THE PEOPLE OF THE PHILIPPINES, VS. ALVIN ABULON Y SALVANIA, APPELLANT.

G.R. No. 174473. August 17, 2007

Ponente: TINGA, J.

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TINGA, J.:

For automatic review is the decision[1] of the Court of Appeals (CA) dated 28 April 2006, affirming with modification the decision[2] of the Regional Trial Court (RTC) of Santa Cruz, Laguna, Branch 28,[3] dated 27 December 2000, finding him guilty beyond reasonable doubt of two (2) counts of qualified rape and one (1) count of acts of lasciviousness.

In three (3) separate Informations[4] for Criminal Cases No. SC-7422, SC-7423 and SC-7424 all dated 16 June 1999, appellant was indicted before the RTC for three (3) counts of qualified rape against his minor daughter AAA.[5] The accusatory portions in all the Informations are identical, except as regards the date of commission of the crime. The Information in Criminal Case No. SC-7422 reads:

> At the instance of the private complainant [AAA] with the conformity of her mother [BBB][6] in a sworn complaint filed with the Municipal Circuit Trial Court of Lumban-Kalayaan (Laguna), the undersigned Assistant Provincial Prosecutor of Laguna hereby accuses ALVIN ABULON Y SALVANIA, of the crime of "RAPE," committed as follows:
> "That on or about March 14, 1999, in the Municipality of Kalayaan, Province of Laguna, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd designs, with grave abuse of confidence or obvious ungratefulness, and with force and intimidation, did then and there wilfully [sic], unlawfully and feloniously have carnal knowledge of his legitimate minor daughter, [AAA], who at the [sic] time was thirteen (13) years of age, against her will and consent and to her damage and prejudice."
>
> **CONTRARY TO LAW.**

After appellant pleaded not guilty, trial ensued with AAA herself, as the first prosecution witness, testifying to the following facts:

AAA is the oldest of five (5) legitimate children born to appellant and BBB. On 14, 15, and 16 March 1999, appellant raped AAA. The first rape incident occurred at around 1:30 in the morning of 14 March 1999. AAA was home, fast asleep next to her brother and sister when she suddenly woke up to the noise created by her father who arrived drunk, but who likewise soon thereafter returned to the wedding festivities he was attending. Abiding by their father's instructions, AAA and her siblings went back to sleep.[7]

AAA was next awakened by the weight of her father lying naked on top of her. Appellant had removed her underwear while she slept. He poked a knife on AAA's waist and threatened to kill her and her siblings if she reported the incident to anyone. She begged him to stop but he proceeded to kiss her mouth, vagina, and breast, and to have carnal knowledge of her.[8] Although they witnessed the ongoing ordeal, AAA's siblings could do nothing but cry as appellant likewise poked the knife on them.[9] The following morning, AAA found a whitish

substance and blood stains on her panty.[10]

On 15 March 1999, at around 10:30 in the evening, AAA and her siblings were awakened as appellant came home drunk. He told them to eat first as they had not taken their supper yet. After dining together, appellant left and AAA, her brother, and her sister went back to sleep.[11] As in the previous evening, appellant roused AAA in mid-sleep. This time, she woke up with her father holding her hand, covering her mouth and lying on top of her. He undressed AAA, then mounted her. Repeatedly, he inserted his penis into her vagina, and AAA felt pain in her private parts. Appellant also kissed and fondled AAA on different parts of her body.[12]

Again, AAA's siblings could only cry as they saw appellant rape their sister. AAA's sister, however, took a pen and wrote her a note which read: "Ate, let us tell what father was doing to the police officer." After appellant had raped AAA, the latter's sister asked their father why he had done such to AAA. In response, appellant spanked AAA's sister and threatened to kill all of them should they report the incidents to the police.[13] The sisters nonetheless related to their relatives AAA's misfortune, but the relatives did not take heed as they regarded appellant to be a kind man.[14]

The third rape episode happened at around 3:30 in the morning of 16 March 1999. Although appellant did not insert his penis into AAA's vagina on this occasion, he took off her lower undergarments and kissed her vagina.[15] On cross-examination, AAA asserted that her father inserted his tongue into the hole of her vagina and she felt pain because of this.[16]

To corroborate AAA's testimony, the prosecution presented BBB and AAA's 6- year old brother CCC.[17] BBB testified that she was a stay-in housemaid working in Las Piñas on the dates that her daughter was raped by appellant. On 26 March 1999, she went home and stayed with her family. However, it was only on 4 May 1999 that BBB learned of the rape, when CCC told her that appellant had raped AAA three (3) times and that he had seen his father on top of his sister during those occasions. BBB then verified the matter with AAA herself, and the latter affirmed the incidents. BBB thus took AAA with her to the barangay and police authorities to report the incidents, and later to the provincial hospital for medical examination.[18]

CCC testified that on three (3) separate occasions, he saw his father lying naked on top of AAA, who was likewise naked.[19]

