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SECOND DIVISION

[G.R. No. 127878. July 25, 2003.]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **MAURO DE JESUS *y* MAGNAYE,** *accused-appellant.*

SYNOPSIS

Ma. Cristina de Jesus, assisted by her mother, accused her father, herein accused-appellant, of sexually violating her when she was two years old. According to her, sometime in the month of July 1990, appellant placed his finger in her vagina while bathing her and while she was asleep. Amelita Murillo, mother of the victim, declared that she repeatedly observed appellant insert his finger in the sex organ of all her daughters at night. Despite appellant's denial of the allegation against him, him the trial court convicted him of statutory rape and sentenced to *reclusion perpetua*. Hence, this appeal. Appellant questioned the credibility of the complainant.

It is well-established that any child, regardless of age, can be a competent witness if he or she can perceive, and perceiving, can make known his or her perception to others, that is, he or she is capable of relating truthfully facts for which the child is examined. In the instant case, the Court found that the trial court seriously erred in giving credence to the testimony of the complainant. It entertained serious doubts as to the competence of the six-year old Ma. Christina to testify on the incident that happened over four years past when she was less than two years old. It is likewise a portentous source of quandary for a reasonable mind how a child of such tender age could remember how her father repeatedly inserted his finger into her vagina and that she felt pain by reason thereof, and yet, when asked why she did not love her father, she replied that it is because she spanked her and not because he hurt her when he inserted his finger or penis in her vagina. She likewise testified on direct examination that her father inserted his finger as well as his penis in her vagina several times when, in fact, on cross-examination, she testified that she did no know what "*ari*" means. The Court further found that the complainant have little, nay nil, independent recollection as to the incident in July 1990. Complainant admitted on cross-examination that

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she had been coached by her mother on what to say in court. It affirmatively appeared that she had been talked to so much about the alleged rape by her mother that she had little, if any, independent recollection as to the facts and circumstances surrounding the alleged crime. The testimony of complainant's mother also failed to prove rape. She did not cite any instance when she actually saw the complainant being molested by appellant. Thus, for failure of the prosecution to sufficiently establish the guilt of the appellant beyond reasonable doubt, the Court acquitted him of the crime charged.

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; GUIDING PRINCIPLES IN REVIEW OF RAPE CASES.—** In rape cases, the following principles have been formulated to guide the courts in the decision of these cases: (1) it is difficult to prove rape, but even more difficult for the person accused, though innocent, to disprove it; (2) in view of the intrinsic nature of the crime of rape, where only two persons are usually involved, the testimony of the complainant is scrutinized with extreme caution; and (3) the evidence of the prosecution stands or falls on its own merits and cannot be allowed to draw strength from the weakness of the defense.

2. **ID.; ID.; WITNESSES; COMPETENCY OF A CHILD-WITNESS; REQUIREMENTS.—** It is well-established that any child, regardless of age, can be a competent witness if he or she can perceive, and perceiving, can make known his or her perception to others, that is, he or she is capable of relating truthfully facts for which the child is examined. The requirements of a child's competence as a witness are: (a) capacity of observation, (b) capacity of recollection and (c) capacity of communication. A child may be a competent witness where he or she has sufficient capacity to understand the solemnity of an oath and to comprehend the obligation it imposes, and where he or she has sufficient intelligence to receive just impressions as to the facts of which the child is to testify and relate them correctly, although he or she is very young.

3. **CRIMINAL LAW; RAPE; REQUIRES ONLY THE SLIGHTEST PENETRATION OF THE MALE SEX ORGAN**

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LABIA OF THE VICTIM'S GENITALIA.— In case of rape of a woman under 12, only carnal knowledge had to be proved to establish the crime. Carnal knowledge is defined as the act of a man having sexual intercourse or sexual bodily connections with a woman. For this purpose, it is enough if there was even the slightest contact of the male sex organ with the *labia* of the victim's genitalia. However, there must be proof, by direct or indirect evidence, of such contact. It has been ruled that in the absence of any showing of the slightest penetration of the female organ, *i.e.,* touching 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.

