

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. FLORENCIO ABANILLA Y RIVERA, APPELLANT.

G.R. Nos. 148673-75. October 17, 2003

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PER CURIAM:

For automatic review before us is the consolidated decision[1] rendered by the Regional Trial Court of Batangas City,[2] in Criminal Cases Nos. 10857, 10858 and 10859, finding appellant Florencio Abanilla y Rivera guilty beyond reasonable doubt of three counts of rape committed against his seventeen-year-old daughter, Lorena Abanilla y Arellano, which resulted in the latter's pregnancy.

On April 7, 2000, the following informations were filed against appellant:[3]

Criminal Case No. 10857

That in or about June 1999 at around 11:00 o'clock in the evening at Brgy. Pulot Itaas, Batangas City, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, motivated by lust and lewd designs, by means of force, threat and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of one Lorena Abanilla y Arellano who was then a minor, 17 years of age, against her will.

That the qualifying aggravating circumstance of relationship is attendant in the commission of the offense, the 17-year old victim/offended party being the daughter of the accused.

Criminal Case No. 10858

That during the first half of October 1999 at Brgy. Pulot Itaas, Batangas City, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, motivated by lust and lewd designs, by means of force, threat and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of one Lorena Abanilla y Arellano who was then a minor, 17 years of age, against her will.

That the qualifying aggravating circumstance of relationship is attendant in the commission of the offense, the 17-year old victim/offended party being the daughter of the accused.

Criminal Case No. 10859

That during the last week of October 1999 at Brgy. Pulot Itaas, Batangas City, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, motivated by lust and lewd designs, by means of force, threat and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of one Lorena Abanilla y Arellano who was then a minor, 17 years of age, against her will.

That the qualifying aggravating circumstance of relationship is attendant in the commission of the offense, the 17-year old victim/offended party being the daughter of the accused.

Appellant pleaded not guilty to each of the informations charged and a joint trial was conducted. On March 12, 2001, the court a quo rendered the aforementioned consolidated decision, the dispositive portion of which reads:

WHEREFORE, the accused, FLORENCIO ABANILLA y RIVERA, is found guilty beyond reasonable doubt of the three (3) counts of aggravated rape under Articles 266-A and 266-B of the Revised Penal Code, and he is hereby sentenced to suffer the supreme penalty of death for each of the charges in these cases, with costs. He is further ordered to indemnify Lorena Abanilla with the sum of P50,000 for each of the three offenses or a total of P150,000 as moral damages.

In convicting appellant, the trial court found the following facts to have been duly established:[4]

The accused, forty four (44) years old, has been a widower for four (4) years. He was a carpenter and came home in the evening often drunk. In June of 1999, as well as in the second and last weeks of October 1999, the accused came home in Pulot Itaas, Batangas City drunk. At around 10:00 o'clock in the evening he laid beside her daughter, Lorena, who was sleeping. Lorena was then 17 years old for [she was] born on October 3, 1982. He touched her private parts, removed her shorts and pant[y], undressed himself and laid on top of her. He inserted his penis into her vagina causing her pain. He then made the up and down movement and ejected something hot from his penis. He told Lorena not to make any noise since her siblings were sleeping in the same room. He warned her not to tell anyone about the incident because, if she did, he would kill her. Out of fear Lorena did not report to anyone but on April 1, 2000, Modesta Ebora, Lorena's godmother who noticed Lorena's enlarged breasts, hips and abdomen, tried to talk to the latter who related that the accused was the one responsible for her condition. On April 3, 2000, while the accused was having a hair cut, Lorena reported to SPO4 Natividad who arrested the accused. Lorena was examined by a physician and an Ultra Sound examination was done on her which confirmed her pregnancy. On July 14, 2000, Lorena gave birth to a baby boy (see letter of Social Worker, p. 45 of record).

Appellant denied raping his daughter and counters with the following statement of facts in his brief:[5]

Accused FLORENCIO ABANILLA denied having raped his daughter during the incidents charged in the information. On June 12, 1999, he worked as a carpenter on a house built in their barangay in Pulot Itaas, Batangas City. His companions at their residence were his eight (8) children and a brother-in-law. In October 1999, he got a job at Tiera Verde, necessitating him to stay thereat for two (2) weeks. He labeled the charges made by her daughter as fabrications, and instigated by the relatives of her deceased wife due to a land dispute. He likewise averred that her daughter receives male visitors at their house (TSN, October 2, 2000, pp. 4-10).

