SECOND DIVISION

G.R. No. 224597 - ***People of the Philippines v. Dante Cubay y Ugsalan***

Promulgated:

29 JUL 2019

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DISSENTING OPINION

REYES, J. JR., *J.*:

But let your communication be, Yea, Yea; Nay, Nay
for whatsoever is more than these cometh of evil.

Matthew 5:37

History is telling that those who pursued the primrose path oft courted their own demise and eventual ruin. There is nothing more sinister than a gardener who feels entitled to indiscriminately pick a flower from a garden without the permission from his/her master just because he/she was allowed to tend it. For the most dangerous thief is not the one that lingers outside your home, but the one who enters it and pretends to be your friend.

The *ponencia* acquits the accused-appellant on the ground that 1) the Information do not charge the crime of rape; and 2) the elements of rape were not established.

I disagree.

At the outset, it is beyond comprehension how a young girl, of tender age and afflicted with significant communication deficiency, could possibly give her consent to an opportunistic and unscrupulous deviant, who has no ability or knowledge whatsoever to receive the same. Moreover, to rely on the opinion that the complainant's "weak resistance" justified the unwarranted advances of accused-appellant should deserve the utmost disdain from this Court and has no place in our jurisprudence lest it encourage malicious elements to abuse and exploit more victims in the future.

The Information had sufficiently and substantially established all the elements of the crime of rape

The *ponencia* postulates that the Information failed to state all the elements of the crime of rape, specifically that the accused-appellant employed force or intimidation, or that the victim was deprived of reason, unconscious, under 12 years of age, or was demented.

The separate Information charging accused-appellant with 44 counts of rape generally states the following, to wit:

> That on or about the (7th day of September, 2007), in the evening, at XXX, Province of Bukidnon, Philippines, particularly at the Special Education (SPED) Dormitory and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully and feloniously have [sic] sexual intercourse with [AAA], an 18-year-old but [sic] suffered a physical defect (hearing defect) **against her will**, to the damage and prejudice of [AAA] in such amount as may be allowed by law. (Emphasis supplied)

It is well-established in our jurisprudence that the acts or omissions constituting the offense and the qualifying and aggravating circumstances alleged **must be stated in ordinary and concise language; they do not necessarily need to be in the language of the statute, and should be in terms sufficient to enable a person of common understanding to know what offense is charged and what qualifying and aggravating circumstance are alleged**, so that the court can pronounce judgment.[1]

The essence of rape is carnal knowledge of a female either *against her will* (through force or intimidation) or *without her consent* (where the female is deprived of reason or otherwise unconscious, or is under 12 years of age, or is demented).[2] There is nothing more concise and direct statement/description to allege that accused-appellant employed force or intimidation, or that the victim was deprived of reason, unconscious, under 12 years of age, or was demented, from that he had carnal knowledge with the complainant **against her will**. While the means or methods employed by the accused were not specifically described in the legal terms used by the law, it was sufficiently implied by the use of the phrase "*against her will.*"

Furthermore, contrary to the assertions of the *ponencia*, it cannot be said that accused-appellant was not formally informed of the facts and the acts constituting the offense charged. The phrase "*against her will*" connotes deprivation of will or consent from the victim, as opposed to the defense of accused-appellant that his carnal knowledge of the former was mutual and with consent. The fact that he used the "sweetheart defense" necessarily

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1 *Olivarez v. Court of Appeals*, 503 Phil. 421, 435 (2005).
2 *People v. Butiong*, 675 Phil. 621, 634 (2011).

means that he understood and denies the allegation that any sexual congress that occurred between him and the complainant was against her will or consent.

Any ground to quash an Information does not entitle the accused to an acquittal

Assuming *arguendo* that the Information lacks an element of the crime charged against the accused-appellant, Section 4, Rule 117 of the Revised Rules of Criminal Procedure clearly states that **if the ground based upon is that "the facts charged do not constitute an offense," the prosecution shall be given by the court an opportunity to correct the defect by amendment.**[3]

In *People v. Leviste,*[4] this Court stressed that the State, like any other litigant, is entitled to its day in court; in criminal proceedings, the public prosecutor acts for and represents the State, and carries the burden of diligently pursuing the criminal prosecution in a manner consistent with public interest. Thus, by not allowing the prosecution to have the opportunity to amend the alleged defect in the Information during the trial stage and worse, to acquit the accused-appellant outright, effectively curtailed the State's right to due process.

