

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. TOMAS TUNDAG, ACCUSED-APPELLANT.

G.R. Nos. 135695-96. October 12, 2000

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

For automatic review is the judgment of the Regional Trial Court of Mandaue City, Branch 28, in Criminal Cases Nos. DU-6186 and DU-6203, finding appellant Tomas Tundag guilty of two counts of incestuous rape and sentencing him to death twice.

On November 18, 1997, private complainant Mary Ann Tundag filed with the Mandaue City Prosecutor's Office two separate complaints for incestuous rape. The first complaint, docketed as Criminal Case No. DU-6186, alleged:

That on or about the 5th day of September, 1997, in the City of Mandaue, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, being the father of complainant MARY ANN TUNDAG, who is a 13-year-old girl, with deliberate intent, did then and there wilfully, unlawfully and feloniously have sexual intercourse with the said offended party against the latter's will.

CONTRARY TO LAW.[1]

The other, docketed as Criminal Case No. DU-6203, averred:

That on or about the 7th day of November, 1997, in the City of Mandaue, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, being the father of complainant MARY ANN TUNDAG, who is a 13-year-old girl, with deliberate intent, did then and there wilfully, unlawfully and feloniously have sexual intercourse with the said offended party against the latter's will.

CONTRARY TO LAW.[2]

Upon arraignment appellant, assisted by counsel de parte, pleaded "Not Guilty" to the charges.

The two cases were consolidated and a joint trial ensued.

Appellant's defense was bare denial. He claimed that private complainant had fabricated the rape charges against him since he and his daughter, "had a quarrel when he accordingly reprimanded her for going out whenever he was not at home." [3]

Appellant did not present any witness to reinforce his testimony.

On August 31, 1998, the trial court rendered its decision, thus:

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

I. In Criminal Case No. DU-6186 -

a) Finding the herein accused TOMAS TUNDAG guilty beyond reasonable doubt for the crime of rape, said accused is hereby sentenced to the penalty of death;

b) To indemnify the offended party Mary Ann Tundag the following amounts:

(1) P50,000.00 by reason of the commission of the offense of rape upon her; and

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

c) To pay the costs.

II. In Criminal Case No. DU-6203 -

a) Finding the herein accused TOMAS TUNDAG guilty beyond reasonable doubt for the crime of rape, said accused is hereby sentenced to the penalty of death;

b) To indemnify the offended party Mary Ann Tundag the following amounts:

(1) P50,000.00 by reason of the commission of the offense of rape upon her; and

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

(3) To pay the costs.

SO ORDERED.[4]

In its judgment, the court below gave credence to complainant's version of what accused did to her.

The evidence for the prosecution as adduced during the trial on the merits clearly shows that private complainant Mary Ann Tundag is a 13 year old girl who does not know how to read and write and has an IQ of 76% which is a very low general mental ability and was living with her father, the herein accused, at Galaxy Compound, Mandaue City.

x x x

That on September 5, 1997 at about 10:00 o'clock in the evening, she was in the house together with her father. But before she went to sleep, her father was already lying down on the mat while herself (sic) just lied down at his head side which was not necessarily beside him. However, when she was already sleeping, she noticed that her father who was already undressed was beside her and was embracing her. Then, he undressed her which she resisted but her father used a knife and told her that he would kill her if she shouts and after that, he inserted his penis into her vagina and told her not to shout or tell anyone. In effect, his penis penetrated her genital, which made her vagina bleed and was very painful.

That when the penis of her father was already inserted in her vagina, her father was all the time asking by saying (sic) : 'Does it feel good?' And at the same time, he was laughing and further, told her that a woman who does not marry can never enter heaven and he got angry with her when she contradicted his statement.

That while the penis of her father was inside her vagina and (he) was humping over her, she felt intense pain that she cried and told him to pull it out but did not accede and in fact, said: 'Why will I pull it out when it feels so good(?)'

