G.R. No. 179031 – PEOPLE OF THE PHILIPPINES, Plaintiff-Appellee, versus BENJAMIN SORIA *y* GOMEZ, Accused-Appellant.

Promulgated:

NOV 14 2012

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DISSENTING OPINION

BRION, *J.*:

I DISSENT as I believe that the prosecution ***has not proven beyond reasonable doubt*** that appellant Benjamin Soria is guilty of rape through sexual assault under Article 266-A, paragraph 2 of the Revised Penal Code, as amended.

As my discussions below will show, the appellant should be acquitted of this crime on grounds of reasonable doubt, and should instead be convicted of the lesser crime and included crime of acts of lasciviousness – the crime that, under the available evidence, has been proven beyond reasonable doubt.

The Antecedents:

The evidence for the prosecution showed that in the afternoon of February 26, 2000, AAA[1] and her siblings ate the spaghetti that their father (the appellant) brought home for *merienda*. The records also show that after AAA finished eating, the appellant went on top of her and removed her clothes.[2] **AAA felt pain in her breasts and in her stomach; she also felt**

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[1] See our ruling in *People v. Cabalquinto*, 533 Phil. 703 (2006).

[2] **There is nothing in the transcript of stenographic notes that supports the *ponencia*'s narration that AAA went in the bedroom to rest after eating.**

that "something" had been inserted into her private part. When AAA told the appellant that she felt pain in her private part, the latter apologized to her and then left the room. The incident was allegedly witnessed by BBB, who told AAA that it was the appellant's "bird" that had been inserted into her vagina. AAA reported the incident to her aunt, CCC, who told her that the appellant was a bad person. CCC accompanied AAA to the hospital when AAA's vagina started to bleed. AAA also informed her mother what the appellant did to her. Thereafter, AAA was committed to the care and custody of the Department of Social Welfare and Development.

The prosecution charged the appellant with the **crime of rape** under Article 266-A of the Revised Penal Code, as amended, in relation to Republic Act No. 7610, before the Regional Trial Court (*RTC*), Branch 94, Quezon City. In its judgment[3] of June 30, 2005, the RTC found the appellant guilty beyond reasonable doubt of the **crime of rape by sexual intercourse**,[4] and it imposed the death penalty. It also ordered him to pay the victim the amounts of ₱75,000.00 as civil indemnity, ₱50,000.00 as moral damages, and ₱25,000.00 as exemplary damages.

On appeal, the Court of Appeals (*CA*) affirmed the RTC judgment with the following modifications: (1) the appellant was found guilty of simple rape only; (2) the death penalty was reduced to *reclusion perpetua*; and (3) the amount of civil indemnity was reduced to ₱50,000.00.[5]

The *ponencia* affirmed the CA decision with the following modifications: (1) the appellant is found guilty of **rape through sexual assault** under Article 266-A, paragraph 2 of the Revised Penal Code, as

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3 Penned by Judge Romeo F. Zamora; CA *rollo*, pp. 39-44.

4 Qualified by relationship and minority.

5 Penned by Associate Justice Vicente Q. Roxas, and concurred in by Associate Justices Josefina Guevara Salonga and Apolinario D. Bruselas, Jr.; *rollo*, pp. 2-15.

amended; (2) he is sentenced to suffer the indeterminate penalty of twelve (12) years of *prision mayor*, as minimum, to twenty (20) years of *reclusion temporal*, as maximum; and (3) on his liability for damages – (a) the amount of civil indemnity is reduced from ₱50,000.00 to ₱30,000.00; (b) the amount of moral damages is reduced from ₱50,000.00 to ₱30,000.00; (c) the amount of exemplary damages is increased from ₱25,000.00 to ₱30,000.00; and (d) the appellant is ordered to further pay the victim interest on all damages awarded at the legal rate of 6% per annum from the date of finality of the judgment until fully paid.

The Dissent:

I clarify at the outset that I agree with the *ponencia*'s conclusion that the appellant cannot be convicted of **rape by sexual intercourse** under Article 266-A, paragraph 1 of the Revised Penal Code, as amended. The prosecution failed to establish beyond reasonable doubt the element of carnal knowledge.

My opposition stems from the *ponencia*'s finding that the appellant should be convicted of **rape through sexual assault** under Article 266-A, paragraph 2 of the Revised Penal Code, as amended.

Under Article 266-A, paragraph 2 of the Revised Penal Code, as amended, rape through sexual assault is committed "[b]y any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person."[6]

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[6] Underscoring ours.

