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SECOND DIVISION

[G.R. Nos. 137278-79. February 17, 2003]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **FRIVALDO BESMONTE y LORENO and SONNY APUYAN *y* MORIN,** *accused-appellants.*

SYNOPSIS

Each of the accused-appellants herein was charged with rape. The young victim is related to the appellants. Apuyan is the brother of the victim's mother, while Besmonte is the second husband of her maternal grandmother. At the time she was raped, the victim was only 15 years old. The two rape cases were consolidated and jointly tried. After trial, the court found herein appellants guilty of rape and sentenced each of them to suffer the penalty of *reclusion perpetua.*

The Supreme Court found each of the appellants herein guilty of one count of rape and affirmed the imposition of *reclusion perpetua* upon them. The victim positively identified appellants in open court as her ravishers without any hesitation. According to the Court, the testimony of a rape victim, if credible, suffices to convict appellants herein. In both cases, the victim credibly testified on the details of her harrowing experiences and positively identified the appellants as the persons who raped her. The evidence for the prosecution has established beyond reasonable doubt the elements of carnal knowledge and force or intimidation.

SYLLABUS

1. CRIMINAL LAW; RAPE; LUST IS NO RESPECTER OF TIME AND PLACE; APPLICATION IN CASE AT BAR.— The presence of people nearby is no guarantee that rape will not be committed, for lust is no respecter of time and place. Rape has been committed in places where people congregate, like parks or school premises and even in a house where there are other occupants. There is no rule or norm that a woman can only be raped in seclusion. It has been committed in a room adjacent to where other members of the family stay or in a room,

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which the victim shared with others. We have more than once observed that rape could take place in the same room where other members of the family were sleeping. In the instant cases, both rapes complained of were committed in the middle of the night. It is of judicial notice that it is at this time when children are in deep slumber and could not be easily awakened. The fact that Melanie's siblings were not awakened at the times she was ravished is not improbable.

2. ID.; ID.; FORCE AND INTIMIDATION; PRESENT IN CASE AT BAR.— Rape is committed when a man has carnal knowledge of a victim with the use of force and intimidation. In both cases, Melanie credibly testified on the details of her harrowing experiences and positively identified the appellants as the persons who raped her. The evidence for the prosecution has established beyond reasonable doubt the elements of carnal knowledge and force or intimidation.

3. REMEDIAL LAW; EVIDENCE; TESTIMONY OF RAPE VICTIM; SUFFICES TO CONVICT WHEN TESTIMONY IS CREDIBLE; APPLICATION IN CASE AT BAR.— She positively identified appellants in open court as her ravishers without any hesitation. Indeed, where the accusing words come from a girl of tender years and they are directed against her own relatives, they are difficult to disbelieve. We further note that Melanie broke out in tears while testifying. The crying of a victim during her testimony is evidence of the truth of the rape charges, for the display of such emotion indicates the pain that the victim feels when asked to recount her traumatic experience. Melanie testified in a categorical, straightforward, and frank manner, and she remained consistent under cross-examination. The inescapable conclusion is that she is a credible witness. The sole testimony of a rape victim, if credible, suffices to convict.

4. ID.; ID.; ID.; SOUND OF THE VOICE OF A PERSON AS AN ACCEPTABLE MEANS OF IDENTIFICATION; PRESENT IN CASE AT BAR.— The victim did not solely rely upon her sense of smell in identifying her ravisher. She emphatically declared in open court that she also recognized Besmonte from his voice when he uttered threatening words to her in the dark. It is highly inconceivable that complainant would not recognize Besmonte's voice, having lived with him for quite some time. The sound of the voice of a person is an acceptable means of

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identification where it is established that the witness and the accused knew each other personally and closely for a number of years.

5. **ID.; ID.; ALIBI, AS A DEFENSE; ACCUSED MUST PROVE THAT HE WAS SOMEWHERE ELSE WHEN THE CRIME WAS COMMITTED AND DEMONSTRATE PHYSICAL IMPOSSIBILITY OF HIS PRESENCE AT THE *LOCUS CRIMINIS*.**— For alibi to prosper, appellant must not only prove that he was somewhere else when the crime was committed, he must also convincingly demonstrate the physical impossibility of his presence at the *locus criminis* at the time of the incident. In Besmonte's case, it was not physically impossible for Besmonte to have been at the crime scene at the time the rape was committed, in view of the trial court's observation that: It is of judicial notice that the *poblacion* of Magallanes can be reached thru a jeep, which is the means of transportation from the town of Sorsogon for about one (1) hour only. Accused did not even present the person he resides with while in Sorsogon. That Besmonte's wife corroborated his alibi is no moment. No other witness unrelated to appellant Besmonte was presented to corroborate his claim. Alibi cannot prosper if it is established mainly by the accused and his relatives, and not by credible persons. This is because alibi is easy to contrive and difficult to disprove.

