Villanueva, Barangay Captain of Tipolo, Mandaue City, corroborated this allegation.[17]

Fe Ferolino further supported her husband's testimony regarding his employment as well as the possible reason for his indictment, that is, the mauling incident which was amicably settled at the barangay level after the Dumaguits asked for ANTONIO's forgiveness.[18] She added that, contrary to the prosecution's statement of facts, Lorelina's family was not living with them in April 1995.[19]

For her part, ANTONIO's daughter Fely denied that she knocked at the door of the warehouse where the alleged incident took place in April 1995.

Francisca Bustamante, ANTONIO's neighbor, co-member of the Tipolo New Society Livelihood Organization, and co-worker at Andrew Amadora's warehouse, testified that during the period of her employment the warehouse was always occupied. She admitted, however, that during daytime she would sometimes bring her work home or leave the workplace for lunch.[20]

The trial court was fully convinced of the criminal culpability of ANTONIO. It ruled that the gravamen of the offense of rape, which is having sexual intercourse with a woman against her will, was fully established. FERLYN testified that when she was sexually attacked, no full penetration occurred; yet she added that the penis of ANTONIO touched the labia of her vagina. The positive declaration of the victim on this matter is sufficient to support a judgment of conviction since "a slight penetration of the labia consummates the crime of rape." [21]

Conversely, the trial court refused to give credence to ANTONIO's denial and the self-serving testimonies of his witnesses, and ruled that the alleged ill motive for the filing of the rape charge was not sufficiently proven.

The trial court considered against ANTONIO the twin qualifying circumstances of age (FERLYN was only eight years old at the time of the incident) and relationship (ANTONIO's wife Fe is the sister of FERLYN's father Fernando, making him FERLYN's uncle by affinity). The presence of these special qualifying circumstances, duly

alleged in the information, rendered mandatory the imposition of the death penalty pursuant to Article 335 of the Revised Penal Code, as amended by R.A. No. 7659.[22]

Thus, in its decision[23] of 29 October 1997, the trial court decreed as follows:

WHEREFORE, foregoing premises considered, Joint Judgment is hereby rendered, to wit:

I

Crim. Case No. DU-5228 -

Finding the herein accused declaring ANTONIO FEROLINO alias FRANCISCO FEROLINO guilty beyond reasonable doubt for the crime of Rape:

- 1) Said accused is hereby sentenced to the penalty of death;
- 2) To indemnify the offended party Ferlyn Dumaguit the following amounts:
 - (a) P50,000.00 by reason of the commission of the offense of rape upon her;

(b)

P50,000.00 as moral and exemplary damages under Article 2219 in relation. to Articles 2217 and 2230 of the New Civil Code for pain, moral shock suffered by her and for the commission of the crime of rape with one aggravating circumstance;

- 3) to pay the cost.

II Criminal Case No. DU-5229

Finding the herein accused ANTONIO FEROLINO alias FRANCISCO FEROLINO guilty beyond reasonable doubt for the crime of Rape:

- 1) Said accused is hereby sentenced to the penalty of death;
- 2) To indemnify the offended party Ferlyn Dumaguit the following amounts:
 - (a) P50,000.00 by reason of the commission of the offense of rape upon her;

(b)

P50,000.00 as moral and exemplary damages under article 2219 in relation to Article 2217 and 2230 of the New Civil Code for pain, moral shock suffered by her and for the commission of the crime of rape with aggravating circumstance;

- 3) To pay the cost.

SO ORDERED.

The judgment was brought to us for automatic review pursuant to Article 47 of the Revised Penal Code, as amended by Section 22 of R.A. No. 7659. In his Appellant's Brief, ANTONIO assigns this lone error:

THE TRIAL COURT GRAVELY ERRED IN NOT CONSIDERING THE TWO (2) INFORMATIONS INSUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION FOR FAILURE TO STATE THE PRECISE DATES WHEN THE CRIMES CHARGED WERE ALLEGEDLY COMMITTED, IT BEING AN

ESSENTIAL ELEMENT OF THE OFFENSE.

