

**EN BANC**

**[ G.R. No. 175888, February 11, 2009 ]**

**SUZETTE NICOLAS Y SOMBILON, PETITIONER, VS. ALBERTO ROMULO, IN HIS CAPACITY AS SECRETARY OF FOREIGN AFFAIRS; RAUL GONZALEZ, IN HIS CAPACITY AS SECRETARY OF JUSTICE; EDUARDO ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY; RONALDO PUNO, IN HIS CAPACITY AS SECRETARY OF THE INTERIOR AND LOCAL GOVERNMENT; SERGIO APOSTOL, IN HIS CAPACITY AS PRESIDENTIAL LEGAL COUNSEL; AND L/CPL. DANIEL SMITH, RESPONDENTS.**

**G.R. NO. 176051**

**JOVITO R. SALONGA, WIGBERTO E. TAÑADA JOSE DE LA RAMA, EMILIO C. CAPULONG, H. HARRY L. ROQUE, JR., FLORIN HILBAY, AND BENJAMIN POZON, PETITIONERS, VS. DANIEL SMITH, SECRETARY RAUL GONZALEZ, PRESIDENTIAL LEGAL COUNSEL SERGIO APOSTOL, SECRETARY RONALDO PUNO, SECRETARY ALBERTO ROMULO, THE SPECIAL 16<sup>TH</sup> DIVISION OF THE COURT OF APPEALS, AND ALL PERSONS ACTING IN THEIR CAPACITY, RESPONDENTS.**

**G.R. NO. 176222**

**BAGONG ALYANSANG MAKABAYAN (BAYAN), REPRESENTED BY DR. CAROL ARAULLO; GABRIELA, REPRESENTED BY EMERENCIANA DE JESUS; BAYAN MUNA, REPRESENTED BY REP. SATUR OCAMPO; GABRIELA WOMEN'S PARTY, REPRESENTED BY REP. LIZA MAZA; KILUSANG MAYO UNO (KMU), REPRESENTED BY ELMER LABOG; KILUSANG MAGBUBUKID NG PILIPINAS (KMP), REPRESENTED BY WILLY MARBELLA; LEAGUE OF FILIPINO STUDENTS (LFS), REPRESENTED BY VENCER CRISOSTOMO; AND THE PUBLIC INTEREST LAW CENTER, REPRESENTED BY ATTY. RACHEL PASTORES, PETITIONERS, VS. PRESIDENT GLORIA MACAPAGAL-ARROYO, IN HER CAPACITY AS CONCURRENT DEFENSE SECRETARY, EXECUTIVE SECRETARY EDUARDO ERMITA, FOREIGN AFFAIRS SECRETARY ALBERTO ROMULO, JUSTICE SECRETARY RAUL GONZALEZ, AND INTERIOR AND LOCAL GOVERNMENT SECRETARY RONALDO PUNO, RESPONDENTS.**

**D E C I S I O N**

**AZCUNA, J.:**

These are petitions for *certiorari*, etc. as special civil actions and/or for review of the Decision of the Court of Appeals in *Lance Corporal Daniel J. Smith v. Hon. Benjamin T. Pozon, et al.*, in CA-G.R. SP No. 97212, dated January 2, 2007.

The facts are not disputed.

Respondent Lance Corporal (L/CPL) Daniel Smith is a member of the United States Armed Forces. He was charged with the crime of rape committed against a Filipina, petitioner herein, sometime on November 1, 2005, as follows:

The undersigned accused LCpl. Daniel Smith, Ssgt. Chad Brian Carpentier, Dominic Duplantis, Keith Silkwood and Timoteo L. Soriano, Jr. of the crime of Rape under Article 266-A of the Revised Penal Code, as amended by Republic Act 8353, upon a complaint under oath filed by Suzette S. Nicolas, which is attached hereto and made an integral part hereof as Annex "A," committed as follows:

"That on or about the First (1<sup>st</sup>) day of November 2005, inside the Subic Bay Freeport Zone, Olongapo City and within the jurisdiction of this Honorable Court, the above-named accused's (*sic*), being then members of the United States Marine Corps, except Timoteo L. Soriano, Jr., conspiring, confederating together and mutually helping one another, with lewd design and by means of force, threat and intimidation, with abuse of superior strength and taking advantage of the intoxication of the victim, did then and there willfully, unlawfully and feloniously sexually abuse and have sexual intercourse with or carnal knowledge of one Suzette S. Nicolas, a 22-year old unmarried woman inside a Starex Van with Plate No. WKF-162, owned by Starways Travel and Tours, with Office address at 8900 P. Victor St., Guadalupe, Makati City, and driven by accused Timoteo L. Soriano, Jr., against the will and consent of the said Suzette S. Nicolas, to her damage and prejudice.

CONTRARY TO LAW."<sup>[1]</sup>

Pursuant to the Visiting Forces Agreement (VFA) between the Republic of the Philippines and the United States, entered into on February 10, 1998, the United States, at its request, was granted custody of defendant Smith pending the proceedings.

During the trial, which was transferred from the Regional Trial Court (RTC) of Zambales to the RTC of Makati for security reasons, the United States Government faithfully complied with its undertaking to bring defendant Smith to the trial court every time his presence was required.

On December 4, 2006, the RTC of Makati, following the end of the trial, rendered its Decision, finding defendant Smith guilty, thus:

WHEREFORE, premises considered, for failure of the prosecution to adduce sufficient evidence against accused S/SGT. CHAD BRIAN CARPENTER, L/CPL. KEITH SILKWOOD AND L/CPL. DOMINIC DUPLANTIS,

all of the US Marine Corps assigned at the USS Essex, are hereby ACQUITTED to the crime charged.

The prosecution having presented sufficient evidence against accused L/CPL. DANIEL J. SMITH, also of the US Marine Corps at the USS Essex, this Court hereby finds him GUILTY BEYOND REASONABLE DOUBT of the crime of RAPE defined under Article 266-A, paragraph 1 (a) of the Revised Penal Code, as amended by R.A. 8353, and, in accordance with Article 266-B, first paragraph thereof, hereby sentences him to suffer the penalty of *reclusion perpetua* together with the accessory penalties provided for under Article 41 of the same Code.

Pursuant to Article V, paragraph No. 10, of the Visiting Forces Agreement entered into by the Philippines and the United States, accused L/CPL. DANIEL J. SMITH shall serve his sentence in the facilities that shall, thereafter, be agreed upon by appropriate Philippine and United States authorities. Pending agreement on such facilities, accused L/CPL. DANIEL J. SMITH is hereby temporarily committed to the Makati City Jail.

Accused L/CPL. DANIEL J. SMITH is further sentenced to indemnify complainant SUZETTE S. NICOLAS in the amount of P50,000.00 as compensatory damages plus P50,000.00 as moral damages.

SO ORDERED.<sup>[2]</sup>

As a result, the Makati court ordered Smith detained at the Makati jail until further orders.

On December 29, 2006, however, defendant Smith was taken out of the Makati jail by a contingent of Philippine law enforcement agents, purportedly acting under orders of the Department of the Interior and Local Government, and brought to a facility for detention under the control of the United States government, provided for under new agreements between the Philippines and the United States, referred to as the Romulo-Kenney Agreement of December 19, 2006 which states:

The Government of the Republic of the Philippines and the Government of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between our two nations, Lance Corporal Daniel J. Smith, United States Marine Corps, be returned to U.S. military custody at the U.S. Embassy in Manila.

(Sgd.) Kristie A. Kenney      (Sgd.) Alberto G. Romulo  
Representative of the United States of America      Representative of the Republic of the Philippines

DATE: 12-19-06

DATE: December 19, 2006

and the Romulo-Kenney Agreement of December 22, 2006 which states:

The Department of Foreign Affairs of the Republic of the Philippines and the Embassy of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between the two nations, upon

transfer of Lance Corporal Daniel J. Smith, United States Marine Corps, from the Makati City Jail, he will be detained at the first floor, Rowe (JUSMAG) Building, U.S. Embassy Compound in a room of approximately 10 x 12 square feet. He will be guarded round the clock by U.S. military personnel. The Philippine police and jail authorities, under the direct supervision of the Philippine Department of Interior and Local Government (DILG) will have access to the place of detention to ensure the United States is in compliance with the terms of the VFA.

