JAREN TIBONG Y CULLA-AG, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 191000. September 15, 2010

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

Jaren Tibong y Culla-ag (petitioner) was indicted for attempted rape allegedly committed as follows:

> That on or about the 14[th] [sic][1] day of April 2006, at Betag, Municipality of La Trinidad, Province of Benguet, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with lewd designs, did then and there willfully, unlawfully and feloniously try and attempt to rape [AAA[2]] while the latter was sleeping and therefore unconscious, by removing the latter's pajama and panty, and thereafter holding her vagina and fondling her breasts, and endeavor to have sexual intercourse with her against her will and consent, thereby commencing in the execution of the crime of rape but did not perform all the acts of execution which should have produced the felony as a consequence by reason that the offended party was awakened, defended herself and escaped from him, which cause is not his spontaneous desistance, to the damage and prejudice of the said [AAA].
>
> That the accused and [AAA] are relatives within the 3[rd] civil degree.[3] (Underscoring supplied)

On April 17, 2006, then 18-year-old AAA, a college student at the Benguet State University, was at the house owned by petitioner's parents at Betag, La Trinidad, Benguet where she was boarding. She occupied a room at the 3-bedroom basement.[4] One of the rooms was occupied by petitioner and his wife. The third room was unoccupied.

From the account of AAA, the following transpired:

Days before the incident, petitioner's wife left the house after a misunderstanding with him. Before midnight of April 17,[5] 2006, petitioner arrived and repaired to the sofa at the basement's living room. AAA thereafter fell asleep but was awakened at about midnight as she "felt someone was undressing [her]."[6] She saw petitioner, her first cousin (her father and his mother being siblings), wearing only "briefs" and "crouching over [her]," "on top of [her] bed," and pulling down her pajamas and panties.[7] She asked appellant why he was doing that, to which he replied that "[they] will have sexual intercourse" and keep it a secret. She retorted if he was not sickened about it, to which he replied that she need not be bothered about their being cousins.[8]

Continuing, AAA narrated:

She resisted and pulled up her pajamas and panties, but appellant pulled them down to her knees and mashed her breasts. He soon told her that they would watch a "bold" movie and apply what they watched.[9] She struggled to free herself, but he forced her to lie down. She tried to shout for help, but he covered her mouth.

AAA further recounted:

Petitioner thereafter went towards the compact disc (CD) player which was "in front of the door of [her] room" to

insert/play a CD. Finding the opportunity to escape, she grabbed her cell phone and bag which were placed on top of a table at her bedside, ran out of the house after appellant failed to restrain her, headed towards the highway, took a taxicab and proceeded to the house of her elder brother BBB[10] in Bahong, La Trinidad where she sought refuge.

The following morning (April 18), AAA, accompanied by BBB and an uncle, reported the incident to the La Trinidad Police Station where P03 Chona P. Bugnay took down her sworn complaint.[11]

The presentation of prosecution witnesses BBB and P03 Chona Bugnay was dispensed with, the defense having admitted the corroborative nature of their respective testimonies.

Upon the other hand, petitioner whose wife, as earlier reflected, left the house days before the incident after a quarrel with him, denied the accusation. He claimed that in the afternoon of April 17, 2006 until past 1:00 A.M. of the following day (April 18), he was drinking liquor with his friend Benny Malao (Malao) in three places - first at his (petitioner's) father's house, then at Maryland, and finally at Malao's boarding house, all located at La Trinidad; and on returning home drunk early morning of April 18, he immediately went to sleep at the living room adjacent to AAA's room.[12]

Branch 62 of the Regional Trial Court (RTC) of La Trinidad, Benguet found petitioner guilty of attempted rape, as charged, disposing as follows:

> WHEREFORE, the accused must be, as he is hereby found guilty beyond reasonable doubt of the crime of attempted rape.
>
> Applying the Indeterminate Sentence Law, there being no modifying circumstance established, he is hereby imposed a penalty of imprisonment ranging from three (3) years and four (4) months of prision correccional medium, as minimum, to eight (8) years and six (6) months of prision mayor medium, as maximum.
>
> The accused is hereby ordered to pay the private complainant moral damages in the amount of Twenty Five Thousand Pesos (P25,000.00) and to pay the costs.
>
> SO ORDERED.[13]

The Court of Appeals affirmed petitioner's conviction, hence, the present petition for review on certiorari, contending that the prosecution failed to prove petitioner's guilt beyond reasonable doubt.

