

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. IAN CONTRERAS Y EROY, ACCUSED-APPELLANT.

G.R. Nos. 137123-34. August 23, 2000

Ponente: MENDOZA, J.

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MENDOZA, J.:

These cases are here on automatic review from the decision[1] of the Regional Trial Court, Branch 171, Valenzuela City, so far as it finds accused-appellant guilty of rape of a six-year old girl and sentences him to death. A total of 12 informations for rape were filed against accused-appellant, but since the exact dates of the incidents could not be ascertained, he was convicted only of four counts of rape, corresponding to the four victims. Accused-appellant was sentenced to reclusion perpetua for each count of rape, except one committed against a six-year old girl for which he was sentenced to death.

The 12 informations[2] against accused-appellant alleged the following:

Crim. Case No. 5668-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS Y EROY, based on the sworn declaration of one ANGELIC OCRENAS y CONTRERAS assisted by NELENE DIAZ Y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one ANGELIC OCRENAS y CONTRERAS, age 6 years old.”

Crim. Case No. 5669-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one ANGELIC OCRENAS y CONTRERAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one ANGELIC OCRENAS y CONTRERAS, age 6 years old.”

Crim. Case No. 5670-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one ANGELIC OCRENAS y CONTRERAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one ANGELIC OCRENAS age 6 years old.”

Crim. Case No. 5671-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one ANGELIC OCRENAS y CONTRERAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one ANGELIC OCRENAS y CONTRERAS age 6 years old.

Crim. Case No. 5672-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one ANGELIC OCRENAS y CONTRERAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one ANGELIC OCRENAS y CONTRERAS age 6 years old.

Crim. Case No. 5673-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one JODALYN CABITEN y ALINYABON assisted by TERESITA CABITEN of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one JODALYN CABITEN y ALINYABON age 8 years old.

Crim. Case No. 5674-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one PAULENE JADE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. NO. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there, wilfully, unlawfully and feloniously have sexual intercourse with one PAULENE JADE DIAZ Y OCRENAS age 6 years old.”

Crim. Case No. 5675-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one STEPHANIE JANE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there, wilfully, unlawfully and feloniously have sexual intercourse with one STEPHANIE JANE DIAZ y OCRENAS age 7 years old.”

Crim. Case No. 5676-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one STEPHANIE JANE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996, in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there, wilfully, unlawfully and feloniously have sexual intercourse with one STEPHANIE JANE DIAZ y OCRENAS age 7 years old.”

Crim. Case No. 5677-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one STEPHANIE JANE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one STEPHANIE JANE DIAZ y OCRENAS age 7 years old.

Crim. Case No. 5678-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one STEPHANIE JANE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one STEPHANIE JANE DIAZ y OCRENAS age 7 years old.”

Crim. Case No. 5679-V-96

The undersigned State Prosecutor accuses IAN CONTRERAS y EROY, based on the sworn declaration of one STEPHANIE JANE DIAZ y OCRENAS assisted by NELENE DIAZ y OCRENAS of the crime of “STATUTORY RAPE IN RELATION TO R.A. 7610”, committed as follows:

That between the period from May to June 1996 in Valenzuela, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, with lewd design, did then and there wilfully, unlawfully and feloniously have sexual intercourse with one STEPHANIE JANE DIAZ y OCRENAS age 7 years old.”

Accused-appellant pleaded not guilty to the charges,[3] whereupon he was tried.

Six witnesses, namely, Stephanie Jane, Paulene Jade, Jodalyn Cabiten, Nelene Diaz, Teresita Cabiten, and Juan Gubat, testified for the prosecution.

Nelene Diaz is a cousin of accused-appellant. She has three daughters ³/₄ Stephanie Jane, 7, Paulene Jade, the evidence about whose age the trial court found to be uncertain, although it was alleged she was six when the incident happened, and Arlene Joy, 3. On May 16, 1996, she took her children to the house of her aunt, Teresa Ocrenas, at the Peña Compound in Mapulang Lupa, Valenzuela City so that they could play with Angelic (or Angelique) Ocrenas. Angelic’s mother had gone to work,[4] so Nelene locked the children inside the house as she herself went to work nearby as a rattan weaver.

