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[G.R. No. 142856-57. August 25, 2003]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **ROBERTO NEGOSA *alias* "JOVIN,"** *appellant.*

SYNOPSIS

Two counts of rape were filed against Roberto Negosa for the sexual abuses he committed against his alleged minor stepdaughter Gretchen Castaño. He interposed denial as a defense. After trial, the court *a quo* convicted him of one count of qualified rape and one count of acts of lasciviousness. Hence, this automatic review.

It bears stressing that when the appellant raped the victim, she was only eleven years old. Thus, the Court agreed with the appellant's contention that he is guilty only of simple statutory rape, and not of rape in its qualified form. The prosecution was burdened to prove the allegation in the Information that the appellant was the stepfather of the victim. However, the prosecution failed to prove the same. The evidence on record showed that the appellant was merely the common-law husband of the victim's mother. This special qualifying circumstance that the appellant was the common-law husband of the mother of the victim was not alleged in the Information. Even if such qualifying circumstance was proved, it cannot be appreciated against the appellant in order to qualify the crime; otherwise, the appellant would be deprived of his right to be informed of the charge lodged against him. Accordingly, the decision of the Regional Trial Court was affirmed with modification in that appellant was found guilty of statutory rape and imposed the penalty of *reclusion perpetua.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; RAPE VICTIM OF TENDER AGE IS NOT EXPECTED TO ACT AND REACT LIKE AN ADULT. — It bears stressing that Gretchen was only in Grade V, barely eleven years old when the appellant raped her on June 28, 1997. At such a tender age,

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still inexperienced in the vagaries of life, she could not be expected to act and react like an adult. Being subjected to a vicious sexual assault was an emotional and psychological experience on the part of the young victim. In *People v. Aquino,* this Court held that "the range of emotions shown by rape victims is yet to be captured even by calculus. It is thus unrealistic to expect information from rape victims." This Court has repeatedly ruled that "the workings of the human mind placed under a great deal of emotional and psychological stress are unpredictable, and different people react differently. There is no standard form of human behavioral response when one is confronted with a strange, startling, frightful or traumatic experience — some may shout, some may faint, and some may be shocked into insensibility." Some may choose to keep to themselves the harrowing and debilitating experience rather than suffer the embarrassment, humiliation and ostracization from relatives after divulging the terrible secret. In this case, the evidence on record shows that the victim was the secretive and silent type, who chose not to confide in her relatives.

2. **ID.; ID.; ID.; NOT UNCOMMON FOR A YOUNG GIRL OF TENDER AGE TO BE INTIMIDATED INTO SILENCE BY THE MILDEST THREAT AGAINST HER LIFE.** — In her diary, Gretchen wrote that the appellant warned her not to tell her mother that he had raped her. This Court ruled that "it is not uncommon for a young girl of tender age to be intimidated into silence by the mildest threat against her life."

3. **ID.; ID.; ADMISSIBILITY; ENTRIES MADE MORE THAN A YEAR AFTER THE INCIDENT DOES NOT LESSEN ITS PROBATIVE WEIGHT.** — [T]he fact that Gretchen started making entries in her "diary" only on September 2, 1998, more than a year after the first rape incident occurred (June 28, 1997), does not lessen the probative weight of the said entries.

4. **CRIMINAL LAW; RAPE; UNDER TWELVE-YEAR OLD VICTIM IS CONCLUSIVELY PRESUMED INCAPABLE OF GIVING CONSENT TO SEXUAL INTERCOURSE.** — It bears stressing that when the appellant raped the victim, she was only eleven years old, and under Article 335, paragraph 3 of the Revised Penal Code, as amended by Republic Act No. 7659, the appellant is guilty of statutory rape. In statutory rape, the under twelve-year-old victim is conclusively presumed incapable of giving consent to sexual intercourse with another.