The evidence for the prosecution consisted of the testimonies of four witnesses, namely: Lorena Abanilla, the complainant herself; Modesta Ronquillo, the complainant's godmother; Dr. Buenaventura Magboo, the physician who examined the complainant; and SPO4 Venecio Natividad, the policeman who arrested appellant. Of the four witnesses, it was only the complainant who testified on the rape incident itself. Modesta Ronquillo's testimony that the complainant disclosed to her that she was raped by appellant is hearsay and is not admissible to prove rape.[6] The other two witnesses, Buenaventura Magboo and SPO4 Venecio Natividad, respectively testified to the pregnancy of the complainant and the arrest of appellant.

On the other hand, the sole evidence presented by appellant was his own testimony denying the complainant's accusations against him.

Judging by the evidence on hand, determining whether or not the alleged rape occurred ultimately boils down to the word of the complainant against that of appellant. In deciding which party deserves credence, the Court applies the three guiding principles in reviewing rape cases: 1) an accusation of rape can be made with facility - it is hard to prove, and even more difficult for the accused to disprove; 2) in view of the intrinsic nature of the crime in which only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and 3) the evidence for the prosecution must stand or fall on its own merits and not draw strength merely from the weakness of that of the defense.[7]

Considering that appellant's conviction was chiefly due to the complainant's testimony, the Court is obliged to examine thoroughly the veracity of such testimony to ensure that it meets the required quantum of proof beyond reasonable doubt necessary to overturn the constitutional presumption of innocence.

The complainant testified on three alleged rape incidents. The first was said to have occurred during the month of June 1999, while the second and the third rape incidents purportedly occurred on the second and last weeks of October 1999, respectively. The pertinent portions of the testimony of the complainant are as follows:[8]

xxx xxx xxx

[FIRST INCIDENT]

q

Sometime in the month of June, 1999 do you remember if there was an unusual incident that happened to you?

WITNESS:

a

There, was, ma'am.

PROS. PANGANIBAN

q

What was that?

WITNESS:

a

I was raped by my father, ma'am.

q

Will you kindly tell this Honorable Court how you were raped by your father?

a

My father arrived 10:00 o'clock in the evening at our house, ma' am.

q

What did he do to you?

a

He was drunk, he asked for light, he asked me to prepare food, and then he ate.

q

According to you at 10:00 your father arrived drunk and he asked for light. What kind of light was that which you provide[d]?

a

[A] lamp, ma'am.

q

And according to you he asked for food. After he [ate] his supper what happened more?

a

I slept, ma `am. Afterwards I felt that he laid beside me.

q

After he laid down beside you, what happened more?

a

He touched my private part and told me not to create noise because he will kill me.

q

After that what happened?

a

He removed my shorts and panty, removed his under wear and placed himself on top of me and placed his organ into mine and made an up and down movement because he was not able to insert his organ into mine, I felt something hot came out from his organ.

q

According to you he placed himself on top of you and made an up and down movement on top of you how long was that?

a

About (4) minutes, ma `am

q

During the act that he was on top of you because he was not able to insert his organ, did it touch your private part?

WITNESS:

a

It touched my private part, ma `am.

PROS. PANGANIBAN:

q

And after you have felt that something hot came out front his organ, what did you feel?

a

Painful, ma `am.

q

Were you then attending school at that time?

a

Yes, ma'am.

q

In what year were you then?

a

Third year high school, ma'am.

q

Whereat?

a

Talahib Pandayan National High School, ma'am.

q

Have you reported the first incident to any authority or to anybody else?

a

I did not.

q

Why did you not report the said incident to anybody?

a

Because I am afraid of my father, ma'am.

q

Why were you afraid of your father?

a

Because he is going to kill me, ma'am.

[SECOND INCIDENT]

q

After this incident was there any incident that happened to you?

a

There was, ma'am, second week of October, 1999.

q

What was that incident?

a

He laid beside me, he touched my private part, removed my shorts and panty, he removed his underwear.

q

Can you tell the time when this incident happened?

a

10:00 o'clock in the evening, ma'am.

q

Where did it happen, the second time?

a

At our house, ma'am.

q

What were you doing then when he laid beside you?

a

I was sleeping then.

