

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
ROGELIO OMBRESO Y MUTIA ALIAS "ROWING";
ACCUSED-APPELLANT.**

G.R. No. 142861. December 19, 2001

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PER CURIAM:

This case comes to us for review from the Regional Trial Court, Branch 8, Malaybalay City, Bukidnon, which found accused-appellant Rogelio Ombreso guilty of rape and accordingly sentenced him to death and to pay complainant Lorlyn Dimalata moral damages in the amount of P50,000.00 and indemnity in the amount of P75,000.00.[1]

The information against accused-appellant alleged:

"That on or about the 17[th] day of March 1998, in the morning at barangay Cayaga, municipality of San Fernando, province of Bukidnon, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, prompted by lewd design by means of force and intimidation on the person of LORLYN N. DIMALATA, a six (6) year-old-minor, did then and there willfully, unlawfully and criminally remove the panty of the latter who was asleep, insert his penis into the vagina of LORLYN N. DIMALATA and have sexual intercourse with LORLYN N. DIMALATA, against her will, to the damage and prejudice of the victim in such amount as maybe allowed by law." [2]

Accused-appellant pleaded not guilty to the charge, whereupon he was tried.

The evidence for the prosecution established the following: Complainant Lorlyn Dimalata, the fourth of the five children of Angelito and Lucita Dimalata, was born on January 29, 1992.[3] At the time material to this case, she was only six years old. Accused-appellant Rogelio Ombreso, whom Lorlyn calls "Uncle Rowing," is the husband of her father's elder sister, Angelita Dimalata.[4]

On March 16, 1998, Lorlyn and her older sister Honeybee were left to the care of their paternal grandmother, Candelaria Dimalata, in Purok 2, Cayaga, San Fernando, Bukidnon by their mother, Lucita, as the latter had to stay for a few days in Malaybalay.[5] The next morning, March 17, 1998, while Lorlyn was still asleep and alone in the house as her sister Honeybee had to go to the bathroom, accused-appellant arrived. What transpired afterward is narrated by Lorlyn in court:

"Q

While you were sleeping, can you recall if you were awoken from your sleep?

A

Yes.

Q

Why were you awoken from your sleep?

A

(Witness no answer)

Q

Now, on that morning of March 17, 1998, where was your Uncle Rowing?

A

First he was in his house because according to him there is much noise in their house he transferred to the house of my Lola.

Q

When your Uncle Rowing transferred to the house of your Lola Cande, what happened if any?

A

He took off my panty.

Q

What else did he do if any?

A

He also removed his brief and his short pants.

Q

Now, after he removed your panty and also removed his short pants and brief, what happened next if any?

A

He placed himself on top of me.

Q

Were you able to see his penis?

A

No, because I was still asleep.

Q

Was the penis of your uncle entered into your vagina?

A

No, just here, (witness pointing to her vagina)

Q

Lorlyn, if this is your vagina, where was the penis of your uncle?

A

Just here. (witness pointing to the upper part of the vagina opening)

Q

Where particularly, can you clearly demonstrate to the court where was the penis of your uncle in relation to your vagina?

A

Here. (witness pointing to the same spot)

ASST. PROS. TORIBIO:

Your Honor, I demonstrate the diagram of the vagina.

INTERPRETER:

The prosecuting Fiscal demonstrated to the witness her right hand with her thumb and index finger that oval shape of the vagina and witness pointed to the place of the two fingers to demonstrate the position of the penis of his uncle with respect to her vagina.

COURT: (to the witness)

Q

The penis of your uncle was it hard?

A

Yes.

ASST. PROS. TORIBIO: (to the witness)

Q

Did it take so long for the penis of your uncle to touch your vagina?

A

Yes.

COURT: (to the witness)

Q

Did you feel something coming out of the penis?

A

No, Your Honor.

Q

No fluid?

A

None, Your Honor.

ASST. PROS. TORIBIO:

Q

When the penis of your uncle was touching your vagina, what did you feel?

A

I felt pain.

Q

Why did you feel pain Lorlyn?

A

Because he repeatedly pushed his penis (bangga-bangga)."[6]

Lorlyn's testimony was corroborated by her elder sister, Honeybee Dimalata, who told the court that on March 16, 1998, she and Lorlyn slept in the house of their paternal grandmother Candelaria Dimalata and that in the morning of the next day, March 17, 1998, she saw, through a hole in the door, accused-appellant remove Lorlyn's clothes, place himself on top of her sister (gihapaan), and then cover themselves with a blanket. She said accused-appellant threatened to dump Lorlyn in a hole if she squealed.[7]

On cross-examination, Honeybee said that only she and Lorlyn slept in the sala of their grandmother's house on the night of March 16, 1998 and that the next morning, March 17, 1998, their grandmother went over to accused-appellant's house, which was nearby.[8]

The last prosecution witness was Lucita Dimalata. She testified that she arrived from Malaybalay at 4:00 in the afternoon of March 21, 1998 at the same time that Honeybee and Lorlyn came from the Seventh Day Adventist church. According to Lucita, she learned about the incident because Lorlyn told her that she was not going to get near her Uncle Rowing again, because he had removed her underwear and placed himself on top of her and "made a pump of his private parts." Honeybee confirmed what Lorlyn had said, because she saw the incident. Lucita asked Lorlyn whether she had told her grandmother about the incident. Lorlyn said she had not because accused-appellant had warned her that he would throw her into a hole if she did.[9]

Lucita testified that she did not confront accused-appellant at once out of fear considering that he was the chairman of the Civilian Volunteers Organization (CVO) in their barangay. But, shortly afterward, accused-appellant came to wash the motorcycle which he operated for hire in a water faucet near her house. Upon seeing her, Lucita claimed, accused-appellant was surprised and hurriedly left without cleaning his motorcycle. As her suspicion was confirmed, Lucita took Lorlyn to the Bukidnon Provincial Hospital in Malaybalay on March 23, 1998 for an examination. The following day, she and her daughters, Lorlyn and Honeybee, executed affidavits in Camp Onahon, Malaybalay, Bukidnon, on the basis of which a complaint for rape against accused-appellant was filed on March 30, 1998.[10] Lucita said the affidavits were executed in Camp Onahon in Malaybalay City rather than in San Fernando because accused-appellant had friends in the police force.[11]

On cross-examination, Lucita admitted that she had a dispute with her husband's siblings over inheritance. She also admitted she did not immediately tell her husband about the incident, but she claimed that she kept quiet to ensure that accused-appellant would not be able to flee. She claimed that in 1987 her husband's nephew, Jovy Alabado, had raped her other daughter Hazel Faith but Alabado was able to escape, because Candelaria Dimalata helped him.[12]

Accused-appellant, 43, testified in his behalf. He denied the allegations against him. A part-time motorcycle driver plying the Calangan-San Fernando route, he claimed that at around 6:00 in the morning of March 17, 1998, he left his house in Cayaga, San Fernando, Bukidnon and drove his motorcycle towards Calangan, two kilometers away, to pick up passengers bound for poblacion San Fernando. On that day, he said he twice plied his route, stopping only for lunch at San Fernando and going home to Cayaga at 4:00 in the afternoon. According to him, at

no time on that day did he ever see Lorlyn.[13]

