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WHEREFORE, the decision of the Regional Trial Court of Oriental Mindoro, Branch 43, in Criminal Case No. R-837 finding appellant VICTOR LOPEZ *Y* MANING guilty of statutory rape and sentencing him to *reclusion perpetua* is *AFFIRMED* with the *MODIFICATION* that appellant is also ordered to pay to the offended party Cristina Gajisan ₱50,000.00 as moral damages, and ₱25,000.00 as exemplary damages in addition to the civil indemnity of ₱50,000.00 awarded below along with the costs.

SO ORDERED.

Bellosillo, Acting C.J., (Chairman), Austria-Martinez, and *Callejo, Sr., JJ.,* concur.

Mendoza, J., on official leave.

EN BANC

[G.R. Nos. 139788 & 139827. October 3, 2002]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **ROGELIO DEL AYRE** *y* **LITRAN,** *appellant.*

SYNOPSIS

For sexually violating his minor daughter Zaira M. del Ayre on February 16, 1993 and September 26, 1994, the Regional Trial Court convicted accused-appellant of two counts of rape and sentenced him to *reclusion perpetua* for one count and to death for the other. In rendering judgment against appellant, the trial court gave credence to the complainant's categorical and coherent declarations and rejected his defense of alibi.

Hence, this automatic review.

Accused-appellant questioned the sufficiency of the prosecution's evidence and the imposition of the death penalty.

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The Supreme Court ruled that the clear and categorical declarations of complainant more than sufficiently established carnal knowledge and, consequently, appellant's culpability. Also sufficiently established was the employment of force by appellant on complainant, as well as the resistance she put up. The Court held that when an alleged victim of rape says she has been violated, she says in effect all that is necessary to show that rape has been inflicted on her. So long as her testimony meets the test of credibility, the accused may be convicted on that basis. Thus, the uncorroborated alibi of appellant cannot prevail over the positive identification of him by complainant as the man who had raped her. The Court, however, found that in both cases, appellant was liable for simple rape only, which was punishable with *reclusion perpetua*. The rape that occurred on September 26, 1994 cannot be punished with death because the father-daughter relationship of the parties was not alleged in the Information. Such failure is fatal and bars conviction for rape in its qualified form. The Court, therefore, affirmed the decision of the trial court with modifications.

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; ACCUSED MAY BE CONVICTED ON BASIS OF RAPE VICTIM'S TESTIMONY, IF CREDIBLE.**— By the very nature of rape, conviction or acquittal depends almost entirely on the credibility of the complainant and her testimony. Because the direct participants are often the only ones who have had personal knowledge of the commission of the rape, they are usually the only ones who can directly testify as to its occurrence. Thus, the strength of the prosecution's evidence ultimately revolves around the credibility of the complaining witness. In the present case, complainant related how her father had abused her. The clear and categorical declarations of complainant more than sufficiently established carnal knowledge and, consequently, appellant's culpability. Well-settled is the rule that when an alleged victim of rape says she has been violated, she says in effect all that is necessary to show that rape has been inflicted on her. So long as her testimony meets the test of credibility, the accused may be convicted on that basis.

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2. **ID.; ID.; ALIBI; WHEN UNCORROBORATED, CANNOT PREVAIL OVER POSITIVE IDENTIFICATION OF ACCUSED BY COMPLAINANT.**— Appellant, together with his wife, claims to have been in the market on the dates when the rapes were committed. However, no disinterested witness corroborated his alibi. Uncorroborated, it cannot prevail over the positive identification of him by complainant as the man who had raped her.

3. **ID.; ID.; ID.; REQUISITES TO PROSPER AS A DEFENSE.**— For alibi to succeed as a defense, appellant must establish by clear and convincing evidence (a) his presence at another place at the time of the perpetration of the offense and (b) the physical impossibility of his presence at the scene of the crime. Thus, his alibi is demolished by the fact that it was not physically impossible for him to have been at their home where the rapes occurred. The market was just 15 minutes away. He could have easily gone to the market, returned home, raped his daughter, and then proceeded back to the market, as in fact testified to by the latter.

4. **CRIMINAL LAW; STATUTORY RAPE; ELEMENT OF FORCE AND VIOLENCE; NEED NOT BE OVERPOWERING OR IRRESISTIBLE; SUFFICIENT THAT IT ENABLES THE OFFENDER TO CONSUMMATE HIS PURPOSE.**— Also sufficiently established was the employment of force by appellant on complainant, as well as the resistance she put up. His acts of dragging her as she defiantly clung to the door, removing her clothes, and placing her on the bed despite her objections clearly evinced the use of force. Resistance need not be carried out to the point of inviting death or sustaining physical injuries at the hands of the rapist. The force or violence that is required in rape cases is relative; when applied, it need not be overpowering or irresistible. That it enables the offender to consummate his purpose is enough. The parties' relative age, size and strength should be taken into account in evaluating the existence of the element of force in the crime of rape.