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5. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; TESTIMONY OF WITNESS MAY BE PARTLY BELIEVED OR DISBELIEVED. — In *People vs. Lucena,* we ruled that the testimony of a witness may be partly believed or disbelieved, depending on the corroborative evidence and intent on the part of the witness to pervert the truth. The principle *FALSUS IN UNO FALSUS IN OMNIBUS* is not strictly applied in this jurisdiction. x x x In this case, the trial court believed Gretchen's testimony that the appellant inserted his penis through the side of his short pants and the side of her loose shorts, but disbelieved that part of her testimony that a small part of his penis was able to penetrate her vagina. There is no evidence that Gretchen intended to pervert the truth as to the extent of the sexual abuse done to her on September 4, 1998. Neither can it be claimed that she prevaricated when she testified that the appellant raped her on June 28, 1997.

6. CRIMINAL LAW; RAPE; SPECIAL QUALIFYING CIRCUMSTANCE; RELATIONSHIP OF THE VICTIM TO THE OFFENDER; APPELLANT WAS THE COMMON-LAW HUSBAND OF THE VICTIM'S MOTHER AND NOT THE VICTIM'S STEPFATHER AS ALLEGED IN THE INFORMATION. — We agree with the appellant's contention that he is guilty only of simple statutory rape and not of rape in its qualified form under Article 335, paragraph 3 of the Revised Penal Code, as amended. The prosecution was burdened to prove the allegation in the Information that the appellant was the stepfather of the victim. However, the prosecution failed to prove the same. The evidence on record shows that the appellant was merely the common-law husband of the victim's mother. This special qualifying circumstance, that the appellant was the common-law husband of the mother of the victim, was not alleged in the Information. Even if such special qualifying circumstance was proved, it cannot be appreciated against the appellant in order to qualify the crime; otherwise, the appellant would be deprived of his right to be informed of the charge lodged against him.

APPEARANCES OF COUNSEL

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

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DECISION

CALLEJO, SR., *J.*:

Before us on automatic review is the Decision[1] of the Regional Trial Court of Camiguin, Branch 28, convicting the appellant Roberto Negosa *alias* "Jovin" of rape in Criminal Case No. 918, and sentencing him to the supreme penalty of death; and convicting the said appellant guilty of acts of lasciviousness in Criminal Case No. 919, and sentencing him to an indeterminate penalty of six months of *arresto mayor* maximum, as minimum, four years and two months of *prision correccional* medium, as maximum. The appellant was also ordered to pay the victim Gretchen Castaño the sum of ₱50,000.00 as civil indemnity *ex delicto* in Criminal Case No. 918, and the amount of ₱25,000.00 in Criminal Case No. 919.

In Criminal Case No. 918, the Information filed against the appellant reads:

"That on or about June 28, 1997 at 9:00 o'clock in the morning more or less, at their residence, in Bura, Catarman, Camiguin, Philippines, within the jurisdiction of this Honorable Court, the above-named accused, stepfather of the victim and resident of Bura, Catarman, Camiguin, employing force and intimidation upon the victim, did then and there willfully, unlawfully and feloniously have sexual intercourse with one Gretchen Castano, who was ten years old at the time of the commission of the crime."

CONTRARY to law and in violation of Article 335 of the Revised Penal Code.[2]

The said appellant was charged with the same felony in Criminal Case No. 919 under an Information which reads:

"That on or about September 4, 1998 at 10:00 o'clock in the morning more or less, at their residence in Bura, Catarman, Camiguin, Philippines, within the jurisdiction of this Honorable Court, the above-named accused, stepfather of the victim and resident of Bura, Catarman,

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[1] Penned by Judge Sinforoso V. Tabamo, Jr.

[2] Records, Criminal Cases Nos. 918 and 919, p. 1.

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Camiguin, employing force and intimidation upon the victim, did then and there willfully, unlawfully and feloniously have sexual intercourse with one Gretchen Castaño, who was eleven years old at the time of the commission of the crime."

CONTRARY to law and in violation of Article 335 of the Revised Penal Code.[3]

The appellant, assisted by counsel, was arraigned in both cases on April 8, 1999, and entered a plea of not guilty to both charges.