Accused-appellant claimed that the rape charge against him was instigated by Lorlyn's mother, Lucita, whose claim concerning a piece of land he had opposed. He said that his wife and Lucita owned adjoining lots, but Lucita wanted to extend her landholding beyond the creek, which served as the boundary between the two lands. For opposing her claim, accused-appellant said, Lucita vowed to take revenge against him.[14]

The other defense witness was Candelaria Dimalata, Lorlyn's grandmother, who was presented to corroborate accused-appellant's alibi. Candelaria testified that Lorlyn, Honeybee, and her five other grandchildren slept in her house in Cayaga, San Fernando, Bukidnon on the night of March 16, 1998. They had breakfast at 6:30 the next morning, after which the children went out to play. She denied ever leaving her house or having seen accused-appellant that morning. She admitted, however, that the distance of her house to the house of accused-appellant was only about 20 meters.[15]

Like accused-appellant, Candelaria Dimalata said that Lucita filed the case against accused-appellant because they had a dispute concerning lands owned by Lucita and accused-appellant's wife.[16]

The defense presented in evidence the medical certificate (Exh. "1") issued by Dr. Joselyn Baeyens of the Bukidnon Provincial Hospital, the authenticity of which was admitted by the prosecution.[17] The certificate stated that Lorlyn was examined on March 23, 1998 and that no laceration or abrasion was found in her hymen and that she tested negative for spermatozoa.[18]

On February 7, 2000, the trial court rendered judgment as follows:

"WHEREFORE, judgment is rendered finding accused Rogelio Ombreso y Mutia GUILTY beyond reasonable doubt of the crime of rape defined and penalized under Republic Act 8353 and hereby sentenced to suffer the penalty of death. In line with recent jurisprudence accused is further ordered to indemnify his victim Lorlyn Dimalata the sum of P75,000.00 and moral damages of P50,000.00." [19]

In this appeal, accused-appellant alleges:

"I.

THE TRIAL COURT ERRED IN GIVING CREDENCE TO THE INCREDIBLE AND INCONSISTENT STATEMENTS OF THE PROSECUTION WITNESSES.

II.

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED OF THE CRIME OF RAPE WHEN THE GUILT OF THE ACCUSED WAS NOT PROVEN BEYOND REASONABLE DOUBT.

III.

THE TRIAL COURT ERRED IN IMPOSING THE SUPREME PENALTY OF DEATH CONSIDERING THAT THERE WAS NO ACTUAL SEXUAL INTERCOURSE BETWEEN THE ACCUSED-APPELLANT AND THE ALLEGED RAPE VICTIM PURSUANT TO THE RULING OF THE SUPREME COURT IN THE CASE OF PEOPLE VERSUS PRIMO CAMPUHAN Y BELLO." [20]

FIRST. Accused-appellant cites certain portions of the testimonies of Lorlyn, Honeybee, and Lucita Dimalata which he claims are incredible, to wit: (1) Lorlyn's testimony that her mother Lucita arrived from Malaybalay, Bukidnon on March 17, 1998 is inconsistent with Lucita's testimony that she came back from Malaybalay on March 21, 1998; (2) Lorlyn's statement that accused-appellant did not penetrate her allegedly contradicts her subsequent testimony that she felt pain in her sex organ as accused-appellant kept pushing his penis into her

vagina; (3) Honeybee's claim that she did not call for help despite the fact that she allegedly saw her sister being molested by accused-appellant is contrary to human nature; and (4) the claim of Lucita that she did not confront accused-appellant after learning of her daughter's misfortune, nor even tell her husband about it, is likewise contrary to human experience.[21]

These contentions relate to the evaluation of the testimonies of prosecution witnesses. We have time and again said that the evaluation of the testimonies of witnesses must be left to the trial court as the agency in the best position to observe the witnesses' demeanor on the stand.[22] Unless shown that the trial court overlooked or misunderstood some facts or circumstances of weight and substance that could affect the result of the case, its findings on questions of facts will not be disturbed on appeal.[23] In this case, we have reviewed the record and found nothing which would warrant a reversal of the trial court's findings.

The discrepancy in the testimonies of Lorlyn and Lucita as to the date when Lucita returned to Cayaga from Malaybalay has no bearing on the principal question whether accused-appellant had carnal knowledge of Lorlyn. Lorlyn, who was only 6 years old, could have been mistaken as to the date her mother came back from Malaybalay. It is more probable her mother arrived on March 21, 1998, as testified by the latter, since complainant was not examined until March 23, 1998. At all events what is noteworthy is that, immediately after her mother arrived, Lorlyn told her about the incident.

Nor do we find it inconsistent for Lorlyn to say that she felt pain in her sex organ and, in the next breath, claim that accused-appellant's penis did not penetrate her vagina. Her statement that accused-appellant's penis did not enter her sex organ simply means there was no full penetration. There can be no doubt, however, that there was at least a partial entry, so as to make the crime consummated rape, considering the pain the entry caused. Complainant said she was hurt because accused-appellant repeatedly pushed his penis into her vagina. When a rape victim, as in this case, is of such age that she cannot be expected to make a distinction between partial and full penile entry, her testimony that the accused's penis did not enter her sex organ should be taken together with the rest of her testimony and not taken out of context.

Neither do we find anything unnatural in Honeybee's failure to call for help despite the fact that she witnessed her sister being molested. Honeybee was herself a child of tender years, being only nine years old at the time. Even in the case of adults, this Court has found it not unnatural that they should fail to call for help in situations like the one at bar. In *People vs. Torejos*,[24] this Court gave credence to the testimony of the victim's mother pertaining to the rape of her daughter despite the fact that, having caught the accused *flagrante delicto*, she did not immediately raise an alarm. Instead, she told her husband about the incident only after it had taken place.

Indeed, it is quite probable that Honeybee was frightened when she heard accused-appellant threatening her sister with harm, if she reported what he had done to her. The two were so frightened that neither of them disclosed the incident to anyone except to their mother.

On the other hand, Lucita Dimalata had a reason to keep quiet for a while. As she testified:

"[ASST. PROS. TORIBIO]

Q

Was there a time or occasion that you confronted Rogelio Ombreso of what he did to your daughter?

A

No.

Q

Why?

A

Because I felt guilty to confront him considering that he is a chairman of the CVO, I was afraid.

Q

When you said that you felt guilty you mean it that you were afraid?

A

Yes.

Q

How about your husband, did you inform your husband about what the accused did to his daughter?

A

No.

Q

Up to this very moment your husband does not know of what happened to your daughter?

A

He already knew just recently.

Q

What was the reaction of your husband when he knew about the incident?

A

He in fact blame[d] me why I did not immediately inform him.

xx xx xx xx

Q

You said also Mrs. Dimalata that you lied to your husband by not telling him of the filing of this case, why?

A

Because of a previous incident wherein my daughter was raped by his nephew and when they knew about it they let that nephew flee and so with this case now I decided not to inform them so that they will not let the accused flee.

Q

Now, who is that daughter of yours which was molested also by the nephew of your husband?

A

Hazel Faith.

Q

Wh[at] was the name of the nephew of your husband who molested your daughter Hazel Faith?

A

Jovy Alabado whom my mother-in-law made to flee.

xx xx xx xx

COURT:

xx xx xx xx

Q

When did this happen?