At around 1:30 in the afternoon on that day, accused-appellant came to get from Nelene the key to Teresa Ocrenas’ house. Accused-appellant lived in that house, and he said he wanted to go home to have lunch and take a bath before plying his route in his tricycle. For this reason, Nelene gave him the key.[5]

After a while, Nelene decided to check on her children. As she came near the house, she saw through the window her children lying on the bamboo bed while accused-appellant was sitting on the floor watching television.[6] She then went back to work.

After 10 minutes, however, Nelene decided to see her children again. She said she did this because she already had suspicions that accused-appellant was up to something bad. She said that, as she approached the house, she noticed its door and windows closed. Getting more suspicious, she slowly pushed the door open and entered the house. She saw accused-appellant sitting on the floor, his fly open, and his sex organ out, while Angelic was sitting on his lap, facing him, her legs spread apart, and without any underwear on. Nelene's three children were on the bed watching Angelic and accused-appellant.[7]

Nelene said she sent the other children out of the house. Angelic picked up her underwear and also went out, while accused-appellant lay on the bed and curled up, clutching a pillow. Nelene was so mad she went out of the house without saying a word to accused-appellant and took the children to her house located at the back of Teresa Ocrenas' house.[8] Nelene said she asked the children what the accused-appellant had done to them, but she received no answer. She quoted Angelic, however, as having told her "Kinakantot po kami ni Kuya Ian." [9] Three days later, Nelene said, she again talked to Angelic and her two daughters, Stephanie Jane and Paulene Jade. Stephanie Jane and Paulene Jade, this time, admitted that accused-appellant had molested them several times in the past but, because they were afraid, they did not tell their mother.[10]

On June 21, 1996, Nelene took Stephanie Jane to the Philippine National Police (PNP) Crime Laboratory in Camp Crame, Quezon City for physical examination. She had Paulene Jade examined on June 24, 1996 and Angelic Ocrenas on June 26, 1996. The results of their examination are as follows:

Victim: DIAZ, Stephanie Jean [should be Jane]

GENERAL AND EXTRAGENITAL:

Fairly developed, fairly nourished and coherent female child. Breasts are undeveloped. Abdomen is flat and soft.

GENITAL:

There is absence of pubic hair. Labia majora are full, convex and gaping with the pinkish labia minora presenting in between. On separating the same disclosed an elastic fleshy-type hymen, with deep healed laceration at 7 o'clock. External vaginal orifice admits tip of the examiner's smallest finger.

CONCLUSION:

Subject is in non-virgin state physically.

There are no external signs of application of any form of violence.

REMARKS:

Vaginal and peri-urethral smears are negative for gram-negative diplococci and for spermatozoa.

Victim: DIAZ, Paulene Jade

GENERAL AND EXTRAGENITAL:

Fairly developed, fairly nourished and coherent female child. Breasts are undeveloped. Abdomen is flat and soft.

GENITAL:

There is absence of pubic hair. Labia majora are full, convex and coaptated with the pinkish brown labia minora presenting in between. On separating the same disclosed a short, membrane-type hymen with deep healed laceration at 3 o'clock position. External vaginal orifice admits the tip of the examiner's smallest

finger with strong resistance.

CONCLUSION:

Subject is in non-virgin state physically.

There are no external signs of application of any form of violence.

REMARKS:

Vaginal and peri-urethral smears are negative for gram-negative diplococci and for spermatozoa.

Victim: OCRENAS, Angelic C.

GENERAL AND EXTRAGENITAL:

Fairly developed, fairly nourished and coherent female child. Breasts are undeveloped. Abdomen is flat and soft.

GENITAL:

There is absence of pubic hair. Labia majora are full, convex and coaptated with the pinkish brown labia minora presenting in between. On separating the same disclosed an elastic, fleshy-type hymen with shallow healed laceration at 10 o'clock and deep healed laceration at 7 o'clock. External vaginal orifice admits tip of the examiner's smallest finger.

CONCLUSION:

Subject is in non-virgin state physically.

There are no external signs of application of any form of violence.