In the present case, **there is no admissible evidence to show that the appellant inserted his penis into AAA's mouth or anal orifice, or any instrument or object into the victim's genital or anal orifice**. In her testimony, AAA merely "felt" that something had been inserted in her private part, as a result of which, she felt pain. To be sure, ***had there been any testimony*** that it was the appellant's "bird" that had been inserted into her vagina, the appellant's conviction for rape by sexual intercourse under Article 266-A, paragraph 1 should have followed. No such testimony, however, was ever given; **AAA merely admitted that her brother BBB told her it was the appellant's bird that had been inserted**. This testimony, of course, is clearly **hearsay**; BBB was never presented in court to testify.

On the basis of this evidence, the *ponencia* holds that while it had not been clearly established that it was the appellant's penis that had been inserted into AAA's vagina, it cannot be denied that the appellant "inserted an object" into the victim's female organ. The *ponencia* based its conclusion on the following circumstances: (a) AAA "experienced pain when the appellant inserted something in her vagina";[7] and (b) Dr. Francisco Supe, Jr. testified that the victim's hyperemic hymen could have been caused by an object being "rubbed" on her private part.

I find the *ponencia*'s reasoning and conclusion seriously flawed.

First, it is a dangerous proposition to equate AAA's testimony of pain in her private part with rape; it is the insertion of an instrument or object into the victim's genital or anal orifice, not pain, that constitutes rape through sexual assault. Thus, the victim's testimony should, at the very least, have mentioned that the appellant inserted an object or instrument in her vagina or

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[7] *Ponencia*, p. 11.

anal orifice or she should have testified on circumstances that would lead us to reasonably conclude that the appellant inserted an instrument or object into her genital or anal orifice. As earlier stated, **AAA merely felt pain**; it was BBB who told her that it was the appellant's "bird" that had been inserted into her vagina. **At most, AAA merely "assumed" that something had been inserted into her vagina**. This is what the totality of her testimony implied.

Significantly, the records bear out that **the appellant removed only AAA's clothes, and not her underwear**, during the incident. To directly quote from the records:

> FISCAL BEN DELA CRUZ:
>
> Q: So you said you wanted to explain something about your father, what was that?
>
> AAA:
>
> A: What he did, sir.
>
> Q: What is that?
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> A: I was raped, sir.
>
> Q: What did he do when you said he raped you?
>
> A: He laid on top of me, sir.
>
> Q: **Did you have your dress on when he did that?**
>
> A: **Yes, sir.**
>
> Q: **What about your underwear? Did you have your underwear on?**
>
> A: **Yes, sir.**
>
> Q: **He did not remove any of your clothes?**
>
> A: **Only my clothes, sir.**[8] (emphasis ours)

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[8] TSN, February 10, 2003, pp. 3-4.

This circumstance makes the insertion of an object or instrument into the victim's genital highly improbable. Considering that AAA also testified that she felt pain in her breasts and stomach when the appellant went on top of her, it is not far-fetched that the pain she felt in her private part could have been caused by the appellant's weight being pressed against her whole body, and it was not due to the insertion of an object into her vagina.

***Second*, Dr. Supe's Medico-Legal Report and court testimony did not support the *ponencia*'s conclusion that the appellant inserted an object or even his penis into AAA's vagina**. Dr. Supe testified that he conducted a medical examination on AAA on March 3, 2000, and made the following findings:

> GENERAL AND EXTRA-GENITAL: Fairly developed, fairly nourished and coherent female child. Breasts are undeveloped. Abdomen is flat and soft.
>
> GENITAL: There is absent growth of pubic hair. Labia majora are full, convex, and coaptated with light brown labia minora presenting in between. On separating the same, disclosed an elastic, fleshy type, hyperemic and intact hymen. Posterior fourchette is sharp.
>
> CONCLUSION: The subject is in virgin state physically. **There are no external signs of application of any form of physical trauma**.[9] (emphasis ours)

According to Dr. Supe, a hyperemic hymen is the result of the application of friction, such as scratching, on the hymen. Dr. Supe further stated that the insertion of an object could result to a hyperemic hymen if this object was "rubbed." For clarity and precision, I quote the relevant portions of Dr. Supe's testimony:

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[9] *Ponencia*, p. 3.

ASSISTANT CITY PROSECUTOR BEN DELA CRUZ:

Q: Doctor, with respect to Exhibit A, the Medico-Legal Report pertaining to the entry on the genital, which reads: On separating the hymen, disclosed an elastic, fleshy-type, **hyperemic and intact hymen**. Will you please tell us, Doctor, what is this hyperemic hymen?

DR. FRANCISCO SUPE, JR.:

A: Hyperemic hymen, sir, means that at the time of the examination, I found out that it was reddish in color.

Q: Considering that the age of the child or the patient, the victim whom you examined at that time which was about 6 years old, will you be able to tell us, Doctor, what could have caused this type of injury, because this is an injury to the hymen?

