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[G.R. No. 117472, February 07, 1997]

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.LEO ECHEGARAY Y PILO, ACCUSED-APPELLANT.

R E S O L U T I O N

PER CURIAM:

On June 25, 1996, we rendered our decision in the instant case affirming the conviction of the accused-appellant for the crime of raping his ten-year old daughter. The crime having been committed sometime in April, 1994, during which time Republic Act (R.A.) No. 7659, commonly known as the Death Penalty Law, was already in effect, accused-appellant was inevitably meted out the supreme penalty of death.

On July 9, 1996, the accused-appellant timely filed a Motion for Reconsideration which focused on the sinister motive of the victim's grandmother that precipitated the filing of the alleged false accusation of rape against the accused. We find no substantial arguments on the said motion that can disturb our verdict.

On August 6, 1996, accused-appellant discharged the defense counsel, Atty. Julian R. Vitug, and retained the services of the Anti-Death Penalty Task Force of the Free Legal Assistance Group of the Philippines (FLAG).

On August 23, 1996, we received the Supplemental Motion for Reconsideration prepared by the FLAG on behalf of accused-appellant. The motion raises the following grounds for the reversal of the death sentence:

> "[1] Accused-appellant should not have been prosecuted since the pardon by the offended party and her mother before the filing of the complaint acted as a bar to his criminal prosecution.
>
> [2] The lack of a definite allegation of the date of the commission of the offense in the Complaint and throughout trial prevented the accused-appellant from preparing an adequate defense.
>
> [3] The guilt of the accused was not proved beyond a reasonable doubt.
>
> [4] The Honorable Court erred in finding that the accused-appellant was the father or stepfather of the complainant and in affirming the sentence of death against him on this basis.
>
> [5] The trial court denied the accused-appellant of due process and manifested bias in the conduct of the trial.

[6] The accused-appellant was denied his constitutional right to effective assistance of counsel and to due process, due to the incompetence of counsel.

[7] R.A. [No.] 7659, reimposing the death penalty is unconstitutional *per se:*

a. For crimes where no death results from the offense, the death penalty is a severe and excessive penalty in violation of Article III, Sec. 19 (I) of the 1987 Constitution.

b. The death penalty is cruel and unusual punishment in violation of Article III, Sec. 11 of the 1987 Constitution."

In sum, the Supplemental Motion for Reconsideration raises three (3) main issues: (1) mixed factual and legal matters relating to the trial proceedings and findings; (2) alleged incompetence of accused-appellant's former counsel; and (3) purely legal question of the constitutionality of R.A. No. 7659.

I.

It is a rudimentary principle of law that matters neither alleged in the pleadings nor raised during the proceedings below cannot be ventilated for the first time on appeal before the Supreme Court. Moreover, as we have stated in our Resolution in *Manila Bay Club Corporation v. Court of Appeals*:[1]

"If well-recognized jurisprudence precludes raising an issue only for the first time on appeal proper, with more reason should such issue be disallowed or disregarded when initially raised only in a motion for reconsideration of the decision of the appellate court."

It is to be remembered that during the proceedings of the rape case against the accused-appellant before the sala of then presiding Judge xxx, the defense attempted to prove that:

a) the rape case was motivated by greed, hence, a mere concoction of the alleged victim's maternal grandmother;

b) the accused is not the real father of the complainant;

c) the size of the penis of the accused cannot have possibly penetrated the alleged victim's private part; and

d) the accused was in xxx during the time of the alleged rape.

In his Brief before us when the rape case was elevated for automatic review, the accused-appellant reiterated as grounds for exculpation:

a) the ill-motive of the victim's maternal grandmother in prompting her grandchild to file the rape case;

b) the defense of denial relative to the size of his penis which could not have caused the healed hymenal lacerations of the victim; and

c) the defense of alibi.

Thus, a second hard look at the issues raised by the new counsel of the accused-appellant reveals that in their messianic appeal for a reversal of our judgment of conviction, we are asked to consider for the first time, by way of a Supplemental Motion for Reconsideration, the following matters:

a) the affidavit of desistance written by the victim which acted as a bar to the criminal prosecution for rape against the accused-appellant;

b) the vagueness attributed to the date of the commission of the offense in the Complaint which deprived the accused-appellant from adequately defending himself;

c) the failure of this Court to clearly establish the qualifying circumstance that placed the accused-appellant within the coverage of the Death Penalty Law;

d) the denial of due process and the manifest bias exhibited by the trial court during the trial of the rape case.

Apparently, after a careful scrutiny of the foregoing points for reconsideration, the only legitimate issue that We can tackle relates to the Affidavit of Desistance which touches on the lack of jurisdiction of the trial court to have proceeded with the prosecution of the accused-appellant considering that the issue of jurisdiction over the subject matter may be raised at any time, even during appeal.[2]

It must be stressed that during the trial proceedings of the rape case against the accused-appellant, it appeared that despite the admission made by the victim herself in open court that she had signed an Affidavit of Desistance, she, nevertheless, "strongly pointed out that she is not withdrawing the charge against the accused because the latter might do the same sexual assaults to other women." [3] Thus, this is one occasion where an affidavit of desistance must be regarded with disfavor inasmuch as the victim, in her tender age, manifested in court that she was pursuing the rape charges against the accused-appellant.