REMARKS:

Vaginal and peri-urethral smears are negative for gram-negative diplococci and for spermatozoa.[11]

Teresita Cabiten, mother of the minor Jodalyn Cabiten, testified that she learned from Nelene Diaz on June 23, 1996 that her daughter Jodalyn had also been raped by accused-appellant. Teresita said she asked her daughter if there was any truth to what Nelene had told her, and Jodalyn admitted that once, when she was in the house of a certain Kuya Ramon, playing with other children, accused-appellant removed her underwear and inserted his penis into her vagina. At that time, accused-appellant lived with Ramon, who is the brother-in-law of Nelene Diaz.[12]

Teresita said she asked her son Jonjon, who was with Jodalyn when this incident happened. According to Teresita, her son told her that he had seen the accused-appellant pull Jodalyn under the bed and that, when he and his playmates looked under the bed, they saw the naked buttocks of accused-appellant who was on the floor with Jodalyn lying in front of him.[13] Teresita took Jodalyn to Camp Crame for examination where she was found to be in a "virgin state." [14]

Accused-appellant was arrested on June 26, 1996, hiding in a house at De Castro Subdivision in Valenzuela. He was taken to the municipal hall where he was identified by his victims who gave sworn affidavits to the police.[15] The case was later referred for inquest.

The other witnesses for the prosecution were three of the four young girls. After being made to understand the significance of an oath, the children testified.

Jodalyn Cabiten, 8, said that accused-appellant raped her. She demonstrated how she was raped with the use of two dolls. According to her, she was in the house of Kuya Ramon with her playmates sometime before Christmas of 1995. She was under a wooden bed with the accused-appellant. She was lying on her right side while accused-appellant was behind her, also lying on his right side. Accused-appellant was wearing a pair of short pants and briefs, while she was wearing sando, shorts, and panties. According to Jodalyn, accused-appellant raised her left leg and then inserted his penis in her vagina. She thought that accused-appellant applied saliva on his penis because she felt a slippery hard object being inserted into her vagina from behind. But Jodalyn was still hurt when accused-appellant inserted his penis into her private part. She did not tell her mother what happened for fear of being scolded as this was what accused-appellant told her would happen.[16]

Stephanie Jane Diaz, 7, testified that she was already in the second grade in Mapulang Lupa Elementary School and that she knew how to read, write, and count. She knew accused-appellant personally because the latter is her mother's cousin. Stephanie Jane testified that she was raped five times by accused-appellant but she does not remember the exact dates when this happened because she does not know how to read the calendar. She recalled, however, that accused-appellant started molesting her when she was six years old and that accused-appellant usually had sexual intercourse with her in the house of Angelic. Accused-appellant was staying in that house which was three meters away from their house. Stephanie Jane said that her sister, Arlene, was not touched by the accused-appellant. She confirmed that, at one time, when she was seven, her mother caught them watching accused-appellant about to molest Angelic. Because of this, accused-appellant was not able to continue the sexual act. He got a pillow instead which he clutched while lying on his side on the bed.[17]

On the other hand, Paulene Jade Diaz described with the use of two dolls what happened to her. She said accused-appellant was wearing a T-shirt and a pair of short pants, while she was in sando, shorts, and panties. As she could not count, she could not say how many times she was abused by the accused-appellant. Once, she was abused in the house of her cousin Monique. She said that she was lying on her back while accused-appellant was lying on her left facing her. He pulled his shorts and briefs down to his knees and then removed Paulene's shorts and panties. Accused-appellant told Paulene that he would put saliva on his penis so that he could penetrate her. Paulene saw accused-appellant putting saliva on his organ. She testified, by means of an illustration, that the penis of accused-appellant touched her labia majora but he failed to penetrate her.[18] According to Paulene, after accused-appellant was through, he next turned to Stephanie Jane.

On cross-examination, Paulene Jade said she was molested by the accused-appellant in the house of Angelic; that she was told to undress, otherwise she would be scolded; and that, while she was being abused, her two sisters and Angelic watched television. She said she was made to lie on her side as accused-appellant assumed the same position. But accused-appellant was not able to rape Paulene Jade because of the timely arrival of the latter's mother.[19]

On April 20, 1997, while the trial was ongoing, accused-appellant escaped from jail.[20] He has since remained at large. Accordingly, after the prosecution had rested, the case was submitted for decision.

