Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff-Appellee,

- versus -

GUILLERMO LOMAQUE,
Accused-Appellant.

G.R. No. 189297

Present:

BRION,[*] *Acting Chairperson,*
DEL CASTILLO,
ABAD,[**]
PEREZ, *and*
LEONEN,[***] *JJ.*

Promulgated:
JUN 05 2013

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DECISION

DEL CASTILLO, *J.*:

For review is the July 30, 2009 Decision[1] of the Court of Appeals (CA) in CA-G.R. CR-H.C. No. 03163 affirming the Judgment[2] of the Regional Trial Court (RTC), Branch 94, Quezon City, finding accused-appellant Guillermo Lomaque (appellant) guilty of seven counts of Rape by Sexual Intercourse, one count of Rape by Sexual Assault, and one count of Acts of Lasciviousness.

Factual Antecedents

Appellant was charged under separate Informations for 13 counts of Rape by Sexual Intercourse allegedly committed against his stepdaughter "AAA"[3] on

[*] Per Special Order No. 1460 dated May 29, 2013.
[**] Per Raffle dated April 10, 2013.
[***] Per Special Order No. 1461 dated May 29, 2013.
[1] CA *rollo*, pp. 129-147; penned by Associate Justice Vicente S.E. Veloso and concurred in by Associate Justices Jose L. Sabio, Jr. and Ricardo R. Rosario.
[2] Records, pp. 314-332; penned by Presiding Judge Romeo F. Zamora.
[3] "The identity of the victim or any information which could establish or compromise her identity, as well as those of her immediate family or household members, shall be withheld pursuant to Republic Act No. 7610, An Act Providing for Stronger Deterrence And Special Protection Against Child Abuse, Exploitation And Discrimination, And for Other Purposes; Republic Act No. 9262, An Act Defining Violence Against Women And Their Children, Providing For Protective Measures For Victims, Prescribing Penalties Therefor, And for Other Purposes; and Section 40 of A.M. No. 04-10-11-SC, known as the Rule on Violence against Women and Their Children, effective November 5, 2004." *People v. Dumadag*, G.R. No. 176740, June 22, 2011, 652 SCRA 535, 538-539.

June 5, 1999 (Criminal Case No. Q-00-96389), February 11, 1999 (Criminal Case No. Q-00-96390), second week of January 1999 (Criminal Case No. Q-00-96391), last week of December 1998 (Criminal Case No. Q-00-96392), November 2, 1998 (Criminal Case No. Q-00-96393), October 24, 1998 (Criminal Case No. Q-00-96394), September 13, 1998 (Criminal Case No. Q-00-96395), April 27, 1998 (Criminal Case No. Q-00-96396), April 17, 1998 (Criminal Case No. Q-00-96397), January 2, 1998 (Criminal Case No. Q-00-96398), September 20, 1996 (Criminal Case No. Q-00-96399), March 17, 1999 (Criminal Case No. Q-00-96400), and September 16, 1996 (Criminal Case No. Q-00-96401).[4] Except as to the aforementioned dates of occurrence and the age of "AAA" at the time of the commission of the crimes, the accusatory portions in the Informations are similarly worded as the Information in Criminal Case No. Q-00-96389 which reads:

> The undersigned, upon prior sworn complaint of "AAA" accuses GUILLERMO LOMAQUE of the crime of RAPE (Paragraph 1 of Article 266-A of the Revised Penal Code as amended by RA 8353 in relation to Section 5 of RA 7610) committed as follows:
>
> That on or about the 5th day of June 1999 in Quezon City, Philippines, the above-named accused with force and intimidation did then and there willfully, unlawfully and feloniously commit acts of sexual assault upon the person of one "AAA" his own stepdaughter a minor 14 years of age by then and there removing her shorts and inserting his penis inside her vagina and thereafter had carnal knowledge of her against her will and without her consent.
>
> CONTRARY TO LAW.[5]

In addition, appellant was also charged with Acts of Lasciviousness in relation to Section 5 of Republic Act (RA) No. 7610,[6] as amended, in Criminal Case No. Q-00-96402, the accusatory portion of which reads:

> The undersigned, upon prior sworn complaint of "AAA" accuses GUILLERMO LOMAQUE of the crime of ACTS OF LASCIVIOUSNESS IN RELATION TO SECTION 5 OF R.A. 7610, committed as follows:
>
> That on or about the 8th da[y] of May 1993 in Quezon City, Philippines, the above-named accused with force and intimidation did then and there willfully, unlawfully and feloniously commit acts of lewdness upon the person of one "AAA" his own stepdaughter a minor 8 years of age by then and there caress[ing] her breast, and her vagina, smell[ing] her private parts and insert[ing] his finger inside her vagina, which are acts prejudicial to the child's psychological and emotional development, debase, demean and degrade the intrinsic worth and dignity of said "AAA" as a human being.