The matter was brought before the Court of Appeals which decided on January 2, 2007, as follows:

WHEREFORE, all the foregoing considered, we resolved to DISMISS the petition for having become moot.<sup>[3]</sup>

Hence, the present actions.

The petitions were heard on oral arguments on September 19, 2008, after which the parties submitted their memoranda.

Petitioners contend that the Philippines should have custody of defendant L/CPL Smith because, first of all, the VFA is void and unconstitutional.

This issue had been raised before, and this Court resolved in favor of the constitutionality of the VFA. This was in *Bayan v. Zamora*,<sup>[4]</sup> brought by *Bayan*, one of petitioners in the present cases.

Against the barriers of *res judicata vis-à-vis Bayan*, and *stare decisis vis-à-vis* all the parties, the reversal of the previous ruling is sought on the ground that the issue is of primordial importance, involving the sovereignty of the Republic, as well as a specific mandate of the Constitution.

The provision of the Constitution is Art. XVIII, Sec. 25 which states:

Sec. 25. After the expiration in 1991 of the Agreement between the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.

The reason for this provision lies in history and the Philippine experience in regard to the United States military bases in the country.

It will be recalled that under the Philippine Bill of 1902, which laid the basis for the Philippine Commonwealth and, eventually, for the recognition of independence, the United States agreed to cede to the Philippines all the territory it acquired from Spain under the Treaty of Paris, plus a few islands later added to its realm, except certain naval ports and/or military bases and facilities, which the United States retained for itself.

This is noteworthy, because what this means is that Clark and Subic and the other

places in the Philippines covered by the RP-US Military Bases Agreement of 1947 were not Philippine territory, as they were excluded from the cession and retained by the US.

Accordingly, the Philippines had no jurisdiction over these bases except to the extent allowed by the United States. Furthermore, the RP-US Military Bases Agreement was never advised for ratification by the United States Senate, a disparity in treatment, because the Philippines regarded it as a treaty and had it concurred in by our Senate.

Subsequently, the United States agreed to turn over these bases to the Philippines; and with the expiration of the RP-US Military Bases Agreement in 1991, the territory covered by these bases were finally ceded to the Philippines.

To prevent a recurrence of this experience, the provision in question was adopted in the 1987 Constitution.

The provision is thus designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be equally binding on the Philippines and the foreign sovereign State involved. The idea is to prevent a recurrence of the situation in which the terms and conditions governing the presence of foreign armed forces in our territory were binding upon us but not upon the foreign State.

Applying the provision to the situation involved in these cases, the question is whether or not the presence of US Armed Forces in Philippine territory pursuant to the VFA is allowed "under a treaty duly concurred in by the Senate xxx **and recognized as a treaty by the other contracting State.**"

This Court finds that it is, for two reasons.

First, as held in *Bayan v. Zamora*,<sup>[5]</sup> the VFA was duly concurred in by the Philippine Senate and has been recognized as a treaty by the United States as attested and certified by the duly authorized representative of the United States government.

The fact that the VFA was not submitted for advice and consent of the United States Senate does not detract from its status as a binding international agreement or treaty recognized by the said State. For this is a matter of internal United States law. Notice can be taken of the internationally known practice by the United States of submitting to its Senate for advice and consent agreements that are policymaking in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case-Zablocki Act, within sixty days from ratification.<sup>[6]</sup>

The second reason has to do with the relation between the VFA and the RP-US Mutual Defense Treaty of August 30, 1951. This earlier agreement was signed and duly ratified with the concurrence of both the Philippine Senate and the United States Senate.

The RP-US Mutual Defense Treaty states:<sup>[7]</sup>