Petitioner cites Perez v. Court of Appeals[14] which held:

> Petitioner's acts of lying on top of the complainant, embracing and kissing her, mashing her breasts, inserting his hand inside her panty and touching her sexual organ, while admittedly obscene and detestable acts, do not constitute attempted rape absent any showing that petitioner actually commenced to force his penis into the complainant's sexual organ. Rather, these acts constitute acts of lasciviousness. x x x.[15] (Emphasis and underscoring supplied)

Insisting that there was no attempted rape, petitioner argues that AAA merely testified that he told her that they would have sexual intercourse; and that "this is not equivalent to carnal knowledge, or even an attempt to have carnal knowledge," since there is no showing that he had commenced or attempted to insert his penis into her sexual organ before she fled.[16]

Under Article 6 of the Revised Penal Code, there is an attempt to commit a felony when the offender commences its commission directly by overt acts but does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.

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Article 336 of the Revised Penal Code provides:

> Any person who shall commit any act of lasciviousness upon the other person of either sex, under any of the circumstances mentioned in the preceding article [referring to Article 335 on rape], shall be punished by prision correccional.

While rape and acts of lasciviousness have the same nature, they are fundamentally different. For in rape, there is the intent to lie with a woman, whereas in acts of lasciviousness, this element is absent.[17]

Ironically, during the defense's cross examination of AAA, the existence of petitioner's overt acts showing his intent to lie with her was put to light. Consider the following testimony of AAA on cross examination:

> Atty. Santos [defense counsel, to witness AAA]:
>
> x x x x
>
> Q
>
> He did not try to insert his penis into your vagina, Madam Witness?
>
> A
>
> He was trying to force it on me but I covered my vagina.
>
> Q
>
> Is it not a fact that when he put down your pajama and underwear down to your knee, he was still wearing his brief?
>
> A
>
> Sir, his brief was already lowered down to the middle of his upper leg (witness was illustrating by touching the middle of her upper legs).
>
> Q
>
> When he tried to lie on top of you, you wrestled and you tried to run out from your room. Is that correct?
>
> A
>
> Yes, sir.
>
> x x x x
>
> Q
>
> And that was the time that when he opened the CD player, you took your cell phone and ran out from your room?
>
> A
>
> Yes, sir.
>
> Q
>
> So in other words, Mr. Jaren Tibong had no chance of inserting his penis in your vagina because you ran out of your room already. Correct?
>
> A

Yes, sir.[18] (Emphasis and underscoring supplied)

Petitioner's acts, as narrated by AAA, far from being mere obscene or lewd, indisputably show that he intended to have, and was bent on consummating, carnal knowledge of AAA.

WHEREFORE, the petition is DENIED. The assailed Court of Appeals Decision[19] of October 12, 2009 in CA-G.R. CR No. 31644 is AFFIRMED. Costs against petitioner.

SO ORDERED.

Bersamin, Del Castillo,[*] Villarama, Jr., and Sereno, JJ., concur.

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[*] Additional member per Special Order No. 879 dated August 13, 2010.

[1] Should be 17[th].

[2] The real name of the private complainant is withheld per Republic Act (R.A.) No. 7610 (Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act); R.A. 9262 (Anti-Violence Against Women and Their Children Act of 2004); and A.M. No. 04-10-11-SC effective November 15, 2004 (Rule on Violence Against Women and Their Children). Vide: People v. Cabalquinto, G.R. No. 167693, September 19, 2006, 502 SCRA 419, 421-423.

[3] Information, records, pp. 1-2.

[4] TSN, January 17, 2007, pp. 2-3, 5.

[5] The trial court noted in its decision that the Information wrongly alleged the date of the incident complained of as April 14, 2006, when the sworn complaint of private complainant AAA and her testimony in court indicate that the incident happened about 12:00 midnight of April 17, 2006. It ruled that such defect is not fatal as "the date of commission is not an essential element of the crime of rape, what is material being the occurrence of the rape," citing People v. Lozano (G.R. No. 127122, July 20, 1999, 310 SCRA 707, 716-717). Besides, the defense never objected to such error.

[6] TSN, March 20, 2007, p. 6.

[7] Id. at 6-7, 12.

[8] Id. at 7.

[9] Id. at 7-8.

[10] His real name is withheld per note 2.

[11] Exhibits "A" and "A-1," records, p. 5.

[12] TSN, July 25, 2007, pp. 4-8, 14-15, 19.

[13] Decision dated April 4, 2008, records, p. 173.

[14] G.R. No. 143838, May 9, 2002, 382 SCRA 182.

[15] Id. at 190.

[16] Petition, rollo, p. 19.

[17] Aquino, The Revised Penal Code, Vol. III, 1997 ed., p. 430.

[18] TSN, May 16, 2007, pp. 3-4.

[19] Penned by Associate Justice Priscilla J. Baltazar-Padilla, with Associate Justices Fernanda Lampas Peralta and Celia C. Librea-Leagogo concurring; rollo, pp. 30-50.

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