

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOEL ALIBUYOG Y BULALA, APPELLANT.

G.R. No. 144976. March 11, 2004

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

Appellant Joel Alibuyog y Bulala prays that he be declared guilty of only attempted rape[1] in his appeal from the Decision[2] of Branch 17 of the Regional Trial Court of Davao City in Criminal Case No. 43083-99 finding him guilty of consummated rape.

The Information[3] dated May 7, 1999 charged appellant as follows:

That on or about May 5, 1999, in the City of Davao, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, willfully, unlawfully and feloniously have carnal knowledge or sexual intercourse with JOCEL D. MADELOSO, who is a minor of seven (7) years of age, against her will.

After pleading not guilty,[4] appellant waived pre-trial, his counsel manifesting that he would neither plead guilty to a lesser offense nor enter into any stipulation.[5]

From the evidence for the prosecution consisting of, among other things, the testimonies of Jocel Madeloso (the victim), her mother Juveniana Madeloso (Juveniana),[6] Dr. Samuel Cruz, who physically examined the victim the day following the incident subject of the case, the victim's aunt-neighbor Emelina Albaraccin (Emelina), and SPO1 Leonilo Jackain, the following have been established:

On the night of May 5, 1999, while Juveniana was attending a birthday party at a neighbor's house, her daughter - the then 7-year old victim,[7] accompanied by two other children and herein appellant, sought permission from her to go bicycle riding with her companions. Juveniana assented to the request.[8]

The victim, together with her companions, thereupon proceeded as planned. While she and appellant were on board a bicycle cruising along Ferriols St. in Toril, Davao City, appellant brought her to a dark and grassy place. There, appellant kissed her face and lips, undressed her and removed her shorts and underwear. He then lay on top of her and made push and pull movements.[9]

Aware of appellant's bringing of the victim to a dark and grassy place in front of a store owned by one Rosalie Cudiamat, one of the victim's playmates, a certain Randy, notified Juveniana about it. Juveniana lost no time in going to the direction pointed to by Randy, which was about three houses away from her house, in search of the victim.[10]

As Juveniana started calling out the name of the victim, the latter was able to free herself from appellant and proceeded towards the road. On seeing her mother Juveniana, the victim, who was crying, narrated what had transpired in the grassy area. Juveniana thus brought her to the house of Emelina,[11] to whom she recounted the victim's plight. They then proceeded to the Toril Police Station to file a report.[12]

The result of the physical examination conducted on the victim the following day showed that her hymen was intact and its orifice small as to preclude complete penetration by an average sized male organ in erection without causing hymenal injury; there was no extra-genital physical injury; and the semenalysis performed on her was negative for spermatozoa.[13]

At the witness stand, Dr. Cruz declared that the finding that a victim's hymen is intact does not preclude partial penetration by the penis as long as it does not exceed 0.8 cm. in diameter,[14] "the hymenal orifice of the patient."

Appellant, 21 years old when he testified on May 5, 2000[15] or a year after the incident, upon the other hand, denied the accusation and attributed ill-motive on the part of Juveniana behind the filing of the case.

His version goes: Around 5:30 p.m. of May 5, 1999, as he was washing his feet at an artesian well, he advised the victim, who together with her parents live in his (appellant's) grandmother's house, to stay away as she might get wet. Not heeding his advice, he poured water over her head, prompting her to report the matter to her mother Juveniana. Angered by the incident, Juveniana, with a bolo in hand, accosted him, hence, he ran. While Juveniana chased him, she failed to catch up with him.[16]

At around 7:00 p.m. of that same day, May 5, 1999, while he was playing with youngsters his age and children including the victim, he heard Juveniana shouting at her live-in partner-father of the victim from whom she inquired on the whereabouts of the victim. On seeing Juveniana walking in a "swinging" manner, he (appellant) told her that she reeked of liquor and that she was drunk, to which she retorted that he had no business telling her if she was indeed drunk. Juveniana's live-in partner then pointed to where the victim was playing.[17] Juveniana thus repaired to where the victim was.