4. ID.; ATTEMPTED RAPE; ACCUSED CAN NOT BE HELD GUILTY THEREOF WHERE IT WAS SHOWN THAT HE MERELY PLACED HIS FINGER IN THE VICTIM'S VAGINA.— Based on the testimony of Ma. Cristina, the trial court erred in finding appellant guilty of rape as the child understood "*ari,*" penis or "*titi*" as the finger of her father. Nowhere could we find from said testimony any indication that appellant successfully placed, or tried to insert, his penis and penetrated at least the *labia* of the victim. The victim only said in her testimony that Mauro placed his finger in her vagina while bathing her and while she was asleep. Under such situation, neither could appellant be held guilty of attempted rape.

5. CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHTS OF THE ACCUSED; RIGHT TO BE PRESUMED INNOCENT; WHERE THE EVIDENCE IN A CRIMINAL CASE IS EVENLY BALANCED, THE CONSTITUTIONAL PRESUMPTION OF INNOCENCE TILTS THE SCALES IN FAVOR OF THE ACCUSED.— Moreover, the inconsistency between the findings of the medical examinations conducted on Ma. Cristina contained in the medical reports prepared by the PNP and NBI favors the innocence of appellant. The presence of two conflicting medical reports, one from the NBI yielding a negative result and the other from the PNP Crime Laboratory stating that Ma. Cristina is in a non-virgin state, behooves us to favor the proposition that appellant is innocent of rape. This is in consonance with the rule that where the evidence in a criminal case is evenly balanced, the constitutional presumption of innocence tilts the scales in favor of the accused.

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6. **CRIMINAL LAW; ACTS OF LASCIVIOUSNESS; COMMITTED WHERE ACCUSED FORCIBLY PLACED HIS HAND BETWEEN THE LEGS OF A GIRL OVER 12 YEARS OLD OR WITHOUT FORCE IF SHE WERE UNDER THAT AGE.**— It has been ruled that the act of an accused in forcibly placing his hand between the legs of a girl over 12 years old, or without force if she were under that age, constitutes the crime of acts of lasciviousness. However, in the present case, even the lesser crime of acts of lasciviousness has not been proven by the prosecution beyond reasonable doubt.

7. **REMEDIAL LAW; EVIDENCE; COMPETENCY OF A CHILD WITNESS; REQUIREMENTS.**— It affirmatively appears that she had been talked to so much about the alleged rape by her mother that she had little, if any, independent recollection as to the facts and circumstances surrounding the alleged crime. Considering her tender age, the trial court seriously erred in giving credence to the testimony of Ma. Cristina. We find her to have little, nay nil, independent recollection as to the incident in July, 1990. It is likewise a portentous source of quandary for a reasonable mind how a child of such tender age could remember how her father repeatedly inserted his finger into her vagina and that she felt pain by reason thereof, and yet, when asked why she did not love her father, she replied that it is because she spanked her and not because he hurt her when he inserted his finger or penis. In one U.S. case, the court held that a child eight years of age was not a competent witness to testify to an accident that happened to him when he was between four and five years of age, where he was not a smart, precocious child and had little, if any, independent recollection as to the facts surrounding the accident. In the instant case, the records reveal that Ma. Cristina is functioning on the borderline level of intelligence as reported by the psychologist and social worker of the Reception and Study Center for Children. Further examination of her oral testimony discloses her level of intelligence when at the age of six, she did not even know her birthdate.

8. **ID.; ID.; ID.; ID.; THEORY OF INFANTILE AMNESIA; EXPLAINED.**— The presumption of innocence in favor of appellant also finds support in the theory of infantile amnesia. The theory posits that there is a general inability of people to remember specific events from the early years of their lives.

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under the age of 3, and the average age of the earliest memory reported is 3½. Sigmund Freud, who first stated the theory, claims that early childhood memories, particularly sexual ones, are repressed because they are too frightening and distasteful to the child to be preserved as such. These types of memories are replaced by "screen memories" of ordinary events that are less threatening. While it is recognized that pseudomemories of abuse are possible, the processes underlying accurate and inaccurate recollections of childhood abuse are largely unknown. The most frequently reported factor related to recall was being in therapy. In one case, a U.S. court found the repressed memory syndrome reliable and admissible. The plaintiff therein was found to have no memory of sexual abuse by her cousin until after 45 years after the incident and during psychotherapy. This notwithstanding, critics are still reluctant to accept the idea which they consider unreliable, since recovered memories are too often obtained while the subject is under hypnosis and the therapist is in control, directing the client what to visualize and what to explore. They say that controls should be put in place to ensure the use of non-suggestive techniques by unbiased clinicians when "recovering memories."

9. CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHTS OF THE ACCUSED; PRESUMPTION OF INNOCENCE; NOT OVERCOME IN CASE AT BAR.— In fine, we are constrained to rule that the prosecution's evidence failed to discharge the burden of proof necessary for appellant's conviction for rape. Neither was the evidence consisting of the testimony of the victim and her mother's sufficient to establish appellant's guilt beyond reasonable doubt for the crime of attempted rape or acts of lasciviousness. It cannot be overemphasized that the constitutional presumption of innocence demands that the prosecution prove the commission of the crime beyond reasonable doubt. In the case at bar, the prosecution evidence failed to meet the quantum of proof necessary for conviction in a criminal case to overcome the presumption of innocence accorded by the Constitution to an accused.

APPEARANCES OF COUNSEL

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

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DECISION

AUSTRIA-MARTINEZ, *J.*:

Before us is an appeal from the decision,[1] dated September 19, 1996, of the Regional Trial Court (Branch 26), Manila, convicting accused Mauro de Jesus *y* Magnaye of statutory rape in Criminal Case No. 94-138700, sentencing him to suffer the penalty of *reclusion perpetua* and ordering him to indemnify the private complainant in the amount of ₱50,000.00 by way of moral damages, ₱25,000.00 by way of exemplary damages, and to pay the costs of the suit.

Based on the sworn complaint filed by Amelita Murillo and the sworn statement of her daughter, Ma. Cristina de Jesus,[2] assisted by her mother, both dated August 16, 1994, an Information was filed accusing Mauro de Jesus *y* Magnaye of raping his daughter, committed as follows:

> That in or about July, 1990 and subsequently thereafter, in the City of Manila, Philippines, the said accused, father of Maria Cristina Murillo de Jesus, with lewd design, did then and there willfully, unlawfully and feloniously have carnal knowledge of said Maria Cristina Murillo de Jesus, five (5) years old, against her will and consent.
>
> CONTRARY TO LAW.[3]

On November 21, 1994, accused was arraigned and pleaded not guilty. Thereafter, trial ensued.

The prosecution presented its witnesses, namely: Ma. Cristina de Jesus, P/Insp. Manuel Noroña, SPO3 Ricardo Ocampo, Amelita Murillo, and Dr. Ma. Cristina Freyra.

Ma. Cristina de Jesus testified: She is five years old. Sometime in the month of July 1990, when she was two years old,[4] her

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[1] Penned by Judge Guillermo L. Loja, Sr.

[2] Also referred to as "Maria Cristina Murillo," "Maria Christina," and "Christina" in the Records.

[3] *Rollo*, p. 3.

[4] TSN, November 29,1994, pp. 2 and 10.

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father placed his finger in her vagina while giving her a bath. Still not content, he put his penis in her vagina on several occasions while she was sleeping in their room. He usually did these when her mother was not home. Even if she felt pain in her private part, she did not confide to her mother for fear that her father would spank her.[5]

Amelita Murillo, mother of Ma. Cristina, testified that she and her common-law husband Mauro have five daughters, namely: Maria Josephine,[6] Ma. Cristina, Ma. Lourdes,[7] Carmina, and Elizabeth. According to her, she repeatedly observed Mauro insert his finger in the sex organ of all her daughters at night, as she had been awakened by the cries of the children in the middle of the night. She had confronted Mauro about the incidents but the latter would refuse to listen. Instead, they would end up quarreling. Because Mauro alone earns for the family as refrigerator technician, he would always threaten her and say that for every mouth he would feed there should be something in exchange. She tried to keep her silence because she would like her family to remain intact and also in the hope that Mauro would change. When things went serious that she could no longer bear it, she reported the matter to the *barangay* chairman on August 1, 1994. On the same day, she brought her daughters, except Elizabeth, to the Philippine General Hospital (PGH) to have them examined. However, the hospital advised her to bring them to the National Bureau of Investigation (NBI) instead. The NBI findings revealed a negative result. Because she knew that Mauro had relatives at the NBI, she did not believe the results. She knew that Mauro did something to her daughters. On advice of her neighbor, *Aling Lingling*,[8] she went to the Department of Interior and Local Government (DILG) which referred her to the Criminal Investigation Unit of the Philippine National Police (PNP).[9]

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[5] *Id.*, pp. 2-9.

[6] Also referred to as "Marriane Josephine" in the Records.

