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[G.R. No. 139181. October 27, 2003]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **JIMMY AQUINO** *y* **VIOLA,** *appellant.*

SYNOPSIS

Appellant was found guilty by the trial court of the crime of statutory rape and was sentenced to suffer the penalty of death. Hence, this automatic review of the case which raised the main issue of whether or not appellant had carnal knowledge of the victim.

The Supreme Court did not sustain the conviction of the appellant for the crime of rape but found him guilty of the crime of acts of lasciviousness. In view of the consistency and credibility of the witnesses presented by the defense, who equally withstood strict scrutiny during trial, the Court gave weight to the evidence for the defense and made room for the uncertainty that arose out of it. At most what has been admitted by the appellant is that he asked the victim to undress. Whether it was a prelude to sexual intercourse or to truly satisfy his curiosity is debatable. Whether this event continued into the consummation of the sexual act remains uncertain. From the consistent and credible evidence of the defense, the Court found that the scales have to be tipped again, if not in favor of the appellant, then to balance the scales and to reaffirm the precept that when inculpatory facts and circumstances are capable of two or more explanations, one consistent with innocence and the other with guilt, such evidence would not meet the test of moral certainty and would not support a conviction. However, while appellant cannot be held guilty of the charge of rape on the ground of reasonable doubt, the Court found his act of directing the victim to remove her lower apparel constitutes an act of lasciviousness.

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; GUIDING PRINCIPLES IN REVIEWING RAPE CASES.**— In reviewing rape cases, three guiding principles must be borne in mind: (1)

Supreme Court E-Library

an accusation for rape may be made with facility, for it is difficult to prove but more difficult for the person accused, though innocent, to disprove; (2) in view of the intrinsic nature of the crime where two persons are involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence for the defense.

2. **ID.; EVIDENCE; CREDIBILITY OF WITNESSES; FINDINGS THEREON BY TRIAL COURT, GENERALLY ENTITLED TO GREAT WEIGHT ON APPEAL; EXCEPTION.**— As a general rule the trial court's findings as to the credibility of witnesses are entitled to great weight and should largely remain undisturbed. On review, an appellate court may reverse these findings when there appears on record some fact or circumstance of weight and influence which has been overlooked or misinterpreted that could affect the result of a case. It is on this ground that we find that the trial court committed a reversible error in completely disregarding all other evidence contrary to what was deemed as the irrefutable testimony of the complainant.

3. **ID.; ID.; WHEN INCULPATORY FACTS ARE CAPABLE OF TWO OR MORE EXPLANATIONS, ONE CONSISTENT WITH INNOCENCE AND THE OTHER WITH GUILT, SUCH EVIDENCE WOULD NOT SUPPORT A CONVICTION.**— From the consistent and credible evidence of the defense, we find that the scales have to be tipped again, if not in favor of the appellant, then to balance the scales and to reaffirm the precept that when inculpatory facts and circumstances are capable of two or more explanations, one consistent with innocence and the other with guilt, such evidence would not meet the test of moral certainty and would not support a conviction.

4. **ID.; CRIMINAL PROCEDURE; JUDGMENT; VARIANCE BETWEEN THE OFFENSE CHARGE AND THAT PROVED; IN CASES OF VARIANCE BETWEEN THE OFFENSE CHARGED AND THAT PROVED, ACCUSED CAN BE CONVICTED OF THE OFFENSE PROVED WHICH IS INCLUDED IN THE OFFENSE CHARGED, OR OF THE OFFENSE CHARGED WHICH IS INCLUDED IN THAT WHICH IS PROVED; CASE AT BAR.**— [W]hile the appellant cannot

Supreme Court E-Library

be held guilty of the charge of rape on the ground of reasonable doubt, we find that his act of directing Analyn to remove her lower apparel constitutes an act of lasciviousness under Article 336 of the Revised Penal Code. Section 4, Rule 120 of the Revised Rules of Criminal Procedure authorizes, in cases of variance between the offense charged and that proved, the conviction of an accused of the offense proved which is included in the offense charged, or of the offense charged which is included in that which is proved. In *People v. Caralipio*, we ruled that although an accused is charged in the information with the crime of rape, he can be convicted of acts of lasciviousness, which is included in rape.

