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[G.R. No. 139211. February 12, 2003]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **GORGONIO VILLARAMA *alias* "Baby,"** *appellant.*

SYNOPSIS

Rosendo and Merlita Tumulak left behind their three young children in their home. While the three children were playing inside their house without an adult supervision, appellant, Merlita's brother, arrived. He, then, ordered the two elder children to pasture the goats, leaving behind the youngest child, Elizabeth. While alone with the little girl, appellant did the dastardly act of raping his own niece. This was the scene which greeted the prosecution's eyewitness, Ricardo Tumulak, brother of Rosendo, who was supposed to return a *bolo* he borrowed from his brother. When the appellant noticed the presence of Ricardo, he hurriedly stood up and scurried away through the backdoor. Appellant was charged with rape. The prosecution presented four witnesses: eyewitness Ricardo, the physician who examined the victim, and the victim's parents, while the defense presented two witnesses: the appellant and his cousin. The appellant denied the accusation against him. The trial court gave credence to the testimony of the prosecution's witnesses, and found appellant guilty as charged and imposed upon him the supreme penalty of death. In this automatic review before the Supreme Court the appellant made much capital on the non-presentation of the victim on the witness stand and invoked the doctrine of willful suppression of evidence which raised the presumption that such evidence was adverse for the prosecution.

The Supreme Court was not convinced that there was suppression of evidence. The victim was present in the courtroom a few times during the trial and the defense could have called her to the stand as a hostile witness, but it did not. The Court believed with moral certainty that appellant raped the 4-year old girl, but downgraded the penalty to *reclusion perpetua*. The Court hesitated to impose the death penalty upon the accused in view of the moral uncertainty of

Supreme Court E-Library

the victim's exact age on account of the failure of the prosecution to present the birth certificate or similar authentic document and to make a positive and unequivocal manifestation that the victim was indeed 4 years old. There was also an absence of a categorical finding by the trial court of the victim's minority. The appellant, therefore, could neither be convicted of incestuous rape nor rape of a child below seven years old.

SYLLABUS

1. **CRIMINAL LAW; RAPE; CONVICTION THEREOF DOES NOT REQUIRE TESTIMONY OF RAPE VICTIM WHEN THE OFFENSE WAS PROVIDENTIALLY WITNESSED BY ANOTHER PERSON; PRESENT IN CASE AT BAR.**— Unlike countless other rape cases perpetrated in relative isolation and secrecy, where only the victim can testify on the forced coitus, the offense here was providentially witnessed by another person, an adult, who was definitely more articulate in describing the sensitive details of the crime. Moreover, Dr. Jane Solaña's testimony sealed the case for the prosecution when she testified on the presence of a contusion on the victim's genital organ, specifically the labia minora. Thus, the prosecution deemed the evidence sufficient to overwhelm the constitutional presumption of innocence of appellant. While the victim's testimony of the assault would have added support to appellant's conviction, the same was not indispensable. As aptly pointed out by the Solicitor General, the intent of the prosecution was to spare the victim from further trauma which could have resulted from being placed on the witness stand.

2. **ID.; ID.; WHEN COMMITTED AGAINST YOUNG GIRL; ACTUAL PENETRATION OF THE VICTIM'S ORGAN OR RUPTURE OF THE HYMEN IS NOT REQUIRED.**— As can be drawn from the above ruling, the mere introduction of the male organ into the labia majora of the pudendum is sufficient to consummate rape. The Court is convinced that the medical report and testimony of Dr. Solaña provided enough bases to prove that appellant's sexual assault on the victim had reached the gynecological threshold for rape. The labia minora are directly beneath the labia majora, thus, the contusion in labia minora of the victim's vagina and the pain she felt as reported by Dr.

Supreme Court E-Library

Solaña were decisive indications that appellant was able to enter the labia majora. Clearly, this is way beyond the mere "shelling of the castle of orgasmic potency" or the "strafing of the citadel of passion." In most cases of rape committed against young girls where total penetration of the victim's organ is improbable due to the small vaginal opening, it has been held that actual penetration of the victim's organ nor rupture of the hymen is not required.

