

## THIRD DIVISION

[ G.R. No. 144976, March 11, 2004 ]

**PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOEL ALIBUYOG Y BULALA, APPELLANT.**

### DECISION

**CARPIO MORALES, J.:**

Appellant Joel Alibuyog y Bulala prays that he be declared guilty of only attempted rape<sup>[1]</sup> in his appeal from the Decision<sup>[2]</sup> of Branch 17 of the Regional Trial Court of Davao City in Criminal Case No. 43083-99 finding him guilty of consummated rape.

The Information<sup>[3]</sup> dated May 7, 1999 charged appellant as follows:

That on or about May 5, 1999, in the City of Davao, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, willfully, unlawfully and feloniously have carnal knowledge or sexual intercourse with JOCEL D. MADELOSO, who is a minor of seven (7) years of age, against her will.

After pleading not guilty,<sup>[4]</sup> appellant waived pre-trial, his counsel manifesting that he would neither plead guilty to a lesser offense nor enter into any stipulation.<sup>[5]</sup>

From the evidence for the prosecution consisting of, among other things, the testimonies of Jocel Madeloso (the victim), her mother Juveniana Madeloso (Juveniana),<sup>[6]</sup> Dr. Samuel Cruz, who physically examined the victim the day following the incident subject of the case, the victim's aunt-neighbor Emelina Albaraccin (Emelina), and SPO1 Leonilo Jackain, the following have been established:

On the night of May 5, 1999, while Juveniana was attending a birthday party at a neighbor's house, her daughter - the then 7-year old victim,<sup>[7]</sup> accompanied by two other children and herein appellant, sought permission from her to go bicycle riding with her companions. Juveniana assented to the request.<sup>[8]</sup>

The victim, together with her companions, thereupon proceeded as planned. While she and appellant were on board a bicycle cruising along Ferriols St. in Toril, Davao City, appellant brought her to a dark and grassy place. There, appellant kissed her face and lips, undressed her and removed her shorts and underwear. He then lay on top of her and made push and pull movements.<sup>[9]</sup>

Aware of appellant's bringing of the victim to a dark and grassy place in front of a store owned by one Rosalie Cudiamat, one of the victim's playmates, a certain Randy, notified Juveniana about it. Juveniana lost no time in going to the direction

pointed to by Randy, which was about three houses away from her house, in search of the victim.<sup>[10]</sup>

As Juveniana started calling out the name of the victim, the latter was able to free herself from appellant and proceeded towards the road. On seeing her mother Juveniana, the victim, who was crying, narrated what had transpired in the grassy area. Juveniana thus brought her to the house of Emelina,<sup>[11]</sup> to whom she recounted the victim's plight. They then proceeded to the Toril Police Station to file a report.<sup>[12]</sup>

The result of the physical examination conducted on the victim the following day showed that her hymen was intact and its orifice small as to preclude complete penetration by an average sized male organ in erection without causing hymenal injury; there was no extra-genital physical injury; and the semenalysis performed on her was negative for spermatozoa.<sup>[13]</sup>

At the witness stand, Dr. Cruz declared that the finding that a victim's hymen is intact does not preclude partial penetration by the penis as long as it does not exceed 0.8 cm. in diameter,<sup>[14]</sup> "the hymenal orifice of the patient."

Appellant, 21 years old when he testified on May 5, 2000<sup>[15]</sup> or a year after the incident, upon the other hand, denied the accusation and attributed ill-motive on the part of Juveniana behind the filing of the case.

His version goes: Around 5:30 p.m. of May 5, 1999, as he was washing his feet at an artesian well, he advised the victim, who together with her parents live in his (appellant's) grandmother's house, to stay away as she might get wet. Not heeding his advice, he poured water over her head, prompting her to report the matter to her mother Juveniana. Angered by the incident, Juveniana, with a bolo in hand, accosted him, hence, he ran. While Juveniana chased him, she failed to catch up with him.<sup>[16]</sup>

At around 7:00 p.m. of that same day, May 5, 1999, while he was playing with youngsters his age and children including the victim, he heard Juveniana shouting at her live-in partner-father of the victim from whom she inquired on the whereabouts of the victim. On seeing Juveniana walking in a "swinging" manner, he (appellant) told her that she reeked of liquor and that she was drunk, to which she retorted that he had no business telling her if she was indeed drunk. Juveniana's live-in partner then pointed to where the victim was playing.<sup>[17]</sup> Juveniana thus repaired to where the victim was.

On seeing the victim, Juveniana pulled and spanked her "at the back lower portion" of her body and she (the victim) rolled on the ground. Juveniana thereafter helped the victim stand up and brought her to the house of a certain Roding, a *kagawad*.<sup>[18]</sup>

Corroborating appellant's claim were witnesses Mauricio Terante<sup>[19]</sup> and Andres Cañedo.<sup>[20]</sup>

Defense witness Maxima Alibuyog, a relative of appellant, also corroborated

appellant's claim about the pouring of water on the victim incident but she (witness) claimed that it was not on the date of the alleged rape incident, May 5, 1999, as claimed by appellant, but three days before.<sup>[21]</sup>

Finding for the prosecution, the trial court rendered the Decision under review, the dispositive portion of which reads:

WHEREFORE, finding the evidence of the prosecution sufficient, to establish the guilt of accused, Joel Alibuyog beyond reasonable doubt, accused Joel Alibuyog, is sentenced to suffer a penalty of reclusion perpetua together with all accessory penalt[ies] as provided for by law.

[A]ccused, is furthermore ordered to pay the complainant, Jocel Madeloso the amount of P50,000.00 by way of civil indemnity and still another amount of P50,000.00 by way of moral damages for the commission of such a very beastly act of destroying the honor and reputation of a young and tender child, without regard to her future and family x x x.<sup>[22]</sup>

In his present appeal, appellant assigns just one error:

THE TRIAL COURT ERRED IN DECLARING ACCUSED-APPELLANT GUILTY OF THE CRIME OF RAPE INSTEAD OF ATTEMPTED RAPE ONLY.<sup>[23]</sup>

Appellant cites the case of *People v. Contreras*<sup>[24]</sup> which enumerates the elements of attempted felony as follows:

1. The offender *commences* the commission of the felony directly by overt acts;
2. He *does not perform* all the acts of execution which *should produce* the felony;
3. The offender's act be not *stopped by his own spontaneous desistance*;
4. The *non-performance of all acts of execution* was due to *cause or accident* other than his spontaneous desistance.<sup>[25]</sup> (Italics in the original)

Appellant argues that as, by the victim's own declaration, when he was doing the push and pull movement, his pants were still on and his organ did not penetrate her vagina but only touched it, he is liable only for attempted rape.

For a conviction of consummated rape to prosper, complete or full penetration of the victim's private part is not necessary because mere introduction of the male organ into the *labia majora* of the victim's genitalia consummates the crime.<sup>[26]</sup> What is fundamental, however, is that the entry or at least the introduction of the male organ into the *labia* of the pudendum must be convincingly proved.

Of critical importance is that there must be sufficient and convincing proof that the penis indeed touched even just the labia or slid onto the victim's organ, and not