The prosecution also presented SPO1 Bayani G. Montesur (SPO1 Montesur) and Dr. Gloria Cabael (Dr. Cabael). SPO1 Montesur identified the Police Blotter of 4 May 1999 which recorded the complaints of rape against appellant and the report of the latter's arrest.[20] Dr. Cabael, on the other hand, testified that she examined AAA on 4 May 1999 upon the request of Police Officer Gallarosa. She identified the Rape Case Report she prepared thereafter.[21]

Appellant testified as the sole witness on his behalf, proffering denial and alibi as his defenses. According to appellant, he was hired by his aunt, Raquel Masangkay, to deliver hogs and that at 1:30 in the morning of 14 March 1999, he was in Calamba, Laguna pursuant to such employment. He averred that he went home at 7:00 in the morning of the following day and thus could not have raped his daughter as alleged.[22] Likewise denying the second rape charge, appellant testified that on 15 March 1999, he attended a wedding ceremony in Sityo Kalayaan, San Antonio, Kalayaan, Laguna. He went home drunk at 6:00 that evening and promptly went to sleep.[23] Similarly, at 3:00 in the morning of 16 March 1999, appellant claimed to have been asleep with his children and could not have thus committed the rape as charged.[24]

Finding that the prosecution had proven beyond reasonable doubt the guilt of appellant of the crime of qualified rape in Criminal Case Nos. SC-7422 and SC-7423 and the crime of acts of lasciviousness in Criminal Case No.

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SC-7424, the RTC rendered a Consolidated Judgment against appellant and sentenced him accordingly, thus:

> W H E R E F O R E :
> Under Criminal Case No. SC-7422, this Court finds the accused ALVIN ABULON y SALVANIA GUILTY BEYOND REASONABLE DOUBT as PRINCIPAL of CONSUMMATED QUALIFIED RAPE as defined and penalized under Article 335 of the Revised Penal Code, as amended by Rep. Act No. 7639, otherwise known as the DEATH PENALTY LAW, and hereby sentences him to suffer the SUPREME PENALTY of DEATH and to indemnify the offended party [AAA] the following sums:
>
> P 75,000.00 - as civil indemnity
> 50,000.00 - as moral damages; and
> 50,000.00 - as exemplary damages.
>
> Under Criminal Case No. SC-7423, this Court finds the accused ALVIN ABULON y SALVANIA GUILTY BEYOND REASONABLE DOUBT as PRINCIPAL of CONSUMMATED QUALIFIED RAPE as defined and penalized under Article 335 of the Revised Penal Code, as amended by Rep. Act No. 7639, otherwise known as the DEATH PENALTY LAW, and hereby sentences him to suffer the SUPREME PENALTY of DEATH and to indemnify the offended party [AAA] the following sums:
>
> P 75,000.00 - as civil indemnity
> 50,000.00 - as moral damages; and
> 50,000.00 - as exemplary damages.
>
> Under Criminal Case No. SC-7424, this Court finds the accused ALVIN ABULON y SALVANIA GUILTY BEYOND REASONABLE DOUBT as PRINCIPAL of ACTS OF LASCIVIOUSNESS as defined and penalized under Article 336 of the Revised Penal Code and hereby sentences him to suffer the penalty of imprisonment for SIX (6) MONTHS of ARRESTO MAYOR as MINIMUM to SIX (6) YEARS of PRISION CORRECCIONAL as MAXIMUM.
>
> The accused is further ordered to pay the costs of the instant three (3) cases.
>
> SO ORDERED.[25]

With the death penalty imposed on appellant, the case was elevated to this Court on automatic review. However, pursuant to this Court's ruling in People v. Mateo,[26] the case was transferred to the Court of Appeals. On 28 April 2006, the appellate court rendered its decision affirming appellant's conviction, but with modification as to damages awarded to the victim. The dispositive portion of the decision states:

> WHEREFORE, the decision of the Regional Trial Court of Santa Cruz, Laguna, Branch 28, in Criminal Case Nos. SC-7422 and SC-7423 finding appellant Alvin S. Abulon guilty beyond reasonable doubt of the crimes of qualified rape, and in Criminal Case No. SC-7424, finding appellant guilty beyond reasonable doubt of the crime of acts of lasciviousness, are hereby AFFIRMED.
>
> The civil aspect of the case is MODIFIED to read: In Criminal Case Nos. SC-7422-7423, the award of exemplary damages in the amount of [P]50,000.00 is reduced to [P]25,000.00. In Criminal Case No. SC-7424, appellant is ordered to pay the victim the amount of [P] 30,000.00 as moral damages. We affirm in all other respects.
>
> Pursuant to A.M. 00-5-03-SC (Amendments to the Revised Rule of Criminal Procedure to Govern Death Penalty Cases), which took effect on October 15, 2004, this case is elevated and certified to the Supreme Court for its automatic review.
>
> SO ORDERED.[27]

In his Brief,[28] appellant assails his conviction and imputes grave error to the trial court for giving weight and credence to the testimony of AAA. In particular, he makes capital of AAA's delay in reporting the incidents to her mother. He likewise impugns the trial court's alleged bias in propounding inappropriate leading questions to private complainant AAA. Finally, he maintains that the Informations against him are defective as they failed to allege the key element of force and/or intimidation.[29]

We affirm the decision of the Court of Appeals with modifications.