That after removing his penis from her vagina and after telling her that she could not go to heaven if she did not get married, her father just stayed there and continued smoking while she cried.

That in the evening of November 7, 1997, she was at home washing the dishes while her father was just smoking and squatting. That after she finished washing the dishes, she lied (sic) down to sleep when her father embraced her and since she does not like what he did to her, she placed a stool between them but he just brushed it aside and laid down with her and was able to take her womanhood again by using a very sharp knife which he was holding and was pointing it at the right side of her neck which made her afraid.

That in the early morning of the following day, she left her father's place and went to her neighbor by the name of Bebie Cabahug and told her what had happened to her, who, in turn, advised her to report the matter to the police, which she did and accompanied by the policemen, she went to the Southern Islands Hospital where she was examined and after her medical examination, she was brought back by the police and was investigated by them."[5]

Appellant's claim that the complainant's charges were manufactured did not impress the trial court, which found him twice guilty of rape. Now before us, appellant assails his double conviction, simply contending that:[6]

THE TRIAL COURT HAS COMMITTED AN ERROR IN NOT ABSOLVING THE ACCUSED-APPELLANT OF THE CRIMES CHARGED IN THE INFORMATION DESPITE THE PRESENCE OF REASONABLE DOUBT TO EXCULPATE HIM OF THE SAME.

Appellant flatly denies that the incidents complained of ever took place. He contends that on September 5, 1997, he was working as a watch repairman near Gal's Bakery in Mandaue City Market and went home tired and sleepy at around 11:00 o'clock that evening. On November 7, 1997, he claims he was at work. In his brief, he argues that it was impossible for him to have raped his daughter because when the incidents allegedly transpired, "he went to work and naturally, being exhausted and tired, it is impossible for him to do such wrongdoings."[7]

The Office of the Solicitor General disagrees with appellant and urges the Court to affirm the trial court's decision, with the recommendation that the award of damages and indemnity ex delicto be modified to conform to prevailing jurisprudence.

Considering the gravity of the offense charged as a heinous crime and the irreversibility of the penalty of death imposed in each of these cases before us, the Court leaves no stone unturned in its review of the records, including the evidence presented by both the prosecution and the defense. Conviction must rest on nothing less than a moral certainty of guilt.[8] But here we find no room to disturb the trial court's judgment concerning appellant's guilt, because his defense is utterly untenable.

Appellant's defense of alibi and denial is negative and self-serving. It hardly counts as a worthy and weighty ground for exculpation in a trial involving his freedom and his life. Against the testimony of private complainant who testified on affirmative matters,[9] such defense is not only trite but pathetic. Denial is an inherently weak defense, which becomes even weaker in the face of the positive identification by the victim of the appellant as the violator of her honor.[10] Indeed, we find that private complainant was unequivocal in charging appellant with ravishing her. The victim's account of the rapes complained of was straightforward, detailed, and consistent.[11] Her testimony never wavered even after it had been explained to her that her father could be meted out the death penalty if found guilty by the court.[12]

In a prosecution for rape, the complainant's credibility is the single most important issue.[13] The determination of the credibility of witnesses is primarily the function of the trial court. The rationale for this is that the trial court has the advantage of having observed at first hand the demeanor of the witnesses on the stand and, therefore, is in a better position to form an accurate impression and conclusion.[14] Absent any showing that certain facts of value have clearly been overlooked, which if considered could affect the result of the case, or that the trial court's findings are clearly arbitrary, the conclusions reached by the court of origin must be respected and the judgment

rendered affirmed.[15]

Moreover, we note here that private complainant's testimony is corroborated by medical findings that lacerations were present in her hymen. The examination conducted by Dr. Bessie Acebes upon the private complainant yielded the following results:

