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EN BANC

[G.R. No. 142749. March 18, 2003.]

THE PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **BERNARDO C. GAVINO,** *defendant-appellant.*

SYNOPSIS

This is an automatic review of the decision holding appellant guilty of qualified rape and sentenced to suffer the penalty of death.

While appellant alleged delay in reporting the crime, the Court ruled that the same was due to the death threats of appellant who exercised moral ascendancy over the victim. Further, the complained forcible defloration was corroborated by the results of the physical examination conducted on the victim. The victim may have also signed an affidavit of retraction. It was established, however, that the same was signed under duress. At any rate, the Court modified the crime committed to two counts of simple rape punishable by *reclusion perpetua* for each count. There had been no adequate proof of the victim's minority and appellant's relationship with the victim.

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; NOT AFFECTED BY DELAY IN REPORTING THE CRIME.** — The reluctance and delay of Wenna in reporting the series of incestuous abuses she suffered for many years is not necessarily indicative of a fabricated charge. The delay is due to the pattern of fear instilled by the appellant on Wenna. The sexual assaults were accompanied with death threats from appellant who exercised moral ascendancy over her.

2. **ID.; ID.; ID.; FINDINGS OF TRIAL COURT, RESPECTED.**— We adhere to the settled rule that the calibration of the credibility of a witness is best left to the discretion of the trial judge

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who was able to observe the demeanor of the witness while testifying.

3. **ID.; ID.; ID.; POSITIVE TESTIMONY OF DEFLORATION CORROBORATED BY PHYSICAL EXAMINATION, UPHELD.**— The victim's positive testimony of forcible defloration was corroborated by the results of the physical examination conducted on her. It is settled that the existence of lacerations, coupled with the victim's testimony, are the best physical evidence of sexual abuse. In contrast, we find the defense adduced by the appellant to be flimsy. It is unnatural for a naïve, barrio lass to accuse her father of such a grave, personal offense and expose herself and her family to social humiliation if it were not true.

4. **ID.; ID.; AFFIDAVIT OF RETRACTION; NOT APPRECIATED.**— Appellant insists that the trial court failed to give due weight to Wenna's affidavit of retraction considering that its execution and signing was attended by defense witnesses Atty. Demecillo and Pastor Elizardo. We are not persuaded. For one, Atty. Demecillo who prepared Wenna's affidavit of retraction cannot be considered a neutral witness as he was the counsel of appellant during the trial of these cases. Thus, his testimony as to the alleged voluntary execution of Wenna's affidavit of retraction is immediately suspect. Secondly, Pastor Felizardo admitted during the trial that he was unaware whether Wenna signed the affidavit due to threats or a promise of reward. Thirdly, it is of judicial notice that an affidavit of desistance or retraction is easily procured through intimidation, threat or a promise of reward. Courts thus view such affidavit with suspicion and reservation. In the case at bar, the prosecution duly established that Wenna signed the affidavit of retraction under duress. Her relatives accosted her in school while she was under the custody of the DSWD and took her to Agusan to sign the said affidavit. Its content was not explained to Wenna nor was she given a chance to read it. She was forced to sign the affidavit as she was threatened that she could not return to Cagayan de Oro City if she refused.

5. **CRIMINAL LAW; RAPE; MINORITY; GUIDELINES.**— In *People vs. Ramirez*, the Court *en banc* laid down the guidelines for the proper appreciation of minority either as an element of a crime or as a qualifying circumstance. It held that: (1) the best evidence to prove the age of the offended party is an

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original or certified true copy of the certificate of live birth of such party; (2) in its absence, similar authentic documents such as baptismal certificate and school records which show the date of birth of the victim would suffice to prove age; (3) if the certificate of live birth or authentic document is shown to have been lost or destroyed or otherwise unavailable, the testimony, if clear and credible, of the victim's mother or a member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended party pursuant to Section 40, Rule 130 of the Rules of Evidence shall be sufficient; and, (4) in the absence of all the above, the complainant's testimony will suffice provided it is expressly and clearly admitted by the appellant.