The duty to ascertain the competence and credibility of a witness rests primarily with the trial court,[30] because it has the unique position of observing the witness's deportment on the stand while testifying. Absent any compelling reason to justify the reversal of the evaluations and conclusions of the trial court, the reviewing court is generally bound by the former's findings.[31]

In rape cases particularly, the conviction or acquittal of the accused most often depends almost entirely on the credibility of the complainant's testimony. By the very nature of this crime, it is generally unwitnessed and usually the victim is left to testify for herself.[32] Her testimony is most vital and must be received with the utmost caution.[33] When a rape victim's testimony, however, is straightforward and marked with consistency despite grueling examination, it deserves full faith and confidence and cannot be discarded. Once found credible, her lone testimony is sufficient to sustain a conviction.[34]

The court a quo found the testimony of AAA in its entirety to be credible, made in a candid, spontaneous, and straightforward manner and never shaken even under rigid cross-examination.[35] We agree that AAA's narration of her harrowing experience is worthy of credence, thus:

> Criminal Case No. SC-7422
>
> Trial Prosecutor:
>
> Q : Tell us what happened at around 1:30 in the morning of March 11, [sic] 1999 to you?
> A : My brother and sister and I were already asleep when my father who was drank [sic] came home. We told him to just sleep. My father told us that he would still return to the wedding celebration (kasalan).
>
> x x x x
>
> Q : What happened next when you continued sleeping?
> A : I was awakened when I felt my father already on top of me, sir.
>
> Q : Tell us exactly what was [sic] your position then at that time you woke up?
> A : I was still lying straight down, sir.
>
> Q : How about your father in relation to you, where was he at the time you woke up?
> A : He was on top (nakadagan) of me, sir.
>
> Court:
> Q : Was he naked?
> A : Already naked, Your Honor.
>
> Q : How about you, do [sic] you have your clothes on?
> A : I have [sic] my lady sando on, Your Honor.
>
> Trial Prosecutor:
> Q : Are [sic] you still wearing your panty when you were awakened?
> A : No more, sir.

x x x x

Q : What did your father do aside from placing his body on top of you?
A : He poked a knife on [sic] me, sir.

Court:
Q : Did he say something?
A : Yes, Your Honor.

Q : What did he say?
A : He said that if he [sic] report her [sic] to anybody he would kill us, Your Honor.

x x x x

Trial Prosecutor:
Q : What else did he do aside from telling you "huag kang magsusumbong"?
A : He also poked the knife on [sic] my brother and sister, sir.

Q : They were already awakened at that time?
A : Yes, sir.

Q : What else did he do aside from poking a knife on [sic] you and your brother and sister?
A : No more, sir.

Court:
Q : While your father according to you is [sic] on top of you, what did he do if any?
A : "Kinayog na po niya ako."

Q : What do you mean by telling [sic] "kinayog na po niya ako"?
A : He was moving, Your Honor.

Q : While your father was moving, what else was happening at that time?
A : I felt pain, Your Honor.

Trial Prosecutor:
Q : From where did you feel that pain?
A : From my private part, sir.

x x x x

Q : Do you know if you know why you felt the pain on the lower portion of your body?
A : Yes, sir.

Q : Please tell us if you know?
A : Something whitish coming out from it, sir.

Court:
Q : From where did it come from [sic]? That whitish substance?
A : From my father's private part, Your Honor.

Q : Why, what happened to the private part of your father? A : I do not know, Your Honor.

Q : When you felt pain, what was your father doing then?
A : He repeated what he told [sic] previously not to tell to [sic] anybody.

Q : At that time, did you see the private part of your father?
A : Yes, Your Honor.

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Q : When you felt pain. Do you know what is [sic] happening to the private part of your father?
A : Yes, Your Honor.

Q : What was happening?
A : His private part stiffened or hardened (tumirik), Your Honor.

Q : Where was it placed if any?
A : Into my private part, Your Honor.

Q : Did the private part of you father actually penetrate your vagina?
A : Yes, Your Honor.

Q : What did you feel at the time the penis of your father entered your vagina?
A : It was painful, Your Honor.

Q : At that time was your father making any movement?
A : Yes, Your Honor.

Q : Will you describe the movement made by your father?
A : (Witness demonstrating an upward and downward stroke by placing her right palm over her left hand)

Trial Prosecutor:
Q : Did he kiss you?
A : Yes, sir.

Q : In what part of your body?
A : On my mouth, sir.

Q : Aside from your mouth, what other part or parts of your body did he kiss?
A : On my private part, sir.

