

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. JESSIE MAYORAL, ACCUSED-APPELLANT.

G.R. Nos. 96094-95. November 13, 1991

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

In Criminal Case No. 4472, the accused-appellant was charged with the crime of rape in a complaint, signed by the victim, Mayshelle Neri, a minor, assisted by her mother, Nerissa Neri. The complaint dated December 12, 1986 was filed before the Regional Trial Court, Branch 22, General Santos City. It alleged:

"That on or about 3:30 o'clock in the afternoon of October 24, 1986 at Apitong Street, Lagao, General Santos City, Philippines and within the jurisdiction of this Honorable Court, the above named accused, by means of force or intimidation, did then and there wilfully, unlawfully and feloniously have carnal knowledge with the undersigned minor who is barely seven (7) years old.

"CONTRARY TO LAW." (p. 10, Rollo)

In Criminal Case No. 4585 (1076), the accused-appellant was charged with the crime of acts of lasciviousness. The information dated March 10, 1987 based on the complaint filed by Mercydel Sombilon, also a minor, assisted by her mother, Vilma Sombilon was filed with the Regional Trial Court, Branch 23, General Santos City, and read as follows:

"That on or about 3:30 o'clock in the afternoon of October 24, 1986 at Apitong Street, Lagao, General Santos City, Philippines and within the jurisdiction of this Honorable Court, above-named accused, with lewd design and by means of force and intimidation, did then and there wilfully, unlawfully and feloniously undress the herein private complainant, Mercydel Sombilon who is barely eight (8) years old, touch her vagina and place himself on top of her in an attempt to have a sexual act with her, without her consent and against her will.

"CONTRARY TO ART. 336 OF THE REVISED PENAL CODE." (p. 12, Rollo)

The accused pleaded not guilty to both charges [p. 29, Records, Criminal Case No. 4472 and p. 20, Records in Criminal Case No. 4585 (1076)].

On December 29, 1987, Criminal Case No. 4585(1076) was transferred to and consolidated with Criminal Case No. 4472 then pending with Branch 22, upon motion of the City Fiscal who manifested that the two cases arose from the same incident (p. 29, Record of Criminal Case No. 4585). These two (2) cases were jointly tried.

The evidence of the prosecution showed that:

Mayshelle Neri and Mercydel Sombilon were neighbors at Apitong Street, Lagao, General Santos City. On October 24, 1986, at about 3:30 o'clock in the afternoon, they were invited by the accused inside a room he was occupying with a relative of his mother, Teresita Ladao. Once inside, the accused locked the door. Then, he removed their skirts and their panties. The accused also removed his pants and exposed his penis to the two girls.

Mayshelle testified that the accused placed himself on top of her and inserted his penis inside her vagina. She felt pain in her stomach and she cried (pp. 24-26, TSN, August 7, 1987). Mayshelle testified that she was alone with Jessie when she was abused (p. 42, TSN, August 7, 1987).

Mercydel Sombilon corroborated the testimony of Mayshelle. She likewise testified that she saw Jessie place his penis in the vagina of Mayshelle but he stopped his act when the latter shouted "Tama na Jess." Then, the accused placed himself on her top and tried to put his organ on her vagina but it did not penetrate (pp. 45-47, TSN, August 7, 1987).

A neighbor, Mrs. Arlene Barreto arrived and asked the girls what they were doing inside the room of Mrs. Ladao (which was the same room occupied by Jessie) and they answered that they were "fucked" by Jessie. Mrs. Barreto informed Mayshelle's mother upon her return from a neighbor's house about what happened. When the mother confronted her daughter, Mayshelle revealed that Jessie had sexual intercourse with her (TSN, June 22, 1987, p. 5). Mrs. Barreto likewise informed Mercydel's mother, Vilma Sombilon who confronted her daughter. Mercydel also admitted that Jessie had sexual intercourse with her (TSN, October 11, 1988, p. 11).

Only Mayshelle was brought to the doctor for examination. The attending physician issued a medical certificate with the following findings:

"Tenderness and slight redness on the vaginal opening upon pressure.

