



**Republic of the Philippines  
Supreme Court  
Manila**

**FIRST DIVISION**

**PEOPLE OF THE PHILIPPINES,**  
Plaintiff-Appellee,

**G.R. No. 202060**

Present:

SERENO, *CJ.*,  
Chairperson,  
LEONARDO-DE CASTRO,  
BERSAMIN,  
VILLARAMA, JR., and  
REYES, *JJ.*

- versus -

**FERDINAND BANZUELA,**  
Accused-Appellant.

Promulgated:

**DEC 11 2013**

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

**LEONARDO-DE CASTRO, J.:**

The accused-appellant Ferdinand Banzuela (Banzuela) challenges in this appeal the August 31, 2011 **Decision**<sup>1</sup> promulgated by the Court of Appeals in **CA-G.R. CR.-H.C. No. 03868**, wherein he was convicted for Rape and Acts of Lasciviousness.

On July 25, 2003, Banzuela was charged with Rape and Attempted Rape under Article 335 of the Revised Penal Code in relation to Republic Act No. 7610<sup>2</sup> before Branch 209, Regional Trial Court (RTC) of Mandaluyong City. The Informations read as follows:

**I. For Rape (Criminal Case No. MC03-919-FC-H)**

That sometime [i]n February 2003, in the City of Mandaluyong, Philippines, a place within the jurisdiction of this Honorable Court, the above-named accused, with lewd designs and by means of force and intimidation, did, then and there willfully, unlawfully and feloniously have

<sup>1</sup> *Rollo*, pp. 2-19; penned by Associate Justice Mario V. Lopez with Associate Justices Magdangal M. de Leon and Socorro B. Inting, concurring.

<sup>2</sup> An Act Providing For Stronger Deterrence And Special Protection Against Child Abuse, Exploitation And Discrimination, Providing Penalties For Its Violation, And For Other Purposes.

*hnp*

carnal knowledge with [AAA<sup>3</sup>], minor (6 years old), against her will and consent, thus debasing and/or demeaning the intrinsic worth and dignity of the child as a human being.<sup>4</sup>

## II. For Attempted Rape (Criminal Case No. MC03-918-FC-H)

That sometime in February 2003, in the City of Mandaluyong, Philippines, a place within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully and feloniously attempt to have carnal knowledge of [BBB], a girl seven (7) years of age, by then and there bringing her to a grassy portion of Mandaluyong Cemetery, made to lie down, undressed her, thus directly by overt acts but failed to perform all acts of execution when a third party helped the victim to get away from the accused.<sup>5</sup>

Banzuela pleaded not guilty to both charges during his arraignment on November 20, 2003.<sup>6</sup> After the completion of the pre-trial conference on January 22, 2004,<sup>7</sup> trial on the merits ensued.

The following narration of facts was made by the RTC and the Court of Appeals:

### *Version of the Prosecution*

Sometime in February 2003, while six-year old AAA and seven-year old BBB were watching TV in AAA's house, Banzuela approached them and asked them to go with him to the nearby cemetery. AAA and BBB refused, but Banzuela carried AAA away prompting BBB to follow suit. Upon reaching the cemetery, Banzuela blindfolded BBB, who thereafter removed the blindfold and looked for AAA and Banzuela. Meanwhile, Banzuela laid AAA on a dirty tomb, pulled up her dress, and removed her underwear. He thereafter removed his shorts and briefs, mounted AAA, kissed her, inserted his penis in her vagina, and moved his body up and down against the crying AAA. He threatened to kill her entire family if she ever spoke of the incident. When BBB finally found them, Banzuela hurriedly pulled up his briefs and shorts and then ran away. BBB approached AAA and saw that there was blood on the tomb from AAA's vagina. They wiped the blood with a banana leaf, then proceeded to BBB's house, where AAA washed her bloodied dress and underwear before going back to AAA's house.<sup>8</sup>

After the incident with AAA, Banzuela used the same method on BBB, the daughter of his mother's half-brother. One morning in February

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<sup>3</sup> Under Republic Act No. 9262 also known as "Anti-Violence Against Women and Their Children Act of 2004" and its implementing rules, the real name of the victim and those of her immediate family members are withheld and fictitious initials are instead used to protect the victim's privacy.

<sup>4</sup> Records, p. 14.

<sup>5</sup> Id. at 1.

<sup>6</sup> Id. at 50-51.

<sup>7</sup> Id. at 59-61.

