

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ALBERTO
“JUN” GAVINA, JR. Y HEBULAN, ACCUSED-APPELLANT.**

Ponente: PERALTA, JR., E. B., J.

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PERALTA, JR., E. B., J.:

An appeal[1] was interposed by the accused from the Decision dated June 6, 2011 of the Regional Trial Court, Branch 94 of Quezon City in Criminal Case No. Q-08-1521119[2] relative to his guilt for Acts of Lasciviousness, in relation to Republic Act No. 7610, otherwise known as the Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act, allegedly perpetrated against a 13 year old.

When arraigned for the corresponding indictment[3] on July 16, 2008, he reiterated his plea of innocence.[4] During pre-trial conference, conceded were the jurisdiction of the Court over the person of the accused and the identity of the accused.[5]

Trial on the merits then ensued.

Save for the accused, fictitious initials were inevitable following Republic Act No. 7610, Republic Act No. 9262, Section 40 of A.M. No. 04-10-11-SC or the "Rule on Violence Against Women and Their Children," effective November 5, 2004, and People v. Cabalquinto,[6] to preserve privacy on the victim's identity or other sensitive information, inclusive of the victim's immediate family or household members.

On the evening of May 11, 2008, AAA[7] was at the liaison office of Camp Aguinaldo in Quezon City where he played computer games while he waited for his father, BBB[8], who was in the kitchen located in another building. Thereafter, AAA played basketball with the accused whom he called Jun. After their basketball game, AAA and the accused watched television in the receiving area of the liaison office. While seated on the sofa, AAA fell asleep.[9] When he woke from slumber, the accused was already sucking his penis.[10] AAA uttered, "Ano ito?" and left the room to find his father.[11] Scared, AAA did not report the incident to his father.[12]

Later, AAA was examined by Dra. Editha Martinez, Medico-Legal Officer of the Philippine National Police Crime Laboratory, Camp Crame in Quezon City.[13] During her direct examination, she presented and identified the following documents:[14]

- Request for Physical/Genital examination;[15]
- Initial Medico-Legal Report Case No. RO8- 1118;[16]
- Medico Legal Report No. RO8-1118[17]
- Sexual Crime (Protocol);[18]
- Manifestation of Consent;[19] and
- Protocol for Sexual Cases.[20]

While the accused admitted that he was present at the liaison office within Camp Aguinaldo on May 11, 2008, he

denied having molested AAA.[21]

Per his narration, the accused was inside the camp because his security license was about to expire. He was informed by the son of the owner of his security agency, who also worked at the liaison office, to remain thereat to expedite processing of his papers.[22] At around 7:00 to 8:00 in the evening of May 11, 2008, AAA sat beside the accused on a sofa inside the liaison office, leaned on the arm of the sofa, and placed his feet on the accused's lap.[23] AAA then allegedly got hold of the accused's right hand and put it inside his shorts. The defendant scolded AAA saying, "huwag kang ganyan, isusumbong kita sa tatay mo."

AAA stood and went to the bathroom. After 5 minutes, AAA returned and told the defendant to check if BBB was done cooking dinner. The defendant did not accede so AAA invited the defendant to go with him and check on BBB's dinner preparations. When dinner was not yet ready, AAA told the defendant that he was going to take a bath. For this purpose, the accused offered fresh underwear for AAA. When AAA finished bathing, he and the defendant ate dinner. Later, the accused washed the dishes, returned to the room and continued watching television.[24]

In the afternoon of May 12, 2008, the accused was shocked when he was informed of the Complaint against him.[25] He alleged that it was AAA who seduced him[26] and that it was the "tampuhan" between him and BBB which impelled the filing of the criminal case against the accused.[27]

On June 6, 2011, the trial court rendered its assailed Decision, the decretal portion of which reads:[28]

WHEREFORE, the prosecution having proved the guilt of the accused ALBERTO "JUN" GAVINA, JR. Y HEBULAN of the crime of Acts of Lasciviousness in relation to Republic Act (sic) 7610 otherwise known as the "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act", he is hereby sentenced to suffer an indeterminate penalty of EIGHT (8) YEARS AND ONE (1) DAY OF PRISON MAYOR IN ITS MEDIUM PERIOD AS MINIMUM TO FOURTEEN (14) YEARS AND EIGHT (8) MONTHS OF RECLUSION TEMPORAL IN ITS MINIMUM PERIOD AS MAXIMUM AND TO PAY COST.