A

April 27, 1987."[25]

There is, it has been held, no standard form of response to a strange, startling, or frightful experience.[26] Lucita's explanation cannot simply be dismissed because it is uncommon. Her reason for not confronting the accused is plausible and is confirmed by the fact that her affidavit and that of her children had to be executed in Malaybalay City rather than in San Fernando because Lucita distrusted the local authorities. On the other hand, her explanation why she did not tell her husband about the incident until the case was filed in court and after accused-appellant's arrest is plausible. Her husband's nephew, Jovy Alabado, whom she claims raped her eldest daughter Hazel Faith in 1987, was able to escape prosecution because her husband's mother, Candelaria Dimalata, helped the boy escape.

Indeed, it is accused-appellant's claim that the rape charge against him was merely fabricated by complainant's mother in order to get back at him which we find to be implausible. As the trial court well observed, it would be contrary to human nature for a mother like Lucita to expose her daughter of six years to the rigors of a trial for rape which may leave her stigmatized for life, and, in addition, involve another daughter as corroborative witness, just so she could exact her pound of flesh against accused-appellant. In several rape cases,[27] this Court has uniformly rejected similar defenses on the ground that it is unbelievable.

Accused-appellant's alibi is unavailing. His claim that, at around 6:00 in the morning of March 17, 1998, he went to barangay Calangan to pick up passengers bound for San Fernando, does not negate the possibility that he might be present in Cayaga at the time of the commission of the crime, since the distance between Cayaga and Calangan is only two kilometers. And even if accused-appellant proceeded to San Fernando, the possibility that he committed the crime cannot be ruled out since the distance of Cayaga to San Fernando is only 26 kilometers, and he was using a motorcycle. For alibi to prosper, it must be shown that it was physically impossible for the accused to have been present at the crime scene at the time of its commission.[28]

Moreover, no witness was presented to corroborate accused-appellant's alibi. To be sure, Candelaria Dimalata testified that accused-appellant did not go to her house in the morning of March 17, 1998. Even so, however, her testimony is suspect not only because both Lorlyn and Honeybee testified that at the time the former was molested, Candelaria was in the house of accused-appellant, but also because she did not deny Lucita's allegation that Candelaria begged her (Lucita) to drop the case. As Lucita testified:

"[ASST. PROS. TORIBIO]

Q

When your mother-in-law learned that Rogelio Ombreso was arrested, what was her reaction if any?

A

She cried.

Q

Did she not confront you?

A

She did.

Q

What was her purpose in talking with you?

A

She requested for my pity that I allowed Rogelio Ombreso to be released.

Q

What did you answer if any to your mother-in-law?

A

I told her that I cannot decide on letting him be released.

Q

Who will xx xx xx then decide to release him?

A

The court."^[29]

Significantly, although Candelaria testified that in the morning of March 17, 1998, her five other grandchildren were in the house, none was presented by the defense to corroborate Candelaria's claim.

SECOND. Accused-appellant argues that, if at all, he is only liable either for attempted rape or for acts of lasciviousness following the ruling in *People vs. Campuhan*.^[30] For this purpose, he cites the testimony of Lorlyn that accused-appellant's organ "did not enter" her genitalia and the results of Lorlyn's medical examination which show that she did not suffer hymenal laceration or abrasion.^[31]

The contention has no merit. In that case, it was held that the crime was merely attempted rape because all that the prosecution evidence showed, based on the testimony of the victim's mother, was that she saw the accused "with his short pants down to his knees kneeling before Crysthel [the victim] x x x forcing his penis into Crysthel's vagina."^[32] For this reason, in finding the accused guilty of attempted rape only, this Court held:

"It can reasonably be drawn from the foregoing narration that Primo's kneeling position rendered an unbridled observation impossible. Not even a vantage point from the side of the accused and the victim would have provided Corazon an unobstructed view of Primo's penis supposedly reaching Crysthel's external genitalia, i.e., labia majora, labia minora, hymen, clitoris, etc., since the legs and arms of Primo would have hidden his movements from Corazon's sight, not to discount the fact that Primo's right hand was allegedly holding his penis thereby blocking it from Corazon's view. It is the burden of the prosecution to establish how Corazon could have seen the sexual contact and to shove her account into the permissive sphere of credibility. It is not enough that she claims that she saw what was done to her daughter. It is required that her claim be properly

demonstrated to inspire belief. xx xx xx xx."[33]

Indeed, all that the victim said in that case was that the accused's penis "touch[ed] her organ" but did not "penetrate [it]."[34] Hence, this Court concluded:

"This testimony alone should dissipate the mist of confusion that enshrouds the question of whether rape in this case was consummated. It has foreclosed the possibility of Primo's penis penetrating her vagina, however slight xx xx xx xx. Nor can it be deduced that in trying to penetrate the victim's organ the penis of the accused touched the middle portion of her vagina and entered the labia of her pudendum as the prosecution failed to establish sufficiently that Primo made efforts to penetrate Crysthel. Corazon did not say, nay, not even hint that Primo's penis was erect or that he responded with an erection. On the contrary, Corazon even narrated that Primo had to hold his penis with his right hand, thus showing that he had yet to attain an erection to be able to penetrate his victim."[35]

But, in the case at bar, the victim herself testified. She told the trial court:

"[ASST. PROS. TORIBIO]

Q

Now, after he removed your panty and also removed his short pants and brief, what happened next if any?

A

He placed himself on top of me.

xx xx xx xx

Q

Was the penis of your uncle entered into your vagina?

A

No, just here. (witness pointing to her vagina).

Q

Lorlyn, if this is your vagina, where was the penis of your uncle?

A

Just here. (witness pointing to the upper part of the vagina opening)

Q

Where particularly, can you clearly demonstrate to the court where was the penis of your uncle in relation to your vagina?

A

Here. (witness pointing to the same spot).

ASST. PROS. TORIBIO:

Your Honor, I demonstrate the diagram of the vagina.

INTERPRETER:

The prosecuting Fiscal demonstrated to the witness her right hand with her thumb and index finger that oval

shape of the vagina and witness pointed to the place of the two fingers to demonstrate the position of the penis of his uncle with respect to her vagina.

COURT: (to the witness)

Q

The penis of your uncle was it hard?

A

Yes.

ASST. PROS. TORIBIO: (to the witness)

Q

Did it take so long for the penis of your uncle to touch your vagina.

A

Yes.

xx xx xx xx

Q

When the penis of your uncle was touching your vagina, what did you feel?

A

I felt pain.

Q

Why did you feel pain Lorlyn?

A

Because he repeatedly pushed his penis (bangga-bangga)."[36]

Thus, although there was no full penetration, and therefore no laceration of the hymen as the examining physician said, accused-appellant's penis nonetheless touched the upper part of complainant's vaginal opening. As accused-appellant repeatedly pushed his organ into complainant's vagina, the latter suffered pain. Unlike in Campuhan, where this Court found that accused did not attain erection, and his penis was flaccid, here, accused-appellant's penis, according to the victim, was erect and, for a long time, accused-appellant tried to make a full penetration. This was no mere "stroking" or "grazing of the surface of the female organ," as this Court described what took place in the Campuhan case. What happened in this case was a penetration, albeit not a full one because of the relative smallness of complainant's vagina. Although the victim many times said "just here" in pointing to the spot in her genitalia which was touched by accused-appellant's male organ, "just here," as she demonstrated, meant the "upper part of [her] vaginal opening." It was therefore consummated rape which accused-appellant committed.

