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SECOND DIVISION

[G.R. No. 142740. August 6, 2003]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **ROBERTO TAMPOS *Y* AGUSTIN,** *accused-appellant.*

SYNOPSIS

Appellant was found guilty by the trial court of the crime of statutory rape for sexually abusing a six-year old girl. He was sentenced to suffer the penalty of *reclusion perpetua*. On appeal, appellant raised the issues of whether he had carnal knowledge of complainant and whether the penalty imposed on him is appropriate.

In affirming the decision of the trial court, the Supreme Court ruled that the two elements of statutory rape were established in the case at bar, to wit: (1) that the accused had carnal knowledge of a woman; and (2) that the woman is below 12 years of age. In this case, the victim's age was duly proven. She was below 12 years old and this was confirmed by her mother in open court.

The Court likewise ruled that the pain felt by the victim in her sexual organ and the doctor's finding that both the labia majora and minora were gaping, were external indicia of carnal knowledge. The presence of appellant's spermatozoa in her genitalia, established by medical evidence, added to the credibility of the prosecution's stance that carnal knowledge did take place.

The phrase "under twelve years of age" makes the offense statutory rape. It is punishable by *reclusion perpetua*, a single indivisible penalty, under Article 266-B, of the Revised Penal Code. The Court ruled that the constitutional right of the accused to be informed of the charges against him would be violated if it should convict him on the basis of a provision of law, R.A. 8353, the Anti-Rape Law of 1997, which imposes death. Moreover, it is well settled that an accused may only be convicted of a crime charged against him in the information or those necessarily included therein.

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SYLLABUS

1. **CRIMINAL LAW; STATUTORY RAPE; ELEMENTS.**— The two elements of statutory rape are: (1) that the accused had carnal knowledge of a woman; and (2) that the woman is below 12 years of age.

2. **REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; FINDINGS THEREON BY TRIAL COURT, GENERALLY ENTITLED TO GREAT RESPECT ON APPEAL; CASE AT BAR.**— The trial court's assessment of the credibility of witnesses is entitled to great respect on appeal, for it had the opportunity to closely observe the witnesses' demeanor and deportment on the witness stand. The trial court found that "the complainant acted without malice in reporting the alleged abuses of accused on her person." In contrast, according to the trial court, appellant's "unsubstantiated and self-serving" denial could not hold up against the "positive declaration and frank manner" by which the victim recounted her ordeal. A careful scrutiny of the records leads us to the same conclusion, that the prosecution witnesses and their testimonies are logical and more credible than that of the defense. We have no hesitation in rejecting the testimony of the appellant for being less than candid and truthful.

3. **CRIMINAL LAW; RAPE; NOT NEGATED BY ABSENCE OF HYMENAL LACERATION.**— That appellant's penis only touched the lower tip of the victim's vagina without any resulting external genital injury or laceration of the hymen would not preclude a finding of rape. In several cases, we have held that rupture of the hymen or vaginal lacerations are not necessary for rape to be consummated. An intact hymen does not negate a finding that the victim was raped. To commit the crime of rape the rupture of the hymen is not indispensable. Significantly, in a number of cases we held that "where penetration was not fully established, the Court had anchored its conclusion that the rape was nevertheless committed on the victim's testimony that she felt pain, or the medico-legal finding of discoloration in the inner lips of the vagina, or the *labia majora* was already gaping with redness, or the hymenal tags were no longer visible." ... The victim felt pain in her sexual organ; the doctor found both the *labia majora* and *minora* to be "gaping." These, in

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our view, are external *indicia* of "carnal knowledge." As we stated in *People v. Ayo*: "While it may be granted that penetration may not have been accomplished as the girl's hymen was shown to have remained intact and the orifice too small to preclude full penetration, jurisprudence recognizes that slight penetration of the labia by the male organ still constitutes rape. It is sufficient that there be entrance of the male organ within the labia of the pudendum. Absence of hymenal laceration does not disprove sexual abuse especially when the victim is of tender age. Mere touching, no matter how slight, of the labia or lips of the female organ by the male genital, even without rupture or laceration of the hymen, is sufficient to consummate rape."

