

## EN BANC

[ G.R. No. 126134, March 02, 1999 ]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JOVEN DE LA CUESTA Y PARARAS, ACCUSED- APPELLANT.**

### D E C I S I O N

**PARDO, J.:**

The case is before the Court for automatic review of the decision<sup>[1]</sup> of the Regional Trial Court, Makati City, finding the accused-appellant Joven de la Cuesta y Pararas guilty of six (6) cases of rape committed against nine-year-old (9) Merma Binasbas y Velasquez. For each case of rape, the trial court sentenced the accused to suffer the supreme penalty of death, and to indemnify the victim Merma Binasbas y Velasquez in the amount of P20,000.00, plus costs of suit.

On February 8, 1996, an assistant prosecutor of Makati, upon prior sworn complaint of Merma Binasbas y Velasquez, filed with the Regional Trial Court, Makati City, six (6) separate informations for rape against the accused.

The accusatory portion of the information<sup>[2]</sup> in Criminal Case No. 96-350 alleges:

"That on or about the 18<sup>th</sup> day of January 1996, in the City of Makati, Philippines and within the jurisdiction of this Honorable Court, the above-named accused with lewd design and by means of force, violence and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge with the said Merma Binasbas y Velasquez, a nine (9) years old girl, without her consent and against her will.

CONTRARY TO LAW."

The information<sup>[3]</sup> in each of Criminal Cases Nos. 96-351, 96-352, 96-353, 96-354, 96-355 is similarly worded except as to the dates of commission of the offense, which are on January 19, 20, 21, 22, 23, 1996, respectively.<sup>[4]</sup> The six cases were consolidated in one sala upon request of the prosecution.

Upon arraignment on February 26, 1996, the accused pleaded not guilty to all the charges. After due trial, the court *a quo* rendered a consolidated decision dated September 11, 1996, finding the accused guilty beyond reasonable doubt of six (6) counts of rape and sentencing him in each case to suffer the supreme penalty of death and to indemnify the victim Merma Binasbas y Velasquez in the amount of P20,000.00, plus costs.

Hence, this automatic review of the death sentence.

The prosecution's evidence established the following facts:

Merma Binasbas, a nine-year-old girl, lived with her mother Mercedes Binasbas in one of three rooms for rent in the second floor of House No. 283 Guijo St., Makati City, owned by spouses Salvador and Rodina Lipon. Mercedes' niece, Lyka Mariano, and her husband Richard, rented the other room; while boarders Tess<sup>[5]</sup> and Beth<sup>[6]</sup> occupied the third room. The spouses Lipon lived on the ground floor of the house. Three other girls lived in the room rented by Mercedes Binasbas, namely, Tina, Evelyn and Benilda, the "anak-anakan" of the accused Joven dela Cuesta, a 64-year-old man. Joven dela Cuesta (later referred to as Joven, for brevity) lived in the house adjacent to the Lipon's house. However, since his house was being renovated, Joven had been staying in the room rented by Mercedes Binasbas for about two months until January 23, 1996.

On January 18, 1996, Mercedes Binasbas left for Davao, leaving her daughter Merma in the care of her niece Lyka Mariano and Joven. That same night, while Merma and Joven were alone in the room, the accused started kissing her; sucking her mouth and tongue; touching her breast;<sup>[7]</sup> inserting his fingers inside her vagina; asking her to touch his penis; placing himself on top of the victim and inserting his penis for about an inch deep inside Merma's vagina.<sup>[8]</sup> Although Merma did not bleed, she testified that she was in pain and "(m)ay tumutulo pong malagkit sa aking hita."<sup>[9]</sup> For five (5) consecutive nights thereafter, from January 19 to 23, 1996, the accused repeatedly laid on top of Merma and inserted his penis inside her vagina. After each sexual encounter, the accused threatened her not to report anything to her mother and gave her twenty (P20.00) pesos.<sup>[10]</sup>