Thus, it is not People vs. Campuhan, but the case of People vs. Puertollano,[37] which governs this case. In Puertollano, the victim was ten years old. She testified that after undressing her, the accused lifted her and tried to insert his penis into her vagina, but, encountering difficulty, he changed their position and instead placed the victim on a bench, and lay on top of her. He then attempted to have sexual intercourse with her, as a result of

which, the child felt excruciating pain in her sex organ. As in the case at bar, the medical examination in that case showed that the child's hymen was intact although abrasion and hyperemia were noted in the vulva. Accused was found guilty of consummated rape. On appeal, he argued that, at all, he was liable only for attempted rape. This Court dismissed his claim and affirmed his conviction, finding that there was partial penetration. It was explained that full or deep penetration is not necessary for rape to be consummated.

Significantly, the Court in *Campuhan* acknowledged that a victim's testimony that she felt pain in her sex organ during the assault constitutes sufficient proof that the rape was consummated, thus:

"(I)n cases where penetration was not fully established, the Court had anchored its conclusion that the rape was nevertheless committed on the victim's testimony that she felt pain, or the medico-legal finding of discoloration in the inner lips of the vagina, or the labia majora was already gaping with redness, or the hymenal tags were no longer visible." [38]

And, in *People vs. Palicte*, [39] in which although the victim's hymen was found intact and she claimed that during the attack she felt pain in her genitalia, it was held:

"In the case before us, (private complainant) repeatedly testified that the accused inserted his penis into her vagina x x x, as a consequence of which she felt pain. This, at least, could be nothing but the result of the penile penetration sufficient to constitute rape. Being a virgin, as found by the examining physician, her hymenal resistance could be strong as to prevent full penetration. But just the same, penetration there was, which caused the pain. For, rape is committed even with the slightest penetration of the woman's sex organ. Mere entry of the labia of lips of the female organ without rupture of the hymen or laceration of the vagina, as in this case x x x is sufficient to warrant conviction for consummated rape."

It is true that in *People vs. Francisco* [40] and *People vs. Mariano*, [41] the Court found the accused liable for attempted rape only notwithstanding the complainant's testimony that accused-appellant kept pushing his sex organ against her genitalia causing her much pain. In none of these cases, however, was the complainant ever made to demonstrate, with the use of an illustration of the female genitalia, the exact spot penetrated by the accused's sex organ. Indeed, the ruling in *Mariano* was based, in large part, upon the victim's admission that there was no penile penetration of her vagina, but only "fingering." Similarly, the complainant in *Francisco* testified that the accused merely poked his penis at her genitalia, nudging instead her anus in the process. At the very least, therefore, it was doubtful whether there was penetration of either the labia.

As to the doctor's finding that *Lorlyn* had no hymenal lacerations or abrasions, note should be made of the fact that her examination was made only on March 23, 1998, six days after she had been raped. In addition, it has also been noted that the small vaginal orifice of child rape victims could explain the lack of hymenal laceration/s. [42]

At any rate, it is settled that the absence of hymenal lacerations or abrasions as well as of seminal fluid, spermatozoa, or hematoma around the genital area does not negate the commission of rape. [43] As observed in a recent case:

"There is no gainsaying that medical evidence is merely corroborative, and is even dispensable, in proving the crime of rape. In child sexual abuse cases particularly, normal physical findings are common due to several factors, such as delay in seeking medical examination, the rapid healing of injuries, washing, urinating or defecating after the sexual assault, the elasticity of the hymen, changes in the hymenal tissue due to estrogen effect when the victim is at the pubertal stage, or the type of sexual molestation involved, such as fondling, oral sodomy, or cunnilingus, which leaves no physical marks. The child's disclosure is the most important evidence of the sexual abuse she has gone through." [44]

Nor is there any question that accused-appellant in this case committed rape by means of threat and intimidation.

A 43-year old motorcycle driver and an uncle of private complainant, accused-appellant exercised not only physical superiority but also moral ascendancy over his six-year old victim such that his threat to inflict physical harm on her effectively cowed the child into submitting to his lustful designs. This Court has repeatedly observed that in rape cases, it is not uncommon for a young girl of tender age to be intimidated by the mildest threat against her life.[45]

Under Art. 266-A of the Revised Penal Code, as amended by Republic Act No. 8353, which took effect on October 22, 1997,[46] rape is consummated upon contact, however slight, of the male organ with the labia of the victim's genitalia by means of force, threat, or intimidation.[47] On the other hand, attempted rape is committed when the offender commences the commission of rape directly by overt acts but does not perform all the acts of execution by reason of some cause or accident other than his own spontaneous desistance.

For the foregoing reasons, we find that the elements of consummated rape have been duly proven in this case as provided under Art. 266-A, par. 1(a) of the Revised Penal Code, as amended.

THIRD. The trial court correctly imposed the death penalty on accused-appellant. Under Art. 266-B, as amended, the death penalty is to be imposed if the offended party is a child below seven (7) years old. In this case, Lorlyn's birth certificate shows that she was born on January 29, 1992. Hence, at the time of the commission of the rape on March 17, 1998, she was less than seven years of age.

The Court likewise sustains the award of civil indemnity in the amount of P75,000.00 and moral damages in the amount of P50,000.00 as they are in accord with prevailing jurisprudence.[48]

Four (4) members of the Court, although maintaining their adherence to the separate opinions expressed in *People vs. Echegaray*[49] that R.A. No. 7659, insofar as it prescribes the penalty of death, is unconstitutional, nevertheless submit to the ruling of the majority that the law is constitutional and that the death penalty should accordingly be imposed.

WHEREFORE, by the vote of 10 to 4 of its members (the latter being of the opinion that the crime committed is attempted rape), the Court AFFIRMED the decision of the Regional Trial Court, Branch 8, Malaybalay City, finding accused-appellant guilty of consummated rape and sentencing him to death pursuant to Art. 266-A(1)(a) and Art. 266-B, par. 6(5) of the Revised Penal Code and ordering him to pay the complainant Lorlyn Dimalata the sums of P75,000.00 as indemnity and P50,000.00 as moral damages. The dissenting opinions, in one of which two members of the Court concurred, are hereto attached as Annexes A and B.

In accordance with Section 25 of R.A. 7659, amending Article 83 of the Revised Penal Code, upon the finality of this decision, let the records of this case be forthwith transmitted to the Office of the President for the possible exercise of the sovereign prerogative of mercy.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Pardo, Ynares-Santiago, De Leon, Jr., Sandoval-Gutierrez, and Carpio, JJ., concur.
Buena, J., abroad on official business.

[1] Per Judge Vivencio P. Estrada.

[2] Rollo, p. 5.

[3] As evidenced by a copy of Lorlyn's birth certificate (Exh. A).

