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This was affirmed by the Court of Appeals. We find no cogent reason to reverse such finding.

Third. The petitioner is barred from raising the issue of jurisdiction. The petitioner actively participated in all stages of the instant case, setting up a counterclaim and asking for affirmative relief in his answer.[39] He failed, however, to question the court's jurisdiction over the suit. After relying on the jurisdiction of the regular courts, he cannot be permitted to turn around and question it. It is not right for a party who has affirmed and invoked the jurisdiction of a court in a particular matter to secure an affirmative relief, to afterwards deny that same jurisdiction.[40]

IN VIEW WHEREOF, the petition is hereby *DENIED* for lack of merit, and the decision of the Court of Appeals is *AFFIRMED in toto*.

Costs against the petitioner.

SO ORDERED.

Bellosillo (Chairman), *Quisumbing, Austria-Martinez,* and *Tinga, JJ.*, concur.

THIRD DIVISION

[G.R. Nos. 141724-27. November 12, 2003]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **ARNULFO ORANDE *y* CHAVEZ**, *appellant.*

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[39] *Centeno v. Centeno*, 343 SCRA 153 (2000).

[40] *Celendro v. Court of Appeals*, 310 SCRA 835 (1999), citing *Tijam v. Sibonghanoy*, 23 SCRA 29 (1968).

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SYNOPSIS

Complainant Jessica Castro charged appellant of raping her four times between January 1994 and November 1996. The evidence of the prosecution showed that appellant was the common-law husband of Jessica's mother. For his defense, appellant advanced denial and alibi. However, the trial court gave credence to the testimony of Jessica and convicted the appellant. He was sentenced to suffer three counts of *reclusion perpetua* for the simple and statutory rapes, and an indeterminate penalty for the frustrated rape. The appellant filed his appeal before the Supreme Court.

The Supreme Court found that the prosecution was able to prove beyond reasonable doubt appellant's guilt for two counts of statutory rape and two counts of simple rape, there being no such crime as frustrated rape. According to the Court, it was an error for the trial court to convict appellant of frustrated rape. In the present case, the victim testified that she felt pain and her vagina bled, indisputable indications of slight penetration or, at the very least, that the penis indeed touched the labia and not merely stroked the external surface thereof. Thus, appellant was found guilty of consummated rape and not merely frustrated or attempted rape.

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; A MATTER BEST ASSESSED BY THE TRIAL COURT; APPLICATION IN CASE AT BAR.**— After a thorough review of the records, we find no reason to deviate from the well-established rule that the credibility of witnesses is a matter best assessed by the trial court because of its unique opportunity to observe them firsthand and to note their demeanor, conduct and attitude. In the present case, the trial court found Jessica's testimony convincing, logical and credible. Moreover, the court *a quo*: xxx discerned from her demeanor the intense mental torture, embarrassment, emotional pain and bitterness she suffered whenever she was asked to recall and narrate the humiliating sexual ordeals she had gone through, and her ... desire for justice and the punishment of her defiler. She was continually in tears while testifying and the proceeding was interrupted several times to calm her down. No young woman

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would allow an examination of her private part and subject herself to the humiliation and rigor of a public trial if the accusations were not true, or if her motive were other than a fervent desire to seek justice.

2. **ID.; ID.; ID.; ID.; NOT AFFECTED BY INCONSISTENCIES REGARDING MINOR DETAILS.**— The alleged inconsistencies and improbabilities in Jessica's testimony did not discredit her nor reveal any fabrication. Inconsistencies regarding minor details were attributable to the fact that she was recalling details of incidents that happened three years before, not to mention the fact that these details pertained to something she had very little knowledge of, being then only nine years and three months old when the first rape was committed. We have consistently ruled that errorless recollection of a harrowing experience cannot be expected of a witness (a very young one at that) specially when she is recounting details of an occurrence so humiliating, so painful and, in this case, so alien as rape.

3. **ID.; ID.; ID.; ID.; FAILURE OF THE RAPE VICTIM TO CRY OUT FOR HELP DOES NOT MAKE HER TESTIMONY IMPROBABLE.**— Also, the failure of Jessica to cry out for help during the incidents in question, inspite of the physical proximity of her relatives, or to report to them what happened, did not at all make her testimony improbable inasmuch as it is not uncommon for a young girl of tender age to be easily intimidated into silence and conceal for sometime the violation of her honor, even by the mildest threat to her life. Besides, Girlie, Jessica's mother, had a rift with her siblings who lived in the same house and forbade Jessica to socialize with them. It was likewise highly probable that the strained relations between Jessica's mother, uncle and aunt prevented Jessica from confiding in them.