On August 25, 1998, the trial court rendered its decision convicting accused-appellant in four cases, while acquitting him in the rest. It explained its decision thus:

The court . . . is of the considered view that the accused can only be held criminally responsible for one (1) act committed against each of the victims. The Court noted that the victims cannot tell the dates when the rape was committed nor narrated how the accused raped them on other occasions. Victim Jodalyn Cabiten testified she was raped before Christmas. Stephanie Jane Diaz said she was raped on a Sunday. Paulene Jade Diaz's story refers only to one (1) incident. Victim Angelic Ocrenas was not presented and eyewitness Nelene Diaz narrated only one rape incident committed by the accused on Angelic on May 16, 1996.

There is no clear and positive proof as to the other rape incidents committed to the victims.[21]

As Jodalyn Cabiten and Stephanie Jane were eight and seven years old respectively, accused-appellant was sentenced to reclusion perpetua in each of the criminal case in which they were the complainants. For failure of the prosecution to prove with certainty the age of Paulene Jade, who was alleged to be six years old at the time of the incident, accused-appellant was likewise sentenced to reclusion perpetua. For the commission of rape against Angelic Ocrenas, who was found by the trial court to be six years old, accused-appellant was sentenced to death. The trial court stated:

The Court noted that victim Angelic Ocrenas y Contreras was more than six (6) but less than seven (7) years old, at the time of the commission of the offense. She was born on December 26, 1989 as stated in the PNPCL Medico Legal Report No. M-981-96 (Exhibit C). Victim Jodalyn Cabiten as per the testimony of the mother, Teresita Cabiten was born on April 27, 1988. She was more than eight (8) years old at the time of the commission of the offense. Victim Stephanie Jane Diaz was more than seven (7) years old at the time of the commission of the offense, having been born on January 2, 1989 as mentioned in the PNPCL Medico Legal Report No. M-951-96 (Exhibit A). Victim Paulene Jade Diaz age was not clearly established. In the absence of proof that the victim was below seven (7) years old at the time of the commission of the offense, the penalty of death could not be imposed.[22]

Indeed, the records show that the only evidence of Paulene being six years old is the testimony of her mother.[23] The trial court, therefore, correctly held that the lone testimony of Nelene to establish Paulene's age is insufficient.

Accordingly, judgment was rendered as follows:

Criminal Case No. 5668-V-96

Finding the accused Ian Contreras y Eroy Guilty beyond reasonable doubt of the offense charged committed on Angelic Ocrenas y Contreras, a girl of more than six (6) years and less than seven (7) years old, at the time of its commission, he is hereby sentence of Death.

To indemnify the victim the amount of P50,000.00 with costs.

Criminal Case No. 5669-V-96

For failure of the Prosecution to establish the guilt of the accused beyond reasonable doubt of the offense charged, he is hereby acquitted with costs de oficio.

Criminal Case No. 5670-V-96

The Prosecution failed to prove the guilt of the accused beyond reasonable doubt, he is hereby Acquitted of the offense charged with costs de oficio.

Criminal Case No. 5671-V-96

The guilt of the accused Ian Contreras y Eroy not having proven beyond reasonable doubt, he is hereby Acquitted of the offense charged with costs de oficio.

Criminal Case No. 5672-V-96

Not having proven his guilt beyond reasonable doubt, accused Ian Contreras y Eroy is Acquitted of the offense charged. Costs de oficio.

Criminal Case No. 5673-V-96

The guilt of accused Ian Contreras y Eroy having proven beyond reasonable doubt of the offense charged committed on Jodalyn Cabiten y Alinyabon, eight (8) years old at the time of the commission of the offense, he is hereby sentenced to suffer the penalty of Reclusion Perpetua.

Accused is hereby ordered to indemnify the victim the sum of P50,000.00 and costs.

Criminal Case No. 5674-V-96

Accused Ian Contreras y Eroy guilt having been proven beyond reasonable doubt of the offense charged committed on Paulene Jade Diaz y Ocrenas, whose age at the time of the commission was not clearly established, he is hereby sentenced to Reclusion Perpetua.

To indemnify the victim the sum of P50,000.00 and pay the costs.

Criminal Case No. 5675-V-96

Finding accused Ian Contreras y Eroy guilty beyond reasonable doubt of the offense charged committed on Stephanie Jane Diaz y Ocrenas who was more than seven (7) years old at the time of the commission, he is hereby sentenced to suffer the penalty of Reclusion Perpetua.