3. **ID.; ID.; WHEN COMMITTED AGAINST A MINOR; INDEPENDENT EVIDENCE SHOWING THE AGE OF THE VICTIM, REQUIRED; ABSENCE THEREOF IN CASE AT BAR.**— Under paragraph 1, of Article 335 of the Revised Penal Code, as amended by R.A. 7659 although Elizabeth was less than 18 years at the time she was raped and the offender was her uncle, *the information failed to categorically state that said offender was a relative by consanguinity within the third civil degree.* Jurisprudence dictates that if the offender is merely a relative, not a parent, ascendant, step-parent, or guardian or common-law spouse of the mother of the victim, the information must allege that he is "a relative by consanguinity or affinity (as the case may be) within the third civil degree." *It is not enough for the information to merely allege that appellant is the "uncle" of the victim even if the prosecution is able to prove the same during trial.* Under paragraph 4, it is true that the penalty for raping a child below 7 years old is death. However, in the case at hand, even if Elizabeth was only 4 years old when the appellant committed the dastardly crime, the prosecution did not present, other than the testimony of the mother, independent evidence proving her age. Court decisions on the rape of minors invariably state that, in order to justify the imposition of the death penalty, there must be independent evidence showing the age of the victim. Testimonies on the victim's age given by the prosecution witnesses or the lack of denial of the accused or even his admission thereof on the witness stand is not sufficient. This Court has held that, to justify the imposition of the death penalty for rape committed against a child below 7, the minority of the victim must be proved with equal certainty and clarity as the crime itself. The failure to sufficiently establish the victim's age with factual certainty and beyond reasonable doubt is fatal and consequently bars conviction for rape in its qualified form.

Supreme Court E-Library

4. REMEDIAL LAW; EVIDENCE; EXCEPTIONS TO HEARSAY RULE; PART OF *RES GESTAE*; WHEN ADMISSIBLE; PRESENT IN CASE AT BAR.— There are several well-entrenched exceptions to the hearsay rule under Sections 37 to 47 of Rule 130 of the Rules of Court. Pertinent to the case at bar is Section 42. To be admissible as part of *res gestae,* a statement must be spontaneous, made during a startling occurrence or immediately prior or subsequent thereto, and must relate to the circumstance of such occurrence. In the case at bar, there is no doubt that the victim was subjected to a startling occurrence when she pointed to appellant as her assailant. It is evident from the records that the statement was spontaneous because the time gap from the sexual assault to the time the victim recounted her harrowing experience in the hands of appellant was very short. Obviously, there was neither capability nor opportunity for the 4-year-old victim to fabricate her statement.

5. ID.; ID.; CREDIBILITY OF WITNESSES; NOT AFFECTED BY BLOOD OR CONJUGAL RELATIONSHIP BETWEEN THE WITNESS AND THE VICTIM.— Blood or conjugal relationship between a witness and the victim does not *per se* impair the credibility of a witness. On the contrary, relationship itself can strengthen credibility in a particular case, for it is unnatural for a relative of a victim to falsely accuse someone other than the actual culprit.

6. ID.; ID.; JUDICIAL NOTICE OF THE ISSUE OF AGE WITHOUT THE REQUISITE HEARING NOT SUFFICIENT TO ESTABLISH AGE OF VICTIM TO WARRANT DEATH PENALTY; GUIDELINES FOLLOWED BY THE COURT.— Judicial notice of the issue of age without the requisite hearing under Section 3 of Rule 129 of the Rules on Evidence would not be sufficient to establish the age of the victim to warrant the imposition of the death penalty. The matter of appreciating the age of the victim, either as an element of the crime or as a qualifying circumstance, was settled when the Court, in the case of *People vs. Pruna,* laid down the following guidelines: 1. The best evidence to prove the age of the offended party is an original or certified true copy of the certificate of live birth of such party. 2. In the absence of a certificate of live birth, similar authentic documents such as baptismal certificate and school records which show the date of birth of the victim would suffice

Supreme Court E-Library

to prove age. 3. If the certificate of live birth or authentic document is shown to have been lost or destroyed or otherwise unavailable, the testimony, if clear and credible, of the victim's mother or a member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended party pursuant to Section 40, Rule 130 of the Rules on Evidence shall be sufficient under the following circumstances: a. If the victim is alleged to be below 3 years of age and what is sought to be proved is that she is less than 7 years old; b. If the victim is alleged to be below 7 years of age and what is sought to be proved is that she is less than 12 years old; c. If the victim is alleged to be below 12 years of age and what is sought to be proved is that she is less than 18 years old. 4. In the absence of a certificate of live birth, authentic document, or the testimony of the victim's mother or relatives concerning the victim's age, the complainant's testimony will suffice provided that it is expressly and clearly admitted by the accused. 5. It is the prosecution that has the burden of proving the age of the offended party. The failure of the accused to object to the testimonial evidence regarding age shall not be taken against him.

APPEARANCES OF COUNSEL

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

D E C I S I O N

CORONA, *J.*:

On November 2, 1996, the spouses Rosendo and Merlita Tumulak went to the cemetery to light candles for the dead, leaving behind their three young children, Arthel (8 years old), Bernadeth (6 years old) and Elizabeth (4 years old), playing inside their house without adult supervision. That perhaps was the biggest mistake of their lives and one the couple will always regret. On that fateful day, their youngest child fell prey to the rapacious desires of a beast in the person of the child's own uncle, appellant Gorgonio Villarama.