6. **ID.; CRIMINAL PROCEDURE; QUALIFYING OR AGGRAVATING CIRCUMSTANCES MUST FIRST BE SPECIFICALLY ALLEGED IN THE INFORMATION; SIGNIFICANCE THEREOF IN THE DETERMINATION OF PROPER PENALTY.**— Under Sections 8 and 9 Rule 110 of the 2000 Revised Rules of Criminal Procedure, a qualifying or aggravating circumstance must first be specifically alleged in the information and then duly proved during the trial. Otherwise, even if proved, such a circumstance cannot be appreciated in determining the proper penalty. In Criminal Case No. 95-3919, the relationship between Apuyan and his victim was not alleged in the information. Hence, for purposes of determining the penalty to be imposed, the relationship even if proved during the trial, should not be considered as a generic aggravating circumstance. The 2000 Revised Rules of Criminal Procedure, providing that aggravating circumstances, whether ordinary or qualifying, must be so stated in the complaint or information, applies to the cases against

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appellants under the principle of retroactivity of procedural law because the rules favor the accused. Since no aggravating circumstance could be appreciated in the commission of rape in Criminal Case No. 95-3919, the trial court did not err in applying Article 63 (2) of the Revised Penal Code by imposing on appellant Apuyan only the penalty of *reclusion perpetua.*

APPEARANCES OF COUNSEL

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

D E C I S I O N

QUISUMBING, *J.*:

On appeal is the consolidated judgment[1] of the Regional Trial Court of Sorsogon, Sorsogon, Branch 52, dated September 7, 1998, in Criminal Cases Nos. 95-3918-19, finding herein appellants Frivaldo Besmonte *y* Loreno and Sonny Apuyan y Morin guilty of rape and sentencing them to suffer the penalty of *reclusion perpetua.*

The young victim in these cases, Melanie A. Gozmo,[2] is related to the appellants. Apuyan is the brother of her mother, while Besmonte is the second husband of Melanie's maternal grandmother. She was staying at the house of the appellant Apuyan, where appellant Besmonte likewise resided, at the time of the rapes complained of.

On June 6, 1995, the Office of the Provincial Prosecutor for Sorsogon filed an information for rape against appellant Besmonte. Docketed as Criminal Case No. 95-3918, the accusatory portion of the charge sheet read as follows:

That on or about the 15th day of December, 1994, at about 12:00 o'clock noon at Barangay Hubo, Municipality of Magallanes, Province of Sorsogon, Philippines, and within the jurisdiction of this Honorable

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[1] Records, Crim. Case No. 95-3918, pp. 131-135.

[2] Also referred to as "Melany" or "Lanie" in the records.

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Court, the above-named accused, armed with a bladed instrument, with lewd designs and by means of force, violence and/or intimidation, did then and there, willfully, unlawfully and feloniously have carnal knowledge of one Melanie A. Gozmo, a 15 year old minor, against her will and consent, to the damage and prejudice of the latter.

CONTRARY TO LAW.[3]

That same day, another information for the same offense was filed against appellant Apuyan. Docketed as Criminal Case No. 95-3919, it averred:

That on or about the 31st day of May 1994 at about 12:00 o'clock midnight and for several occasions and dates thereafter, at barangay Hubo, Municipality of Magallanes, Province of Sorsogon, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with a knife, with lewd designs and by means of force, violence and/or intimidation, did then and there, willfully, unlawfully, and feloniously have carnal knowledge of one Melanie A. Gozmo, a 15 year old minor, against her will and consent, to the damage and prejudice of the latter.

CONTRARY TO LAW.[4]

On July 27, 1995, appellant Besmonte was arraigned in Criminal Case No. 95-3918 and with assistance of counsel, pleaded not guilty to the charge.

Appellant Apuyan was, in turn, arraigned on September 25, 1995 and duly assisted by counsel *de oficio*, likewise entered a plea of not guilty.