On seeing the victim, Juveniana pulled and spanked her "at the back lower portion" of her body and she (the victim) rolled on the ground. Juveniana thereafter helped the victim stand up and brought her to the house of a certain Roding, a kagawad. [18]

Corroborating appellant's claim were witnesses Mauricio Terante[19] and Andres Cañedo.[20]

Defense witness Maxima Alibuyog, a relative of appellant, also corroborated appellant's claim about the pouring of water on the victim incident but she (witness) claimed that it was not on the date of the alleged rape incident, May 5, 1999, as claimed by appellant, but three days before.[21]

Finding for the prosecution, the trial court rendered the Decision under review, the dispositive portion of which reads:

WHEREFORE, finding the evidence of the prosecution sufficient, to establish the guilt of accused, Joel Alibuyog beyond reasonable doubt, accused Joel Alibuyog, is sentenced to suffer a penalty of reclusion perpetua together with all accessory penal[ies] as provided for by law.

[A]ccused, is furthermore ordered to pay the complainant, Jocel Madeloso the amount of P50,000.00 by way of civil indemnity and still another amount of P50,000.00 by way of moral damages for the commission of such a very beastly act of destroying the honor and reputation of a young and tender child, without regard to her future and family x x x.[22]

In his present appeal, appellant assigns just one error:

THE TRIAL COURT ERRED IN DECLARING ACCUSED-APPELLANT GUILTY OF THE CRIME OF RAPE INSTEAD OF ATTEMPTED RAPE ONLY.[23]

Appellant cites the case of *People v. Contreras*[24] which enumerates the elements of attempted felony as follows:

- The offender commences the commission of the felony directly by overt acts;
- He does not perform all the acts of execution which should produce the felony;
- The offender's act be not stopped by his own spontaneous desistance;
- The non-performance of all acts of execution was due to cause or accident other than his spontaneous desistance.[25] (*Italics in the original*)

Appellant argues that as, by the victim's own declaration, when he was doing the push and pull movement, his pants were still on and his organ did not penetrate her vagina but only touched it, he is liable only for attempted rape.

For a conviction of consummated rape to prosper, complete or full penetration of the victim's private part is not necessary because mere introduction of the male organ into the labia majora of the victim's genitalia consummates the crime.[26] What is fundamental, however, is that the entry or at least the introduction of the male organ into the labia of the pudendum must be convincingly proved.

Of critical importance is that there must be sufficient and convincing proof that the penis indeed touched even just the labia or slid onto the victim's organ, and not merely stroked the external surface thereof.[27]

In Juveniana's affidavit-complaint[28] - basis of the filing on May 7, 1999 of the information, she declared that when the victim surfaced from the dark and grassy place after she had called her out, the victim related that appellant brought her there, kissed her cheeks and lips, pulled down her shorts and "directed" his penis into her vagina. This document reflects the first account of the victim of the incident, as related to her mother — that appellant "directed" his penis into her vagina. Such described act, however, does not per se amount to penetration of the victim's private part which is essential to a conviction for consummated rape.

On questioning by the trial court, the victim declared that appellant's penis "touched" her vagina. Thus she testified:

Q -

While he was pumping you[, did] you notice if his penis touched your vagina?

FISCAL:

No basis.

A -

No.

COURT:

x x x

Q -

What did he do with your vagina?

A -

He placed his penis on my vagina.

x x x

Q -

When his penis went inside your vagina, did you feel pain?

A -

Actually, his penis did not penetrate on my vagina.

Q -

If it did not get inside your vagina did it touch your vagina?

A -

Yes.[29] (Emphasis and underscoring supplied)

The rest of the transcript of the victim's testimony is replete with repeated denial of penile insertion.

Complementing the victim's testimony is the finding of Dr. Cruz, as contained in his medical report,[30] that no extra-genital physical injury was noted and that her hymen was intact and negative for spermatozoa.

The absence of spermatozoa does not of course negate rape.[31] Neither does the absence of fresh lacerations in the hymen nor the lack of external signs of physical injuries.[32] Where there is, however, positive testimony and a medical certificate, both should in all respects complement each other.[33]

Given the victim's testimony which is too ambiguous to prove the vital element of penetration of her private part and the result of her physical examination which was bereft of telltale marks suggestive of penetration, appellant's proposition that he is liable only for attempted rape persuades.