Supreme Court E-Library

Approximately between five to six o'clock in the afternoon, appellant, 35-year-old Gorgonio Villarama, elder brother of the victim's mother Merlita, arrived at the Tumulaks' house and found the three children by themselves.[1]

Thereupon, appellant ordered the two older children, Arthel and Bernadeth, to pasture the goats, leaving the youngest, Elizabeth, with him.[2] Once alone, appellant undressed Elizabeth and made her lie down while he pulled down his pants and briefs to his knees, and thereafter mounted his niece Elizabeth.[3]

This was the scene which greeted the prosecution's eyewitness, Ricardo Tumulak, younger brother of Elizabeth's father Rosendo, when he arrived at his brother's house to return the *bolo* he borrowed from the latter.[4] Ricardo peeped through the open window to check why his niece was crying and saw appellant, with briefs and pants slipped down to the knees, on top of Elizabeth who was naked.[5] When appellant noticed Ricardo's presence, he hurriedly stood up and scurried away through the backdoor.[6] Ricardo immediately entered the house and dressed up the crying child. Ricardo then called his mother, the victim's paternal grandmother, who was in the house nearby.[7] The grandmother asked Elizabeth what happened but the child did not answer and just continued crying.[8]

Rosendo and Merlita Tumulak got home at about six o'clock in the evening. They were met by Rosendo's parents who told them what happened.[9]

Merlita immediately went to her daughter who had not stopped crying and asked Elizabeth what happened and why was she

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[1] TSN, January 11, 1999, pp. 11-12.

[2] *Ibid.*, pp. 31-32.

[3] TSN, November 24, 1997, p. 39; TSN, May 22, 1998, pp. 15-16.

[4] TSN, November 24, 1997, p. 15.

[5] *Ibid.*, p. 32.

[6] *Ibid.*, p. 35.

[7] *Ibid.*, p. 17.

[8] *Ibid.*, p. 18-19.

[9] TSN, May 22, 1998, pp. 13-18.

Supreme Court E-Library

crying.[10] It was then that Elizabeth spoke and told her mother that her uncle Baby, herein appellant, removed her panties, made her lie down and then inserted his penis inside her vagina.[11]

That same evening, the Tumulak family, including Rosendo's father, who was a b*arangay tanod,* looked for appellant. They found him at a party in a neighbor's house half a kilometer from theirs. They apprehended appellant and delivered him, first, to the *barangay* captain and later on, to the Merida Police.[12] Appellant allegedly admitted the commission of the crime and said that he only did it out of drunkenness.[13]

On November 4, 1996, Elizabeth was brought to Dr. Jane Grace. Solaña, a physician at the Rural Health Center of Merida, for examination. Dr. Solaña found the girl complaining of pain in her vagina and detected contusions in her *labia minora.* The doctor wrote her findings in the following medical report:

> Reddish discoloration w/ tenderness (contusion), medial aspect (R) & (L) labia minora.
>
> CONCLUSIONS:
>
> 1. The above described physical injuries are found in the body of the subject, the age of which is compatible to the alleged date of infliction.
>
> 2. Under normal circumstances, without subsequent complication and/or deeper involvement present, but not clinically apparent at the time of the examination, the above described physical injuries is expected to improve in 7 to 10 days.[14]

Appellant was charged with rape as then defined and penalized under Article 335 of the Revised Penal Code, as amended by RA 7659,[15] in the following information:

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[10] *Ibid.*

[11] *Ibid.*

[12] TSN, November 24, 1997, pp. 21-24.

[13] TSN, October 16, 1998, pp. 15-16.

[14] Records, p. 208 ; Exhibit A.

[15] Now transposed to Article 266-A by the "Anti-Rape Law of 1997" (RA 8353).

Supreme Court E-Library

That on or about the 2nd day of November 1996, at Sitio Capasanan, Barangay Casilda, Municipality of Merida, Province of Leyte, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, by means of force and intimidation, did then and there willfully, unlawfully and feloniously have carnal knowledge of the herein offended party ELIZABETH V. TUMULAK, who is 4 years old, against her will and without her consent, while inside their residential house of the victim, the accused who is her uncle, held her hand, remove her short pants and was made to lie down and was made to spread her legs, lay on top of her and insert his penis over (sic) the victim's genital organ to accomplish his lewd design, to her damage and prejudice.

CONTRARY TO LAW.[16]

Upon arraignment, appellant, assisted by counsel, entered a plea of not guilty. Trial on the merits ensued.

The prosecution presented four witnesses: eyewitness Ricardo Tumulak, Dr. Jane Grace Solaña, the physician who examined the victim, and the victim's parents Merlita and Rosendo Tumulak.

The defense presented two witnesses: appellant Gorgonio Villarama and Bernaldo Claros, cousin of appellant.