- [4] TSN (Lucita Dimalata), Aug. 11, 1999, pp. 23, 28.
- [5] Id., pp. 23-25.
- [6] Id., pp. 13-16 (underscoring supplied).
- [7] TSN (Honeybee Dimalata), Aug. 11, 1999, pp. 3-6.
- [8] Id., p. 9.
- [9] TSN (Lucita Dimalata), Aug. 11, 1999, pp. 24-27.
- [10] Id., pp. 24-28, 32-33.
- [11] Id., pp. 28-29, 36-37.
- [12] Id., pp. 33-34, 37.
- [13] TSN (Rogelio Ombreso), Oct. 11, 1999, pp. 16-20.
- [14] Id., pp. 22-24.
- [15] TSN (Candelaria Dimalata), Oct. 11, 1999, pp. 4-6, 11.
- [16] Id., pp. 6-9.
- [17] TSN, Oct. 11, 1999, p. 27.
- [18] Records, p. 6.
- [19] Rollo, p. 15.
- [20] Id., pp. 1-2.
- [21] Accused-appellant's Brief, pp. 6-17; Rollo, pp. 6-17.
- [22] See *People vs. Digma*, G.R. Nos. 127750-52, Nov. 20, 2000; *People vs. Tundag*, G.R. Nos. 135695-96, Oct. 12, 2000.
- [23] *People vs. Ulgasan*, 335 SCRA 441 (2000); *People vs. Padilla*, 301 SCRA 265 (1999).

[24] 326 SCRA 75 (2000).

- [25] TSN (Lucita Dimalata), Aug. 11, 1999, pp. 28-29, 37 (underscoring supplied).
- [26] *People vs. Roncal*, 272 SCRA 242 (1997); *People vs. Barcelona*, 325 SCRA 168 (2000).
- [27] E.g., *People vs. Segui*, G.R. Nos. 131532-34, Oct. 28, 2000; *People vs. Villaraza*, 339 SCRA 666 (2000); *People vs. Cula*, 329 SCRA 101 (2000); *People vs. Rosare*, 264 SCRA 398 (1996).
- [28] *People vs. Gonzales*, G.R. Nos. 139445-46, June 20, 2001; *People vs. Tabarangao*, 303 SCRA 623 (1999).
- [29] TSN (Lucita Dimalata), Aug. 11, 1999, p. 30.

[30] 329 SCRA 270 (2000).

- [31] Appellee's Brief, pp. 26-30; Rollo, pp. 26-30.
- [32] *People vs. Campuhan*, *supra* at 279.

[33] Id.at p. 283

[34] Id.at p. 284.

[35] Id.at pp. 284-285.

[36] TSN, Aug. 11, 1999, pp. 14-16 (underscoring supplied).

[37] 308 SCRA 356 (1999). See also *People vs. Castromero*, 280 SCRA 421 (1997).

[38] *People vs. Campuhan*, supra at 285-286 (underscoring supplied).

[39] 229 SCRA 543, 547-548 (1994) (underscoring supplied). See also the case of *People vs. Gabris*, 258 SCRA 663 (1996).

[40] G.R. Nos. 135201-02, March 15, 2001.

[41] G.R. Nos. 135511-13, November 14, 2001.

[42] *People vs. Ayo*, 305 SCRA 543 (1999).

[43] *People vs. Domantay*, 307 SCRA 1 (1999); *People vs. Dela Peña*, 233 SCRA 573 (1994).

[44] *People vs. Bohol*, G.R. Nos. 141712-13, August 22, 2001 (underscoring supplied).

[45] *People vs. Villamor*, 297 SCRA 262 (1998), citing cases.

[46] *People vs. Tundag*, G.R. Nos. 135695-96, Oct. 12, 2000.

[47] See *People vs. Domantay*, 307 SCRA 1 (1999); *People vs. Evangelista*, 282 SCRA 37 (1997).

[48] See *People vs. Brondial*, G.R. No. 135517, Oct. 18, 2000.

[49] 267 SCRA 682 (1997).

DISSENTING OPINION

With due regard for the exhaustive presentation of evidentiary antecedents, I am nonetheless constrained to register my dissent. I am bothered by the crucial finding in the Majority Opinion that accused-appellant Rogelio Ombreso should be held liable for consummated, not merely attempted, rape of Lorlyn N. Dimalanta. In light of the ambivalent context of the sexual assault as narrated by Lorlyn, her expressed denial of entry of accused-appellant's penis into her vagina as well as the benign medico-legal certificate, I am not comfortable with the ratio of the Majority that the concurrence of his hard penis, the repeated brushing or *bangga-bangga* of his penis against her vagina and her allegation of pain are sufficient to prove beyond reasonable doubt the slightest penetration of her vagina to consummate rape.[1] Carnal knowledge is an element of rape which must be proved actually, not presumptively, to warrant a conviction for its consummation.[2]

In the instant case only two (2) items of evidence are relevant for purposes of proving or refuting carnal knowledge: (a) the testimony of Lorlyn, and (b) the medico-legal certificate. Quoting from the ponencia's significant excerpts of Lorlyn's testimony -

"Q:

When your Uncle Rowing transferred to the house of your Lola Cande, what happened if any?

A:

He took off my panty x x x x

Q:

Now, after he removed your panty and also removed his short pants and brief, what happened next if any?

A:

He placed himself on top of me.

Q:

[Did] the penis of your uncle enter into your vagina?

A:

No, just here (witness pointing to her vagina; underscoring supplied) x x x x

Q:

The penis of your uncle was it hard?

A:

Yes x x x x

COURT: Did you feel something coming out of the penis?

A:

No, Your Honor.

Q:

No fluid?

A:

None, Your Honor.

ASST. PROS. TORIBIO: When the penis of your uncle was touching your vagina, what did you feel?

A:

I felt pain.

Q:

Why did you feel pain Lorlyn?

A:

Because he repeatedly pushed his penis (banga-banga)[3]"

xxx xxx xxx

The medico-legal certificate of Lorlyn's examination on 23 March 1998 plainly attests to the absence of laceration, abrasion and spermatozoa in her hymen.[4]

As may be shown hereunder, there are apparent ambiguities in the testimony of Lorlyn. Examining these obscure particulars, it is obvious that doubt pervades the purported proof of the "slightest penetration" of the victim's vagina. Consistent with the constitutional presumption of innocence and the mandated burden of proof of the prosecution, these gaps must be resolved against the State and in favor of the accused.

Lorlyn testified that accused-appellant's penis was "hard." But at what stage of the sexual assault was the male organ "hard?" By "hard," does she mean an "erect penis capable of full penetration?" The prosecution, together with the trial court, was duty-bound to elicit such precision in the testimony of Lorlyn since according to *People vs. Dela Peña* "the physiologic impossibility of penetration absent an erection - complete or otherwise - cannot be gainsaid."^[5] For a child of very tender years who would naturally encounter difficulty in communicating matters of sexual undertones, the victim's reference to "hard" could mean anything, not just an erect penis. Unfortunately, neither the prosecution did so nor the court, which could have raised clarificatory questions to explore this statement thoroughly.

Of course an erect penis touching the external portions of the female genitalia, without more, does not ipso facto establish the necessary element of carnal knowledge as it is still necessary to show that, as ruled in the herein cited *Dela Peña*, "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."^[6] In such a case, "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."^[7] The absence of this factual milieu in the case at bar forbids us from applying this rule in *Dela Peña*.