In any event, any ground to sustain a motion to quash under Section 3, Rule 117 of the Rules of Court, except Section 3(g) and (i), is not a bar to another prosecution for the same offense[5] and if in custody, the accused shall not be discharged unless admitted to bail, if allowed.[6] Thus, it is incorrect to order the acquittal of accused-appellant because it would serve as double jeopardy and therefore, bar any subsequent complaint or information to be filed against him for the same offense. The rules regarding the same are clear and there is no room for any other interpretation thereto.

The date of the commission of the rape is not an essential element of the crime

The *ponencia* finds that the prosecution has failed to establish the elements of the crime of rape. The majority faults the complainant for: 1) failing to testify the accurate dates when she was raped by accused-appellant; 2) the testimony of the complainant was "noticeably terse, vague, equivocal and seriously wanting in details pertaining to the presence of the essential element of force and intimidation;" and 3) failing to prove that her resistance was *manifested and tenacious*.

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3 *People v. Andrade*, 747 Phil. 703, 716 (2014).
4 325 Phil. 525, 538 (1996).
5 RULES OF COURT, Rule 117, Section 6.
6 Id. at Sec. 5.

It is well-established that the date of commission of the rape is not an essential element of the crime.[7] Since human memory is fickle and prone to the stresses of emotion, accuracy in a testimonial account has never been used as a standard in testing the credibility of a witness.[8] This is even truer in cases where the victim suffers from a disability which clearly prevents her from effectively communicating with another person, as is in the instant case.

Neither is the belated filing of the Information against accused-appellant relevant, as jurisprudence is replete with rulings that a rape victim's deferral in reporting the crime does not equate to falsification of the accusation.[9]

It has been repeatedly ruled that "delay in reporting an incident of rape is not necessarily an indication that the charge is fabricated, particularly when the delay can be attributed to fear instilled by threats from one who exercises ascendancy over the victim."[10] The accused-appellant was the caretaker of the school dormitory where the complainant was residing. Under the context of "friendship," he gained the trust and goodwill of complainant in her vulnerable state. He had access to the complainant any time of the day, which was clearly shown when he went to her room, sent her roommate away and satisfied his lust against her will. The absence of force or intimidation during the subsequent times that he raped her gains no valuable significance considering that accused-appellant exerted a moral influence over the complainant, over which may substitute for actual physical violence and intimidation.[11]

Furthermore, to blame the victim for not raising the injustice that had happened to her immediately after her first ordeal to the proper authorities and allowing the perpetrator to continue with his vile advances would be absurd. Every person's reaction to a heinous act committed against his/her person, honor, liberty and/or property cannot be simply chalked up to mathematical statistics and logical drivel. One may instantly fling himself/herself against his/her attacker in righteous fury and seek immediate and just reparation for the damage done to his/her person and honor, while another may need a longer time to recover his/her sanity due the shock of the abuse, thus, committed against him/her and prefer to delay his/her retaliation against his/her tormentors. Only an omnipotent, omniscient and omnipresent God could tell how a rape victim should and would react after such harrowing and stressful situation. If even trained experts in this field have differing opinions on how the abused mind of a rape victim reacts after the

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7 *People v. Escultor*, 473 Phil. 717, 727 (2004).
8 *People v. Zafra*, 712 Phil. 559, 570-571 (2013).
9 *People v. Brioso*, 788 Phil. 292, 308 (2016); *People v. Pareja*, 724 Phil. 759, 779 (2014); *People v. Ogarte*, 664 Phil. 642, 661 (2011).
10 *People v. Cañada*, 617 Phil. 587, 604 (2009).
11 *People v. Opeña*, G.R. No. 220490, March 21, 2018.

fact, the Court should apply the same level of caution and not make any speculative judgments regarding when a rape victim should have been considered recovered enough to face his/her abuser/s privately, much less publicly in court.

As held in *People v. Ducay,*[12] [t]he range of emotions shown by rape victims is yet to be captured even by the calculus. It is, thus, unrealistic to expect uniform reactions from rape victims. We have no standard form of behavior for all rape victims in the aftermath of their defilement, for people react differently to emotional stress.

Thus, the Court should only rely on the evidence presented before it and not engage in guesswork on how the complainant should have reacted or the decisions she should have taken after being subjected to a traumatizing event at the hands of her abuser. That kind of "what-ifs" scenario should be left to the unforgiving imagination of the victim herself and the Court should not allow guilt to compound with the already insufferable grief she is already experiencing at the present.

The refusal of the victim to the advances of the accused, no matter when and how it was employed, can never ripen to an assent to the same

The *ponencia* opined that complainant's testimony attesting that she pushed accused-appellant away when he undressed her and touched her body, and that she was afraid when all of these were happening to her, "is at best equivocal" that is "subject to different interpretations depending on the attendant circumstances" and "hardly equates with force or intimidation within the penal provision defining and penalizing rape."