Appellant denied the accusation against him. He claimed that at about five o'clock in the afternoon of November 2, 1996, he was in the house of his aunt, Patricia Claros, butchering a pig. He, however, admitted that at 6 o'clock that same evening, he went to the victim's house about a kilometer away from his aunt's house, after a 30-minute walk. Upon reaching the place, he discovered that his sister Merlita and her husband were not home, but their three children were playing inside the house. Appellant then told the children to tell their mother that he was going to spend the night in their house because it was already late and he could not find any means of transportation to go to Ormoc City where he lived.[17]

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[16] *Rollo*, p. 7.

[17] TSN, January 11, 1999, pp. 13-14.

Supreme Court E-Library

Thereafter he smoked a cigarette in the balcony and admitted having cradled the victim because the child allegedly clung to his shoulder. Appellant claims that it was that cradling which eyewitness Ricardo Tumulak chanced upon when the latter arrived to borrow the *bolo* of his brother Rosendo. According to appellant, they were not able to find the *bolo* so Ricardo left. Not long after, appellant also left, heeding the invitation of a friend to attend the birthday party of the latter's wife.[18] Upon arriving at the friend's house, appellant helped in grating coconut and joined the celebrations. It was then that he was arrested by the victim's paternal grandfather, a *barangay tanod,* and brought before the *barangay* captain who informed him of the accusation against him. The Mayor of Merida thereafter arrived with police officers and brought him to the Merida jail.[19]

On cross examination and in response to questions propounded by the trial court, appellant also admitted ordering the victim's two older siblings to pasture the goats, leaving him alone with the victim Elizabeth.[20]

Appellant's cousin, Bernaldo Claros, corroborated appellant's testimony that they butchered a pig together. However, Claros also testified that he left appellant at about 5:30 in the afternoon to go to the house of his elder brother Oligario Claros, Jr. where he spent one hour before going back to his mother's house, and, upon his return, he found appellant still there. Thereafter, they attended a friend's birthday party. They arrived at the party at 6:30 in the evening and stayed there until the *barangay tanod* arrested appellant.

On April 30, 1999, the Regional Trial Court of Ormoc City, Branch 35, Eighth Judicial Region, in Criminal Case No.50630-0 rendered a decision[21] finding accused-appellant Gorgonio Villarama guilty as charged and imposing the death sentence on him. The trial court disposed thus:

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[18] TSN, *supra*, pp. 15-17.

[19] TSN, January 11, 1999, p. 24.

[20] TSN, January 11, 1999, pp. 31–32.

[21] Penned by Judge Fortunito L. Madrona; *Rollo* pp. 16-21.

Supreme Court E-Library

Wherefore, for all the foregoing consideration, the Court finds the accused Gorgonio Villarama *alias* "Baby" guilty beyond reasonable doubt of the crime of Rape, and hereby sentences him, it being proven that the crime of rape was committed under the attendant circumstance of the victim being under eighteen (18) years of age and the accused, the offender being an uncle and therefore relative by consanguinity within the third civil degree, to the penalty of DEATH pursuant to Art. 335 of the Revised Penal Code, as amended by Sec. 11, RA 7659.

The accused is also penalized to pay the private offended party the sum of ₱50,000.00 as indemnity.

SO ORDERED.[22]

Appellant now questions said conviction in this automatic review before us and anchors his appeal on the general catch-all argument that the trial court erred in finding him guilty beyond reasonable doubt.

Appellant makes much capital of the non-presentation of the victim Elizabeth on the witness stand and invokes the doctrine of willful suppression of evidence which raises the presumption that such evidence was adverse to the prosecution.

This argument is utterly without merit.

At the outset, it must be stressed that it is the prosecution which controls the presentation of its witnesses.[23]

Unlike countless other rape cases perpetrated in relative isolation and secrecy, where only the victim can testify on the forced coitus, the offense here was providentially witnessed by another person, an adult, who was definitely more articulate in describing the sensitive details of the crime.

Moreover, Dr. Jane Solaña's testimony sealed the case for the prosecution when she testified on the presence of a contusion on the victim's genital organ, specifically the labia minora. Thus, the prosecution deemed the evidence sufficient to overwhelm the constitutional presumption of innocence of appellant.

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[22] RTC Decision; *Rollo*, p. 58.

[23] *People vs. Andal*, 279 SCRA 474.

Supreme Court E-Library

While the victim's testimony of the assault would have added support to appellant's conviction, the same was not indispensable. As aptly pointed out by the Solicitor General, the intent of the prosecution was to spare the victim from further trauma which could have resulted from being placed on the witness stand. The prosecution's apprehension in presenting the victim can be inferred from the records:

TESTIMONY OF ROSENDO TUMULAK

PROS. BELETA

/continuing

Q Now, since that incident up to this time, do you notice of (sic) any physical changes in her?

A Yes, ma'am.

Q Will you please tell this Honorable Court.