Accused is hereby ordered to indemnify the offended party the sum of P50,000.00 and pay the costs.

Criminal Case No. 5676-V-96

For failure of the Prosecution to prove the guilt of the accused beyond reasonable doubt of the offense charged, he is hereby Acquitted with costs de oficio.

Criminal Case No. 5677-V-96

The Prosecution having failed to establish the accused guilt beyond reasonable doubt, he is hereby Acquitted of the offense charged. Costs de oficio.

Criminal Case No. 5678-V-96

The guilt of the accused Ian Contreras y Eroy not having proven beyond reasonable doubt, he is hereby Acquitted of the offense charged. Costs de oficio.

Criminal Case No. 5679-V-96

Accused Ian Contreras y Eroy guilt not having proven beyond reasonable doubt of the offense charged, he is hereby Acquitted with costs de oficio.[24]

Pursuant to Rule 122, §10 of the Rules on Criminal Procedure, the decision was automatically elevated to this Court for review in view of the imposition of the death penalty on accused-appellant. However, the judgment in Criminal Cases Nos. 5673-V-96, 5674-V-96, 5675-V-96, in each of which the penalty imposed is reclusion perpetua, had to be appealed pursuant to §3(c), Rule 122 of the Rules of Court if accused-appellant wished to secure a review of said decisions. Although he did not, we would nevertheless have extended the review of the record to the three cases in accordance with our ruling in *People v. Alitagtag*[25] that where cases have been consolidated and jointly tried and only one decision is rendered sentencing accused-appellant to death in one and to reclusion perpetua in the others, he will be deemed to have appealed from the judgment in the latter cases.

However, as the Solicitor General points out, because accused-appellant had escaped from jail, his appeal, even if one had been taken from the decisions in Criminal Cases Nos. 5673-V-96, 5674-V-96, and 5675-V-96, should be dismissed in view of Rule 124, §8 which provides:

SEC. 8. Dismissal of appeal for abandonment or failure to prosecute. ¾ The appellate court may, upon motion

of the appellee or on its own motion and notice to the appellant, dismiss the appeal if the appellant fails to file his brief within the time prescribed by this Rule, except in case the appellant is represented by a counsel de oficio.

The court may also, upon motion of the appellee or on its own motion, dismiss the appeal if the appellant escapes from prison or confinement or jumps bail or flees to a foreign country during the pendency of the appeal.

Accused-appellant cannot invoke the jurisdiction of the Court to seek a review of his conviction after he has made a mockery of the judicial process by escaping from prison.

In accordance with the ruling in *People v. Esparas*,^[26] the escape of accused-appellant does not affect the review in Criminal Case No. 5668-V-96 in which death penalty had been imposed because review in such case is not only automatic but also mandatory.

Accused-appellant contends:

I. THE TRIAL COURT ERRED IN METING OUT THE DEATH PENALTY ON THE ACCUSED FOR THE RAPE OF ANGELIQUE OCRENAS.

II. THE TRIAL COURT ERRED IN IMPOSING RECLUSION PERPETUA FOR THE RAPE OF JODALYN CABITEN FOR THE ACCUSED HAS NOT BEEN PROPERLY CHARGED OF THE RAPE AS THE INFORMATION ALLEGES RAPE FROM MAY TO JUNE 1996 WHEN COMPLAINANT TESTIFIED THAT THE RAPE OCCURRED BEFORE CHRISTMAS (BEFORE DECEMBER, 1995)

III. THE TRIAL COURT ERRED IN IMPOSING THE PENALTY OF RECLUSION PERPETUA FOR THE RAPE OF STEPHANIE JANE DIAZ CONSIDERING THAT SHE COULD NOT REMEMBER WHEN THIS HAPPENED.^[27]

Only the first assignment of error is relevant to this remaining appeal. Accused-appellant argues:

In [the] very recent case of *People v. Amado Sanchez Javier*, G.R. No. 126096, July 26, 1999 it was held that a birth certificate is necessary to establish the age of the victim. More so in this case where it is claimed Angelique was only 6 years old. Who knows? The child did not testify in court. Neither did her mother. Only her foster mother Nelene Diaz testified and she has no personal knowledge of Angelique's age.

....