The two cases were then consolidated and jointly tried.

The prosecution presented two witnesses: Agnes Hinanay, a paternal first cousin of the victim, and the private complainant, Melanie A. Gozmo.

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[3] *Supra* note 1 at 30.

[4] Records, Crim. Case No. 95-3919, p. 30.

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Agnes Hinanay testified that on April 17, 1995, she paid the victim a visit at appellant Apuyan's house in Hubo, Magallanes, Sorsogon.[5] Agnes noticed that private complainant was pregnant.[6] When Agnes asked Melanie about her pregnancy, the latter revealed that she was raped by appellant Apuyan on May 31, 1994 and on several other occasions thereafter.[7] Melanie further disclosed to her that on December 15, 1994, appellant Besmonte also raped her.[8]

After learning about the rapes, Agnes then took Melanie and her siblings to live with her at Binisitihan Norte, Magallanes, Sorsogon.[9]

On April 17, 1995, Agnes reported the rape of Melanie at the Magallanes Police Station where she executed a sworn statement.[10]

Agnes likewise brought the victim to a doctor where an examination confirmed that she was pregnant.[11] The victim gave birth to a baby boy in 1995.[12]

Private complainant testified that after the death of her father in 1992, she was brought by her mother to Hubo, Magallanes, Sorsogon to live in the house of her uncle, appellant Apuyan.[13] At about midnight of May 31, 1994, while complainant was sleeping in said house, Apuyan undressed her and placed himself on top of her.[14] She was awakened and found herself in the nude. She tried to resist appellant but she was overpowered when he poked a knife at her neck.[15] Appellant then thrust his phallus into her

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[5] TSN, July 23, 1996, p. 14.

[6] *Id.* at 14.

[7] *Id.* at 9-10.

[8] *Ibid.*

[9] *Id.* at 10-11.

[10] Exh. "A" and sub-markings, Records, Crim. Case No. 95-3919, p. 4.

[11] TSN, July 23, 1996, p. 11.

[12] *Id.* at 11-12.

[13] TSN, September 24, 1996, p. 14.

[14] *Id.* at 9.

[15] *Id.* at 24.

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vagina[16] and "let it in and let it out."[17] Melanie felt pain and her private parts bled as a result.[18] After, Apuyan had satiated his libidinous desires, he warned her not to tell anybody about the incident, as otherwise, he would kill her and her siblings.[19]

Melanie also claimed that on the night of December 15, 1994, while she was sleeping at Apuyan's house, her grandmother's husband, Besmonte, placed himself on top of her and inserted his penis inside her vagina.[20] She was not able to resist as Besmonte threatened to kill her and her siblings, if she would report the matter.[21] Although it was dark, she was able to recognize Besmonte by his voice and underarm odor.[22]

Despite the threats, Melanie reported the incidents to her mother and her grandmother. The mother did nothing while the grandmother struck her with a piece of bamboo and told her not to make any fuss lest the matter reach the *barrio* folks of Hubo, Magallanes.[23] Melanie then revealed her plight to her cousin, prosecution witness Agnes Hinanay, and her aunt, Elsa Mirandilla.[24] The two took her and her siblings away from the house of appellant Apuyan, reported the matter to the police, and had her examined by a doctor who advised her that she was pregnant. She delivered a boy on August 25, 1995.[25] At the time she was raped, Melanie was only 15 years old.[26]

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[16] *Id.* at 7.

[17] *Id.* at 8.

[18] *Ibid.*

[19] *Ibid.*

[20] *Id.* at 11-12.

[21] *Id.* at 12.

[22] *Id.* at 31.

[23] *Id.* at 15-16, 18.

[24] *Id.* at 16.

[25] Exh. "B" and sub-markings, Records, Crim. Case No. 95-3918, p. 88; See TSN, July 23, 1996, p. 11; TSN, September 24, 1996, pp. 19-20.

[26] Exh. "C" and sub-markings, Records, Crim. Case No. 95-3918, p. 89, TSN, July 23, 1996, pp. 17-18.

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Appellants raised the defenses of denial and alibi.