6. **ID.; ID.; QUALIFYING CIRCUMSTANCES; RELATIONSHIP AND MINORITY; NOT APPRECIATED.** – No birth certificate or similar authentic document was offered by the prosecution to prove Wenna's minority. Neither was it shown that they were lost, destroyed or unavailable at the time of the trial. The testimony of the mother or the victim relative to the latter's age cannot be accepted as adequate proof thereof. In addition, we note that the prosecution failed to adduce independent proof to establish appellant's relationship with the victim. Although Wenna's filiation to appellant and minority was neither refuted nor contested by the defense, proof thereof is critical considering the penalty of death imposed for qualified rape. Thus, the prosecution's failure to sufficiently establish Wenna's minority and relationship to appellant bars the latter's conviction for qualified rape and the imposition of the extreme penalty of death.

7. **REMEDIAL LAW; CRIMINAL PROCEDURE; WHERE INFORMATION CHARGED MULTIPLE RAPE AND COMMISSION OF TWO SIMPLE RAPES ESTABLISHED; PROPER PENALTY.** – On a last note, we find that the trial court erred in finding the appellant guilty of only one (1) count of rape considering that the Information charged appellant with multiple rape and the commission of two (2) counts of simple rape was established beyond reasonable doubt by the prosecution at the trial. *IN VIEW WHEREOF*, the appealed Decision is modified. Appellant is found guilty of two (2) counts of simple rape. He is sentenced to suffer the penalty of *reclusion perpetua*

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for each count and to pay Wenna Gavino the total amount of two hundred thousand pesos (₱200,000.00), broken down as follows: fifty thousand pesos (₱50,000.00) as civil indemnity for each count of rape, and another fifty thousand pesos (₱50,000.00) as moral damages also for each count.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Marciano B. Cerna, Jr. for acused-appellant.

D E C I S I O N

PUNO, *J.*:

"The family is under attack," declared the Pope in the recently concluded Third World Meeting of Families. With the growing number of incestuous rape cases, however, it is unfortunate that one such attack comes from within the family.

WENNA GAVINO charged her father, appellant *BERNARDO C. GAVINO*, with multiple rape in an Information which reads:

"That sometime in the year 1989 and up to March 10, 1995 in the premises and vicinity particularly at the house of the accused located at Purok 9, Poblacion, Prosperidad, Agusan del Sur, Philippines and within the jurisdiction of this Honorable Court, the above-named accused by force, threats and intimidation, with lewd design, did then and there wilfully, unlawfully and feloniously succeed in having sexual intercourse with his own daughter WENNA GAVINO, a girl who (was) then nine (9) years of age, of good reputation, against her will and consent to the damage and prejudice of the said victim consisting of moral, actual and compensatory damages.

CONTRARY TO LAW. Article 335 of the Revised Penal Code."[1]

Wenna, a resident of Purok 9, Prosperidad, Agusan del Sur, recounted the sexual betrayal she suffered in the hands of her own father, the appellant. Sometime in 1989, Wenna, then nine (9) years old, was ordered by the appellant to sleep beside him

[1] *Rollo* at 7.

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in the bedroom. When she refused, the appellant got mad and she had to obey him. Her younger brothers slept in the living room while her mother spent the night in the town of Gakob where she had a teaching job. Wenna was only able to sleep briefly that night for, at about midnight, the appellant, wearing a *sando* and brief, suddenly pulled her close to him. He hit her thrice on the abdomen and she felt dizzy. He then made her lie on the bed with her back against him. He inserted his fingers into her organ before he finally penetrated her. Wenna felt intense pain but could not shout for help as the appellant covered her mouth with his palm. While molesting her, appellant told her that it was she he loved and not her mother.