4. **ID.; ID.; ID.; ID.; NOT AFFECTED BY DELAY IN REPORTING THE CRIME OF RAPE.**— In a number of cases, this Court has likewise ruled that delay, even of three years, in reporting the crime does not necessarily detract from the witness' credibility as long as it is satisfactorily explained. Jessica was threatened by appellant that he would kill her mother and relatives if she reported the rape. A young girl like Jessica can easily be mesmerized by fear of bodily harm and, unlike a mature woman, cannot be expected to have the courage or

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confidence to immediately report a sexual assault on her, specially when a death threat hangs over her head.

5. **ID.; ID.; ID.; DEFENSES OF DENIAL AND ALIBI CANNOT STAND AGAINST POSITIVE IDENTIFICATION AND CATEGORICAL TESTIMONY OF A RAPE VICTIM.**— In view of the credible testimony of Jessica, appellant's defenses of denial and alibi deserve no consideration. These weak defenses cannot stand against the positive identification and categorical testimony of a rape victim.

6. **CRIMINAL LAW; RAPE; CAN BE COMMITTED EVEN IN PLACES WHICH TO MANY MIGHT APPEAR UNLIKELY AND HIGH-RISK VENUES FOR ITS COMMISSION.**— Appellant makes much of the fact that two incidents of rape happened inside the room where the other children were sleeping. This Court has repeatedly held that rape can be committed in the same room where other members of the family are also sleeping, in a house where there are other occupants or even in places which to many might appear unlikely and high-risk venues for its commission.

7. **ID.; ID.; A CRIME WHICH CANNOT BE COMMITTED IN THE FRUSTRATED STAGE; RATIONALE.**— The Court sustains appellant's contention that there is no such crime as frustrated rape, as we have ruled in a long line of cases. Recently, in *People vs. Quinanola*, we again reiterated the rule: Let it be said once again that, as the Revised Penal Code presently so stands, there is no such crime as frustrated rape. In *People vs. Orita*, the Court has explicitly pronounced: Clearly, in the crime of rape, from the moment the offender has carnal knowledge of his victim, he actually attains his purpose and, from that moment also all the essential elements of the offense have been accomplished. Nothing more is left to be done by the offender, because he has performed the last act necessary to produce the crime. Thus, the felony is consummated. In a long line of cases (*People vs. Oscar*, 48 Phil. 527; *People vs. Hernandez*, 49 Phil. 980; *People v. Royeras*, G.R. No. L-31886, April 29, 1974, 56 SCRA 666; *People vs. Amores*, G.R. No. L-32996, August 21, 1974, 58 SCRA 505), We have set the uniform rule that for the consummation of rape, perfect penetration is not essential. Any penetration of the female organ by the male organ is sufficient. Entry of the labia or lips of the female organ, without rupture of the hymen or laceration

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of the vagina is sufficient to warrant conviction. Necessarily, rape is attempted if there is no penetration of the female organ (*People vs. Tayaba*, 62 Phil. 559; *People vs. Rabadan, et al.*, 53 Phil. 694; *United States vs. Garcia*, 9 Phil. 434) because not all acts of execution was performed. The offender merely commenced the commission of a felony directly by overt acts. Taking into account the nature, elements and manner of execution of the crime of rape and jurisprudence on the matter, it is hardly conceivable how the frustrated stage in rape can ever be committed. Of course, We are aware of our earlier pronouncement in the case of *People vs. Eriñia*, 50 Phil. 998 [1927] where We found the offender guilty of frustrated rape there being no conclusive evidence of penetration of the genital organ of the offended party. However, it appears that this is a 'stray' decision inasmuch as it has not been reiterated in Our subsequent decisions. Likewise, We are aware of Article 335 of the Revised Penal Code, as amended by Republic Act No. 2632 (dated September 12, 1960) and Republic Act No. 4111 (dated March 29, 1965) which provides, in its penultimate paragraph, for the penalty of death when the rape is attempted or frustrated and a homicide is committed by reason or on the occasion thereof. We are of the opinion that this particular provision on frustrated rape is a dead provision. The Eriñia case, *supra*, might have prompted the law-making body to include the crime of frustrated rape in the amendments introduced by said laws.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

D E C I S I O N

CORONA, *J.*:

This is an appeal from the decision[1] of the Regional Trial Court of Manila, Branch 18, in Criminal Case Nos. 97-159184, 97-159185, 97-159186 and 97-159187, convicting appellant for

[1] Penned by Judge Perfecto Laguio, Jr.