[7] Also referred to as "Ma. Loirdes" in the Records.

[8] Also referred to as "Aling Ningning" in the Records.

[9] TSN, February 8, 1995, pp. 3-29.

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On August 16, 1994, Ma. Cristina was taken to the PNP Crime Laboratory where she was examined by Dr. Ma. Cristina B. Freyra. Dr. Freyra issued the following report:

FINDINGS:

GENERAL AND EXTRAGENITAL:

Fairly developed, fairly nourished and coherent female child. Breasts are undeveloped. Abdomen is flat and soft.

GENITAL:

There is absence of pubic hair. Labia majora are full, convex and coaptated with the pinkish brown labia minora presenting in between. On separating the same disclosed an elastic, membrane-type hymen with shallow healed laceration at 3 o'clock. External vaginal orifice admits the tip of the examining index finger.

CONCLUSION:

Subject is in non-virgin state physically.

There are no external signs of application of any form of violence.

REMARKS:

Vaginal and peri-urethral smears are negative for gram-negative diplococci and for spermatozoa.[10]

On the basis of the letter-indorsement from DILG Undersecretary Alexander P. Aguirre,[11] an investigation was conducted by Team 3 of the Police Criminal Investigation Unit (PCIU) of the PNP Criminal Investigation Service Command (CISC) stationed at Camp Crame, Quezon City. On August 17, 1994, the team went to the residence of Mauro at 2716 Old Panaderos St., Sta. Ana, Manila and arrested him at around 1:15 o'clock in the afternoon. Mauro was immediately brought

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[10] Exhibit "F", Records, p. 175.

[11] Records, p. 327.

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to the headquarters of the PCIU, CISC for investigation and proper disposition.[12]

On the basis of the foregoing evidence, the prosecution rested its case.

The defense presented as its witnesses, herein appellant Mauro de Jesus, his father Bayani de Jesus and Dr. Annabelle L. Soliman.

Appellant denied the allegations against him. According to him, he met Amelita in 1985 while he was working as receiving clerk and rewinder in the Technical House in San Marcelino, Manila while she was working in a nearby beer house. They started living together in 1986 and five daughters were born to them, namely, Maria Josephine, Ma. Cristina, Ma. Lourdes, Carmina, and Elizabeth. He was later forced to leave work because of his troubled relationship with Amelita. He testified that when Amelita has no money, she becomes irritable, starts a quarrel with him, and even beats and maltreats their children. In fact, in one of her bouts of irritability and bursts of anger, she quarreled with him, got a knife and slashed his left forearm. On August 1, 1994, he said his wife caused him to be incarcerated in Precinct 6 of Manila on charges of raping his four daughters. He stayed in prison for four days but was later released on August 4, 1994 because the NBI findings showed negative results of rape. However, on August 16, 1994, he was again arrested and detained on the same grounds. He vehemently denied that he ever sexually abused any of his children and claimed that the charges are mere fabrications of his wife. Further, he said he loves his daughters and the only reason Ma. Cristina testified against him was because her mother threatened her.[13]

Bayani de Jesus, father of appellant, corroborated the testimony of his son. According to him, Amelita is his son's common-law spouse since 1985. They both lived with him in Sta. Ana, Manila.

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[12] TSN (P/Insp. Manuel Noroña), January 10, 1995, pp. 3-12; TSN (SPO3 Ricardo Ocampo), January 10, 1995, pp. 14-20; Joint Affidavit of SPO3 Ricardo Ocampo and SPO2 Leodegario Canillo dated August 17, 1994 (Exh. "C"; Records, p. 170).

[13] TSN, September 5, 1995, pp. 3-13; October 4, 1995, pp. 2-7.

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He testified that his son and Amelita are not in good terms because the latter often exhibits abnormalities. Amelita beats her children without cause, using belt, wood, or anything she can take hold of.[14]

Dr. Annabelle L. Soliman, the NBI Medico-Legal Officer who first examined Ma. Cristina on August 1, 1994, testified that she did not find any injury on the latter and that penetration was not possible since her hymen was intact. Her medical report states in pertinent parts, thus:

GENERAL PHYSICAL EXAMINATION:

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Fairly nourished, normally developed, conscious, coherent, cooperative, ambulatory subject.

Breasts, infantile. Areola, brown, measures 1.0 cm. in diameter. Nipples, brown, flat, measures 0.2 cm. in diameter.