After satiating his savage urge, appellant left the bedroom and repaired to the living room. Wenna continued to lie on the bed. She touched her organ and felt it bleeding. She wreathed with pain, too weak to move. Sleep eluded her that night. She kept silent about her ordeal as the appellant threatened to kill her, her mother and siblings should she reveal her defilement.

Appellant's sexual assaults on Wenna continued for the next six (6) years, until Wenna reached the age of fifteen. Wenna recounted that she was last abused on March 10, 1995, at about 6:30 a.m. Her mother was then outside the house, bathing at the spring. The appellant ordered her brothers to go to school earlier than usual. Then, alone in the house, Wenna was pulled by the appellant to the bedroom. He hit her abdomen and kicked her back. He then lifted her, dropped her on the wooden bed and succeeded on having carnal knowledge of her. Pain engulfed her body.

Wenna finally decided to break her silence. She reported to her science teacher, Ms. Ismael, that the appellant had been beating her up. Nonetheless, she did not disclose the sexual abuses she suffered in the hands of the appellant out of embarrassment. Ms. Ismael advised her to seek the assistance of the DSWD. Accompanied by a friend, Wenna summoned enough courage to reveal her sexual molestations to the DSWD in Cagayan de Oro City. A DSWD personnel accompanied her to the police station where she executed a statement. They

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proceeded to the Patin-ay Provincial Hospital for medical examination and then to the Bahbah Municipal Trial Court for preliminary investigation. Wenna was placed under the protective custody of the DSWD in Cagayan de Oro City for her total rehabilitation.[2]

On February 2, 1996, after the filing of the rape charges, Wenna was accosted by her mother Estelita, Neneng Amper and Dodong Angub in her school in Cagayan de Oro City. They forced her to go with them to Agusan del Sur. On February 7, 1996, Wenna and her mother fetched Pastor Elizardo Amper and then proceeded to the house of Atty. Germiniano Demecillo, appellant's counsel in the rape cases. Atty. Demecillo directed Wenna to sign a document.[3] She inquired about the nature of the document but her mother dismissed her query. Her mother threatened that she would not be able to return to Cagayan de Oro City unless she affixed her signature on the document. She signed even as she could not see or read its contents as Atty. Demecillo covered its upper portion.

Thereafter, Wenna asked her mother if she could return to Cagayan de Oro City as she had a school examination. Her mother refused but Wenna was able to return to the DSWD in Cagayan de Oro City a week later. She told social worker Evelyn Sagusay that her mother forced her to sign a piece of paper. Evelyn suspected that the document was a desistance and would be used to cause the dismissal of the rape charges against the appellant. Wenna grew apprehensive. She went to the NBI and executed an affidavit of retraction[4] deposing that she signed the desistance under duress.[5]

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[2] September 6, 1995 TSN at 2-16; September 7, 1995 TSN at 8-33; November 6, 1997 TSN at 2–6.

[3] Records at 139; The document turned out to be an affidavit of desistance where Wenna retracted her testimony during the investigation of the rape cases and her court testimony relative to the rape cases.

[4] Records at 140.

[5] November 6, 1997 TSN at 7–11.

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Wenna's testimony was corroborated by social worker *CATALINA JOMOCAN*.[6] Likewise, *DR. FLORIANO MANTILLA*, who examined Wenna on the day she was last abused by the appellant, corroborated her claim of defloration. His medical examination revealed that Wenna's organ had a gaping introitus or vaginal canal; there were also fresh and healed lacerated wounds on the fourchette; and, Wenna's organ admitted two (2) fingers with ease, indicating her non-virgin state.[7]

The defense proffered the theory that Wenna filed the rape charges to get back at the accused. *ESTELITA GAVINO*, appellant's wife, testified that throughout their marriage, appellant never hurt her and had been a loving and caring father to all their children. The rape charges were precipitated by the February 13, 1995 incident when Wenna came home late. Estelita and the appellant noticed a stain on Wenna's skirt, near her buttocks. Upon questioning, Wenna revealed that she has been sexually abused but refused to identify the culprit. They did not persist to know his identity and allowed Wenna to rest.