<sup>8</sup> *Rollo*, pp. 3-4; *CA rollo*, p. 30; records, pp. 410-432; 558-562.

2003, Banzuela asked BBB to go with him to the cemetery. When BBB refused, Banzuela carried her out of the house and brought her to the cemetery. BBB cried, but Banzuela proceeded to lay her down on the ground, pulled her dress up, removed her underwear, and kissed her. However, before Banzuela could do anything more, a man passed by causing Banzuela to flee the scene. The man thereafter instructed BBB to go home. Upon reaching her house, Banzuela, who was already there, threatened her against telling anyone of the incident, otherwise, he would kill everyone in their house.<sup>9</sup>

AAA, with her mother, submitted herself for examination but both the Initial Medico-Legal Report<sup>10</sup> and the Medico-Legal Report No. M-0914-03<sup>11</sup> stated that AAA was physically in a virgin state, and her hymen “intact.”

### ***Version of the Defense***

Banzuela denied the accusations against him, claiming that he was working for at least twelve (12) hours a day at Bestflow Purified Drinking Water Refilling Station the whole month of February 2003. To prove this, he submitted photocopies of his Daily Time Record (DTR) from November 2002 to February 2003.<sup>12</sup> Banzuela added that he did not go to the cemetery the entire February of 2003.<sup>13</sup>

### ***Ruling of the RTC***

On February 27, 2009, the RTC convicted Banzuela of the crimes of rape of AAA and attempted rape of BBB. The dispositive portion of the Decision<sup>14</sup> reads as follows:

**WHEREFORE**, in view of the foregoing, judgment is hereby rendered as follows:

1. In Criminal Case No. MC03-919-FC-H, finding accused FERDINAND BANZUELA guilty beyond reasonable doubt of the crime of RAPE under Article 335 of the Revised Penal Code, as amended by R.A. 7659 and is hereby sentenced to suffer the penalty of **RECLUSION PERPETUA** and to indemnify the victim, [AAA], of the sum of FIFTY THOUSAND (₱50,000.00) PESOS as civil indemnity; [and]

2. In Criminal Case No. MC03-918-FC-H, finding accused FERDINAND BANZUELA guilty beyond reasonable doubt of the crime of ATTEMPTED RAPE, and there being no mitigating or aggravating circumstances and pursuant to Article 51, in relation to Article 335 of the Revised Penal Code, as amended, is hereby sentenced to suffer an

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<sup>9</sup> CA rollo, p. 30; records, pp. 133-142, 553-565.

<sup>10</sup> Records, p. 25.

<sup>11</sup> Id. at 266.

<sup>12</sup> Id. at 347-350.

<sup>13</sup> CA rollo, p. 65; records, pp. 442-456.

<sup>14</sup> Id. at 29-40.

indeterminate penalty of two (2) years, four (4) months and one (1) day of *pris[i]on correccional* as minimum to ten years and one (1) day of *prision mayor* as maximum and to indemnify the victim, [BBB] of the sum of FIFTEEN THOUSAND (₱15,000.00) PESOS.<sup>15</sup> (Emphases supplied.)

In AAA’s charge of rape, the RTC deemed as insignificant the results of the medical examination that AAA’s hymen was still intact. The RTC, invoking established jurisprudence, said that the mere touching of the labia consummates rape, and that a broken hymen is not an essential element of rape. The RTC added that a medical examination, in any event, was not essential in the prosecution of a rape case, being merely corroborative in character.<sup>16</sup>

The RTC also found the prosecution to have proved its charge of attempted rape against BBB as it was clear that Banzuela intended to have sexual congress with BBB had he not been unexpectedly disturbed.<sup>17</sup>

Anent Banzuela’s defense of alibi, the RTC did not give it merit for being weak. The RTC shot down the DTRs Banzuela presented for not having been authenticated and verified, and for having been weakened by his own testimony.<sup>18</sup>

In essence, the RTC decided in favor of the prosecution due to AAA’s and BBB’s testimonies, to wit:

The testimonies of AAA and BBB are worthy of credence as they were straightforward, spontaneous and “bore the hallmarks of truth.” More notable is that they were able to withstand the rigors of cross-examination without wavering or being caught in inconsistencies. Indeed, it defies belief that these victims, who were below 12 years old, would fabricate a sordid tale of sexual abuse and indict their very own cousin. Their testimonies of the separate incidents of sexual abuse that happened to them recounted vivid details that could not have been concocted by girls of tender age. The testimony of the complainants are consistent, clear and free of serious contradictions.<sup>19</sup>