4. **REMEDIAL LAW; CRIMINAL PROCEDURE; PROSECUTION OF OFFENSES; INFORMATION; ACCUSED MAY ONLY BE CONVICTED OF A CRIME CHARGED AGAINST HIM IN THE INFORMATION OR THOSE NECESSARILY INCLUDED THEREIN; CASE AT BAR.**— The phrase "under twelve years of age" makes the offense STATUTORY RAPE as well understood in our jurisdiction. It is punishable by *reclusion perpetua,* a single indivisible penalty, under Art. 266-B, RPC, now. In our view, the constitutional right of the accused to be informed of the charges against him would be violated if, as the OSG argues, we should convict him on the basis of a provision of law, R.A. 8353, the Anti-Rape Law of 1997, which imposes death. ... The Information first and foremost refers to the crime of rape defined in Paragraph 3 of Article 335 of the Revised Penal Code, now Article 266-A, where the "woman is under twelve years of age," which is statutory rape. It is this specific provision of the Code, favorable in this context to the appellant that we should apply. To convict an accused of a higher or more serious offense than that specifically charged in the complaint or information on which he is tried would be an outright violation of his basic rights. It is well settled that an accused may only be convicted of a crime charged against him in the information or those necessarily included therein. The information herein charging STATUTORY RAPE could not be validly converted to a charge of CHILD-RAPE. The latter charge constitutes a greater offense punishable by death, quite distinct from statutory rape. Having been specifically arraigned on the charge of STATUTORY RAPE, appellant could not after trial be held to answer for child-rape.

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To do so would raise infractions of due process and other guarantees in favor of appellant, particularly his right to be informed, and not misinformed, of the offense charged.

5. **CIVIL LAW; DAMAGES; CIVIL INDEMNITY AND MORAL DAMAGES; AWARDED IN CASE AT BAR.**— As to damages, civil indemnity of ₱50,000 and moral damages in the amount of ₱50,000 are also properly awarded in favor of private complainant, on the ground that victims of rape suffer psychological and moral injuries sufficient to justify the award, without necessity of further proof.

APPEARANCES OF COUNSEL

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

D E C I S I O N

QUISUMBING, *J.*:

On appeal is the decision[1] dated January 3, 2000 of the Regional Trial Court of Davao City, Branch 17, in Criminal Case No. 42,631-99. Appellant ROBERTO TAMPOS *Y* AGUSTIN was convicted of statutory rape and sentenced to suffer the penalty of *reclusion perpetua.*

Appellant was charged in an information[2] containing the following allegations:

The undersigned, at the instance of the offended party HAPPYLEN ORTEGA *Y* RIOS, whose affidavit hereto attached and form part of this Information accuses the above-named accused of the crime of STATUTORY RAPE, under Art. 335, Par. 3 of the Revised Penal Code in relation to R.A. 7610 and R.A. 7659 and R.A. 8313 it being a heinous offense, committed as follows:

That on or about February 18, 1999, in the City of Davao, Philippines, and within the jurisdiction of this Honorable Court,

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[1] *Rollo*, pp. 14–22.

[2] *Id.* at 8.

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the above-mentioned accused, by means of force and intimidation, did then and there wilfully, unlawfully and feloniously have carnal knowledge with the complainant HAPPYLEN ORTEGA *Y* RIOS, who is six (6) years old, against her will.

CONTRARY TO LAW.

Assisted by counsel on arraignment, appellant pleaded not guilty to the charge. At the trial, the prosecution presented five witnesses, namely private complainant Happylen Ortega, her mother Lady Lewin Ortega, security guard George Amigable, Ms. Benaranda V. Orosco, and Dr. Samuel Cruz.

Complainant HAPPYLEN[3] ORTEGA testified[4] that on February 18, 1999, while on her way to the house of an Uncle George, she noticed appellant Roberto Tampos staring at her. She knew Tampos and even knew where he lived.[5] Appellant suddenly pulled her by the right wrist and, using his two hands, lifted and carried her. Appellant brought her to an unlighted area at the back of Almendras Gym where a junked ambulance[6] was parked. Appellant then forced complainant to lie on the plywood flooring and proceeded to remove her short pants. She was not wearing any panty at that time. Appellant then removed his own short pants and brief. It was then that she was raped.[7] While placing himself on top of Happylen, appellant's erect penis was placed in her vagina. Complainant illustrated this by thrusting her right forefinger towards a circle formed by the fingers of her other hand.[8]

According to Happylen, appellant covered her mouth to prevent her from shouting. He warned her not to tell her parents about

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[3] Sometimes spelled "Hapilyn" in some parts of the record.

