

## **SPECIAL SIXTEENTH DIVISION**

**[ CA-G.R. CR No. 35376, October 29, 2014 ]**

**PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.  
ROGELIO PINERA Y DOTON, ACCUSED-APPELLANT.**

### **D E C I S I O N**

**ZALAMEDA, R.V., J.:**

Before Us is an Appeal from the Decision<sup>[2]</sup> dated 22 October 2012 of Branch 37, Regional Trial Court of Bambang, Nueva Vizcaya,<sup>[3]</sup> finding accused-appellant Rogelio Pinera y Doton<sup>[4]</sup> guilty beyond reasonable doubt of Attempted Rape committed against AAA,<sup>[5]</sup> the dispositive portion of which states:

"X x x

WHEREFORE, the court finds accused Rogelio Pinera guilty beyond reasonable doubt of attempted rape as defined and penalized under Articles 266-A and 266-B in relation to Article 51 of the Revised Penal Code, as amended by RA 8353 and hereby imposes upon him an indeterminate sentence of three years of *prision correccional* as minimum to nine years of *prision mayor* as maximum and to pay the costs. He is also ordered to pay complainant P30,000.00 as indemnity, P25,000.00 as moral damages and P10,000.00 as exemplary damages.

SO ORDERED.

X x x"<sup>[6]</sup>

The facts, as culled from the records, are as follows:

On 31 January 2011, accused-appellant was charged with Rape under Article 266-A of the Revised Penal Code<sup>[7]</sup> committed against AAA in an Information before the RTC, docketed as Crim. Case No. 2947, the accusatory portion thereof reads:

"X x x

That on or before December 31, 2010, in Barangay YYY, Municipality of ZZZ, Province of Nueva Vizcaya, Philippines and within the jurisdiction of this Honorable Court, the above-named accused with lewd design, by means of force and intimidation, did then and there, willfully, unlawfully and feloniously insert his penis inside the vagina of AAA, against her will and without her consent, to her damage and prejudice.

CONTRARY TO LAW.

X x x"<sup>[8]</sup>

On arraignment, accused-appellant duly assisted by counsel, entered a plea of NOT GUILTY<sup>[9]</sup> to the charge. During pre-trial, the parties stipulated on the following:

"X x x

1. The accused and the father of the complainant are employees of the DENR and have been provided housing at the DENR compound. xxx- the complainant and her family reside at housing unit Q-9/10 while the accused and his family reside at the adjacent unit Q-7;
2. On Friday, December 21, 2010, at around 9:00 o'clock in the morning, the accused went to buy something from the store tended by the complainant located at the first floor of their housing unit;
3. The accused was arrested without warrant before noon on the same date by the PNP Aritao;
4. The complainant was brought for medical examination for alleged rape at the Nueva Vizcaya Provincial Hospital at around 11:25 A.M. of the same day for alleged rape and was brought for medical examination at NVPH, Bambang, Nueva Vizcaya;
5. As borne out by the medical certificate (Exhibit 'B' which was also marked Exhibit '2', the only finding of Dr. Jocelyn B. Bumidang was 'negative (-) spermatozoa;
6. The accused was administratively charged before the DENR and the complainant testified during the formal hearing on January 18, 2011, as evidenced by the minutes of the proceedings (Exhibit '7') which the prosecution provisionally admitted pending verification from original documents, but the minutes shall be considered true and correct unless the prosecution is able to present a different one on the initial hearing; [and]
7. That the sketch (Exhibit 'E' and Exh. '5' and the pictures Exhibits '7' to '7-U' are admitted by the parties to be faithful reflections of what they purport to be.

X x x"<sup>[10]</sup>

After the pre-trial conference was terminated, trial on the merits ensued.

The prosecution presented the following witnesses: (1) AAA, herein private

complainant; (2) BBB, AAA's mother; and (3) Teresita Macaraig.<sup>[11]</sup>

The evidence of the prosecution reveals the following:

On 21 December 2012, AAA, then 19-year-old, was tending their store at the first floor of their house around 9:00 o'clock in the morning when accused-appellant, whom she calls "uncle" arrived to buy "vetsin" and pepper. AAA then handed him said goods after which accused-appellant asked about the whereabouts of parents. After AAA answered that her parents were not around, accused-appellant suddenly hugged AAA and kissed her cheeks.<sup>[12]</sup> He then dragged AAA to her room, pinned her on the bed and pulled off her shorts. AAA fought back and resisted but accused-appellant did not relent and instead told her to just give in because he is already in heat, *"sigen a, pagbigyan mo na ako. Agut-uttugak la ngaruden."*<sup>[13]</sup> Accused-appellant later pulled down his shorts but failed to take them off as AAA was shouting and struggling to free herself.<sup>[14]</sup> Accused-appellant then while on top of AAA pulled out his penis and ejaculated on the blanket. After satisfying his lust, accused-appellant gave AAA his payment for the goods he bought then left.