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4 Records, pp. 2-100.
5 Id. at 2.
6 Known as the Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act.

CONTRARY TO LAW.[7]

At arraignment, appellant entered a plea of not guilty to all the Informations. Soon the cases were set for Pre-Trial where only the minority of "AAA" was stipulated upon. Accordingly, the joint trial on the merits ensued.

Version of the Prosecution

The CA summarized the evidence for the prosecution based on the Decision of the RTC and the records of the case as follows:

> AAA was born on September 15, 1985 to BBB by her first husband. She was about eight (8) years old at the time Lomaque started abusing/molesting her.
>
> The first act of molestation happened on May 8, 1993 when Lomaque asked AAA to remove his growing mustache and take out white hair from his head. Lomaque, while lying on AAA's lap, started to smell and sniff her private parts, and thereafter inserted his finger inside her vagina.
>
> At that time, she did not understand what Lomaque did to her. But to avert any further incident, she decided to sleep more often in the house of her aunt DDD. When her mother, BBB, inquired why she often slept in her Aunt's house, AAA told her mother that accused-appellant touched her private parts. BBB confronted Lomaque and they quarreled. For a while, Lomaque stopped molesting her so AAA returned to their house to sleep there again. In the evening of September 16, 1996, while almost everybody was asleep, AAA was awakened by Lomaque who embraced her and slowly removed her shorts, and immediately inserted his penis into her vagina. She was then only [11] years old.
>
> On September 20, 1996, when everybody in the room was already asleep, Lomaque again embraced AAA, slowly removed her shorts, and against her will, inserted his penis into AAA's vagina while her back was against him.
>
> On January 2, 1998, when BBB was in the hospital, Lomaque again sexually abused AAA, this time removing all the clothes of AAA, and thereafter inserting his penis into her vagina. AAA could not shout as Lomaque, with a gun, threatened to kill her and her mother if she reported the incident.
>
> Again, on April 17, 1998, while everyone was watching the television, Lomaque positioned himself at the back of AAA, and pinned AAA's thigh with his own legs. Lomaque slowly removed AAA's shorts and inserted his penis into her vagina. AAA could not do anything as she recalled Lomaque's threat to kill her and her mother if she reported the matter to BBB.
>
> On April 27, 1998, while they were watching TV in their house, Lomaque touched and held AAA's vagina. Again, she could not do anything as she was scared.

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7 Records, p. 107.

> In the evening of September 13, 1998, accused-appellant again sexually abused AAA, while everyone was asleep. He laid beside AAA, embraced her, lowered her shorts, and then inserted his penis into her vagina.
>
> Another incident happened on October 24, 1998. This time, while AAA was embracing her mother BBB apologizing for something she did earlier, Lomaque positioned himself at the back of AAA, and initially held BBB's breasts, he then lowered his hand towards AAA's waist, and slowly removed AAA's shorts. Lomaque then inserted his penis into AAA's vagina.
>
> During the last week of December 1998, Lomaque, while clad only with towel, summoned AAA to go upstairs. He asked AAA to hold his penis, had it inserted into AAA's mouth, and also rubbed his penis against her lips.
>
> On February 11, 1999, while AAA was about to sleep, Lomaque went on top of her, and inserted his penis into her vagina while kissing her.
>
> AAA's harrowing experience with Lomaque continued and she eventually became pregnant. It was during the last week of November 1999, when Lomaque asked BBB to bring AAA to the doctor for medical check-up, that BBB discovered that AAA was pregnant.
>
> BBB inquired who the father was and AAA told her that it was Lomaque, a matter which Lomaque admitted. However, when BBB became hysterical, Lomaque retracted and concocted a story that somebody else caused the pregnancy of AAA.
>
> After giving birth, AAA returned to their house. There she saw Lomaque kissing her younger sister, CCC. Afraid that CCC might suffer the same fate she had, she decided to file a complaint against Lomaque with the help of Bantay-Bata 163.
>
> On June 19, 2000, AAA with her aunt DDD went to Bantay-Bata 163 to seek assistance. There, AAA disclosed to social worker Liwayway Ilao, what Lomaque did to her. Ilao conducted further interview and counseling on AAA and her sister CCC; submitted AAA for medico-legal examination; and assisted AAA in filing a complaint before the Women and Children Concern Office at Camp Crame, among others.
>
> Dr. Jaime Rodrigo Leal ("Dr. Leal"), the medico-legal officer who conducted the physical examination on AAA, testified that AAA had an attenuated hymen and deep healed lacerations, indicating chronic penetration. While the same was consistent with vaginal delivery, Dr. Leal however explained that his findings validate the fact that AAA was indeed sexually abused several times, and that she gave birth on April 1, 2000.[8]