The period during which he was placed under preventive imprisonment shall be credited in full in his favor provided he agrees voluntarily in writing to abide by the same disciplinary rules imposed upon convicted prisoners pursuant to Article 29 of the Revised Penal Code. (Emphasis Supplied)

SO ORDERED.

Inasmuch as the court below also rejected the defendant's Motion for Reconsideration,[29] the appeal is now with Us premised on the sole error:[30]

...IN CONVICTING THE ACCUSED-APPELLANT DESPITE THE PROSECUTION'S FAILURE TO PROVE HIS GUILT BEYOND REASONABLE DOUBT

THIS COURT'S RULING

Appellant was charged with Acts of Lasciviousness in relation to R.A. No. 7610.[31] Section 5 (b), Article III of R.A. No. 7610 spoke of acts of lasciviousness committed against a child:[32]

Section 5. Child Prostitution and Other Sexual Abuse. - Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

XXX

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject to other sexual abuse; Provided, That when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: Provided, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period; and xxx;

For sexual abuse under Section 5, Article III of R.A. No. 7610, it is essential that:[33]

- The accused commits the act of sexual intercourse or lascivious conduct.
- The said act is performed with a child exploited in prostitution or subjected to other sexual abuse.
- The child whether male or female, is below 18 years of age.

Anent the first element of sexual abuse, AAA's open-court declarations affirmed that appellant committed lechery:[34]

ACP DE RAMOS:

Q:

Mr. Witness, will you please tell to the Court where were you on May 11, 2008

A:

I was in Camp Aguinaldo, ma'am

Q:

And that Camp Aguinaldo is in Quezon City, correct?

A:

Yes, ma'am.

xxx

Q:

And could you please tell to the Court what were you doing on that day at Camp Aguinaldo?

A:

I was playing computer, ma'am.

Q:

You were playing computer?

A:

Internet, ma'am.

Q:

And that Camp Aguinaldo is very big, will you please tell to the Court what was the exact location in Camp Aguinaldo you were doing (sic) that internet then?

A:

At the Liaison Office, ma'am.

Q:

After you played your computer (sic), what happened next, if you recall?

A:

I played basketball, ma'am.

Q:

You played basketball with whom?

A:

Jun, ma'am.

INTERPRETER

(The witness is pointing to a man inside the courtroom)

ACP DE RAMOS:

Q:

Are you referring to the accused in this case?

A:

Yes, ma'am

Q:

And after you played basketball with the accused, what happened next?

A:

We watched t.v., ma'am.

Q:

Both of you?

A:

Yes, ma'am.

Q:

And after you and the accused watched t.v., what happened?

A:

I fell asleep, ma'am.

Q:

And then after that?

A:

I saw him "Inaano na niya yong ari ko", ma'am.

Q:

You saw him what?

A:

I saw him "sinusubo po" putting my penis inside his mouth, ma'am.

Q:

You saw him putting your penis inside his mouth?

A:

Yes, ma'am.

xxx

Per Navarrete vs. People,[35] appellant's act of sucking AAA's genital organ constituted lascivious demeanor:

"Lascivious conduct" is defined under Section 2 (h) of the rules and regulations of R.A. No. 7610 as:

[T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the

same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.

The third element of sexual abuse on minority was supported by the presentation of AAA's birth certificate during trial. Per AAA's Certificate of Live Birth,[36] he was born on February 23, 1995. Thus, on May 11, 2008, when the accusation of molestation in Criminal Case No. 0-08-152119 allegedly happened, AAA was only thirteen years old.

Anent the second element of sexual abuse, jurisprudence is replete with rulings that Section 5 (b) of R.A. No. 7610 covers not only a child exploited in prostitution but also one who engages in any lascivious conduct through coercion or intimidation. Once more, the case of *Navarrete v. People*, was instructive:[37]

Petitioner insists that Section 5 (b) of RA 7610 refers only to those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution and argues that this does not apply in this case since the victim is not a child exploited in prostitution.

