



Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

PEDRO "PEPE" TALISAY,
Petitioner,

G.R. No. 258257

Present:

- versus -

GESMUNDO, C.J., Chairperson,
HERNANDO,
ZALAMEDA,
ROSARIO, and
MARQUEZ, JJ.

Promulgated:

PEOPLE OF THE PHILIPPINES,
Respondent.

AUG 09 2023 *mtb*

X ----- X

DECISION

GESMUNDO, C.J.:

This Appeal by *Certiorari*¹ seeks to reverse and set aside the August 28, 2020 Decision² and the July 21, 2021 Resolution³ of the Court of Appeals (CA) in CA-G.R. CEB CR No. 03427. The CA affirmed with modification the January 11, 2019 Decision⁴ of the Regional Trial Court, [REDACTED] (RTC); in Criminal Case No. R-PAL-17-2246-CR, finding Pedro "Pepe" Talisay (*petitioner*) guilty of violation of Section 5(b) of Republic Act (R.A.) No. 7610, otherwise known as the Special Protection of Children Against Abuse, Exploitation and Discrimination Act, committed against

¹ *Rollo*, pp. 11-36.

² Id. at 76-91; penned by Associate Justice Gabriel T. Ingles, and concurred in by Associate Justices Emily R. Aliño-Geluz and Lorenza Redulla Bordios.

³ Id. at 102-103; penned by Associate Justice Gabriel T. Ingles, and concurred in by Associate Justices Lorenza Redulla Bordios and Roberto P. Quiroz.

⁴ Id. at 54-61; penned by Executive Judge Mario O. Quinit.

AAA.⁵ The assailed CA Decision modified the RTC Decision by amending the nomenclature of the crime and the amount of damages awarded by the said trial court.

The Antecedents

Petitioner was charged with Violation of Sec. 5(b) of R.A. No. 7610 in an Information, the accusatory portion of which reads:

That on or about September 29, 2016, in ██████████ Leyte, Philippines, and within the jurisdiction of this Honorable Court, the accused, PEDRO "PEPE" TALISAY, with deliberate intent and moved by lewd design, taking advantage of the minority of his 15-year old victim, [AAA], and by means of force, threat and intimidation, did then and there, willfully, unlawfully, and criminally commit acts of lasciviousness upon her, by kissing her on her cheeks, removing her pants and panty, and satisfying [his] sexual desire by placing his penis outside of her vagina, which acts are constitutive of sexual abuse which debases, degrades or demeans her intrinsic worth and dignity as a human being, to the damage and prejudice of the said victim.

CONTRARY TO LAW.⁶

During arraignment on November 3, 2017, petitioner pleaded not guilty to the offense charged.⁷ After pre-trial was terminated, trial on the merits ensued.⁸

Version of the Prosecution

The prosecution presented AAA, the private complainant, whose testimony was summarized by the CA, as follows:

On September 29, 2016 at around 1:00 o'clock in the afternoon, while the victim was fetching water from the faucet of "Kapitania" located

⁵ The identity of the victim or any information to establish or compromise her identity, as well as those of her immediate family or household members, shall be withheld pursuant to Republic Act (R.A.) No. 7610, "An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes," approved on June 17, 1992; R.A. No. 9262, "An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes," approved on March 8, 2004; Sec. 40 of A.M. No. 04-10-11-SC known as the "Rule on Violence Against Women and Their Children, effective November 15, 2004; *People v. Cabalquinto*, 533 Phil. 703 (2006); and Amended Administrative Circular No. 83-2015 dated September 5, 2017, *Subject: Protocols and Procedures in the Promulgation, Publication, and Posting on the Websites of Decisions, Final Resolutions, and Final Orders Using Fictitious Names/Personal Circumstances*.

⁶ Rollo, p. 54.

⁷ Id.

⁸ Id.

in [REDACTED] Leyte, the [appellant] followed and caught her [a]nd dragged her to the pig pen.