PROS. PANGANIBAN

q

You said you were sleeping, you mean to say you were awakened when he laid beside you?

WITNESS:

a

Yes, ma'am.

q

When your father removed your shorts and panty and he touched your private part, after that what did he do more?

a

He placed himself on top of me and forcibly inserted his organ and he was able to insert his organ into mine.

q

For how long [was] he on top of you?

a

Five (5) minutes, ma'am.

q

After he inserted his organ into yours what did he do?

a

He threatened me not to tell anyone because he will kill me.

q

After he inserted his private part into yours what did you feel?

a

Very painful, ma'am.

q

What more did he do to you?

a

None, ma'am.

q

Who were with you in your house at that time?

a

My siblings and father, ma'am.

q

In what part of the house did this happen?

a

Inside the room, ma'am.

q

Do you mean to say you have one room?

a

Two (2) rooms, ma'am.

q

Who were with you in that room sleeping.

a

My siblings, ma'am.

q

Who were they?

a

Cherryl.

q

Do you know her age?

a

(16) years old, ma'am.

WITNESS:

Angeline, 4 years old, Leody 10 years old, Robert, 6 y[ea]rs old and myself, ma'am.

PROS. PANGANIBAN:

q

At the time your father was [having] sexual intercourse [with you], do you know where your brothers and sisters you mentioned [were]?

a

They were beside me, ma'am.

q

What were they doing?

a

They were sleeping, ma'am.

q

Did you report this second incident to anybody?

a

No, ma'am.

q

Why did you not report to anybody?

a

Because I was afraid of my father. He is going to kill me, ma'am.

PROS. PANGANIBAN:

Your Honor may I manifest into the record that while the witness is answering she is crying.

[THIRD INCIDENT]

q

Aside from the second incident, is there any other instance that happened [to] you?

a

There was, ma'am.

q

What was this incident?

a

Last week of October, 1999, ma'am.

q

What happened to you during the last week of October?

a

I was sleeping, my father laid beside me, and touched my private part. After that he removed my shorts and panty and he removed his underwear.

q

What happened more?

a

He told me not to shout, he is going to kill me.

q

What happened?

a

He laid himself on top of me. He again inserted his organ into mine.

q

What more did he do to you after inserting his organ into yours?

a

None.

PROS. PANGANIBAN:

q

After inserting his private part into yours what happened?

a

He made an up and down movement and then I felt something hot come out of his organ. Then he warned me not to tell anybody because he is going to kill me.

q

Did you report this incident to anybody?

a

No, ma'am. Because I was afraid of my father, he is going to kill me.

xxx xxx xxx

The informations against appellant alleged that the crimes were committed by means of force, threat or intimidation. A perusal of the complainant's testimony indicates that the prosecution attempted to establish that the first and third rape charges were committed by means of threat and intimidation. The complainant testified that on the first incident, appellant touched her private part and told her not to create noise or he will kill her. Thereafter, appellant removed her shorts and panty and placed himself on top of the complainant. As to the third incident, the complainant testified that before appellant laid himself on top of her, he again told her not to shout or else he will kill her.

On the other hand, the complainant's testimony does not bear out the elements of threat or intimidation on the second rape incident. The complainant testified that appellant threatened to kill her, should she tell anyone about

what happened, only after the alleged rape was committed. Hence, appellant cannot be said to have threatened or intimidated the complainant into having sexual relations.[9] Nevertheless, as borne out by the same testimony, force was shown to have been employed in the consummation of the sexual act. In the complainant's testimony, she declared that appellant had "forcibly" inserted his organ.

The Court shall now determine whether the aforementioned circumstances employed by appellant sufficed to vitiate the consent of the complainant.

Under the doctrine laid down in *People v. Dulay*,^[10] the traditional concept of rape is that carnal knowledge is gained against or without the consent of the victim. If the rape is made by force, violence or intimidation, it is self-evident that it was made against or without the victim's consent. Republic Act No. 8353, the Anti-Rape Law of 1997, states:

"Article 266-D. Presumptions - Any physical overt act manifesting resistance against the act of rape in any degree from the offended party, or where the offended party is so situated as to render her/him incapable of giving valid consent, may be accepted as evidence in the prosecution of the acts punished under Article 266-A."