"No hymenal tear noted." (p. 11, Record of Criminal Case No. 4472)

The defense, on the other hand, presented this picture:

The accused-appellant testified that in the same afternoon, he came out from the bathroom with a towel wrapped around his waist. Mayshelle and Mercydel who were outside the bathroom teased him and tried to remove the towel from his waist and remarked "you have a nice body, good to embrace." At that point, Mrs. Arlene Barreto arrived and overheard the children utter the words, "Fuck, Fuck" (p. 64, TSN, Sept. 16, 1987).

A few days later, the accused was investigated together with Mayshelle Neri and her mother Nerissa, and Mercydel Sombilon and her mother Vilma at the police station of Lagao, General Santos City. According to the accused-appellant, Mayshelle was asked by the police investigators if it was true that Jessie Mayoral took off her panty. She answered "No, sir." The mother allegedly pinched Nerissa (pp. 64-67, Ibid).

Accused-appellant also testified that the reason why Mayshelle's mother, Nerissa, brought a charge against him was because he decided to end their illicit relationship because he was afraid of Nerissa's husband (pp. 69-97, *ibid*).

The defense also presented Mrs. Ladao, the owner of the house where the incident happened and in whose room the accused-appellant lived. She testified that on the same afternoon, she was inside the room where the incident allegedly happened. She testified that there was no unusual occurrence that afternoon (pp. 51-52, TSN, October 12, 1988).

After trial, judgment was rendered finding accused-appellant guilty beyond reasonable doubt of the charges filed against him. The decision, dated August 6, 1990 rendered judgment, as follows:

"ACCORDINGLY, finding the accused Jessie Mayoral guilty beyond reasonable doubt of the crimes of rape in Criminal Case No. 4472 and acts of lasciviousness in Criminal Case No. 4585, respectively, and there being no modifying circumstance in either case, he is hereby sentenced to RECLUSION PERPETUA in the rape charge and applying the Indeterminate Sentence Law in the offense of acts of lasciviousness, he is also sentenced to an indeterminate penalty of 2 months and 1 day to 2 years, 4 months and 1 day, to indemnify Mayshelle Neri

and Mercydel Sombilon in the amount of P10,000.00 and P4,000.00, respectively, as moral damages, plus costs.

"SO ORDERED." (p. 29, Rollo)

On August 29, 1990, herein accused-appellant, represented by counsel, filed a notice of appeal (p. 128, Rollo). In his brief, he presented a lone assignment of error:

THE COURT A QUO ERRED IN CONVICTING THE ACCUSED-APPELLANT DESPITE THE ABSENCE OF EVIDENCE REQUIRED TO PROVE HIS GUILT BEYOND REASONABLE DOUBT.

The accused-appellant contends that no rape could have been committed on Mayshelle Neri because the medical certificate containing the findings of the doctor who examined her stated that there was only "tenderness and slight redness on the vaginal opening upon pressure" and that there was "no hymenal tear noted." The slight redness on the vaginal opening was caused by mucuous or fluid present, making it appear reddish or due to pressure which may have been caused by contact on hard object while the child was playing or that her private parts were mashed or fingered.

The contention has no merit. As testified to by Mayshelle, the accused-appellant directed his organ and actually placed it in her vagina. The other victim, Mercydel, corroborated Mayshelle's story. However, the accused-appellant failed to penetrate the vagina. Hence, as found by the examining physician, there was only redness of the vaginal opening which could have been caused by contact with a hard object but there was no laceration nor hymenal tear.

In *People v. Hernandez*, G.R. No. 23916, October 14, 1925, 49 Phil. 980, We held that:

"Any penetration whether reaching to the hymen or not is sufficient to constitute the crime; for as Lord Meadowbank said in a case in Scotland, 'Scientific and anatomical distinctions as to where the vagina commences are worthless in a case of rape; it is enough if the woman's body is entered; and it is not necessary to show to what extent penetration of the parts has taken place; whether it has gone past the hymen, into what is anatomically called the hymen, or even so far as to touch the hymen.' (Steward on Legal Medicine, p. 137).