***Ruling of the Court of Appeals***

Having lost in the RTC, Banzuela appealed to the Court of Appeals,<sup>20</sup> which, on August 31, 2011, rendered a verdict no better than the RTC’s, viz:

**FOR THE STATED REASONS**, the assailed Decision of the Regional Trial Court (Branch 209) of Mandaluyong City is **AFFIRMED** with the following **MODIFICATION**:

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<sup>15</sup> Id. at 39-40.  
<sup>16</sup> Id. at 37.  
<sup>17</sup> Id. at 38.  
<sup>18</sup> Id. at 39.  
<sup>19</sup> Id. at 36.  
<sup>20</sup> Id. at 41.

1. In Criminal Case No. MC03-919-FC-H, Ferdinand Banzuela is sentenced to suffer the penalty of *reclusion perpetua* without parole and to indemnify AAA the amounts of ₱75,000.00 as civil indemnity *ex delicto*, ₱75,000.00 as moral damages, and ₱25,000.00 as exemplary damages.

2. In Criminal Case No. MC03-918-FC-H, Ferdinand Banzuela is found guilty beyond reasonable doubt of acts of lasciviousness and sentenced to an indeterminate penalty of 12 years, and 1 day of *reclusion temporal*, as minimum, to 16 years, *reclusion temporal*, as maximum and to indemnify BBB the amounts of ₱25,000.00 as moral damages and ₱10,000.00 as exemplary damages.<sup>21</sup> (Citation omitted.)

In agreeing with the RTC's finding of guilt, the Court of Appeals said that Banzuela failed to destroy the victims' credibility or taint their straightforward and categorical testimonies.<sup>22</sup>

However, the Court of Appeals did not agree with the RTC's finding that Banzuela attempted to rape BBB. The Court of Appeals, alluding to jurisprudence, said that "[a]ttempted 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." Thus, the Court of Appeals declared, that because Banzuela's intent to rape BBB was not clearly established, he could only be convicted of acts of lasciviousness.<sup>23</sup>

### *Issues*

Undaunted, Banzuela elevated his case to this Court,<sup>24</sup> assigning the same errors he did before the appellate court, to wit:

#### **ASSIGNMENT OF ERRORS**

##### **I**

THE COURT A QUO GRAVELY ERRED IN GIVING WEIGHT TO THE MATERIALLY INCONSISTENT AND INCREDIBLE TESTIMONIES OF THE PROSECUTION WITNESSES.

##### **II**

THE COURT A QUO GRAVELY ERRED IN CONVICTING THE ACCUSED-APPELLANT DESPITE THE PROSECUTION'S FAILURE TO PROVE HIS GUILT BEYOND REASONABLE DOUBT.<sup>25</sup>

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<sup>21</sup> *Rollo*, p. 18.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 15-16.

<sup>24</sup> *Id.* at 20-22.

<sup>25</sup> CA *rollo*, p. 59.

Banzuela is attacking the credibility of the witnesses for being “highly inconsistent, unusual, doubtful and thus insufficient to sustain a conviction.” Banzuela claimed that AAA’s testimony was full of inconsistencies and contradictions, such as how she managed to remove his hand from her mouth and yet she did not shout for help, how Banzuela managed to blindfold BBB while still carrying her, and more importantly, how confused she was as to whether his penis actually penetrated her or simply touched her groin area. Banzuela argued that the fact that AAA was still a virgin was confirmed by the medico-legal examination, and as the medico legal officer said during his testimony, although the consensus was that it is possible for a woman to remain a virgin physically despite penetration, he himself has had no personal encounter of such a case.<sup>26</sup>

Moreover, Banzuela said, even BBB's actions were highly unusual, considering the circumstances of her situation. First, Banzuela said, BBB continued to follow him and AAA despite being blindfolded, instead of turning back and calling for help. Second, in view of what BBB witnessed happened to AAA earlier that month, it was contrary to human nature, Banzuela averred, that she did not resist or try to attract the attention of her neighbors when he brought her to the cemetery.<sup>27</sup>

Finally, Banzuela reasoned, the prosecution cannot profit from the weakness of his defense in light of their failure to establish his guilt beyond reasonable doubt. Thus, he said, he should be acquitted of the charges against him.<sup>28</sup>

### ***Ruling of this Court***

We find no reason to reverse the conviction of Banzuela.

In essence, Banzuela’s appeal is hinged on the proposition that the victims were not credible witnesses for having made several inconsistent statements when they testified in court.