Q : When did he kiss you private part, before inserting his penis or after? A : After he inserted his penis, sir.

Q : What other part of your body did he kiss?
A : On my breast, sir.[36]

x x x x

Criminal Case No. SC-7423

TP. Arcigal, Jr.:
Q : Now, you said that the second incident happened [on] March 15, 1999, am I correct?
A : Yes, sir.

Q : And where and what time said [sic] second incident happened?
A : 10:30 in the evening, sir, also in our house, sir.

x x x x

Q : And what were you doing when your father returned at around 11:00 o'clock in the evening?
A : We were all asleep, sir.

Q : And how did you come to know that he returned at around 11:00 P.M.?
A : My father suddenly held my hand, sir.

Q : And because of that, you were awakened?
A : Yes, sir.

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Q : And what happened when you were awakened because your father held your hand?
A : He covered my mouth, sir.

Q : And after covering your mouth, what else did he do?
A : He removed the lower portion of my clothes. "Hinubuan po niya ako."

x x x x

Q : After removing your lady sando, what else did he do?
A : He laid himself on top of me, sir.

x x x x

Q : Now, what did he do to you when he was already on top of you? A : He was "kinakayog niya po ako."

Q : Aside from "kinakayog," what else did he do?
A : He kissed my breast, sir.

Q : Aside from that, what else?
A : He likewise touched my private part, sir.

Q : When he was on top of you, do you know where was [sic] his penis at that time?
A : Yes, sir.

Q : Where?
A : Into my vagina, sir.

Q : How did you come to know that the penis of your father was inside your vagina?
A : I felt pain in my private part, sir.

Q : And do you know why you felt pain in your private part?
A : Yes, sir.

Q : Why?
A : His private part ". (Thereafter witness is crying while uttering words: "I am afraid I might be killed by my father.") He held his penis into my vagina. Thereafter, inserted it repeatedly into mine, sir.

Q : And you were able to actually feel his penis inside your vagina?
A : Yes, sir. [37]

x x x x

Criminal Case No. SC-7424

TP. Arcigal, Jr.:
Q : Now, you said also that you were raped on March 16, 1999, am I correct?
A : Yes, sir.

Q : What time?
A : It was 3:30 o'clock in the morning, sir.

x x x x

TP. Arcigal, Jr.:
Q: Now, how did it happen, that third incident?
A: I was able to run downstairs but when I was about to open the door, he was able to hold my dress, sir.

Q : Was your father drunk at that time?

A : Yes, sir.

Q : How did you come to know?
A : His eyes were red and he was laughing at me while telling me: "It is your end." (Witness crying while answering the question.)

Q : Now, what happened when your father was able to hold your dress? A : He carried me upstairs, sir.

Q : Was he able to carry you upstairs?
A : Yes, sir.

Q : What did he do, if any, when you were upstairs? A : He removed my panty and shortpants, sir.

Q : After removing your shorts and panty, what else did he do?
A : No more but he kissed my vagina.

Q : Which part of your vagina did he kiss?
A : That part of my vagina with hold [sic].

Court: Q : What about your upper garments at that time?
A : He did not remove it, Your Honor.

Q : What else did he do, aside from that?
A : Nothing more, just that.

Q : After kissing your vagina, what else happened, if any?
A : He again poked the knife on us, Your Honor.

Q : At that time, was your father naked or not?
A : Still with his clothes on, Your Honor.

x x x x

Q : For clarification, what else, if any, did your father do after your father kissed your vagina?
A : Nothing more, merely that act, Your Honor.

Q : You mean your father did not insert his penis to [sic] your vagina anymore? A : No more, Your Honor.

x x x x

TP. Arcigal, Jr.:
Q : Now, what did he use in kissing your clitoris?
A : His tongue, sir.

Q : How did you come to know that it was his tongue that he used? A : It is because I saw him put out his tongue, sir.[38]:

Verily, it is inconceivable and contrary to human experience for a daughter, who is attached to her father by the natural bond of love and affection, to accuse him of rape, unless he is the one who raped and defoliated her.[39] As we have pronounced in People v. Canoy:[40]

> It is unthinkable for a daughter to accuse her own father, to submit herself for examination of her most intimate parts, put her life to public scrutiny and expose herself, along with her family, to shame, pity or even ridicule not just for a simple offense but for a crime so serious that could mean the death sentence to the very person to whom she owes her life, had she really not have been aggrieved. Nor do we believe that the victim would fabricate a story of rape simply because she wanted to exact revenge against her father, appellant herein, for allegedly scolding and maltreating her.[41]

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In stark contrast with AAA's convincing recital of facts, supported as it was by the testimonies of BBB and CCC, are appellant's uncorroborated and shaky defenses of denial and alibi. Nothing is more settled in criminal law jurisprudence than that alibi and denial cannot prevail over the positive and categorical testimony and identification of the complainant.[42] Alibi is an inherently weak defense, which is viewed with suspicion because it can easily be fabricated.[43] Denial is an intrinsically weak defense which must be buttressed with strong evidence of non- culpability to merit credibility.[44]