Version of the Defense

Appellant denied his complicity in the crimes charged by alleging alibi. His testimony was synthesized by the CA in this wise:

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[8] CA *rollo*, pp. 132-136.

> Lomaque testified that he started to live with BBB in 1993, bringing with him his own set of children by his first marriage.
>
> He denied that he sexually abused AAA, claiming that he could not have committed the crimes charged because as a bio-medical technician, he was deployed all over the country to repair hospital equipment. He offered several plane tickets in support of this allegation. These place tickets were dated: June 2, 1992; February 21, 1994; March 5, 1994; August 14, 1994; August 25, 1994; November 9, 1994; November 27 (year illegible); and January 7, 1997. He likewise testified that his parents-in-law and sister-in-law were living with them.[9]

Ruling of the Regional Trial Court

After trial, the RTC found "AAA" to be a credible witness and rejected the defense of denial and alibi proffered by the appellant. Consequently, it rendered a Decision[10] dated October 23, 2007 which declared appellant guilty of seven counts of rape by sexual intercourse (Criminal Case Nos. Q-00-96390, Q-00-96394, Q-00-96395, Q-00-96397, Q-00-96398, Q-00-96399 and Q-00-96401), one count of rape by sexual assault (Criminal Case No. Q-00-96392) and one count of Acts of Lasciviousness (Criminal Case No. Q-00-96402). Accordingly, the RTC sentenced appellant to imprisonment and ordered him to pay damages, *viz*:

> WHEREFORE, premises considered, judgment is hereby rendered finding the accused Guillermo Lomaque:
>
> 1) In Crim. Case No. Q-00-96389, **NOT GUILTY** on ground of reasonable doubt with costs *de-officio.*
>
> 2) In Crim. Case No. Q-00-96390, **GUILTY** beyond reasonable doubt of the crime of Rape and hereby sentences him to suffer the penalty of *Reclusion Perpetua*; to indemnify the offended party "AAA" the sum of P75,000; moral damages in the sum of P50,000 and to pay the costs.
>
> 3) In Crim. Case No. Q-00-96391, **NOT GUILTY** of the crime of Rape on ground of reasonable doubt.
>
> 4) In Crim. Case No. Q-00-96392, **GUILTY** beyond reasonable doubt and sentences accused with the indeterminate penalty ranging from FOUR (4) YEARS and TWO (2) MONTHS of *prision correccional* in its medium period as minimum to TEN (10) YEARS of *prision mayor* in its medium period as maximum.
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> 5) In Crim. Case No. Q-00-96393, **NOT GUILTY** on ground of reasonable doubt with costs *de-officio*.

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9 Id. at 136.

10 Records, pp. 314-332.

6) In Crim. Case No. Q-00-96394, **GUILTY** beyond reasonable doubt and sentences accused to suffer the penalty of *Reclusion Perpetua;* to indemnify the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000 and to pay the costs.

7) In Crim. Case No. Q-00-96395, **GUILTY** beyond reasonable doubt of the crime of Rape and hereby sentences him to suffer the penalty of *Reclusion Perpetua*; to indemnify the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000; and to pay the costs.

8) In Crim. Case No. Q-00-96396, **NOT GUILTY** on ground of reasonable doubt with costs *de-officio.*

9) In Crim. Case No. Q-00-96397, **GUILTY** beyond reasonable doubt and hereby sentences him to suffer the penalty of *Reclusion Perpetua;* to indemnity the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000; and to pay the costs.

10) In Crim. Case No. Q-00-96398, **GUILTY** beyond reasonable doubt of the crime of Rape and hereby sentences him to suffer the penalty of *Reclusion Perpetua;* to indemnify the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000; and to pay the costs.