A Right after the incident, she was sick, she seemed to be, she cannot sleep and she seemed to be scared.[24]

TESTIMONY OF MERLITA TUMULAK

Q Prior to that incident, could your child talk intelligently?

A Yes, she could talk intelligently.

Q After the incident, how did you observe her speech? Could she also talk intelligently the way she talked prior to the incident?

A No longer.[25]

PROS. BELETA

Q After this incident of November 2, 1996, can you tell this court the behavior of your child Elizabeth Tumulak. Did you find any unusual behavior?

A Yes, ma'am.

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[24] TSN, October 16, 1998, p. 17.

[25] TSN, May 22, 1998, pp. 42-43.

Supreme Court E-Library

Q Can you tell this Court, what is that unusual behavior?

A We can no longer hear her speak, she used to have fever, and she was so sickly. If you talk to her, it would seem nothing and she would easily cry.

Q Before the incident, do you find her to be jolly?

A Yes, ma'am.

Q Would you consider her very sick?

A Yes, ma'am.[26]

The Court is not convinced that the prosecution suppressed any evidence. The victim was present in the court room a few times during the trial. The defense could have called Elizabeth to the stand as a hostile witness but it did not.

Time and again, the Court has held that the non-presentation of certain witnesses by the prosecution is not a sufficiently plausible defense.[27] There should thus be no unfavorable inferences from the failure of the prosecution to present Elizabeth. If appellant believed that her testimony would have exculpated him, then he should have presented Elizabeth. And the coercive processes of the court would have been at his disposal had Elizabeth refused to testify.[28]

Appellant likewise asserts that the testimonies of the victim's parents were hearsay since they did not witness the actual rape and were only relating the rape as allegedly told to them by Elizabeth.

This too fails to convince us.

There are several well-entrenched exceptions to the hearsay rule under Sections 37 to 47 of Rule 130 of the Rules of Court. Pertinent to the case at bar is Section 42 which provides:

SEC. 42. *Part of the res gestae*. — Statements made by a person while a startling occurrence is taking place or immediately prior or

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[26] TSN, *Ibid.*, pp. 24-25.

[27] *People vs. Dela Cruz*, 184 SCRA 461 [1990].

[28] *People vs. Samillano*, 267 SCRA 55 [1997].

Supreme Court E-Library

subsequent thereto with respect to the circumstances thereof, may be given in evidence as part of the *res gestae*. So, also, statements accompanying an equivocal act material to the issue, and giving it a legal significance, may be received as part of the *res gestae*.

To be admissible as part of *res gestae*, a statement must be spontaneous, made during a startling occurrence or immediately prior or subsequent thereto, and must relate to the circumstance of such occurrence.[29]

In the case at bar, there is no doubt that the victim was subjected to a startling occurrence when she pointed to appellant as her assailant. It is evident from the records that the statement was spontaneous because the time gap from the sexual assault to the time the victim recounted her harrowing experience in the hands of appellant was very short. Obviously, there was neither capability nor opportunity for the 4-year-old victim to fabricate her statement.

The critical factor is the ability or chance to invent a story of rape. At her age, the victim could not have had the sophistication, let alone the malice, to tell her mother that her uncle made her lie down, took off her panties and inserted his penis inside her vagina.

The shock of an unwelcome genital penetration on a woman is unimaginable, more so to a four-year-old child. Such a brutal experience constituted unspeakable trauma. The fact that Elizabeth was still crying when her parents arrived reinforces the conclusion that she was still in a traumatic state when she made the statements pointing to appellant.

In *People vs. Moreno*,[30] the Court, sustaining the conviction of an accused for robbery with rape, ruled that the affidavit of the accused who was not available for trial was properly admitted in evidence as part of *res gestae*:

This exception is based on the belief that such statements are trustworthy because made instinctively, 'while the declarant's mental

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[29] *People vs. Esquilona*, 248 SCRA 139 [1995].

[30] 220 SCRA 292 [1993].

Supreme Court E-Library

powers for deliberation are controlled and stilled by the shocking influence of a startling occurrence, so that all his utterances at the time are the reflex products of immediate sensual impressions, unaided by retrospective mental action.' Said natural and spontaneous utterances are perceived to be more convincing than the testimony of the same person on the witness stand.

Immediately after the three accused left the house where the crime was committed, and the threatening presence of the accused was gone, both Mary Ann Galedo and Narcisa Sumayo told their employers, the Mohnani spouses, that they were raped. The latter later testified in court as to these statements. These were thus part of the *res gestae* since they were spontaneously made after their harrowing experience, as soon as the victims had the opportunity to make them without fear for or threat to their lives."

The Court is not unmindful of its ruling in *People vs. Contreras*,[31] wherein the accused was acquitted in one of the many statutory rape charges against him because, among other things, the prosecution failed to present the child-victim.