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two counts of simple rape, one count of statutory rape and one count of frustrated rape, and sentencing him to suffer three counts of *reclusion perpetua* for the simple and statutory rapes, and an indeterminate penalty of 8 years to 14 years and 8 months of imprisonment for the frustrated rape.

Complainant Jessica Castro charged appellant with raping her four times between January 1994 and November 1996. The informations filed against appellant by the City Prosecutor read:

In Criminal Case No. 97-159184 —

That on or about January 14, 1996, in the City of Manila, Philippines, the said accused did then and there willfully, unlawfully and feloniously, by means of force and intimidation, that is, by threatening to kill said Jessica Castro, had carnal knowledge of the latter against her will.

CONTRARY TO LAW.

In Criminal Case No. 97-159185 —

That on or about April 15, 1994, in the City of Manila, Philippines, the said accused did then and there willfully, unlawfully and feloniously, by means of force and intimidation, that is, by threatening JESSICA CASTRO *Y* DE LA CRUZ of death should she resist or report the matter to anybody, had carnal knowledge of said Jessica C. Castro, a minor, under 12 years of age, against her will.

CONTRARY TO LAW.

In Criminal Case No. 97-159186 —

That on or about March 12, 1995, in the City of Manila, Philippines, the said accused did then and there willfully, unlawfully and feloniously, by means of force and intimidation, that is, by threatening Jessica Castro *y* de la Cruz of death should she resist or report the matter to anybody, had carnal knowledge of said Jessica C. Castro, a minor, under 12 years of age, against her will.

CONTRARY TO LAW.

In Criminal Case No. 97-159187 —

That on or about November 17, 1996, in the City of Manila, Philippines, the said accused did then and there willfully, unlawfully and feloniously, by means of force and intimidation, that is, by

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threatening to kill said Jessica Castro, had carnal knowledge of the latter against her will.

CONTRARY TO LAW.[2]

Arraigned on September 5, 1997, appellant pleaded not guilty.[3] Thereafter, trial on the merits ensued. However, the trial was subsequently postponed for eight months as Jessica was suffering from psychological and emotional trauma from her horrifying ordeal.[4] The lower court ordered the suspension of the trial to enable her to undergo psychological therapy at the Child Protection Unit of the Philippine General Hospital. Trial resumed in November 1998 with the prosecution presenting Jessica as its first witness.

Incidentally, prior to the filing of the aforementioned cases, Jessica also filed a criminal case against her mother, Girlie de la Cruz Castro, and the appellant for child abuse.

The evidence of the prosecution showed that appellant was the common law husband of Jessica's mother Girlie. Appellant, a pedicab driver, started living with Girlie and her three children sometime in 1993 in a two-storey house in Paco, Manila owned by Girlie's mother. They occupied a room on the ground floor which served as their bedroom, kitchen and living room. The adjacent room was occupied by Girlie's brother and his family while the room on the second floor was occupied by Girlie's sister and her family.

Girlie gave birth to two more children by appellant. To earn a living, Girlie sold fish at the Paco Market, buying her stock from the Navotas fish market late at night and sometimes in the early hours of the morning.

The first incident of rape, subject of Criminal Case No. 97-159185, happened sometime in April 1994 when Girlie was at the fish market. Appellant was left in the house with Jessica,

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[2] *Rollo*, pp. 6-9.

[3] Records, p. 13.

[4] Records, p. 33.

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her siblings and appellant's two children with Girlie. Jessica was then watching television while her brothers and sisters were sleeping beside her. Appellant grabbed Jessica's right hand and lasciviously jabbed her palm with his finger. He ordered her to undress which she obeyed out of fear as appellant was armed with a knife. Appellant then removed his pants, placed himself on top of complainant and succeeded in partially penetrating her. Jessica felt pain in her vagina and saw it smeared with blood and semen. She tried to leave the room but appellant locked the door and threatened to kill her if she told her mother what happened. Jessica was then only nine years and four months old, having been born on December 19, 1983.[5]

The second rape, subject of Criminal Case No. 97-159186, occurred on March 14, 1995 at around 11:00 a.m. when Jessica was 11 years and 3 months old. Girlie was in the market while Jessica and her siblings were left in the house watching television. Soon after, appellant arrived and sent the children, except Jessica, to play outside. Left alone with Jessica, appellant removed his clothes, pulled out a *balisong* and ordered Jessica to undress. He then held her by the shoulder and made her lie down. Then he mounted her. Appellant reached his orgasm shortly after penetrating her slightly. He stood up with semen still dripping from his penis. Apparently still not satisfied, he knelt down, kissed and fingered Jessica's vagina, then mashed her breasts. He only stopped what he was doing when someone knocked at the door. Appellant and Jessica hurriedly put on their clothes and, as appellant opened the door, Jessica went to the bathroom to wash herself.

