

NICANOR DULLA, PETITIONER, VS. COURT OF APPEALS AND ANDREA ORTEGA, REPRESENTED BY ILUMINADA BELTRAN, RESPONDENTS.

G.R. No. 123164. February 18, 2000

Ponente: MENDOZA, J.

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MENDOZA, J.:

This is a petition for review on certiorari of the decision[1] of the Sixth Division of the Court of Appeals, affirming the conviction of herein petitioner by the Regional Trial Court, Branch 5, Manila, for acts of lasciviousness.

The information against petitioner Nicanor Dulla charged him with rape. It was alleged -

That on or about February 2, 1993, in the city of Manila, Philippines, the said accused, did then and there wilfully, unlawfully and feloniously with lewd designs have carnal knowledge with ANDREA ORTEGA, three years old, by then and there inserting his penis to her vagina, then succeeded in having carnal knowledge of the said ANDREA ORTEGA against her will and consent.

CONTRARY TO LAW.

The facts are as follows:

Andrea Ortega was at birth entrusted to the care of her grandaunt, Iluminada Beltran, by her mother, Leslie Dulla Ortega.

On February 2, 1993, Andrea, who was then three years old, came home crying, with bruises on her right thigh. She told her guardian, Iluminada Beltran, that her uncle, herein petitioner, touched her private part. In her own words, she said, "Inaano ako ng uncle ko," while doing a pumping motion with the lower part of her body to demonstrate what had been done to her. She also said that petitioner showed his penis to her.[2]

The matter was reported to Barangay Councilor Carlos Lumaban who, with the child, the latter's guardian, and three barangay tanods, went to the house of petitioner to confront him. As petitioner's father refused to surrender his son to Lumaban and his party, Lumaban sought assistance from the nearby Western Police District (WPD) Station No. 7. It appears, however, that petitioner took advantage of the situation and ran away.[3]

On February 8, 1993, Lumaban was informed that petitioner was in the nearby barangay. Together with some barangay tanods, Lumaban went to the place where petitioner was reported to be, but petitioner's employer refused to surrender the latter to the authorities. Later, however, with the aid of two policemen from the WPD Police Station No. 1, Lumaban and his party were able to take petitioner to Precinct 1 and later to Precinct 7.[4]

Upon arraignment, petitioner pleaded not guilty to the charge of rape, whereupon trial ensued.

In her testimony in court, Andrea said that petitioner fondled her organ and showed her his penis. She said that

when petitioner did a pumping motion, she had no panties on and that she was lying down. Petitioner was also lying down, according to her.[5]

The medical report[6] on Andrea prepared by Dr. Maximo Reyes, who examined the child on February 3, 1993, showed:

PHYSICAL INJURIES:

Abrasion, brownish, 0.1 x 1.0 cm. bridge of nose, linear, 0.1 x 3.0 cm, antero-medial aspect, middle third, left leg.

Contusion, reddish, blue, 3.0 x 8.0 cm. postero-lateral aspect, lower third, right thigh.

GENITAL EXAMINATION:

Conclusions:

Pubic hair, no growth. Labia majora and labia minora, coaptated. Fourchette, tense. Vestibule, pinkish. Hymen, annular, thin, narrow, and intact. Hymenal orifice, admits a tube 0.5 cm. in diameter. Vaginal walls and rugosities, cannot be reached by the examining finger.

CONCLUSIONS:

1. The above physical injuries were noted on the body of the subject at that time of examination.
2. Hymen, intact.

Petitioner, on the other hand, denied the accusation against him. He said that Andrea was coached by her guardian. He likewise denied that he escaped from Lumaban and his men on February 2, 1993, and said that he only went away to avoid any trouble that time.[7]

Based on the foregoing evidence, the trial court found petitioner guilty of acts of lasciviousness. It held:

Viewed from the foregoing, the court is convinced that although the accused had a lewd design on the child, and that he had removed his pants, and apparently lain on top of her swaying his hips to and fro, he never intended to enter her, as clearly shown by the fact that he did not remove her panty. In other words, even if the "big penis" of the accused was erect and he was thrusting it into the private parts of the child, he could not have plunged it inside because of the panty protectively shielding it from such an illegal entry. Because of the panty worn by the child it cannot even be said that the sexual organ of the accused and that of his victim were in close contact, so that rape in its legal conception, would have been committed.