5. CRIMINAL LAW; ACTS OF LASCIVIOUSNESS; ELEMENTS.— The elements of the crime of acts of lasciviousness are as follows: 1. The offender commits an act of lasciviousness or lewdness; 2. The act is done (a) by using force or intimidation, (b) when the offended party is deprived of reason or otherwise unconscious, or (c) when the offended party is under 12 years of age; and 3. The offended party is another person of either sex.

6. ID.; ID.; ORDERING A GIRL TO REMOVE HER UNDERWEAR FOR THE PURPOSE OF SEEING HER PRIVATE ORGAN CONSTITUTES AN ACT OF LASCIVIOUSNESS.—From the environmental circumstance under which the acts was done, lewd design can be imputed to Jimmy. He claimed that his purpose was to see her private organ because of the alleged rumors that it (Analyn's genitalia) was "beautiful and big." Such act was not out of sheer curiosity but rather out of lascivious curiosity. Notably, on cross-examination, he testified that he never tried "to peep to see the private organs" of his sisters to confirm whether they were big and beautiful. He also acknowledged that it is "very immoral for a man to look and stare at the private organ of a lady."

APPEARANCES OF COUNSEL

Solicitor General for plaintiff-appellee.
Felipe V. Buencamino for accused-appellant.

Supreme Court E-Library

DECISION

DAVIDE, JR., *C.J.*:

Before us on automatic review is the 7 June 1999 Decision of the Regional Trial Court of Malolos, Bulacan, Branch 21, in Criminal Case No. 1310-M-98 convicting appellant Jimmy Aquino of the crime of statutory rape and sentencing him to the penalty of death.[1]

The Information under which Jimmy was charged reads:

> That on or about the 24th day of May 1996, in the municipality of San Miguel, province of Bulacan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a bladed instrument, did then and there willfully, unlawfully and feloniously, with lewd designs, by means of force and intimidation have carnal knowledge of the said Analyn dela Cruz y Viola, 11 years of age, against her will.[2]

Upon his arraignment, Jimmy pleaded not guilty to the offense charged.[3] Pre-trial ensued, followed by the trial on the merits of the case.

The evidence for the prosecution, culled from the testimonies of the victim Analyn de la Cruz and her mother Lolita Viola de la Cruz, is as follows:

Analyn was 10 years and 11 months old on the day of the alleged rape, having been born on 23 June 1985. She filed the complaint with the assistance of her mother, Lolita, who is Jimmy's first cousin. Prior to the filing of this case and the assumption of custody by the Department of Social Welfare and Development, Analyn lived with her grandmother in Sta. Ines, San Miguel, Bulacan; while her mother lived with her second husband in another house within the same *barangay*.[4]

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[1] Original Record (OR), 129-138; *Rollo*, 39. Per Judge Cesar M. Solis.

[2] OR, 2.

[3] *Id.*, 20.

[4] TSN, 11 November 1998, 3; 16 November 1998, 3-7.

Supreme Court E-Library

At around 9:00 a.m. of 24 May 1996, while Analyn was playing with her friend near the house of Jimmy's sister Nini in Sta. Ines, San Miguel, Bulacan, Jimmy, who was staying in Nini's house during the day, called out Analyn to buy cooking oil for him from the store nearby. He gave her ₱5.00 and a glass for the cooking oil. When she returned to Nini's house, Jimmy asked her to get the feeding bottle of his niece near the bed, which was in a slightly elevated portion of the house. She then went to get the bottle. Jimmy followed her and, producing a knife, ordered Analyn to remove her shorts and underwear. Fearing for her safety, Analyn acceded. Jimmy then proceeded to remove his clothes and force himself on top of her. With a knife in his right hand pressed against her left palm, he began to have sexual intercourse with her. Once during the ordeal, he applied to her genitals the cooking oil she bought. Jimmy stopped his assault only after two hours, or at around 11:00 a.m., when he heard the voice of his brother-in-law outside the house. He forthwith ordered Analyn to get dressed and get out of the house. Analyn went home and reported the rape to her grandmother.[5]

Later in the afternoon, Analyn went to the poultry farm where her mother worked and told her that "*Tio* Imi" had raped her.[6] Lolita went to the *Barangay* Council of Sta. Ines and reported the rape. Councilman Ismael Julian asked *Barangay Tanod* Rolando Viola to fetch Jimmy. Under interrogation by Ismael, Jimmy admitted to having asked Analyn to undress. The councilman prepared a statement,[7] which was signed by him, Jimmy and Lolita, wherein it was stated that the nature of the complaint was that Jimmy had asked Analyn to remove her clothes because he wanted to see what her vagina looked like. Even if the statement did not mention rape, Lolita signed it thinking it would merely be used as evidence that she had made a complaint.[8]

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[5] TSN, 11 November 1998, 3-11; 13 November 1998, 3.