The Case for the Prosecution

Living as husband and wife without the benefit of marriage,[4] Senador Acosta and Cenilda Castaño had a daughter Gretchen Castaño who was born on May 26, 1986.[5] However, Senador and Cenilda fell out of love for each other and went their separate ways, with Cenilda having to keep their daughter Gretchen.

Thereafter, Cenilda met the appellant who himself was also separated from his erstwhile wife, Tonia Gok-ong, with whom he had four children namely, Levy, 19; Sammy, 18; Ruel, 16; and Sheila, 13.[6] Sometime in 1992, Cenilda and the appellant decided to live together in Bura, Catarman, Camiguin. Cenilda entrusted Gretchen to the care of her parents who also resided in Bura, Catarman, Camiguin.[7] In 1996, Gretchen eventually joined her mother and the appellant.[8] Gretchen was then enrolled in Grade IV at the Bura Elementary School. In the meantime, Cenilda gave birth to a son, Ronel (Dodong), fathered by the appellant.

When school year 1997-1998 started, Gretchen went to live with her mother's sister, Elsita Rabongue, in Lawigan, Catarman,

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[3] Separate folder.

[4] TSN, 25 October 1999, pp. 97-98.

[5] Exhibit "A".

[6] TSN, 26 October 1999, p. 127.

[7] *Id.* at 128.

[8] *Id.* at 129.

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Camiguin. She enrolled in Grade V at the Lawigan Elementary School, but went home every Saturday in Bura to visit her mother.[9]

June 28, 1997, a Saturday,[10] was the eve of the fiesta in Sitio Lumad, Bura, Catarman. Cenilda went to Catarman to buy some items to sell during the fiesta the next day. Gretchen and the appellant were left in the house. He asked Gretchen to get some liniment for him and Gretchen did as she was told. When Gretchen was about to hand over the liniment to the appellant, he suddenly held her hand, pulled her towards himself and made her lie down on the floor. The appellant pulled down and removed her shorts and panties, after which, he also removed his shorts and underwear. Placing himself on top of Gretchen, Roberto inserted his aroused phallus into her vagina. Gretchen felt excruciating pain but was too afraid to cry for help, for fear that the appellant would harm her, as he used to whenever he was angry at her.[11] The appellant pulled out his penis after having ejaculated. Gretchen felt a sticky substance flowing on the periphery of her vagina which the appellant wiped off. He warned Gretchen not to tell her mother what he had done to her.[12] Gretchen kept the harrowing experience to herself because she was afraid that her mother would side with the appellant if she found out what happened. Every now and then the appellant abused her sexually but she did not tell her mother about it. However, she revealed her ordeal to some of her close friends in school, like Germalin Bacorro, Rogelyn Madale, Recheney Pole, Corazon Apal, Mary Ann Ihong and Greta Bacorro.[13]

The following school year, 1998-1999, Gretchen went back to Bura and lived with the appellant and her mother Cenilda. She was enrolled as a Grade VI pupil at the Bura Elementary School.[14] Gretchen decided to record her ordeal at the hands of the appellant in the pages of a notebook. Recalling the sexual

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[9] TSN, 25 October 1999, p. 91.

[10] *Id.* at 85.

[11] TSN, 24 May 1999, pp. 31-32.

[12] Exhibit "B-3".

[13] *Id.* at 39-40.

[14] *Id.* at 29.

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abuse she suffered on June 28, 1997, Gretchen wrote on September 2, 1998, thus:

Gretchen Castaño

I am Gretchen Castaño, nicknamed Belen. My mother is Nenil and my father is Mador but they are separated and her live-in partner now is Oben together with my brother Dodong.