Thereat, [appellant] first kissed both che[e]ks of the victim causing her to tremble [in] fear. Thereafter, [appellant] removed totally his clothes thereby exposing his penis and whole body which the victim saw. Then [appellant] removed the victim's clothes, shortpants (sic) and panty, and let her stand. While both of them were in standing position and both naked, [appellant], without the victim's consent and against her will, placed his penis on top/outside of her vagina. The victim resisted, pushed and shouted at the [appellant] not to do it because her body was already shaking as she was being attacked by her ailment - the epilepsy. But the [appellant] did not listen and just continued with his lustful desire on the victim and did push and pull movements. Then [appellant] wiped the victim's face and gave the victim two (2) pieces of [P]100 bills with the instruction not to tell her (victim['s]) mother that he ([appellant]) gave her money. Despite [appellant's] instruction, the victim told her mother what happened to her in the hands of [appellant].⁹

Version of the Defense

The defense presented petitioner, his wife [REDACTED], and their son [REDACTED], as its witnesses.

As synthesized by the CA, the version of the defense is as follows:

On September 22, 2016, [appellant] and his wife [REDACTED] were attending to their sari-sari store while their son [REDACTED] was watching television. Then the victim and her younger sister, who were outside of [appellant's] house, asked for water from the [appellant]. [Appellant] gave the two children water which they dr[a]nk. But after the victim dr[a]nk the water, she collapsed as she is suffering from epilepsy. When the victim regained her consciousness, she asked for food as she was hungry. Everytime (sic) the victim is attacked by her ailment and after regaining consciousness, she would always feel hungry. These facts are known in their place since the victim was still young.

As the family of the [appellant] had no more food and because of pity, [REDACTED] the wife of the [appellant], gave [P]200 to her husband, and told him to give it to the victim and her younger sister to which [appellant] did.

On September 28, 2016, [appellant], together with his wife, and the parents of the victim, were at the Office of the Punong Barangay of [REDACTED] because of the complaint filed by [BBB], the mother of the victim. [BBB] was under the belief that [appellant] did something wrong to the victim that was why he gave [P]200.00 to the victim. During the confrontation, the victim was asked by Brgy. Chairman Rubilita Asuero if [appellant] touched and sexually abused her to which the latter answered in

⁹ Id. at 78.

the negative. [Appellant] reasoned out that they gave money to the victim because he and his wife just pitied them. Then Brgy. Chairman Asuero let the [appellant] signed (sic) a "Kasarabutan" committing that he would no longer be giving money to any child. The said document was also signed by the mother of the victim, [BBB].

On September 29, 2016, at around 1:00 o'clock in the afternoon, [appellant]; [his] wife [REDACTED], and son [REDACTED] were just at home. On the said date, [appellant] and [his] wife attended their store the whole day, from morning until afternoon while their son [REDACTED] was watching television also the whole day. Never that (sic) [appellant] left their house the whole day nor did they take a nap or sleep. In the evening, [appellant] did not leave also their house. Hence, the allegations of the victim that [appellant] sexually abused her are not true.¹⁰

The RTC Ruling

In its January 11, 2019 Decision, the RTC gave more credence to AAA's testimony than petitioner's twin defenses of denial and alibi. It held that AAA's testimony was given in a "candid, straightforward, firm and unwavering"¹¹ manner. Also, the delay of two days in reporting the incident to her mother and the alleged inconsistencies in the testimony of AAA were insufficient to deflate her credibility.¹² The dispositive portion of the decision reads:

WHEREFORE, premises considered, this Court finds the accused **GUILTY** beyond reasonable doubt of the crime of acts of lasciviousness in relation to Republic Act 7610 and is hereby sentenced him to suffer the penalty of **14 years and 8 months** of *reclusion temporal* as minimum to **20 years** of *reclusion temporal* as maximum and ordered to pay the victim **[P]20,000.00** as civil indemnity, **[P]15,000.00** as moral damages and a fine of **[P]15,000.00**.

SO ORDERED.¹³

Aggrieved, petitioner appealed said RTC Decision before the CA.

The CA Ruling

In its August 28, 2020 Decision, the CA affirmed with modification the ruling of the RTC. It held that the prosecution successfully established the elements of lascivious conduct and found AAA's testimony credible because

¹⁰ Id. at 79.

¹¹ Id. at 59.

¹² Id. at 59-60.