We do not agree.

### ***Credibility of the witnesses***

The guidelines to follow, when this Court is confronted with the issue of credibility of witnesses on appeal, are established in jurisprudence. In *People v. Sanchez*,<sup>29</sup> we enumerated them as follows:

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<sup>26</sup> Id. at 67-71.

<sup>27</sup> Id. at 71-72.

<sup>28</sup> Id. at 72-74.

<sup>29</sup> G.R. No. 197815, February 8, 2012, 665 SCRA 639, 643.

**First**, the Court gives the highest respect to the RTC's evaluation of the testimony of the witnesses, considering its unique position in directly observing the demeanor of a witness on the stand. From its vantage point, the trial court is in the best position to determine the truthfulness of witnesses.

**Second**, absent any substantial reason which would justify the reversal of the RTC's assessments and conclusions, the reviewing court is generally bound by the lower court's findings, particularly when no significant facts and circumstances, affecting the outcome of the case, are shown to have been overlooked or disregarded.

**And third**, the rule is even more stringently applied if the CA concurred with the RTC. (Citations omitted.)

It is well-settled in this jurisdiction that the determination of the credibility of the witnesses is correctly assigned to the trial court, which is in the best position to observe the demeanor and bodily movements of all the witnesses.<sup>30</sup> Elucidating on the rationale for this rule, this Court, in *People v. Sapigao, Jr.*,<sup>31</sup> said:

It is well settled that the evaluation of the credibility of witnesses and their testimonies is a matter best undertaken by the trial court because of its unique opportunity to observe the witnesses firsthand and to note their demeanor, conduct, and attitude under grilling examination. These are important in determining the truthfulness of witnesses and in unearthing the truth, especially in the face of conflicting testimonies. For, indeed, the emphasis, gesture, and inflection of the voice are potent aids in ascertaining the witness' credibility, and the trial court has the opportunity and can take advantage of these aids. These cannot be incorporated in the record so that all that the appellate court can see are the cold words of the witness contained in transcript of testimonies with the risk that some of what the witness actually said may have been lost in the process of transcribing. As correctly stated by an American court, "There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed in the very nature of things cannot be transcribed upon the record, and hence they can never be considered by the appellate court." (Citations omitted.)

In the case at bar, both the RTC and the Court of Appeals found the testimonies of the witnesses to be credible. Furthermore, this Court's own independent examination of the records leads us to the same conclusion.<sup>32</sup> As the Court of Appeals said, both AAA's and BBB's testimonies were straightforward, detailed, and consistent.<sup>33</sup> Their credibility is further

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<sup>30</sup> *Perez v. Court of Appeals*, 431 Phil. 786, 792 (2002).

<sup>31</sup> G.R. No. 178485, September 4, 2009, 598 SCRA 416, 425-426.

<sup>32</sup> *People v. Sanchez*, supra note 29 at 644.

<sup>33</sup> *Rollo*, p. 10.

strengthened by their clear lack of ill motive to falsify such a charge against their cousin, who shattered their youth and innocence.<sup>34</sup>

The inconsistencies in AAA's testimony, as catalogued by Banzuela in his brief,<sup>35</sup> have no bearing in the determination of his guilt or innocence, and are too trivial in character to damage AAA's credibility. The material details of the rape were clearly established,<sup>36</sup> and BBB corroborated AAA's testimony on every relevant point. As this Court stated in *People v. Saludo*<sup>37</sup>:

Rape is a painful experience which is oftentimes not remembered in detail. For such an offense is not analogous to a person's achievement or accomplishment as to be worth recalling or reliving; rather, it is something which causes deep psychological wounds and casts a stigma upon the victim, scarring her psyche for life and which her conscious and subconscious mind would opt to forget. Thus, a rape victim cannot be expected to mechanically keep and then give an accurate account of the traumatic and horrifying experience she had undergone. (Citation omitted.)