- Genitalia: grossly female
- Pubic Hairs: scanty
- Labia Majora: coaptated
- Labia Minora: -do-
- Fourchette: U-shaped
- Vestibule: pinkish
- Hymen: + old healed laceration at 3 and 9 o'clock position(s).
- Orifice: admits 2 fingers with ease
- Vagina:
- Walls: pinkish
- Ruganities: prominent
- Uterus: small
- Cervix: closed
- Discharges: Muroid, minimal
- Smears:
- Conclusions: sperm identification (-)
- Gram staining of vaginal disc.[16]

Dr. Acebes testified that her findings of healed hymenal lacerations in the complainant's private parts meant a history of sexual congress on her part.[17] According to her, the lacerations may have been caused by the entry of an erect male organ into complainant's genitals. The examining physician likewise pointed out that previous coitus may be inferred from complainant's U-shaped fourchette since the fourchette of a female who has not yet experienced sexual intercourse is V-shaped.[18] While Dr. Acebes conceded under cross-examination, that the existence of the datum "U-shape(d) fourchette does not conclusively and absolutely mean that there was sexual intercourse or contact because it can be caused by masturbation of fingers or other things,"[19] nonetheless, the presence of the hymenal lacerations tends to support private complainant's claim that she was raped by appellant.

Appellant next contends that his daughter pressed the rape charges against him because she had quarreled with him after he had castigated her for misbehavior. He stresses that the prosecution did not rebut his testimony regarding his quarrel or misunderstanding with private complainant. He urges us to consider the charges filed against him as the result of his frequent castigation of her delinquent behavior.[20]

Such allegation of a family feud, however, does not explain the charges away. Filing a case for incestuous rape is of such a nature that a daughter's accusation must be taken seriously. It goes against human experience that a girl would fabricate a story which would drag herself as well as her family to a lifetime of dishonor, unless that is the truth, for it is her natural instinct to protect her honor.[21] More so, where her charges could mean the death of her own father, as in this case.

Appellant likewise points out that it was very unlikely for him to have committed the crimes imputed to him considering that he and his wife had ten children to attend to and care for. This argument, however, is impertinent and immaterial. Appellant was estranged from his wife, and private complainant was the only child who lived with him.[22] As pointed out by the Solicitor General, appellant was thus "free to do as he wished to satisfy his bestial lust on his daughter." [23]

Nor does appellant's assertion that private complainant has some psychological problems and a low IQ of 76 in any way favor his defense. These matters did not affect the credibility of her testimony that appellant raped her twice. We note that the victim understood the consequences of prosecuting the rape charges against her own father, as shown by the following testimony of the victim on cross-examination:

Q :

Were you informed that if, and when your father will be found guilty, your father will be sentenced to death?

A :

Yes.

Q :

Until now you wanted that your father will be sentenced by death?

A

(Witness nodding.)

x x x

Q :

I will inform you, Miss Witness, that you have filed two cases against your father and in case your father would be found guilty, two death sentences will be imposed against him?

A :

Yes.

Q :

With that information, do you still want this case would proceed?

A :

I want this to proceed.[24]

Indeed, appellant is guilty. But is the penalty of death imposed on him correct?

Section 335 of the Revised Penal Code, as amended by Section 11 of R.A. No. 7659,[25] penalizes rape of a minor daughter by her father as qualified rape[26] and a heinous crime. In proving such felony, the prosecution must allege and prove the elements of rape: (1) sexual congress; (2) with woman; (3) by force or without her consent[27] and in order to warrant the imposition of capital punishment, the additional elements that: (4) the victim is under 18 years of age at the time of the rape and (5) the offender is a parent of the victim.[28]

In this case, it was sufficiently alleged and proven that the offender was the victim's father.[29] But the victim's age was not properly and sufficiently proved beyond reasonable doubt. She testified that she was thirteen years old at the time of the rapes. However, she admitted that she did not know exactly when she was born because her mother did not tell her. She further said that her birth certificate was likewise with her mother. In her own words, the victim testified -[30]

COURT TO WITNESS

Q:

When were you born?

A:

I do not know.

Q:

You do not know your birthday?