ANTONIO alleges that the two informations in Criminal Case No. DU-5228 and Criminal Case No. DU-5229 are void since they failed to state the approximate time of the commission of the offense, as set forth in Section 6, Rule 110 of the Rules of Court. Such failure was a violation of the rule that in every criminal prosecution of rape "each sexual intercourse must be proved to have been committed at a precise date and time." The allegations in the informations only stated that ANTONIO committed rape "sometime in April 1995." He claims such allegations are too "indefinite" and, thus, deprived him of his right to be informed of the nature and cause of accusation against him so as to afford him an adequate opportunity to prepare for his defense.[24] ANTONIO concludes that the two informations are fatally defective, and for this reason, the challenged decision of 29 October 1997 should be set aside and anew one entered acquitting him.

These arguments have no merit.

Under Section 11, Rule 110 of the Rules of Court, it is not necessary for the information to allege the date and time of the commission of the crime with precision and exactitude, unless, of course, the time is an essential ingredient of the offense. Thus,

Section 11. Time of the commission of the offense. - It is not necessary to state in the complaint or information the precise time at which the offense was committed except when time is a material ingredient of the offense, but the act may be alleged to have been committed at any time as near to the actual date at which the offense was committed as the information or complaint will permit.

The legal implications of this provision has been explained in *People v. Lucas*,[25] where we reiterated the early ruling in *U.S. v. Arcos*[26] that:

Where time or place or any other fact alleged is not an essential element of the crime charged, conviction may be had on proof of the commission of the crime, even if it appear(s) that the crime was not committed at the precise time or place alleged, or if the proof fails to sustain the existence of some immaterial fact set out in the complaint, providing it appears that the specific crime charged was in fact committed prior to the date of the filing of the complaint or information within the period of the statute of limitations, and at a place within the jurisdiction of the court.

We do not agree with ANTONIO's contention that the two informations under which he was charged are invalid since they failed to allege the exact date and time of the commission of the crime. FERLYN, who was only nine (9) years old at the time she testified, explained that her harrowing experience occurred in 1995, although she cannot remember what particular month.[27] Her mother, however, shed light on this uncertainty. Lorelina testified that FERLYN complained of some pain in her private part sometime in April of 1995.[28] This was when FERLYN divulged to her mother what her Papa Tonio had done to her.[29]

After a rigorous study of the records of this case, we find nothing on record that would justify a reversal of ANTONIO's conviction.

We cannot simply disregard the direct and spontaneous testimony of FERLYN, who was merely nine (9) years old at the time she testified. It is unbelievable for a girl of such a tender age, unfamiliar with the ways of the world, to fabricate such sordid story of defloration, a traumatic experience with repercussions beyond relief and irreversibly lasting in its effects. FERLYN survived an intensive cross-examination. Her narration revealed each and every relevant detail of the incidents. She was taken to an empty warehouse, which was ANTONIO's modus operandi to isolate them from prying eyes. He removed her underwear. She was made do lean on the wall and spread her legs to facilitate his intrusion. She felt the pain when he entered her, as well as the wetness in his private parts. We believe this declaration sufficiently establishes beyond moral doubt the commission by

ANTONIO of the crime of rape against FERLYN in the month of April 1995, thus:

Q

Can you remember what happen last year in 1995 with respect to while you were still living at Antonio Ferolino's house?

A

Yes.

Q

Can you tell us what was that?

A

He brought me to the building.

Q

Why did he bring you to the building?

A

To pluck his gray hair.

Q

How far is this building from Antonio Ferolino's house?

A

It is very near.

Q

When you arrived at this building what did Antonio Ferolino do?

A

He brought me inside the building and then he closed the door and immediately took off my panty.

Q

What position were you when he took off your underwear?

A

Standing.

Q

What about Ferolino, what did he do after he had taken off your panty?

A

He also took off my pants.

Q

After that what did he do?

A He had me lean on the wall.

Q And what happened after that?

A He did like that with his penis to my vagina.

COURT INTERPRETER:

Witness demonstrating by moving her left and right hands together forward.

FISCAL TO WITNESS:

Q What did you feel as a result of that act of Ferolino?

A I felt pain in my vagina.

Q What did you tell him, if any?

A Nothing.

Q Did you not shout?

A I did.

Q And what did he, say to you when you shouted?

A Not to shout because my nanay might hear.

Q After he pushed his penis inside or on your vagina, what happened?

A I shouted saying "Nay!" And then he said. "Your nanay will not hear, you."

Q After that what did he do?