Petitioner's argument is untenable. In *People v. Larin* (and reiterated in several subsequent cases), we emphasized that the law covers not only a situation in which a child is abused for profit but also one in which a child, through coercion or intimidation, engages in any lascivious conduct. The very title of Section 5, Article III (Child Prostitution and Other Sexual Abuse) of RA 7610 shows that it applies not only to a child subjected to prostitution but also to a child subjected to other sexual abuse. A child is deemed subjected to "other sexual abuse" when he or she indulges in lascivious conduct under the coercion or influence of any adult. Here, BBB was sexually abused because she was coerced or intimidated by petitioner (who poked her neck with a knife) to indulge in lascivious conduct. (Emphasis Ours)

Similarly, *Olivarez v. Court of Appeals et., al.* decreed:[38]

Thus, a child is deemed subjected to other sexual abuse when the child indulges in lascivious conduct under the coercion or influence of any adult. In this case, Cristina was sexually abused because she was coerced or intimidated by petitioner to indulge in a lascivious conduct. Furthermore, it is inconsequential that the sexual abuse occurred only once. As expressly provided in Section 3 (b) of R.A. 7610, the abuse may be habitual or not. It must be observed that Article III of R.A. 7610 is captioned as "Child Prostitution and Other Sexual Abuse" because Congress really intended to cover a situation where the minor may have been coerced or intimidated into lascivious conduct, not necessarily for money or profit. The law covers not only child prostitution but also other forms of sexual abuse. (Emphasis Ours)

However, neither coercion nor intimidation as a mode of committing sexual abuse was sufficiently established in the instant case.

AAA himself testified that he was asleep at the time of the incident and when he woke, appellant was already sucking his penis. Being unconscious at the time the crime happened, AAA could not have opposed appellant's advances. Moreover, there was no showing that after AAA was roused from slumber, he was compelled or threatened into silence by the appellant to endure his advances.[39] Verily, AAA only mentioned during his cross-examination that he was just scared of what happened to him:[40].

Q:

And after you and the accused watched t.v., what happened?

A:

I fell asleep, ma'am

Q:

And then after that:

A:

I saw him “sinusubo po” putting my penis inside his mouth, ma'am.

Q:

And then what did you do when you saw the accused putting your penis inside his mouth?

A:

None, ma'am.

Q:

You did not shout?

A:

I did not, ma'am.

Q:

Why?

A:

Because I am scared, ma'am.

Q:

Why? Was he threatening you at that time?

A:

No, ma'am.

Q:

Was there any pointed material aimed at you at that time?

A:

None, ma'am.

xxx

Q:

Mr. Witness, you mentioned that a while ago that you were sleeping at that time. What time did you sleep?

A:

7:30 in the evening, sir.

Q:

What time did you wake up?

A:

Around 7:40, sir.

xxx

Q:

But you only woke up when the accused sucked your penis?

A:

When he was already “sinusubo” sucking, sir.

Q:

When the accused was sucking your penis, what did you tell, if any, to the accused?

A:

I said, “ano ito?”

Q:

And what was the response of the accused, if any?

A:

None sir.

Q:

After the accused sucked your penis, what did the accused do next?

A:

None, sir.

Q:

You mentioned that after the incident, you went to your father, did you tell your father what happened?

A:

No, sir.

Q:

And what was the reason why did you not tell to your father what happened?

A:

I am scared, sir.

Q:

You just mentioned that the accused never threatened you, how come you are saying now that you are frightened?

A:

Because of what he did, sir.

ATTY ORENCIA:

That would be all for the witness, your Honor.

COURT:

NO RE-DIRECT?

ACP DE RAMOS:

No re-direct, your honor.

COURT (to the witness)

Q:

AAA, are you saying that the only reason why you were afraid and you did not shout and tell your father about what happened is that because you were just afraid of what accused did to you.

A:

Yes, your honor. (Emphasis Ours)

In *People v. Abello* the Supreme Court aptly declared:[41]

In the present case, the prosecution failed to present any evidence showing that force or coercion attended Abello's sexual abuse on AAA; the evidence reveals that she was asleep at the time these crimes happened and only awoke when she felt her breasts being fondled. Hence, she could have not resisted Abello's advances as she was unconscious at the time it happened. In the same manner, there was also no evidence showing that Abello compelled her, or cowed her into silence to bear his sexual assault, after being roused from sleep. Neither is there evidence that she had the time to manifest conscious lack of consent or resistance to Abello's assault.

x x x

Thus, sans the second element of sexual abuse, i.e., coercion or intimidation of a child, appellant cannot be punished for sexual abuse against AAA. Even then, he can be held liable for the crime of acts of lasciviousness, the elements of which crime were duly alleged on the indictment[42] and were established by the prosecution per Article 336 of the Revised Penal Code:[43]

- (1) The offender commits any act of lasciviousness or lewdness;
- (2) It is done under any of the following circumstances:
 - a. By using force or intimidation; or
 - b. When the offended party is deprived of reason or otherwise unconscious; or
 - c. When the offended party is under 12 years of age; and

(3) The offended party is another person of either sex.