Moreover, there was no categorical statement from Nelene Diaz that she saw Angelique being raped by Ian Contreras. All she said was that when she saw them, his zipper was open and his penis was out while Angelique was sitting on his lap with legs spread out, that she was not wearing any panty at all. Stephanie even testified that hindi inano si Angelique dahil nakita na ng mama ko.

Therefore either Ian Contreras should be acquitted from the alleged rape of Angelique Ocrenas or his penalty reduced to reclusion perpetua.^[28]

We find merit in accused-appellant's point.

Art. 335 of the Revised Penal Code, as amended by R.A. No. 7659, states:

ART. 335. When and how rape is committed. $\frac{3}{4}$ 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.

The crime of rape shall be punished by reclusion perpetua.

....

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

....

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

The elements of rape are:

- (1) That the offender had carnal knowledge of a woman;
- (2) That such act is accomplished under any of the following circumstances:
 - (a) By using force or intimidation; or
 - (b) When the woman is deprived of reason or otherwise unconscious; or
 - (c) When the woman is under 12 years of age.[29]

First. The evidence fails to show conclusively that accused-appellant had carnal knowledge of Angelic Ocrenas. Nelene Diaz admitted that she did not really see whether accused-appellant was able to insert his organ into Angelic's vagina or even whether his penis made contact with the labia of her vagina. The following is her testimony:

Q So when you saw upon going back the second time that the windows and door and the curtains were closed, what did you do?

A I slowly pushed the door.

Q And what did you see when the door was opened?

A When I entered, I saw Ian Contreras on the cemented floor near the door and Angelique was sitting on his lap and the zipper of Ian Contreras is open and his organ was out.

Q What about when you said that Angelique was sitting on his lap, will you please demonstrate to us what was the position of Angelique?

A Ian Contreras was sitting like this.

FISCAL RAZON:

Witness demonstrating that Angelique was sitting on Ian Contreras' lap facing each other.

ATTY. GALLO: (To the witness)

Q Now what about the legs of Angelique, did you see the position of her legs?

A The legs were spread out.

Q What was she wearing?

A She was wearing a dress.

Q Was she wearing any underwear?

A Angelique was not wearing any panty.[30]

....

Q Likewise, according to you, you returned for the second time and saw the windows, door and curtain were closed and you pushed the door. Right?

A Yes, sir.

Q How far were you when you saw the accused sitting on the floor while Angelic was sitting on his lap?

A From here to there.

FISCAL RAZON:

One armslength.

COURT:

Agree?

ATTY. GILERA:

Yes, Your Honor.

ATTY. GILERA (To the witness)

Q Did the accused see you?

A Yes, sir.

Q And that distance of one armslength you claimed that the zipper of the short of the accused was opened and his organ was out?

A Yes, sir.

Q What was the accused wearing at that time?

A He was wearing short pants.

Q However you did not see the accused inserted his organ into the vagina of Angelic. Right?

A No, sir.

....

Q And it was at that time when Angelic told you that she was allegedly raped several times. Right?

A Yes, sir.

Q Did Angelic told you when was the first alleged rape committed?

A She just answer those words.

Q But no time was mentioned by Angelic?

A No time was mentioned.

Q But you have no personal knowledge of this rape against Angelic?

A I have no personal knowledge.[31]

Nor was Angelic presented in court. Not even her mother testified. Only Nelene Diaz, a cousin and neighbor, was concerned enough to narrate what she witnessed on that fateful afternoon of March 16, 1996. But, although she said she saw accused-appellant holding Angelic on his lap and his organ had been put out of his underwear, Nelene admitted she did not see accused-appellant perform the sexual act.

Among Angelic's playmates, only Stephanie Jane talked of the afternoon of March 16, 1996. She, however, said that, because of the timely arrival of her mother Nelene, accused-appellant was not able to do anything else to Angelic. Stephanie Jane testified:

Q During the five times that the accused allegedly inserted his penis inside your vagina you did not tell this to your mother?

A No, sir, when I was seven (7) years old my mama saw Angelique when she slowly open the door.

Q Your mother saw Angelique?

A Yes, sir.

Q But you were not there?

A We were there, watching.

Q Watching what?

A Channel 7.

Q And when your mother slowly opened the door and saw Angelique you were all watching T.V.?