The pain referred to by Lorlyn in her testimony does not necessarily prove carnal knowledge. Neither *People vs. Palicte*^[8] nor *People vs. Gabris*^[9] cited in the ponencia is relevant to support the observation that "the testimony of the rape victim that she felt pain in her sex organ during the sexual assault constitutes sufficient proof of penetration upon which a conviction for rape could be based."^[10] In both *Palicte* and *Gabris*, there was evidence of insertion of the accused's penis into the vagina of his victim before the pain. Thus we narrated in *Palicte*: "He placed himself on top of her and inserted his penis into her vagina. He did this for half an hour. As Edievien felt the pain, she heard her brothers arrive."^[11] And in *Gabris*: "With Analyn lying on top of the pillow, appellant kissed her vagina. He then opened his zipper and while holding her at knifepoint, forcibly placed his penis inside her vagina. It was painful."^[12] In the case before us, there was no insertion of the penis, however slight, preceding the pain.

Even in *People vs. De la Cruz*^[13] where we appear to have associated pain in the vagina as convincing circumstantial evidence of carnal knowledge, there were other corroborative circumstances which led us to conclude consummation of the rape. Thus while we noted an inference of carnal knowledge on the basis of "pain" experienced by the victim, "Brigida's statement that she felt pain in her private part would have been incomprehensible if there had been absolutely no penetration, not even of the labia, by the accused's male organ."^[14] But this inference was nonetheless buttressed by solid facts confirming penetration as shown hereunder -

"Moreover, Dr. Salvador testified that he had found physical evidence of "manipulation" of the vagina or the vertibule thereof, which is consistent with entry into the lips of the female part of Brigida:

Court: You use the word manipulation, what was manipulated?

A:

The attempt to insert a finger or in some other cases wherein the man attempts to insert his erected penis on the

child whose genitalia is not yet ripe, with that particular act, there is no way that the penis can go inside the vaginal opening because at this age, the vaginal opening is still narrow, normal, .5 cms.

Q:

In this particular case of Brigida, there were signs that there were manipulations?

A:

I think so because the appearance is reddish which is not normal, it should be pinkish.

Dr. Moraleda's finding, upon the other hand, was that Brigida's hymen had in fact been lacerated, showing that there must have been some penetration. The fact that Dr. Moraleda's examination of Brigida took place eleven (11) days after the examination by Dr. Salvador does not impair the credit worthiness of Dr. Moraleda's findings. It is important to note, moreover, that the testimony of the child Brigida herself is quite consistent with the findings and testimony of both Dr. Salvador and Dr. Moraleda that there had been some penetration at least of the labia of Brigida's female part. Brigida's testimony stated, in relevant part:

Court:

Ida, you said he put his penis into your vagina, does (sic) his penis get into your vagina or not?

A:

Only on top, sir.

Q:

It did not go in?

A:

No, sir.

Q:

And did you feel any pain or you did not feel any pain?

A:

Yes, sir, I felt pain, sir.

Q:

Why did you feel pain, what pain? Where was the pain on your vagina or your body as a whole?

A:

In my vagina, sir.

Q:

Was [there a] medical report?

Fiscal:

The record of the fiscal's office shows there were two medical examinations.

Court:

Ida, you said a short time did you urinate at that time?

A:

Yes, sir.

Q:

What about this Bosyo did he urinate?

A:

No, sir.

Q:

How do you know you urinated?

A:

(Witness does not answer).

Q:

Did you know whether something came out from the penis of Bosyo?

A:

Sticky fluid and dropped on my thigh.

Q:

But you said you urinated, when did you urinate at the time or when?

A:

When I went home, sir.

Q:

Did you notice any or rather did you notice whether or not there was blood around the area of your vagina?

A:

No, sir.

Brigida's statement that she had felt pain in her private part would have been incomprehensible if there had been absolutely no penetration, not even of the labia, by the accused's male organ. It appears to the Court that the 7-year old Brigida was much too young to be capable of distinguishing between the penis merely lying outside the vagina and on top of the pubes, from the erect penis poking into the labia in the effort to get into the vaginal canal, but being unable to do so because of the unripe or infantile condition of the canal. We agree with the conclusion of the trial court that there had in fact been some penetration at least of the labia and that consequently, the crime that was committed was consummated rape."^[15]

It is truly a dangerous proposition to equate the victim's testimony of pain with proof of carnal knowledge. The peril lies in the absolute facility of manufacturing testimonies asserting pain. With malice towards none of the parties or their respective counsel in this case, lawyers can easily coach victims to utter "I felt pain" to secure the conviction of the accused. "Pain" is subjective and so easy to feign, unless the specific cause is pinpointed which

in the case of rape should be an insertion of the penis into the vagina. To insist on this inference of carnal knowledge on the strength solely of "pain" in the vagina effectively emasculates the critical distinction between consummated and attempted rape that we laid down in *People vs. Campuhan*[16] that the touching of the female organ to constitute consummated rape should be construed in relation to the entry by the penis, however slight, into the labia majora. We emphasized this need even more by ruling that it was not mere touching in the ordinary sense, nor a grazing or clashing alone of the organs, but there must be entry of the vagina of the victim even in the slightest degree. Thus in *Campuhan* the judgment of the court a quo holding the accused guilty of consummated rape was modified to attempted rape for failure of the prosecution to prove the slightest intrusion into the labia majora of the victim.

The repeated brushing or "bangga-bangga" of accused-appellant's penis against the vagina of Lorlyn is fatally ambiguous to prove carnal knowledge. In *People vs. Francisco*[17] we found the testimony of the victim that "[h]indi po sa butas pero sa aking pepe lang," to be inconclusive as it was "shrouded in ambiguity," and further declared -

"The prosecution has the onus probandi of establishing the precise degree of culpability of the accused. It must demonstrate in sufficient detail the manner by which the crime was perpetrated. Certainly, the testimony of the victim to the effect that the accused repeatedly poked her vagina and that she felt pain as a consequence thereof, would not be enough to warrant the conclusion that a consummated rape had indeed been committed. The quantum of evidence in criminal cases requires more than that" (underscoring supplied).

Prior to *Francisco* we ruled in *People vs. Tolentino*[18] that a victim's testimony, "binundul-bundol and kanyang ari" by the accused did not conclusively prove that rape was committed. We further ruled that this "testimony is subject to different interpretations and will not lead to the conclusion that [the accused's] intent was to have carnal knowledge of her." We also found no consummated rape in *People vs. Arce*[19] on account of the victim's claim that the accused "attempted to touch her vagina with his penis or `idinidikit yung ari niya." Verily in all these cases where the victim herself, as Lorlyn in the instant case, failed to state for the record that there was an insertion of the penis into the vagina, this Court for the nonce took a step back to examine other prosecution evidence to find indispensable support for the claim of consummated rape, absent which, we modified the crime to attempted rape.

In *People vs. Arce*[20] this Court held -

"Of added significance is the finding contained in the medical report as testified to by Dr. Luella Nario which reveals that there were no hymenal lacerations found on Gemmalyn. In cases of rape where there is a positive testimony and a medical certificate, both should in all respects complement each other; otherwise, to rely on the testimonial evidence alone, in utter disregard of the manifest variance in the medical certificate, would be productive of unwarranted or even mischievous results. It is necessary to carefully ascertain whether the penis of the accused in reality entered the labial threshold of the female organ to accurately conclude that rape was committed."