In the evening of January 22, 1996, Rodina Lipon overheard the accused telling Merma: "Maghugas ka na, pagkatapos ay magpalit ka ng underwear at pumunta ka sa taas." She also heard the accused asking for some water to wash himself.<sup>[11]</sup> Afterwards, Joven and Merma locked themselves inside the room rented by Mercedes. Rodina then repeatedly heard Merma giggling and uttering: "Itay, huwag po diyan. Itay, nakikiliti po ako." Rodina later relayed the incident to Lyka Mariano, who questioned Merma about the matter in Rodina's presence. After some prodding, Rodina heard Merma confessing that "pinakialaman po niya ako;" "pinasok niya ang ari niya sa akin;" "pinahahawakan niya ang ari niya;" and that she saw a white sticky substance afterwards.<sup>[12]</sup>

Lyka Mariano testified that on January 17, 1996, Mercedes Binasbas left Merma in her care while the former was in the province. When she learned of the sexual abuse suffered by Merma, she repeatedly asked the child regarding its veracity. Upon determining the truthfulness of the statement, on January 26, 1996, she accompanied Merma to the police station to file a formal complaint against the accused.<sup>[13]</sup>

Dr. Eduardo Vargas, Jr., the medico-legal officer who examined Merma on January 27, 1996, testified that there were no evident signs of extra-genital physical injuries on the body of the victim, the hymen was intact and the orifice was small, around 1.5 cms. in diameter.<sup>[14]</sup> He categorically stated that there was no medical basis of an insertion (of the penis) in the labia menora, although he did not discount the possibility that there was an insertion. He stated that with an intact hymen and small orifice, it was impossible that there was complete penetration. He also

maintained that there was no medical basis of even a partial penetration. On cross-examination, he admitted that there is a great possibility that there was no penetration at all.<sup>[15]</sup>

Accused Joven dela Cuesta denied the charges against him. He said that Mercedes left Merma in his care while the former went to the province to look for money to repay her debt to him. He looked after the child as his own granddaughter.<sup>[16]</sup> He averred that he had been entrusted to take care of Merma every time Mercedes went to work. He maintained that he was framed up by the spouses Lipon as a revenge for telling Merma that Salvador Lipon had a pending case for rape and that Merma should not play with the spouses' daughter since she might be raped too. He also insisted that Lyka Mariano was part of the frame-up since she was likewise indebted to him. Apart from these, he could not think of any reason for the alleged frame-up.<sup>[17]</sup> When asked by the court if he still had erections, he replied -- "hindi na po gaya ng dati." His last erection was three (3) years ago.<sup>[18]</sup>

The defense likewise offered the medico-legal findings as part of its evidence, stressing the statement that there was no laceration of the hymen. It also adopted the testimony of the medico-legal expert that there is a possibility that the organ of the accused did not touch the labia menora or labia majora of the victim.

The trial court gave full faith and credence to the testimony of Merma Binasbas, which it found to be "firm, categorical and convincing." The act of the accused in placing himself on top of Merma and inserting his penis inside the child's vagina for six (6) consecutive days constitutes six (6) separate counts of rape. It gave little credit to the testimony of the medico-legal expert that the hymen was still intact and there was no laceration. We have consistently held that rupture of the hymen or laceration of the vagina is not an essential element of rape, for mere knocking at the door of the pudenda by the accused's penis suffices to constitute the crime of rape.<sup>[19]</sup> In this case, the penis did not only knock but insertions were made into the vagina. The trial court found the accused's allegation of a frame-up too shallow to be believed. It considered Lyka Mariano as not the type of woman to concoct a rape charge against an old man and neighbor for a flimsy reason.

The trial court sentenced the accused to death for raping a girl under eighteen (18) years old and the offender is her guardian, in accordance with Art. 335 of the Revised Penal Code, as amended by R.A. No. 7659. It also ordered the accused to indemnify the victim in the amount of P20,000.00 for each count of rape. It concluded that the accused acted as Merma's guardian during the time that he committed the rape when Mercedes left Merma in the care of the accused. It reasoned that the fact that Merma was often left in the custody of the accused, that Merma even called him "Itay," and that he treated the child as his granddaughter were sufficient to consider him a guardian of Merma.<sup>[20]</sup>

In his first assignment of error, the accused-appellant avers that the trial court erred in considering him as the guardian of the victim. He contends that mere management of another person's affairs does not automatically constitute one as a guardian of the former. A judicial appointment is necessary to be considered a guardian of another person or of his property. The Solicitor General, in his appellee's brief, agrees with appellant that the trial court erred in imposing the death penalty. The Solicitor General avers that the accused was not the victim's guardian during