5. **ID.; ID.; ID.; MORAL ASCENDANCY OF THE ACCUSED OVER THE VICTIM SUBSTITUTES FOR VIOLENCE AND INTIMIDATION; CASE AT BAR.**— In the present case, Zaira was just nine to ten years old at the time of the incidents and was no match against appellant, who was already an adult in

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the prime of his life. Furthermore, he was her father. Actual force and intimidation is not even necessary in incestuous rape. In a rape committed by a father against his own daughter, the moral ascendency of the former over the latter substitutes for violence or intimidation.

6. **ID.; ID.; ID.; PROOF OF FORCE AND CONSENT IS IMMATERIAL; ABSENCE OF FREE CONSENT IS PRESUMED WHERE RAPE VICTIM IS BELOW AGE TWELVE.**— Moreover, where the girl — such as complainant herein — is below twelve (12) years of age at the time of the incident, violence or intimidation is not required, and the only subject of inquiry is whether "carnal knowledge" took place. Proof of force and consent becomes immaterial, because force is not an element of statutory rape; when the rape victim is below age twelve, the absence of free consent is presumed.

7. **ID.; ID.; MINORITY OF RAPE VICTIM; PRESENTATION OF BIRTH CERTIFICATE IS NOT AN ALL-EXCLUSIVE REQUISITE IN PROVING AGE OF VICTIM; CASE AT BAR.**— Appellant contends that the age of the offended party was not sufficiently proven, because the prosecution did not present her birth certificate. We clarify. The presentation of the birth certificate is not an all-exclusive requisite in proving the age of the victim. Certainly, her age may be proven by evidence other than that. This principle was upheld in *People v. Tipay,* which we quote: "This does not mean, however, that the presentation of the certificate of birth is at all times necessary to prove minority. The minority of a victim of tender age who may be below the age of ten is quite manifest and the court can take judicial notice thereof. The crucial years pertain to the ages of fifteen to seventeen where minority may seem to be dubitable due to one's physical appearance." Likewise, in *People v. Boras* we held as follows: "The testimony of the mother as to the age of her child is admissible in evidence for who else would be in the best position to know when she delivered the child. Besides, the court could very well assess whether or not the victim is below twelve years old by simply looking at her physique and built."

8. **ID.; ID.; ID.; PRESENTATION OF BIRTH CERTIFICATE, WHEN REQUIRED; CASE AT BAR.**— Current jurisprudence requires the presentation of the birth certificate of the alleged victim to ascertain her actual age, only when it is between 13

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and 18 at the time of the sexual assault, or when there are ambiguous or conflicting testimonies on record regarding it. In the case at bar, there is no doubt that complainant was nine years old on February 16, 1993, and ten years old on September 26, 1994. Her categorical statement that she was 13 years old when questioned under oath in July and December 1997 was not inconsistent with her testimony. On the witness stand, she said that she was nine (9) when her father had carnal knowledge of her for the first time on February 16, 1993; and ten (10) years old when the second incident took place on September 26, 1994. Her testimony regarding her age remains uncontradicted in the records. Even appellant categorically confirmed that she was 9 and 10 years old when the two incidents occurred. Indeed, with personal knowledge of his own daughter's age, he himself offered unsolicited, independent and categorical statements on it, consistent with her claim.

9. **ID.; ID.; NOT NEGATED BY THE INTACT STATE OF VICTIM'S HYMEN; BROKEN OR LACERATED HYMEN IS NOT AN ELEMENT OF THE CRIME.**— Appellant also contends that her claim of rape is not supported by the medical findings, which state that the "hymen [of the victim] is intact but distendible and its orifice wide (2.5 cm in diameter) as to allow complete penetration by an average sized adult, Filipino male organ in full erection without producing any genital injury." We disagree. The intact state of the victim's hymen does not negate rape, especially considering its self-explanatory qualification or description in this case. That it is broken or lacerated is not an essential element of rape, not even where the victim is an innocent child.