A:

My mama did not tell me exactly when I asked her.

COURT: Proceed.

FISCAL PEREZ: For our failure to secure the Birth Certificate Your Honor, may we just request for judicial notice that the victim here is below 18 years old.

ATTY. SURALTA: Admitted. ...

Judicial notice is the cognizance of certain facts which judges may properly take and act on without proof because they already know them.[31] Under the Rules of Court, judicial notice may either be mandatory or discretionary. Section 1 of Rule 129 of the Rules of Court provides when court shall take mandatory judicial notice of facts -

SECTION 1. Judicial notice, when mandatory. - A court shall take judicial notice without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions.

Section 2 of Rule 129 enumerates the instances when courts may take discretionary judicial notice of facts -

SEC. 2. Judicial notice, when discretionary. - A court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration or ought to be known to judges because of their judicial functions.

Thus, it can be considered of public knowledge and judicially noticed that the scene of the rape is not always nor necessarily isolated or secluded for lust is no respecter of time or place. The offense of rape can and has been committed in places where people congregate, e.g. inside a house where there are occupants, a five (5) meter room with five (5) people inside, or even in the same room which the victim is sharing with the accused's sister.[32]

The Court has likewise taken judicial notice of the Filipina's inbred modesty and shyness and her antipathy in publicly airing acts which blemish her honor and virtue.[33]

On the other hand, matters which are capable of unquestionable demonstration pertain to fields of professional and scientific knowledge. For example, in *People v. Alicante*,^[34] the trial court took judicial notice of the clinical records of the attending physicians concerning the birth of twin baby boys as "premature" since one of the alleged rapes had occurred 6 to 7 months earlier.

As to matters which ought to be known to judges because of their judicial functions, an example would be facts which are ascertainable from the record of court proceedings, e.g. as to when court notices were received by a party.

With respect to other matters not falling within the mandatory or discretionary judicial notice, the court can take judicial notice of a fact pursuant to the procedure in Section 3 of Rule 129 of the Rules of Court which requires that -

SEC. 3. Judicial notice, when hearing necessary. - During the trial, the court, on its own initiative, or on request of a party, may announce its intention to take judicial notice of any matter and allow the parties to be heard thereon.

After the trial, and before judgment or on appeal, the proper court, on its own initiative or on request of a party, may take judicial notice of any matter and allow the parties to be heard thereon if such matter is decisive of a material issue in the case.

In this case, judicial notice of the age of the victim is improper, despite the defense counsel's admission, thereof acceding to the prosecution's motion. As required by Section 3 of Rule 129, as to any other matters such as age, a hearing is required before courts can take judicial notice of such fact. Generally, the age of the victim may be proven by the birth or baptismal certificate of the victim, or in the absence thereof, upon showing that said documents were lost or destroyed, by other documentary or oral evidence sufficient for the purpose.

Thus, in *People v. Rebancos*, 172 SCRA 426 (1989), the victim was below 12 and we found that the rape committed was statutory rape. The mother testified that her daughter was born on October 26, 1974, and so was only 9 years old at the time of the rape on February 12, 1984. Although no birth certificate was presented because the victim's birth had allegedly not been registered, her baptismal certificate was duly presented. Hence, we ruled that the mother's testimony coupled with the presentation of the baptismal certificate was sufficient to establish that the victim was below 12 at the time of the rape.

However, in *People v. Vargas*, 257 SCRA 603 (1996), we ruled that appellant can only be convicted of simple rape, and not statutory rape, because of failure of the prosecution to prove the minority of the victim, who was allegedly 10 years old at the time of the rape. The prosecution failed to present either the birth or baptismal certificate of the victim. Also there was no showing that the said documents were lost or destroyed to justify their non-presentation. We held that testimony of the victim and her aunt were hearsay, and that it was not correct for the trial court to judge the age of the victim by her appearance.