A He urinated.

Q What about you what did you do?

A I ran.

Q Did you tell your mother about what Antonio Ferolino did?

A No.

Q Why?

A He warned me that all of us will be killed if I tell.

Q The next day can you tell us what unusual incident happened, if any?

A He again brought me to the building.

Q Why did he bring you to the building?

A He again told me to pluck his gray hair.

Q Did you not say no to your Papa Tony?

A I did but my mother told me to obey because we are living in their house.

Q Is this the same building where he brought you the day before?

ATTY.SURALTA:

Objection, leading.

COURT:

Let her answer.

FISCAL:

I think allowance should be granted to this kind of witness, Your Honor.

WITNESS:

A Yes.

FISCAL TO WITNESS:

Q Upon arriving at the building what did Ferolino do?

A He again took of my panty.

Q After taking off your panty what did he do?

A He also took off his short pants then laid me down on the bench and immediately stayed on top of me.

Q After that what did he do next?

A He squeezed his penis.

Q After that what did he do?

A His penis squirted something like water.

Q Can you describe his movements while he was on top of you?

A He again squeezed his penis.

Q After that what did Ferolino do?

A He stood up.

Q Where did he go when he stood up?

A His daughter knocked on the door and then he opened the door.

Q What about you, what did you do when he stood up?

A I ran.

Q Where did you go?

A To our house.

Q Did you tell your mother right away about what had happened?

A No.

Q Did you in effect later on tell your mother about these incidents?

A Yes.

Q When Ferolino placed himself on top of you what did you feel?

A I felt pain on my body.

Q What about particularly with respect to your sexual organ?

A It was painful also.

x-x-x

COURT TO WITNESS:

Q

You said that when Antonio Ferolino placed himself on top of you, you felt pain in your vagina. Can you tell us why you felt pain in your vagina?

A Because he pushed his penis.

Q Did his penis penetrate your vagina?

A No, just at the sides.

Q What do you mean by the side?

A On the lip.

Q Of your vagina?

A Yes.

Q

What about the first time when he let you lean on the wall, you also said that you felt pain on your vagina. What was the cause of it?

A Because he tried to push in his penis also.

Q And what portion of , your vagina did it hit?

A On the lips.

Q In other words it has not penetrated you deep inside?

A No.

Q Did you sustain bleeding?

A No.[30](Underscoring ours for emphasis).

Let us now consider the imposable penalty. The trial court imposed the death penalty because it considered the special qualifying circumstances of relationship of ANTONIO to FERLYN, and the latter's age. Both informations alleged that ANTONIO "Willfully, unlawfully and feloniously through force and intimidation commit sexual abuse and have sexual intercourse with his niece, an 8 year old girl, FERLYN DUMAGUIT." The prosecution was able to prove that at the time she was raped FERLYN was only eight years old, having been born on 14 December 1986 as evidenced by the certificate of live birth.[31] The prosecution likewise proved that ANTONIO's wife Fe is FERLYN's aunt, being the sister of FERLYN's father Fernando. Therefore, Fe is FERLYN's relative by consanguinity within the third civil degree, while ANTONIO is FERLYN's relative by

affinity within the third civil degree.,

The seventh paragraph of Article 35 of the Revised Penal Code, as amended by Section 7 of R.A. No. 7659 provides:

The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances:

1.

When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.

2. When the victim is under the custody of the police or military authorities.

3.

When the rape is committed in full view of the husband, parent, any of the children or other relatives within the third degree of consanguinity.

4. When the victim is religious or a child below seven (7) years old.

5. When the offender knows that he is afflicted with Acquired Immune Deficiency Syndrome (AIDS) disease.

6.

When committed by any member of the Armed Forces of the Philippines or the Philippine National Police or any law enforcement agency.

7.

When by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation. (As amended by Sec. 11, R.A. No. 7659)

These seven attendant circumstances, given that they alter the nature of the crime of rape and thus increase the degree of the penalty, are in the nature of qualifying circumstances. Plainly, these attendant circumstances added by R.A. No. 7659 are not ordinary aggravating circumstances, which merely increase the period of the penalty. These are special qualifying circumstances which must be specifically pleaded or alleged with certainty in the information; otherwise, the death penalty cannot be imposed.[32]

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

Consequently, ANTONIO can only be held liable for simple rape in each case for the rape of a child under twelve years of age. The penalty therefor under Article 335 of the Revised Penal Code, as amended by R.A. No. 7659, is reclusion perpetua.