10. **ID.; ID.; DEATH PENALTY; CONCURRENCE OF THE MINORITY OF THE VICTIM AND HER RELATIONSHIP TO OFFENDER SHOULD BE BOTH ALLEGED AND PROVED TO WARRANT IMPOSITION THEREOF; CASE AT BAR.**— In both cases, appellant is liable for simple rape only, which is punishable with *reclusion perpetua*. The rape that occurred on February 16, 1993 (Criminal Case No. 1402-M-97) cannot be punished with death, because RA 7659 was not yet effective at the time. Although it was already in effect when the rape on September 26, 1994 took place, still, the penalty of death cannot be imposed on him. The reason why the death penalty cannot be imposed, even for the second

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offense, is that the father-daughter relationship of the parties was not alleged in the Information. "Such failure is fatal and bars conviction for rape in its qualified form, which is punishable with death. The concurrence of the minority of the victim and her relationship to the offender is a special qualifying circumstance that should both be alleged in the information and proven during the trial in order to warrant the imposition of the death penalty."

11. **CIVIL LAW; DAMAGES; EXEMPLARY DAMAGES; AWARDED WHERE AGGRAVATING CIRCUMSTANCE, EVEN IF NOT ALLEGED, WAS PROVEN TO HAVE ATTENDED THE COMMISSION OF THE CRIME; CIVIL INDEMNITY OF ₱75,000.00 AWARDED WHEN DEATH IS IMPOSED.**— In accordance with current jurisprudence, civil indemnity of ₱50,000 and exemplary damages of ₱25,000 are in order. Since the relationship was not alleged in either of the two Informations, it cannot be used to aggravate or qualify the rapes. However, even if not so alleged, an aggravating circumstance, when proven to have attended the commission of the crime, entitles the complainant to exemplary damages. In several cases, we have held that the relationship between the appellant and the rape victim justifies this civil award in order to deter fathers with perverse sexual behavior from abusing their daughters. Civil indemnity of ₱75,000 is awarded when death is also imposed.

12. **ID.; ID.; MORAL DAMAGES; AWARD THEREOF LOWERED TO P50,000.00 IN ACCORDANCE WITH CURRENT JURISPRUDENCE.**— The trial court awarded moral damages of ₱75,000. This should be lowered to ₱50,000 for each case in accordance with current jurisprudence.

APPEARANCES OF COUNSEL

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

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DECISION

PANGANIBAN, *J.*:

It is well-settled that the death penalty cannot be imposed in incestuous rapes, if the information does not allege or specify the relationship of the victim to the offender.

The Case

For automatic review by this Court is the Decision[1] dated May 28, 1999, issued by the Regional Trial Court (RTC) of Malolos, Bulacan (Branch 78). The RTC found Rogelio del Ayre *y* Litran guilty beyond reasonable doubt of two (2) counts of rape and sentenced him to death for one count and to *reclusion perpetua* for the other. The decretal portion of the Decision reads as follows:

"WHEREFORE, the foregoing considered, this Court hereby finds accused ROGELIO DEL AYRE *Y* LITRAN GUILTY beyond reasonable doubt of two (2) counts of Rape defined and penalized under Article 335 of the Revised Penal Code as amended by Republic Act No. 7659, and hereby sentences him to suffer the penalty of *Reclusion Perpetua* for Crim. Case No. 1402-M-97 and Death for Crim. Case No 1403-M-97 and to pay private complainant Zaira M. del Ayre the amount of Seventy Five Thousand Pesos (₱75,000.00) as moral damages. With costs.

"SO ORDERED."[2]

Two separate Informations,[3] both dated October 16, 1997, charged appellant as follows:

Criminal Case No. 1402-M-97

"That on or about the 16th day of February, 1993 in the [M]unicipality of Obando, [P]rovince of Bulacan, Philippines and within the

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[1] *Rollo*, pp. 16-23; penned by Judge Gregorio S. Sampaga.

[2] Assailed Decision, p. 8; *Rollo*, p. 23; records, p. 214.

[3] *Rollo*, pp. 6-9; signed by Assistant Provincial Prosecutor Renato T. Santiago.

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jurisdiction of this Honorable Court, the above-named accused, did then and there wilfully, unlawfully and feloniously, with lewd designs, have carnal knowledge of the offended party Zaira M. del Ayre, a nine years of age [*sic*], against her will and without her consent."[4]

Criminal Case No. 1403-M-97

"That on or about the 26th day of September, 1994, in the [M]unicipality of Obando, [P]rovince of Bulacan, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, did then and there wilfully, unlawfully and feloniously, with lewd designs, have carnal knowledge of the offended party Zaira M. del Ayre, a ten years of age [*sic*], against her will and without her consent."[5]

When arraigned on November 7, 1997, appellant, assisted by his counsel *de oficio*,[6] pleaded not guilty.[7] In due course, he was tried and found guilty.