[4] TSN, 23 July 1999, pp. 3–15.

[5] *Id.* at 4.

[6] Also described as an "old damaged jeep" in the RTC Decision, *Rollo*, p. 15 and in other parts of the record.

[7] *Supra*, note 4 at 6.

[8] *Ibid.*

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what he did, otherwise, appellant would kill her.[9] Appellant then stood up to urinate and it was then that the guard on duty at the Almendras gym apprehended him. At first, Happylen did not tell her mother about what happened but eventually had to since her Auntie Betty and two of the latter's children saw her and they had already related the incident to her mother. Her mother accompanied her to the police where she executed an affidavit detailing what had happened. They also went to the doctor where Happylen submitted herself to a medical examination.

During cross-examination, complainant testified that appellant's penis did not penetrate her organ.[10] On re-direct, however, she said that there was actual contact of the penis and her vagina.[11] When asked to point to the part of her body that was touched by the penis, complainant pointed to a part a little above the vagina.

On query by the court, however, Happylen clarified that appellant's organ did not "pass" her vagina but only its lower portion. She stated that it was "not on the middle but on the lower portion" or on the lower tip of the vagina.[12]

GEORGE AMIGABLE[13] was the security guard on duty at the Almendras Gym when the incident occurred. He testified that on February 18, 1999, at past 7:00 p.m., while he was roving around the compound of Almendras Gym, two women reported to him that a child was being raped in the junked ambulance. He rushed to said place and found appellant and complainant both standing up. The witness saw appellant putting his shirt on.[14] He then asked the appellant and the child their names which they promptly gave him. The girl appeared to be normal but then she cried when she told him that appellant had

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[10] *Id.* at 11.

[11] *Id.* at 13.

[12] *Id.* at 14–15.

[13] TSN, 21 April 1999. pp. 10–25.

[14] *Id.* at 21–22.

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raped her.[15] He held appellant at once, to prevent him from running away. The other security guard on duty assisted him. He turned over custody of appellant to PO3 Romeo Autor,[16] a policeman living nearby. Thereafter, the girl's parents arrived.

Complainant's mother, LADY LEWIN[17] ORTEGA[18] testified that her daughter was only six years and nine months at the time of the incident. She presented Happylen's Birth Certificate,[19] indicating that the child was born on July 4, 1992. Mrs. Ortega knew appellant because he had been a neighbor for three months.[20] The children in the area were likewise familiar with appellant since he used to hang out in the vicinity of the chapel where the children usually played.[21]

A witness told Mrs. Ortega about the rape. Later on, Happylen also told her about it.[22] The child was crying while relating to her what she suffered at the hands of appellant.[23] Mrs. Ortega then assisted her daughter in filing a complaint with the police and accompanied her to the doctor for physical examination.

BENARANDA[24] *V. OROSCO*[25] also testified for the prosecution. On the date and time in question, she was asked by one Beatriz[26]

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[15] *Id.* at 14, 23. The term "sexual intercourse" was likewise used in the testimony referring to the child's answer about what had happened between her and the appellant.

[16] Sometimes spelled as "Otor" in other parts of the record.

[17] Otherwise referred to as Ledelewin.

[18] TSN, 21 April 1999, pp. 3–9.

[19] Records, p. 6; Marked as Exhibit "C-7".

[20] TSN, 21 April 1999, p. 6.

[21] *Id.* at 8–9.

[22] *Id.* at 8.

[23] *Id.* at 7.

[24] Sometimes spelled as Veneranda.

[25] TSN, 21 April 1999, pp. 26–45. Also spelled as "Orozco" in some parts of the record.

[26] Also known as "Betty" in some parts of the record.

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Danuco to accompany the latter to the Almendras Gym. Betty said her son Marvin told her there was a little girl at the gym and a man was doing something bad to her.[27] Upon reaching the back of the gym, and from a distance of about 4–5 meters, they saw appellant Roberto Tampos. The witness demonstrated how appellant was bending up and down.[28] She did not actually see the child at that time because it was dark.[29] Thereafter, a security guard arrived and she went home. When she returned to the gym, appellant was already being held by the security guard and surrounded by many people. It was only then that she saw Happylen.