At first blush, the facts of that case are deceptively similar to those of the case at bar. However, upon careful scrutiny and analysis of the two cases, we rule that the instant case is not on all fours with the *Contreras* case.

In *Contreras,* the main witness for the prosecution, Nelene Diaz, was not deemed by the Court to be in a position to categorically state that the accused's genitals had penetrated the victim's vagina. In fact, what she saw was merely the accused, with his zipper open and his penis exposed, facing the six-year-old victim who was sitting on his lap with her legs apart. Although the victim had no underwear, it was, nevertheless, established that the witness did not see any genital contact between the two as the genital organs were visibly apart. However, in the case at bar, the eyewitness saw the appellant, without his briefs and pants, on top of the naked victim — a position conclusively indicating sexual intercourse.

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[31] 338 SCRA 622 [2000].

Supreme Court E-Library

In *Contreras,* there was positive testimony of the victim's companions that the rape was prevented by the timely arrival of the witness. This circumstance is not present in this case.

Furthermore, in *Contreras,* the victim's statement that she had been sexually molested by the accused was not received under the *res gestae* exception to the hearsay rule, because her statement did not refer to the incident witnessed by Nelene but to a general pattern of molestation of her and her companions by the accused. In contrast, Elizabeth's declaration to her mother regarding the then just concluded assault were so full of details specific to the incident that there could be no doubt she was referring to the same incident witnessed by Ricardo Tumulak.

Finally, in the *Contreras* case, the mother of the victim did not testify in court for no explainable reason. Here, Elizabeth's mother actively pursued the prosecution of appellant who is her own brother. No mother will falsely accuse a person of rape, specially if it involves her own sibling, unless she is convinced it will vindicate the wrong done to her daughter.

Appellant attempts to cast doubt on Ricardo Tumulak's testimony, branding the same as self-serving and devoid of any evidentiary weight on the ground that Ricardo is the victim's uncle.

This argument is flimsy.

First of all, a self-serving declaration is one that is made by a party, out of court and in his favor. It does not include the testimony he gives as a witness in court.[32]

Second, Ricardo Tumulak's testimony was credible. He harbored no ill-motive against appellant which could have impelled him to fabricate a story so repulsive as to attach a stigma on his niece, the victim, for the rest of her life. Appellant himself admitted that, prior to the rape incident, he had been a friend of Ricardo.

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[32] *N.D.C. vs. Workmen's Compensation Commission, et al.,* 19 SCRA 861 [1967].

Supreme Court E-Library

Blood or conjugal relationship between a witness and the victim does not *per se* impair the credibility, of a witness. On the contrary, relationship itself can strengthen credibility in a particular case, for it is unnatural for a relative of a victim to falsely accuse someone other than the actual culprit.[33]

The guilt of the appellant having been established, we now delve into the extent of his culpability, the stage of consummation of the crime of rape.

Appellant insists that the medical report of the prosecution witness, Dr. Solaña, failed to support the finding of consummated rape.

The Court, in *People vs. Campuhan*,[34] laid down the parameters of genital contact in rape cases, thus:

> In *People v. De la Peña*, we clarified that the decisions finding a case for rape even if the attacker's penis merely touched the external portions of the female genitalia were made in the context of the presence or existence of an erect penis capable of full penetration. Where the accused failed to achieve an erection, had a limp or flaccid penis, or an oversized penis which could not fit into the victim's vagina, the Court nonetheless held that rape was consummated on the basis of the victim's testimony that the accused repeatedly tried, but in vain, to insert his penis into her vagina and in all likelihood reached the *labia* of her *pudendum* as the victim felt his organ on the lips of her vulva, or that the penis of the accused touched the middle part of her vagina. Thus, touching when applied to rape cases does not simply mean mere epidermal contact, stroking or grazing of organs, a slight brush or a scrape of the penis on the external layer of the victim's vagina, or the *mons pubis*, as in this case. There must be sufficient and convincing proof that the penis indeed touched the *labias* or slid into the female organ, and not *merely stroked the external surface thereof,* for an accused to be convicted of consummated rape. As the labias, which are *required to be "touched" by the penis,* are by their natural *situs* or location *beneath* the *mons pubis* or the vaginal surface, to touch them with the penis, is to attain some degree of penetration beneath the surface, hence, the conclusion that touching the *labia majora* or the *labia minora* of the *pudendum* constitutes consummated rape.

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[33] *People vs. Rendoque*, 322 SCRA 622 [2000].

[34] 329 SCRA 270 [2000].