The Facts

Version of the Prosecution

The Office of the Solicitor General (OSG) summarized the evidence for the prosecution in this wise:

"On February 16, 1993, at about 5:00 o'clock in the morning, appellant Rogelio L. del Ayre arrived at their house located at Bonoanagan, Obando, Bulacan from the public market located at Barangay Paco, Obando, Bulacan where he had left his wife who was selling oysters. In the house, his 9-year old daughter Zaira del Ayre was attending to her five-year old sister Laiza. Appellant ordered Zaira to serve him a cup of coffee. Zaira's four (4) other siblings were fast asleep inside their house.

"Appellant did not drink the coffee but instead forcibly rolled up Zaira's sleeveless blouse. Zaira tried to resist and said '*ayoko po*,' but appellant removed her blouse, shorts and panty. Zaira was made

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[4] *Rollo*, p. 6; records, p. 2.

[5] *Id.*, p. 8.

[6] Atty. Teodora Gonzales.

[7] Order dated November 7, 1997; records, p. 15.

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to lie down on a wooden bed while appellant removed his short pants and brief. Appellant [lay] on top of Zaira and inserted his finger into her vagina while commanding her not to speak out loud as it would [only take] a few minutes. She tried to resist but appellant squeezed her body. Appellant inserted his finger into her vagina after which he inserted his penis and made push and pull movements for about three (3) minutes. Then appellant threatened Zaira that if the matter was divulged, he would kill the members of the family. Afraid, Zaira proceeded outside their house and cried.

"On September 26, 1994, Zaira was together with her sister Laiza inside their house. Appellant forcibly pulled Zaira towards him and forced her to lie down on their wooden bed. She tried to resist but appellant prevailed upon her and told her that it would only take a few minutes. Appellant took off Zaira's short pants and panty while the former took off his shorts and brief. Appellant placed himself on top of Zaira, inserted his penis inside her vagina and made push and pull movements for about five (5) minutes. Then appellant inserted his finger into Zaira's vagina while mashing her breasts for a few minutes. Appellant threatened her not to report the incident to anybody. It was only on July 20, 1997 when Zaira mustered enough courage to report the matter to her grandmother which led to the apprehension of appellant.

"On July 21, 1997, Zaira underwent medical examination by a medico legal officer from the National Bureau of Investigation (NBI), Manila and it was found that her 'hymen [was] intact but distendible and its orifice wide (2.5 cm in diameter) as to allow complete penetration by an average size adult Filipino male organ in full erection without producing any genital injury.'"[8] (Citations omitted)

Version of the Defense

On the other hand, appellant presents his version of the incident as follows:

"Accused **ROGELIO DEL AYRE** testified that on February 16, 1993 at around 5:00 A.M., he was with his wife in the market selling oysters. He sells oysters with his wife from Monday to Sunday.

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[8] Appellee's Brief, pp. 4-7; *Rollo*, pp. 91-94. The Brief was signed by Assistant Solicitor General Carlos N. Ortega, Assistant Solicitor General Fernanda Lampas Peralta and Solicitor Ma. Carla D. Ofilada.

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He was also in the market on September 26, 1994. He was sure that he was in the market on both dates when the alleged rape was committed because, that is his daily activity. He was not aware about the charges filed by his daughter against him. He was just arrested in the market on July 1997 by the *Barangay* Captain. All the charges against him are not true because every time he scolded Zaira, he would hit her. Then she would proceed to the house of his mother-in-law. It was his mother-in-law who instigated the filing of these cases against him. The last time that he scolded Zaira and hit her was about 2 or 3 days before he was arrested. He scolded and hit Zaira because she denied using the money that he told her to keep and that is why he slapped her face strongly.

"From the time he and his wife got married, his mother-in-law was mad at him because she (mother-in-law) doesn't like him added by the fact that he disagreed to register in her (mother-in-law) name the lot where their house was built.

"His house is located at the coastal area where the houses are built adjacent to each other. They applied for that land from the government and when it was approved, his mother-in-law told him to register that land to one person but he disagreed because he thought of his family. His mother-in-law, then got mad at him and told him that she will find ways to get rid of him.

"Because of that, he decided to talk to his wife and went on vacation for 5 years in the province. After 5 years, he returned to his family only to find out that his mother-in[-]law was still mad at him. He learned that his mother-in-law was telling his children nothing but his faults, that is why his children are mad at him.

"When he returned to his family, Zaira filed a case of rape against him.

"*RAYMOND DEL AYRE*, 19 years old, elder brother of private complainant, testified that on February 16, 1993 at 5:00 in the afternoon, he was in their house taking care of his siblings. On the same day, he woke up at 3:00 in the morning. His father and mother were then in the market. His father arrived between 8:00 and 8:30 in the morning. There was no room, nor division inside their small house, which is made up of wood and '*yero*' (iron sheets). Their house is located in Binuangan, Obando, Bulacan. Their nearest neighbor is about an arm's length. Beside their house is that of their maternal grandmother. Their aunt likewise lives in the same area. When asked to describe his relationship with his father on the

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dates when the alleged rape happened, he stated that his father is strict, always cursing and hot-headed.