No extragenital physical injury noted.

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GENITAL EXAMINATION:

Pubic hair, no growth. Labia majora and minora, coaptated. Fourchette, tense. Vestibular mucosa, pinkish. Hymen, short, thin, intact. Hymenal orifice measures 0.4 cm. in diameter. Vaginal walls and Rugosities cannot be reached by the examining finger.

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CONCLUSIONS:

1. No evident sign of extragenital physical injury noted on the body of the subject at the time of examination.

2. Hymen, intact and its orifice small (0.4 cm. in diameter) as to preclude complete penetration by an average-sized, adult male organ in full erection without producing genital injury.[15]

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[15] Records, p. 328.

[14] TSN, August 23, 1995, pp. 6-10.

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On September 19, 1996, the trial court rendered a decision[16] finding appellant guilty and sentencing him to *reclusion perpetua.* The dispositive portion of the decision reads:

WHEREFORE, PREMISES CONSIDERED, this Court finds the accused, MAURO DE JESUS *y* MAGNAYE, GUILTY beyond reasonable doubt of the crime of statutory rape as defined and penalized under Article 335 of the Revised Penal Code and hereby sentences him, to suffer the penalty of *Reclusion Perpetua* plus the accessory penalty provided by law and to indemnify private complainant MARIA CRISTINA MURILLO DE JESUS the sum of ₱50,000.00 by way of moral damages, the sum of ₱25,000.00 by way of exemplary damages, and to pay the cost of the suit.

As the accused is a detention prisoner, he is credited with the full length of time he was under detention.

SO ORDERED.[17]

Hence, this appeal. Appellant assails the judgment of conviction, contending that —

1. THE COURT *'A QUO'* COMMITTED A GRAVE ABUSE OF DISCRETION IN ITS APPRECIATION OF THE EVIDENCE PRESENTED BY BOTH SIDES, FAVORING THE PROSECUTION'S AND, PALPABLY SUPPLANTING ITS OWN PRECONCEPTIONS OVER THAT OF THE DEFENSE.

2. CONSIDERING THE HIGHLY DOUBTFUL TESTIMONIES OF THE COMPLAINANT AND HER MOTHER, WHICH TESTIMONIES HAVE SERIOUS INCONSISTENCIES SHARPLY CONTRADICTED BY THE PHYSICAL EVIDENCE ESTABLISHED DURING THE FIRST MEDICAL EXAMINATION OF THE COMPLAINANT BY THE NBI, BUT WHICH PHYSICAL EVIDENCE WAS INEXPLAINABLY DISREGARDED BY THE COURT *'A QUO,'* THE CONVICTION OF THE ACCUSED IS UNJUSTIFIED AND MUST BE REVERSED.[18]

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[16] Decision, pp. 1-9; *Rollo*, pp. 19-27.

[17] RTC Decision, p. 9; *Rollo*, p. 27.

[18] Appellant's Brief, p. 6; *Rollo*, p. 55.

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In rape cases, the following principles have been formulated to guide the courts in the decision of these cases: (1) it is difficult to prove rape, but even more difficult for the person accused, though innocent, to disprove it; (2) in view of the intrinsic nature of the crime of rape, where only two persons are usually involved, the testimony of the complainant is scrutinized with extreme caution; and (3) the evidence of the prosecution stands or falls on its own merits and cannot be allowed to draw strength from the weakness of the defense.[19]

Based on a careful study of the records of the instant case, the Court finds the evidence presented by the prosecution insufficient to establish the guilt of appellant for the crime of statutory rape.

The appellant in this case stands charged of raping his own daughter. The victim, Ma. Cristina, testified that she was around two years old when her father allegedly abused her in July, 1990. To be exact, as declared by her mother, Amelita in her Sworn Statement that Cristina was born on October 31, 1988,[20] she was 1 year and 9 months old. On the date she testified, that is, on November 29, 1994, Ma. Cristina had just turned six years old. How she is able to recall an incident that happened four years before she testified and relate in court her experience when she was barely two years old is something that is quite perplexing to the mind of the Court.