Estelita then sought the help of *NENENG AMPER*, a friend of their family at the United Pentecostal Church. Neneng tried to discuss with Wenna about the reported sexual assault but the latter initially kept silent. On February 15, 1995, Neneng accompanied Wenna to a doctor for physical examination. On their way, Wenna confided to Neneng that she had sexual congress with her boyfriend Lino Racho. She, however, requested Neneng not to reveal anything to her parents as she wanted to tell them herself. At the hospital, the doctor refused to examine Wenna for lack of referral from a government physician authorizing him to perform the examination on the alleged rape victim.

As she wanted, Wenna later divulged to her parents that it was Lino Racho who sexually assaulted her. The revelation angered the appellant. They did not, however, file a complaint against Lino as Wenna did not want to see him put behind bars.

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[6] November 23, 1995 TSN at 1–6.

[7] Medical Certificate, Records at 6; September 7, 1995 TSN at 2–8.

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On March 3, 1995, Neneng and Lino Racho's mother went to the Gavinos to ask for Wenna's hand in marriage.

On March 10, 1995, Wenna did not return to their house. Estelita asked the appellant to look for her. That same day, appellant was arrested by the police as a suspect in the rape charges. Estelita brought Lino Racho to the police headquarters to shed light on the charges but the police officers refused to investigate him as he was not implicated by Wenna in her complaints.

On cross-examination, Estelita admitted that she, Neneng and other relatives fetched Wenna from Cagayan de Oro and brought her to the office of Fiscal Clapis where she signed the affidavit repudiating her charges of rape against the appellant.[8]

NENITA "Neneng" AMPER, a friend of the Gavinos in the United Pentecostal Church, testified that she has known the accused since 1989 as they lived in the same *barangay*. He was a good father and provider. Neneng said that Wenna admitted to her that her boyfriend Lino Racho was the one who raped her. On cross-examination, however, Neneng confirmed that on February 2, 1996, she accompanied Estelita to Cagayan de Oro to visit Wenna. She claimed she could not recall whether they brought Wenna to the house of Atty. Demecillo, counsel of the appellant.[9]

LEODEGARIO PULIDO, a neighbor and co-worker of the appellant, attested to his good moral character. He said he never noticed any unusual incident in the appellant's house during the alleged six (6) years' molestation of Wenna by the appellant. He confirmed that Wenna had a boyfriend named Lino Racho and that sometimes Lino visited Wenna in his house. Wenna's parents suspected about the relationship when Wenna started going home late from school. On March 10, 1995, at about 6:30 a.m., the date when the appellant allegedly last molested

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[8] May 20, 1998 TSN at 2–13.

[9] October 7, 1998 TSN at 2–13.

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Wenna, Leodegario was in his house and heard how Wenna was scolded by her parents. [10]

ELIZARDO F. AMPER, Neneng's husband and a neighbor of the appellant since 1989, is a pastor at the United Pentecostal Church to which appellant's family belonged. On February 5, 1996, Wenna and her mother fetched Elizardo from his house. They proceeded to Atty. Demecillo as Wenna wanted to repudiate her statements charging appellant with rape. After Atty. Demecillo prepared her affidavit of retraction, they all repaired to Prosecutor Clapis where Wenna attested to the veracity of its contents. However, Elizardo said that he was not aware whether a promise of reward was made to Wenna or whether she was coerced or intimidated to sign her affidavit.[11]

ATTY. GERMINIANO A. DEMECILLO, the lawyer representing the appellant in the rape case, testified that Wenna requested him to prepare her affidavit of retraction. She was then with her mother Estelita, Neneng and Pastor Elizardo. He prepared the affidavit upon the prodding of Wenna and her mother. He first interviewed Wenna and then prepared the affidavit after satisfying himself that Wenna wanted him to repudiate her statements in connection with the rape charges. He, however, refused to notarize the affidavit as he was appellant's counsel.[12]

