

FIRST DIVISION

[G.R. No. 204061, February 05, 2018]

**EDMISAEAL C. LUTAP, PETITIONER, V. PEOPLE OF THE
PHILIPPINES, RESPONDENT.**

D E C I S I O N

TIJAM, J.:

Through this petition for review on *certiorari*^[1] under Rule 45, petitioner Edmisael C. Lutap seeks the reversal of the Decision^[2] dated July 10, 2012 and Resolution^[3] dated October 2, 2012 of the Court of Appeals (CA)^[4] in CA-G.R. CR No. 33630 finding petitioner guilty of attempted rape. The assailed CA Decision modified the Decision dated August 23, 2010 of the Regional Trial Court (RTC)^[5] of Quezon City, Branch 94 which, in turn, found petitioner guilty of rape by sexual assault as charged.

The Antecedents

Petitioner was charged in an Information the accusatory portion of which reads:

That on or about the 27th day of April 2004 in Quezon City, Philippines, the said accused by means of force, threats and intimidation, did then and there willfully, unlawfully and feloniously commit acts of sexual assault upon the person of [AAA],^[6] 6 year[s] of age, a minor, by then and [there] inserting his finger into complainant's genital organ against her will and without her consent, to the damage and prejudice of said offended party.

CONTRARY TO LAW.^[7]

Upon petitioner's plea of not guilty, pre-trial and trial on the merits ensued.^[8]

The prosecution presented as witnesses private complainant AAA, her younger brother BBB, her mother DDD and P/SUPT. Ruby Grace Sabino-Diangson. The evidence for the prosecution tends to establish the following facts:

At the time of the incident, AAA was only six (6) years old having been born on September 11, 1997.^[9] Petitioner, who was also known as "Egay", frequently visits the house of AAA's family, being the best friend of AAA's father. Around 6:30 o'clock in the evening of April 27, 2004, AAA and her younger siblings, BBB and CCC, were watching television in their *sala*, together with petitioner. Meanwhile, their mother DDD was cooking dinner in the kitchen separated only by a concrete wall from the *sala*.^[10]

AAA was then wearing short pants^[11] and was sitting on the floor with her legs spread apart while watching television and playing with "text cards." BBB, on the other hand, was seated on a chair beside CCC, some five steps away from AAA. Petitioner was seated on the sofa which was one foot away from AAA.^[12]

Petitioner then touched AAA's vagina.^[13] AAA reacted by swaying off his hand. ^[14]

BBB saw petitioner using his middle finger in touching AAA's vagina.^[15] Upon seeing this, BBB said "*Kuya Egay, bad iyan, wag mong kinikiliti ang pepe ni Ate.*"^[16] BBB then went to where DDD was cooking and told her that petitioner is bad because he is tickling AAA's vagina.^[17] DDD then called AAA, brought her inside the room and asked her if it were true that petitioner tickled her vagina. AAA answered, "but I swayed his hand, Mama." DDD again asked AAA how many times have petitioner tickled her vagina and AAA answered, "many times in [petitioner's] house" and that he also "let her go on the bed, remove her panty, open her legs and lick her vagina."^[18]

As such, DDD confronted petitioner and asked why he did that to AAA. Petitioner said that it was because AAA's panty was wet and that he was sorry.^[19]

The next day, or on April 28, 2004, DDD brought AAA to Camp Crame for medical examination but because the doctor was not available, AAA was examined only on April 30, 2004.^[20]

In defense, petitioner denied the accusations against him. Petitioner testified that he merely pacified AAA and BBB who were quarreling over the text cards. When petitioner separated the children, BBB then said, "*bad yan, bad.*"^[21] After which, DDD talked to her two children in the kitchen and when she came out, she asked petitioner if he touched AAA. Petitioner denied having touched AAA and suggested that AAA be examined.^[22]

The testimony of Melba Garcia, a Purok Leader, was also presented to the effect that she personally knows petitioner and that the latter enjoys a good reputation. DDD, on the other hand, was the subject of several complaints from the neighbors.^[23]

The RTC found petitioner guilty as charged. The RTC gave full credit to AAA's and BBB's candid testimonies that petitioner inserted his finger in the vagina of AAA.^[24] The RTC emphasized that BBB graphically demonstrated the act committed by petitioner by moving his middle finger constantly. To prove its point, the RTC cited the following excerpt from BBB's testimony:

COURT: I want to clarify. What was the finger doing?

WITNESS: Pinaano po sa ano ni Ate.

COURT: Ideretso muna. Pinaano ang ano.

WITNESS: Inilulusot po niya.

COURT: Sa ano?

WITNESS: Dito po.

COURT: Ang ano?

WITNESS: Sa ano ni Ate, dito po.

ACP Ano tawag diyan? Huwag kang mahiya, sabihin mo.

VILLALON:

WITNESS: Pepets po. xxx^[25]

As such, the RTC disposed:

WHEREFORE, finding accused EDMISAE LUTAP y CUSPAO GUILTY beyond reasonable doubt of the crime of Rape under Article 266-A paragraph 2 in relation to Article 266-B of the Revised Penal Code, taking into consideration the aggravating circumstance that the victim was only six (6) years old at the time of the commission of the offense, he is hereby sentenced to an indeterminate penalty of SIX (6) YEARS and ONE (1) DAY of PRISION MAYOR as minimum to TWELVE YEARS (12) YEARS and ONE (1) DAY of RECLUSION TEMPORAL as maximum and to pay the cost.