In his defense, appellant Apuyan testified that on May 31, 1994, he was in the *barangay* proper of Hubo, Magallanes having a drinking spree with his friends Rowan Perdigon, Ryan de los Santos, and Noel de los Santos.[27] They started drinking gin from four o'clock in the afternoon to ten o'clock in the evening.[28] They consumed a dozen bottles of gin. He then staggered home and upon reaching his house, he fell into a drunken sleep.[29] He only woke up the following morning. At that time, there were 13 persons inside his house, which had two rooms.[30] He slept alone while the rest slept side by side.[31] He denied raping Melanie. He likewise denied executing a counter-affidavit which stated that he was ready to marry Melanie as she was carrying his child.[32]

For his part, appellant Besmonte declared that he could not have raped Melanie on December 15, 1994 since on that date he was in Sorsogon, Sorsogon buying bamboo to be used in the mussel farm (*tahungan*) of a certain Zaldy.[33] He worked at said mussel farm from May 30, 1994 to January 1, 1995.[34] It was only on the latter date that he found time to return to Hubo, Magallanes and he stayed there only for three days. Afterwards, he returned to Sorsogon, Sorsogon. Besmonte could not think of any reason why the victim should charge him with rape.[35] He said he treated her like his own child and even sent her to school.[36] He was also unaware of any bad blood between him and Agnes Hinanay.[37]

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[27] TSN, August 13, 1997, p. 3.

[28] *Ibid.*

[29] *Id.* at 4.

[30] *Id.* at 6-7.

[31] *Id.* at 7.

[32] *Id.* at 22, 25.

[33] TSN, June 18, 1997, p. 3.

[34] *Ibid.*

[35] *Id.* at 11.

[36] *Id.* at 10.

[37] *Id.* at 14.

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To corroborate appellant Besmonte's alibi his wife, Rosalina Apuyan, testified that from May 1994 to December 1994, he was in Sorsogon, Sorsogon.[38] It was only on January 1995 that he visited them.[39] According to Rosalina, her granddaughter, Melanie, could not have been raped given the circumstance that she slept side by side with several persons. There were 12 persons who called Apuyan's house their home. Melanie slept close to the room of the Besmontes, according to Rosalina. She could see Melanie from their room, if any of the appellants approached her at night,[40] said the witness.

On September 7, 1998, the trial court promulgated its consolidated decision, thus:

> WHEREFORE, premises considered, the Court finds accused Frivaldo Besmonte *y* Loreno in Criminal Case No. 95-3918 and Sonny Apuyan *y* Morin in Criminal Case No. 95-3919 guilty beyond reasonable doubt of the crime of Rape under Art. 335 [of the Revised Penal Code] and hereby sentences each of them [to] the penalty of *RECLUSION PERPETUA* and to pay the sum of ₱50,000.00 each as civil indemnity and ₱10,000.00 as moral damages to the complainant without subsidiary imprisonment in case of insolvency and to pay the cost.
>
> In the service of their sentence, they shall be credited with the full period of their confinement pursuant to law.
>
> SO ORDERED.[41]

Before us, appellants now appeal their conviction, imputing to the trial court the following errors:

I

THE TRIAL COURT ERRED IN RELYING HEAVILY ON THE INCREDIBLE TESTIMONY OF PRIVATE COMPLAINANT MELANIE GOZMO.

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[38] TSN, November 4, 1997, p. 2.

[39] *Ibid.*

[40] *Id.* at 4.

[41] *Rollo*, p. 26.

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II

THE TRIAL COURT ERRED IN NOT ACQUITTING THE ACCUSED-APPELLANTS ON THE GROUND THAT HIS (sic) GUILT WAS NOT PROVED BEYOND REASONABLE DOUBT.

III

THE TRIAL COURT GRAVELY ERRED IN CONVICTING ACCUSED-APPELLANT FRIVALDO BESMONTE DESPITE THE FACT THAT HE WAS NOT SUFFICIENTLY IDENTIFIED.[42]

In sum, we find the issues to be: (1) the credibility of complaining witness; (2) the sufficiency of the prosecution's evidence; and (3) the identification of appellant Besmonte as one of the rapists.

Appellants submit that the first and second issues are interrelated, hence jointly discussed.

On the *first and second issues*, appellants assail Melanie's testimony as unworthy of belief and hence, a flimsy ground for their conviction. In describing private complainant's testimony as "incredible," they ask us to note the fact that both times when she was allegedly raped, complainant was lying beside and very close to her siblings. Yet neither her brother nor her sister was awakened. Appellants assert that this is very much contrary to common knowledge and human experience. Appellants argue that it is difficult to believe that appellants raped her at times when almost all members of the family were present in the house.