Dr. SAMUEL CRUZ [30] testified that he conducted the physical/medical examination of complainant on February 19, 1999 or a day after the incident. His findings were reduced to writing as follows:

GENITAL EXAMINATION:

Pubic hair, no growth. Labia majora and minora, gaping. Fourchette, tense. Vestibule, pinkish, smooth. Hymen, thick, tall, intact. Hymenal orifice, annular, 0.5 cm. in diameter. Vaginal walls and rugosities, can't be reached by examining finger.

CONCLUSIONS:

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

2.) Hymen, intact and its orifice, small as to preclude complete penetration by an average-sized male organ in erection without causing hymenal injury.

REMARKS: Semenology: Positive for Spermatozoa[31]

According to Dr. Cruz, his findings indicated that no male organ had penetrated the child's vagina, otherwise, hymenal lacerations would have been present.[32] However, he stated that

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[27] *Supra*, note 25 at 29.

[28] *Id.* at 31, 36, 38.

[29] *Id.* at 40–41.

[30] TSN, 13 April 1999, pp. 2–6.

[31] Records, p. 42; Marked as Exhibit "A".

[32] TSN, 13 April 1999, p. 4.

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this would not negate the possibility of partial penetration or of contact between the penis and the vagina. Further, Dr. Cruz testified that he took a sample from the opening of the vagina by dabbing a cotton swab therein. Upon laboratory examination[33] of the sample conducted by a medical technologist, it was found to be positive for spermatozoa.

The lone testimony of the appellant was presented in his defense.

ROBERTO TAMPOS[34] testified that he did not know complainant's name, but he recognized her only by face. He admitted that he was with complainant at around 6:00 to 7:00 p.m. of February 18, 1999.[35] He saw her playing on the road leading to the back of Almendras Gym at around 6:00 p.m., while he was on his way to the house of his foreman.[36] He said he was a bit drunk at the time.[37] He brought her to the back of Almendras Gym, made her sit on a plywood near the junk vehicle and gave her ₱1.00.[38] People were passing by at the time. He placed the girl on his lap and in the process touched her side. He admitted that he intended to touch the girl and then masturbate, which was what actually happened. He slipped his penis out at the side of his brief and shorts. Appellant denied removing Happylen's shorts but said he only lowered them.[39] He then saw the girl's vagina but denied that he ever touched it. He did not place himself on top of the girl when he masturbated. He only knelt beside her while Happylen lay on the plywood. He touched the girl's thigh but not her private parts. As he was ejaculating, he actually touched Happylen's hips. He directed his semen above the hips of the girl.[40] Nothing more happened

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[33] *Id.* at 43: Marked as Exhibit "B." and "B-1".

[34] TSN, 26 November 1999, pp. 3–15.

[35] *Id.* at 3.

[36] *Id.* at 12.

[37] *Ibid.*

[38] *Id.* at 3–4.

[39] *Supra.* note 36.

[40] *Id.* at 14.

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after that. He then left the girl behind and went home. However, he was immediately apprehended by the security guard of Almendras Gym, brought to the guard's office, and taken to the *barangay* captain.

After trial, the RTC; rendered its assailed decision, thus:

> WHEREFORE, finding the evidence of the prosecution more than sufficient to prove the guilt of accused beyond reasonable doubt of the offense charged, accused ROBERTO TAMPOS is sentenced to suffer a penalty of *RECLUSION PERPETUA* and to pay the additional amount of ₱50,000.00 as moral damages to Lady Lewin Ortega, another amount of ₱50,000.00 as civil indemnity together with all accessory penalties as provided for by law. (*PP vs. Romeo Ambray y Luterio,* GR 127177 promulgated on February 25, 1999; *PP vs. Melanio Bolatete y Melon,* GR 127570 promulgated on February 25, 1999).
>
> SO ORDERED.[41]

Aggrieved, appellant interposed the present appeal, with the following assignment of errors:

I

THE LOWER COURT ERRED IN FINDING THE ACCUSED GUILTY BEYOND REASONABLE DOUBT OF THE CRIME OF RAPE NOTWITHSTANDING THE TESTIMONY OF THE CHILD HERSELF THAT THE ACCUSED PENIS (*sic*) DID NOT GO INSIDE HER VAGINA BUT MERELY ON HER NAVEL, ABOVE HER VAGINA AND THE LOWER PORTION OF HER VAGINA.