The critical bottom line in this dissent therefore is the absence of sufficient evidence for the prosecution to prove what we have set out in *Campuhan*: there must be sufficient and convincing proof that the penis indeed touched the labias or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. As I find no evidence of this sort in the case at bar, accused-appellant is liable only for attempted rape.

A review of recent jurisprudence bearing substantially similar facts resulted in a conviction only for attempted rape. In *People vs. Francisco*[21] we ruled:

"However, we disagree with the trial court's conclusion that accused-appellant is guilty of consummated rape. A careful sieving and sifting examination of the evidence shows that as observed by the Solicitor General, and to which we agree, accused-appellant is merely guilty of attempted rape. We fail to discern from Coralyn's testimony that accused-appellant attained some degree of penile penetration necessary to consummate the rape. In fact, on redirect examination by Fiscal Beltran, as if leading her to say that she was sexually penetrated by her father, she said -

Q:

You said that "ang ari ng tatay mo ay hindi nakapasok ng tuluyan sa ari mo?"

A:

Hindi po sa butas pero sa aking pepe lang.

Q:

How many times?

A:

Several times.

What Coralyn merely described, and clearly so, was the "hit and miss" character of accused-appellant's pumping motions, wherein his wayward phallus blindly and aimlessly hammered the victim's genitalia, likewise hitting the anus in the process. There is indeed serious doubt on the extent of the accused-appellant's penis assaulting as to touch, if at all, the labia majora. Her testimony that "Hindi po sa butas pero sa aking pepe lang," is inconclusive as it is shrouded in ambiguity. What does pepe mean to an 11-year old child? Does it pertain to the external pudenda, the mons pubis and its environs, as distinguished from her other term butas, which would then logically refer to labia majora and labia minora, collectively? To be sure, the prosecution evidence provided no explanation, much less an answer to enlighten the Court on what crime indeed was perpetrated.

The medico-legal report is likewise unavailing to confirm the commission of rape. On the contrary, it seems to support the absence of penile-labial contact - no extragenital physical injuries were noted on the body of the subject and that the hymen is intact and its orifice small, as to preclude complete penetration by an average sized adult Filipino male organ in full erection. Thus, as explained by Dr. Soliman -

COURT:

There is nothing entered in the vagina (sic)?

WITNESS:

There is nothing entered in the hymenal (sic).

FISCAL AGARAN:

So are you telling us Doctor that there was no complete penetration in the vaginal canal of the person of Coralyn?

WITNESS:

There was no penetration.

COURT:

Not even incomplete?

WITNESS:

Yes, your honor.

In *People vs. Campuhan* we held that touching when applied to rape cases does not simply mean mere epidermal contact, stroking or grazing of organs, a slight brush or a scrape of the penis on the external layer of the victim's vagina or her mons pubis, as in this case. There must be sufficient and convincing proof that the penis indeed touched the labias or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. As the labias, which are required to be "touched" by the penis, are by their natural situs beneath the mons pubis or the vaginal surface, to touch them with the penis is to attain some degree of penetration beneath the surface, hence, the conclusion that touching the labia majora or the labia minora of the pudendum constitutes consummated rape. But in the absence of any showing of the slightest penetration of the female organ, i.e., touching either labia of the pudendum by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness.

The prosecution has the onus probandi of establishing the precise degree of culpability of the accused. It must demonstrate in sufficient detail the manner by which the crime was perpetrated. Certainly, the testimony of the victim to the effect that the accused repeatedly poked her vagina and that she felt pain as a consequence thereof, would not be enough to warrant the conclusion that a consummated rape had indeed been committed. The quantum of evidence in criminal cases requires more than that. More so in the instant case where even the medico-legal certificate failed to back up the charge of consummated rape -

In cases of rape where there is a positive testimony and a medical certificate, both should in all respects complement each other; otherwise, to rely on the testimonial evidence alone, in utter disregard of the manifest variance in the medical certificate, would be productive of unwarranted or even mischievous results. It is necessary to carefully ascertain whether the penis of the accused in reality entered the labial threshold of the female organ to accurately conclude that rape was consummated. Failing in this, the thin line that separated attempted rape from consummated rape will significantly disappear.

The lacuna in the evidence engenders a cloud of doubt as to whether accused-appellant consummated the crime charged. Courts must ensure that verdicts of conviction rest firmly on sufficient and competent evidence, and not the results of passion and prejudice."

Under the same set of facts did we also hold the accused liable only for attempted rape in *Tolentino*,^[22] *Dimapilis*^[23] and *Arce*,^[24] all cited above.

The corresponding penalty for attempted rape is two (2) degrees lower than the imposable penalty of death for the offense charged, which is statutory rape of a minor below seven (7) years. Two (2) degrees lower is reclusion temporal, the range of which is twelve (12) years and one (1) day to twenty (20) years. Applying the Indeterminate Sentence Law, and in the absence of any mitigating or aggravating circumstance, the maximum of the penalty to be imposed upon the accused shall be taken from the medium period of reclusion temporal, the range of which is fourteen (14) years, eight (8) months and (1) day to seventeen (17) years and four (4) months, while the minimum shall be taken from the penalty next lower in degree, which is prision mayor, the range of which is from six (6) years and one (1) day to twelve (12) years, in any of its periods.

For all the foregoing, I vote to modify the Decision of the court a quo finding accused-appellant ROGELIO OMBRESO y MUTIA alias "ROWING" guilty of qualified statutory rape and sentencing him to death and to pay

damages. He should instead be found guilty of ATTEMPTED RAPE and punished accordingly, otherwise, we will be obliterating the marked distinction between attempted rape and consummated rape, which means, between reclusion temporal and death, on the basis of mere presumption!

[1] Majority Opinion, pp. 14-15.

[2] See *People vs. Caballes*, G.R. Nos. 102723-24, 19 June 1997 where we observed that "[t]he prosecution, however, failed to establish with clear and convincing evidence the attendance of any of these elements which cannot be inferred merely from conjectures and suppositions."

[3] Majority Opinion, pp. 3-4, citing *TSN*, 11 August 1999, pp. 14-16.

[4] *Id.*, p. 7; *Records*, p. 6.

[5] G.R. No. 104947, 30 June 1994, 233 SCRA 573, 579.

[6] *Ibid.*

[7] *Ibid.*

[8] G.R. No. 101088, 27 June 1994, 229 SCRA 543.

[9] G.R. No. 116221, 11 July 1996, 258 SCRA 663.

[10] Main Decision, p. 15.

[11] See Note 9, p. 545.

[12] See Note 10, p. 667.

[13] G.R. No. 75267, 10 September 1990, 189 SCRA 391.

[14] *Id.*, pp. 401-402.

[15] *Id.*, pp. 400-402.

[16] G.R. No. 129433, 30 March 2000, 329 SCRA 270.

[17] G.R. Nos. 135201-02, 15 March 2001.

[18] G.R. No. 130514, 17 June 1999, 308 SCRA 485.

[19] G.R. Nos. 139064-66, 6 September 2001.