For the appellee, the Office of the Solicitor General (OSG) points out jurisprudence has recognized that rape can take place in circumstances of crowding similar to that of the instant cases. Appellants cannot exonerate themselves by claiming that the crimes charged could not possibly take place since there were several other persons present inside the house. Precedents abound undermining appellants' contention.

The presence of people nearby is no guarantee that rape will not be committed, for lust is no respecter of time and place.[43]

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[42] *Id.* at 63.

[43] See *People v. Rodavia*, G.R. Nos. 133008-24, February 6, 2002, p. 17, citing *People v. Losano*, 310 SCRA 707, 722-723 (1999).

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Rape has been committed in places where people congregate, like parks or school premises and even in a house where there are other occupants.[44] There is no rule or norm that a woman can only be raped in seclusion.[45] It has been committed in a room adjacent to where other members of the family stay or in a room, which the victim shared with others.[46] We have more than once observed that rape could take place in the same room where other members of the family were sleeping.[47] In the instant cases, both rapes complained of were committed in the middle of the night. It is of judicial notice that it is at this time when children are in deep slumber and could not be easily awakened.[48] The fact that Melanie's siblings were not awakened at the times she was ravished is not improbable. Hence, appellants' thesis that it was impossible for them to have committed the rape in the presence of private complainant's siblings who were sleeping next to her deserves scant consideration.

Appellants ask us to discredit private complainant's testimony because she was inconsistent in her account. They point out that when she testified as to how Apuyan raped her at knifepoint, she initially claimed that he poked a knife at her neck using her right hand, while his left hand was cupped over her mouth. When grilled further, she changed her statement and said that he propped himself up on the mat with his right hand. Moreover, they say complainant had a poor memory and could hardly remember her birthday. Hence, they conclude that the trial

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[44] *People v. Sanchez*, G.R. No. 124393, January 31, 2002, p. 12, citing *People v. Alitagtag*, 368 Phil. 637, 650 (1999).

[45] *People v. Tagud, Sr.*, G.R. No. 140733, January 30, 2002, p. 16, citing *People v. Gonzales*, 338 SCRA 678, 689 (2000).

[46] *People v. Abala*, G.R. Nos. 135858-61, July 23, 2002, p. 19, citing *People v. Abella*, 315 SCRA 36, 43 (1999).

[47] *People v. Estomaca*, G.R. Nos. 134288-89, January 15, 2002, p. 12, citing *People v. Castillo*, 335 SCRA 100, 110 (2000) and *People v. Ramos*, 296 SCRA 559, 571 (1999).

[48] *People v. Ponsica*, G.R. Nos. 137661-63, July 4, 2002, p. 13, citing *People v. Balmoria,* 344 SCRA 723, 728 (2000).

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court should have taken great caution in giving credence to her testimony.

The OSG counters that the alleged inconsistency is minor or trivial. It pertains only to peripheral matters. Hence, it cannot impair private complainant's credibility as a witness.

In ruling upon Melanie's credibility, the trial court found her testimony to be "forthright, clear, and free from serious contradictions."[49] The trial court's assessment of complainant's credibility, considering that it had the advantage of observing her demeanor as she testified, is not easily discarded. The trial court judge is in the best position to determine the truthfulness of the complainant's testimony. Unless it is shown that the trial court overlooked, misunderstood, or misapplied some fact or circumstance of weight or substance that would otherwise affect the result of the case, its findings will not be disturbed on appeal.[50] We find no compelling reason now to depart from said rule. We have carefully read the victim's testimony and find that the discrepancy harped upon by appellants focused more on her account of events immediately preceding the rape by Apuyan. They did not zero in on her narration of the crime itself. Complainant's testimony may not be flawless, but its substance, veracity, and weight were unaffected by the triviality of the alleged inconsistency.

What is material here is Melanie's testimony on how she was sexually abused. She positively identified appellants in open court as her ravishers without any hesitation. Indeed, where the accusing words come from a girl of tender years and they are directed against her own relatives, they are difficult to disbelieve. We further note that Melanie broke out in tears while testifying.[51] The crying of a victim during her testimony

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[49] *Rollo*, p. 25.

[50] *People v. Dela Cruz*, G.R. Nos. 135554-56, June 21, 2002, p. 19, citing *People v. Yaoto*, G.R. Nos. 136317-18, November 22, 2001, p. 10, *People v. Rebato*, G.R. No. 139552, May 24, 2001, p. 6, and *People v. Saladino*, 353 SCRA 819, 826 (2001).