II

THE LOWER COURT ERRED IN NOT GIVING CREDENCE TO THE TESTIMONY OF ACCUSED-APPELLANT THAT HE MERELY MASTURBATED AND THIS FACT IS CONSISTENT WITH THE MEDICAL FINDINGS ON THE PHYSICAL EXAMINATION OF THE GIRL RIGHT AFTER THE INCIDENT AS WELL AS TO THE TESTIMONY OF THE OTHER WITNESSES PRESENTED BY THE PROSECUTION.[42]

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[41] *Rollo*, p. 22.

[42] *Id.* at 47.

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More specifically, the issues are: (1) whether appellant had "carnal knowledge" of complainant; and (2) whether the penalty imposed on appellant is appropriate.

Appellant is charged of STATUTORY RAPE under paragraph 3 of Article 335 of the Revised Penal Code. The two elements of statutory rape are: (1) that the accused had carnal knowledge of a woman; and (2) that the woman is below 12 years of age.[43] Article 335 of the Revised Penal Code is now in Article 266-A, par. 1-d, in view of the amendments introduced by R.A. 8353. Statutory rape is committed by having carnal knowledge of a woman under par. d, "when the offended party is under 12 years of age."

In this case, the victim's age is undisputed. She is below 12 years old. Her Birth Certificate shows that she was born on July 4, 1992. Thus, on February 18, 1999, Happylen was exactly six (6) years, seven (7) months and fourteen (14) days old. Her mother confirmed this in open court. Hence, the issue is whether there is sufficient evidence to prove carnal knowledge between appellant and Happylen beyond reasonable doubt.

Appellant submits that, assuming *arguendo* that Happylen's testimony were true, the could not be convicted of rape but only acts of lasciviousness. He insists that there was no penetration of the vagina. He points out that the medical findings show that the hymen was intact and, had there been penetration, hymenal lacerations would have been present. Appellant contends that the acts described do not constitute "carnal knowledge" as the essential element of rape. He sticks to his claim that he merely masturbated.He adds that he only held on to the hips of complainant at that time, without touching her private parts.

For the State, the Office of the Solicitor General argues for the affirmation of the trial court's judgment finding appellant guilty of rape. However, the OSG recommends that the penalty of death be imposed on appellant instead of *reclusion perpetua* only.

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[43] *People v. Bato*, 382 Phil. 558, 568–569 (2000) citing *People v. Bolatete*, 363 Phil. 336, 345 (1999); *People v. Lerio*, 381 Phil. 80, 87 (2000).

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Considering the evidence on record, we are one with the trial court in giving credence to the testimonies of the complainant and the other prosecution witnesses. The trial court's assessment of the credibility of witnesses is entitled to great respect on appeal, for it had the opportunity to closely observe the witnesses' demeanor and deportment on the witness stand.[44] The trial court found that "the complainant acted without malice in reporting the alleged abuses of accused on her person." In contrast, according to the trial court, appellant's "unsubstantiated and self-serving" denial could not hold up against the "positive declaration and frank manner" by which the victim recounted her ordeal.[45] A careful scrutiny of the records leads us to the same conclusion, that the prosecution witnesses and their testimonies are logical and more credible than that of the defense. We have no hesitation in rejecting the testimony of the appellant for being less than candid and truthful.

Instructive is complainant's testimony, which we find worth excerpting, to detail what appellant did to her:

DIRECT EXAMINATION

x x x x x x x x x

Q: Now, Hapilyn Ortega, tell the court, how did he rape you?

A: He placed his organ to me. (witness demonstrating her right forefinger thrusting it towards the circle of her other finger as if penetrating inside).

Q: What was the position of the accused when he inserted his penis to your private part?

A: His penis erected.

Q: Precisely, was he on top of you at that time?

A: Yes, sir.

x x x x x x x x x

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[44] *People v. Ayo*, 365 Phil. 88, 96 (1999) citing *People v. Ramirez*, 334 Phil. 305, 316 (1997); *People v. Corea*, G.R. No. 114383, 3 March 1997, 269 SCRA 76, 87; *People v. Antipona*, G.R. No. 119071, 19 June 1997, 274 SCRA 328, 337; *People v. Tadulan*, 337 Phil. 685, 694 (1997).

[45] *Rollo*, p. 20.

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Q: Going back to the testimony, that his penis (*sic*) the accused inserted his penis to your vagina, in the course of sexual contact made to you by the accused, what did you feel if any, coming from the penis of the accused?

A: I cried.