"x x x.

"In the following cases it has been held that entry of the labia or lips of the female organ, merely, without rupture of the hymen or laceration of the vagina, is sufficient to warrant conviction of the consummated crime of rape. (*Kenney vs. State* [Tex. Crim. App.]; 65 L. R. A., 316; 79 S. W., 817 [1903]. See [Eng.] *Reg. vs. Lines*, 1 Car. & K., 393 [1844]; 44 N. W., 571 [1890]; [Tex.]; *Rodgers vs. State*, 30 Tex. App., 510; 17 S. W., 1077 [1891]; [Wis.] *Brauer vs. State*, 25 Wis., 413 [1870]."

This had been Our consistent ruling. (*People v. Cruz*, G.R. No. 82121, December 29, 1989, 180 SCRA 765; *People v. Arazona*, G.R. No. L-43751, 19 September 1985, 138 SCRA 569 and other cases cited therein).

As against the denial of accused-appellant, the testimonies of the victims are more convincing. His victims in the crimes charged, both below twelve (12) years of age, positively stated that accused-appellant placed his penis inside their vaginas. In the rape charge, Mayshelle testified that the accused removed her panty and he placed it on her vagina. The accused only stopped when she cried, "Tama na Jess." On direct examination, she testified:

"Fiscal Gacal:

Q. Why are you in Court today?

A. Because there is a case.

Q. Whose case?

A. My case.

Q. Against whom? If you do not know his name, please point him if he is in Court?

A. (no answer)

COURT:

Q. What do you mean when you said you have a case?

A. Because I was sexually intercoursed. 'Kay gi-iyot man ako.'

Fiscal Gacal:

Q. Who sexually intercoursed you? (sic)

A. It was Jessie.

Q. Is this Jessie in court?

A. Yes, sir.

Q. Where is he, point him?

A. (witness pointing to the accused correctly.)

Q. Where did he sexually intercoursed you?

A. In his house.

x x x

Q. Was it with your consent, this is statutory, your Honor please, but just the same, we ask the question. Was it your consent when he sexually intercoursed with your (sic)?

A. I agreed.

COURT:

Q. Why did you agree, what did he tell you?

A. He told me to remove my skirt and my panty.

x x x

Q. When you removed your skirt and panty, what did he do?

A. He immediately have (sic) sexual intercourse with me.

Q. How did you feel?

A. I felt pain in my stomach.

Q. Did his penis touch your vagina?

A. Yes, sir.

Q. When you felt pain, what did you do or say?

A. I cried and Arjean asked me what happened to you and told Arjean I felt pain in my stomach. (TSN, August

7, 1987, pp. 24--27).

The accused-appellant also contends that the testimonies of the two (2) complainants were conflicting. While Mayshelle testified that she was alone in the room when she was abused, Mercydel testified that they were together with Mayshelle in the room when they were abused.

We do not believe that the conflicting testimonies of the two (2) complainants as to who were present in the room of the accused-appellant at the time of the commission of the offenses is of such importance as to cast doubt on his guilt. It should be noted that at the investigation by the police a few days after the incident, Mayshelle was positive that she and her friend Mercydel were together in that room with the accused-appellant. Of course, the accused tried to taint this declaration when he testified that Mayshelle was pinched by her mother when she was asked by the police officer if he removed her panty and she answered "No." Mrs. Ladao likewise testified that Mercydel was also pinched by her mother when she was asked the same question and she also answered "No." These allegations by the accused-appellant and Mrs. Ladao however, were belied by the police officer who conducted the investigation. Cpl. Nestor Carillo testified that the only participation of the respective mothers of the victims was that they acted as interpreters. All the questions asked during the investigation were put in writing. Carillo also testified that the accused-appellant was placed in a separate room when the victims and their parents were examined (pp. 182-189, TSN, Feb. 13, 1989). It was therefore impossible for the accused-appellant to observe what was going on when the victims were interrogated.