[51] See TSN, September 24, 1996, p. 7.

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is evidence of the truth of the rape charges, for the display of such emotion indicates the pain that the victim feels when asked to recount her traumatic experience.[52] Melanie testified in a categorical, straightforward, and frank manner, and she remained consistent under cross-examination. The inescapable conclusion is that she is a credible witness. The sole testimony of a rape victim, if credible, suffices to convict.[53]

On the *third issue*, appellant Besmonte argues that his identification by complaining witness as her rapist on December 15, 1994 is doubtful and cannot serve as the basis of his conviction, as it was undisputed that the room where he supposedly raped Melanie had no illumination. Hence, assuming *arguendo*, that she was indeed raped, it was improbable for her to positively identify him as her assailant given the total darkness of the surroundings. She only presumed that it was him on account of his underarm odor. Besmonte contends that it would be unjust to conclude that he was the real culprit on account of his underarm odor. After all, he is not the only person with that smell.

The OSG, however, points out that private complainant was able to identify Besmonte not just from his underarm smell but also from his voice. She was familiar with both, as the two of them had been living in the same house for at least four years prior to her rape by Besmonte. Her identification of Besmonte must be deemed both sufficient and indubitable, said the OSG.

Appellant Besmonte's bid for exoneration on the theory of doubtful identification, in our view, is an exercise in futility. The absence of illumination in the place of the commission of the crime does not detract from the positive identification by Melanie of Besmonte as her ravisher. Although visibility is an

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[52] *People v. Manlod*, G.R. Nos. 142901-02, July 23, 2002, p. 11, citing *People v. Quilatan*, 341 SCRA 247, 253 (2000) and *People v. Villanos*, 337 SCRA 78, 87 (2000); See also *People v. Sancha*, 324 SCRA 646, 663 (2000).

[53] *People v. Capili*, G.R. No. 142747, March 12, 2002, p. 8, citing *People v. Cura*, 240 SCRA 234, 243 (1995).

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important factor in the identification of a felon, its relative significance depends largely on the attending circumstances and the discretion of the trial court.[54] We have held that the sense of smell, in the right circumstances, might be a reliable mode of identification, but it could also prove to be tenuous if it were the sole source of identification under circumstances that leave much room for other probabilities to contend with.[55] In the case against Besmonte, there is not much room to doubt the positive identification on account of the victim's olfactory faculties.

The prosecution's case against Besmonte is founded on Melanie's familiarity with him. If she was not at all familiar with appellant Besmonte, the prosecution's whole case against him collapses, for such familiarity was its very foundation. In the instant case, it was not disputed that Melanie had lived in the same house with Besmonte for almost four years prior to the incident. In fact, Besmonte himself testified that he had treated her like a daughter and was even responsible for her schooling.[56] Thus, the basis for her identification was her long familiarity with Besmonte. She pointed to him because she knew him well prior to the sexual assault. Melanie was familiar with his body smell. No doubt she could perceive and recognize that smell at the time of sexual contact. At that time, private complainant was as close to Besmonte as was physically possible, for a man and a woman could not be physically closer to each other than during a sexual act.[57] Moreover, the victim did not solely rely upon her sense of smell in identifying her ravisher. She emphatically declared in open court that she also recognized Besmonte from his voice[58] when he uttered threatening words

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[54] *People v. Cambi*, 333 SCRA 305, 313-314 (2000), citing *People v. Mendoza*, 254 SCRA 61, 74 (1996).

[55] *People v. Pajarillo*, G.R. Nos. 143755-58, February 20, 2002, p. 13.

[56] TSN, June 18, 1997, p. 10.

[57] *People v. Diopita*, 346 SCRA 794, 801 (2000), citing *People v. Castañeda*, 252 SCRA 247, 255 (1996).

[58] TSN, September 24, 1996, pp. 33–34.

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to her in the dark. It is highly inconceivable that complainant would not recognize Besmonte's voice, having lived with him for quite some time. The sound of the voice of a person is an acceptable means of identification where it is established that the witness and the accused knew each other personally and closely for a number of years.[59]

We find no reason to doubt the accuracy of the identification of the malefactor based on auditory and olfactory perception by the victim on December 15, 1994. Under the circumstances, Melanie was able to perceive who her rapist was and to make known that perception. Nor is there any reason to doubt her sincerity to tell the truth, for there is no showing at all by the defense that she charged Besmonte with rape due to an evil or corrupt motive.