11) In Crim. Case No. Q-00-96399, **GUILTY** beyond reasonable doubt of the crime of Rape and hereby sentences him to suffer the penalty of *Reclusion Perpetua;* to indemnity the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000; and to pay the costs.

12) In Crim. Case No. Q-00-96400, **NOT GUILTY** on ground of reasonable doubt with costs *de-officio*.

13) In Crim. Case No. Q-00-96401, **GUILTY** beyond reasonable doubt of the crime of Rape and hereby sentences him to suffer the penalty of *Reclusion Perpetua;* to indemnity the offended party ("AAA") the sum of P75,000; to pay moral damages in the sum of P50,000; and to pay the costs.

14) In Crim. Case No. Q-00-[96402], **GUILTY** beyond reasonable doubt of the crime of Acts of Lasciviousness in relation to Section 5 of Republic Act No. 7610 and hereby sentences him to suffer the indeterminate penalty ranging from EIGHT (8) YEARS and ONE (1) DAY of *prision mayor* in its medium period as minimum to FOURTEEN (14) YEARS and EIGHT (8) MONTHS and ONE (1) DAY of *Reclusion Temporal* in its medium period as maximum; to indemnify the offended party ("AAA") the sum of P50,000; to pay moral damages in the sum of P50,000; and to pay the costs.

To credit the accused the full period of his detention in accordance with law.

SO ORDERED.[11]

Appellant thus assailed his conviction before the CA.

Ruling of the Court of Appeals

In his Brief,[12] appellant faulted the trial court in giving full weight and credence to "AAA's" testimony and in finding him guilty beyond reasonable doubt of the crimes charged. The Office of the Solicitor General (OSG), for the plaintiff-appellee People of the Philippines, on the other hand prayed for the affirmance of the assailed Judgment contending that "AAA's" testimony is clear, candid and straightforward. It contended that appellant's culpability was established beyond reasonable doubt.

The CA, however, was not impressed with the arguments of the appellant, and hence rendered the questioned Decision[13] dated July 30, 2009 affirming the Decision of the RTC.

Still not satisfied, appellant is now before us insisting on his innocence.

In the Resolution[14] dated February 8, 2010, we required the parties to file their respective supplemental briefs if they so desire.[15] Appellant manifested that he was no longer filing a supplemental brief and was instead adopting the Appellant's Brief filed before the CA.[16] The OSG took the same recourse by praying that its Appellee's Brief be considered as its supplemental brief.[17] Thus, the case was deemed submitted for decision on the basis of the parties' respective briefs filed with the CA.

Issue

Simply stated, the principal issue for resolution is whether the prosecution has proven beyond reasonable doubt the guilt of appellant for the crimes of rape and acts of lasciviousness. Basically, appellant assails the credibility of "AAA." Thus, the resolution of the issue rests upon the credibility of the testimony of the offended party.

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11 Id. at 330-332.
12 CA *rollo*, pp. 48-62.
13 Id. at 129-147.
14 *Rollo*, pp. 36-37.
15 Id. at 36.
16 Id. at 42-44.
17 Id. at 48.

Our Ruling

We affirm.

The RTC and the CA's finding of appellant's guilt must be sustained.

It is now too well-settled to require extensive documentation that where the issue is the extent of credence to be properly given to the declaration made by witnesses, the findings of the trial court are accorded great weight and respect. Such findings can only be discarded or disturbed when it appears in the records that the trial court overlooked, ignored or disregarded some facts or circumstances of weight or significance which if considered would have altered the result.[18] Here, we find no plausible ground to disturb the findings of the trial court, as sustained by the CA, respecting the credibility of "AAA." Her testimony indeed bears the earmarks of truth and sincerity which contains details only a real victim could remember and reveal. "AAA" was really positive and firm in pointing an accusing finger on appellant as the very person who sexually assaulted her on different dates.

In his attempt to discredit "AAA," appellant contends that "AAA's" silence and failure to divulge her alleged horrifying ordeal to immediate relatives despite the claim that it happened for several times run counter to the natural reaction of an outraged maiden despoiled of her honor.