Going back to the inconsistency regarding the persons present at the time Mayshelle was abused, it should be noted that Mayshelle was of tender age not only during the time of the commission of the crime but also at the time she testified in court. It is possible that the details of the incident already escaped her memory. Another reason for such failure of memory would be Mayshelle's poor mental capacity. There was a showing that she was not only of tender age but that her mental age was also much less than her actual age.

Be that as it may, the other complainant, Mercydel Sombilon, who was older and who appeared to be more coherent in her testimony positively declared that they were together inside accused-appellant's room at that time. Moreover, the accused-appellant himself testified that on that same afternoon, the two girls were together when they teased him and they tried to remove the towel wrapped around his waist. He also testified that the two (2) girls were together when a neighbor, Arlene Barreto found them in the house shouting "Fuck, fuck" on that fateful afternoon.

The alleged motive of Mayshelle's mother in bringing a charge against the accused is not believable. If it were true that indeed, he had an amorous relationship with Nerissa Neri, and that Mrs. Ladao once saw them kissing in the dark, Mrs. Ladao would have confirmed this but she never mentioned nor intimated about this on direct examination nor on cross. It is also hard to believe that a woman married to a supervising engineer of the NAPOCOR would fall for the accused and go to the extent of exposing her daughter to public humiliation by conjuring a rape charge against the accused to get him back or to get back at him. While appellant also boasted that he and Nerissa Neri had at least seven (7) trysts while their illicit relation lasted, he had been very evasive when asked when these occurred.

There is no doubt that the elements of the crime first charged against the accused were duly proven. The crime charged was statutory rape as defined under paragraph 3, Article 335 of the Revised Penal Code. The only elements of the crime are (1) that the offender had carnal knowledge of a woman; and (2) that such woman is under twelve (12) years of age. [People v. Alegado, G.R. Nos. 93030-31, August 21, 1991 citing People v. Santos, 183 SCRA 25 (1990)]. It is not necessary to prove that the victim was intimidated or that force was used against her because in statutory rape the law presumes that the victim on account of her tender age, does not and cannot

have a will of her own [People v. Bacani, 181 SCRA 393 (1990); People v. Lualhati, 171 SCRA 277 (1989); People v. Derpo, 168 SCRA 447 (1988), also cited in People v. Alegado, supra].

In the case for acts of lasciviousness, Mercydel Sombilon, corroborating the testimony of Mayshelle testified on direct examination:

Q. Why do you know Jessie Mayoral?

A. Because he is residing in our place.

x x x.

Q. Did he ever invite you one time in the past in his room or in his house?

A. Yes, sir.

Q. Were you alone when you were invited or you were with your friend?

A. I have my companion.

Q. Did you go to his room when you were invited?

A. Yes, sir.

Q. Together with whom?

A. Together with Mayshelle.

Q. When you were inside the room of Jessie Mayoral, what happened or what did he do?

A. He removed our panties.

Q. Did he close the door?

A. Yes, sir.

Q. And then when he ... you said he removed our panties, are you referring to yourself and to your friend Mayshelle Neri?

A. Together with Mayshelle.

Q. Did Mayshelle remove her panty?

A. Yes, sir.

Q. When Mayshelle Neri removed her panty, what did Jessie Mayoral do to her?

A. Jessie Mayoral placed his body on top of us.

Q. What did Jessie Mayoral do when he laid on top of Mayshelle Neri.

COURT:

She said 'gihapaan.'

Fiscal Gacal:

Q. What did he do to you and Mayshelle Neri when he laid on top of you?

I withdraw. Did he remove his pants before he laid on top of both of you?

A. Yes, sir.

Q. Did you see his penis?

A. Yes, sir.

Q. What did he do with his penis?

A. He inserted his penis into our vagina.

Q. But did you see Jessie Mayoral insert his penis inside the vagina of Mayshelle Neri?

A. Yes, sir.

Q. Did he also insert his penis inside your vagina?

A. It did not penetrate.

Q. When Jessie Mayoral inserted his penis in the vagina of Mayshelle Neri, what did Mayshelle Neri say if she said anything?

