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SECOND DIVISION

[G.R. No. 175479, July 23, 2008]

THE PEOPLE OF THE PHILIPPINES, APPELLEE, VS. BIENVENIDO PAYOT, JR. Y SALABAO, APPELLANT.

D E C I S I O N

TINGA, J,:

On automatic review is the Decision[1] dated 12 August 2003 of the Regional Trial Court of Cabadbaran, Agusan del Norte convicting appellant Bienvenido Salabao Payot, Jr. (Payot) of raping AAA.[2] The dispositive portion of the decision provides:

> **WHEREFORE,** in the light of all the foregoing, the Court finds the accused Bienvenido Payot, Jr. y Salabao **GUILTY** beyond reasonable doubt of the crime of rape as charged in the Information. Accordingly, he is hereby sentenced to suffer imprisonment of **RECLUSION [PERPETUA]**, to pay the offended party [AAA], the amount of P50,000.00 as civil indemnity, P50,000.00 as exemplary damages, to suffer the accessory penalties provided for by law and to pay the costs.
>
> In the service of his sentence, accused is entitled to the full time during which he has undergone preventive imprisonment, conformably to Article 29 of the Revised Penal Code, as amended.
>
> The accused shall serve his sentence entirely at the Davao Prison and Penal Farm, Panabo City.
>
> IT IS SO ORDERED.[3]

Payot was charged with rape in an Information dated 14 December 1999, to wit:

> That on or about the 17th day of July,[*sic*] 1999, at 1:00 o'clock in the afternoon, more or less at Barangay Jaliobong, Kitcharao, Agusan del Norte, Philippines, and within the jurisdiction of this Honorable Court, the accused, by means of force and intimidation did then and there[,] willfully, unlawfully and feloniously have carnal knowledge of the complainant, [AAA], a woman[,] 16 years of age.
>
> CONTRARY TO LAW: (Art. 335, Revised Penal Code as amended by R.A. [No.] 7659).[4]

At his arraignment on 14 February 2000, Payot, with the assistance of his counsel entered a plea of not guilty.[5] Thereafter, trial on the merits ensued. The prosecution presented the victim, AAA, and Dr. Arsenia Referente (Dr. Referente), the physician who conducted an examination on AAA.

AAA testified that Payot is her elder sister's husband and that since she was 8 years old, she had been living with him together with her elder sister,[6] her younger brother and Payot's two children.

AAA narrated that on 17 July 1999, after having taken their lunch together, her sister and brother went up to the mountain to harvest bananas while the two children went to sleep in one room and she in another. AAA was awakened by the pressing weight of Payot over her body, and she realized that her skirt had already been pulled up and her panties rolled down to her knees. Payot, wearing only a vest and without his underwear on, held down AAA's waist with his hands, inserted his penis into AAA's vagina and made push-and-pull movements. Payot also kissed her on the neck. AAA could not shout for help and was unable to break free as Payot was then holding a bolo with his left hand. AAA felt pain in her vagina, and later on sensed a milky substance come out of Payot's penis as if the latter had urinated inside her. AAA cried afterward. AAA also testified that the nearest house was about 75 meters away.[7]

A couple of months after the incident, AAA left for her friend's, BBB's,[8] house to ask for help and in order to be away from Payot. BBB accompanied AAA to the Department of Social Welfare and Development which reported the incident to the police. She was then examined by Dr. Referente.[9]

Dr. Referente testified that she found two old healed hymenal lacerations in AAA's genitalia at 3 o'clock and 6 o'clock positions.[10] She stated that the lacerations could have been caused by the insertion of a hard object into the vagina, possibly an erect male genital organ. She explained that the lacerations could not have been caused by masturbation or by insertion of a finger into the vagina. She, however, said that the forceful insertion of two fingers, all together measuring more than three centimeters, into the vagina might produce lacerations of such nature.[11] She issued a medico-legal report containing these findings.[12]

The defense presented two witnesses, namely, appellant Payot himself and his friend, Urbano Sandulan (Sandulan).

Payot denied the charges against him and interposed the defense of alibi. He testified that at noon time of 17 July 1999, he had lunch with his family, AAA and her brother at his residence. At around 12:30 p.m., he asked permission from his wife to go to the barrio but before leaving, he instructed his wife to harvest some bananas. He left and headed for the house of Caridad Damian (Caridad), which is approximately ten (10) minutes away by foot, where he watched the television until 2:00 p.m. He then went to the house of Rudy Mosende for a drink of *tuba* and stayed there until 3:00 p.m. after which, he proceeded to go home.[13]