The records disclose that not a shred of evidence was adduced by appellant to corroborate his alibi. Alibi must be supported by credible corroboration from disinterested witnesses, otherwise, it is fatal to the accused.[45] Further, for alibi to prosper, it must be demonstrated that it was physically impossible for appellant to be present at the place where the crime was committed at the time of its commission.[46] By his own testimony, appellant clearly failed to show that it was physically impossible for him to have been present at the scene of the crime when the rapes were alleged to have occurred. Except for the first incident, appellant was within the vicinity of his home and in fact alleged that he was supposedly even sleeping therein on the occasion of the second and third incidents.

Appellant's contention that AAA's accusations are clouded by her failure to report the alleged occurrences of rape is unmeritorious. To begin with, AAA categorically testified that she told her father's niece about the incidents. However, the latter doubted her, believing instead that appellant was not that kind of man. AAA's subsequent attempt to report the incidents to the barangay turned out to be futile as well as she was only able to speak with the barangay driver, who happened to be appellant's brother-in-law. She was likewise disbelieved by the latter. Her disclosure of the rapes to a certain Menoy did not yield any positive result either. Fearing for the lives of her grandparents, AAA decided not to tell them about the incidents.[47]

A child of thirteen years cannot be expected to know how to go about reporting the crime to the authorities.[48] Indeed, We see how AAA must have felt absolutely hopeless since the people around her were relatives of her father and her attempts to solicit help from them were in vain. Thus, AAA's silence in not reporting the incidents to her mother and filing the appropriate case against appellant for over a month is sufficiently explained. The charge of rape is rendered doubtful only if the delay was unreasonable and unexplained.[49] It is not beyond ken that the child, living under threat from appellant and having been turned away by trusted relatives, even accused by them of lying, would simply opt to just suffer in silence thereafter. In People v. Gutierrez,[50] we held:

> Complainant's failure to immediately report the rape does not diminish her credibility. The silence of a victim of rape or her failure to disclose her misfortune to the authorities without loss of material time does not prove that her charge is baseless and fabricated. It is not uncommon for young girls to conceal for some time the assault on their virtues because of the rapist's threat on their lives, more so when the offender is someone whom she knew and who was living with her.[51]

Appellant brands the trial judge as partial against him for propounding leading questions to AAA. According to him, were it not for the lower court's and the prosecution's biased leading questions, AAA would not have proven the elements of the crimes charged.[52]

Appellant's argument is not well-taken. It is the judge's prerogative to ask clarificatory queries to ferret out the truth.[53] It cannot be taken against him if the questions he propounds reveal certain truths which, in turn, tend to destroy the theory of one party.[54] After all, the judge is the arbiter and ought to be satisfied himself as to the respective merits and claims of both parties in accord with the stringent demands of due process.[55] Also, being the arbiter, he may properly intervene in the presentation of evidence to expedite proceedings and prevent unnecessary waste of time.[56]

Besides, jurisprudence explains that allegations of bias on the part of the trial court should be received with

caution, especially when the queries by the judge did not prejudice the accused. The propriety of the judge's questions is determined by their quality and not necessarily by their quantity and, in any event, by the test of whether the defendant was prejudiced by such questioning or not.[57] In the instant case, the Court finds that on the whole, the questions propounded by the judge a quo were but clarificatory in nature and that, concomitantly, appellant failed to satisfactorily establish that he was prejudiced by such queries.

The matter of the purportedly defective Informations was properly addressed by the Court of Appeals, pointing out that a close scrutiny of the Informations would reveal that the words "force and/or intimidation" are specifically alleged therein.[58] Even if these were not so, well- established is the rule that force or intimidation need not be proven in incestuous cases. The overpowering moral influence of a father over his daughter takes the place of violence and offer of resistance ordinarily required in rape cases where the accused is unrelated to the victim.[59]

Now, we turn to the determination of the crime for which appellant under the third charge is liable and the corresponding penalty therefor. In the Brief for the People, the Office of the Solicitor General (OSG) argues that all three (3) charges of rape, including the rape committed on 16 March 1999 subject of Criminal Case No. SC-7424, were proved beyond reasonable doubt. The court a quo held that it was clear from the evidence that appellant merely kissed the vagina of AAA and made no attempt of penetration, meaning penile penetration, and for that reason found him guilty of acts of lasciviousness only.[60] Yet, in affirming the trial court, the Court of Appeals did not find any categorical testimony on AAA's part that appellant had inserted his tongue in her vagina, stressing instead that the mere probability of such insertion cannot take the place of proof required to establish the guilt of appellant beyond reasonable doubt for rape.[61]