It is well-established that any child, regardless of age, can be a competent witness if he or she can perceive, and perceiving, can make known his or her perception to others, that is, he or she is capable of relating truthfully facts for which the child is examined.[21] The requirements of a child's competence as a

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[19] *People vs. Matugas*, G.R. Nos. 139698-726, February 20, 2002, citing *People vs. Painitan*, G.R. No. 137665, January 16, 2001; *People vs. Panique*, 316 SCRA 757 (1999); *People vs. Mahinay*, 302 SCRA 455 (1999); *People vs. Manansala*, 273 SCRA 512 (1997); *People vs. Godoy*, 250 SCRA 676 (1995); *People vs. Sanchez*, 250 SCRA 14 (1995); *People vs. Teves*, 246 SCRA 236 (1995); *People vs. Tacipit*, 242 SCRA 241 (1995).

[20] Exhibit "D", Records, p. 171.

[21] Rule 130, Sec. 21., RULES ON EVIDENCE.

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witness are: (a) capacity of observation, (b) capacity of recollection and (c) capacity of communication.[22] A child may be a competent witness where he or she has sufficient capacity to understand the solemnity of an oath and to comprehend the obligation it imposes, and where he or she has sufficient intelligence to receive just impressions as to the facts of which the child is to testify and relate them correctly, although he or she is very young.[23]

This Court finds cogent reason to re-evaluate the trial court's assessment regarding the credibility of Ma. Cristina as a witness. We entertain serious doubts as to the competence of the six-year old Ma. Cristina to testify on the incident that happened over four years past when she was less than two years old. She testified on direct examination that her father inserted his finger as well as his penis in her vagina several times when, in fact, on cross-examination, she testified that she did not know what *ari* means:

Q In July 1990 do you remember who you were with?
A My father.

Q And the whole time that you are with your father in 1990, do you remember if there were still other people inside your house?
A Yes, Sir.

Q And who were they?
A My sisters.

Q When you said your father was inserting his penis into your vagina while you were sleeping, your sisters were also there, is that correct?
A Yes, sir.

Q And you said, your sisters, who are they?
A Carmina and Lourdes.

Q And you said that the penis of your father was inserted into your vagina, was the whole size of the penis inserted?
A Yes, sir.

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[22] *People vs. Nang*, 289 SCRA 16 (1998).

[23] 97 C.J.S. 449.

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Q Do you know what a penis is?
A *May we make it of record that the witness indicated sideways indicating [s]he does not know what "ari" is and the word "ari" is used in the translation the whole time for penis.*[24] (Italics ours)

and on re-direct examination, thus:

Q Please tell the court what your father inserted in your vagina?
A Witness showing her *kamay*, finger.

Q When you say "*kamay*" what portion did he insert in your vagina?
A (Witness point to the pointing finger).

Q When you say "*ari*" is it . . . your father put his "titi" in your vagina?
A Yes, maam.

Q And can you tell this court how big is your father's penis?

Court

Malaki ba or *maliit*?

A *Malaki po ito* (Big sir).[25]

The afore-quoted testimony of Ma. Cristina readily discounts the charge of rape.

In case of rape of a woman under 12, only carnal knowledge had to be proved to establish the crime. Carnal knowledge is defined as the act of a man having sexual intercourse or sexual bodily connections with a woman.[26] For this purpose, it is enough if there was even the slightest contact of the male sex organ with the *labia* of the victim's genitalia. However, there must be proof, by direct or indirect evidence, of such contact.[27] It has been ruled that in the absence of any showing of the slightest

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[24] TSN, November 29, 1994, pp. 10-11.

[25] TSN, November 29, 1994, p. 15.

[26] *People vs. Domantay*, 307 SCRA 1, 21 (1999).

[27] *People vs. Domantay*, 307 SCRA 1, 21 (1999).

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penetration of the female organ, *i.e.*, touching 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.[28]

Based on the above-quoted testimony of Ma. Cristina, the trial court erred in finding appellant guilty of rape as the child understood "*ari,*" penis or "*titi*" as the finger of her father. Nowhere could we find from said testimony any indication that appellant successfully placed, or tried to insert, his penis and penetrated at least the *labia* of the victim. The victim only said in her testimony that Mauro placed his finger in her vagina while bathing her and while she was asleep. Under such situation, neither could appellant be held guilty of attempted rape.

Likewise, the testimony of her mother, Amelita Murillo failed to prove rape or for that matter, attempted rape. She merely testified that she saw Mauro place his finger in the private parts of her children. She did not testify particularly on the incident concerning Ma. Cristina, thus:

Q Where were you at that particular time and date on July 1990?
A At home, maam.

Q And do you recall anything unusual that happened on that time and place?
A Yes, maam.