We are not persuaded. "AAA's" momentary inaction will neither diminish nor affect her credibility. "The filing of complaints of rape months, even years, after their commission may or may not dent the credibility of witness and of testimony, depending on the circumstances attendant thereto."[19] "It does not diminish the complainant's credibility or undermine the charges of rape when the delay can be attributed to the pattern of fear instilled by the threats of bodily harm, specially by one who exercises moral ascendancy over the victim."[20] In this case, not long after the initial rape, appellant threatened "AAA" that he would kill her and her mother if ever she would tell anyone about what happened. At that time, "AAA" was only 11 years old and was living under the same roof with the latter whom she treated as a father. Obviously, the threat "AAA" received from appellant, coupled with his moral ascendancy, is enough to cow and intimidate "AAA." Being young and inexperienced, it instilled tremendous fear in her mind. In *People v. Domingo,*[21] we ruled that the effect of fear and intimidation

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18 *People v. Eling*, G.R. No. 178546, April 30, 2008, 553 SCRA 724, 735-736.
19 *People v. Ricamora*, 539 Phil. 565, 579 (2006).
20 *People v. Degala*, 411 Phil. 650, 663 (2001).
21 G.R. No. 177136, June 30, 2008, 556 SCRA 788, 801-802.

instilled in the victim's mind cannot be measured against any given hard-and-fast rule such that it is viewed in the context of the victim's perception and judgment not only at the time of the commission of the crime but also at the time immediately thereafter. In any event, "the failure of the victim to immediately report the rape is not necessarily an indication of a fabricated charge."[22]

Neither the failure of "AAA" to struggle nor at least offer resistance during the rape incidents would tarnish her credibility. "Physical resistance need not be established when intimidation is brought to bear on the victim and the latter submits herself out of fear. As has been held, the failure to shout or offer tenuous resistance does not make voluntary the victim's submission to the criminal acts of the accused."[23] Rape is subjective and not everyone responds in the same way to an attack by a sexual fiend. Although an older person may have shouted for help under similar circumstances, a young victim such as "AAA" is easily overcome by fear and may not be able to cry for help.

Also, the fact that "AAA" resumed her normal life after the commission of the alleged rapes cannot be taken against her. We have consistently ruled that "no standard form of behavior can be anticipated of a rape victim following her defilement, particularly a child who could not be expected to fully comprehend the ways of an adult. People react differently to emotional stress and rape victims are no different from them."[24]

Moreover, appellant contends that it challenges human credulity that he was able to sexually abuse "AAA" despite the many people around them. Such contention deserves scant consideration. This is not the first time that our attention was called upon to rule on this matter. As has been repeatedly ruled, rape can be committed even when the rapist and the victim are not alone. "[L]ust is no respecter of time and place."[25] "[R]ape is not impossible even if committed in the same room while the rapist's spouse is sleeping or in a small room where other family members also sleep."[26]

"AAA" having positively identified the assailant to be the appellant and no other, the latter's proffered defense of denial must fail. "Denial could not prevail over the victim's direct, positive and categorical assertion."[27] As to his alibi, appellant failed to substantiate the same with clear and convincing evidence. The plane tickets he submitted in evidence to show that he was in other places during the incidents are irrelevant. As correctly observed by the RTC, the tickets were all issued in 1994 while the incidents subject of the Informations charging appellant

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22 *People v. Tejero*, G.R. No. 187744, June 20, 2012, 674 SCRA 244, 256.
23 *People v. Achas*, G.R. No. 185712, August 4, 2009, 595 SCRA 341, 351-352.
24 *People v. Crespo*, G.R. No. 180500, September 11, 2008, 564 SCRA 613, 637.
25 *People v. Montesa*, G.R. No. 181899, November 27, 2008, 572 SCRA 317, 337.
26 *People v. Mariano*, G.R. No. 168693, June 19, 2009, 590 SCRA 74, 89-90.
27 *People v. Espina*, G.R. No. 183564, June 29, 2011, 653 SCRA 36, 39.

with rape transpired from 1996 to 1999. Thus, appellant's alibi being uncorroborated and unsubstantiated by clear and convincing evidence, is self-serving and deserves no weight in law.

In fine, "AAA's" woeful tale of her harrowing experience in the hands of the appellant is impressively clear, definite and convincing. Her detailed narration of the incidents, given in a spontaneous and frank manner and without any fanfare, were beyond cavil well-founded. We therefore sustain the RTC's and the CA's findings of appellant's guilt.

However, the rapes committed in Criminal Case Nos. Q-00-96390, Q-00-96394, Q-00-96395, Q-00-96397, Q-00-96398, Q-00-96399 and Q-00-96401 are simple and not qualified since the relationship between appellant and the victim was not proven.