A peek into the record of this case revealed that the Information filed against appellant explicitly alleged, among other matters, that, at the time of AAA's molestation, he was asleep, deprived of reason or otherwise unconscious.[44] In his testimony before the court, AAA affirmed that after his slumber, appellant was already sucking his penis.[45]

Appellant's Defenses

Appellant's defenses of bare denial and ill-motive deserve scant consideration.[46] Well-settled is the rule that bare denials cannot prevail over the positive testimonies of the witnesses.[47]

Moreover, We are similarly unconvinced, as appellant would like Us to believe, that AAA filed the instant complaint because of the "tampuhan" between appellant and AAA's father. No parent would expose his or her own daughter to the shame and scandal of having undergone such a debasing defilement of his chastity if the charge filed were not true. They could not have been impelled by a motive other than to bring to justice the despoiler of his virtue.[48]

The Imposable Penalty

As per Our previous disquisition, appellant cannot be punished for sexual abuse, sans the second element of sexual abuse i.e., coercion or intimidation of a child. However, he can be held accountable for the crime of acts of lasciviousness, as penalized under Article 336 of the Revised Penal Code with prision correccional.[49]

Applying the Indeterminate Sentence Law, the maximum term of the indeterminate penalty shall be that which could be properly imposed under the Revised Penal Code, which is prision correccional. Sans any aggravating and mitigating circumstances, the penalty shall be imposed in its medium period,[50] which has a range of two (2) years, four (4) months and one day to four (4) years and two (2) months.

On the other hand, the minimum term to be imposed on the appellant shall be taken within the range of the penalty next lower than that provided by the Revised Penal Code, which is arresto mayor, the range of which is from one (1) month and one (1) day to six (6) months. Thus, for the crime of acts of lasciviousness as penalized under Article 336 of the Revised Penal Code in Criminal Case No. 136556, appellant shall suffer the indeterminate sentence of six (6) months of arresto mayor, as minimum, to four (4) years and two (2) months of prision correccional, as maximum.

Civil Liabilities

In accord with case law and substantive law, AAA was entitled to moral damages in the amount of P30,000.00 and P20,000.00 as civil indemnity.[51]

WHEREFORE, premises considered, the assailed Decision dated June 6, 2011 of the Regional Trial Court, Branch 94 of Quezon City in Criminal Case No. Q-08-152119 against Alberto “Jun” Gavina Jr. is hereby MODIFIED, thusly:

(1) Accused-appellant Alberto “Jun” Gavina Jr. is hereby CONVICTED for Acts of Lasciviousness under Article 336 of the Revised Penal Code, and sentenced to suffer imprisonment for an indeterminate penalty of four (4) months and one (1) day of arresto mayor as minimum, to four (4) years and two (2) months of prision correccional as maximum, subject to Article 29 of the Revised Penal Code;[52] and

(2) Accused-appellant is also hereby ORDERED to pay AAA, the following amounts:

- (a) P30,000.00 as moral damages; and
- (b) P20,000.00 as civil indemnity.

SO ORDERED.

De Leon (Chairperson) and Cruz, JJ., concur.

[1] Initially raffled on January 31, 2012 to Justice Cruz and re-raffled to Justice Eduardo B. Peralta, Jr. on June 4, 2013 as initial caseload. Rollo was received by the Office on October 23, 2013, Rollo, back page of 46.

[2] Rollo, pp. 8-17.

[3] 1-2 Folder, Record, page 1.

xxx

“That on or about the 11th day of May, 2008, in Quezon City, Philippines, accused with lewd designs, did then and there, willfully, unlawfully and feloniously commit acts of lasciviousness upon xxx, a minor, 13 years of age, by caressing and sucking his sexual organ against his will and without his consent, while he was asleep, deprived of reason or otherwise unconscious, to his damage and prejudice.

CONTRARY TO LAW.”

[4] Record, page 17.

[5] Record, pp.20-21.

[6] People v. Cabalquinto, G.R. No. 167693, September 19, 2006, 502 SCRA 419.

[7] Victim's name is withheld to protect his identity and privacy.