That no crime of rape took place, is further shown by the medical certificate of Dr. Maximo Reyes stating that the victim's hymen (sic) is annular, thin, narrow and intact.

While rape was not committed, this court is nonetheless convinced that the accused had committed an act of lasciviousness on the child. Said act is penalized under Article 336 of the Revised Penal Code. Rape and acts of lasciviousness have the same nature. The difference is that in rape there is an intent to lie with a woman. This element is absent in acts of lasciviousness. Hence, even though the charge is consummated, frustrated or attempted rape, the defendant may still be convicted of acts of lasciviousness (People vs. Mariano, 50 Phil. 587, cit. by Aquino, The Revised Penal Code, 1968 Ed., Vol III, p. 412.)

...

WHEREFORE, premises considered, judgment is rendered finding the accused Nicanor Dulla y Cunanan GUILTY beyond reasonable doubt of the crime of acts of lasciviousness and hereby sentences him to serve the indeterminate penalty of not less than SIX (6) YEARS of Prison Correctional as minimum and not more than

TWELVE (12) YEARS of Prison Mayor as maximum and all the accessory penalties provided by law and to pay the costs.[8]

SO ORDERED.

On appeal, the Court of Appeals affirmed the findings of the trial court but modified the decision, to wit:

THE FOREGOING CONSIDERED, the appealed decision is hereby AFFIRMED, but the penalty is modified to twelve (12) years and one (1) day of reclusion temporal, as the minimum, to not more than fourteen (14) years, eight (8) months and one (1) day also of reclusion temporal, as the maximum, with costs, together with all the accessory penalties.

SO ORDERED.

Petitioner now makes the following assignment of errors:

- The court a quo erred in affirming the decision of the RTC finding the petitioner guilty of the crime of Acts of Lasciviousness.
- The court a quo erred in considering and giving credence to the testimony of Andrea Ortega.
- The court a quo erred in not ruling that the guilt of the accused-petitioner was not proven beyond reasonable doubt of any offense.
- The court a quo erred in not ruling that the case for rape should be dismissed by the Regional Trial Court.

First. Petitioner questions the competence of Andrea as a witness. He argues that Andrea is not capable of understanding the questions propounded to her. Moreover, she did not take an oath and the fact that she was asked purely leading questions shows that she was only coached by her guardian.[9]

The contention has no merit. As a general rule, all persons who can perceive, and perceiving, can make known their perception to others, may be witnesses.[10] Under Rule 130, §21 of the Rules of Court, only children who, on account of immaturity, are incapable of perceiving the facts respecting which they are examined and of relating them truthfully are disqualified from being witnesses. In *People v. Mendoza*,[11] the Court held:

It is thus clear that any child, regardless of age, can be a competent witness if he can perceive, and perceiving, can make known his perception to others and of relating truthfully facts respecting which he is examined. In the 1913 decision in *United States vs. Buncad*, this Court stated:

Professor Wigmore, after referring to the common-law precedents upon this point, says: "But this much may be taken as settled, that no rule defines any particular age as conclusive of incapacity; in each instance the capacity of the particular child is to be investigated." (Wigmore on Evidence, vol. I, p. 638)

...

The requirements then of a child's competency as a witness are the: (a) capacity of observation, (b) capacity of recollection, and (c) capacity of communication. And in ascertaining whether a child is of sufficient intelligence according to the foregoing, it is settled that the trial court is called upon to make such determination.

