

EN BANC

[G.R. No. 140033, January 25, 2002]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
ROGELIO MORENO Y REG, ACCUSED-APPELLANT.**

DECISION

DAVIDE JR., C.J.:

Before us for automatic review^[1] is the Decision^[2] of 9 August 1999 of the Regional Trial Court, Branch 138, Makati City, in Criminal Case No.99-026 finding accused-appellant Rogelio Moreno y Reg (hereafter ROGELIO) guilty beyond reasonable doubt of the special complex crime of robbery with rape and sentencing him to suffer the penalty of death and to pay the amounts of P200,000 as moral damages and P1,000 representing the value of the personal property taken from the victim Marites Felix (hereafter MARITES).

The accusatory portion of the Information^[3] reads as follows:

That on or about the 8th day of January 1999 in the City of Makati, Metro Manila, Philippines, a place within the jurisdiction of this Honorable Court, the above-named accused, armed with a bladed weapon, with intent to gain and by means of violence and intimidation, did then and there willfully, unlawfully rob, take and divest Marites Felix y Tacadena of one (1) gold ring, black bag containing one (1) ATM card, one (1) white Burger Machine T-shirt, 30 copies of Burger Machine coupons, one (1) pocket book, a bible, toothbrush, toothpaste and cash money in the amount of P200.00, all belonging to Marites Felix y Tacadena, to the latter's damage and prejudice and on the occasion of the said robbery and by using force and intimidation, accused did then and there willfully, unlawfully and feloniously have carnal knowledge of the complainant Marites Felix y Tacadena against her will and consent.

CONTRARY TO LAW.

Upon arraignment on 25 January 1999, ROGELIO, with the assistance of counsel *de officio*, entered a plea of not guilty.

At the pre-trial, the only fact the parties could agree on was that ROGELIO was wearing a Burger Machine T-shirt at the time he was arrested. Thereafter trial ensued.

The victim, 20-year-old MARITES, testified that at about 12:45 A.M. of 8 January 1999, as she was walking along ABC Commercial Complex, Makati, after her duty as service crew of the Burger Machine outlet located at Guadalupe Nuevo, Makati, she noticed a man behind her. Suddenly, the man put his arms around her and pointed

a fan-knife at her neck. Since the place was illuminated by streetlights and lights coming from the ABC Commercial Complex, MARITES noticed the tattoos in his arms and recognized him to be accused-appellant ROGELIO. Prior to 8 January 1999, ROGELIO would pass by their Burger Machine outlet twice a week, but there was never an occasion that he bought something from Burger Machine. [4]

ROGELIO dragged MARITES and at the same time ordered her to follow him to the side of ABC Complex, which is about five arms-length away from EDSA. MARITES removed her ring from her bag and gave it to ROGELIO.[5] The latter told her, "*Mamaya na iyan.*"[6] "[T]hat will come later on because I will give it back to you but you have to follow me first." [7]

ROGELIO grabbed MARITES's long-sleeved shirt, unbuttoned it, and pushed her to the vacant space behind the car then parked on the side of ABC Complex. He again pointed his knife at her throat and pulled down her pants. To her plea for mercy, he replied "*Huwag kang maingay, kundi papatayin kita.*" ROGELIO then removed his pants and again uttered "*Huwag kang maingay kundi sasaksakin kita.*" Still, she told him that he could get her bag if he needed money, but he replied, "I do not need money." [8]

ROGELIO ordered MARITES to open her legs apart or else he would kill her. MARITES was forced to obey him. ROGELIO then went on top of her with his right hand holding her throat, inserted his sexual organ into hers, and kept on pumping. After he was through, ROGELIO went again on top of MARITES and ordered her to put his organ inside her vagina. MARITES said, "*Ayoko.*" At this point, she heard someone nearby running. ROGELIO forthwith put on his shorts and snatched the shoulder bag of MARITES, which contained her ATM card, P200 cash, a small Bible, coupons of Burger Machine and T-shirt with Burger Machine markings. He then ran away towards the direction of the other side of EDSA. [9]

The vendors who saw MARITES crying as she was walking inquired about what happened to her. They brought her back to the Burger Machine outlet and called the police. MARITES joined the police in the search for ROGELIO around the vicinity and to the place where the incident happened. One of the two policemen saw her ring in said place. They continued to search the vicinity until they reached Laperal Compound. As they were approaching Guadalupe Bridge, several persons who were talking to each other scampered away upon seeing MARITES and the police officers. One of them was ROGELIO, who immediately went inside a house and turned off its lights. With the assistance of the barangay *tanod*, the police went to the back portion of the house and saw ROGELIO, who at the time was wearing a hat and a blue jacket with his head bowed down. [10]