Q: The question is what did you observe if any, coming from the penis of the accused?

A: None.

x x x x x x x x x

CROSS EXAMINATION

Q: You testified that earlier, that you were raped by the accused by placing his organ to your organ, is that correct?

A: Yes, sir.

Q: Was the penis of the accused able to penetrate your organ?

A: No, sir.

Q: Now, when he (sic) accused removed your shortpants, what did the accused do with his penis?

A: He let it out.

Q: Did he hold his penis? Did he push and pull it with his hands?

A: No.

x x x x x x x x x

RE-DIRECT

Q: Hapilyn Ortega, you said the organ of the accused did not penetrate your organ, do you mean to say that there was an actual contact of the penis in your vagina?

A: Yes, sir.

x x x x x x x x x

RE-CROSS

Q: Can you point out to this court, what portion is that which was touched by the penis of the accused?

A: (witness pointing to her vagina).

x x x x x x x x x

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COURT:

Q: Hapilyn Ortega, you testified before, you are pointing in your finger like this, is that correct?

A: Yes, sir.

Q: You are referring to the one of your finger like this, as the organ of the accused?

A: Yes, sir.

Q: And the one you are forming in your finger a ring symbolizes your vagina?

A: Yes, sir.

Q: Now, when the accused raped you, is it that his organ passes to your vagina?

A: No.

Q: Where is that part in your vagina here in your circle that the penis of the accused was pointed?

A: To the lower portion.

Q: It did not go inside here?

A: Yes, not on the middle but on the lower portion.

Q: Where in this vagina where the penis of accused penetrated?

A: Lower portion.

Q: Only on the lower tip of the vagina?

A: Yes sir.[46]

From the foregoing, we resolve the crucial issue: Did the acts described above constitute the essential requisite of "carnal knowledge" in a case of rape?

In *People v. Lerio*,[47] we stated:

In the context it is used in the Revised Penal Code, 'carnal knowledge,' unlike its ordinary connotation of sexual intercourse, does not necessarily require that the vagina be penetrated or that the hymen be ruptured (6 WORDS AND PHRASES 273 citing *Walker*

[46] TSN, 23 July 1999, pp. 6–7, 11, 13–15.

[47] 381 Phil. 80, 87 (2000) citing *People v. Quiñanola*, 366 Phil. 390, 410 (1999).

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v. State, 273 S.W. 2d 707, 711, 197 Tenn. 452). The crime of rape is deemed consummated even when the man's penis merely enters the labia or lips of the female organ (*People vs. Cabebe*, G.R. No. 125910, May 21, 1998) or, as once so said in a case, by the '*mere touching* of the external genitalia by a penis capable of consummating the sexual act.' (*People v. De la Peña*, 233 SCRA 573 cited in *People v. Castromero*, 280 SCRA 421.)

Appellant's counsel, in his brief, admits that the foregoing testimony of Happylen "clearly demonstrated that appellant's penis, indeed, touched the victim's vagina."[48] However, he contends that, much like the case of *People v. Campuhan*,[49] the touching was merely an epidermal contact or a slight brush or a scrape of the penis on the external layer of the victim's vagina or the *mons pubis*. To bolster defense counsel's claim that there was no penetration, he cites the result of the medical examination that shows no extragenital injury and no hymenal lacerations.

Complainant herself testified that there was no penetration of her organ. However, she indicated at least two areas where the penis of the appellant touched her vagina: (1) the one she pointed to above her vagina; and (2) the lower portion or lower tip of the vagina. But even if we consider only the second spot, the lower portion or tip of her vagina, which she categorically indicated during counsels' examination and upon inquiry by the court, in our view, sexual contact has been indubitably established. That appellant's penis only touched the lower tip of the victim's vagina without any resulting external genital injury or laceration of the hymen would not preclude a finding of rape.

In several cases, we have held that rupture of the hymen or vaginal lacerations are not necessary for rape to be consummated.[50] An intact hymen does not negate a finding that the victim was raped. To commit the crime of rape the rupture of the hymen is not indispensable.[51]

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[48] *Rollo*, p. 57.

[49] 385 Phil. 912, 920–921(2000).

[50] *People v. Lerio, supra*, note 47 at 102.

[51] *People v. Almaden*, G.R. No. 112088, 25 March 1999, 305 SCRA 157, 165.