In the case at bar, Andrea was three years and 10 months old at the time she testified. Despite her young age, however, she was able to respond to the questions put to her. She answered "yes" and "no" to questions and, when unable to articulate what was done to her by petitioner, Andrea demonstrated what she meant. During her interrogation, she showed an understanding of what was being asked. She was consistent in her answers to the questions asked by the prosecutor, the defense counsel, and even by the judge. Thus:

FISCAL:

Q

Do you know Nic?

A

Yes, sir.

Q

Do you see him around?

A

Yes, sir. (Witness pointed to a person who identified himself as Nicanor Dulla).

Nic is of unsound mind.

....

Q

Did you see his penis?

A

Yes, sir. (She is nodding).

Q

Is it big?

A

Yes, sir.

Q

What did Nicanor Dulla do?

A

The child is making a pumping motion to and fro.

Q

What was he doing?

A

A big penis, sir.

Q

You saw it?

A

Yes, sir.

Q

What did Nicanor Dulla do with his penis with you?

A

The child answered by showing a pumping motion to and fro.

COURT:

Q

What was your position when Nicanor Dulla was making a push and pull motion?

A

He was lying down, sir.

Q

He was touching your vagina?

A

Yes, sir.

Q

What did you feel with your vagina?

A

Nothing, sir.

....

Q

When you were lying down, what was Nicanor Dulla doing?

A

Witness answered by pumping motion.

Q

Were you wearing your panty at that time?

A

None, sir.

....

CROSS-EXAMINATION BY ATTY. ORTICIO:

Q

You said Nicanor Dulla has a big penis, how big was it?

A

Witness extended her two arms showing a big size.

....

Q

Did he touch it to yourself?

A

No, sir.

....

COURT:

Q

When you said [you saw] the big penis of accused Nicanor Dulla, was he wearing his pants?

A

None, sir.

Q

You mean that he was not wearing any pants nor brief?

A

Yes, sir.

ATTY. ORTICIO:

Q

When you said that Nicanor Dulla has a large penis did he touch [it to] your vagina?

A

No, sir.

Court:

Q

Did the penis of the accused touch your vagina while the accused was doing the pumping motion?

A

No, sir.

ATTY. ORTICIO:

No further question, Your Honor.

COURT:

Any redirect?

FISCAL:

Q

Did your vagina ache?

A

No, sir.

Q

Did he enter his penis into your vagina?

A

No, sir.[12]

The determination of the competence and credibility of a child as a witness rests primarily with the trial judge who has the opportunity to see the witness and observe his manner, his apparent intelligence or lack of it, and his understanding of the nature of the oath. As many of these qualities cannot be conveyed by the record of the case, the trial judge's evaluation will not be disturbed on review, unless it is clear from the record that his judgment is erroneous.[13]

In this case, the defense did not even object to the presentation of Andrea as a witness, nor questioned her competence to testify. On the contrary, the defense cross examined her, and the result of her examination showed that she was intelligent and could make her answers known to others.

Petitioner makes much of the fact that Andrea did not take an oath and that the questions propounded to her during direct examination were purely leading.

It should be noted, however, that in the beginning of her testimony, Andrea was asked the following questions:

Q

I will ask you questions, will you tell the truth?

A

Yes, sir.

Q

Do you know Jesus?

A

Yes, sir.

Q

He is the God?

A

Yes, sir.

Q

God will get mad if you will tell a lie?

A

Yes, sir.

Q

So, you will not tell a lie?

A

Yes, sir.

Q

What will Jesus do with you if you will tell a lie?

A

God will punish me "papaluin." [14]

The trial court considered this line of questioning sufficient to show that Andrea understood her obligation to tell the truth. Thus, the trial court said:

In this case, the traditional oath was not administered to the child witness. Immediately upon her presentation in court, the public prosecutor began asking her if she would tell the truth; if she knew Jesus; and what God would do to her if she would tell a lie. To these questions, she evinced her desire to tell the truth because if she told a lie, God would get mad, and He would whip her (papaluin).

What followed after these series of questions was an intelligent account of what happened which she narrated in monosyllables and a unique body language.