[6] TSN, 16 November 1998, 6-7.

[7] OR, 108.

[8] TSN, 16 November 1998, 9-11; 11 December 1998, 6-8.

Supreme Court E-Library

Analyn was also sent for, and though she testified to having signed a document upon the request of the *barangay tanods,* she did not know what document she signed.[9] Analyn's signature does not appear in the statement signed by her mother and Jimmy.

According to Lolita, she was frustrated by the lack of action by the *Barangay* officials. She attributed it to the fact that Jimmy was a relative of many of them, and that they wanted her to settle the case with him. Thinking that Jimmy had fled, she did not pursue the complaint. It was only on 20 August 1997, Jimmy's birthday, that she spotted Jimmy in the house of his grandmother. Her rage renewed. she tried to go to the police in San Miguel, Bulacan, but the policemen refused to help her because Jimmy was the nephew of the incumbent *barangay* captain at that time.[10]

With the help of her friend Celia Manese, she, together with Analyn, filed on 10 November 1997 a complaint with the Municipal Trial Court (MTC) of San Miguel, Bulacan. The next day, Analyn was examined at the Philippine National Police Crime Laboratory in Malolos, Bulacan.[11] The examining physician, Dr. Manuel Aves, found old healed hymenal lacerations, which the parties admitted.[12]

For his defense, Jimmy interposed a basic denial. His version of the events is that on 24 May 1996, he was in the house of his sister Nini where he usually stayed during the day, sometimes to take care of his niece. Around two meters away was Antonio Clemente, a first cousin of Jimmy and Lolita and a carpenter by profession, who was hired by Nini to put up a fence in the back of the house.[13]

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[9] TSN, 16 November 1998, 10-11.

[10] TSN, 14 May 1999, 20-21.

[11] *Id.*, 9-14.

[12] Exh. "G."

[13] TSN, 12 May 1999, 3-4.

Supreme Court E-Library

At approximately 9:00 a.m., Analyn arrived and watched television with Jimmy. Sometime between 10:00 and 11:00 a.m., Antonio got hungry and asked Jimmy for merienda. Because none was available, Antonio gave Jimmy ₱5.00 to buy ice and some cooking oil to fry *camote* (sweet potatoes). Jimmy, in turn, gave Analyn the money and bid her to buy the items in a store nearby. She returned with the cooking oil worth ₱3.00 but without the ice, and gave the ₱2.00 to Jimmy.[14]

At one point while the *camote* was being fried, Jimmy became curious about the rumors he had heard about the beautiful appearance of Analyn's private organ. To see it for himself, he asked Analyn to pull down her shorts. The latter agreed. When Analyn's shorts were down, a group of children entered the house and laughed when they saw Analyn. Among this group were Analyn's younger brother Jonathan Duklayan, and Antonio's son Jervy Clemente. Antonio also looked in to see what was happening. He saw Analyn with her shorts around her knees and her underwear exposed. The children then asked whether they could have some of the *camote* being fried. Antonio playfully asked them to also pull down their shorts as a condition to giving them any.[15]

Late that same afternoon, Rolando Viola, a *barangay tanod,* came and informed him that Lolita was making a complaint against him (Jimmy) with the *barangay* councilor. He (Jimmy) went to where Ismael Julian and Lolita were and, when confronted, admitted to having asked Analyn to pull down her shorts because he was curious about her. He signed a statement made by Ismael that was in question-and-answer form, and both he and Lolita were made to sign the same document. The issue of rape was not discussed during that confrontation, and he had no idea of the charge until he was arrested in his house on 12 November 1997 and brought to the provincial jail.[16]

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[14] TSN, 12 May 1999, 4-5.

[15] *Id.*, 5-6.

[16] *Id.*, 7-9; 14 May 1999, 6-7, 12.