Upon seeing ROGELIO, MARITES exclaimed: "He is the one." ROGELIO refused to remove his hat when she tried to remove it. After finally succeeding in removing his hat, MARITES confirmed: "He [was] the one who raped me." She then removed his jacket and saw under it her T-shirt with Burger Machine prints at the left sleeve and catsup stains in the front and upper parts of the shirt. This was the shirt she used in working at their Burger Machine outlet. [11]

The police brought ROGELIO and MARITES to the police station where MARITES was

investigated. At 9:00 A.M. of the following day, MARITES was examined by Dr. Aurea P. Villena, a medico-legal officer of the National Bureau of Investigation (NBI).^[12]

Dr. Aurea P. Villena testified that she conducted an examination on MARITES and found that MARITES sustained contusions on her breasts. She also noted the following:

- 2) Hymen, intact but distensible and its orifice wide (2.5 cm in diameter) as to allow complete penetration of an average-sized adult Filipino male organ in full erection without producing any genital injury;
- 3) Semenology - positive for human spermatozoa which is highly indicative of recent sexual intercourse with [a] man.^[13]

SPO3 Quillano Molmisa of the Makati Police Station corroborated the testimony of MARITES that upon receiving her complaint for rape, he, together with the latter and SPO4 Alejandro Alisangco, proceeded to the Laperal Compound in Guadalupe, which was known to the police officers as a hiding place of criminals in that area. ROGELIO ran away upon seeing MARITES and the police officers. ROGELIO was later found hiding in a kneeling position in Laperal Compound. MARITES was hysterical as she positively identified ROGELIO. SPO3 Molmisa brought ROGELIO to the *Ospital ng Makati* for medical examination before bringing him to the police station.^[14]

Accused-appellant ROGELIO, 19 years old and a resident of Laperal Compound, Guadalupe Viejo, Makati City, put up the defense of alibi. He testified that on or about 12:45 A.M. of 8 January 1999, he was sleeping in a folding bed located outside the house owned by his uncle, with whom he had been living. ROGELIO was roused from sleep by the police. MARITES approached him, took off his hat and was hysterical when she pointed to him saying, "*Iyan nga po iyon, iyan nga po iyon.*" "*Ikaw ang nangholdap sa akin at nang rape.*" Then the policemen tied his hands and brought him to the *Ospital ng Makati*, together with MARITES.^[15]

ROGELIO did not deny the fact that he was wearing a T-shirt with Burger Machine prints at the time of his arrest. According to him it had been with him for almost a year prior to the incident. It was given to him as a souvenir by a friend who worked at the Burger Machine.^[16]

Zaldy Carino, a 17-year-old neighbor and friend of ROGELIO for three years prior to the incident, testified that between 5:00 and 8:00 P.M. of 7 January 1999 he was playing basketball with ROGELIO and the latter's friends. ROGELIO was wearing a Burger Machine T-shirt the whole time that they were playing basketball. After winning the game, ROGELIO bought some *merienda* for his playmates, since he was the one who placed the bet. They stayed in ROGELIO's house until about 10:00 P.M. when ROGELIO told them that he was going to sleep. After Zaldy and his friends left, ROGELIO slept in a folding bed located outside the house of his uncle.^[17]

Between 2:00 and 3:00 A.M. of the following day, Zaldy was awakened when he heard noises. He went out of the house and went to the place where the noise was coming from. He found out that it came from the place where ROGELIO was

sleeping, and he saw ROGELIO being beaten up by four persons, including a barangay *tanod*. Zaldy also saw MARITES shouting, crying and claiming that the T-shirt worn by ROGELIO was hers. ROGELIO and another person by the name of Inteng were taken away.^[18]

After evaluating the evidence offered by the parties, the trial court gave full faith and credit to the version of the prosecution, convicted ROGELIO of robbery with rape and appreciated against him the aggravating circumstance of nocturnity. It disregarded ROGELIO's defenses of denial and alibi in view of his positive identification by MARITES as her assailant. Accordingly, in its Decision of 9 August 1999, the trial court decreed as follows:

FOR THE REASONS GIVEN, the Court finds accused Rogelio Moreno y Reg, guilty beyond reasonable doubt of having committed the special complex crime of robbery with rape, defined and penalized under Articles 293 and 294 of the Revised Penal Code as amended by Republic Act No. 7659. Applying Article 63 of the Revised Penal Code, considering the attendance of the aggravating circumstance of nocturnity and absent any mitigating circumstance, the Court imposes the penalty of death upon said accused. Accused is ordered to pay the complainant P200,000.00 as and for moral damages plus P1,000.00 representing the value of the personal properties taken but not recovered.^[19]