"On cross-examination, he admitted having executed a sworn statement and subscribed it before Judge Quilantang, but his statement therein that he witnessed the rape incident on February 26, 1994 was a mere fabrication by him.

"On re-direct examination, he pointed to the policemen and the *barangay* captain as those who dictated the contents of his sworn statement."[9] (Citations omitted)

Ruling of the Trial Court

Finding "complainant's categorical and coherent declarations" credible, the trial court ruled that appellant had carnal knowledge of complainant on February 16, 1993 and September 26, 1994. It held that his explicit threat to kill her and the other members of her family was strong enough to cow her into submission.[10]

The court *a quo* further held that the alibi of appellant was unconvincing, considering the short distance and travel time between his house and the market, where he claimed to be at the time of the rape incidents.

Hence, this automatic review.[11]

Assignment of Errors

In his Brief, appellant faults the court *a quo* with the following alleged errors:

I

"The trial court gravely erred in finding the accused guilty beyond reasonable doubt of two (2) counts of rape in Criminal Case Nos. 1402-M-97 and 1403-M-97 despite the insufficiency of evidence for the prosecution.

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[9] Appellant's Brief, pp. 6-8; *Rollo*, pp. 47-49. The Brief was signed by Attorneys Arceli A. Rubin, Bartolome P. Reus and Howard B. Areza of the Public Attorney's Office.

[10] RTC Decision, pp. 5-6; *Rollo*, pp. 20-21.

[11] This case was deemed submitted for decision on April 25, 2001, upon receipt by this Court of appellant's Reply Brief.

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II

"The trial court erred in not giving any credence to the testimonial evidences for the defense of the accused.

III

"Assuming in *arguendo* that the accused is guilty, the trial court committed grave error in imposing the death penalty in Criminal Case No. 1403-M-97 despite the lack of any qualifying circumstances alleged in the information."[12]

The Court's Ruling

The appeal is partly meritorious.

First Issue: *Sufficiency of Evidence*

By the very nature of rape, conviction or acquittal depends almost entirely on the credibility of the complainant and her testimony. Because the direct participants are often the only ones who have had personal knowledge of the commission of the rape, they are usually the only ones who can directly testify as to its occurrence.[13] Thus, the strength of the prosecution's evidence ultimately revolves around the credibility of the complaining witness.[14] In the present case, complainant related how her father had abused her as follows:

"Q On February 16, 1993 at around five o'clock in the morning, do you remember where you were?

x x x x x x x x x

A I was in our house.

x x x x x x x x x

Q What about your father, where was your father at that time?
A He accompanied my mother to the market.

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[12] Appellant's Brief, pp. 1-2; *Rollo*, pp. 42-43.

[13] *People v. Abuan,* 284 SCRA 46, January 7, 1998; *People v. Fortich,* 281 SCRA 600, November 13, 1997.

[14] *People v. Villaflores*, GR Nos. 135063-64, December 5, 2001; *People v. Soriano*, 272 SCRA 760, May 29, 1997.

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Q Did he return?
A Yes, sir.

Q What time did he return?
A I do not know, sir. Because it was dawn.

Q Together with your mother?
A No. He was alone when he came back.

x x x x x x x x x

Q What about your father, what did he do while inside the house?
A None, sir, '*ginalaw na po niya ako.*'

Q When you said, '*ginalaw na po niya ako,*' what do you mean by that?
A He raped me, sir.

Q How did your father rape you?
A He removed my dress.

FISCAL:

May we make it on record at this juncture when the question propounded how the father raped the victim, the victim started to cry.

Q What were you wearing at that time?
A I was wearing a short and sleeveless blouse.

Q How your father removed you dress?
A He forced me.

Q What kind of force was employed by your father?
A He forcibly rolled up my blouse[.]

Q While your father was forcibly rolling up your blouse, what did you do if you did any?
A No. I told him, '*ayoko po.*'

Q Why did you say '*ayoko po*' to your father?
A Because at that time he was about to rape me.

Q Was he able to remove your upper apparel?
A Yes, sir.

Q After your father removed your blouse, what did he do next?
A He asked me to lie.

Q To lie in what particular place?
A In the wooden bed.

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Q [D]id you follow the request of your father?
A No. He made me to lie on the wooden bed.

Q After you were lied on the wooden bed, what transpired next?
A He removed his short he was using for fishing.