Payot also testified that he could not have held a bolo with his his left hand, contrary to AAA's testimony, because he had always used his right hand for writing and for carrying weapons. He likewise stated that he had more than once caught AAA in their house kissing her lesbian ("*tomboy*") friend in June 1999 for which he scolded the duo. He claimed that AAA resented this and the latter's lesbian friend allegedly angrily warned him to be careful as someday he would regret doing what he had

done. Payot moreover averred that there had been instances in the past when AAA's lesbian friend slept over in their house, but after several reprimands AAA no longer slept at their house and slept instead at her lesbian friend's house.[14]

Sandulan testified that at around 12:30 p.m. on 17 July 1999, he was heading for Payot's house to remind the latter about their bible-sharing activity for the evening; he met Payot on his way but since the latter was then on his way to the barrio, he (Sandulan) suggested that they go to the barrio together. They parted ways at Caridad's house where Payot had planned on watching the television. Sandulan then proceeded to Rudy Mosende's house, right across Caridad's house, also to remind Mosende of the activity that evening which was going to be held at Payot's house. While there, Mosende offered him a glass of *tuba*. During his stay at Mosende's house, Sandulan allegedly could tell that Payot likewise remained at Caridad's house. Sandulan left for home at 1:45 p.m. and on his way, saw Payot coming from Caridad's house and taking the direction to Mosende's.[15]

Upholding AAA's version of the events, the trial found Payot guilty in this wise:

> x x x the conclusion is ineluctable that the lacerations were caused by an erect penis. In fact when she testified, Dr. Referente confirmed that the lacerations could have been caused by an erect penis.
>
> Now, it may be asked: When was the occasion that complaining witness had sexual intercourse?
>
> According to her, the intercourse on 17 July 1999 was her first. Prior to this date and even after that, there is showing that she had carnal knowledge by any other men. Thus, there can be no doubt, therefore, that the erect penis of accused caused the 3:00 o'clock and 6:00 o'clock lacerations in her vagina.
>
> The insinuation by the defense that the lacerations could have been caused by the insertion of a finger or fingers is farfetched. According to the physician, the insertion of a finger or fingers with consent cannot cause laceration. Fingers can cause laceration only if inserted with force.
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> x x x x
>
> And since the defense has not presented an indicium of evidence that complaining witness [AAA] was actuated by improper motive to falsely testify against the accused, her declaration is worthy of belief and credence x x x
>
> x x x x
>
> Aside from insinuating that a lesbian caused complaining witness's lacerations, accused also interposed the defense of alibi by alleging that at the time of the commission of the crime, he was at the house of Caridad Damian viewing T.V. But trite as it is, the Court has to impress upon the accused once again the doctrine that alibi is the weakest defense an accused can concoct. It cannot prevail over the positive identification of the accused. The shopworn rule is that for alibi to

prosper, it is not enough to show that accused was at some place else at the time of the commission of the crime, it must also be proved by clear and convincing evidence that it was physically impossible for him to have been at the scene of the crime of its commission and commit the crime.

As shown by the defense, the house of Caridad Damian is only about 300 meters from the house of accused where the crime was committed. Thus, it was not physically impossible for him to be at the locus delicti at the time the crime was committed and commit the crime.

The defense also wanted to impress upon the Court that the offense could not have been committed inside accused's house because at that time, his wife, children and private complainant's younger brother were present then. Although the victim testified that only the children of the accused were still in the house at the time and that they were sleeping in the other room, as accused's wife and her younger brother, Anselmo Enoy, were out in the mountain harvesting bananas, it is not impossible for accused to have committed the offense.

x x x x

The prosecution has established beyond a shadow of doubt that accused has carnal knowledge of the private complainant at about 1:30 o'clock in the afternoon of 17 July 1999. It has also established that the carnal knowledge was by means of force and intimidation as he has a sharp bolo then in his possession.

x x x x

Whenever rape is committed with the use of a deadly weapon, the penalty shall be reclusion perpetua to death. This is provided for under Article 266-B of the Revised Penal Code, as amended. There being neither mitigating nor aggravating circumstance shown, the minimum thereof or reclusion perpetua, should be the appropriate penalty.

Under the first circumstance of Article 266-B, the death penalty could have been imposed upon the accused as he may be considered a guardian or relative by affinity within the fourth degree and that the offended party is a minor. Although minority is alleged in the Information, there is, however, no proof that the private complainant is really a minor. The circumstances of being a guardian or relative by affinity within the fourth degree were not also alleged in the Information. Therefore, the death penalty cannot be imposed.[16]

The judgment was elevated to the Court for automatic review. In a Resolution[17] dated 16 March 2005 of the Court in G.R. No. 161770,[18] the case was transferred to the Court of Appeals for intermediate review pursuant to the Court's ruling in *People v. Efren Mateo*.[19]

In a Decision[20] dated 7 June 2006, the Court of Appeals affirmed the judgment of conviction. The appellate court held that the prosecution was able to prove Payot's