In sum, the defense of denial and alibi interposed by appellants cannot prevail over their positive identification by the victim. It is a time-honored principle that the positive and categorical assertions of a witness generally prevail over bare denials.[60] In the case against Apuyan, greater probative value and evidentiary weight must be accorded to Melanie's unwavering and categorical identification of appellant Apuyan as one of her tormentors over this appellant's feeble, self-serving, and uncorroborated denial. Affirmative testimony from a credible witness is stronger and more trustworthy than a bare negative testimony.[61]

Equally unmeritorious is appellant Besmonte's alibi that he could not have raped Melanie because he was in Sorsogon, Sorsogon from May 1994 to January 1995. For alibi to prosper, appellant

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[59] *People v. Oranza*, G.R. No. 127748, July 25, 2002, p. 8, citing *People v. Gayomma*, 315 SCRA 639, 646 (1999).

[60] *People v. Patanayan, Jr.*, G.R. Nos. 141189-141202, July 23, 2002, p. 24, citing *People v. Gonzales, Jr.*, G.R. Nos. 143143-44, January 15, 2002, p. 22.

[61] See *People v. Dela Torre*, G.R. No. 98431, January 15, 2002, pp. 13–14. See also *People v. Sagun*, 303 SCRA 382, 392 (1999), *People v. Vaynaco*, 305 SCRA 93, 102 (1999), *People v. Quiñanola*, 306 SCRA 710, 731 (1999), and *People v. Antonio*, 303 SCRA 414 (1999).

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must not only prove that he was somewhere else when the crime was committed, he must also convincingly demonstrate the physical impossibility of his presence at the *locus criminis* at the time of the incident.[62] In Besmonte's case, it was not physically impossible for Besmonte to have been at the crime scene at the time the rape was committed, in view of the trial court's observation that:

> It is of judicial notice that the *poblacion* of Magallanes can be reached thru a jeep, which is the means of transportation from the town of Sorsogon for about one (1) hour only. Accused did not even present the person he resides with while in Sorsogon.[63]

That Besmonte's wife corroborated his alibi is no moment. No other witness unrelated to appellant Besmonte was presented to corroborate his claim. Alibi cannot prosper if it is established mainly by the accused and his relatives, and not by credible persons.[64] This is because alibi is easy to contrive and difficult to disprove.[65]

Rape is committed when a man has carnal knowledge of a victim with the use of force and intimidation.[66] In both cases, Melanie credibly testified on the details of her harrowing experiences and positively identified the appellants as the persons who raped her. The evidence for the prosecution has established

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[62] *People v. Lachica*, G.R. No. 143677, May 9, 2002, pp. 17-18, citing *People v. Hofileña*, 334 SCRA 214, 227 (2000), *People v. Legaspi*, 331 SCRA 95, 113 (2000), *People v. Llanes*, 324 SCRA 727, 746 (2000), *People v. Rendoque*, 322 SCRA 622, 636 (2000), *People v. Pontilar, Jr.*, 275 SCRA 338, 351 (1997), and *People v. Barera*, 262 SCRA 63, 79 (1996).

[63] *Rollo*, p. 25.

[64] *People v. Vallejo*, G.R. No. 144656, May 9, 2002, p. 30, citing *People v. Rivera*, G.R. No. 139180, July 31, 2001, p. 24.

[65] *People v. Sanchez, supra*, at 12-13, citing *People v. Marfil*, 366 Phil. 181, 187 (1999).

[66] REV. PEN. CODE. Art. 335. *When and how rape is committed.* — Rape is committed by having 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.

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beyond reasonable doubt the elements of carnal knowledge and force or intimidation. Hence, we must sustain the conviction of both appellants and deny their respective appeals.

But did the trial court correctly impose the penalty of *reclusion perpetua* on appellants?