Viewing the child while she was on the stand answering the preliminary questions of the public prosecution, it is apparent that the child had sufficient capacity to know the obligation of an oath, even though the ritual attending the same had not been administered. Her answers indicated an intelligence sufficient to satisfy this court that she was supposed to tell the truth once she took the witness stand. She was, in other words, aware of the wrongfulness of telling a lie, because in her own words, God would punish her (papaluin). Because of this, she was qualified to testify (See *State vs. Mayer*, 135 Iowa 507, N.W. 322 cit. by Francisco, *Basic Evidence*, p.340). [15]

With respect to the fact that leading questions were propounded to Andrea during her direct examination, suffice it to say that under the Rules of Court, such questions are allowed considering the age (three years and 10 months) of the witness at the time she testified in court. Rule 132, §10 provides:

Leading and misleading questions. - A question which suggests to the witness the answer which the examining party desires is a leading question. It is not allowed, except:

x x x x x x x x

(c) When there is difficulty in getting direct and intelligible answers from a witness who is ignorant, or a child of tender years, or is of feeble mind, or a deaf-mute; x x x

Petitioner's contention, therefore, that Andrea was incompetent to testify must be rejected.

Second. Petitioner claims that the prosecution failed to prove that he touched any part of Andrea's body. This is not so. Andrea testified that petitioner fondled her private part. [16] Likewise, in her sworn statement given to PO3 Wilfredo Ursua at the WPD Station No. 7, she said:

08.

Tanong

Sino itong mamang ito (ref. to suspect Nicanor Dulla)?

Sagot

Nick sira ulo.

09.

Tanong

Ano ang gawa sa iyo ni Nick sira ulo?

Sagot

Hawak pepe, malaki titi.[17]

Thus, petitioner's contention that he can only be convicted of unjust vexation if it were true that he showed his private organ to Andrea must fail. By fondling Andrea's vagina, exhibiting his penis, and doing the pumping motion, there is no doubt that petitioner had lewd designs on the child.

Third. Petitioner also contends that:

Another error committed by the trial court, is that it did not dismiss the case outright from the very beginning, since in the information filed in the rape case, it appears that the complainant is the alleged caretaker of the alleged 3-year old girl offended party, not her parents, grandparents, in that order exclusively, as required by the Rules on Criminal Procedure. The alleged offended minor's mother is still alive and even objected to the filing of this case, and testified in favor of the accused-appellant.[18]

Rule 110, §5(4) provides:

The offended party, even if she were a minor, has the right to initiate the prosecution for the above offenses, independently of her parents, grandparents or guardian, unless she is incompetent or incapable of doing so upon grounds other than her minority. Where the offended party who is a minor fails to file the complaint, her parents, grandparents, or guardian may file the same. The right to file the action granted to the parents, grandparents or guardian shall be exclusive of all other persons and shall be exercised successively in the order herein provided, except as stated in the immediately preceding paragraph.

The contention is thus wrong. In this case, the complaint[19] was filed by Andrea herself, assisted by her guardian. The provision that the guardian can file a complaint only in default of the parents and grandparents of the minor applies only if the minor, who is the offended party, fails to file the complaint herself.

Petitioner further claims that Iuminada Beltran had an ill motive for accusing him of rape, i.e., to keep custody of Andrea. However, there is no basis for this allegation. Andrea's mother, Leslie Dulla Ortega, testified that she entrusted Andrea to the care of her aunt, Iuminada Beltran, and there is nothing in her testimony to indicate that she was trying to get custody of her child from Beltran. As Leslie Dulla Ortega told the court:

Q

You will admit that you turned over the custody of the child to Miss Iuminada Beltran when she was a month

old?

A

Yes, sir.

Q

And that I see the child still in the physical custody of Iluminada Beltran, you will admit that up to now, up to today she is still with the custody of Beltran?