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Significantly, in a number of cases[52] we held that "where penetration was not fully established, the Court had anchored its conclusion that the rape was nevertheless committed on the victim's testimony that she felt pain, or the medico-legal finding of discoloration in the inner lips of the vagina, or the labia majora was already gaping with redness, or the hymenal tags were no longer visible."[53]

Thus, contrary to appellant's assertion, we are convinced that appellant's penis came in contact with complainant's vagina in a way much more intense than mere epidermal contact or a slight brush or a scrape of the penis which the defense wants us to accept. The victim felt pain in her sexual organ;[54] the doctor found both the *labia majora* and *minora* to be "gaping."[55] These, in our view, are external *indicia* of "carnal knowledge."

As we stated in *People v. Ayo*:[56]

> While it may be granted that penetration may not have been accomplished as the girl's hymen was shown to have remained intact and the orifice too small to preclude full penetration, jurisprudence recognizes that slight penetration of the labia by the male organ still constitutes rape. It is sufficient that there be entrance of the male organ within the labia of the pudendum. Absence of hymenal laceration does not disprove sexual abuse especially when the victim is of tender age. Mere touching, no matter how slight, of the labia or lips of the female organ by the male genital, even without rupture or laceration of the hymen, is sufficient to consummate rape.

The presence of appellant's spermatozoa in her genitalia, established by medical evidence, adds to the credibility of the prosecution's stance that carnal knowledge did take place.

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[52] *People v. Gerry Libeta y Torre*, G.R. No. 139231, 12 April 2002, pp. 10–12; *People v. Ombreso*, G.R. No. 142861, 19 December 2001, 372 SCRA 675, 693.

[53] *Ibid.*

[54] Records, p. 3.

[55] *Id.* at 5.

[56] *People v. Ayo, supra*, note 44 at 102.

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Jurisprudence requires that, to be considered consummated rape, an erect penis capable of penetration[57] must have touched, at the very least, the area of the labia of the *pudendum*. In the present case, Happylen testified that contact was made "on the lower tip" of her vagina. A six-year-old girl might have difficulty pinpointing which part of her vagina was actually touched. But Happylen had no such difficulty. Clearly, there was sexual contact, for spermatozoa was found present in her vagina. The trial court is convinced as we are that the "lower tip" of her vagina testified to by complainant as the point touched by appellant's organ is the vaginal opening or the area between the labia through which the semen (spermatozoa) traveled and therein found the following day when the gynecological examination was performed.

Now, as to the imposable penalty in this case. The OSG contends that the trial court erred in imposing on appellant the penalty of *reclusion perpetua*. The OSG argues that the offense committed is the heinous offense of child-rape, where the victim is less than seven years old. Hence, the OSG recommends that the penalty should be death.

At the outset, we find that the appellant is being charged of STATUTORY RAPE as defined in Art. 335, Paragraph 3 of the Revised Penal Code, as amended. This provision reads:

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

1. By using force or intimidation;

2. When the woman is deprived of reason or otherwise unconscious; and

3. *When the woman is under twelve years of age or is demented.*

The crime of rape shall be punished by *reclusion perpetua*.[58]

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[57] *Supra*, note 49 at 920 citing *People v. De la Peña*, G.R. No. 104947, 30 June 1994, 233 SCRA 573, 578–579.

[58] Italics supplied, *vide* RPC, Arts. 266-A and B. See Regalado, *Criminal Law Conspectus*, pp. 474–486; National Book Store, Inc., 2000.

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The phrase "under twelve years of age" makes the offense STATUTORY RAPE as well understood in our jurisdiction. It is punishable by *reclusion perpetua*, a single indivisible penalty, under Art. 266-B, RPC, now. In our view, the constitutional right of the accused to be informed of the charges against him would be violated if, as the OSG argues, we should convict him on the basis of a provision of law, R.A. 8353, the Anti-Rape Law of 1997, which imposes death. True, the information mentions confusedly Art. 335 of the Revised Penal Code, "in relation to R.A. 7610, R.A. 7659 and R.A. 8313, it being a heinous offense." Note that the information does not mention R.A. 8353. The visible emphasis of the present charge, clearly, is on STATUTORY RAPE, which the Prosecutor spelled in capital letters.