The appellant testified that he has five (5) children — a girl and four boys. He has never maltreated his wife and is a good father to his children. He has provided Wenna with everything she needed. The only time he lifted a hand against Wenna was when he discovered her sexual relationship with Lino Racho. Wenna insisted on marrying Lino but he refused to give his consent as he wanted Wenna to finish her schooling first. In retaliation, Wenna filed rape charges against him.[13]

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[10] January 11, 1996 TSN at 1–7.

[11] July 7, 1999 TSN at 3–6.

[12] *Id.* at 7–9.

[13] July 8, 1999 TSN at 2–7.

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After trial, the court found the appellant guilty of qualified rape and sentenced him to the supreme penalty of death, thus:

"WHEREFORE, the Court finds accused BERNARDO C. GAVINO, GUILTY beyond reasonable doubt as principal in the crime of RAPE as defined and penalized under Article 335 of the Revised Penal Code as amended by R.A. No. 7659, Section 11 thereof and hereby imposes upon the accused Bernardo C. Gavino the penalty of DEATH; to pay the victim Wenna S. Gavino civil indemnity in the amount of FIFTY THOUSAND (₱50,000.00) PESOS and the costs." [14]

Hence, the automatic review of the case by this Court.

Appellant contends that his guilt was not proved beyond reasonable doubt. He argues that Wenna's testimony is not worthy of credit. He opines that it is unbelievable for Wenna to have experienced pain when she was last abused in March, 1995 considering her claim that appellant had been sexually molesting her since she was nine (9) years old. Appellant likewise insists that Wenna's failure to report to her mother the continued assault on her virtue for six (6) years further detracts from her credibility.

Appellant's attempt to discredit Wenna is unconvincing. First, Wenna's testimony that she suffered pain when she was last molested by the appellant is not inconceivable. The evidence shows that on the last sexual assault, appellant hit Wenna on the abdomen and kicked her back. He then lifted the weakened girl, dropped her on the wooden bed and ravished her. Clearly, the physical attack that preceded the molestation contributed to the pain of Wenna. Second, the reluctance and delay of Wenna in reporting the series of incestuous abuses she suffered for many years is not necessarily indicative of a fabricated charge. The delay is due to the pattern of fear instilled by the appellant on Wenna. The sexual assaults were accompanied with death threats from appellant who exercised moral ascendancy over her.

Neither do we agree with appellant's contention that the trial court overlooked the nefarious motive of Wenna in accusing

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[14] Decision, dated February 10, 2000; *Rollo* at 57.

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him of rape. We adhere to the settled rule that the calibration of the credibility of a witness is best left to the discretion of the trial judge who was able to observe the demeanor of the witness while testifying. In giving more weight to Wenna's testimony, the trial court found her testimony to be sincere and straightforward as she narrated in detail the manner by which she was ravished by the appellant.[15] The trial court also took note of Wenna's agony as her testimony throughout the trial was punctuated by uncontrollable bursts of tears.[16] Moreover, her positive testimony of forcible defloration was corroborated by the results of the physical examination conducted on her. It is settled that the existence of lacerations, coupled with the victim's testimony, are the best physical evidence of sexual abuse.[17] In contrast, we find the defense adduced by the appellant to be flimsy. First, it is unnatural for a naive, barrio lass to accuse her father of such a grave, personal offense and expose herself and her family to social humiliation if it were not true. Second, the defense's attempt to shift the blame on Lino Racho has to fail for lack of evidence.

