

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. GILBERT DELA PEÑA Y PONCE, ACCUSED-APPELLANT.*G.R. No. 104947. June 30, 1994*

Ponente: KAPUNAN, J.

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At the time of the alleged rape, Erly Rose P. Marasigan was a nine (9) year old third-grade student of a public elementary school in Mayasan, Valenzuela, Metro Manila. On school days, she would take a shortcut using an alley between her school and her home in order to attend her classes between 12:00 noon and 5:00 p.m. On July 18, 1991, the day of the alleged incident, while traversing this route, she noticed a man standing at a corner of the alley, whom she later on identified as the defendant-appellant, Gilbert de la Pena. As she passed by, he grabbed her left arm with both of his hands, pulled her towards a grassy area and threatened bodily harm if she would not keep quiet.[1]

The accused-appellant ordered Erly Rose to lie down. He then pulled his pants and briefs down, removed her panties and raised her skirt. He kissed her and attempted to insert his penis into her vagina to no avail. According to the testimonies of both the complainant and the accused-appellant, he did not have an erection and was unable to insert his penis into her vagina. Failing in this, the accused-appellant instead fondled his victim's vagina and inserted his finger into the vaginal orifice.[2]

During the process, de la Pena hit his victim in the stomach and on both cheeks with his fist. Erly Rose cried, then tried to play dead. The accused appellant thereafter hurriedly fled the scene.[3]

The complainant pretended to be dead for another five minutes. When she was finally sure that her attacker was no longer around, she pulled up her panties, gathered her belongings and staggered away from the area towards her home. On her way home, Romeo Brojas, a neighbor and friend of her father noticed that her clothes were caked with mud and that she was crying.[4] Informed about the incident he and some neighbors immediately looked for the accused-appellant and found him in Rincon Road, Valenzuela. Erly Rose identified her attacker when he was found. Accompanied by her father and some neighbors, she thereafter narrated the details of the attack to the Valenzuela Police on the same day.[5]

Pursuant to a written request for a medical examination by the Valenzuela Police, she was subsequently examined by Dr. Lowella Nario of the National Bureau of Investigation who found no physical evidence of penetration during her examination of the victim. According to Dr. Nario, there was no sign of injury on the victim's private parts. The vagina was normal, without a reddening.[6]

An information signed by the state prosecutor, dated 30 July 1991, charged the accused with the crime of ATTEMPTED RAPE based on the complaint affidavit of the victim.[7] However, a criminal complaint signed by the state prosecutor subsequently charged the accused with STATUTORY RAPE, committed as follows:[8]

That on or about the 18th day of July, 1991, in the Municipality of Valenzuela, Metro Manila, Philippines and

within the jurisdiction of this Honorable Court, the above-named accused, by means of force and intimidation, did then and there willfully, unlawfully and feloniously lie with and have sexual intercourse with ERLY ROSE P. MARASIGAN, a minor, 9 years old, against the latter's will and without her consent.

Contrary to law.

Following trial in the court below, and after assessing the evidence of the accused, Judge Teresita D. Capulong of the Regional Trial Court of Valenzuela, Metro Manila, found de la Pena guilty as charged and sentenced him to suffer the penalty of reclusion perpetua and to pay the costs.[9]

In his brief, the appellant contends that a surfeit of the evidence presented at trial negates a finding of Statutory Rape. He avers that the victim, Erly Rose Marasigan, during direct examination, herself testified that no penetration had occurred, that the medico-legal examination conducted by the National Bureau of Investigation yielded negative results, and that there was an attempt, but that no carnal knowledge had actually occurred.[10]

We agree.

Settled is the rule that full penetration of the vaginal orifice is not an essential ingredient in the commission of the crime of rape.[11] The mere touching of the external genitalia by a penis capable of consummating the sexual act constitutes carnal knowledge.[12] When accomplished together with the other elements defined in the Revised Penal Code, the offense constitutes rape.