A

Yes, sir.

x x x x x x x x

Q

If you live with the father of this Andrea Ortega, why is it that you decided to entrust Andrea Ortega to Iluminada Beltran?

A

Because even when Andrea was small, I used to pay Mrs. Iluminada Beltran to take care of the child.

Q

You don't like Andrea Ortega very much?

A

No, sir I am working and there is no one to take care of the child.[20]

Indeed, even if there was a fight for the custody of the child, we do not see how it had anything to do with the filing of this case against petitioner.

Fourth. Petitioner also contends that the prosecution witnesses Beltran and Lumaban gave inconsistent statements. The alleged inconsistencies, however, do not exist, and the contention itself appears to have been made perfunctorily as petitioner merely quoted in his petition the transcript of the witnesses' testimonies without pointing out any contradiction therein.[21]

On the other hand, the trial court found inconsistencies in the testimony of Andrea on whether or not petitioner took off her underwear, and, on that ground, found petitioner guilty of acts of lasciviousness only, not rape. According to the trial court:

Turning to her account of what happened on February 2, 1993, the child narrated on direct examination that her uncle showed her his "big penis"; that at the time, her uncle had no pants nor brief; that apparently she was made to lie down; that she was not wearing her panty; that her uncle also laid down; that very soon her uncle was making a pumping motion which she demonstrated by swaying the lower part of her body to and fro.

Asked whether she felt anything in her vagina, she said "nothing sir". She then corrected herself by saying that she was wearing her panty when she was lying down. On cross-examination, she reiterated that the accused was not wearing his pants; that she saw his "big penis"; that he did the pumping motion when he was on top of her; and that his "big penis" did not enter her vagina.

In her sworn statement, the child also stated that she saw the penis of her uncle; that when she was asked "ano

pa gawa sa iyo", she did not answer but "motioned to this prober a pumping motion" (see Exh. "A"). Consistent with her testimony in court, she also stated that she was wearing her panty, and the accused did not remove it. Thus:

Tanong : Alis ba niya panty mo?

Sagot : Hindi po.

Viewed from the foregoing, the court is convinced that although the accused had a lewd design on the child, and that he had removed his pants, and apparently lain on top of her swaying his hips to and fro, he never intended to enter her, as clearly shown by the fact that he did not remove her panty.[22]

The records, however, belie the trial court's findings on this issue. The following is Andrea's testimony:

Q

When you were lying down, what was Nicanor Dulla doing?

A

Witness answered by pumping motion.

Q

Was Nicanor Dulla lying down when he was doing that thing to you?

A

Yes, sir.

Q

Were you wearing your pant[y] at that time?

A

None, sir.[23]

To be sure, in her cross-examination, Andrea was never asked if she was wearing her underwear when petitioner touched her private part.[24]

Nonetheless, we think the trial court correctly convicted petitioner of acts of lasciviousness. Andrea told the court that petitioner's penis was never inserted in her vagina, nor was there even a touching of her external organ by petitioner's penis. There could, therefore, be no rape.

Moreover, although petitioner and Andrea were both lying down, it was not shown how they were positioned in relation to each other. The trial court's statement that petitioner was on top of Andrea is not based on the testimony of Andrea or of any of the other witnesses. The medical findings of Dr. Maximo Reyes bolster the conclusion that no intercourse or attempt to commit sexual intercourse occurred. Iluminada Beltran also testified that the injuries suffered by the child on her right thigh as well as on the bridge of her nose were due to the physical chastisement inflicted on her by petitioner and his father on certain occasions.[25]

Thus, what was actually established by the prosecution are the following:

- That petitioner fondled Andrea's vagina.
- That he removed Andrea's underwear.
- That he lay down with Andrea.

- That petitioner did a pumping motion with his penis exposed to Andrea.

The lewd design of petitioner is thus evident and, although the information filed was for the crime of rape, he can be convicted of acts of lasciviousness because the latter is necessarily included in rape.[26] Rule 120, §4 of the Rules of Court states:

Judgment in case of variance between allegation and proof. - When there is 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 accused shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved.