The third rape, subject of Criminal Case No. 97-159184, occurred on January 14, 1996; when Jessica was 12 years and 6 months old. She arrived from school at around 11:00 a.m. While she was changing her clothes, appellant ordered Jessica's brother and sister to visit their mother at the Paco Market and sent his children to play outside the house. When appellant and Jessica were alone, he removed his pants, got his knife and ordered her to undress. Since she was afraid, Jessica was forced

[5] TSN, February 17, 1998. p. 2; Exhibit E.

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to remove her clothes. Appellant then told her they would do what they did before, pulled her towards him and made her lie down on the floor. While holding the knife, he kissed and fingered her vagina, then mashed her breasts. Thereafter, he placed himself on top of her, partially penetrated her until he ejaculated. When Jessica's brother and sister arrived, appellant hurriedly put on his clothes. Jessica did the same. She then went to the bathroom to wash herself and change her bloodstained underwear.

The last rape, subject of Criminal Case No. 97-159187, occurred sometime in November 1996, at around 11:00 p.m. Girlie was again in the public market while Jessica was at home with her siblings who were all asleep. Appellant told Jessica that they would again do what they did before but she refused, saying that she might get pregnant. Appellant brandished his *balisong* and threatened to kill her. He then covered himself and Jessica with a blanket, removed his pants and her shorts, and placed himself on top of her. His penis slightly penetrated her vagina. He mashed her breasts, inserted his finger into her vagina and kissed it. Jessica pushed him away and told him she wanted to sleep. Then she put on her shorts. Appellant also put on his pants and told Jessica not to tell her mother what he did to her. He assured her that she would not get pregnant because she was not yet menstruating.

Sometime in March 1997, a teacher of Jessica, Mrs. Adoracion Mojica, noticed the unusual treatment of Jessica by appellant. When confronted by Mrs. Mojica, Jessica admitted that appellant had raped her several times. Mrs. Mojica called up Jessica's aunt, Mrs. Antonina de la Cruz, and narrated to her what Jessica had confessed. Mrs. De la Cruz then accompanied Jessica to the police station to file a complaint and to the Philippine General Hospital (PGH), Child Protection Unit, to be examined. Dr. Bernadette J. Madrid, Director of the Child Protection Unit, examined Jessica and the findings revealed the following:

Genital Examination:

Hymen: Estrogenized,

Attenuated from 1 o'clock position to 4 o'clock position and from 6 o'clock to 12 o'clock position

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	Notch at 5 o'clock
	Healed hymenal tear at the 6 o'clock position
Anus:	Normal rectal tone, no pigmentation, no scars, normal rugae[6]

For his defense, appellant advanced denial and alibi. He denied ever raping Jessica and testified that, during the alleged second rape incident, he was driving his pedicab. His live-in partner Girlie testified that, during the purported first and second incidents of rape, appellant was with her to buy fish in Navotas and sell them in Paco market. Appellant argued that since Jessica disapproved of his relationship with her mother, she had the motive to falsely accuse him of raping her. Further, he pointed out the improbability of the alleged first and fourth incidents of rape inasmuch as the make-up of the room made it impossible for Jessica's siblings not to wake up during the commission of the crime. Appellant further contended that Jessica's failure to cry out for help, knowing that her mother's relatives were in the same house, made her story of rape unbelievable.

The trial court gave credence to the testimony of Jessica and convicted the appellant:

WHEREFORE, in Criminal Case No. 97-159184, Accused Arnulfo Orande *y* Chavez is convicted of simple rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua* with all the accessory penalties provided by law.

In Criminal Case No. 97-159185, the accused is also convicted of simple rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua* with all the accessory penalties provided by law.

In Criminal Case No. 97-159186, the accused is likewise convicted of statutory rape under Article 335 of the Revised Penal Code and sentenced to transfer the penalty of *reclusion perpetua* with all the accessory penalties provided by law.

In Criminal Case No. 97-159187, the accused is convicted of frustrated rape under Article 335 of the Revised Penal Code and

[6] Exhibit C, Records, p. 8.