A Yes, sir.

Q Together with Angelique?

A Yes, sir.

Q But Ian was not there?

A He was also there.

Q What was Ian doing while you were watching T.V.?

A He was lying.

Q And sleeping?

A He was just lying down.

Q Ian was just lying and also watching T.V.?

A No, sir.

Q But during that time while you and your playmates were watching T.V., Ian was only lying and was not doing anything?

A Yes, sir, he took the pillow.

Q Ian took the pillow and used it in resting his head?

A Yes, sir.

....

ADDITIONAL DIRECT-EXAMINATION :

....

Q You also said that you were watching T.V. and you were watching Channel 7 and you were together with others, who were your companion at that time when you were watching T.V.?

A Arlene, Paulene, Angelique and I, sir.

Q And Ian was also there?

A Yes, ma'am.

Q During that time that your mother slowly opening the door, what if anything was Ian doing to Angelique?

....

A Hindi na po si Angelique inano dahil po nakita na po ng Mama ko.

Q What do you mean when said inaano?

A I do not know.[32]

Nelene's testimony that Angelic admitted to her that she had been sexually molested by accused-appellant is hearsay and is inadmissible for the purpose of showing that accused-appellant is guilty of rape. For the same reason, the sworn affidavit of Angelic given to SPO1 Arsenio V. Francisco cannot be given weight in the absence of Angelic's testimony in the trial court.

Nor can the laceration in Angelic's hymen be considered against accused-appellant. At most, this fact only shows that Angelic was raped, but as to who did it to her, the evidence does not show.

In the absence of direct proof that accused-appellant had carnal knowledge of Angelic, we cannot convict accused-appellant of rape.

Second. We now consider whether accused-appellant can be convicted of attempted rape. Attempted rape is committed when the offender commences the commission of rape directly by overt acts but does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.[33] The prosecution must, therefore, establish the following elements of an attempted felony:

1. The offender commences the commission of the felony directly by overt acts;
2. He does not perform all the acts of execution which should produce the felony;
3. The offender's act be not stopped by his own spontaneous desistance;
4. The non-performance of all acts of execution was due to cause or accident other than his spontaneous desistance.[34]

The four elements of an attempted felony were established.

However, these must be shown to have been carried out under any of the three circumstances in which the crime of rape may be committed. In this case, none of these circumstances was proven. Force or intimidation was not shown. Neither was the victim's lack of reason or her unconsciousness substantiated. Even the age of Angelic was not sufficiently established. Nelene testified:

Q If we may just clarify Your Honor. Mrs. Diaz, you said that you caught Mr. Contreras in the act of raping the ward of your auntie, what is the name of the ward of your auntie?

A Angelique Ocrenas.

Q And how old is this Angelique Ocrenas?

A Six (6) years old.[35]

Stephanie Jane also testified that Angelic was six years old at the time of the commission of the offense. Hence,

Q Now, you mentioned Angelique the sister of Ian who was with you on all these five times, do you know how old Angelique is?

A Six (6) years old.[36]

Both witnesses, however, did not have personal knowledge of what they testified on. In the case of *People v. Vargas*,^[37] we considered the testimonies of the victim and her aunt insufficient to establish the former's age. There was no documentary evidence to support their testimonies as neither the victim's birth nor her baptismal certificate was presented. Indeed, as held in *People v. Javier*,^[38] the minority of the victim must be proved with equal certainty and clearness as the crime itself. Otherwise, failure to sufficiently establish the victim's age is fatal and consequently bars conviction for rape in its qualified form.

In this case, the trial court based its finding that Angelic was six years old in March 1996 on PNP Medico-Legal Report No. M-981-96 of Angelic Ocrenas, which stated that her birthdate is December 26, 1989, thus making her six (6) years and almost three (3) months old on March 16, 1996. We cannot, however, make a finding on Angelic's age based on this document, because such information was also furnished by Nelene Diaz who testified that she had accompanied Angelic to Camp Crame for the medical examination. Moreover, the physician who prepared such report was not even presented in court to testify on the contents of the said document.