I strongly disagree.

This view should never be considered, much less accepted by the Court, as long as it still stands by its mandate to serve justice when it is due. It is incredible to consider the complainant's actions as anything but for accused-appellant to desist from satisfying his lust for her. It is not "a gentle 'no,' 'not yet,' 'wait,' 'I am shy' or 'not here.'" This is not a matter of coyness or bashfulness coming from complainant to entice or tempt accused-appellant to proceed with his sexual advances.

NO means NO. NO can never be a YES under any circumstance or event whatsoever. To say otherwise is the height of folly bordering on

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[12] 747 Phil. 657, 670 (2014).

guesswork and speculations to ascribe validation to what is inherently a horrendous act against one's honor and person.

From the direct testimony of the complainant's interpreter, she narrated that she was raped by accused-appellant and even told him that she hated him, to wit:

> COURT:
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> Q: When was the first time you met this (complainant) and narrated to you facts relating to these cases now on trial?
> A: If I'm not mistaken, it's late last year.
>
> Q: And what information or informations did (complainant) tell you in relation to these cases?
> A: She told me that she was raped several times.
>
> Q: How did you know these?
> A: Because of her actions Sir.
>
> Q: What actions did she give you?
> A: She has the pushing action, she even sign like this, it means I hate you, she [doesn't] like you.
>
> INTERPRETER:
>
> Witness signing using his 2 hands x x x
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> A: I know that she was raped because the action of (complainant) who demonstrated the pushing action by demonstrating pushing the other party and showed sign of "litik" kicking with the use of her finger means the sign language "I hate that person and in Tagalog "*pinagdidirihan,*" "loathing." [sic]
>
> FISCAL DALAPO: (to the witness)
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> Q: What action did she give you when she said she was raped?
> A: Aside from pushing action[,] she was laid down with Dante on top of her.[13]

The complainant's testimony was direct, clear and straightforward. It was neither noticeably terse, nor vague, nor equivocal, nor seriously wanting in details. She testified that she was raped, that she pushed away accused-appellant when he approached her to satisfy his lust for her and that she hated him to the point of disgust. There is absolutely nothing in her testimony that indicates consent or willingness to submit to accused-appellant's advances.

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[13] TSN, October 5, 2010, p. 21.

The degree of resistance employed by the victim in the crime of rape is immaterial and irrelevant to prove the same

In the more recent case of *People v. Romobio,*[14] citing *People v. Gayeta,*[15] this Court ruled that tenacious resistance against rape is not required; neither is a determined or a persistent physical struggle on the part of the victim is necessary.

Furthermore, the cited case by the *ponencia* was not even on all fours with the instant case. In *People v. Tionloc,*[16] the accused was an 18-year-old boy while the victim was 24 years old at the time of the incident and the latter was not inhibited by any disability that could affect her consent.

Even assuming *arguendo* that complainant did not offer resistance to accused-appellant's advances the first time that he raped her, it does not mean that she agreed or consented to the same.

Absence of resistance only implies passivity. It may be the product of one's will. It may imply consent. However, it may also be the product of force, intimidation, manipulation and other external forces.[17] To say that complainant, in keeping silent throughout her ordeal implied that she had given her consent would be a stretch of supposition and postulation that paints a colorful narrative on the events that transpired within the confines of the room where the rape incidents happened.

Complainant did not and was not able to give her consent, informed or otherwise, to the advances of the accused-appellant

The *ponencia* suggests that because the complainant is deaf-mute and certified to be only at Grade 2 level in formal sign language education, it does not mean that she is suffering from such mental abnormality, deficiency or retardation as hindering her capacity to give consent.

The term "deprived of reason" has been construed to encompass mental abnormality, **deficiency** or retardation.[18] In *People v. Quintos,*[19] this Court described a person "deprived of reason" as having deficiency in his/her

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14 G.R. No. 227705, October 11, 2017, 842 SCRA 512.
15 594 Phil. 636 (2008).
16 G.R. No. 212193, February 15, 2017, 818 SCRA 1.
17 *People v. Quintos*, 746 Phil. 809, 828 (2014).
18 *People v. Monticalvo*, 702 Phil. 643, 657 (2013).
19 Supra.

general mental abilities and has an impaired conceptual, social and practical functioning relative to his/her age, gender and peers. Because of such impairment, he/she does not meet the "socio-cultural standards of personal independence and social responsibility."[20]