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sentenced to suffer the indeterminate penalty of 8 years of *prision mayor* as minimum to 14 years and 8 months of *reclusion temporal* as maximum, and to pay the costs.

On the civil liability of the accused in the four cases, he is ordered to pay the victim, Jessica Castro, moral, nominal and exemplary damages in the respective sums of ₱400,000.00, ₱200,000.00 and ₱100,000.00.

SO ORDERED.[7]

In this appeal, appellant assigns the following errors:

I. THE COURT *A QUO* GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANT GUILTY BEYOND REASONABLE DOUBT OF ONE COUNT OF STATUTORY RAPE, ONE COUNT OF FRUSTRATED RAPE AND TWO COUNTS OF SIMPLE RAPE.

II. THE COURT *A QUO* GRAVELY ERRED IN CONVICTING THE ACCUSED-APPELLANT OF FRUSTRATED RAPE DESPITE THE FACT THAT UNDER PREVAILING JURISPRUDENCE THERE IS NO SUCH CRIME.[8]

The Office of the Solicitor General argues that appellant's convictions should be upheld as the prosecution was able to prove his guilt beyond reasonable doubt.

The appeal is partly meritorious. This Court finds that the prosecution was able to prove beyond reasonable doubt appellant's guilt for two counts of statutory rape and two counts of simple rape, there being no such crime as frustrated rape in this jurisdiction.

After a thorough review of the records, we find no reason to deviate from the well-established rule that the credibility of witnesses is a matter best assessed by the trial court because of its unique opportunity to observe them firsthand and to note their demeanor, conduct and attitude.[9] In the present case, the

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[7] *Rollo*, p. 23.

[8] *Rollo*, p. 41.

[9] *People vs. Sabdani*, 334 SCRA 498 [2000]; *Pag-Ibig Village Association vs. Angon*, 294 SCRA 554 [1998].

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trial court found Jessica's testimony convincing, logical and credible. Moreover, the court *a quo*:

> xxx discerned from her demeanor the intense mental torture, embarrassment, emotional pain and bitterness she suffered whenever she was asked to recall and narrate the humiliating sexual ordeals she had gone through, and her . . . desire for justice and the punishment of her defiler. She was continually in tears while testifying and the proceeding was interrupted several times to calm her down.[10]

No young woman would allow an examination of her private part and subject herself to the humiliation and rigor of a public trial if the accusations were not true, or if her motive were other than a fervent desire to seek justice.[11]

We do not subscribe to appellant's theory that the filing of the rape charges was motivated by Jessica's dislike for him. To charge appellant with rape for the sole purpose of exacting revenge, as appellant implies in his brief, takes a certain kind of psychiatric depravity which this Court does not see in Jessica. The fact that Jessica had to undergo psychological treatment[12] after her first testimony in February 1998 belies appellant's defense. The need for such counseling came about *after* the defilement she suffered in the hands of appellant. In fact, it was the incidents of rape that caused her psychological and emotional imbalance which required therapy at the Child Protection Unit of the Philippine General Hospital.

The alleged inconsistencies and improbabilities in Jessica's testimony did not discredit her nor reveal any fabrication. Inconsistencies regarding minor details were attributable to the fact that she was recalling details of incidents that happened three years before, not to mention the fact that these details pertained to something she had very little knowledge of, being then only nine years and three months old when the first rape

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[10] *Rollo*, p. 26.

[11] *People vs. Clado*, 343 SCRA 729 [2000]; *People vs. Mariano*, 345 SCRA 17 [2000]; *People vs. Sancha*, 324 SCRA 646 [1998].

[12] *Rollo*, pp. 33-41.

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was committed. We have consistently ruled that errorless recollection of a harrowing experience cannot be expected of a witness (a very young one at that) specially when she is recounting details of an occurrence so humiliating, so painful and, in this case, so alien as rape.[13]

Appellant makes much of the fact that two incidents of rape happened inside the room where the other children were sleeping. This Court has repeatedly held that rape can be committed in the same room where other members of the family are also sleeping, in a house where there are other occupants or even in places which to many might appear unlikely and high-risk venues for its commission.[14]

Also, the failure of Jessica to cry out for help during the incidents in question, inspite of the physical proximity of her relatives, or to report to them what happened, did not at all make her testimony improbable inasmuch as it is not uncommon for a young girl of tender age to be easily intimidated into silence and conceal for sometime the violation of her honor, even by the mildest threat to her life.[15] Besides, Girlie, Jessica's mother, had a rift with her siblings who lived in the same house and forbade Jessica to socialize with them. It was likewise highly probable that the strained relations between Jessica's mother, uncle and aunt prevented Jessica from confiding in them.