BBB was likewise candid, straightforward, and detailed in her narration of not only how AAA was raped, but also of how she almost suffered the same fate. Her alleged unusual actions during AAA's ordeal, and later hers, are not enough to discredit her. It has been established that a victim of a heinous crime such as rape cannot be expected to act with reason or in conformity with society's expectations. This acquires greater significance where the victim is a child of tender age. The workings of a human mind placed under emotional stress cannot be predicted; and people cannot be expected to act as usual in an unfamiliar situation. Furthermore, it is not accurate to say that there is a standard reaction or norm of behavior among rape victims, as each of them had to deal with different circumstances.<sup>38</sup>

***Crime of Rape proven  
beyond reasonable doubt***

Sexual intercourse with a woman below 12 years of age, whether she consented to it or not, is punishable as rape under our laws. As such, proof of force, threat, or intimidation is unnecessary in cases of statutory rape, they, not being elements of the crime. When the complainant is below 12 years old, the absence of free consent is conclusively presumed as the law supposes that a woman below this age does not possess discernment and is incapable of giving intelligent consent to the sexual act.<sup>39</sup>

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<sup>34</sup> *People v. Sanchez*, supra note 29 at 644.

<sup>35</sup> *CA rollo*, pp. 57-75.

<sup>36</sup> *People v. Sanchez*, supra note 29 at 644.

<sup>37</sup> G.R. No. 178406, April 6, 2011, 647 SCRA 374, 388.

<sup>38</sup> *Id.* at 394.

<sup>39</sup> *People v. Canares*, G.R. No. 174065, February 18, 2009, 579 SCRA 588, 601.



In order to successfully convict an accused of statutory rape, the prosecution must prove the following:

1. The age of the complainant;
2. The identity of the accused; and
3. The carnal knowledge between the accused and the complainant.<sup>40</sup>

The first element was established by the prosecution upon the presentation and submission to the court of a Certification from the Office of the Municipal Civil Registrar of Mandaluyong City dated August 24, 2004 stating that AAA was born on September 10, 1996.<sup>41</sup> Hence, she was only 6 years old when the rape was committed in February 2003.

The second element was clearly satisfied when AAA positively and consistently identified Banzuela as her offender.<sup>42</sup>

As regards the third element, it is instructive to define “carnal knowledge” in the context it is used in the Revised Penal Code:

‘[C]arnal knowledge,’ unlike its ordinary connotation of sexual intercourse, does not necessarily require that the vagina be penetrated or that the hymen be ruptured. The crime of rape is deemed consummated even when the man’s penis merely enters the labia or lips of the female organ or, as once so said in a case, by the ‘*mere touching* of the external genitalia by a penis capable of consummating the sexual act.’<sup>43</sup> (Citations omitted.)

This element was proven when AAA detailed in open court how Banzuela forcefully inserted his sex organ into her genitalia in February 2003 and how she felt pain during her ordeal.

Banzuela makes much of the fact that the medico-legal examination yielded negative results, *i.e.*, that AAA remained a virgin. This Court, in *People v. Boromeo*,<sup>44</sup> suitably refuted that argument, *viz*:

Proof of hymenal laceration is not an element of rape. An intact hymen does not negate a finding that the victim was raped. To sustain a conviction for rape, full penetration of the female genital organ is not necessary. It is enough that there is proof of entry of the male organ into the *labia of the pudendum* of the female organ. Penetration of the penis by entry into the lips of the vagina, even without laceration of the hymen, is enough to constitute rape, and even the briefest of contact is deemed rape. As long as the attempt to insert the penis results in contact with the lips of the vagina, even without rupture or laceration of the hymen, the rape is consummated. x x x. (Citations omitted.)

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<sup>40</sup> Id. at 601-602.

<sup>41</sup> Records, p. 264.

<sup>42</sup> *Sinumpaang Salaysay*, Records, p. 10; TSN, September 13, 2005, Records, p. 435.

<sup>43</sup> *People v. Tampos*, 455 Phil. 844, 857-858 (2003).

<sup>44</sup> G.R. No. 150501, June 3, 2004, 430 SCRA 533, 542.

Significantly, as this Court has held before,<sup>45</sup> the pain that AAA suffered is, in itself, an indicator of the commission of rape. Moreover, AAA's ordeal was witnessed by BBB, who in fact was the one who told AAA's mother about the incident. Thus, contrary to Banzuela's assertions, this Court is convinced that the prosecution was able to establish that he had carnal knowledge of AAA, making him guilty beyond reasonable doubt of the crime of rape.

***Crime of Attempted Rape not established  
but crime of Acts of Lasciviousness  
proven beyond reasonable doubt***

Upon appeal, the Court of Appeals found no evidence to prove with the moral certainty required by law that Banzuela intended to have carnal knowledge of BBB, thus, it modified the crime the RTC convicted Banzuela of from Attempted Rape under Article 266-A, paragraph 1(d) in relation to Article 51 of the Revised Penal Code, to Acts of Lasciviousness under Article 336 of the Revised Penal Code in relation to Republic Act No. 7610.