Supreme Court E-Library

Antonio Clemente, a first cousin of both Jimmy and Lolita, corroborated Jimmy's story. He testified that on the day of the alleged rape, he was fixing the fence in the back of Nini's house. He could see into the house of Nini because the back wall was almost non-existent. At around 10:00 a.m. he asked Jimmy for food and gave him money to buy cooking oil and ice. Afterwards, he heard children laughing and he saw Analyn with her shorts around her knees. He even jokingly asked the children to do the same so that they could eat some of the *camote*.[17]

Rolando Viola, a *barangay tanod* and an uncle of both the appellant and the victim's mother, testified to having seen Antonio fix the house. Sometime before 10:00 a.m., he went looking for Antonio because he wanted to have his roof fixed. While he was conferring with Antonio, he saw Analyn and Jimmy watching television inside Nini's house. He also testified that the state of Nini's house at that time was such that although he was at the back, he could see into the house and out into the street and at passers-by because the front and back walls were dilapidated and almost non-existent.[18]

He also testified that he was present when Lolita reported to *Barangay* Councilman Ismael Julian that Analyn was ordered by the appellant to take off her lower apparel. He was even the one who fetched the appellant from his house to be investigated. He was likewise present during the investigation.[19] This testimony was corroborated by Ismael Julian.[20]

Alberto Viola, uncle of Jimmy and granduncle of Analyn, declared that he had been taking care of Jimmy ever since the latter was 10 years old, after Jimmy's father died. He testified that at around 10:30 a.m. of 24 May 1996, while he was cooking lunch in his house, he heard children laughing. From his kitchen

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[17] TSN, 8 March 1999, 4-12.

[18] TSN, 15 March 1999, 4-8.

[19] *Id.*, 14-15.

[20] TSN, 4 June 1999, 2-4.

Supreme Court E-Library

in the back of the house, he had a view of the front of Nini's house, where he saw children. Noticing nothing extraordinary, he continued cooking. At around noon, Jimmy came over and ate with him.[21]

Teresita Bacuan, another cousin of Analyn and a close friend, testified that at 11:00 a.m. of 24 May 1996, Analyn came by her house to tell her that "*Tio* Imi" had almost succeeded in raping her (Analyn). Teresita was worried that a rape had in fact been committed and asked Analyn whether the latter was just ashamed to admit it. Analyn assured her that nothing happened because of the timely arrival of one Jervy and other small children. Teresita confronted Jervy Clemente, who then denied having witnessed any attempt at rape. Teresita's testimony also included revelations from Analyn that sometime in April of 1997, Analyn was having sexual intercourse with her boyfriend named Ryan Ramos.[22]

The witnesses for the appellant denied Jimmy's flight. They testified that they had seen him working in the field or in a construction,[23] watching television in Nini's house, or buying something in the store, and sometimes in the company of Analyn.[24]

The defense put forward several motives for Lolita to have constrained Analyn to accuse him of rape. One was for the money that Lolita was claiming to settle the case. After the case was filed, she wanted ₱10,000 to settle the case, and later, according to her neighbor Lerma, she wanted ₱50,000.[25] The second was because of a land dispute over the inheritance between Lolita's father Edilberto and Jimmy's uncle Alberto.[26] The third was revenge in that Jimmy's sister Lala was instrumental

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[21] TSN, 12 April 1999, 3-6.

[22] TSN, 12 May 1999, 4-9.

[23] TSN, 12 April 1999, 9-10.

[24] TSN, 15 March 1999, 10.

[25] *Id.*, 11-12; TSN, 12 April 1999, 8-9.

[26] TSN, 12 April 1999, 8; 19 May 1999, 3.

Supreme Court E-Library

in putting in jail the father of Lolita's friend Celia Manese for raping his stepdaughter.[27]

After trial, the trial court rendered the decision now on review. Convinced of the overall veracity of Analyn's claim, the trial court gave no weight to the testimonies of the witnesses for the defense because of their relation to Jimmy. Reasoning that lust is not a respecter of time and place, it found inconsequential the testimonies of the witnesses that the house where the rape was allegedly committed was located near a store or artesian well. It could find no reason why either Analyn or her mother Lolita would fabricate a story of rape when to do so would subject Analyn to an emotional ordeal and humiliation. On Analyn's claim that Jimmy raped her for two hours, the court attributed this to Jimmy's youth and strong physical condition as a probable "sexual athlete," or else to a condition called satyriasis, which describes excessive sexual desire.