The guilt of appellant having been established and following the settled rule that in a criminal case an appeal throws the whole case open for review,[28] we will now determine the sufficiency of evidence respecting the presence of the qualifying circumstances of minority and relationship. This is considering that it was under this context that the CA based its affirmance of appellant's guilt for qualified rape as shown by its declaration that the proper imposable penalty for the seven counts of rape at that time is death.[29]

Under Article 266-B of the Revised Penal Code (RPC), rape is qualified and the penalty of death is imposed when the victim is below 18 years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree or the common-law spouse of the parent of the victim. To justify the imposition of the death penalty, however, it is required that the special qualifying circumstances of minority of the victim and her relationship to the appellant be properly alleged in the Information and duly proved during the trial. Needless to say, these two circumstances must concur.

Based on our meticulous review, we find that the courts below erred in finding appellant guilty of rape in its qualified form. Indeed, the subject Informations clearly aver the special qualifying circumstances of minority of "AAA" and her filiation (stepdaughter) to the appellant. While the prosecution was able to sufficiently prove "AAA's" minority through the latter's testimony

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[28] *People v. Tambis*, G.R. No. 175589, July 28, 2008, 560 SCRA 343, 348.
[29] CA *rollo*, p. 146.

during the trial and by the presentation of her Certificate of Live Birth[30] showing that she was born on September 15, 1985, it however, failed to prove the fact of relationship between her and the appellant (stepfather-stepdaughter). Notably, said alleged relationship was not even made the subject of stipulation of facts during the pre-trial.[31] As held in *People v. Hermocilla*,[32] "[a] stepdaughter is a daughter of one's spouse by previous marriage, while a stepfather is the husband of one's mother by virtue of a marriage subsequent to that of which the person spoken is the offspring." The allegation that "AAA" is the stepdaughter of appellant requires competent proof and should not be easily accepted as factually true. The bare testimony of appellant that he was married to "BBB" ("AAA's" mother) is not enough. Neither does "AAA's" reference to appellant as her stepfather during her testimony would suffice. As ruled in *People v. Agustin*,[33] "the relationship of the accused to the victim cannot be established by mere testimony or even by the accused's very own admission of such relationship." In this case, save for the testimony of appellant that he was married to "BBB," the record is bereft of any evidence to show that appellant and "BBB" were indeed legally married. The prosecution could have presented the marriage contract, the best evidence to prove the fact of marriage but it did not. As aptly observed in *People v. Abello*:[34]

> This modifying circumstance, however, was not duly proven in the present case due to the prosecution's failure to present the marriage contract between Abello and AAA's mother. If the fact of marriage came out in the evidence at all, it was *via* an admission by Abello of his marriage to AAA's mother. This admission, however, is inconclusive evidence to prove the marriage to AAA's mother, as the marriage contract still remains the best evidence to prove the fact of marriage. This stricter requirement is only proper as relationship is an aggravating circumstance that increases the imposable penalty and hence must be proven by competent evidence.

Following *Abello*, "AAA" cannot be considered as appellant's stepdaughter and conversely, appellant as "AAA's" stepfather. Appellant, therefore, should only be convicted of simple rape in Criminal Case Nos. Q-00-96390, Q-00-96394, Q-00-96395, Q-00-96397, Q-00-96398, Q-00-96399 and Q-00-96401 where the proper penalty for the same under Article 266-B[35] of the RPC is *reclusion perpetua*. Incidentally, the penalty of *reclusion perpetua* is the same penalty which would have been imposable even if he were guilty of qualified rape pursuant to RA 9346.[36]

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30 Exhibit "E," records, p. 128.

31 See Pre-Trial Order dated March 6, 2001, id. at 143.

32 G.R. No. 175830, July 10, 2007, 527 SCRA 296, 304.

33 G.R. No. 175325, February 27, 2008, 547 SCRA 136, 146, citing *People v. Balbarona*, G.R. No. 146854, April 28, 2004, 428 SCRA 127, 145.

34 G.R. No. 151952, March 25, 2009, 582 SCRA 378, 398-399.

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

36 An Act Prohibiting the Imposition of Death Penalty in the Philippines.

There is variance in the mode of the commission of the crime of rape in Criminal Case No. Q-00-96392 as alleged in the Information and as proven during trial. Nevertheless, appellant's conviction for rape by sexual assault stands.