Nor can accused-appellant be convicted of acts of lasciviousness under Art. 336 of the Revised Penal Code, a crime included in the crime of rape. Its elements are as follows:

1. That the offender commits any act of lasciviousness or lewdness.
2. That it is done under any of the following circumstances:
 - a. By using force or intimidation; or
 - b. When the offended party is deprived of reason or otherwise unconscious; or
 - c. When the offended party is under 12 years of age.

3. That the offended party is another person of either sex.[39]

Though the first and the third elements were duly proven by the testimony of Nelene, the second element was not likewise established for the same reasons stated above.

The Solicitor General contends that accused-appellant should be held liable for unjust vexation under Art. 287(2) of the Revised Penal Code.^[40] However, the elements of unjust vexation do not form part of the crime of rape as defined in Art. 335 of the Revised Penal Code. Moreover, the circumstances stated in the information do not constitute the elements of the said crime. Accused-appellant, therefore, cannot be convicted of unjust vexation.

Indeed, we cannot hold accused-appellant liable for any of the above crimes. We are puzzled why the prosecution did not present Angelic herself or even her mother when this was done with the other victims. And we are more

surprised that the trial court meted unto accused-appellant the supreme penalty of death when there was no evidence to warrant it.

Hence, we are constrained to acquit accused-appellant on reasonable doubt with regard to the crime charged in Criminal Case No. 5668-V-96. Nevertheless, the decision in Criminal Cases Nos. 5673-V-96, 5674-V-96, and 5675-V-96, sentencing accused-appellant to reclusion perpetua and ordering him to indemnify the victim in the amount of P50,000.00, having become final and executory, stand.

WHEREFORE, the decision of the Regional Trial Court, Branch 171, Valenzuela City, insofar as it finds accused-appellant guilty of rape and sentences him to death, is REVERSED and accused-appellant is ACQUITTED. The appeal from the decision of the trial court, insofar as it finds accused-appellant guilty of rape in Criminal Cases Nos. 5673-V-96, 5674-V-96, and 5675-V-96 and sentences him to the penalty of reclusion perpetua in each of said cases, is DISMISSED and the decision of the trial court with respect to such cases is declared FINAL and EXECUTORY. Let an order of arrest issue against accused-appellant.

SO ORDERED.

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

Panganiban, J., reiterate separate opinions in *People v. Esparas*, 260 SCRA 593 and *People v. Raquino*, GR No. 132480, Sept. 30, 1999.

[1] Per Judge Adrian R. Osorio.

[2] Rollo, pp. 8-19.

[3] Records, p. 16.

[4] TSN, pp. 7-8, Aug. 13, 1996.

[5] Id. at 9.

[6] Id.

[7] Id. at 10-13.

[8] Id. at 13-15.

[9] Id. at 15.

[10] Id. at 16.

[11] Records, pp. 178-180.

[12] TSN, pp. 4-6, Sept. 9, 1996.

[13] Id. at 7.

[14] Id. at 7-8.

[15] Records, pp. 5-12.

[16] TSN, pp. 2-23, Oct. 14, 1996.

[17] TSN, pp. 4-11, Jan. 21, 1997.

[18] TSN, pp. 4-6, Oct. 15, 1997.

[19] TSN, pp. 3-4, Dec. 5, 1997.

[20] Records, p. 141.

[21] Rollo, p. 50.

[22] Id. (Emphasis added).

[23] See TSN, p.6, August 13, 1996.

[24] Rollo, pp. 51-52. (Emphasis added).

[25] 309 SCRA 325 (1999).

[26] 260 SCRA 539 (1996).

[27] Rollo, pp. 72-73.

[28] Id. at 90-92.

[29] 2 L. B. Reyes, The Revised Penal Code, 774-775 (1993).

[30] TSN, p. 12, Aug. 13, 1996.

[31] TSN, pp. 4-7, Aug. 20, 1996 (Emphasis added).

[32] TSN, pp. 9-11, Jan. 21, 1997.

[33] REVISED PENAL CODE, ART. 6.

[34] 1 L. B. Reyes, THE REVISED PENAL CODE, 98 (1981).

[35] TSN, p. 6, Aug. 13, 1996.

[36] TSN, pp. 10-11. Jan. 21, 1997.

[37] 257 SCRA 603 (1996).

[38] 311 SCRA 122 (1999).

[39] 2 L. B. REYES, REVISED PENAL CODE, 781 (1993).

[40] See Rollo, p. 170.

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