The rule is that resistance may be proved by any physical overt act in any degree from the offended party. Tenacious resistance, however, is not required. Neither is a determined and persistent physical struggle on the part of the victim necessary.^[11]

It is true that complainant's testimony does not indicate that she put up any resistance against the sexual advances of appellant. This notwithstanding, proof of resistance is not necessary in light of appellant's moral ascendancy over the complainant. Being the father, appellant's force or threat was sufficient to create fear in the mind of the complainant compelling her to submit to his sexual abuse.^[12]

The complainant's description of the first incident, however, cannot be deemed as rape. The complainant's testimony shows that appellant "was not able to insert his organ." Appellant merely rubbed it against her private part until ejaculation. In *People v. Campuhan*,^[13] the Court extensively discussed what should constitute rape:

xxx xxx xxx

....[T]ouching when applied to rape cases does not simply mean mere epidermal contact, stroking or grazing of organs, a slight brush or a scrape of the penis on the external layer of the victim's vagina, or the mons pubis, as in this case. There must be sufficient and convincing proof that the penis indeed touched the labias or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. As the labias, which are required to be "touched" by the penis, are by their natural situs or location beneath the mons pubis or the vaginal surface, to touch them with the penis is to attain some degree of penetration beneath the surface, hence, the conclusion that touching the labia majora or the labia minora of the pudendum constitutes consummated rape.

The pudendum or vulva is the collective term for the female genital organs that are visible in the perineal area, e.g., mons pubis, labia majora, labia minora, the hymen, the clitoris, the vaginal orifice, etc. The mons pubis is the rounded eminence that becomes hairy after puberty, and is instantly visible within the surface. The next layer is the labia majora or the outer lips of the female organ composed of the outer convex surface and the inner surface. The skin of the outer convex surface is covered with hair follicles and is pigmented, while the inner surface is a thin skin which does not have any hair but has many sebaceous glands. Directly beneath the labia majora is the labia minora. Jurisprudence dictates that the labia majora must be entered for rape to be consummated, and not merely for the penis to stroke the surface of the female organ. Thus, a grazing of the surface of the female organ or touching the mons pubis of the pudendum is not sufficient to constitute consummated rape. Absent any showing of the slightest penetration of the female organ, i.e., touching of either

labia of the pudendum by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness.

Without the penetration, the crime committed is either attempted rape or acts of lasciviousness.[14] Attempted rape, however, requires that the offender commence the commission of rape directly by overt acts but does not perform all the acts of execution by reason of some cause or accident other than his own spontaneous desistance.[15] In the present case, nothing prevented appellant from consummating the act and it would seem that he was already contended with rubbing his penis against the complainant without actually inserting it into her private part. Thus, appellant cannot be convicted of attempted rape but only of acts of lasciviousness for the June 1999 incident.

As to the second and third incidents, the complainant's candid narration is complete in all its details. There was a categorical declaration that appellant either used force or threatened to kill her before inserting his penis into her vagina. Evidently, all the required elements to convict for rape are present: 1) the offender had carnal knowledge; and 2) by using force, threats or intimidation.[16] The Court finds no reason to doubt the testimony of the complainant, whose credibility has already been passed upon by the trial court. Settled is the rule that when credibility is in issue, the Court generally defers to the findings of the trial court. Having heard the witnesses and observed their deportment during trial, the trial court is in a better position to decide the question.[17] Moreover, the testimony of the complainant is entitled to great weight, as a daughter would not accuse her father of a heinous crime had she not been really aggrieved.[18]

On the Proper Penalty

The Court now resolves the issue of whether the ultimate penalty of death should be imposed on appellant for the second and third rape charge.

Article 266-B of the Revised Penal Code dictates that the penalty of death shall be imposed if the victim is under eighteen years old and the offender is a parent. Appellant contends that even though his relationship to the complainant is admitted, the minority of the latter was not sufficiently proven. While there may have been testimony from the complainant, to the effect, that she was less than 18 years-old at the time of rape, it was still indispensable for the prosecution to present the original birth certificate. Appellant claims that a photocopy of the birth certificate was marked provisionally, as an exhibit, but the original was never submitted.