A. Mayshelle said 'tama na Jess' meaning that is enough Jess.

Q. When he inserted his penis in your vagina, what did you say?

A. I also said enough.

Q. Did you feel pain?

A. Yes, sir." (TSN, August 7, 1987, pp. 45-47).

Mercydel Sombilon positively declared that the appellant removed his pants, exposed his penis and placed his body on top of her and likewise tried to insert his penis in her vagina, but there was no penetration. With this testimony, the accused-appellant could have also been convicted of the crime of rape. The offense of rape is deemed consummated even if penetration was not complete (*People v. Rabanos*, 172 SCRA 425). It was enough that there was proof of entrance of the male organ within the labia of the pudendum. This matter was testified to by Mercydel. However, considering that accused-appellant was only charged with the crime of acts of lasciviousness, he cannot be convicted of the crime of rape. The information alleged only that the herein accused-appellant undressed the private complainant, touched her vagina and placed himself on top of her in an attempt to have sexual intercourse with her. There was no allegation that he had carnal knowledge with the victim or that he had introduced his penis into her vagina, nor that the penis of the accused touched the middle of the vagina.

"x x x.

"An accused person cannot be convicted of a higher offense than that with which he is charged in the complaint or information on which he (is) tried. It matters not how conclusive and convincing the evidence of guilt may be, an accused person cannot be convicted in the courts of these Islands of any offense, unless it is charged in the complaint or information on which he is tried, or necessarily included therein. He has a right to be informed of the nature of the offense with which he is charged before he is put on trial, and to convict him of a higher offense than that charged in the complaint or information on which he is tried would be an (un)authorized denial of that right" (*Matilde, Jr. v. Jabson*, G.R. No. L-38392, December 29, 1975, 68 SCRA 456, 461, citing *U.S. v. Ocampo*, 23 Phil. 396, cited in *People v. Guevarra*, G.R. No. 66437, December 4, 1989, 179 SCRA 740).

Article 336 of the Revised Penal Code provides, "(A)ny person who shall commit any act of lasciviousness upon

other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by prision correccional. Rape and acts of lasciviousness have the same nature. The difference is that in rape, there is the intent to lie with a woman. This element is absent in acts of lasciviousness (Aquino, Revised Penal Code, Vol. III, p. 412, 1988 Ed.).

Considering that the body of the information alleges an attempt to rape the victim, the accused should be convicted of the crime of attempted rape and not of acts of lasciviousness, the name of the offense designated in the information. It is not the technical name given by the fiscal that determines the character of the crime but the allegations in the body of the information.

The penalty for the crime of rape is reclusion perpetua. As the crime committed by the accused-appellant is an attempted one, the imposable penalty shall be two degrees lower or prision mayor. Applying the Indeterminate Sentence Law, the maximum term of the indeterminate sentence to be imposed upon him, there being no mitigating nor aggravating circumstances attending the commission of the offense, shall be within the range of prision mayor in its medium period and the minimum of the penalty shall be within the range of the penalty next lower in degree or prision correccional.

ACCORDINGLY, the appealed decision is MODIFIED as follows: (1) for the crime of rape in Criminal Case No. 4472, the accused is sentenced to suffer the penalty of reclusion perpetua. The award of P10,000.00 damages for the victim, Mayshelle Neri, is increased to P30,000.00; and (2) for the crime of attempted rape in Criminal Case No. 4585(1076), he is sentenced to an indeterminate penalty ranging from four (4) years and two (2) months of prision correccional as minimum, and not more than ten (10) years of prision mayor as maximum. The award of P4,000.00 damages to the victim, Mercydel Sombilon, is likewise increased to P10,000.00

SO ORDERED.

Narvasa, (Chairman), Cruz, Feliciano, and Grino-Aquino, JJ., concur.

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