Finding, therefore, that rape was committed and that the accused used a deadly weapon in its commission, the trial court declared:

> As to the penalty to be imposed, the law provides that for Statutory Rape, the penalty is *Reclusion Perpetua*: whereas if committed with the use of a deadly weapon, it should be *Reclusion Perpetua* to Death. Inasmuch as the circumstance of using of the fan knife which is a deadly weapon, was established, it is hereby deemed to be one that aggravated the commission of the offense. Accordingly, accused Jimmy V. Aquino is hereby sentenced to suffer the supreme penalty of DEATH by lethal injection.
>
> Further, he is hereby ordered to indemnify Analyn dela Cruz the sum of ₱75,000.00 (in line with the case of *People v. Victor*, G.R. No. 127903, July 9, 1998) and to pay moral damages of ₱100,000.00.
>
> With costs against the accused.
>
> SO ORDERED.[28]

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[27] TSN, 12 April 1999, 6-7; 12 May 1999, 9.

[28] *Rollo*, 38-39.

Supreme Court E-Library

The records were elevated to us.

In his Appellant's Brief, Jimmy contends that the trial court erred in (1) holding that the testimonies of the prosecution witnesses are direct and credible, and (2) ignoring the truth and credibility of the witnesses for the defense. On the other hand, the Office of the Solicitor General, representing the People of the Philippines, agrees with the trial court in giving full faith and credence to Analyn's narration of the facts that warranted the conviction of the accused.

In reviewing rape cases, three guiding principles must be borne in mind: (1) an accusation for rape may be made with facility, for it is difficult to prove but more difficult for the person accused, though innocent, to disprove; (2) in view of the intrinsic nature of the crime where two persons are involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence for the defense.[29]

Taking into account the totality of the evidence presented, we cannot sustain the conviction of the appellant for the crime of rape.

The main issue in this case is whether on the day of 24 May 1996, Jimmy Aquino had carnal knowledge of Analyn de la Cruz. Because Analyn was under 12 years old, her age takes the place of force and intimidation in vitiating her consent, and only an evidence of carnal knowledge is necessary.[30] The presence of a deadly weapon only qualifies the offense.[31]

Excluding the peripheral motives and actuations of the secondary players in this drama, we are once again tasked

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[29] *People v. Rafales*, G.R. No. 133477, 21 January 2000, 323 SCRA 13, 20-21; *People v. Fernandez*, G.R. No. 137647, 1 February 2001, 351 SCRA 80, 88-89.

[30] Article 335, Revised Penal Code, as amended by Republic Act No. 7659; *People v. Antonio*, G.R. No. 122473, 8 June 2000, 333 SCRA 201.

[31] Article 335, Par. 2, Revised, Penal Code, as amended by R.A. No. 7659.

Supreme Court E-Library

with the duty of weighing the testimony of the victim as against the appellant. As a general rule the trial court's findings as to the credibility of witnesses are entitled to great weight and should largely remain undisturbed.[32] On review, an appellate court may reverse these findings when there appears on record some fact or circumstance of weight and influence which has been overlooked or misinterpreted that could affect the result of a case.[33] It is on this ground that we find that the trial court committed a reversible error in completely disregarding all other evidence contrary to what was deemed as the irrefutable testimony of the complainant.

The trial court found Analyn's demeanor while she testified to the rape as frank, straightforward, sincere, and unshaken despite the rigid cross-examination. True, the positive testimony of a credible complainant is sufficient basis for the conviction of rape, for jurisprudence recognizes that a victim who cries rape, more so if she is a minor, almost always says all that are needed to signify that the crime has been committed.[34] It is also true that a woman would not make a charge of rape for reasons other than to seek justice for what is the truth.[35] We must consider, however, a principle equally fundamental: that evidence to be worthy of credit must not only proceed from a credible source but must, in addition, be credible in itself.[36] In this regard, the probability of the testimony of Analyn is suspect in light of the totality of the evidence presented for and against the appellant.

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[32] *People v. Gutierrez*, G.R. No. 132772, 31 August 2000, 339 SCRA 452; *People v. Rama*, G.R. No. 144386, 23 January 2002, 374 SCRA 447.

[33] *People v. Langalen*, G.R. No. 139670, 21 January 2002, 374 SCRA 161.

[34] *People v. Cristobal*, G.R. No. 116279, 29 January 1996, 252 SCRA 507; *People v. Flores*, G.R. No. 130546, 26 July 1999, 311 SCRA 170; *People v. Docena*, G.R. Nos. 131894-98, 20 January 2000, 322 SCRA 820.