In his Appellant's Brief, ROGELIO claims that the trial court committed the following errors:

- I. ... IN FINDING THAT THE GUILT OF THE ACCUSED-APPELLANT FOR THE CRIME CHARGE HAS BEEN PROVEN BEYOND REASONABLE DOUBT.
- II. ... IN NOT DECLARING THAT THE ACCUSED-APPELLANT'S CONSTITUTIONAL RIGHT WAS VIOLATED WHEN HE WAS ARRESTED AND BROUGHT TO THE POLICE STATION FOR CUSTODIAL INVESTIGATION WITHOUT THE ASSISTANCE OF AN INDEPENDENT AND COMPETENT COUNSEL OF HIS CHOICE.
- III. ... IN APPRECIATING THE AGGRAVATING CIRCUMSTANCE OF NOCTURNITY IN THE COMMISSION OF THE CRIME CHARGED.

As to the first assigned error, ROGELIO banks on the alleged absence of resistance and struggle by MARITES as evidenced by the absence of injuries on her person. He likewise argues that it was improper to charge him with robbery with rape, since the taking of the victim's property was a mere afterthought and an independent act from the alleged commission of the crime of rape.

Anent the second assigned error, ROGELIO alleges that when he was arrested, he was not informed of his right to remain silent, and when he was forced by the policemen to undress and admit the crime, he was not assisted by an independent and competent counsel.

Finally, on the third assigned error, ROGELIO maintains that the trial court erred in appreciating against him the aggravating circumstance of nocturnity because the place where the rape took place was not covered with darkness, and there is no

evidence that nighttime was deliberately sought after by him to carry out a criminal intent.

In the Appellee's Brief, the Office of the Solicitor General (OSG) argues that ROGELIO's conviction was based on the direct testimony of MARITES and not on his alleged admission; in fact, no evidence on his alleged admission was presented by the prosecution. The OSG supports the trial court in convicting him of robbery with rape, as the law does not differentiate whether rape is committed before, during or after the robbery, it being enough that rape accompanied robbery.

The OSG also agrees on the existence of the aggravating circumstance of nighttime, since ROGELIO waited until 12:45 A.M. of the day in question to accomplish his evil design. It further asserts that even if the rape and robbery were considered independently, ROGELIO's sentence for the rape would still be death because such crime was committed with the use of deadly weapon and attended by nocturnity. Hence, it prays that the challenged decision of the trial court be affirmed. It, however, recommends that compensatory damages in the amount of P75,000 be awarded to MARITES and the moral damages be reduced to P50,000.

We are convinced beyond any shadow of doubt that ROGELIO succeeded in having carnal knowledge of MARITES with the use of force and intimidation. When he first put his arms around her, he had a fan-knife in his possession directed towards her neck. As he was on top of her, his hand was on her throat and he threatened to stab and kill her should she create a noise. Fear of further injury overpowered and stifled her attempt to resist the sexual assault. MARITES might have failed to resist ROGELIO's advances, but such failure was a manifestation of involuntary submission, not of consent. In any event, force or intimidation itself is sufficient justification for a woman's failure to offer resistance. It is well settled that physical resistance need not be established in rape when intimidation is exercised upon the victim and the latter submits herself against her will to the rapist's advances because of fear for her life and personal safety.^[20] Thus, the law does not impose a burden on the rape victim to prove resistance. What needs only to be proved by the prosecution is the use of force or intimidation by the accused in having sexual intercourse with the victim.^[21]

This court has frequently held that in rape cases, the conduct of a woman immediately following the alleged assault is of utmost importance. In this case, MARITES immediately reported the incident to the police, accompanied them in looking for her assailant, and upon seeing him she immediately identified him as her rapist. Thereafter, she underwent police investigation and submitted to a physical examination of her private parts by a medico-legal officer. Her conduct negated fabrication or prevarication on her part.^[22]

We cannot, however, sustain ROGELIO's conviction of robbery with rape.

The special complex crime of robbery with rape defined in Article 293 in relation to paragraph 2 of Article 294 of the Revised Penal Code, as amended, employs the clause "when the robbery shall have been accompanied with rape." In other words, to be liable for such crime, the offender must have the intent to take the personal property of another under circumstances that makes the taking one of robbery, and such intent must precede the rape.^[23] If the original plan was to commit rape, but