This Court agrees with the Court of Appeals. In an attempt to commit a felony, the offender commences the commission of such felony directly by overt acts, but 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.<sup>46</sup> In other words, a crime is in its attempted stage when the offender has already performed the acts preliminary to the consummation of the crime. However, because of some reason besides his own spontaneous desistance, he is not able to perform all the acts necessary to consummate the crime. The elements, therefore, of an attempted felony are 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; and
4. The non-performance of all acts of execution was due to cause or accident other than his spontaneous desistance.<sup>47</sup> (Citation omitted.)

In the crime of rape, penetration, however slight, is an essential act of execution that produces such felony. Thus, for Banzuela to be convicted of the crime of attempted rape, he must have already commenced the act of inserting his sexual organ in the vagina of BBB, but due to some cause or

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<sup>45</sup> *People v. Tampus*, supra note 43 at 859; *People v. Canares*, supra note 39 at 603; *People v. Boromeo*, id.

<sup>46</sup> REVISED PENAL CODE, Article 6.

<sup>47</sup> *People v. Mendoza*, 490 Phil. 737, 743 (2005).

accident, excluding his own spontaneous desistance, he wasn't able to even slightly penetrate BBB.<sup>48</sup>

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.<sup>49</sup> “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>50</sup>

In this case, Banzuela's acts of laying BBB on the ground, undressing her, and kissing her, “do not constitute the crime of attempted rape, absent any showing that [Banzuela] actually commenced to force his penis into [BBB's] sexual organ.”<sup>51</sup>

The fact that Banzuela employed on BBB the exact same tactics he used on AAA – from the invitation to go to the cemetery to visit their dead relatives, to the carrying of the child when she refused, to the laying down of the child, undressing her, and kissing her, cannot justify the presumption that he intended to rape BBB, just like he did AAA. “Such a presumption hardly constitutes proof beyond reasonable doubt of the crime of attempted rape. The gauge in determining whether the crime of attempted rape had been committed is the commencement of the act of sexual intercourse, *i.e.*, penetration of the penis into the vagina, before the interruption.”<sup>52</sup> Here, Banzuela was not even able to commence the act of sexual intercourse as he still had his pants on. What the prosecution was able to establish in Criminal Case No. MC03-918-FC-H is that Banzuela was able to lay down BBB, undress her, and kiss her, before the untimely arrival of a third party. Such acts, as the Court of Appeals said,<sup>53</sup> constitute lascivious conduct.

Article 336 of the Revised Penal Code provides for the crime of acts of lasciviousness as follows:

Art. 336. *Acts of lasciviousness.* — Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by *prision correccional*.

Its elements are:

- (1) That the offender commits any act of lasciviousness or lewdness;
- (2) That it is done under any of the following circumstances:

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<sup>48</sup> *Perez v. Court of Appeals*, supra note 30 at 793.

<sup>49</sup> *People v. Mendoza*, supra note 47 at 744.

<sup>50</sup> *People v. Dadulla*, G.R. No. 172321, February 9, 2011, 642 SCRA 432, 443.

<sup>51</sup> *People v. Dominguez, Jr.*, G.R. No. 180914, November 24, 2010, 636 SCRA 134, 155.

<sup>52</sup> *Id.* at 158.

<sup>53</sup> *Rollo*, p. 16.

- a. By using force or intimidation; or
  - b. When the offended party is deprived of reason or otherwise unconscious; or
  - c. When the offended party is under 12 years of age; and
- (3) That the offended party is another person of either sex.<sup>54</sup> (Citation omitted.)

The foregoing elements are clearly present in BBB's case, and were sufficiently established during trial. Although the crime charged against Banzuela was for attempted rape, convicting him for the crime of acts of lasciviousness does not violate any of his rights as such crime is included in the crime of rape.<sup>55</sup>

Anent BBB's actions or inaction, suffice it to say that BBB was direct and consistent in narrating her own experience with Banzuela. The argument that she did not struggle, asked for help, or shout from when she was carried out of her house and brought to the cemetery is unavailing. "[F]ailure of the offended party to make a struggle or outcry is immaterial in the rape of a child below twelve years of age because the law presumes that the victim on account of her age does not and cannot have a will of her own."<sup>56</sup>

### ***Banzuela's Defense***

We agree with the lower courts that Banzuela's defense of alibi hardly deserves credit. Such defense is one of the weakest not only because it is inherently frail and unreliable, but also because it is easy to fabricate and difficult to check or rebut.<sup>57</sup> Thus, for alibi to succeed as a defense, the following must be established by clear and convincing evidence:

1. The accused's presence at another place at the time of the perpetration of the offense; and
2. The physical impossibility of the accused's presence at the scene of the crime.<sup>58</sup>

Banzuela himself admitted the proximity of his work place and his residence to the houses of AAA and BBB and the cemetery. As such, his alibi is negated by the fact that it was not physically impossible for him to have been at the cemetery where the crimes occurred.<sup>59</sup>

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<sup>54</sup> *People v. Dominguez, Jr.*, supra note 51 at 158.