In a number of cases, this Court has likewise ruled that delay, even of three years, in reporting the crime does not necessarily detract from the witness' credibility as long as it is satisfactorily explained.[16] Jessica was threatened by appellant that he would kill her mother and relatives if she reported the rape. A young girl like Jessica can easily be mesmerized by fear of bodily

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[13] *People vs. Bayona*, 327 SCRA 190 [2000]; *People vs. Calayca*, 301 SCRA 192 [1999].

[14] *People vs. Castillo*, 335 SCRA 100 [2000].

[15] *People vs. Bea, Jr.*, 306 SCRA 653 [1999]; *People vs. Antonio*, 336 SCRA 366 [1998].

[16] *People vs. Santos*, 368 SCRA 535 [2001]; *People vs. Gonzales*, 338 SCRA 371 [2000]; *People vs. Padil*, 318 SCRA 795 [1999].

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harm and, unlike a mature woman, cannot be expected to have the courage or confidence to immediately report a sexual assault on her, specially when a death threat hangs over her head.[17]

In view of the credible testimony of Jessica, appellant's defenses of denial and alibi deserve no consideration. These weak defenses cannot stand against the positive identification and categorical testimony of a rape victim.[18]

The court *a quo* convicted appellant of one count of frustrated rape in Criminal Case No. 97-151987, the dispositive portion of which reads:

xxx xxx xxx.

In Criminal Case No. 97-159187, the accused is convicted of frustrated rape under Article 335 of the Revised Penal Code and sentenced to suffer the indeterminate penalty of 8 years of *prision mayor* as minimum, and to pay the costs.

xxx xxx xxx.

SO ORDERED.[19]

However, we agree with the observation of the Solicitor General that the court *a quo* was referring to Criminal Case No. 97-159185, and not Criminal Case No. 97-159187, in convicting appellant of frustrated rape:

The trial court convicted appellant of simple rape in Criminal Case No. 97-159185. However, the factual basis thereof in the body of the decision reads:

> With regard to Criminal Case No. 97-159185, the Court has gathered that sometime in April, 1994, at around 11:00 p.m., Jessica and her two siblings together with the accused were in their house, while their mother, Girlie, was in Navotas

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[17] *People vs. Narido*, 316 SCRA 131 [1999]; *People vs. Alimon*, 257 SCRA 658 [1996].

[18] *People vs. Villaraza*, 339 SCRA 666 [2000]; *People vs. Ballesteros*, 285 SCRA 438 [1998].

[19] *Rollo*, p. 23.

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> buying fish. Jessica was watching TV in a lying position beside her two sleeping siblings, when the accused held Jessica's right hand and jabbed her palm with his finger. Then he told her to remove her short pants, panty and T-shirt, after which the accused removed his pants and with a *balisong* in his hand, he began kissing the sensitive parts of her body. Then he placed himself on top of her and tried to have sexual intercourse with her. *He succeeded in nudging her sex organ with the tip of his penis, but was unable to accomplish penetration, due to the resistance offered by her by struggling and kicking him.* Nonetheless, the accused had orgasm and Jessica's sex organ was smeared with his semen. (Italics supplied, p. 2, Decision)

Such was the only rape incident where the trial court concluded there was no penetration.

On the other hand, the factual basis for the conviction in Criminal Case No. 97-159187 in the body of the trial court's decision reads:

> Anent Criminal Case No. 97-159187, the records further show that in November, 1996, at around 11:00 p.m., Jessica was watching TV while the other siblings were asleep and her mother was away, when accused again made sexual advances to her. She resisted and told accused she might become pregnant, but the accused persisted and threatened to kill her at that very moment if she would not submit to his lust. As in the previous occasions, he again succeeded in having carnal knowledge of the helpless and scared victim. After her defilement, the victim continually cried and the accused tried to calm her down by assuring her that she would not be impregnated, because she has not yet began to have menstruation (p. 3, Decision)

Consequently the conviction for frustrated rape should pertain to the incident in April 1994 described in Criminal Case No. 97-159185 and not Criminal Case No. 97-159187 since this case refers to the November 1996 rape incident where the findings of the trial court was that there was carnal knowledge.[20]

Moreover, the oversight of the court *a quo* in interchanging Criminal Case Nos. 97-159185 and 97-159187 is further evidenced

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[20] *Rollo*, pp. 108-110.