This Oben is my step-father. One day during the fiesta of Lumad, a Saturday year 1997 my mother was in Catarman and while she was there he raped me; first he asked me to get "*haplas*" (a liniment) then he immediately held my hand and pulled me and let me lie down and he started to rape me. After that he warned me not to tell my mother and because of fear I did not report; after that he always abused me when my mother was out or when we are alone with Dodong only. But he does not do it when Dodong is still awake. This incident is known by my female classmates Germelyn or Dayet, Roselyn, Retchale or Cheche, Cristi (illegible), Charry me and Oben.[15]

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My Secrets

Sep. (*sic*) 2, 1998

My mother got married to another man and my father was the second partner of mom and they resided and brought me to Bura. My mother again left for Bukidnon. I was still very young and do not know my father and mother and I stayed with *nanay* (mother). and they let me study until I reached third grade. During the fiesta of Bura my mother returned home. I was still young and not familiar with her and she again left; thereafter she again came back, this time bringing with her a male partner named "Oben." Later they were able to buy a house and we transferred there. A few days later during the fiesta of Lumad, a Saturday 1997, my mother went to Catarman to buy some stuff to be sold during the fiesta of Lumad and the only ones left in our house was Oben and myself; and he asked me to get a liniment (*haplas*). When it was handed to him, he immediately held my hand and let me lie down and he rape me. After that he warned me not to tell anyone and I never told my mother.[16]

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[15] Exhibit "B-3".

[16] Exhibit "B-4".

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because of fear; after that he repeatedly molested knowing that I did not tell my mother although I told some of my female classmates. Others I did not tell.

Sgd. Gretchen Castaño

And I thought now of starting making notes of what he did to me.

In the morning of September 4, 1998, Gretchen was wearing a pair of loose short pants and was looking after her sleeping baby brother, Ronel. The appellant grabbed and caressed her. He started kissing her neck and shoulder. He then mashed her prepubescent breasts. Not contented, the appellant slapped her. She wrote the incident in the notebook:

Friday 10:30 date: 4th day, he sucked my breast and fondled it and he abused me slightly after that he slapped me. I came from Catarman because I bought poultry feeds and my mother was searching for coconuts.[17]

Gretchen tore off the pages and hid them. She inserted her "diary" in a notebook and placed it with her things.

On September 9, 1998, at around 4:30 p.m., Gretchen had just arrived home from school. Her grandmother asked her to buy rice in a nearby store. She left her school things in her grandmother's house and proceeded to the store.[18] Her auntie, Josilyn Estaciones,[19] saw Gretchen's things and decided to read the notebooks to find out how her niece was doing in school.[20] Upon opening one of the notebooks, the torn pages of Gretchen's "diary" fell. Josilyn read the torn pages and was appalled to discover that the appellant had been sexually abusing Gretchen.

When Gretchen returned from the store, Josilyn confronted her about the notes, and asked whether the entries therein were

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[17] Exhibit "B-5."

[18] TSN, 21 May 1999, pp. 17–18.

[19] Also referred to as "Jocelyn" and "Joselyn" in the TSN.

[20] TSN, 21 May 1999, p. 8.

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all true. Gretchen admitted the veracity of what she had written. Josilyn immediately informed her parents, brothers and sisters about Gretchen's revelation. They decided not to tell Cenilda what had happened to her daughter as she might get angry and cause trouble in their house. Without Cenilda's knowledge, they brought Gretchen to a doctor for physical examination.[21]

Dr. Wilfredo T.E. Dublin, Jr. examined Gretchen at the Catarman District Hospital on September 14, 1998. He forthwith issued a Certificate of Treatment/Confinement[22] quoted as follows:

CERTIFICATE OF TREATMENT/CONFINEMENT

00019
Record Number

September 14, 1998
Date

TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY that MISS GRETCHEN CASTAÑO, 12 years old, female, child, a resident of Bura, Catarman, Camiguin, was seen and examined by the undersigned on September 14, 1998 for an alleged sexual abuse.

Pertinent Physical Examination Findings:

Skin : (-) hematoma, (-) abrasions
Breast : (-) hematoma, (-) abrasions
GUT: Hymen not intact, (+) abrasion left labia minora (8 o'clock position); vaginal opening 6 mm.
Speculum exam: (+) bloody discharge at cervical os, (+) abrasion upper cervical lip

IMPRESSION: Sexual abuse — child molestation and sexual intercourse.