<sup>55</sup> *Perez v. Court of Appeals*, supra note 30 at 797.

<sup>56</sup> *People v. Lazaro*, 319 Phil. 352, 360 (1995).

<sup>57</sup> *People v. Palomar*, 343 Phil. 628, 663 (1997).

<sup>58</sup> *People v. Del Ayre*, 439 Phil. 73, 92-93 (2002).

<sup>59</sup> *Id.* at 93.

The presentation of Banzuela’s DTRs is also unpersuasive for lack of corroboration. The DTRs were mere photocopies, Banzuela himself made the entries therein, and they bore no signature from any of his employers. If in fact the owner of the refilling station was no longer in the country, his former manager or the brother of the owner, from whom Banzuela’s mother was able to procure the photocopied DTRs could have testified to confirm the veracity of the entries therein. Banzuela’s alibi therefore cannot prevail over the credible testimonies and positive identification that he was the perpetrator of the crimes, by AAA and BBB, who have known him prior to the incidents, as their cousin.

**Liability for Rape**

Article 266-A, paragraph (1)d of the Revised Penal Code, as amended by Republic Act No. 8353,<sup>60</sup> which is the basis of statutory rape, provides as follows:

Article 266-A. *Rape; When and How Committed.* – Rape is committed -

1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

x x x x

d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

Undoubtedly, AAA was below 12 years old at the time she was raped. However, the law qualifies the crime of statutory rape when it is committed on a child below seven years old, to wit:

Article 266-B. *Penalties.* – Rape under paragraph 1 of the next preceding article shall be punished by *reclusion perpetua*.

x x x x

The death penalty shall also be imposed if the crime of rape is committed with any of the following aggravating/qualifying circumstances:

x x x x

5) When the victim is a child below seven (7) years old.

For having been found guilty of the crime of qualified rape, AAA being a child below seven years of age when the crime occurred, the death penalty should have been imposed on Banzuela. However, Republic Act No.

<sup>60</sup> The Anti-Rape Law of 1997.

9346,<sup>61</sup> which took effect on June 24, 2006, prohibits the imposition of the death penalty. Under this Act, the lower courts correctly imposed upon Banzuela the penalty of *reclusion perpetua* without eligibility for parole<sup>62</sup> in lieu of the death penalty.<sup>63</sup>

### *Liability for Acts of Lasciviousness*

The Court of Appeals convicted Banzuela of acts of lasciviousness under Article 336 of the Revised Penal Code in relation to Section 5(b) of Republic Act No. 7610. For Banzuela to be convicted as such, both the requisites of acts of lasciviousness under Article 336 of the Revised Penal Code as earlier discussed, and sexual abuse under Section 5 of Republic Act No. 7610, must be met and established by the prosecution.<sup>64</sup> The following are the elements of sexual abuse under Section 5, Article III of Republic Act No. 7610:

- (1) The accused commits the act of sexual intercourse or lascivious conduct;
- (2) The said act is performed with a **child exploited in prostitution or subjected to other sexual abuse**; and
- (3) The child, whether male or female, is below 18 years of age.<sup>65</sup>

A review of the Information filed against Banzuela reveals that there was no allegation of the second element of Section 5, Article III of Republic Act No. 7610 – that the act is performed with a child exploited in prostitution or **subjected to other sexual abuse**. There was also no attempt to prove that element, as it would have been a violation of Banzuela’s constitutional right to be informed of the nature and cause of the accusation against him. Although the Information stated that the crime being charged was in relation to Republic Act No. 7610, it is a well-settled rule that “the character of the crime is determined neither by the caption or preamble of the information[,], nor by the specification of the provision of law alleged to have been violated, they being conclusions of law, but by the recital of the ultimate facts and circumstances in the information.”<sup>66</sup> Therefore, Banzuela can only be punished under Article 336 of the Revised Penal Code.