In several recent cases, we have emphasized the need for independent proof of the age of the victim, aside from testimonial evidence from the victim or her relatives. In *People v. Javier*,^[35] we stressed that the prosecution must present independent proof of the age of the victim, even though it is not contested by the defense. The minority of the victim must be proved with equal certainty and clearness as the crime itself. In *People v. Cula*,^[36] we reiterated that it is the burden of the prosecution to prove with certainty the fact that the victim was below 18 when the rape was committed in order to justify the imposition of the death penalty. Since the record of the case was bereft of any independent evidence thereon, such as the victim's duly certified Certificate of Live Birth, accurately showing private complainant's age, appellant could not be convicted of rape in its qualified form. In *People v. Veloso*,^[37] the victim was alleged to have been only 9 years of age at the time of the rape. It held that the trial court was correct when it ruled that the prosecution failed to prove the victim's age other than through the testimony of her father and herself.

Considering the statutory requirement in Section 335 of the Revised Penal Code as amended by R.A. No. 7659 and R.A. No. 8353, we reiterate here what the Court has held in *Javier* without any dissent, that the failure to sufficiently establish victim's age by independent proof is a bar to conviction for rape in its qualified form. For, in the words of Melo, J., "independent proof of the actual age of a rape victim becomes vital and essential so as to remove an 'iota of doubt' that the case falls under the qualifying circumstances" for the imposition of the death

penalty set by the law.

In this case, the first rape was committed on September 5, 1997 and is therefore governed by the death penalty law, R.A. 7659. The penalty for the crime of simple rape or rape in its unqualified form under Art. 335 of the Revised Penal Code, as amended by Sec. 11 of R.A. 7659, is reclusion perpetua. The second rape was committed on November 7, 1997, after the effectivity of R.A. 8353, also known as the Anti-Rape Law of 1997, which took effect on October 22, 1997. The penalty for rape in its unqualified form remains the same.

As to civil indemnity, the trial court correctly awarded P50,000.00 for each count of rape as civil indemnity. However, the award of another P50,000.00 as "moral and exemplary damages under Article 2219 in relation to Articles 2217 and 2230 of the Civil Code" for each count is imprecise. In rape cases, the prevailing jurisprudence permits the award of moral damages without need for pleading or proof as to the basis thereof.[38] Thus, pursuant to current jurisprudence, we award the amount of P50,000.00 as moral damages for each count of rape.

The award of exemplary damages separately is also in order, but on a different basis and for a different amount. Appellant being the father of the victim, a fact duly proved during trial, we find that the alternative circumstance of relationship should be appreciated here as an aggravating circumstance. Under Article 2230 of the New Civil Code, exemplary damages may be imposed when the crime was committed with one or more aggravating circumstances. Hence, we find an award of exemplary damages in the amount of P25,000.00 proper. Note that generally, in rape cases imposing the death penalty, the rule is that relationship is no longer appreciated as a generic aggravating circumstance in view of the amendments introduced by R.A. Nos. 7659 and 8353. The father-daughter relationship has been treated by Congress in the nature of a special circumstance which makes the imposition of the death penalty mandatory.[39] However, in this case, the special qualifying circumstance of relationship was proved but not the minority of the victim, taking the case out of the ambit of mandatory death sentence. Hence, relationship can be appreciated as a generic aggravating circumstance in this instance so that exemplary damages are called for. In rapes committed by fathers on their own daughters, exemplary damages may be imposed to deter other fathers with perverse tendency or aberrant sexual behavior from sexually abusing their own daughters.[40]

WHEREFORE, the judgment of the Regional Trial Court of Mandaue City, Branch 28, in Criminal Case Nos. DU-6186 and DU-6203, is hereby MODIFIED as follows: appellant Tomas Tundag is found guilty of two (2) counts of simple rape; and for each count, sentenced to reclusion perpetua and ordered to pay the victim the amount of P50,000.00 as indemnity, P50,000.00 as moral damages, and P25,000.00 as exemplary damages.