The automatic appeal in criminal cases opens the whole case for review,[62] as in this case. Thus, this Court is mandated to re-examine the vital facts established a quo and to properly apply the law thereto. The two courts below were both mistaken, as we note that AAA unqualifiedly testified on cross-examination to appellant's insertion of his tongue into her vagina, viz:

> Court: Q : On the third time you are [sic] allegedly raped, you said it happened at 3:30 in the morning of March 16, 1999.
> A : Yes, sir.
>
> Q : And you said yesterday that he did not insert his pennies [sic] to [sic] your vagina on March 16?
> A : Yes, sir.
>
> Q : What he did is he kissed your vagina?
> A : Yes, sir.
>
> Q : For how long did he kiss your vagina?
> A : Two minutes, sir.
>
> Q : What did he actually do when he kissed your vagina?
> A : He kissed my vagina, thereafter he laughed and laughed.
>
> Q : You mean to tell the court when he kissed your vagina he used his lips?
> A : His lips and tongue, sir.
>
> Q : What did he do?
> A : He put out his tongue thereafter he "inano" the hole of my vagina.
>
> Court: Q : What did your father do with his tongue?
> A : He placed it in the hole of my vagina.

Q : Did you feel pain?
A : Yes, sir.

Q : By just kissing your vagina you felt pain?
A : Yes, Your Honor.[63]

Notwithstanding the explicit testimony of AAA on the matter, this Court cannot find appellant guilty of rape as proved, but of acts of lasciviousness only. In reaching this conclusion, we take a route different from the ones respectively taken by the courts below.

With the enactment of Republic Act No. 8353 (R.A. No. 8353), otherwise known as the Anti-Rape Law of 1997,[64] the concept of rape was revolutionized with the new recognition that the crime should include sexual violence on the woman's sex-related orifices other than her organ, and be expanded as well to cover gender-free rape.[65] The transformation mainly consisted of the reclassification of rape as a crime against persons and the introduction of rape by "sexual assault"[66] as differentiated from the traditional "rape through carnal knowledge" or "rape through sexual intercourse."

Section 2 of the law provides:

> Sec. 2. Rape as a Crime Against Persons. - The crime of rape shall hereafter be classified as a Crime Against Persons under Title Eight of Act No. 9815, as amended, otherwise known as the Revised Penal Code. Accordingly, there shall be incorporated into Title Eight of the same Code a new chapter to be known as Chapter Three on Rape, to read as follows:
>
> Article 266-A. Rape; When And How Committed. - Rape Is Committed -
>
> - By a man who shall have carnal knowledge of a woman under any of the following circumstances:
>
> - Through force, threat, or intimidation;
>
> - When the offended party is deprived of reason or otherwise is unconscious;
>
> - By means of fraudulent machination or grave abuse of authority; and
>
> - When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.
>
> - By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

Paragraph 1 under Section 2 of R.A. No. 8353, which is now Paragraph 1 of the new Article 266-A of the Revised Penal Code, covers rape through sexual intercourse while paragraph 2 refers to rape by sexual assault. Rape through sexual intercourse is also denominated as "organ rape" or "penile rape." On the other hand, rape by sexual assault is otherwise called "instrument or object rape,"[67] also "gender-free rape,"[68] or the narrower "homosexual rape."[69]

In People v. Silvano,[70] the Court recognized that the father's insertion of his tongue and finger into his daughter's vaginal orifice would have subjected him to liability for "instrument or object rape" had the new law been in effect already at the time he committed the acts. Similarly, in People v. Miranda,[71] the Court observed that appellant's insertion of his fingers into the complainant's organ would have constituted rape by sexual assault had it been committed when the new law was already in effect.

The differences between the two modes of committing rape are the following:

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- In the first mode, the offender is always a man, while in the second, the offender may be a man or a woman;

- In the first mode, the offended party is always a woman, while in the second, the offended party may be a man or a woman;

- In the first mode, rape is committed through penile penetration of the vagina, while the second is committed by inserting the penis into another person's mouth or anal orifice, or any instrument or object into the genital or anal orifice of another person; and

- The penalty for rape under the first mode is higher than that under the second.

In view of the material differences between the two modes of rape, the first mode is not necessarily included in the second, and vice-versa. Thus, since the charge in the Information in Criminal Case No. SC-7424 is rape through carnal knowledge, appellant cannot be found guilty of rape by sexual assault although it was proven, without violating his constitutional right to be informed of the nature and cause of the accusation against him.

However, following the variance doctrine embodied in Section 4, in relation to Section 5, Rule 120, Rules of Criminal Procedure, appellant can be found guilty of the lesser crime of acts of lasciviousness. Said provisions read:

> Sec. 4. Judgment in case of variance between allegation and proof. - When there is a variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.
>
> Sec. 5. When an offense includes or is included in another. -- An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitutes the latter. And an offense charged is necessarily included in the offense proved when the essential ingredients of the former constitute or form part of those constituting the latter.