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[21] *Id.* at 11.

[22] Exhibit "C" to "C-1".

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This certification is being issued at the request of SPO4 Teodomiro G. Dayo for filing criminal complaint against the respondent.

(SGD.) DR. WILFREDO T.E. DUBLIN, JR., M.D.
Medical Officer IV
License No. 085551

Thereafter, two criminal complaints for rape were filed against the appellant with the Municipal Circuit Trial Court for preliminary examination. Finding a *prima facie* case against the appellant for two counts of statutory rape, the record of the case was forwarded to the Provincial Prosecutor's Office for the filing of the appropriate Informations in court.[23] Consequently, two Informations[24] for statutory rape were filed with the RTC.

The Evidence of the Appellant

The appellant denied having raped Gretchen. He interposed the defense of alibi. He testified that he was self-employed and raised fighting cocks. At around 8:00 a.m. on June 28, 1997, he left the house for Sitio Lumad, to help Tado Calustre butcher a pig in preparation for the fiesta. At that time, he was with Bulao Castaño, Ruben Castaño, and Tado's son-in-law. The group also butchered a goat for an hour or so. Thereafter, they had a drinking spree until 1:00 p.m. When he got home, he saw only his live-in partner, Cenilda. He had not seen Gretchen that day since she was in Lawigan with her aunt Elsita.[25]

When confronted by Cenilda about what happened on September 4, 1998, the appellant admitted that he attempted to have carnal knowledge with Gretchen, but desisted when he realized that he would be committing a sin. He testified that he could have easily consummated the dastardly act since Gretchen could not have resisted him.[26] He admitted that a year before, he had spanked Gretchen for not helping in the household chores.

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[23] Records, Criminal Cases Nos. 918 and 919, p. 10.

[24] *Supra*.

[25] TSN, 26 October 1999, pp. 131-136.

[26] *Id.* at 125.

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However, he also admitted that there was no reason for Gretchen to fabricate the charges against him.[27]

Gretchen's mother Cenilda testified for the appellant. She testified that she was at home on June 28, 1997. Gretchen did not go to their house in Bura. At 8:00 a.m., the appellant left and went to the house of Tado Calustre. He returned home at 1:00 p.m. On September 4, 1998, Cenilda was at home washing their dirty laundry and had not noticed anything unusual that had happened between Gretchen and the appellant. Gretchen was taking care of her younger brother Ronel, while the appellant was taking care of his fighting cocks in front of their yard. However, Cenilda admitted that the appellant asked for her forgiveness for attempting to rape Gretchen on September 4, 1998.[28] He told her that "it was the devil's act (*sic*) that I chose (*sic*)." He told her that he "desisted because he remembered God."

The appellant's counsel planned to call Tado Calustre to the witness stand to corroborate the appellant's testimony. However, his counsel, upon meeting with Tado Calustre, found that the latter had asked the appellant to butcher a pig in 1996, and not in 1997 as the appellant claimed.

On March 2, 2000, the trial court rendered judgment finding the appellant guilty of rape in Criminal Case No. 918 and imposed upon him the supreme penalty of death, and found him guilty only of acts of lasciviousness in Criminal Case No. 919:

> WHEREFORE, finding the accused Roberto Negosa *y* Redondo of Rape as charged in Criminal Case No. 918, and of Acts of Lasciviousness, instead of Rape in Criminal Case No. 919, engendered by proof beyond reasonable doubt, the Court hereby strikes a verdict of conviction and accordingly sentences him, Roberto Negosa *y* Redondo, to suffer the penalty of death in Criminal Case No. 918, and in Criminal Case No. 919 the penalty of imprisonment for an indeterminate period of from 6 months of *arresto mayor* maximum, as minimum, to 4 years and 2 months of *prision correccional* medium,

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[27] *Id.* at 141.