[35] *People v. Remudo*, G.R. No. 127905, 30 August 2001, 364 SCRA 61.

[36] *People v. Dayag*, 155 Phil. 421, 423 (1974).

Supreme Court E-Library

Analyn was unyielding on the point that Jimmy did the pumping motion while on top of her for two hours, from 9:00 to 11:00 a.m. of 24 May 1996.[37] Ordinarily, this improbability would be attributable to confusion or perhaps a failure to communicate her sense of time or the sequence of events, especially when accounting for Analyn's age. The trial judge, therefore, disregarded this improbability by factoring in the probability of Jimmy's sexual prowess. However, the adamancy of Analyn as to the continuity of the rape, when confronted with the presence of children in the same cramped one-room house, as well as the declarations of the other witnesses who saw Analyn and Jimmy at intervals during that time, creates an uncertainty as to whether a rape could have occurred during that time.

The accused presented Antonio Clemente and Rolando Viola who testified to having seen Analyn and Jimmy between 9:00 a.m. and 10:00 a.m. watching television. They also testified as to the arrival or the presence of children in the house of Nini sometime before 10:00 a.m. until 11:00 a.m. Even Analyn's mother, Lolita, claimed that her son Jonathan had seen the rape and was the first to report it to her. Lolita's statement is hearsay, but it indicates, at the very least, Jonathan's presence in Nini's house during that time. Moreover, the statement signed by Jimmy and Lolita mentions the presence of Jonathan and other children, who laughed at Analyn after seeing her in a state of undress.[38] Independent is the testimony of Teresita Bacuan that Analyn mentioned the appearance of Jervy Clemente in Nini's house as the reason why Jimmy was unable to consummate the rape. It is unfortunate that none of the children could be made to testify. Both parties show that their presence or absence would have been material. Although the statements of the children cannot be used for being hearsay, the fact that several witnesses acknowledged their presence during the time of the rape is noteworthy.

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[37] TSN, 11 November 1999, 9; 16 November 1999, 6.

[38] OR, 108.

Supreme Court E-Library

It is also significant to note that both Barangay Councilman Ismael Julian and Barangay Tanod Rolando Viola testified that what Analyn's mother, Lolita, reported to them was that Jimmy ordered Analyn to undress or in the dialect, "*pinaghubo.*"[39] There is nothing in the record of such investigation that indicates that she or her mother complained of rape. The record of the investigation, which bears the signatures of Ismael, Jimmy, and Lolita and was identified and marked as Exhibit "1" during the trial, reflects Jimmy's admission to having asked Analyn to undress. Lolita, who had finished grade six,[40] testified during her cross-examination that she knew the contents of the record before she affixed her signature therein.[41] If what Analyn had reported to her mother was one of rape, the latter would have been so enraged that she would not sign that document and would have, instead, insisted that the complaint for rape be likewise reflected in the record. Moreover, it is undisputed that Analyn was present during the investigation.[42] Analyn would have also seized the opportunity to give her side that what happened was rape, not just "undressing."

Furthermore, it was only one-and-a-half years after the incident, or in November 1997, that a complaint for rape was filed by Analyn and her mother before the MTC of San Miguel, Bulacan. We find her reasons for the delay to be unsatisfactory.

We cannot subscribe to the conclusion of the trial court that the witnesses of the appellant should be discredited or otherwise disregarded because they are his relatives. It must be remembered that the witnesses presented were as much related to the complainant as they were to the appellant. On the one hand, a bias in favor of the appellant does not, on its face, exist. On the other hand, a bias against the complainant cannot be explained on the mere recognition that society treats with scorn a non-virgin who is deflowered against her will,[43] as declared by the

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[41] *Id.*, 8.

[42] TSN, 11 November 1998, 12-13; 15 March 1999, 14; 4 June 1999, 4-5.

[43] *People v. Faigano*, G.R. No. 113483, 22 February 1996, 254 SCRA 10, 15.

Supreme Court E-Library

trial court. There was no malice or favor exhibited by any of the witnesses in favor of the appellant or against the complainant. Neither was there an indication in the record as to any wish to discredit Analyn's character. Even the allegation that she had sexual experiences with her boyfriend at the age of 12 years was only to explain the old healed hymenal lacerations.