Indeed, acts of lasciviousness or abusos dishonestos are necessarily included in rape.[72]

In light of the passage of R.A. No. 9346, entitled "An Act Prohibiting the Imposition of Death Penalty in the Philippines,"[73] the penalty of death can no longer be imposed. Accordingly, the penalty meted out to appellant for rape through sexual intercourse in Criminal Cases No. SC-7422 and SC-7423 is reduced in each case from death to reclusion perpetua without eligibility for parole.[74] We affirm the conviction of appellant in Criminal Case No. SC-7424 for acts of lascivousness but modify the penalty imposed by the Court of Appeals instead to an indeterminate sentence of imprisonment of six (6) months of arresto mayor as minimum to four (4) years and two (2) months of prision correccional as maximum as neither mitigating nor aggravating circumstances attended the commission of the crime.

With respect to the civil liability of appellant, we modify the award in Criminal Cases No. SC-7422 and SC-7423 in light of prevailing jurisprudence. Therefore, appellant is ordered to indemnify AAA, for each count of qualified rape, in the amount of P75,000.00 as civil indemnity, P75,000.00 as moral damages, and P25,000.00 as exemplary damages.[75] The award of damages in Criminal Case No. SC-7424 is affirmed.

WHEREFORE, the Decision of the Court of Appeals in CA G.R. CR-HC No. 01926 is AFFIRMED WITH MODIFICATIONS. In Criminal Cases No. SC-7422 and SC-7423, appellant is found guilty beyond reasonable doubt of the crime of qualified rape and sentenced to suffer the penalty of reclusion perpetua without eligibility for parole and to pay the victim, AAA, in the amounts of P75,000.00 as civil indemnity, P75,000.00 as moral damages, and P25,000.00 as exemplary damages plus costs. In Criminal Case No. SC-7424, appellant is found guilty of the crime of acts of lasciviousness and sentenced to suffer the indeterminate penalty of imprisonment for

six (6) months of arresto mayor as minimum to four (4) years and two (2) months of prision correccional as maximum, and to pay AAA moral damages in the amount of P30,000.00 plus costs.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio-Morales, Azcuna, Chico-Nazario, Garcia, Velasco, Jr., Nachura, and Reyes, JJ., concur.

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[1]Rollo, pp. 3-34. Penned by Associate Justice Jose L. Sabio, Jr. and concurred in by Associate Justices Jose C. Mendoza and Arturo G. Tayag.

[2]CA rollo, pp. 25-45.

[3]Presided by Judge Fernando M. Paclibon, Jr..

[4]CA rollo, pp. 9-10, 12-13.

[5]The real name of the victim is withheld per R.A. No. 7610 and R.A. No. 9262. See People v. Cabalquinto, G.R. No. 167693, 19 September 2006, 502 SCRA 419.

[6]The real name of the victim's mother is withheld to protect her and the victim's privacy, also pursuant to R.A. No. 7610 and R.A. No. 9262.

[7]TSN, 14 September 1999, pp. 6-9.

[8]Id. at 9-14.

[9]TSN, 16 September 1999, p. 5.

[10]TSN, 14 September 1999, p. 14.

[11]TSN, 15 September 1999, pp. 3-4.

[12]Id. at 4-6.

[13]Id. at 8-9.

[14]TSN, 16 September 1999, pp. 20-22.

[15]TSN, 15 September 1999, pp. 10-13.

[16]TSN, 16 September 1999, p. 25.

[17]The real name of the victim's brother is likewise withheld to protect him and the victim's privacy, also pursuant to R.A. No. 7610 and R.A. No. 9262.

[18]TSN, 13 October 1999, pp. 5-10, 12.

[19]TSN, 4 November 1999, pp. 3-6.

[20]TSN, 28 September 1999, pp. 2-4.

[21]TSN, 30 September 1999, pp. 2-4.

[22]TSN, 11 January 2000, pp. 3-4.

[23]Id. at 4-5.

[24]Id.

[25]CA rollo, pp. 44-45.

[26]G.R. Nos. 147678-87, 7 July 2004, 433 SCRA 640.

[27]Rollo, p. 33.

[28]Id. at 72-78.

[29]CA rollo, pp. 74-77.

[30]People v. Biong, 450 Phil. 432, 445 (2003), citing People v. Tadeo, G.R. Nos. 128884-85, 3 December 2001, 371 SCRA 303.

[31]People v. Biong, supra, citing People v. Glabo, G.R. No. 129248, 7 December 2001, 371 SCRA 567.

[32]People v. Corral, 446 Phil. 652, 661 (2003).

[33]People v. Penaso, 383 Phil. 200, 208 (2000), citing People v. Domogoy, et al., G.R. No. 116738, 22 March 1999, p. 11, citing People v. Casim, 213 SCRA 390 (1992). See also People v. Babera, 388 Phil. 44, 53 (2000), citing People v. Gallo, 284 SCRA 590 citing People v. Rivera, 242 SCRA 26.