Supreme Court E-Library

The pudendum or vulva is the collective term for the female genital organs that are visible in the perineal area, *e.g., mons pubis, labia majora, labia minora*, the hymen, the clitoris, the vaginal orifice, *etc.* The *mons pubis* is the rounded eminence that becomes hairy after puberty, and is instantly visible within the surface. The next layer is the *labia majora* or the outer lips of the female organ composed of the outer convex surface and the inner surface. The skin or the outer convex surface is covered with hair follicles and is pigmented, while the inner surface is a thin skin which does not have any hair but has many sebaceous glands. Directly beneath the *labia majora* are the *labia minora.* Jurisprudence dictates that the *labia majora* must be entered for rape to be consummated, and not merely for the penis to stroke the surface of the female organ. Thus, a grazing of the surface of the female organ or touching the *mons pubis* of the *pudendum* is not sufficient to constitute consummated rape. Absent any showing of the slightest penetration of the female organ, *i.e.,* touching of either *labia* of the *pudendum* by the penis, there can be no consummated rape; at most, it can only be attempted rape, if not acts of lasciviousness.

Judicial depiction of consummated rape has not been confined to the oft-quoted "touching of the female organ," but also progressed into being described as "the introduction of the male organ into the *labia* of the *pudendum*, or the "bombardment of the drawbridge." But, to our mind, the case at bar merely constitutes a "shelling of the castle of orgasmic potency," or as earlier stated, a "strafing of the citadel of passion."

As can be drawn from the above ruling, the mere introduction of the male organ into the labia majora of the pudendum is sufficient to consummate rape.

The Court is convinced that the medical report and testimony of Dr. Solaña provided enough bases to prove that appellant's sexual assault on the victim had reached the gynecological threshold for rape. The labia minora are directly beneath the labia majora, thus, the contusion in labia minora of the victim's vagina and the pain she felt as reported by Dr. Solaña were decisive indications that appellant was able to enter the labia majora. Clearly, this is way beyond the mere "shelling of the castle of orgasmic potency" or the "strafing of the citadel of passion."

Supreme Court E-Library

In most cases of rape committed against young girls where total penetration of the victim's organ is improbable due to the small vaginal opening, it has been held that actual penetration of the victim's organ nor rupture of the hymen is not required.[35]

We now come to the critical and crucial part as we discuss the propriety of the trial court's imposition of the death penalty.

Article 335 as amended by R.A. 7659, provides:

Art. 335. *When and how rape is committed.* — Rape is committed by having carnal knowledge of a woman under any of the following circumstances.

xxx xxx xxx

1. when the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.
2. when the victim is under the custody of the police or military authorities.
3. when the rape is committed in full view of the husband, parent, any of the children or other relatives within the third degree of consanguinity.
4. when the victim is a religious or a child below seven (7) years old.
5. when the offender knows that he is afflicted with Acquired Immune Deficiency Syndrome (AIDS) disease.
6. when committed by any member of the Armed Forces of the Philippines or the Philippine National Police or any law enforcement agency.
7. when by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation.

The Court is convinced with moral certainty that appellant Gorgonio Villarama raped 4-year-old Elizabeth Tumulak on

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[35] *People vs. Quinagoran*, 315 SCRA 508, [1999].

Supreme Court E-Library

November 2, 1996. We, however, hold that the trial court erred in imposing the death penalty on him. Appellant can neither be convicted for incestuous rape under the first paragraph of Article 335 of the Revised Penal Code, as amended, nor for rape of a child below 7 years old under the fourth paragraph of the same provision.

Under paragraph 1, although Elizabeth was less than 18 years at the time she was raped and the offender was her uncle, *the information failed to categorically state that said offender was a relative by consanguinity within the third civil degree.* Jurisprudence dictates that if the offender is merely a relative, not a parent, ascendant, step-parent, or guardian or common-law spouse of the mother of the victim, the information must allege that he is "a relative by consanguinity or affinity (as the case may be) within the third civil degree." *It is not enough for the information to merely allege that appellant is the "uncle" of the victim even if the prosecution is able to prove the same during trial.*[36]

Under paragraph 4, it is true that the penalty for raping a child below 7 years old is death. However, in the case at hand, even if Elizabeth was only 4 years old when the appellant committed the dastardly crime, the prosecution did not present, other than the testimony of the mother, independent evidence proving her age.

Court decisions on the rape of minors invariably state that, in order to justify the imposition of the death penalty, there must be independent evidence showing the age of the victim. Testimonies on the victim's age given by the prosecution witnesses or the lack of denial of the accused or even his admission thereof on the witness stand is not sufficient. This Court has held that, to justify the imposition of the death penalty for rape committed against a child below 7, the minority of the victim must be proved with equal certainty and clarity as the crime itself. The failure to sufficiently establish the victim's age with factual certainty and beyond reasonable

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[36] *People vs. Ferolino*, 329 SCRA 719 [April 5, 2000], *People vs. Ramos*, G.R. No. 142577 [December 27, 2002].