In fine, since appellant had started the commission of rape by his above-described acts but failed to perform all the acts of execution, not on account of his own spontaneous desistance, he is liable only for attempted rape.

The penalty for attempted rape is two (2) degrees lower than the prescribed penalty of reclusion perpetua for consummated rape of a minor under twelve but not below seven years of age.[34] Two (2) degrees lower from reclusion perpetua is prision mayor, the range of which is Six (6) Years and One (1) Day to Twelve years.

Absent any aggravating or mitigating circumstances and applying the Indeterminate Sentence Law, the maximum of the penalty to be imposed upon appellant is prision mayor in its medium period while the minimum shall be taken from the penalty next lower in degree, which is prision correccional, the range of which is Six (6) Months and One (1) Day to Six (6) Years, in any of its periods.

The amount of civil indemnity awarded by the trial court must accordingly be reduced. It is, in attempted rape, following prevailing jurisprudence, P30,000.00.[35] The amount of moral damages awarded must be reduced too to P25,000.00, concomitant with and necessarily resulting from the attempted rape.[36]

WHEREFORE, the July 12, 2000 Decision of Branch 17 of the Regional Trial Court of Davao City is hereby MODIFIED.

Appellant, Joel Alibuyog y Bulala, is hereby found guilty beyond reasonable doubt of ATTEMPTED RAPE and is sentenced to suffer the indeterminate penalty of Six (6) Years of prision correccional as minimum to Ten (10) Years of prision mayor as maximum. He is ordered to pay the victim, Jocel D. Madeloso, the amount of P30,000.00 as civil indemnity and P25,000.00 as moral damages.

SO ORDERED.

Vitug, (Chairman), Sandoval-Gutierrez, and Corona, JJ., concur.

[1] Rollo at 89.

[2] Id. at 17-46.

[3] Id. at 8.

[4] Id. at 17.

[5] Ibid.

[6] Also "Ubeniana Madeloso."

[7] Exhibit "B," Certificate of Live Birth showing that she was born on April 21, 1992, Record at 55.

[8] Transcript of Stenographic Notes (TSN), November 22, 1999 at 18-11.

[9] TSN, January 17, 2000 at 2-5.

[10] TSN, November 22, 1999 at 6; Records at 6.

[11] Also "Albaracin" and "Albarracin." Emelina is the sister of Claudan Alipanta who is Juveniana's live-in partner and the victim's father.

[12] TSN, January 18, 2000 at 2-3; TSN, January 17, 2000 at 6; TSN, November 22, 1999 at 7.

[13] Records at 8.

[14] TSN, November 22, 1999 at 3-5.

[15] TSN, May 15, 2000 at 2.

[16] TSN, May 15, 2000 at 3-4.

[17] TSN, May 15, 2000 at 5-6.

[18] TSN, May 15, 2000 at 7-8.

[19] TSN, March 20, 2000 at 2-4.

[20] TSN, June 26, 2000 at 3-8.

[21] TSN, March 21, 2000 at 4-5.

[22] Rollo at 45.

[23] Id. at 79.

[24] 338 SCRA 622 (2000).

[25] Id. at 646.

[26] People v. Pascua, G.R. No. 151858, November 11, 2003; People v. Flores, G.R. No. 145309-10, April 4, 2003.

[27] People v. Arce, 364 SCRA 550, 552-553 (2001).

[28] Records at 56.

[29] TSN, January 17, 2000 at 4.

[30] Records at 54, Exhibit "A."

[31] People v. Lozano, at 371 SCRA 546 (2001); People v. Mamalayan, 369 SCRA 79, 88-89 (2001).

[32] People v. Musa, 371 SCRA 234, 246 (2001); People v. Caniezo, 354 SCRA 298, 305 (2001).

[33] People v. Arce, 364 SCRA 550, 565 (2001).

[34] Art. 51, 266-A, 266-B, Revised Penal Code.

[35] People v. Mendoza, G.R. Nos. 152589 & 152758, October 24, 2003.

[36] Ibid.; People v. Monteron, 378 SCRA 340 (2002).

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