People v. Pruna, [19] held that the best evidence to prove the age of the victim is the original or certified true copy of the birth certificate. In the absence of the birth certificate, similar authentic documents such as baptismal certificates and school records which show the victim's age may be offered. Should these be unavailable, the testimony, if clear and credible, of the victim's mother or member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended party pursuant to Section 40, Rule 130 of the Rules of Court shall be sufficient under the following circumstances:

- If the victim is alleged to be below 3 years of age and what is sought to be proved is that she is less than 7 years old;
- If the victim is alleged to be below 7 years of age and what is sought to be proved is that she is less than 12 years old; and
- If the victim is alleged to be below 12 years of age and what is sought to be proved is that she is less than 18 years old;

The Court has meticulously examined the records of the case and finds that the original birth certificate was indeed presented by the prosecution.[20] In fact, during the prosecution's formal offer of exhibits, appellant

manifested no objection to it being entered into the records as part of the testimony of the complainant.[21] Clearly, the prosecution was able properly to establish the minority of the complaint in the manner prescribed by current jurisprudence. The Court therefore sustains the trial court's imposition of the death penalty.

WHEREFORE, premises considered, the assailed decision of the Regional Trial Court of Iloilo City, Branch 38, in Criminal Case No. 10857, is MODIFIED, and appellant is ACQUITTED of the charge of rape, but is CONVICTED of the crime of acts of lasciviousness, as defined and penalized under Article 336 of the Revised Penal Code, and sentenced to suffer the indeterminate penalty of 6 months of arresto mayor, as minimum, to 6 years of prision correccional, as maximum. Appellant is ordered to pay the complainant the amount of P20,000 as moral damages plus costs of suit.[22] The decision in Criminal Cases Nos. 10858 and 10859 are AFFIRMED, with the MODIFICATION that the award of moral damages is increased to P75,000 and additional awards are granted in the amounts of P75,000 as civil indemnity and p25,000 as exemplary damages, the same being for each of the rapes, all in accordance with recent jurisprudence.[23]

Three of the Members of the Court maintain the unconstitutionality of Republic Act No. 7659 insofar as it prescribes the death penalty. Nevertheless, they submit to the ruling of the majority to the effect that the law is constitutional and that the death penalty can be lawfully imposed herein.

In accordance with section 25 of Rep. Act No. 7659 amending Section 83 of the Revised Penal Code, let the records of this case be forthwith forwarded, upon finality of this Decision, to the Office of the President for possible exercise of the pardoning power. No costs.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Puno, Vitug, Panganiban, Quisumbing, Sandoval-Gutierrez, Carpio, Austria-Martinez, Carpio-Morales, Callejo, Sr., Azcuna, and Tinga, JJ., concur.
Ynares-Santiago, J., on official leave.
Corona, J., on leave.

[1] Rollo, pp. 18-25.

[2] Branch 1.

[3] Rollo, pp. 6-11.

[4] Decision pp. 4-5; Rollo, pp. 21-22.

[5] Appellant's brief, pp. 6-7; Rollo, pp. 45-46.

[6] *People v. Ulpindo*, 256 SCRA 201 (1996).

[7] *People v. Bitancor*, G.R. No. 147968, December 4, 2002.

[8] TSN, June 21, 2000, pp. 4-9; italics supplied.

[9] *People v. dela Cruz*, G.R. No. 136158, August 6, 2002.

[10] G.R. Nos. 144344-68, July 23, 2002.

[11] *Ibid.*

[12] *People v. Operario*, G.R. No. 146590, July 17, 2003.

[13] 329 SCRA 271 (2000).

[14] People v. Arce, 364 SCRA 550 (2001).

[15] People v. Ombreso, G.R. No. 142861, December 19, 2001.

[16] People v. Contreras, 338 SCRA 622 (2000).

[17] People v. Rabago, G.R. No. 149893, April 2, 2003.

[18] People v. Baniguid, 340 SCRA 92 (2000).

[19] G.R. No. 138471, October 10, 2002.

[20] Exh. "B," Records, p. 71.

[21] Id., p. 74.

[22] People v. Canoy, G.R. Nos. 148139-43, October 14, 2003.

[23] People v. Sambrando, G.R. No. 143708, February 24, 2003; People v. Soriano, G.R. Nos. 142779-95, August 29, 2002; People v. Catubig, 363 SCRA 621 (2001).

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