It is likewise settled that the absence of physical findings on medical examination does not negate a finding that carnal knowledge had actually occurred. The absence of seminal fluid, spermatozoa, abrasions, lacerations, hematoma etc., around the genital area or the presence of an intact hymen does not automatically lead to a conclusion that no act of rape had occurred or that the act was in fact consensual. In fact, the absence of a medical certificate is not indispensable in the crime of rape.[13] However, our decisions finding a case for rape even if the attacker's penis merely touched the external portions of the female genitalia were made in the context of the presence of the existence of an erect penis capable of full penetration. The physiologic impossibility of penetration absent an erection- complete or otherwise- cannot be gainsaid. If, because of the victim's vigilant attempts at warding off her attacker's sexual advances an accused in a case of rape is unable to accomplish the act of completely penetrating his victim's vaginal orifice, a charge for rape under existing jurisprudence can be sustained anyhow, because full penetration would have been accomplished if the penis were erect, were it not for the victim's vigilance or the occurrence of other circumstances which might have frustrated the accomplishment of complete penetration. That is not the case here.

In the case at bench, the victim, Erly Rose P. Marasigan categorically stated on at least two occasions that the accused-appellant was unable to consummate the act of rape. On direct examination she admitted:[14]

Fiscal:

Q Why were you not able to reach the school on July 18, 1991?

A Because I happened to pass by that man, sir.

Q What place did you pass by that man?

A In a curve of a shortcut area, sir.

Q When you saw the man when you were able to turn to this area what was he doing?

A He was just standing by, sir.

Q To where was he looking when you saw him?

A He was looking at me, sir.

Q Now, what happened when you were already . . . Was your path lighted on the side of the man?

A Yes, sir.

Q When you were already near this man who was standing what happened?

A As I passed by him he immediately held my arm, sir.

Q How did this man hold your arm?

A With his two hands, sir.

Q What arm did he hold you, left or right arm?

A Left, sir.

Q After than what did he do?

A He pulled me towards the grassy area, sir.

Q And then what did he do?

A He ordered me to keep quiet if not he will kill me, sir.

Q When he told you that what did you do?

A I kept quiet and cried, sir.

Q Now, this man who pulled you towards the grassy area can you still recognize him?

A Yes, sir.

Q Can you tell us if that man is here now?

A Yes, sir.

Q Will you point to him?

A That man wearing white t-shirt, sir. (Person pointed to, when asked, gave his name as Gilbert de la Pena).

Q When he told you to keep quiet or he will kill you what did you do next?

A He ordered me to lie down, sir.

Q And did you lie down?

A Yes, sir.

Q And then what did you do next?

A He pulled down his pants and brief, sir.

Q When you said he pulled down he just pulled it down he did not remove it?

A Yes, sir.

Q What about you, you said you obeyed him when he told you to lie down. What did he tell you to do if any as you were lying down?

A He removed my panty, sir.

Q You said you were wearing skirt which is your school uniform, what did he do with your skirt?

A He just raise (sic) it up, sir.

Q And then he personally removed your panty?

A Yes, sir.

Q And then what did he do next after that?

A Pinipilit niyang ipasok ang ari niya sa ari ko, sir.

Q When you said ari niya what do you mean by that?

A His penis, sir.

Q And when you said ari ko what do you mean by that?

A My vagina, sir.

Q How did he do that, how was he able to do that?

A He pressed his right hand on the ground and then he held his penis by his left hand and then tried to insert (sic) it to my vagina, sir.

Q What was his position, you said you were lying down what about him, what was his position?

A He was kneeling with one of his hands pressed on the ground, sir.

Q And when he was kneeling are you saying both his knees were on the ground?

A Yes, sir.

Q And where are you in relation to his two knees?

A I was in front of him lying down, sir.

Q Under his knees?

A Yes, sir.

Q Now, what happened, was he able to insert his penis?

A No, sir.

On cross examination she again repeated before the trial court that no carnal knowledge had actually occurred:[15]

ATTY. PEREZ:

Q In this case you were asked on Page 12 of the Transcript of Stenographic Notes dated November 4, 1991 and I quote, 'Question: Where did it reach if any, his penis? Answer: Outside, your Honor. He was not able to insert it'. Do you still confirm this statement of yours?