AAA immediately sent her mother BBB a text message and requested the latter to come home because her uncle Roger did something untoward to her. AAA rushed out of the house, searched for her father then went straight to the highway. She came across a kakanin vendor, Teresita Macaraig<sup>[15]</sup> and immediately sought refuge from her.<sup>[16]</sup> In tears, AAA relayed to Teresita that accused-appellant raped her. Teresita accompanied her to the house of the Barangay Captain and the three (3) proceeded to the Aritao Police Station where AAA narrated what accused-appellant did to her and later on signed her Sinumpaang Salaysay.<sup>[17]</sup> The police immediately proceeded to AAA's house and collected the semen-stained blanket in her room.<sup>[18]</sup> Assisted by a police officer, AAA and her father then proceeded to the Nueva Vizcaya Provincial Hospital where AAA was medically examined.<sup>[19]</sup>

On the other hand, the defense presented accused-appellant and Apolonio Ducusin as its witnesses.

Interposing the defense of denial and alibi, accused-appellant testified that on the day of the alleged incident, he went to AAA's house and called her as he was to buy powdered soap.<sup>[20]</sup> Moments later, AAA opened the door and welcomed him in. Accused-appellant sat in the sala while AAA went to the kitchen where their store was located. AAA then returned, handed him the soap and asked for her Christmas gift, to which he promised to give at a later time.<sup>[21]</sup> Thereafter, accused-appellant left and returned to his house. While washing clothes, several police officers and members of the barangay tanod arrived, forced him to board their vehicle and brought him to the police station. Accused-appellant claimed that he and BBB, mother of AAA had a misunderstanding, as the latter previously filed a complaint against him before the DENR Grievance Committee for habitual drunkenness.<sup>[22]</sup>

After trial, the RTC rendered the assailed Decision finding accused-appellant guilty beyond reasonable doubt of attempted rape.

Hence, this Appeal, raising the following issues:

WHETHER OR NOT THE COURT ERRED IN FINDING THAT THE PROSECUTION PROVED THE CRIME OF ATTEMPTED RAPE BEYOND REASONABLE DOUBT.

WHETHER THE CRIME CONSTITUTES ATTEMPTED RAPE OR ACTS OF LASCIVIOUSNESS.<sup>[23]</sup>

In his Brief,<sup>[24]</sup> accused-appellant argues that the prosecution failed to overcome the presumption of innocence guaranteed by the Constitution. If at all, he claims that he should not have been convicted of attempted rape as the acts complained of merely constitute the crime of acts of lasciviousness.<sup>[25]</sup>

The People, through the Office of the Solicitor General,<sup>[26]</sup> on the other hand, maintains that the facts established by the prosecution proved beyond reasonable doubt accused-appellant's intent to have carnal knowledge with AAA. The OSG thus asserted that accused-appellant undoubtedly committed the crime of attempted rape.<sup>[27]</sup>

We have closely scrutinized the records of the case and this Court is convinced that the crime committed by accused-appellant was acts of lasciviousness not attempted rape.

Under Article 6 of the Revised Penal Code, there is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.

It has not escaped this Court that rape and acts of lasciviousness are crimes of the same nature. However, the intent to lie with the woman is the fundamental difference between the two, as it is present in rape or attempt of it, and absent in acts of lasciviousness. Attempted rape is committed when the 'touching' of the vagina by the penis is coupled with the intent to penetrate; otherwise, there can only be acts of lasciviousness.<sup>[28]</sup>

In this case, there is no showing that accused-appellant's sexual organ had ever touched AAA's vagina nor any part of her body. What the evidence on record established was that accused-appellant hugged and kissed AAA's cheeks, pulled off her shorts and thereafter ejaculated on the blanket.

AAA thus testified:

"X x x

Q And what did accused do, if any, after you told him that your father accompanied your mother?

A Like that, Sir, he already hug me in the kitchen and he kissed me.