We have explained in the case of *People v. Gerry Ballabare,*[4] that:

"As pointed out in People v. Lim (24 190 SCRA 706 [1990], which is also cited by the accused-appellant, an affidavit of desistance is merely an additional ground to buttress the accused's defenses, not the sole consideration that can result in acquittal. There must be other

circumstances which, when coupled with the retraction or desistance, create doubts as to the truth of the testimony given by the witnesses at the trial and accepted by the judge."[5]

In the case at bar, all that the accused-appellant offered as defenses mainly consisted of denial and alibi which cannot outweigh the positive identification and convincing testimonies given by the prosecution. Hence, the affidavit of desistance, which the victim herself intended to disregard as earlier discussed, must have no bearing on the criminal prosecution against the accused-appellant, particularly on the trial court's jurisdiction over the case.

II

The settled rule is that the client is bound by the negligence or mistakes of his counsel.[6] One of the recognized exceptions to this rule is gross incompetency in a way that the defendant is highly prejudiced and prevented, in effect, from having his day in court to defend himself.[7]

In the instant case, we believe that the former counsel of the accused-appellant to whom the FLAG lawyers now impute incompetency had amply exercised the required ordinary diligence or that reasonable decree of care and skill expected of him relative to his client's defense. As the rape case was being tried on the merits, Atty. Vitug, from the time he was assigned to handle the case, dutifully attended the hearings thereof. Moreover, he had seasonably submitted the Accused-Appellant's Brief and the Motion for Reconsideration of our June 25, 1996 Decision with extensive discussion in support of his line of defense. There is no indication of gross incompetency that could have resulted from a failure to present any argument or any witness to defend his client. Neither has he acted haphazardly in the preparation of his case against the prosecution evidence. The main reason for his failure to exculpate his client, the accused-appellant, is the overwhelming evidence of the prosecution. The alleged errors committed by the previous counsel as enumerated by the new counsel could not have overturned the judgment of conviction against the accused-appellant.

III

Although its origins seem lost in obscurity, the imposition of death as punishment for violation of law or custom, religious or secular, is an ancient practice. We do know that our forefathers killed to avenge themselves and their kin and that initially, the criminal law was used to compensate for a wrong done to a private party or his family, not to punish in the name of the state.

The dawning of civilization brought with it both the increasing sensitization throughout the later generations against past barbarity and the institutionalization of state power under the rule of law. Today every man or woman is both an individual person with inherent human rights recognized and protected by the state and a citizen with the duty to serve the common weal and defend and preserve society.

One of the indispensable powers of the state is the power to secure society against

threatened and actual evil. Pursuant to this, the legislative arm of government enacts criminal laws that define and punish illegal acts that may be committed by its own subjects, the executive agencies enforce these laws, and the judiciary tries and sentences the criminals in accordance with these laws.

Although penologists, throughout history, have not stopped debating on the causes of criminal behavior and the purposes of criminal punishment, our criminal laws have been perceived as relatively stable and functional since the enforcement of the Revised Penal Code on January 1, 1932, this notwithstanding occasional opposition to the death penalty provisions therein. The Revised Penal Code, as it was originally promulgated, provided for the death penalty in specified crimes under specific circumstances. As early as 1886, though, capital punishment had entered our legal system through the old Penal Code, which was a modified version of the Spanish Penal Code of 1870.

The opposition to the death penalty uniformly took the form of a constitutional question of whether or not the death penalty is a cruel, unjust, excessive or unusual punishment in violation of the constitutional proscription against cruel and unusual punishments. We unchangingly answered this question in the negative in the cases of *Harden v. Director of Prison*,[8] *People v. Limaco*,[9] *People v. Camano,*[10] *People v. Puda*[11] and *People v. Marcos,*[12] In Harden, we ruled:

> "The penalty complained of is neither cruel, unjust nor excessive. In Ex-parte Kemmler, 136 U.S., 436, the United States Supreme Court said that 'punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.'"[13]

Consequently, we have time and again emphasized that our courts are not the fora for a protracted debate on the morality or propriety of the death sentence where the law itself provides therefor in specific and well-defined criminal acts. Thus we had ruled in the 1951 case of Limaco that:

> "x x x there are quite a number of people who honestly believe that the supreme penalty is either morally wrong or unwise or ineffective. However, as long as that penalty remains in the statute books, and as long as our criminal law provides for its imposition in certain cases, it is the duty of judicial officers to respect and apply the law regardless of their private opinions,"[14]

and this we have reiterated in the 1995 case of *People v. Veneracion*.[15]

> Under the Revised Penal Code, death is the penalty for the crimes of treason, correspondence with the enemy during times of war, qualified piracy, parricide, murder, infanticide, kidnapping, rape with homicide or with the use of deadly weapon or by two or more persons resulting in