A: Hyperemic, sir, is observed whenever there is **friction applied to an area, such as in the form of scratching.**

Q: What about insertion of an object, would this result into hyperemic hymen?

A: **If the object is being rubbed, sir, there is a possibility.**

Q: A finger would produce that kind of injury?

A: **Possible**, sir.

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ATTY. JOSEPH SIA:

Q: The friction that caused the hyperemic hymen would be caused by other activities of the child, like for example playing or bicycle riding?

DR. SUPE, JR:

A: If there is a friction, it is **possible**.[10] (emphases ours)

Clearly, there was **no categorical declaration by Dr. Supe that an instrument or object had been inserted into the victim's private part**. Notably, Dr. Supe also declared that the victim's other activities, like playing of riding a bicycle, could lead to a hyperemic hymen if friction had

[10] TSN, July 30, 2002, pp. 5-6.

been applied on the area. The prosecution thus failed to establish the medical basis for a finding of rape through sexual assault.

Finally, I point out that **Dr. Supe found AAA to be in a "virgin state physically";[11] he also found her hymen to be intact**. I am not unmindful of the oft-repeated doctrine that an intact hymen does not necessarily preclude a finding that the victim had been raped. However, when the prosecution's evidence fails to establish with moral certainty all the elements necessary to consummate the crime of rape, a finding by the medico-legal officer that the victim is in a "virgin state," and that her hymen is intact, suffices to cast doubt on the appellant's culpability.

In rape cases, the prosecution bears the primary duty to present its evidence with clarity and persuasion, to the end that conviction becomes the only logical and inevitable conclusion. "The freedom of the accused is forfeited only if the requisite quantum of proof necessary for conviction be in existence. This, of course, requires the most careful scrutiny of the evidence for the State, both oral and documentary, independent of whatever defense is offered by the accused. Every circumstance favoring the accused's innocence must be duly taken into account. The proof against the accused must survive the test of reason. Strongest suspicion must not be permitted to sway judgment. The conscience must be satisfied that on the accused could be laid the responsibility for the offense charged."[12]

Lewd or Lascivious Conduct Proven

Notwithstanding the prosecution's failure to prove the appellant's guilt for rape, I take the view that sufficient evidence exists to convict him of acts

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11 Records, p. 4.

12 See *People v. Fabito*, G.R. No. 179933, April 16, 2009, 585 SCRA 591, 614.

of lasciviousness under Article 336 of the Revised Penal Code. A charge of acts of lasciviousness is necessarily included in a complaint for rape. "The elements of acts of lasciviousness are: (1) that the offender commits any act of lasciviousness or lewdness; (2) that it is done under any of the following circumstances: (a) by using force or intimidation, (b) when the offended woman is deprived of reason or otherwise unconscious; or (c) when the offended party is under twelve (12) years of age; and (3) that the offended party is another person of either sex."[13]

"'*Lewd*' is defined as obscene, lustful, indecent, or lecherous. It signifies that form of immorality related to moral impurity, or that which is carried on a wanton manner."[14] In *Sombilon, Jr. v. People*,[15] the Court explained this concept as follows:

> The term "lewd" is commonly defined as something indecent or obscene; it is characterized by or intended to excite crude sexual desire. That an accused is entertaining a lewd or unchaste design is necessarily a mental process the existence of which can be inferred by overt acts carrying out such intention, i.e., by conduct that can only be interpreted as lewd or lascivious. The presence or absence of lewd designs is inferred from the nature of the acts themselves and the environmental circumstances.

The evidence in the present case established that the appellant **went on top of AAA**, and **removed her clothes**. The appellant only stopped when the victim told him that she felt pain in her private part. To my mind, the appellant's acts of mounting her *very own daughter*, and then removing her clothes, showed lewdness that constitutes acts of lasciviousness. These acts are clearly indecent and inappropriate; it undeniably demonstrates the appellant's gross moral depravity.

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13 *People v. Poras*, G.R. No. 177747, February 16, 2010, 612 SCRA 624, 645, citing *People v. Mingming*, G.R. No. 174195, December 10, 2008, 573 SCRA 509, 534-535.

14 *Ibid*., citing *People v. Lizada*, 444 Phil. 67 (2003).

15 G.R. No. 175528, September 30, 2009, 601 SCRA 405, 414.

In light of these considerations, **I maintain that – on grounds of reasonable doubt – the appellant should be acquitted of the crime of rape through sexual assault under Article 266-A, paragraph 2 of the Revised Penal Code, as amended.** He should instead be convicted of the **lesser and included crime of acts of lasciviousness** as the evidence on record shows the presence of all the elements of this crime.

ARTURO D. BRION
Associate Justice