Q And what is that, madam witness?
A I noticed that my eldest daughter had blood on her panty.

Q My eldest, to whom are you referring?
A Maria Josephine de Jesus.

Q And when you saw blood in the panty of your eldest daughter Maria Josephine, what did you do, if any?
A I brought her to the hospital.

Q And what happened at the hospital, if any?
A I was advised at the hospital to bring my eldest daughter to NBI.

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[28] *People vs. Mariano*, G.R. Nos. 135511-13, November 14, 2001.

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Q And what did you do, if any, when the doctor told you to bring your daughter at the NBI?
A I[t] was very early in the morning then, so I was not able to bring her to NBI.

Q And what happened after that, if any, madam witness?
A I observed him, if he is really the one doing it to my daughter, if indeed he is really doing bad [things] to my children.

Atty. Cunanan
Objection, your Honor. Not responsive.

Court
Let it stay on the record.

Atty. Ambrosio
Q By him, to whom are you referring?
A To accused Mauro de Jesus.

Q And what did you observe about the accused Mauro de Jesus, if any?
A I noticed that accused Mauro de Jesus used to place his finger in the sex organ of my children and I also saw blood in the panty.

Q Who in particular of your five children?
A All of my children.

Q (Your honor, please, may we make it of record that witness is crying profusely)

Court
Make I of record that the witness is crying profusely.

Q Now, how many times did you notice the accused Mauro de Jesus do this to your five children?
A Oftentimes, sir.

Q And as you notice him doing it oftentimes to your children, as a mother, what did you do, if any?
A I confronted him and talked to him but he refused to listen.[29]

Cleary, as to Ma. Cristina, Amelita's testimony failed to prove rape.

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[29] TSN, pp. 4-5, February 8, 1995.

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Moreover, the inconsistency between the findings of the medical examinations conducted on Ma. Cristina contained in the medical reports prepared by the PNP and NBI favors the innocence of appellant.

The presence of two conflicting medical reports, one from the NBI yielding a negative result and the other from the PNP Crime Laboratory stating that Ma. Cristina is in a non-virgin state, behooves us to favor the proposition that appellant is innocent of rape. This is in consonance with the rule that where the evidence in a criminal case is evenly balanced, the constitutional presumption of innocence tilts the scales in favor of the accused.[30]

It has been ruled that the act of an accused in forcibly placing his hand between the legs of a girl over 12 years old, or without force if she were under that age, constitutes the crime of acts of lasciviousness.[31]

However, in the present case, even the lesser crime of acts of lasciviousness has not been proven by the prosecution beyond reasonable doubt.

Ma. Cristina admitted on cross-examination that she had been coached by her mother on what to say in court, thus:

Q Before you testified in court, you were always with your mother?
A yes, sir.

Q And you were with her for more than two months?
A yes, sir.

Q *And during all those times, your mother is telling you what to say in this court, is that correct*?
A yes, sir.

Q Do you recall what she told you . . . what you should tell to this Honorable Court?
A yes, sir.

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[30] *People vs. Lagmay*, 306 SCRA 157 (1999).

[31] Reyes, Luis B., II *THE REVISED PENAL CODE* 786 (1993), citing *U.S. vs. Basilio*, 9 Phil. 16 (1907).

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Q *And she said . . . did she tell you what will happen to you if you will not follow her?*
A *She will spank me.*[32] (Italics ours.)

It affirmatively appears that she had been talked to so much about the alleged rape by her mother that she had little, if any, independent recollection as to the facts and circumstances surrounding the alleged crime. Considering her tender age, the trial court seriously erred in giving credence to the testimony of Ma. Cristina. We find her to have little, nay nil, independent recollection as to the incident in July, 1990. It is likewise a portentous source of quandary for a reasonable mind how a child of such tender age could remember how her father repeatedly inserted his finger into her vagina and that she felt pain by reason thereof,[33] and yet, when asked why she did not love her father, she replied that it is because she spanked her[34] and not because he hurt her when he inserted his finger or penis. In one U.S. case,[35] the court held that a child eight years of age was not a competent witness to testify to an accident that happened to him when he was between four and five years of age, where he was not a smart, precocious child and had little, if any, independent recollection as to the facts surrounding the accident.[36] In the instant case, the records reveal that Ma. Cristina is functioning on the borderline level of intelligence as reported by the psychologist and social worker of the Reception and Study Center for Children.[37] Further examination of her oral testimony discloses her level of intelligence when at the age of six, she did not even know her birthdate.[38]

The presumption of innocence in favor of appellant also finds support in the theory of infantile amnesia. The theory posits

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[32] TSN (Ma. Cristina de Jesus), November 29, 1994, p. 11.