Q What else did he remove if any?
A His brie[f] and after that he lied on top of me.

Q What about your lower dress, what did he do with your lower dress?
A He took it off, sir.

Q When did he remove your short pants?
A On that early morning.

Q Was it immediately after removing your blouse?
A Yes, sir.

Q What else did he remove aside from your blouse and short pants?
A My panty, sir.

Q You said you were laid on the wooden bed and after you made to lie on the wooden bed, what your father do?
A He [lay] on top of me.

Q When he [lay] on top of you, was he already naked?
A Yes, sir.

Q When your father [lay] on top of you, what did he do?
A He inserted his finger inside my vagina.

Q When your father [lay] on top of you did you not try to resist?
A I tried but he squeezed my body.

Q Did he not utter something before he [lay] on top of you?
A There was.

Q What was it?
A He told me not to speak loud because it [w]ould only take only a few minutes.

Q You said your father [lay] on top of you and he inserted his finger [into] your vagina, is it not?
A Yes, sir.

Q After inserted his finger [into] your vagina what did he do next?
A [H]e inserted his penis [into] my vagina.

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Q How did you know that his penis was inserted [into] your vagina?
A I felt it, sir.

Q When your father's penis was inside your vagina how was the body of your (father) while he was on top of you?
A (Witness demonstrating push and pull movement as if he is pumping).

Q For how long did he move that way[, that] push and pull movement?
A I can no longer recall.

Q About two to three minutes?
A Probably more than that.

Q More than three minutes?
A Yes, sir.

Q And after the lapse of three minutes, what did he do next?
A After raping me he stood up.

Q And what did he do?
A He dressed himself wearing his short[s] and brief[s].

Q What about you what did you do after he was through with his sexual abuse?
A I went beside our house and cried.

Q And where did your father [proceed]?
A Outside the house.

Q Before he proceeded outside of your house, did he utter something?
A Yes, sir.

Q Wha[t] did he tell you?
A He told me not to report the matter to anybody or else he would kill my relative.[15]

x x x x x x x x x

Q Please, tell the court how you were raped on September 26, 1994?
A He likewise employed force as x x x he did on February 16, 1993.

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[15] TSN, December 5, 1997, pp. 3-8.

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Q Please specify. What kind of force did he employ [on] you on September 26, 1994?
A He pulled me, sir.

Q How did he pull you?
A Because he was then at the door of the house.

Q The front door of the house?
A Yes, sir.

Q How did your father employ the force while you were at the door of the house?
A He was telling me that it would [take] only a few minutes and I told him I [did] not want because I kn[e]w he will rape me. I tried to resist but I could not because he was pulling my arms.

Q What happened next after your father x x x forced you?
A He was able to bring me inside the house where he undressed and raped me.

Q From the door were you resisting when your father was trying to bring you inside the house?
A Yes, sir.

Q How did you resist?
A I tried to hold a piece of wood so that he could not bring me inside.

Q Inspite [of] that resistance your father was able to bring you inside? the house?
A Yes, sir.

Q Were you forced to lie down?
A Yes, sir.

Q On the same wooden bed?
A Yes, sir.

Q And after you were forced to lie on the wooden bed, what did he do next?
A He took off my short pants and panty and he removed his short and brief.

Q What about your upper garment?
A He did not take it off.

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Q And after your short pants and panty were removed by your father, what did he do next?
A He took off his brief[s] and short[s].

Q After he removed your short pants and panty?
A [He lay] on top of me.

Q When he was already lying on top of you, what did he do?
A He inserted his penis inside my vagina.

Q How did you come to know that his penis was inserted [into] your vagina?
A I felt it, sir.

Q How was the body of your father moving on top of you?
A Also in the same movement as if he was pushing his body towards me.

x x x x x x x x x

Q When the accused was on top of you and moving that way [, in that] push and pull movement, what were you doing?
A I was trying to get out of him while he was on top of me.

Q Inspite of your resistance you were not able to get out of him?
A No, sir."[16]

The clear and categorical declarations of complainant more than sufficiently established carnal knowledge and, consequently, appellant's culpability. Well-settled is the rule that when an alleged victim of rape says she has been violated, she says in effect all that is necessary to show that rape has been inflicted on her. So long as her testimony meets the test of credibility, the accused may be convicted on that basis.[17]

Also sufficiently established was the employment of force by appellant on complainant, as well as the resistance she put up. His acts of dragging her as she defiantly clung to the door, removing her clothes, and placing her on the bed despite her

[16] *Ibid.*, pp. 10-11.

[17] *People v. Balas*, GR No. 138838, December 11, 2001; citing *People v. Ambray*, 303 SCRA 697, February 25, 1999.