- [8] Victim's father's name is withheld to protect him and the victim's privacy.
- [9] TSN, November 24, 2008, Record, pp. 4-6.
- [10] TSN, November 24, 2008, Record, page 11.
- [11] TSN, November 24, 2008, Record, page 12.
- [12] TSN, November 24, 2008, Record, page 12.
- [13] TSN, June 2, 2009, Record, page 4.
- [14] TSN, June 2, 2009, Record, pp. 4-6.
- [15] Record, page 43.
- [16] Record, page 42.
- [17] Record, page 41.
- [18] Record, page 44.
- [19] Record, page 45.
- [20] Record, page 46.
- [21] Rollo, page 42.
- [22] TSN, August 24, 2010, Record, page 4.
- [23] TSN, August 24, 2010, Record, pp.5-7.
- [24] TSN, August 24, 2010, Record, pp. 4-11.
- [25] TSN August 24, 2010, Record, page 12.
- [26] TSN, March 22, 2011, Record, page 6.
- [27] TSN, March 2, 2011, Record, pp.7-8.
- [28] Rollo, pp. 94-95.
- [29] Record, 1-2 Folder, pp. 120-122.
- [30] Rollo, page 43.
- [31] See Information, Record, page 1.
- [32] People v. Abello, G.R. No. 151952, March 25, 2009.
- [33] People v. Gaduyon, G.R. No. 181473, November 11, 2013; Garingarao v. People, G.R. No. 192760, July 20, 2011.
- [34] TSN, November 24, 2008, Record, pp. 4-6.
- [35] G.R. No. 147913, January 31, 2007.
- [36] Caballo v. People, G.R. No. 198732, June 10, 2013; TSN, November 24, 2008, Record, page 3. See also 1-2 Folder, Marked as Exhibit "F" Record, page 29.

[37] G.R. No. 147913, January 31, 2007.

[38] G.R. No. 163866, July 29, 2005.

[39] TSN, November 24, 2008, Record, pp. 5-7.

[40] TSN, November 24, 2008, Record, pp. 11-13.

[41] G.R. No. 151952, March 15, 2009.

[42] See 1-2 Folder , Record, page 1.

[43] People v. Navarrete, G.R. No. 147913, January 31, 2007.

[44] See 1-2 Folder, Record, page 1.

[45] TSN, November 24, 2008, page 11.

[46] Rollo, p. 42. TSN, August 24, 2010, TSN, March 22, 2011, Record, pp. 7-8.

[47] People v. Sanchez, G.R. No. 172467, July 30, 2007.

[48] People v. Zaballero, G.R. No.100935, June 30, 1997.

[49] People v. Banzuela, G.R. No. 202060, December 11, 2013;

ART 336. Acts of Lasciviousness- Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by prison correccional.

ART. 335. When and how rape is committed.*-Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation;
 2. When the woman is deprived of reason or otherwise unconscious; and
 3. When the woman is under twelve years of age or is demented
- xxx

*Art. 335 has been repealed by R.A. No. 8353 (Anti- Rape Law of 1997) effective October 22, 1997. New provision on Rape are found in Arts. 266-A to 266-D under Crimes Against Persons, supra.

ART 266-A. Rape, When and How Committed.- Rape is committed-

1. By a man who shall have carnal knowledge of a woman under any of the following circumstances:
 - a. Through force, threat or intimidation;
 - b. When the offended party is deprived of reason or is otherwise unconscious;
 - c. By means of fraudulent machination or grave abuse of authority;
 - d. When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

xxx

[50] Rules for the application of penalties which contain three periods- In cases in which the penalties prescribed by law contain three periods, whether it be a single divisible penalty or composed of three different penalties, each one which forms a period in accordance with the provisions of Articles 76b and 77, the courts shall observe for the application of the penalty the following rules, according to whether there are or are no mitigating or aggravating circumstances:

1. When there are neither aggravating nor mitigating circumstances, they shall impose the penalty prescribed by law in its medium period.

2. x x x

[51] People v. Abello, G.R. No. 151952, March 25, 2009, “For acts of lasciviousness, AAA is awarded Php 20,000 as civil indemnity and Php 30,000 as moral damages for each count in line with existing jurisprudence.” See also Article 2219 of the New Civil Code:

Article 2219. Moral damages may be recovered in the following and analogous cases:

- (1) xxx
- (2) xxx
- (3) Seduction, abduction, rape, or other lascivious acts.
- (4) xxx

Article 100, Revised Penal Code provides:

Art. 100 Civil liability of a person guilty of a felony - Every person criminally liable for a felony is also civilly liable.

[52] Art. 29. Period of preventive imprisonment deducted from term of imprisonment-

xxx

Whenever an accused has undergone preventive imprisonment for a period equal to or more than the possible maximum imprisonment of the offense charged to which he may be sentenced and his case is not yet terminated, he shall be released immediately without prejudice to the continuation of the trial thereof or the proceeding on appeal, if the same is under review. xxx

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