The Information first and foremost refers to the crime of rape defined in Paragraph 3 of Article 335 of the Revised Penal Code, now Article 266-A, where the "woman is under twelve years of age," which is statutory rape. It is this specific provision of the Code, favorable in this context to the appellant that we should apply. To convict an accused of a higher or more serious offense than that specifically charged in the complaint or information on which he is tried would be an outright violation of his basic rights.[59] It is well settled that an accused may only be convicted of a crime charged against him in the information or those necessarily included therein.[60] The information herein charging STATUTORY RAPE could not be validly converted to a charge of CHILD-RAPE. The latter charge constitutes a greater offense punishable by death, quite distinct from statutory rape. Having been specifically arraigned on the charge of

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[59] See *Matilde, Jr. v. Jabson*, No. L-38392, 29 December 1975, 68 SCRA 456, 461.

[60] *People v. Ramos*, 357 Phil. 559, 575 (1998). An accused person cannot be convicted of an offense higher than that with which he is charged in the complaint or information on which he is tried. It matters not how conclusive and convincing the evidence of guilt may be, but an accused cannot be convicted of any offense, unless it is charged in the complaint or information on which he is tried or is necessarily included therein. He has a right to be informed of the nature of the offense with which he is charged before he is put on trial.

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STATUTORY RAPE, appellant could not after trial be held to answer for child-rape. To do so would raise infractions of due process and other guarantees in favor of appellant, particularly his right to be informed, and not misinformed, of the offense charged.

Moreover, the severity of death penalty, especially its irreversible and final nature once carried out, makes the decision-making process in capital offenses aptly subject to the most exacting rules of procedure and evidence.[61] The OSG's prayer to increase appellant's culpability to a capital offense cannot, in our view, be granted now without also fracturing our present Revised Rules of Criminal Procedure. For now, in Rule 110 made effective on December 1, 2000,[62] we find strict requirements for the State Prosecutor to observe faithfully, thus:

> Sec. 8. *Designation of the offense.* — The complaint or information shall state the designation of the offense given by the statute, aver the acts or omissions constituting the offense, and specify its qualifying and aggravating circumstances. If there is no designation of the offense, reference shall be made to the section or subsection of the statute punishing it.
>
> Sec. 9. *Cause of accusation.* — The acts or omissions complained of as constituting the offense and the qualifying and aggravating circumstances must be stated in ordinary and concise language and not necessarily in the language used in the statute but in terms sufficient to enable a person of common understanding to know what offense is being charged as well as its qualifying and aggravating circumstances and for the court to pronounce judgment.

The prosecution must avoid ambiguity, vagueness or uncertainty as to what offense is being charged. The allegation in the information states that the appellant is being charged with "the crime of STATUTORY RAPE, under Art. 335, Par. 3 of the Revised Penal Code." Mention of its "relation to R.A. 7610, R.A. 7659 and R.A. 8313 it being a heinous offense . . ." need

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[61] *People v. Invencion y Soriano,* G.R. No. 131636, 5 March 2003, p. 12.

[62] *People v. Iluis*, G.R. No. 145995, 20 March 2003, pp. 16–17.

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not confuse us. It should not now appear that alternative offenses are charged, which could void the information. To forestall that eventuality, the charge should be read as referring to statutory rape and no other kind. Given that charge, we agree with the trial court's imposition of *reclusion perpetua* as the appropriate penalty on appellant. Prudence counsels us to avoid pronouncing a sentence of death where law and the evidence do not clearly and indubitably call for it.

As to damages, civil indemnity of ₱50,000 and moral damages in the amount of ₱50,000 are also properly awarded in favor of private complainant, on the ground that victims of rape suffer psychological and moral injuries sufficient to justify the award, without necessity of further proof.[63]

WHEREFORE, the assailed decision of the Regional Trial Court of Davao City, Branch 17, is *AFFIRMED*. Appellant *ROBERTO TAMPOS Y AGUSTIN* is declared *GUILTY* of statutory rape, and he is sentenced to *RECLUSION PERPETUA* with all its accessory penalties. The appellant is likewise ordered to pay private complainant, Happylen Ortega, the sum of *FIFTY THOUSAND PESOS* (₱50,000.00) as civil indemnity and another *FIFTY THOUSAND PESOS* (₱50,000.00) as moral damages, together with the costs.

SO ORDERED.

Bellosillo (Chairman), Austria-Martinez, Callejo, Sr., and *Tinga, JJ.,* concur.

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[63] See *People v. Prades*, 355 Phil. 150, 170 (1998).