[34]People v. Penaso, supra, citing People v. Caratay, G.R. Nos. 119458, 119436-37, 5 October 1999, p. 8. See also People v. Babera, supra, citing People v. Gapasan, 243 SCRA 53 and People v. Bulaybulay, 248 SCRA 601.

[35]CA rollo, p. 39.

[36]TSN, 14 September 1999, pp. 7-14. Emphasis supplied.

[37]TSN, 15 September 1999, pp. 3-6. Emphasis supplied.

[38]Id. at 10-13. Emphasis supplied.

[39]People v. Caguioa, Sr., 328 Phil. 747, 753 (1996).

[40]459 Phil. 933 (2003). See also People v. Mendoza, GR. No.152589 and G.R. No. 152758, 31 January 2005, 450 SCRA 328; People v. Servano, 454 Phil. 256 (2003); People v. Biong, 450 Phil. 432 (2003).

[41]People v. Canoy, 459 Phil. 933, 944 (2003).

[42]People v. Penaso, supra note 33, at 210, citing People v. Tabion, G.R. No. 132715, 20 October 1999, p. 18; People v. Accion, G.R. Nos. 122550-51, 11 August 1999, p. 11.

[43]People v. Penaso, supra note 33, at 210, citing People v. Hivela, G.R. No. 132061, 21 September 1999, p. 5.

[44]Id. See also People v. Burce, 336 Phil. 283 (1997).

[45]People v. Caguioa, Sr., supra note 39, citing People v. Calope, 229 SCRA 413 (1994).

[46]People v. Caguioa, Sr., supra note 39, citing People v. Apa-ap, Jr., 235 SCRA 468 (1994).

[47]TSN, 16 September 1999, pp. 20-23.

[48]See People v. Glodo, G.R. No. 136085, 7 July 2004, 433 SCRA 535.

[49]People v. Barcena, G.R. No. 168737, 16 February 2006, 482 SCRA 543, 555.

[50]451 Phil. 227 (2000). See also People v. Ilao, 463 Phil. 797 (2003); People v. Alfaro, 458 Phil. 942 (2003);

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People v. Manahan, 455 Phil. 658 (2003); People v. Romero, 435 Phil. 182 (2002); People v. Ponsica, 433 Phil. 365 (2002); People v. Dela Cruz, 432 Phil. 988 (2002).

[51]People v. Gutierrez, supra, at 241.

[52]CA rollo, p. 76.

[53]People v. Cabiles, 396 Phil. 46, 59 (2000), citing People v. Castillo, 289 SCRA 213, 226-227 (1998).

[54]People v. Rivera, 414 Phil. 430, 451-452 (2001).

[55]People v. Malabago, 333 Phil. 20, 32 (1996), citing People v. Ancheta, 64 SCRA 90, 97 (1975).

[56]Cosep v. People, 352 Phil. 979, 986 (1998).

[57]People v. Castillo, 352 Phil. 39, 54 (1998).

[58]Rollo, p. 26.

[59]People v. Corpuz, G.R. No. 168101, 13 February 2006, 482 SCRA 435. See also People v. Mantis, G.R. Nos. 150613-14, 29 June 2004, 433 SCRA 236.

[60]CA rollo, p. 44.

[61]Rollo, pp. 25-27.

[62]People v. Escarlos, 457 Phil. 580 (2003).

[63]TSN, 16 September 1999, pp. 24-25. Emphasis supplied.

[64]R.A. No. 8353 took effect on 22 October 1997.

[65]Deliberations of the Senate on Senate Bill No. 950, Special Law on Rape, 6 August 1996, pp. 12-15; Deliberations of the House of Representatives, Committee on Revision of Laws and Committee on Women on House Bill No. 6265 entitled "An Act to Amend Article 335 of the Revised Penal Code, as amended, and Defining and Penalizing the Crime of Sexual Assault," 27 August 1996, pp. 44-50.

[66]Deliberations of the Senate on Senate Bill No. 950, 6 August 1996, supra; Deliberations of the House of Representatives on House Bill No. 6265, 27 August 1996, supra at 47-50, 52-52, 71. See also People v. Palma, 463 Phil. 767 (2003); People v. Soriano, 436 Phil. 719 (2002).

[67]People v. Silvano, 368 Phil. 676 (1999).

[68]Supra note 65.

[69]Deliberations of the Senate on Senate Bill No. 950, 6 August 1996, supra.

[70]People v. Silvano, supra.

[71]G.R. No. 169078, 10 March 2006, 484 SCRA 555.

[72]People v. Laguerta, 398 Phil. 370, 380 (2000), citing Dulla v. Court of Appeals, G.R. No. 164, 18 February 2000. See also Amployo v. People, G.R. No. 157718, 26 April 2005, 457 SCRA 282.

[73]Signed into law on 24 June 2006.

[74]People v. Teodoro, G.R. No. 170473, 12 October 2006, 504 SCRA 304.

[75]People v. Barcena, G.R. No. 168737, 16 February 2006, 482 SCRA 543.

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