The award of P50,000 as indemnity in each case is in order. Moral damages and exemplary damages should be separately determined. Conformably with current case law, moral damages of P50,000 may be awarded in each case without need of allegation and proof.[33] Exemplary damages in the amount of P25,000 in each case is also

in order to deter the commission by others of similar dastardly deeds.[34]

WHEREFORE, the decision of the Regional Trial Court of Mandaue City, Branch 28, in Criminal Case No. DU-5228 and Criminal Case No. DU-5229, finding in each case accused-appellant ANTONIO FEROLINO a.k.a. Francisco Ferolino, guilty beyond reasonable doubt of the crime of rape and sentencing him to suffer the penalty of death is hereby MODIFIED. As MODIFIED, accused-appellant ANTONIO FEROLINO, a.k.a. Francisco Ferolino, is found in each case guilty beyond reasonable doubt, as principal, of the crime of simple rape, defined and penalized in Article 335 of the Revised Penal Code, as amended by R.A. No. 7659, and is hereby sentenced in each case to suffer the penalty of reclusion perpetua, with all its accessory penalties and to pay the offended party, FERLYN DUMAGUIT the sum of P50,000 as indemnity, P50,000 as moral damages, and P25,000 as exemplary damages.

Costs against accused-appellant.

SO ORDERED.

Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Purisima, Pardo, Buena, Gonzaga-Reyes, Ynares-Santiago, and De Leon, Jr., JJ., concur.

[1] Per Judge (now Court of Appeals Associate Justice) Mercedes Gozo-Dadole, Original Record (OR), 96-125; Rollo, 73-101.

[2] Rollo, 7-9.

[3] Per Certificate of Live Birth, Exh. "A," OR, 49.

[4] TSN, 29 May 1996, 5; 2 July 1996, 2-3; 2 September 1996, 4.

[5] TSN, 2 September 1996, 5, 11, 15-16.

[6] Id., 6.

[7] Id., 6-8.

[8] Id., 8.

[9] TSN, 29 May 1996, 8.

[10] TSN, 29 May 1996, 8-9; 2 September 1996, 8.

[11] TSN, 8 August 1996, 7.

[12] Exhibit "B," OR, 51.

[13] Exhibits "C" and "D," OR, 53-55.

[14] Exhibit "E," OR, 56.

[15] TSN, 28 April 1997, 3-5.

[16] TSN, 28 April 1997, 5; TSN, 26 May 1997, 3-5.

[17] TSN, 17 March 1997, 3-7.

[18] TSN, 7 October 1996, 10-11.

[19] Id., 3-6, 19-20, 24.

[20] TSN, 24 June 1997, 3-6; 11-15.

[21] Citing *People v. Oscar*, 48 Phil. 527 and *People v. Hernandez*, 49 Phil. 890.

[22] "An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code as Amended, Other Special Laws, and for Other Purposes," which took effect on 31 December 1993 following our ruling in *People v. Simon*, 234 SCRA 555 (1994)

[23] *Supra*, note 1.

[24] Citing *U.S. v. Dichao*, 27 Phil. 421.

[25] 232 SCRA 537, 547 (1994). See also *People v. Losano*, G.R. No. 127122, 20 July 1999; *People v. Teves*, G.R. No. 128839, 20 July 1999.

[26] 11 Phil. 555, 561-562.

[27] TSN, 2 September 1996, 12.

[28] TSN, 29 May 1996, 8.

[29] TSN, 29 May 1996, 6-8.

[30] TSN, 2 September 1996, 4-6, 11.

[31] Exhibit "A," OR, 49.

[32] *People v. Ramos*, G.R. No. 129439, 25 September 1998, 296 SCRA 559; *People v. Olao*, G.R. No. 129529, 29 September 1998, 296 SCRA 658; *People v. Maglente*, G.R. No. 124559-66, 30 April 1999.

[33] *People v. Prades*, G.R. No. 127569, 30 July 1998, 293 SCRA 411.

[34] *People v. Dizon*, G.R. No. 128889, 20 August 1999, citing Article 2229, Civil Code.

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