The OSG disagrees only in regard to appellant Apuyan. It recommends the imposition of the death penalty on him. The OSG argues that with the amendment of the Revised Penal Code by R.A. No. 8353,[67] rape was reclassified as a crime against persons. Under Article 266-B[68] of the Revised Penal Code, as so amended, rape is now punishable with *reclusion perpetua* to death whenever the rape is committed with the use of a deadly weapon. The OSG stresses that the qualifying circumstance of deadly weapon was proven with respect to appellant Apuyan. Moreover, according to the OSG, the relationship of Melanie with Apuyan, while not alleged in the information, was nonetheless proven during the trial and now should be considered as a generic aggravating circumstance, for purposes of imposing the penalty. With the presence of the qualifying circumstance of use of a deadly weapon in the commission of the rape coupled with the generic aggravating circumstance of relationship, without any mitigating circumstance, then the proper penalty for appellant Apuyan should be death, the OSG said.

As the OSG points out, since appellant Apuyan committed the rape with the use of knife, a deadly weapon, the crime is punishable by *reclusion perpetua* to death.[69] However, the OSG's stance that the relationship between Apuyan (uncle)

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[67] Entitled "An Act Expanding the Definition of the Crime of Rape, Reclassifying the Same as a Crime Against Persons, Amending for the Purpose Act No. 3815, as amended, otherwise known as the RPC, and for Other Purposes.

[68] Art. 266-B. *Penalties*. — Rape under paragraph 1 of the next preceding article shall be punished by *reclusion perpetua*.

Whenever the rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death.

[69] See *People v. Tagaylo*, 345 SCRA 284, 294 (2000).

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and Melanie (niece) should be treated as a generic aggravating circumstance to justify imposing the death penalty is precipitate. Under Sections 8[70] and 9[71] Rule 110 of the 2000 Revised Rules of Criminal Procedure, a qualifying or aggravating circumstance must first be specifically alleged in the information and then duly proved during the trial. Otherwise, even if proved, such a circumstance cannot be appreciated in determining the proper penalty.[72]

In Criminal Case No. 95-3919, the relationship between Apuyan and his victim was not alleged in the information. Hence, for purposes of determining the penalty to be imposed, the relationship even if proved during the trial, should not be considered as a generic aggravating circumstance. The 2000 Revised Rules of Criminal Procedure, providing that aggravating circumstances, whether ordinary or qualifying, must be so stated in the complaint or information,[73] applies to the cases against appellants under the principle of retroactivity of procedural law because the rules favor the accused. Since no aggravating circumstance could be appreciated in the commission of rape in Criminal Case No. 95-3919, the trial court did not err in applying Article

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[70] 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.

[71] SEC. 9. *Cause of the 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.

[72] *People v. Soriano,* G.R. No. 135027, July 3, 2002, pp. 21-22.

[73] *People v. Lachica, supra* note 62 at 24-25.

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63 (2)[74] of the Revised Penal Code by imposing on appellant Apuyan only the penalty of *reclusion perpetua.*

Concerning damages awarded below, we find that the trial court awarded ₱50,000.00 as civil indemnity but only ₱10,000.00 as moral damages to the victim. The amount awarded as civil indemnity is sufficient but moral damages should be increased to ₱50,000.00 in accordance with current jurisprudence.[75] The award of ₱25,000.00 as exemplary damages should be sustained, by way of public example and to prevent minors from being sexually abused[76] by their elders.

WHEREFORE, the consolidated judgment of the Regional Trial Court of Sorsogon, Sorsogon, Branch 52, in Criminal Cases Nos. 95-3918 and 95-3919, finding appellants Frivaldo Besmonte Loreno and Sonny Apuyan *y* Morin guilty of one (1) count of rape each and sentencing them to suffer the penalty of *reclusion perpetua* is *AFFIRMED with MODIFICATION.* Each of the appellants is also sentenced to pay the victim, Melanie Gozmo, ₱50,000.00 as civil indemnity, ₱50,000.00 as moral damages, and ₱25,000.00 as exemplary damages, as well as the costs.

SO ORDERED.

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

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[74] Art. 63. *Rules for the application of indivisible penalties.* — In all cases in which the law prescribes a single indivisible penalty, it shall be applied by the courts regardless of any mitigating or aggravating circumstances that may have attended the commission of the deed.

In all cases in which the law prescribes a penalty composed of two indivisible penalties, the following rules shall be observed in the application thereof:

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2. When there are neither mitigating nor aggravating circumstances in the commission of the deed, the lesser penalty shall be applied.

[75] See *People v. Aparejado*, G.R. No. 139447, July 23, 2002, p. 11.

[76] *People v. Lopez*, G.R. No. 134774, April 19, 2002, p. 10.