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by the following paragraph found in page four of the trial court decision:

In *Criminal Case 97-159185 and 97-159184*, the acts of the accused in having carnal knowledge of the victim by intimidation on two separate occasions *in [the] early or middle part [of] 1996*, and in November of the same year, constitute two separate crimes of qualified rape under R.A. 7659 and the penalty prescribed therefore is death by lethal injection.[21] (Italics Ours)

The rape incidents which occurred in 1996 were designated as Criminal Case Nos. 97-159184 and 97-159187, as borne out by the informations filed by the City Prosecutor.[22] Thus, the conviction for frustrated rape should pertain to Criminal Case No. 97-159185 and not Criminal Case No. 97-159187.

Regarding Criminal Case No. 97-159185 (the April 1994 rape incident), the Court sustains appellant's contention that there is no such crime as frustrated rape, as we have ruled in a long line of cases.[23] Recently, in *People vs. Quinanola,*[24] we again reiterated the rule:

Let it be said once again that, as the Revised Penal Code presently so stands, there is no such crime as frustrated rape. In People vs. *Orita*, the Court has explicitly pronounced:

> Clearly, in the crime of rape, from the moment the offender has carnal knowledge of his victim, he actually attains his purpose and, from that moment also all the essential elements of the offense have been accomplished. Nothing more is left to be done by the offender, because he has performed the last act necessary to produce the crime. Thus, the felony is consummated. In a long line, of cases (*People vs. Oscar*, 48 Phil. 527; *People vs. Hernandez*, 49 Phil. 980; *People v. Royeras*, G.R. No. L-31886, April 29, 1974, 56 SCRA 666;

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[21] *Rollo*, p. 26.

[22] *Rollo*, pp. 6-10.

[23] *People vs. Aca-Ac*, 357 SCRA 373 [2001]; *People vs. Quinanola*, 306 SCRA 710 [1999]; *People vs. Orita*, 184 SCRA 105 [1990]:

[24] 306 SCRA 710 [1999].

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People vs. Amores, G.R. No. L-32996, August 21, 1974, 58 SCRA 505), We have set the uniform rule that for the consummation of rape, perfect penetration is not essential. Any penetration of the female organ by the male organ is sufficient. Entry of the labia or lips of the female organ, without rupture of the hymen or laceration of the vagina is sufficient to warrant conviction. Necessarily, rape is attempted if there is no penetration of the female organ (*People vs. Tayaba,* 62 Phil. 559; *People vs. Rabadan, et al.*, 53 Phil. 694; United *States vs. Garcia*, 9 Phil. 434) because not all acts of execution was performed. The offender merely commenced the commission of a felony directly by overt acts. Taking into account the nature, elements and manner of execution of the crime of rape and jurisprudence on the matter, it is hardly conceivable how the frustrated stage in rape can ever be committed.

Of course, We are aware of our earlier pronouncement in the case of *People vs. Eriñia*, 50 Phil. 998 [1927] where We found the offender guilty of frustrated rape there being no conclusive evidence of penetration of the genital organ of the offended party. However, it appears that this is a 'stray' decision inasmuch as it has not been reiterated in Our subsequent decisions. Likewise, We are aware of Article 335 of the Revised Penal Code, as amended by Republic Act No. 2632 (dated September 12, 1960) and Republic Act No. 4111 (dated March 29, 1965) which provides, in its penultimate paragraph, for the penalty of death when the rape is attempted or frustrated and a homicide is committed by reason or on the occasion thereof. We are of the opinion that this particular provision on frustrated rape is a dead provision. The Eriñia case, *supra*, might have prompted the law-making body to include the crime of frustrated rape in the amendments introduced by said laws.

The Court is not unaware that Republic Act No. 7659, amending Article 335 of the Revised Penal Code, has retained the provision penalizing with *reclusion perpetua* to death an accused who commits homicide by reason or on the occasion of an attempted or frustrated rape. *Until Congress sees it fit to define the term frustrated rape and thereby penalize it, the Court will see its continued usage in the statute book as being merely a persistent lapse in language.* (Italics ours)

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Thus, it was error for the trial court to convict appellant of frustrated rape. Besides, after a careful review of the records, we find that the rape was in fact consummated. Jessica initially testified that, although appellant did not succeed in inserting his penis in her vagina, she felt his sex organ touch hers and she saw and felt semen come out of his penis and smear her vagina.[25] In response to the clarificatory questions asked by the prosecutor, Jessica testified that the appellant was able to slightly penetrate her because she felt pain and her vagina bled.[26] It has been held that, to be convicted of rape, there must be convincing and sufficient proof that the penis indeed touched the labia or slid into the female organ, and not merely stroked the external surface thereof.[27] Nevertheless, we have also ruled in cases where penetration is not established that the rape is deemed consummated if the victim felt pain, or the medico-legal examination finds discoloration in the inner lips of the vagina, or the labia minora is already gaping with redness, or the hymenal tags are no longer visible.[28] In the present case, the victim testified that she felt pain and her vagina bled, indisputable indications of slight penetration or, at the very least, that the penis indeed touched the labia and not merely stroked the external surface thereof. Thus, the appellant should be found guilty of (consummated) rape and not merely frustrated or attempted rape.