A Yes, sir.

All throughout, the victim has been consistent in stating that no penetration had occurred because the accused-appellant (as he himself admitted) was too scared to have or sustain an erection. In fact, immediately after the incident, in the afternoon of the attempt she stated the following in answer to investigating policeman's question:[16]

T: Naipasok ba nitong si Gilbert de la Pena ang titi niya sa pekpek mo?

S: Hindi po.

Testifying in his own behalf, the accused had never actually denied that the attempt had been made:[17]

ATTY. PEREZ:

Q You have heard the complaining witness Erly Rose Marasigan testified here that during the attempt on her by you, you molested her to her private parts but your private parts did not enter her private part, what can you about this?

A Yes, sir.

Q She also testified that you did not experience any erection of your private part at that time that you molested her?

A Yes, sir.

It would be important to stress, in the context of our past decisions sustaining a charge of rape in cases where complete penetration had not occurred, of the existence of an underlying assumption of a male sexual organ physiologically capable of accomplishing the act of full penetration at the time of the event, whether or not the latter had actually occurred. In the instant case, both the victim and the accused-appellant were in agreement in their trial court testimonies that no penetration had occurred.[18] There is doubt as to how far the accused's penis had been outside the victim's external genitalia and there is equal doubt as to whether or not the accused-appellant's penis had in any way touched the external pudenda or any part of the vaginal wall. In the absence of a conflict between the statements made by the accused and that of his victim-made under oath- as to what actually occurred at the time of the incident, we see no reason why this Court should sustain the trial court's conclusion finding the defendant guilty of rape. Moreover, the medical findings support our conclusion.[19]

The trial judge's suggestion that the complainant's admission that there was no erection cannot be given weight because finding out whether the accused-appellant's penis were erect "would be the last thing on the mind of the victim complainant," flies in the face of the consistent admissions by the complainant on different occasions that the fact of carnal knowledge did not occur. Moreover, during the incident, she had the intelligence and the remarkable presence of mind to take a grip of the situation she was in at the time of the attack and play dead. Given her presence of mind, it would have been impossible for her not to notice whether or not the accused-appellant's penis had been erect. In spite of her age, her acts during and after the attempt provide no occasion for us to doubt the veracity of her statements.

We note that, at least, on one occasion, during her salaysay (sworn statement) before the Valenzuela Police, the suggestion had been made by the complainant that carnal knowledge had occurred during the incident. Using the vernacular she said: "(H)inubaran niya ako ng panty. Pagkatapos sinikmuraan niya ako. Pagkatapos ay kinantot niya ako." However, following clarificatory questions by the policeman - without suggestion or prodding- she stated that the accused appellant had been unable to insert his penis into her genital orifice. She narrated the same fact subsequently in her testimony before the trial court.

Rape is committed by having carnal knowledge of a woman.[20] The gravamen of the offense of statutory rape as provided for in Article 335, paragraph 3 of the Revised Penal Code is carnal knowledge of a woman below 12 years old. In the case at bench, there was an attempt, which the accused-appellant does not deny, but carnal knowledge did not actually occur.

Of course the failure by the appellant to consummate the act of rape does not make his attack on an innocent and

defenseless girl less reprehensible, particularly in the instant case where his nine year old victim has apparently not even reached her menarche yet. The psychological scar inflicted by the accused's despicable act will remain with her forever, occasionally surfacing from the recesses of her own subconsciousness, in one way or another. If the scar runs deep, if it makes an imprint into her own personality, its effects would define the way she would eventually deal with others, the way she would mother her future children. The potential effects can then go beyond her own lifetime, scarring her children, as well as those whose lives are touched by her. The magnitude of evil wrought on an innocent, defenseless child by an adult's sexual attack is far-reaching and its effects can never be restored by the punishments we mete on these, evil, sexual offenders. However, it is incumbent upon us to impose the proper punishment for the proper crime.