[28] TSN, 25 October 1999, pp. 118-119.

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as maximum. The said accused is ordered to pay the victim, Gretchen Castaño, in the amount of ₱50,000.00 in Criminal Case No. 918, and the amount of ₱25,000.00 in Criminal Case No. 919.

SO ORDERED.[29]

The appellant did not file any notice of appeal from the decision of the trial court in Criminal Case No. 919.

In his brief, the appellant assails the decision of the trial court contending that:

I

THE LOWER COURT ERRED IN GIVING CREDENCE TO THE TESTIMONY OF THE VICTIM DESPITE THE LONG DELAY IN REPORTING THE INCIDENT OF RAPE ESPECIALLY WHEN THERE IS NO SHOWING THAT THE DELAY WAS DUE TO THREATS ON HER LIFE OR DUE TO THE MORAL ASCENDANCY OF THE ACCUSED OVER THE COMPLAINANT.

II

THE LOWER COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANT GUILTY BEYOND REASONABLE DOUBT OF THE CRIME CHARGED.

III

THE LOWER COURT ERRED IN APPRECIATING THE AGGRAVATING CIRCUMSTANCE OF STEPFATHER-STEPDAUGHTER RELATIONSHIP BETWEEN THE ACCUSED AND COMPLAINANT AS ALLEGED IN THE INFORMATION WHEN THE ACCUSED IS NOT LEGALLY MARRIED TO COMPLAINANT'S MOTHER.[30]

Anent the first and second assigned errors, the appellant asserts that Gretchen's testimony is incredible; hence, has no probative weight. She never divulged the sexual assault by the appellant to her mother, or to her aunts Elsita Rabongue and Josilyn Estaciones for that matter. Although Gretchen told some of her classmates of her harrowing experience, it was unnatural

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[29] Records, Criminal Cases Nos. 918 and 919, pp. 93-94.

[30] *Rollo*, pp. 49-50.

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for her to keep it from her mother and her aunts, who were in a better position to help her. He contends that the victim's failure to report the rape incident would have been understandable if he had threatened to inflict bodily harm on her. However, there is no evidence on record that he had so threatened the victim. There is likewise no evidence that the victim attempted to resist the appellant's alleged sexual advances.

The trial court also erred when it relied on the victim's account of events as contained in her "diary." The victim's notes were entered only on September 2, 1998, more than a year after the appellant had allegedly abused her on June 28, 1997.

The testimony of the victim is even inconsistent on material points. She testified on direct examination that the penis of the appellant was able to penetrate her vagina on September 4, 1998. However, on cross examination, she testified that she and the appellant were wearing short pants and underwear. It was physically impossible for his penis to penetrate her vagina. Even the trial court did not believe her testimony and convicted him only of acts of lasciviousness in Criminal Case No. 919. Moreover, the victim claimed that she was raped by the appellant on June 28, 1997. Despite this, she still agreed to live with the appellant and her mother. It is incredible that Gretchen would continue to live with the appellant even after the latter had been sexually abusing her as she intractably claimed.

The contentions of the appellant do not persuade. It bears stressing that Gretchen was only in Grade V, barely eleven years old when the appellant raped her on June 28, 1997. At such a tender age, still inexperienced in the vagaries of life, she could not be expected to act and react like an adult. Being subjected to a vicious sexual assault was an emotional and psychological experience on the part of the young victim. In *People v. Aquino,*[31] this Court held that "the range of emotions shown by rape victims is yet to be captured even by calculus. It is thus unrealistic to expect information from rape victims."[32]

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[31] G.R. No. 144340-42. April 17, 2002.

[32] *Supra.*

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This Court has repeatedly ruled that "the workings of the human mind placed under a great deal of emotional and psychological stress are unpredictable, and different people react differently. There is no standard form of human behavioral response when one is confronted with a strange, startling, frightful or traumatic experience — some may shout, some may faint, and some may be shocked into insensibility."[33] Some may choose to keep to themselves the harrowing and debilitating experience rather than suffer the embarrassment, humiliation and ostracization from relatives after divulging the terrible secret. In this case, the evidence on record shows that the victim was the secretive and silent type, who chose not to confide in her relatives.[34]

The appellant's assertion that he never threatened nor intimidated the victim and, as such, is not criminally liable for statutory rape, is unbelievable.