Appellant likewise insists that the trial court failed to give due weight to Wenna's affidavit of retraction considering that its execution and signing was attended by defense witnesses Atty. Demecillo and Pastor Elizardo. We are not persuaded. For one, Atty. Demecillo who prepared Wenna's affidavit of retraction cannot be considered a neutral witness as he was the counsel of appellant during the trial of these cases. Thus, his testimony as to the alleged voluntary execution of Wenna's affidavit of retraction is immediately suspect. Secondly, Pastor Felizardo admitted during the trial that he was unaware whether Wenna signed the affidavit due to threats or a promise of reward. Thirdly, it is of judicial notice that an affidavit of desistance or retraction is easily procured through intimidation, threat or a promise of reward. Courts thus view such affidavit with suspicion

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[15] RTC Decision at 7; *Rollo* at 26.

[16] *Id.* at 8; *Id.* at 27.

[17] *People vs. Belen*, G.R. Nos. 137991–92, June 10, 2002.

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and reservation.[18] In the case at bar, the prosecution duly established that Wenna signed the affidavit of retraction under duress. Her relatives accosted her in school while she was under the custody of the DSWD and took her to Agusan to sign the said affidavit. Its content was not explained to Wenna nor was she given a chance to read it. She was forced to sign the affidavit as she was threatened that she could not return to Cagayan de Oro City if she refused.

Coming now to the penalty, appellant rightly impugns the correctness of the sentence imposed by the trial court as the prosecution failed to adduce evidence to prove the qualifying circumstances of the victim's minority and her filiation with the accused. In *People vs. Ramirez*,[19] the Court *en banc* laid down the guidelines for the proper appreciation of minority either as an element of a crime or as a qualifying circumstance. It held that: (1) the best evidence to prove the age of the offended party is an original or certified true copy of the certificate of live birth of such party; (2) in its absence, similar authentic documents such as baptismal certificate and school records which show the date of birth of the victim would suffice to prove age; (3) if the certificate of live birth or authentic document is shown to have been lost or destroyed or otherwise unavailable, the testimony, if clear and credible, of the victim's mother or a member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended party pursuant to Section 40, Rule 130 of the Rules of Evidence shall be sufficient; and, (4) in the absence of all the above, the complainant's testimony will suffice provided it is expressly and clearly admitted by the appellant.

In the case at bar, no birth certificate or similar authentic document was offered by the prosecution to prove Wenna's minority. Neither was it shown that they were lost, destroyed

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[18] *People vs. Bertulfo*, G.R. No. 143790, May 7, 2002.

[19] G.R. No. 138471, October 10, 2002.

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or unavailable at the time of the trial. The testimony of the mother or the victim relative to the latter's age cannot be accepted as adequate proof thereof. In addition, we note that the prosecution failed to adduce independent proof to establish appellant's relationship with the victim. Although Wenna's filiation to appellant and minority was neither refuted nor contested by the defense, proof thereof is critical considering the penalty of death imposed for qualified rape. Thus, the prosecution's failure to sufficiently establish Wenna's minority and relationship to appellant bars the latter's conviction for qualified rape and the imposition of the extreme penalty of death.

On a last note, we find that the trial court erred in finding the appellant guilty of only one (1) count of rape considering that the Information charged appellant with multiple rape and the commission of two (2) counts of simple rape was established beyond reasonable doubt by the prosecution at the trial.

IN VIEW WHEREOF, the appealed Decision is modified. Appellant BERNARDO C. GAVINO is found guilty of two (2) counts of simple rape. He is sentenced to suffer the penalty of *reclusion perpetua* for each count and to pay Wenna Gavino the total amount of two hundred thousand pesos (₱200,000.00), broken down as follows: fifty thousand pesos (₱50,000.00) as civil indemnity for each count of rape, and another fifty thousand pesos (₱50,000.00) as moral damages also for each count.

SO ORDERED.

Davide, Jr., C .J., Bellosillo, Vitug, Mendoza, Panganiban, Quisumbing, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio Morales, Callejo, Sr., and *Azcuna, JJ.*, concur.

Ynares-Santiago, J., on leave.