In view of the consistency and credibility of the witnesses presented by the defense, who equally withstood strict scrutiny during trial, we must give weight to the evidence for the defense and make room for the uncertainty that arises out of it. At most what has been admitted by the appellant is that he asked Analyn to undress on 24 May 1996. Whether it was a prelude to sexual intercourse or to truly satisfy his curiosity is debatable. Whether this event continued into the consummation of the sexual act remains uncertain.

From the consistent and credible evidence of the defense, we find that the scales have to be tipped again, if not in favor of the appellant, then to balance the scales and to reaffirm the precept that when inculpatory facts and circumstances are capable of two or more explanations, one consistent with innocence and the other with guilt, such evidence would not meet the test of moral certainty and would not support a conviction.[44]

However, while the appellant cannot be held guilty of the charge of rape on the ground of reasonable doubt, we find that his act of directing Analyn to remove her lower apparel constitutes an act of lasciviousness under Article 336 of the Revised Penal Code. Section 4, Rule 120 of the Revised Rules of Criminal Procedure authorizes, in cases of variance between the offense charged and that proved, the conviction of an accused of the offense proved which is included in the offense charged, or of the offense charged which is included in that which is proved. In *People v. Caralipio*,[45] we ruled that although an accused

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[44] *People v. Parayno*, 133 Phil. 3, 22 (1968); *People v. Lomboy*, G.R. No. 129691, 29 June 1999, 309 SCRA 440, 465.

[45] G.R. Nos. 137766-67, 27 November 2002.

Supreme Court E-Library

is charged in the information with the crime of rape, he can be convicted of acts of lasciviousness, which is included in rape.

The elements of the crime of acts of lasciviousness are as follows:

1. The offender commits an act of lasciviousness or lewdness;
2. The act is done (a) by using force or intimidation, (b) when the offended party is deprived of reason or otherwise unconscious, or (c) when the offended party is under 12 years of age; and
3. The offended party is another person of either sex.[46]

These elements are present in the case at bar. From the environmental circumstance under which the act was done, lewd design can be imputed to Jimmy. He was alone with Analyn when he ordered her to remove her drawers. He claimed that his purpose was to see her private organ because of the alleged rumors that it (Analyn's genitalia) was "beautiful and big."[47] Such act was not out of sheer curiosity but rather out of lascivious curiosity. Notably, on cross-examination, he testified that he never tried "to peep to see the private organs" of his sisters to confirm whether they were big and beautiful. He also acknowledged that it is "very immoral for a man to look and stare at the private organ of a lady."[48]

In any event, the appellant cannot escape liability for his act of ordering Analyn to undress for him to see her private part. Such was an act of lewdness perpetrated against Analyn, who at the time was only 10 years and 11 months old, having been born on 23 June 1985 as evidenced by her Certificate of Live Birth.[49] For such act of lasciviousness, Article 336 of the Revised Penal Code prescribes as penalty *prision correctional,* whose duration is from 6 months and day to 6 years. There being no

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[46] Article 336, Revised Penal Code; *People v. Bon, supra.*

[47] TSN, 12 May 1999, 5-6.

[48] TSN, 14 May 1999, 10.

[49] Exh. "A".

Supreme Court E-Library

modifying circumstances, the penalty should be imposed in its medium period, which ranges from 2 years, 4 months, and 1 day to 4 years and 2 months of imprisonment. Applying the Indeterminate Sentence Law, the appellant should be made to suffer an indeterminate penalty ranging from 4 months of *arresto mayor*, as minimum, to 4 years of *prision correccional*, as maximum.

WHEREFORE, the decision of the Regional Trial Court of Malolos, Bulacan, Branch 21, in Criminal Case No. 1310-M-98 finding appellant Jimmy Aquino guilty of the crime of rape is hereby *modified*. As modified, said appellant is hereby found guilty beyond reasonable doubt of the crime of acts of lasciviousness and is sentenced to suffer an indeterminate penalty of four (4) months of *arresto mayor*, as minimum, to four (4) years of *prision correcional*, as maximum. If he has already served that sentence, his immediate release from custody is hereby ordered unless he is being held for other legal grounds.

Costs *de oficio*.

SO ORDERED.

Davide, Jr., C. J., Bellosillo, Puno, Vitug, Panganiban, Quisumbing, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio Morales, Callejo, Sr., Azcuna, and *Tinga, JJ.,* concur.

Ynares-Santiago, J., on official leave.