First. Gretchen testified that she was afraid to resist or to shout because on prior occasions, the appellant intimidated her by stepping on her feet:

Q At about 10:00 o'clock in the morning, more or less, of June 28, 1997, can you inform us if there were unusual incidents that happened?
A Yes, sir.

Q Please tell the Court what is that unusual incident?
A I was rape (sic) by my stepfather.

Q Can you inform this Honorable Court how did your stepfather, the accused in this case, rape you?
A At first I was requested by my stepfather to get some leniment (sic) for massage. And when I returned I was suddenly pulled . . . my hand was suddenly pulled that made me lay down, and when I was already on the floor, he removed my short pants and panty.

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[33] *People v. San Juan*, 270 SCRA 693 (1997).

[34] TSN, 25 October 1999, p. 92.

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Q What did you do next after he removed your short pants and panties?
A He also removed his short pants and brief.

Q What did he do next after removing his short pants and brief?
A He put himself on top of me and he inserted his penis to my organ.

Q And, what did you feel?
A I felt so much pain.

Q What did you do, if any. Did you not shout?
A No, sir.

Q Why did you not shout?
A Because I am (*sic*) afraid that he will harm me.

Q Why, was there any occasion that he harmed you?
A Yes, sir.

Q How did he harm you?
A He stepped me with his feet.

Q When you, according to you, his penis was inserted into your vagina, did he succeed inserting his penis?
A Yes, sir.[35]

Second. In her diary, Gretchen wrote that the appellant warned her not to tell her mother that he had raped her. This Court ruled that "it is not uncommon for a young girl of tender age to be intimidated into silence by the mildest threat against her life."[36]

Furthermore, the fact that Gretchen started making entries in her "diary" only on September 2, 1998, more than a year after the first rape incident occurred (June 28, 1997), does not lessen the probative weight of the said entries.

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[35] TSN, 21 May 1999, pp. 31-32 (Castaño).

[36] *People v. Villamor*, 297 SCRA 262 (1998).

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Third. Even assuming that the appellant did not threaten nor intimidate the victim, this, and the fact that the latter agreed to live with her mother and her abuser, are purely inconsequential matters. This does not affect the veracity of the victim's testimony.

It bears stressing that when the appellant raped the victim, she was only eleven years old, and under Article 335, paragraph 3 of the Revised Penal Code, as amended by Republic Act No. 7659, the appellant is guilty of statutory rape. In statutory rape, the under twelve-year-old victim is conclusively presumed incapable of giving consent to sexual intercourse with another.[37]

The trial court disbelieved Gretchen's testimony that on September 4, 1998, the appellant managed to insert a small portion of his penis through the side of his short pants and the side of the victim's loose short pants and convicted the appellant only of acts of lasciviousness. This, however, does not impair Gretchen's credibility and the probative weight of her testimony that she was raped by the appellant on June 28, 1997. In *People vs. Lucena*,[38] we ruled that the testimony of a witness may be partly believed or disbelieved, depending on the corroborative evidence and intent on the part of the witness to pervert the truth. The principle *FALSUS IN UNO FALSUS IN OMNIBUS* is not strictly applied in this jurisdiction.

The maxim *falsus in uno, falsus in omnibus* deals only with the weight of evidence and is not a positive rule of law; the rule is not an inflexible one of universal application. Modern trend in jurisprudence favors more flexibility when the testimony of a witness may be partly believed and partly disbelieved depending on the corroborative evidence presented at the trial. Thus, where the challenged testimony is sufficiently corroborated in its material points, or where the mistakes arise from innocent lapses and not from an apparent desire to pervert the truth, the rule may be relaxed. It is a rule that is neither absolute nor mandatory and binding upon the court, which may accept or reject portions of the witness' testimony based on its inherent credibility or on the corroborative evidence in the case.[39]

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[37] *People v. Escober*, 281 SCRA 498 (1997).