The penalty for acts of lasciviousness under Article 336 of the Revised Penal Code is *prision correccional* in its full range. Applying the Indeterminate Sentence Law,<sup>67</sup> the minimum of the indeterminate penalty shall be taken from the full range of the penalty next lower in degree,<sup>68</sup> *i.e.*,

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<sup>61</sup> An Act Prohibiting the Imposition of the Death Penalty, June 24, 2006.

<sup>62</sup> Id., Section 3.

<sup>63</sup> Id., Section 2.

<sup>64</sup> *Cabila v. People*, 563 Phil. 1020, 1027 (2007).

<sup>65</sup> Id.

<sup>66</sup> *People v. Anguac*, G.R. No. 176744, June 5, 2009, 588 SCRA 716, 725.

<sup>67</sup> Republic Act No. 4103, as amended.

<sup>68</sup> Id., Section 1.

*arresto mayor*, which ranges from 1 month and 1 day to 6 months.<sup>69</sup> The maximum of the indeterminate penalty shall come from the proper penalty<sup>70</sup> that could be imposed under the Revised Penal Code for Acts of Lasciviousness.<sup>71</sup> In this case, since there are neither aggravating nor mitigating circumstances, the imposable penalty is the medium period of *prision correccional*, which ranges from 2 years, 4 months and 1 day to 4 years and 2 months.<sup>72</sup>

Banzuela is hereby sentenced to suffer the penalty of 6 months of *arresto mayor*, as minimum, to 4 years and 2 months of *prision correccional*, as maximum.<sup>73</sup>

In line with prevailing jurisprudence, the Court increases the award of exemplary damages from ₱25,000.00 to ₱30,000.00 to AAA (rape);<sup>74</sup> and awards ₱20,000.00 as civil indemnity, ₱30,000.00 as moral damages, and ₱10,000.00 as exemplary damages to BBB (acts of lasciviousness).<sup>75</sup>

**WHEREFORE**, premises considered, the Decision of the Court of Appeals in CA-G.R. CR.-H.C. No. 03868 is hereby **AFFIRMED with MODIFICATION**.

1. In Criminal Case No. MC03-919-FC-H, we find accused-appellant Ferdinand Banzuela **GUILTY** of Rape defined and penalized under Articles 266-A and 266-B of the Revised Penal Code, as amended. He is sentenced to *reclusion perpetua* without the possibility of parole; and is **ORDERED** to pay the victim, AAA, ₱75,000.00 as civil indemnity; ₱75,000.00 as moral damages; and ₱30,000.00 as exemplary damages, all with interest at the rate of 6% *per annum* from the date of finality of this judgment; and
2. In Criminal Case No. MC03-918-FC-H, we find accused-appellant Ferdinand Banzuela **GUILTY** of Acts of Lasciviousness, defined and penalized under Article 336 of the Revised Penal Code, as amended. He is sentenced to an indeterminate prison term of 6 months of *arresto mayor*, as minimum, to 4 years and 2 months of *prision correccional*, as maximum; and is **ORDERED** to pay the victim, BBB, ₱20,000.00 as civil indemnity, ₱30,000.00 as moral damages, and ₱10,000.00 as exemplary damages, all with interest at the rate of 6% *per annum* from the date of finality of this judgment.

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<sup>69</sup> REVISED PENAL CODE, Articles 25 and 27.

<sup>70</sup> Id., Article 64(1).

<sup>71</sup> Republic Act No. 4103, as amended, Section 1.


<sup>72</sup> REVISED PENAL CODE, Article 77.

<sup>73</sup> *People v. Dominguez, Jr.*, supra note 51 at 163.


<sup>74</sup> *People v. Mangune*, G.R. No. 186463, November 14, 2012, 685 SCRA 578, 590-591.


<sup>75</sup> *People v. Poras*, G.R. No. 177747, February 16, 2010, 612 SCRA 624, 647.

**SO ORDERED.**

  
**TERESITA J. LEONARDO-DE CASTRO**  
Associate Justice

WE CONCUR:

  
**MARIA LOURDES P. A. SERENO**  
Chief Justice  
Chairperson

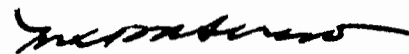
  
**LUCAS P. BERSAMIN**  
Associate Justice

  
**MARTIN S. VILLARAMA, JR.**  
Associate Justice

  
**BIENVENIDO L. REYES**  
Associate Justice

**CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

  
**MARIA LOURDES P. A. SERENO**  
Chief Justice