We note that the original information filed by State Prosecutor Bernard S. Razon on July 30, 1991 charged the accused appellant with attempted rape.[21] The accused himself in this case was willing to plead guilty to the charge of attempted rape. This case would not have proceeded this far, saving government money and resources, had the charge been made consistent with the preliminary findings.

Given the evidence, and the essential absence of conflict between the victim's and the appellant's testimonies in this case, a verdict finding the accused guilty of ATTEMPTED RAPE would be much more appropriate.[22] Accordingly, the proper penalty which should be imposed in the case at bench is prision mayor by virtue of Article 51 of the Revised Penal Code which lowers the penalty in attempted felonies to two degrees. Taking into account the Indeterminate Sentence Law he ought to be sentenced to a penalty whose minimum should be within the range of prision correccional and whose maximum should be within the range of prision mayor.

WHEREFORE, PREMISES CONSIDERED, the decision of the trial court is hereby modified in that appellant is found guilty only of ATTEMPTED RAPE, the act of consummated rape not having been proven beyond reasonable doubt. By virtue of Article 51 of the Revised Penal Code lowering the penalty in attempted felonies to two degrees and taking into account the Indeterminate Sentence Law and the absence of modifying circumstances, the accused is hereby sentenced to suffer an indeterminate penalty of two (2) years and six (6) months of prision correccional medium as minimum to eight (8) years and two (2) months of prision mayor medium as maximum.

SO ORDERED.

Cruz, (Chairman), Davide, Jr., Bellosillo, and Quiason, JJ., concur.

[1] TSN, November 4, 1991, pp. 3-12

[2] Id., TSN, December 4, 1991, pp. 43; TSN, February 5, 1992, pp. 67-68.

[3] Id., February 5, 1992, pp. 69.

[4] TSN, January 13, 1992, pp 29-32.

[5] Id.

[6] TSN, January 22, 1992, pp. 54-56, 58.

[7] Record, p. 1.

[8] Record, p. 12.

[9] Decision, pp. 7; Rollo, p. 10.

[10] Brief for Appellant, pp. 3-7; Rollo, pp. 53-57.

[11] *People vs. Lomibao*, 55 Phil 616 (1931); *People vs Pastores*, 40 SCRA 498 (1971); *People vs. Catalino Oscar*, 48 Phil 527 (1925); *People vs. Amores* 58 SCRA 505 (1974). *People vs. Abonada*, 169 SCRA 530 (1989); *People vs. Navarro* 221 SCRA 684 (1993).

[12] *People vs. Somera*, 170 SCRA 428 (1989).

[13] *People vs. Almenario*, 172 SCRA 268 (1989).

[14] *Supra* note 1.

[15] *Supra* note 2.

[16] *Salaysay*, July 18, 1991; *Record*, pp. 3.

[17] *TSN*, February 5, 1992, pp. 67-68.

[18] *Supra* notes 1 and 2.

[19] On examination (Living Case No. MG-91-751, July 19,1991) Dr. Louella Nario had the following findings:

"Conclusions:

1. No evident sign of extragenital physical injuries noted on the body of the subject at the time of the examination.
2. Hymen, intact and its orifice small (0.6 cms. in diameter) as to preclude complete penetration by an average sized, adult, Filipino male organ in full erection without producing any genital injury.

[20] Article 335 of the Revised Penal Code States:

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 deprive of reason or otherwise unconscious; and
3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.

XXX (Emphasis supplied).

[21] *Supra* Note 7.

[22] The rule is that when the offense proved is more serious than that which is charged, the accused can only be convicted of the offense charged. However, when the offense proved happens to be a lesser one, as in the case at bench, the accused should be convicted of the offense which has been established by the evidence in court which is included in the offense charged. Section 4 of Rule 120 of the Rules of Court states:

"Sec. 4. Judgment in case of variance between allegation and proof.- When there is a variance between the offense charged in the complaint or information, and that proved or established by the evidence, and the offense as charged is included in or necessarily includes the offense proved, the defendant shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved."

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