[38] 356 SCRA 90 (2001).

[39] *Supra*.

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In this case, the trial court believed Gretchen's testimony that the appellant inserted his penis through the side of his short pants and the side of her loose shorts, but disbelieved that part of her testimony that a small part of his penis was able to penetrate her vagina.[40]

There is no evidence that Gretchen intended to pervert the truth as to the extent of the sexual abuse done to her on September 4, 1998. Neither can it be claimed that she prevaricated when she testified that the appellant raped her on June 28, 1997.

The Proper Penalty for the Crime

We agree with the appellant's contention that he is guilty only of simple statutory rape and not of rape in its qualified form under Article 335, paragraph 3 of the Revised Penal Code, as amended. The prosecution was burdened to prove the allegation in the Information that the appellant was the stepfather of the victim. However, the prosecution failed to prove the same. The evidence on record shows that the appellant was merely the common-law husband of the victim's mother. This special qualifying circumstance, that the appellant was the common-law husband of the mother of the victim, was not alleged in the Information. Even if such special qualifying circumstance was proved, it cannot be appreciated against the appellant in order to qualify the crime; otherwise, the appellant would be deprived of his right to be informed of the charge lodged against him. This was the ruling of the Court in *People vs. Lizada*,[41] thus:

We agree with the accused-appellant that he is guilty only of two counts of simple rape, instead of qualified rape. The evidence on record shows that the accused-appellant is the common-law husband of Rose, the mother of the private complainant. The private complainant, as of October 1998, was still 13 years old, and under Article 335 as amended by Republic Act 7659, the minority of the private complainant, concurring with the fact that the accused-appellant is the common-law husband of the victim's mother, is a special qualifying circumstance warranting the imposition of the death penalty. However, the said circumstance was not alleged in the Informations as required by Section 8, Rule 110 of

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[40] Records, pp. 89-90.

[41] G.R. No. 143468-71, January 24, 2003.

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the Revised Rules on Criminal Procedure which was given retroactive effect by this Court because it is favorable to the accused. Hence, even if the prosecution proved the special qualifying circumstance of minority of the private complainant and relationship, the accused-appellant being the common-law husband of her mother, accused-appellant is guilty only of simple rape. Under the given law, the penalty for simple rape is *reclusion perpetua*.[42]

Thus, the appellant is guilty only of simple statutory rape for which the imposable penalty is *reclusion perpetua* under Article 335 of the Revised Penal Code, as amended by Rep. Act No. 7659.

Civil Liabilities of the Appellant

The trial court directed the appellant to pay the victim the amount of ₱50,000. The court did not award moral damages. The decision of the trial court shall, thus, be modified. The appellant is directed to pay the victim the amount of ₱50,000 as civil indemnity and the amount of ₱50,000 as moral damages, conformably to current jurisprudence.[43]

IN LIGHT OF ALL THE FOREGOING, the Decision of the Regional Trial Court, Camiguin, Branch 28, in Criminal Case No. 918 is *AFFIRMED* with *MODIFICATION*. The appellant Roberto Negosa *alias* "Jovin" is found guilty of statutory rape under Article 335, paragraph 3 of the Revised Penal Code, as amended by Rep. Act No. 7659, and is hereby sentenced to *reclusion perpetua*. The appellant is directed to pay the victim *Gretchen Castaño the amount of ₱50,000 as civil indemnity ex delicto* and ₱50,000 as moral damages. Costs against the appellant.

SO ORDERED.

Davide, Jr., C. J., Bellosillo, Puno, Vitug, Panganiban, Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio Morales, Azcuna, and *Tinga, JJ.*, concur.

Sandoval-Gutierrez, J., on official leave.

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[42] *Supra.*

[43] *People v. Lizada, supra.*