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objections clearly evinced the use of force. Resistance need not be carried out to the point of inviting death or sustaining physical injuries at the hands of the rapist.[18] The force or violence that is required in rape cases is relative; when applied, it need not be overpowering or irresistible. That it enables the offender to consummate his purpose is enough.[19] The parties' relative age, size and strength should be taken into account in evaluating the existence of the element of force in the crime of rape.[20]

In the present case, Zaira was just nine to ten years old at the time of the incidents and was no match against appellant, who was already an adult in the prime of his life. Furthermore, he was her father. Actual force and intimidation is not even necessary in incestuous rape. In a rape committed by a father against his own daughter, the moral ascendency of the former over the latter substitutes for violence or intimidation.[21]

Moreover, where the girl — such as complainant herein — is below twelve (12) years of age at the time of the incident, violence or intimidation is not required, and the only subject of inquiry is whether "carnal knowledge" took place.[22] Proof of force and consent becomes immaterial, because force is not an element of statutory rape; when the rape victim is below age twelve, the absence of free consent is presumed.[23]

Appellant contends that the age of the offended party was not sufficiently proven, because the prosecution did not present her birth certificate. We clarify. The presentation of the birth certificate is not an all-exclusive requisite in proving the age of the victim. Certainly, her age may be proven by evidence other

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[18] *People v. Veloso*, 330 SCRA 602, April 12, 2000.

[19] *People v. Combi*, 333 SCRA 305, June 8, 2000; *People v. Garchitorena*, 330 SCRA 613, April 12, 2000.

[20] *People v. Combi*, 333 SCRA 305, June 8, 2000.

[21] *People v. Nava, Jr.*, 333 SCRA 749, June 19, 2000.

[22] *People v. Lerio*, 324 SCRA 76, January 31, 2000.

[23] *People v. Bato*, 325 SCRA 671, February 16, 2000.

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than that. This principle was upheld in *People v. Tipay,* which we quote:[24]

"This does not mean, however, that the presentation of the certificate of birth is at all times necessary to prove minority. The minority of a victim of tender age who may be below the age of ten is quite manifest and the court can take judicial notice thereof. The crucial years pertain to the ages of fifteen to seventeen where minority may seem to be dubitable due to one's physical appearance."

Likewise, in *People v. Boras* we held as follows:[25]

"The testimony of the mother as to the age of her child is admissible in evidence for who else would be in the best position to know when she delivered the child. Besides, the court could very well assess whether or not the victim is below twelve years old by simply looking at her physique and built."

Current jurisprudence requires the presentation of the birth certificate of the alleged victim to ascertain her actual age, only when it is between 13 and 18[26] at the time of the sexual assault, or when there are ambiguous or conflicting testimonies[27] on record regarding it.

In the case at bar, there is no doubt that complainant was nine years old on February 16, 1993, and ten years old on September 26, 1994. Her categorical statement that she was 13 years old when questioned under oath in July[28] and December[29] 1997 was not inconsistent with her testimony. On the witness stand, she said that she was nine (9) when her father had carnal knowledge of her for the first time on February 16, 1993; and

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[24] 329 SCRA 52, 76, March 28, 2000, per Melo, *J.*

[25] 348 SCRA 638, 645, December 22, 2000, per Buena, *J.*

[26] *People v. Javier,* 311 SCRA 122, July 26, 1999; *People v. Tipay*, 329 SCRA 52, March 28, 2000; *People v. Digma*, 345 SCRA 185, November 20, 2000.

[27] *People v. Brigildo*, 323 SCRA 631, January 28, 2000.

[28] *Sinumpaang Salaysay* taken on July 20, 1997; records, p. 4.

[29] TSN, December 5, 1997, p. 2.

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ten (10) years old when the second incident took place on September 26, 1994. Her testimony regarding her age remains uncontradicted in the records. Even appellant categorically confirmed that she was 9 and 10 years old when the two incidents occurred. Indeed, with personal knowledge of his own daughter's age, he himself offered unsolicited, independent and categorical statements[30] on it, consistent with her claim.

Appellant also contends that her claim of rape is not supported by the medical findings, which state that the "hymen [of the victim] is intact but distendible and its orifice wide (2.5 cm in diameter) as to allow complete penetration by an average sized adult, Filipino male organ in full erection without producing any genital injury." We disagree. The intact state of the victim's hymen does not negate rape,[31] especially considering its self-explanatory qualification or description in this case. That it is broken or lacerated is not an essential element of rape, not even where the victim is an innocent child.[32]

Second Issue:
Alibi

Appellant, together with his wife, claims to have been in the market on the dates when the rapes were committed. However, no disinterested witness corroborated his alibi. Uncorroborated, it cannot prevail over the positive identification of him by complainant as the man who had raped her.[33]

For alibi to succeed as a defense, appellant must establish by clear and convincing evidence (a) his presence at another place

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[30] TSN, November 11, 1998, p. 3.