[20] G.R. Nos. 139064-66, 6 September 2001.

[21] See Note 18.

[22] See Note 20.

[23] See Note 22.

[24] See Note 21.

DISSENTING OPINION

With due respect, I take a dissenting view.

The offense the accused committed was attempted rape, not consummated rape. There was no evidence of actual sexual intercourse, or entry of the male organ into the vagina of the victim, however slight. The victim, Lorlyn N. Dimalata, a six-year old girl, testified that the penis of her uncle Rowing, the accused, did not enter her vagina, just "to the upper part of the vaginal opening." She felt pain in her vagina because the accused repeatedly pushed his penis.[1] We quote:

"ASST. PROS. TORIBIO:

Q:

When the penis of your uncle was touching your vagina, what did you feel?

A:

I felt pain.

Q:

Why did you feel pain?

A:

Because he repeatedly pushed his penis (banga-banga)"[2]

Nonetheless, she admitted that there was no penetration, however slight. Thus, we quote:

"Q:

When you were sleeping, can you recall if you were awoken from your sleep?

A:

Yes.

Q:

Why were you awoken from your sleep?

A:

(Witness no answer.)

xxx xxx xxx

Q:

When your uncle Rowing transferred to the house of your Lola Cande, what happened if any?

A:

He took off my panty.

Q:

What else did he do if any?

A:

He also removed his brief and his short pants.

Q:

Now, after he removed your panty and also removed his short pants and briefs, what happened next if any?

A:

He placed himself on top of me.

Q:

Were you able to see his penis?

A:

No because I was still asleep.

Q:

Was the penis of your uncle entered into your vagina?

A:

No, just here. (witness pointing to her vagina)

Q:

Lorlyn, if this is your vagina, where was the penis of your uncle?

A:

Just here. (Witness pointing to the upper part of the vaginal opening)

Q:

Where particularly, can you clearly demonstrate to the court where was the penis your uncle in relation to your vagina?

A:

Here. (Witness pointing to the same spot.)

ATTY. PROS. TORIBIO:

Your Honor, I demonstrate the diagram of the vagina.

INTERPRETER:

The prosecuting fiscal demonstrated to the witness her right hand with her thumb and index finger that oval shape of the vagina and witness pointed to the place of the two fingers to demonstrate the position of the penis of his uncle with respect to her vagina.

COURT: (to the witness)

Q:

The penis of your uncle was it hard?

A:

Yes.

ASST. PROS. TORIBIO: (to the witness)

Q:

Did it take so long for the penis of your uncle to touch your vagina?

A:

Yes.

COURT: (to the witness)

Q:

Did you feel something coming out from the penis?

A:

No your Honor.

Q:

No fluid?

A:

None, your Honor."^[3]

Dr. Joselyn M. Baeyens, attending physician at the Bukidnon Provincial Hospital, issued a medical certificate dated March 25, 1998,^[4] (she did not testify) stating that there was "no laceration, no abrasion" on the hymen of the victim. In other words, the hymen was intact. Touching by the penis of the opening of the vagina is not consummated rape, only attempted rape.^[5] There is no evidence showing that the accused's penis touched the pudendum of the victim.^[6] True, entry of the penis into the lips of the female organ even without rupture or laceration of the hymen is enough.^[7] In this case, the doctor certified that "there was no laceration, no abrasion" on the hymen of the victim.

In *People vs. Campuhan*,^[8] we held that "a grazing of the surface of the female organ or touching the mons pubis of the pudendum is not sufficient to constitute consummated rape. Absent any showing of the slightest penetration of the female organ, i.e., touching of either labia of the pudendum by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness." In *People vs. Bation*,^[9] we ruled that for consummated rape to be established, "what is essential is that there be penetration of the female organ no matter how slight." In *People vs. Oliver*,^[10] the Court ruled that rape is consummated "when the penis touches the pudendum, however slightly."^[11] Or, there is "entrance of the male organ within the labia or pudendum of the female organ."^[12] Very recently, in *People vs. Francisco*, the Court ruled that "[T]here must be sufficient and convincing proof that the penis indeed touched the labias or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. As the labias, which are required to be 'touched' by the penis, are by their natural situs beneath the mons pubis or the vaginal surface, to touch them with the penis is to attain some degree of penetration beneath the surface, hence the conclusion that touching the labia majora or the labia minora of the pudendum constitutes consummated rape.

"But in the absence of any showing of the slightest penetration of the female organ, i.e., touching either labia of

the pudendum by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness." [13]

"To prove rape, it is necessary to establish that the penis touched the labia of the pudendum of the victim. Touching when applied to rape cases does not simply mean mere epidermal contact, stroking or grazing of organs, a slight brush or scrape of the penis on the external layer of the victim's vagina or mons pubis. There must be sufficient and convincing proof that the penis indeed touched the labias or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. As the labias, which are required to be "touched" by the penis, are by their natural situs beneath the mons pubis or the vaginal surface, to touch them with the penis is to attain some degree of penetration beneath the surface, hence, the conclusion that touching the labia majora or the labia minora of the pudendum constitutes consummated rape. But in the absence of any showing of the slightest penetration of the female organ, i.e., touching either labia of the pudendum by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness.

x x x x

Of added significance is the finding contained in the medical report as testified to by Dr. Luella Nario which reveals that there was no hymenal lacerations found on Gemmalyn. In cases of rape where there is a positive testimony and a medical certificate, both should in all respects complement each other; otherwise, to rely on the testimonial evidence alone, in utter disregard of the manifest variance in the medical certificate, would be productive of unwarranted or even mischievous results. It is necessary to carefully ascertain whether the penis of the accused in reality entered the labial threshold of the female organ to accurately conclude that rape was committed." [14]

In this jurisdiction, the law requires that the victim's testimony must find support in the physical evidence. [15] In this case, the physical evidence does not support the victim's testimony.

IN VIEW WHEREOF, I vote to convict the accused of attempted, not consummated rape.

[1] TSN, August 11, 1999, pp. 13-16.

[2] Original Record, Brief for accused-appellant, at p. 11.

[3] Supra, Note 2, at pp. 10-11.

[4] Original Record, Exh. "M", p. 6.

[5] People vs. Campuhan, 329 SCRA 270 [2000].

[6] People vs. Gastador, 365 Phil. 209, 223 (1999).

[7] People vs. Marcelo, 364 Phil. 576, 588 (1999).

[8] Supra, Note 5, at p. 282, per J. Bellosillo.

[9] People vs. Bation, 364 Phil. 731, 748 (1999).

[10] People vs. Oliver, 362 Phil. 414, 424 (1999).

[11] Citing People vs. Caballes, 340 Phil. 213, 225 [1997]; People vs. Andan, 336 Phil. 91, 115 (1997); People vs. Magana, 328 Phil. 721, 745 (1996).

[12] *People vs. Alojado*, 364 Phil. 713, 724 (1999).

[13] G.R. Nos. 135201-02, March 15, 2001; *People vs. Mariano*, G.R. Nos. 135511-134, November 14, 2001.

[14] *People vs. Arce*, G. R. No. 139064-66, September 6, 2001, citing *People vs. Campuhan*, 329 SCRA 270, 287 [2000].

[15] *People vs. Campuhan*, *supra*, Note 5.

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