Pursuant to Section 11 of RA 7659 or the Heinous Crimes Law, the penalty of death is imposed if rape is committed when the victim is under 18 years of age and the offender is the common-law spouse of the parent of the victim. However, the trial court was correct in not imposing the death penalty in Criminal Case Nos. 97-159184 and 97-159187 because the

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[25] TSN, February 17, 1998, p. 5-6.

[26] TSN, February 23, 1999, p. 3.

[27] *People vs. Campuhan*, 329 SCRA 270, 280 [2000].

[28] *Ibid.* citing *People vs. Villamor*, 199 SCRA 472 [1991], *People vs. Palicte*, 229 SCRA 543 [1994], *People vs. Sanchez*, 250 SCRA 14 [1995], *People vs. Gabris*, 258 SCRA 663 [1996], *People vs. Gabayron*, 278 SCRA 78 [1997].

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qualifying circumstances of age and relationship of the victim to the appellant were not alleged in the information.[29] Thus, appellant can only be convicted of simple rape punishable by *reclusion perpetua* under Article 335 of the Revised Penal Code. However, in Criminal Case Nos. 97-159185 and 97-159186, the appellant can be convicted of statutory rape also punishable by *reclusion perpetua* under Article 335 of the Revised Penal Code inasmuch as the age of Jessica was alleged in the information[30] and duly proven during the trial by the presentation of her birth certificate.[31]

We award moral damages of ₱50,000 for each count of rape as moral damages are automatically awarded to rape victims without need of pleading or proof.[32] We also award civil indemnity *ex delicto* of ₱50,000 for each count of rape in the light of the ruling that civil indemnity, which is distinct from moral damages, is mandatory upon the finding of the fact of rape.[33] We likewise award exemplary damages of ₱25,000 for each count of rape consistent with the prevailing jurisprudence on the matter.[34]

WHEREFORE, the decision of the Regional Trial Court of Manila, Branch 18, in Criminal Case Nos. 97-159184 to 87 is *AFFIRMED* with the following *MODIFICATIONS*:

1. In Criminal Case No. 97-159184, appellant is convicted of simple rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua*.

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[29] *People vs. Mendoza*, G.R. Nos. 132923-24, June 6, 2002; *People vs. Gabiana*, 338 SCRA 562 [2000]; *People vs. Dimapilis*, 300 SCRA 279 [1998].

[30] *Rollo*, pp. 7-8.

[31] Exhibit E.

[32] *People vs. Catubig*, 363 SCRA 621 [2001]; *People vs. Sarmiento*, 344 SCRA 345 [2000].

[33] *People vs. Quilatan*, 341 SCRA 247 [2000], *People vs. Narido*, 316 SCRA 131 [1999].

[34] *People vs. Pantanayan, Jr.*, G.R. Nos. 141189-141202, July 23, 2002.

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2. In Criminal Case No. 97-159185, appellant is convicted of statutory rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua.*

3. In Criminal Case No. 97-159186, appellant is convicted of statutory rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua.*

4. In Criminal Case No. 97-159187, appellant is convicted of simple rape under Article 335 of the Revised Penal Code and sentenced to suffer the penalty of *reclusion perpetua.*

For each count of rape, appellant is ordered to pay complainant Jessica Castro ₱50,000 as moral damages, ₱50,000 as civil indemnity and ₱25,000 as exemplary damages, or a total of ₱500,000. Costs against appellant.

SO ORDERED.

Puno (Chairman), *Panganiban, Sandoval-Gutierrez,* and *Carpio Morales, JJ.*, concur.

THIRD DIVISION

[G.R. No. 146094. November 12, 2003]

PHILIPPINE TRANSMARINE CARRIERS, INC., *petitioner, vs.* **FELIPE D. CORTINA,** *respondent.*

SYNOPSIS

The petitioner herein employed respondent as third officer assigned in one of its vessels. The respondent's employment was for a period of one year, but only after four months he