[31] *People v. Cabebe,* 290 SCRA 543, May 21, 1998; *People v. Sapinoso,* 328 SCRA 649, March 22, 2000; *People v. Balora,* 332 SCRA 403, May 31, 2000.

[32] *People v. Tirona,* 300 SCRA 431, December 22, 1998; *People v. Llamo,* 323 SCRA 791, January 28, 2000; *People v. Taño,* 331 SCRA 449, May 5, 2000.

[33] *People v. Rosales,* 313 SCRA 757, September 8, 1999; *People v. Tresballes*, 314 SCRA 774, September 21, 1999; *People v. Mosqueda*, 313 SCRA 694, September 3, 1999.

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at the time of the perpetration of the offense and (b) the physical impossibility of his presence at the scene of the crime.[34] Thus, his alibi is demolished by the fact that it was not physically impossible for him to have been at their home where the rapes occurred. The market was just 15 minutes[35] away. He could have easily gone to the market, returned home, raped his daughter, and then proceeded back to the market, as in fact testified to by the latter.

Third Issue:
Proper Penalty

In both cases, appellant is liable for simple rape only, which is punishable with *reclusion perpetua.*[36] The rape that occurred on February 16, 1993 (Criminal Case No. 1402-M-97) cannot be punished with death, because RA 7659 was not yet effective at the time. Although it was already in effect when the rape on September 26, 1994 took place, still, the penalty of death cannot be imposed on him.

The reason why the death penalty cannot be imposed, even for the second offense, is that the father-daughter relationship of the parties was not alleged in the Information. "Such failure is fatal and bars conviction for rape in its qualified form, which is punishable with death. The concurrence of the minority of the victim and her relationship to the offender is a special qualifying circumstance that should both be alleged in the information and proven during the trial in order to warrant the imposition of the death penalty."[37] Even the OSG concedes that the death penalty was erroneously imposed by the trial court.[38]

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[34] *People v. Suelto,* 325 SCRA 41, February 8, 2000; *People v. Magdato,* 324 SCRA 785, February 7, 2000; *People v. Espina,* 326 SCRA 753, February 29, 2000.

[35] TSN, December 12, 1997, p. 6.

[36] Art. 335, Revised Penal Code. This was the law in effect when the two rape incidents were committed.

[37] *People v. Balas, supra.*

[38] Appellee's Brief, pp. 32-37.

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The court below did not award civil indemnity or exemplary damages to the victim. In accordance with current jurisprudence,[39] civil indemnity of ₱50,000 and exemplary damages of ₱25,000 are in order. Since the relationship was not alleged in either of the two Informations, it cannot be used to aggravate or qualify the rapes. However, even if not so alleged, an aggravating circumstance, when proven to have attended the commission of the crime, entitles the complainant to exemplary damages. In several cases, we have held that the relationship between the appellant and the rape victim justifies this civil award in order to deter fathers with perverse sexual behavior from abusing their daughters.[40] Civil indemnity of ₱75,000 is awarded when death is also imposed.

The trial court awarded moral damages of ₱75,000. This should be lowered to ₱50,000 for each case in accordance with current jurisprudence.[41]

WHEREFORE, the appealed Decision of the Regional Trial Court of Malolos, Bulacan (Branch 78) is hereby *AFFIRMED* with the following *MODIFICATIONS* : (a) In Criminal Case No. 1403-M-97, the penalty is reduced to *reclusion perpetua*; (b) the victim is granted, in each case, civil indemnity *ex delicto* of ₱50,000 and exemplary damages of ₱25,000; and (c) the award of moral damages is changed to ₱50,000.

SO ORDERED.

Bellosillo, (Acting C.J.,), Puno, Vitug, Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio-Morales, and *Callejo, Sr., JJ.,* concur.

Davide, Jr., C.J., Mendoza and *Sandoval-Gutierrez, JJ., abroad,* on official leave.

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[39] *People v. Panganiban*, GR Nos. 138439-41, June 25, 2001; *People v. Galeno,* GR Nos. 135976-80, June 20, 2001.

[40] *People v. Catubig*, GR No. 137842, August 23, 2001. *People v. Bayona*, 327 SCRA 190, March 2, 2000; *People v. Tabion*, 317 SCRA 126, October 20, 1999.

[41] *People v. Balas, supra*; *People v. Supnad,* GR Nos. 133791-94, August 8, 2001.