Supreme Court E-Library

doubt is fatal and consequently bars conviction for rape in its qualified form.[37]

In the case at bar, the victim was presented in open court during the testimony of the mother to establish Elizabeth's age:

Q How about the victim Elizabeth Tumulak, is she your daughter?

A Yes, ma'am.

Q How old is she at the time of the incident?

A Four (4) years and eleven (11) months.

Q Will you please point her out

INTERPRETER

(The witness pointed to a child and when asked about her name, she answered, Elizabeth Tumulak)[38]

The above-quoted testimony, however, is not sufficient for the court to take judicial notice of the victim's age. In *People vs. Liban,*[39] citing *People vs. Tundag,*[40] the Court declared that, in cases calling for a conviction of rape in its qualified form, the age of the victim, without qualification, is not a matter of judicial notice, whether mandatory[41] or discretionary.[42] Judicial notice of the issue of age without the requisite hearing under Section 3 of Rule 129 of the Rules on Evidence would not be sufficient to establish the age of the victim to warrant the imposition of the death penalty.

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[37] *People vs. Javier,* 311 SCRA 122 [1999].

[38] TSN, May 22, 1998, pp. 9-10.

[39] 345 SCRA 453 [2000].

[40] 342 SCRA 704 [2000].

[41] Mandatory judicial notice is limited to the following: the existence and territorial extent of states, their political history, forms of government, and symbols of nationality, the law of nations, the admiralty and maritime courts of the world, and their seals, the political constitution and history of Philippines, the official acts of the legislative, executive, and judicial departments of the Philippines, the laws of nature, measure of time and the geographical divisions. (Rules of Court, Rule 129, Section 1).

[42] Discretionary judicial notice pertains to matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions. (Rules of Court, Rule 129, Section 2).

Supreme Court E-Library

The matter of appreciating the age of the victim, either as an element of the crime or as a qualifying circumstance, was settled when the Court, in the case of *People vs. Pruna*,[43] laid down the following guidelines:

1. The best evidence to prove the age of the offended party is an original or certified true copy of the certificate of live birth of such party.

2. In the absence of a certificate of live birth, similar authentic documents such as baptismal certificate and school records which show the date of birth of the victim would suffice to prove age.

3. If the certificate of live birth or authentic document is shown to have been lost or destroyed or otherwise unavailable, the testimony, if clear and credible, of the victim's mother or a member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended party pursuant to Section 40, Rule 130 of the Rules on Evidence shall be sufficient under the following circumstances:

   a. If the victim is alleged to be below 3 years of age and what is sought to be proved is that she is less than 7 years old;

   b. If the victim is alleged to be below 7 years of age and what is sought to be proved is that she is less than 12 years old;

   c. If the victim is alleged to be below 12 years of age and what is sought to be proved is that she is less than 18 years old.

4. In the absence of a certificate of live birth, authentic document, or the testimony of the victim's mother or relatives concerning the victim's age, the complainant's testimony will suffice provided that it is expressly and clearly admitted by the accused.

5. It is the prosecution that has the burden of proving the age of the offended party. The failure of the accused to object to the testimonial evidence regarding age shall not be taken against him.

The trial court should always make a categorical finding as to the age of the victim[44].

It is clear then that even the admission of appellant as to the age of the victim could not be taken against him in the case at bar

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[43] G.R. No. 138471 [October 10, 2002].

[44] *People vs. Cula*, 329 SCRA 101 [2000].

Supreme Court E-Library

because of the foregoing guidelines. Paragraph 4 which allows the appreciation of the testimony of the complainant as to the victim's age provided the same is expressly and clearly admitted by the accused, must be applied in relation to paragraph 3(a) which dispenses with the presentation of independent proof of age only when the victim is below 3 and the age sought to be proved is less than 7. In this case, the unfortunate victim was 4, a year too old.

In view of the moral uncertainty of the victim's exact age on account of the failure of the prosecution to present the birth certificate or similar authentic document (such as her baptismal certificate) and to make a positive and unequivocal manifestation that the victim was indeed 4 years old, not to mention the absence of a categorical finding by the trial court of the victim's minority, the Court hesitates to impose the penalty of death upon appellant.

As we affirm the appealed decision of the trial court convicting appellant for the crime of rape, we, however, make the following modifications: the penalty imposed is reduced to *reclusion perpetua* and ₱50,000 as moral damages is awarded to the offended party aside from the ₱50,000 as civil indemnity already awarded to her by the trial court.

WHEREFORE, the decision of the Regional Trial Court, Branch 35, Ormoc City is *AFFIRMED* with the *MODIFICATION* that appellant Gorgonio Villarama is sentenced to suffer the penalty of reclusion perpetua and ordered to pay the offended party Elizabeth V. Tumulak the sum of ₱50,000 as civil indemnity and the additional amount of ₱50,000 as moral damages.

Costs *de officio*.

SO ORDERED.

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

Ynares-Santiago, J., on leave.