Accused is further ordered to pay private complainant [AAA] civil indemnity of P50,000.00, moral damages of P50,000.00 and exemplary damages of P25,000.00.

SO ORDERED.^[26]

From this adverse decision, petitioner appealed.

The Ruling of the CA

Revisiting the testimonies of AAA and BBB, the CA found that there was no insertion of petitioner's finger into AAA's vagina as it was merely slightly touched^[27] or touched without too much pressure by petitioner.^[28] The CA went on to conclude that since petitioner's finger merely touched AAA's vagina and that there was no penetration, petitioner can only be held liable for attempted rape.

The CA thus disposed:

WHEREFORE, premises considered, the assailed August 23, 2010 Decision of the Regional Trial Court of Quezon City, Branch 94, is hereby **MODIFIED**. Accused-appellant Edmisael Lutap y Cuspao is found **GUILTY of Attempted Rape**, and is **SENTENCED** to suffer the indeterminate imprisonment of SIX (6) MONTHS of arresto mayor, as minimum, to FOUR (4) YEARS and TWO (2) MONTHS of prision correccional medium, as maximum.

Also, the accused-appellant is ordered to indemnify the victim in the sum of P30,000.00 as civil indemnity, P25,000.00 as moral damages and P10,000.00 as exemplary damages, and to pay the costs.

SO ORDERED.^[29]

Petitioner's motion for reconsideration was similarly denied by the CA. Hence, the instant recourse.

The Issue

Petitioner questions the CA's finding that the crime of attempted rape was committed considering that there is absolutely no showing in this case that petitioner's sexual organ had ever touched the victim's vagina nor any part of her body.^[30] Petitioner likewise argues that there is no clear, competent, convincing and

positive evidence that petitioner touched the vagina of the victim with the intention of forcefully inserting his finger inside. Petitioner directs the Court's attention to the fact that at the time of the alleged incident, AAA was well clothed, her vagina fully covered as she was then wearing a panty and a short pants.^[31]

Thus, the core issue tendered in this petition is whether or not the CA erred in convicting petitioner for the crime of attempted rape on the basis of the evidence thus presented.

Our Ruling

The petition is partly meritorious.

We agree with the CA's ruling that the fact of insertion of petitioner's finger into AAA's sexual organ was not established beyond reasonable doubt to support petitioner's conviction of rape by sexual assault. We also agree with the CA that there was sexual molestation by petitioner's established act of touching AAA's vagina. Be that as it may, the act of touching a female's sexual organ, standing alone, is not equivalent to rape, not even an attempted one.^[32] At most, therefore, petitioner's act of touching AAA's sexual organ demonstrates his guilt for the crime of acts of lasciviousness, an offense subsumed in the charge of rape by sexual assault.^[33]

Rape, under Article 266-A of the Revised Penal Code, as amended by Republic Act No. 8353 or the "Anti-Rape Law of 1997" can be committed in two ways: Article 266-A paragraph 1^[34] refers to rape through sexual intercourse, the central element of which is carnal knowledge which must be proven beyond reasonable doubt; and Article 266-A paragraph 2^[35] refers to rape by sexual assault which must be attended by any of the circumstances enumerated in sub-paragraphs (a) to (d) of paragraph 1.^[36]

The direct examination of AAA and BBB, as well as the clarificatory questions interposed by the RTC, while convincingly prove that there was malicious touching of AAA's sexual organ, nevertheless invite doubts as to whether petitioner indeed inserted his finger inside AAA's vagina.

On point is the direct examination of AAA yielding the following:

Q: While you were playing text, what happened, if any?

A: **Tito Egay touched my vagina.**

Q: What were you wearing during that time?

A: Shorts, ma'am.

Q: **Where did he touch you?**

A: **My vagina, ma'am.**

Q: Did you say anything when your Tito Egay touched your vagina?

A: I swayed off his hands.^[37] (Emphasis supplied)

That the act done by petitioner was mere "touching" of AAA's sexual organ was further corroborated by BBB whose testimony is as follows:

Q On that particular day, April 27, 2004, you saw the accused and your Ate AAA. What did you see?

A Ginaganyan po.

COURT

The witness is demonstrating by moving his middle finger.

Q According to you, you demonstrated by moving your middle finger constantly. Who was the once [sic] doing that?

A Him, ma'am.

COURT INTERPRETER

Witness pointing to the accused.

COURT

I want to clarify. What was that finger doing?

WITNESS

Pinaano po sa ano ni Ate.

COURT

Ideretso muna [sic]. Pinaano ang ano.

WITNESS

Inilulusot po niya.

COURT

Sa ano?

WITNESS

Dito po.

COURT

Ang ano?

WITNESS

Sa ano ni Ate, dito po.

ACP VILLALON

Anong tawag diyan?

COURT

Huwag kang mahiya, sabihin mo.

WITNESS

Pepets po.

ACP VILLALON

Pinapasok.

ATTY. TOPACIO

He did not say pinapasok.

COURT

Ginagalaw.

ACP VILLALON

Ginaganun?

WITNESS

Opo.

COURT

Interpret the answer. Pepets is vagina.

ACP VILLALON

Iyung ginaganun, your honor.

COURT

Touching.

WITNESS (Court Interpreter's interpretation)

The accused was touching by his middle finger the vagina of my sister.

x x x