In this case, at the time of the incident, complainant was a minor. She is a congenital deaf-mute.[21] Her disability is classified as "profound,"[22] which means very great, extreme or intense. Her level of communication in formal sign language is low, *i.e.,* that of a Grade 2 pupil,[23] as opposed to her peers in the same age group. And while she can discern what is right and what is wrong, it takes her a long time to do so.[24] Thus, it is highly doubtful how accused-appellant had managed to reach the conclusion that she had agreed or even consented to having sexual intercourse with him. In fact, he admitted he could only communicate with the complainant through her friend, EEE.[25]

Further still, under Article 266-A of the Revised Penal Code, rape can be committed by means of fraudulent machination or **grave abuse of authority**. It is established that accused-appellant is the school watchman assigned at XXX Elementary School, XXX SPED Center, and the SPED female dormitory, where the complainant was residing at the time of the incident. His wife is even the caretaker of the said dormitory where he, using this influence, had managed to board in one of its rooms. It is through his position in the school and his marriage to his wife that accused-appellant managed to form a connection with AAA, and eventually, finesse his way to the latter's room to unleash his bestiality.

Complainant was admittedly innocent to the notion of love between a man and a woman, much less any sexual congress that happens during the same

The *ponencia* pointed out that complainant's relatives acknowledged her to be normal and capable of engaging into romantic relations, albeit they opposed the idea as she was still studying at that time. However, complainant's own testimony clearly reveals that she does not even understand the concept of love between a man and a woman, to wit:

> Q: Ms. Witness, during your schooling at [SPED] School[,] you take lessons as mathematics, is that correct?
> A: Yes.
>
> Q: How about English?

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20 Id. at 830.
21 TSN, April 10, 2012, p. 6.
22 TSN, October 5, 2010, pp. 18-19.
23 Id. at 18.
24 Id. at 26.
25 TSN, November 13, 2012, pp. 7-12.

A: Yes.

Q: You also learn like such terms as friendship, is that correct? [sic]
A: Yes.

Q: And love, is that correct?
A: No.

Q: You were also learned [sic] concept as emotions?
A: No.

Q: Marriage?
A: No.

Q: Boyfriend and girlfriend?
A: No.

Q: But there are books that were taught to you by your teacher, is that correct?
A: Yes.

Q: And these books are about some kind of a relationship between a man and a woman?
A: Yes.

Q: And from these books[,] you learned concepts or stories about love?
A: No.[26]

I cannot see how the complainant would be able to give her informed consent to engage in a sexual congress willingly when she could not even comprehend how a relationship between a man and a woman works.

There were indications that complainant was traumatized because she was raped by accused-appellant

Finally, the *ponencia* took notice that the complainant *resisted* when it was proposed that she leave her dormitory and instead live with her aunt, BBB, and interpreted it as "consent" to her (complainant) relationship with accused-appellant. However, BBB's testimony would show otherwise, as such:

Q: During the cross [BBB], you said that your niece refuses to go with your father to transfer with you, and you only said that she resisted but you were not there present when she actually resisted, what do you mean by this?
A: It was my father and [CCC] who told me that she did not go with my father.

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[26] TSN, May 14, 2012, p. 4.

Q: Did they tell you how your niece resisted?
A: Yes sir, she resisted and **she doesn't want even to be held.**[27] (Emphasis supplied)

To my mind, the actions of the complainant do not show consent, much less affirm her supposed romantic relationship with accused-appellant. Her actions would suggest that she was traumatized to the extent that she does not even want to be touched.

Verily, already 12 years had lapsed since this case was filed before the trial court. While the rules are clear that instead of acquittal, the case should be remanded to the lower court for re-trial or require the prosecution to file another case against accused-appellant for the same offense, it would be a complete waste of time and resources. More importantly, it would only subject the victim and her family anew to the agony and suffering associated with the prosecution of crimes of this kind. Given the fact that accused-appellant was not deprived of his opportunity to be heard and present his evidence for his defense, I find that another trial for the same offense would only be futile and mundane.

May we be guided by the story of Medusa, who was obstinately hounded by the Greek God Poseidon until she ran to the temple of Athena for her guidance and protection. However, Athena simply stood by and watched as Poseidon raped Medusa. Worse, Athena cursed Medusa to become a monster, just because she (Medusa) let herself be violated by Poseidon inside Athena's temple.

Let this Court not be that temple, that stands by and watch as accused-appellant leave with his freedom then shackle the victim with the consequences of the sickening crime, thus, committed.

WHEREFORE, I vote to **AFFIRM** the conviction of accused-appellant Dante Cubay y Ugsalan.

JOSE C. REYES, JR.
Associate Justice

CERTIFIED TRUE COPY

ATTY. TERESITA A. TUAZON
Deputy Division Clerk of Court

[27] TSN, November 17, 2010, p. 24.