However, in Criminal Case No. Q-00-96392, we observe that the courts below overlooked a glaring variance between what was alleged in the Information and what was proven during trial respecting the mode of committing the offense. While the Information in this case clearly states that the crime was committed by appellant's insertion of his penis inside "AAA's" vagina, the latter solemnly testified on the witness stand that appellant merely put his penis in her mouth.[37] Nevertheless, appellant failed to register any objection that the Information alleged a different mode of the commission of the crime of rape. As ruled in *People v. Abello*[38] and *People v. Corpuz*,[39] a variance in the mode of commission of the offense is binding upon the accused if he fails to object to evidence showing that the crime was committed in a different manner than what was alleged. Thus, appellant's conviction for rape by sexual assault must be sustained, the variance notwithstanding.

Appellant's conviction for Acts of Lasciviousness is likewise sustained.

In Criminal Case No. Q-00-96402, appellant was charged with having inserted his finger inside "AAA's" vagina under Article 336 (Acts of Lasciviousness) of the RPC in relation to Section 5(b), Article III of RA 7610. The elements of Acts of Lasciviousness under Article 336 are:

1. That the offender commits any acts 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 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.

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37 TSN, November 26, 2001, pp. 9-10.
38 Supra note 34 at 393.
39 517 Phil. 622, 639 (2006).

To obtain conviction for the same, the prosecution is also bound to establish the elements of sexual abuse under Section 5, Article III of RA 7610, to wit:

> 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.
>
> 3. The child, whether male or female, is below 18 years of age.

Lascivious conduct is defined under Section 2(H) of the Implementing Rules and Regulations of RA 7610 as "a crime committed through the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh or buttocks with the intention to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person, among others."[40] In this case, it is undisputed that appellant committed lascivious conduct when he smelled "AAA's" genital area and inserted his finger inside her vagina to gratify or arouse his sexual desire. At the time this happened on May 8, 1993, "AAA" was barely eight years old as established through her birth certificate. Without a doubt, all the afore-stated elements are obtaining in this case. We thus likewise sustain the finding that appellant is guilty of Acts of Lasciviousness as defined and penalized under Article 336 of the RPC in relation to Section 5(b), Article III of RA 7610.

The Penalty and Proper Indemnity

Having declared appellant guilty of simple rape only in Criminal Case Nos. Q-00-96390, Q-00-96394, Q-00-96395, Q-00-96397, Q-00-96398, Q-00-96399 and Q-000-96401, the appropriate penalty is *reclusion perpetua* under Article 266-B of the RPC. We, therefore, sustain the penalty of *reclusion perpetua* imposed on the appellant not by reason of RA 9346 but because that is the penalty provided for by the law for simple rape.

With regard to civil indemnity, we uphold the award of the same in line with prevailing jurisprudence that "civil indemnification is mandatory upon the finding of rape."[41] However, since the proper imposable penalty for simple rape is *reclusion perpetua*, the amount of civil indemnity awarded to the private complainant should correspondingly be reduced from ₱75,000.00 to ₱50,000.00 for each count, in line with current jurisprudence.

In like manner, case law requires automatic award of moral damages to a rape victim without need of proof because from the nature of the crime, it can be

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[40] *People v. Abello*, supra note 34 at 394.
[41] *People v. Madsali*, G.R. No. 179570, February 4, 2010, 611 SCRA 596, 621.

assumed that she has suffered moral injuries entitling her to such award. Thus, we find the award of moral damages by the CA in the amount of ₱50,000.00 for each count of rape proper. In addition, exemplary damages in the amount of ₱30,000.00 should be awarded in view of the proven circumstance of minority.

In Criminal Case No. Q-00-96392, rape by sexual assault in Article 266-A(2) of the RPC is punishable under Article 266-B by *prision mayor*, the duration of which is from six (6) years and one (1) day to twelve (12) years. The latter article also provides that if the rape is committed with any of the 10 aggravating/qualifying circumstances therein enumerated, the penalty shall be *reclusion temporal* which has a range of twelve (12) years and one (1) day to twenty (20) years.