No pronouncement as to costs.

SO ORDERED.

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

[1] Records, p. 1.

[2] Rollo, p. 8.

[3][]Supra Note 1, at 61. See also TSN, August 18, 1998, pp. 3-4.

[4] Supra Note 1, at 63-64.

[5] Id. at 59-61.

- [6] Supra Note 2, at 59-60.
- [7] Rollo, p. 61.
- [8] People v. Acala, 307 SCRA 330, 347 (1999).
- [9] Ibid.
- [10] People v. Losano, 310 SCRA 707, 723 (1999).
- [11] TSN, June 23, 1998, pp. 6-12, 18-19.
- [12] TSN, June 24, 1998, pp. 4-5.
- [13] People v. Akhtar, 308 SCRA 725, 735 (1999).
- [14] People v. Mijano, 311 SCRA 81, 87 (1999).
- [15] People v. Ernesto Sevilla, G.R. No. 126199, December 8, 1999, pp. 12-13.
- [16] Supra Note 1. at 35.
- [17] TSN, June 10, 1998, p.9
- [18] Ibid.
- [19] Id. at 10.
- [20] People v. Pedres, 306 SCRA 579, 590 (1999).
- [21] Supra Note 11 at 6. See also TSN, August 18, 1998, pp. 5-6.
- [22] Supra Note 2, at 104
- [23] Ibid.
- [24] TSN, June 24, 1998, pp. 4-5.
- [25] The relevant portions of said provision read: "When and how rape is committed. - Rape is committed by having carnal knowledge of a woman under any of the following circumstances:
- 1) By using force or intimidation;
 - 2) When the woman is deprived of reason or otherwise unconscious; and
 - 3) When the woman is under twelve years of age or is demented.
- x x x
- The death penalty shall 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.
- x x x"
- [26] Regalado, Justice Florenz R., Criminal Law Compendium, First Ed. 2000, p. 483.
- [27] People v. Mahinay, 302 SCRA 455, 476 (1999).

[28] *People v. Silvano*, 309 SCRA 362, 378 (1999).

[29] TSN, August 18, 1998, p. 5.

[30] TSN, June 23, 1998, pp. 16-17. See also *Rollo*, p. 24.

[31] 31 C.J.S. 509.

[32] *People v. Villar*, G.R. No. 127572, January 19, 2000, pp. 10-11; *People v. Geromo*, G.R. No. 126169, December 21, 1999, p. 6; *People v. Sandico*, 307 SCRA 204, 214-215 (1999); *People v. Sangil*, 276 SCRA 532 (1997).

[33] *People v. Taño*, G.R. No. 133872, May 5, 2000, p. 11; *People v. Alquizalas*, 305 SCRA 367, 375 (1999); *People v. Lapinoso*, 303 SCRA 664, 676 (1999).

[34] G.R. No. 127026-27, May 31, 2000, p. 27.

[35] 311 SCRA 122, 140-141 (1999).

[36] G.R. No. 133146, March 28, 2000. Both *Javier* and *Cula* were cited in *People vs. Bali-Balita*, G.R. No. 134266, September 15, 2000. *Gonzaga-Reyes, J.* opined that "it would not have been difficult for the trial court to take judicial notice that the victim is under 18 years of age," since she testified about 4 months after the rape, that she was only 10 years and 4 months old at the time of the rape. But see *Separate Opinion* therein of *Bellosillo, J.*, insisting on the strict requirement of independent proof of age; and that "no serious doubt" as to the victim's age is not a substitute for "proof beyond reasonable doubt."

[37] G.R. No. 130333, April 12, 2000.

[38] *People v. Flores*, 311 SCRA 170, 185 (1999); *People v. Prades*, 293 SCRA 41 (1998).

[39] *People v. Manhuyod, Jr.*, 290 SCRA 257, 277 (1998).

[40] *People v. Alitagtag*, 309 SCRA 325, 339 (1999).

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