

## EN BANC

[ G.R. No. 174058, December 27, 2007 ]

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.  
CARMELITO LAURENTE CAPWA, ACCUSED-APPELLANT.**

### D E C I S I O N

**VELASCO JR., J.:**

This is an automatic review of the May 10, 2006 Decision <sup>[1]</sup> of the Court of Appeals (CA) in CA-G.R. CR. HC No. 00141 entitled *People of the Philippines v. Carmelito Laurente Capwa*, which affirmed the May 21, 2001 Judgment<sup>[2]</sup> of the Surigao City Regional Trial Court (RTC), Branch 32 in Criminal Case No. 5250. The RTC found accused-appellant Carmelito Capwa guilty of incestuous rape and imposed upon him the death penalty.

Accused-appellant, his wife, and six children lived in a small nipa hut in Sitio Maibay, Barangay Sapa, Claver, Surigao del Norte. On the evening of September 4, 1998, while everyone else was sleeping, appellant entered his children's room and came to where his eldest daughter, AAA,<sup>[3]</sup> was sleeping. He then started to touch the different parts of AAA's body and placed himself on top of her.

He removed AAA's underwear, opened the zipper of his shorts, placed his penis inside her vagina, and repeatedly made pumping motions. AAA could not protest because accused-appellant was carrying a bladed weapon. AAA was only 15 years old then.<sup>[4]</sup> On September 11, 1998, AAA left their house and did not return anymore. AAA went to her auntie BBB's house and told her that she was raped by accused-appellant. BBB then accompanied AAA to the Department of Social Welfare and Development Office in Claver, Surigao del Norte.<sup>[5]</sup> On September 29, 1998, AAA, assisted by a social worker, lodged a complaint against appellant before the police.<sup>[6]</sup> Thereafter, she was medically examined at the CARAGA Regional Hospital. The medical findings revealed the following: "[AAA's hymen] not intact but has no fresh or sign of recent lacerations; slightly contused minor lips at 4 and 8 o'clock positions."<sup>[7]</sup> Consequently, an Information for attempted rape was filed.<sup>[8]</sup> However, before arraignment, the prosecution filed an Amended Information for consummated qualified rape.<sup>[9]</sup>

Accused-appellant's defense was denial. He claimed that AAA accused him of raping her only because he scolded and threatened to kill her for refusing to end her relationship with her boyfriend.<sup>[10]</sup>

On May 21, 2001, the RTC rendered a decision, the dispositive portion of which reads:

WHEREFORE, premises considered, the Court finds the accused, Carmelito Laurente Capwa, guilty beyond reasonable doubt as a principal of the crime of incestuous rape under Article 266-A, paragraph 1 (a), of the Revised Penal Code, in relation to Article 266-B thereof, and taking into consideration the aggravating/qualifying circumstance that the victim is under eighteen (18) of age and the offender is her own father, hereby imposes upon him the mandatory penalty of death by lethal injection; and to pay the costs.

The accused is ordered to pay to the victim x x x the following sums: [PhP] 75,000.00 as civil indemnity; [PhP] 50,000.00 as moral; damages; and [PhP] 25,000.00 as exemplary damages.

SO ORDERED.<sup>[11]</sup>

Due to the penalty imposed, the case was forwarded to this Court for automatic review and was originally docketed as G.R. No. 149709. However, in accordance with the ruling in *People v. Mateo*,<sup>[12]</sup> this Court, in its September 7, 2004 Resolution, transferred this case to the CA for intermediate review.

On May 10, 2006, the CA affirmed the May 21, 2001 RTC Decision.

The appellate court observed that accused-appellant questioned the amendment of the information for the first time during his appeal. In dismissing accused-appellant's arguments, the CA ruled that he failed to seasonably raise his objection to the amendment. It held that his silence at the time the amendment was made is deemed a consent to such amendment.

Moreover, in affirming the guilt of accused-appellant, the CA gave credence to the victim's testimony. It disregarded the discrepancy between the victim's *Sinumpaang Salaysay* and testimony in court, and emphasized that statements made in court are preferred over affidavits made ex parte. Also, it found that the victim's allegation of rape was supported by the medical evidence.

On October 3, 2006, this Court required the parties to submit supplemental briefs within 30 days. On November 13, 2006, plaintiff-appellee manifested that it would no longer file a supplemental brief. On the other hand, accused-appellant, to this date, has not yet filed a supplemental brief. Thus, for failure to comply with the October 3, 2006 Resolution, the Court deems as waived the filing of accused-appellant's supplemental brief and considers this case submitted for resolution.

Accused-appellant, in his May 26, 2003 Brief,<sup>[13]</sup> raised three issues for the appellate court's consideration. These issues are now deemed adopted in this present appeal:

## I

The trial court erred in allowing the amendment of the information to charge [accused-appellant] with consummated rape.

## II

The trial court gravely erred in finding that the prosecution had proven beyond reasonable doubt [aaccused-appellant's] guilt for rape, whether attempted or consummated.

### III

The trial court gravely erred in imposing the death penalty on [accused-appellant] considering the prosecution's failure to prove the minority of the complainant.<sup>[14]</sup>

The appeal has no merit.

Accused-appellant questions the propriety of allowing the amendment of the Information from attempted to consummated rape.

He claims that the complainant's *Sinumpaang Salaysay* failed to allege facts that justified the conclusion that the act allegedly committed by accused-appellant was consummated rape; thus, the trial judge gravely erred in accepting the Amended Information because no probable cause was shown. Plaintiff-appellee, on the other hand, claims that appellant is estopped from objecting to the amendment of the Information. It avers that objections to the amendment cannot be raised for the first time on appeal.

Accused-appellant is mistaken. He confused the determination of probable cause to hold a person for trial with the determination of probable cause to issue a warrant of arrest. The duty to determine the existence of probable cause in order to charge a person for committing a crime rests on the public prosecutor. It is an executive function, the correctness of the exercise of which is a matter that the trial court itself does not and may not be compelled to pass upon.<sup>[15]</sup> On the other hand, the duty to determine whether probable cause exists to issue a warrant of arrest rests on the judge--a judicial function to decide whether there is a necessity for placing the accused under immediate custody in order not to frustrate the ends of justice.<sup>[16]</sup>

Courts can not interfere with the discretion of the public prosecutor in evaluating the offense charged.<sup>[17]</sup> Thus, it cannot dismiss the information on the ground that the evidence upon which the information is based is inadequate. And unless it is shown that the finding of probable cause was made with manifest error, grave abuse of discretion, and prejudice on the part of the public prosecutor, the trial court should respect such determination.<sup>[18]</sup> Moreover, as correctly held by the CA, accused-appellant could not raise his objections in the Amended Information for the first time on appeal. It is settled that objections to the amendment of an information should be raised at the time the amendment is made;<sup>[19]</sup> otherwise, defects not seasonably raised are deemed waived.<sup>[20]</sup> In this case, accused-appellant never questioned the amendment either before or during trial. It is only when he appealed his conviction that he raised his objection. Hence, appellant's objections are already deemed waived.

We now rule on the prosecution's sufficiency of evidence. To sustain a conviction for rape, there must be proof of the penetration of the female organ.<sup>[21]</sup> In this