As ruled by the Court in previous cases, the 10 attendant circumstances partake the nature of special qualifying circumstances. Under the first circumstance,[42] the minority of the victim and the relationship of the offender to the victim must both be alleged in the Information and duly proved clearly and indubitably as the crime itself. They must be lumped together and their concurrence constitutes only one special qualifying circumstance. However, in this particular case, while the special qualifying circumstance of minority was alleged and proved, the circumstance of relationship of "AAA" was not clearly established. Accordingly, appellant should be meted the penalty of *prision mayor*. Nonetheless, in *People v. Bayya,*[43] *People v. Esperanza*,[44] *People v. Hermocilla*,[45] and the recent case of *People v. Soria*,[46] the Court held that when one of the qualifying circumstances of relationship and minority is omitted or lacking, that which is pleaded in the Information and proved by the evidence may be considered as an aggravating circumstance. Conformably with such ruling, "AAA's" minority may be appreciated as an aggravating circumstance. Applying the Indeterminate Sentence Law, the minimum of the indeterminate penalty shall be within the full range of the penalty that is one degree lower than *prision mayor*, that is *prision correccional*, the range of which shall be from six (6) months and one (1) day to six (6) years. The maximum of the indeterminate penalty however shall be within the maximum period of *prision mayor* in view of the proven aggravating circumstance of minority. Thus, an indeterminate penalty of six (6) years of *prision correccional*, as minimum, to twelve (12) years of *prision mayor*, as maximum, is imposed upon appellant.

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42 Art. 266-B. x x x

1. When the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common law spouse of the parent of the victim.

x x x x

43 384 Phil. 519, 528 (2000).

44 453 Phil. 54, 77 (2003).

45 554 Phil. 189, 197 (2007).

46 G.R. No. 179031, November 14, 2012, 658 SCRA 483, 507.

"AAA" is likewise entitled to ₱30,000.00 as civil indemnity and ₱30,000.00 as moral damages for rape through sexual assault. Exemplary damages in the amount of ₱30,000.00 is also awarded pursuant to prevailing jurisprudence.

In Criminal Case No. Q-00-96402, appellant is found guilty of Acts of Lasciviousness in relation to Section 5(b), Article III of RA 7610. The imposable penalty is *reclusion temporal* in its medium period since the victim was under 12 years of age at the time the crime was committed. Since the minority of the victim is considered an aggravating circumstance,[47] the penalty shall be applied in its maximum period that ranges from sixteen (16) years, five (5) months and ten (10) days to seventeen (17) years and four (4) months. Applying the Indeterminate Sentence Law, the penalty next lower in degree is *reclusion temporal* in its minimum period with a range of twelve (12) years and one (1) day to fourteen (14) years and eight (8) months. Hence, the proper indeterminate penalty is fourteen (14) years, eight (8) months of *reclusion temporal* as minimum to seventeen (17) years and four (4) months of *reclusion temporal* as maximum. "AAA' is entitled to ₱20,000.00 as civil indemnity and ₱15,000.00 as moral damages.

WHEREFORE, premises considered, the July 30, 2009 Decision of the Court of Appeals in CA-G.R. CR.-H.C. No. 03163 is **AFFIRMED with the following MODIFICATIONS**:

1. In Criminal Case Nos. Q-00-96390, Q-00-96394, Q-00-96395, Q-00-96397, Q-00-96398, Q-00-96399 and Q-00-96401, appellant is hereby found **GUILTY** beyond reasonable doubt of the crime of Simple Rape under Article 266-A of the Revised Penal Code, as amended, and is sentenced to suffer the penalty of *reclusion perpetua* and **ORDERED** to pay "AAA" the reduced amount of ₱50,000.00 as civil indemnity, ₱50,000.00 as moral damages and an additional amount of ₱30,000.00 as exemplary damages for each count.

2. In Criminal Case No. Q-00-96392, appellant is found **GUILTY** of Rape by Sexual Assault under Article 266-A(2) and is hereby sentenced to suffer the indeterminate penalty of six (6) years of *prision correccional*, as minimum, to twelve (12) years of *prision mayor*, as maximum. He is likewise **ORDERED** to pay "AAA" the amount of ₱30,000.00 as civil indemnity, ₱30,000.00 as moral damages and ₱30,000.00 as exemplary damages.

3. In Criminal Case No. Q-00-96402, appellant is found **GUILTY** of Acts of Lasciviousness in relation to Section 5(b) of Republic Act No. 7610 and is meted to suffer the indeterminate penalty of fourteen (14) years and eight (8)

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[47] Id.

months of *reclusion temporal* as minimum to seventeen (17) years and four (4) months of *reclusion temporal* as maximum. He is **ORDERED** to pay "AAA" the amounts of ₱20,000.00 as civil indemnity and ₱15,000.00 as moral damages.

SO ORDERED.

MARIANO C. DEL CASTILLO
Associate Justice

WE CONCUR:

ARTURO D. BRION
Associate Justice
Acting Chairperson

ROBERTO A. ABAD
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

ATTESTATION

I attest 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.

ARTURO D. BRION
Associate Justice
Acting Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Acting Chairperson's Attestation, 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