[33] *Id.*, p. 7.

[34] *Id.*, p. 13.

[35] *Hollaris vs. Jankowski*, 42 N.E. 2d 859.

[36] *Id.*, at 861.

[37] Psychological Evaluation Report, Records, pp. 291-295.

[38] *Id.*, p. 10.

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that there is a general inability of people to remember specific events from the early years of their lives. Psychologists have concluded that there are very few memories under the age of 3, and the average age of the earliest memory reported is 3 1/2.[39] Sigmund Freud, who first stated the theory, claims that early childhood memories, particularly sexual ones, are repressed because they are too frightening and distasteful to the child to be preserved as such. These types of memories are replaced by "screen memories" of ordinary events that are less threatening.[40]

While it is recognized that pseudomemories of abuse are possible, the processes underlying accurate and inaccurate recollections of childhood abuse are largely unknown. The most frequently reported factor related to recall was being in therapy.[41] In one case,[42] a U.S. court found the repressed memory syndrome reliable and admissible. The plaintiff therein was found to have no memory of sexual abuse by her cousin until after 45 years after the incident and during psychotherapy.

This notwithstanding, critics are still reluctant to accept the idea which they consider unreliable, since recovered memories are too often obtained while the subject is under hypnosis and the therapist is in control, directing the client what to visualize and what to explore. They say that controls should be put in place to ensure the use of non-suggestive techniques by unbiased clinicians when "recovering memories."[43]

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[39] "Infantile Amnesia Lecture"; http://pages.slc.edu/~ebj/iminds01/notes/L8-infantile-amnesia/L8-inf-amn.html.

[40] "Piaget and Infantile Amnesia"; http://home.cc.umanitoba.ca/~mdlee/Teaching/Lecture6.htm; "The Birth Scene"; http://www.birthpsychology.com/birthscene/intelligent2.html.

[41] John F. Kihlstrom, "The Trauma-Memory Argument and Recovered Memory Therapy"; http://ist-socrates.berkeley.edu/~kihlstrm/argument.htm; "Peer-Reviewed Studies About Amnesia and Child Abuse"; http://www.brown.edu/Departments/Taubman_Center/Recovmem/reviewx.html

[42] *Shahzade vs. Gregory*, 923 F.Supp. 286.

[43] "Why Recovered Memories Should Not Be;" http:///www. psychology.uwaterloo.ca/people/mross Why%20 Recovered %20 Memories%20. . .

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As pointed out earlier, the testimony of Cristina's mother, Amelita Murillo, in like manner, failed to establish that appellant had committed acts of lasciviousness. She merely testified that she saw Mauro place his finger in the private parts of her children but she did not testify particularly on the incident concerning Ma. Cristina. Amelita was only able to prove that on or about the time the alleged rape was committed, she saw blood in the underwear of her daughter Ma. Josephine. But as to Ma. Cristina, Amelita did not cite any instance when she actually saw Ma. Cristina being molested by her father.

In fine, we are constrained to rule that the prosecution's evidence failed to discharge the burden of proof necessary for appellant's conviction for rape. Neither was the evidence consisting of the testimony of the victim and her mother's sufficient to establish appellant's guilt beyond reasonable doubt for the crime of attempted rape or acts of lasciviousness.

It cannot be overemphasized that the constitutional presumption of innocence demands that the prosecution prove the commission of the crime beyond reasonable doubt. In the case at bar, the prosecution evidence failed to meet the quantum of proof necessary for conviction in a criminal case to overcome the presumption of innocence accorded by the Constitution to an accused.

WHEREFORE, the appealed decision is *REVERSED* and *SET ASIDE* and appellant is *ACQUITTED* on ground of reasonable doubt. The Director of the Prisons is directed to forthwith cause the immediate release of appellant unless the latter is detained for some other lawful cause, and, to inform the Court accordingly within ten (10) days from notice of the action taken hereon.

SO ORDERED.

*Bellosillo (*Chairman*), Quisumbing, Callejo, Sr.,* and *Tinga, JJ.,* concur.