The appellate court was likewise correct in applying Art. III, §5(b) of R.A. No. 7610 in imposing the penalty. It stated, thus:

We go for a modification of the penalty. While the Court applied the provision of Art. VI, Sec. 10, par. 3, the applicable provision should instead be Art. III, par. 5(b), thus:

(b) Those who commit the act of x x x or lascivious conduct with a child exploited x x x or subjected 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, x x x 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;

While Section 5(b) mentions Art. 336 of the Revised Penal Code; Article VI, Section 10(e) (3), on the other hand, refers to Article 339 or acts of lasciviousness with the consent of the offended party. If we go by the allegations in the Information [in] the Court a quo, the offense is typical of acts of lasciviousness under Article 336. The imposable penalty, therefore, pursuant to Article III, Section 5(b), should be reclusion temporal in its medium period, if the victim is under twelve (12) years of age. Applying the provisions of the indeterminate sentence law, the penalty should be twelve years (12) and one (1) day of reclusion temporal, as the minimum, to not more than fourteen (14) years, eight (8) months and one (1) day, similarly of reclusion temporal, as the maximum.

However, the application of the Indeterminate Sentence Law is erroneous. The penalty for acts of lasciviousness under Art. III, §5(b) of R.A. No. 7610 is reclusion temporal in its medium period, the range of which is from 14 years, 8 months and 1 day to 17 years and 4 months. Applying the Indeterminate Sentence Law and in the absence of modifying circumstances, the maximum term of the sentence to be imposed shall be taken from the medium period of the imposable penalty, which is reclusion temporal medium, the range of which is from 15 years, 6 months and 20 days to 16 years, 5 months and 9 days, while the minimum term shall be taken from the penalty next lower in degree, which is reclusion temporal minimum, the range of which is from 12 years and 1 day to 14 years and 8 months.

WHEREFORE, the decision of the Court of Appeals is hereby **AFFIRMED** with the **MODIFICATION** that the penalty to be imposed shall be 12 years and 1 day of reclusion temporal, as minimum, to 15 years, 6 months and 20 days of reclusion temporal, as maximum.

SO ORDERED.

Bellosillo, (Chairman), Quisumbing, and De Leon, Jr., JJ., concur.
Buena, J., on leave.

[1] Per Justice Bernardo Ll. Salas and concurred in by Justices Antonio M. Martinez (Chairman) and Alicia Austria Martinez.

[2] TSN, pp. 13-14, May 17, 1993.

[3] TSN, pp. 8-9, July 26, 1993.

[4] Id., pp. 10-11.

[5] Id., pp. 17-20.

[6] Exh. B; RTC Records, p. 7.

[7] TSN, pp. 12-17, Aug. 23, 1993.

[8] Rollo, pp. 38-40.

[9] Petition, p. 15; Rollo, p. 25.

[10] RULES OF COURT, Rule 130, §20.

[11] 254 SCRA 18, 31-32 (1996).

[12] TSN, pp. 16-18, 20, July 26, 1993.

[13] See *People v. Garigadi*, G.R. No. 110111, Oct. 26, 1999.

[14] TSN, p. 16, July 26, 1993.

[15] Rollo, p. 38.

[16] TSN, p. 17, July 26, 1993.

[17] RTC Records, p. 4.

[18] Petition, p. 16; Rollo, p. 26.

[19] Exh. A; RTC Records, p. 4.

[20] TSN, pp. 5-6, Aug. 23, 1993.

[21] Petition, pp. 11-14; Rollo, pp. 21-24.

[22] RTC Decision, p. 8; Rollo, p. 38.

[23] TSN, p. 18, July 26, 1993.

[24] See TSN, pp. 20-21, July 26, 1993.

[25] TSN, p. 7, July 12, 1993.

[26] *Vega v. Judge Panis*, 202 Phil. 587 (1982); *People v. Mariano*, 50 Phil. 587 (1927).

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