¹³ Id. at 61.

she was able to steadily recount petitioner's immodest acts.¹⁴ Moreover, the alleged inconsistencies in AAA's testimony as to who were present at the place of the incident and the exact date when the money was given, were trivial and do not affect the central fact of the crime. The CA opined that AAA's testimony was clearly consistent with the substantial aspects of the crime, *i.e.*, the identification of petitioner as the perpetrator and the manner by which the crime was committed.¹⁵

The CA, however, held that the proper nomenclature of the offense committed should be "Lascivious Conduct under Section 5(b) of R.A. No. 7610" instead of "Acts of Lasciviousness in relation to Section 5(b) of R.A. No. 7610."¹⁶ It likewise increased the amount of damages in accordance with this Court's ruling in *People v. Tulagan*.¹⁷ The dispositive portion of the CA Decision reads:

WHEREFORE, the appeal is hereby **DENIED**. The Decision dated January 11, 2019 of the Regional Trial Court, ██████████ Leyte in Criminal Case No. R-PAL-17-2246-CR is hereby **AFFIRMED WITH MODIFICATION**. Accused-appellant Pedro "Pepe" Talisay is found **GUILTY** beyond reasonable doubt of the crime of Lascivious Conduct under Section 5 (b) of Republic Act No. 7610. He is hereby sentenced to suffer the penalty of fourteen (14) years and eight (8) months of *reclusion temporal*, as minimum, to twenty (20) years of *reclusion temporal*, as maximum. He is likewise **ORDERED** to pay AAA the amount of Fifty Thousand Pesos ([P]50,000.00) as civil indemnity, Fifty Thousand Pesos ([P]50,000.00) as moral damages, and Fifty Thousand Pesos ([P]50,000.00) as exemplary damages. An interest at the rate of 6% *per annum* on the monetary awards reckoned from the finality of this Decision is likewise imposed.

SO ORDERED.¹⁸ (Italics supplied)

Petitioner filed a Motion for Reconsideration¹⁹ which the CA denied in its July 21, 2021 Resolution. Unfazed, petitioner filed this petition for review on *certiorari* under Rule 45 of the Rules of Court, essentially raising the sole issue:

Whether the CA erred in affirming the decision of the RTC finding petitioner guilty of lascivious conduct under Section 5(b) of R.A. No. 7610.

¹⁴ Id. at 86-87.

¹⁵ Id. at 88.

¹⁶ Id. at 89-90.

¹⁷ 849 Phil. 197 (2019).

¹⁸ *Rollo*, p. 90.

¹⁹ Id. at 92-98.

Petitioner argues that the testimony of AAA was incredible and tainted with inconsistencies.²⁰ He claims that the prosecution was not able to prove all the elements of lascivious conduct because the element of force or coercion was lacking. Petitioner insists that AAA did not manifest any resistance at the time of the incident.²¹ Lastly, petitioner asserts that even if the defense admitted the age of the victim at the time of the commission of the crime, the presentation of the birth certificate is still the best evidence to prove AAA's age. Thus, AAA's age was not duly proven by competent evidence due to the non-presentation of her birth certificate.²²

In its Comment,²³ the People of the Philippines, as represented by the Office of the Solicitor General (OSG), maintains that the issues raised by petitioner are mere reiterations of his previous arguments.²⁴ It underscores that the minor inconsistencies in AAA's testimony were due to the misleading questions propounded to her by the defense counsel. The OSG emphasizes that AAA was empathic and consistent in her assertion regarding petitioner's molestation of her in the pigpen where she even suffered an epileptic episode.²⁵ It also highlights that questions of fact cannot be raised by petitioner in a petition for review on *certiorari* under Rule 45 of the Rules of Court.²⁶

The Court's Ruling

At the outset, it must be pointed out that the issue raised by petitioner is clearly a question of fact which requires a review of the evidence presented before the trial court. As a rule, a petition for review on *certiorari* under Rule 45 covers only questions of law. Questions of fact cannot be reevaluated and passed upon by this Court in the exercise of its power to review. The distinction between questions of law and questions of fact is well-settled. A question of law exists when the doubt or difference centers on what the law is on a certain state of facts. On the other hand, a question of fact exists if there is doubt on the truth or falsity of the alleged facts. This being so, the findings of fact of the CA are final and conclusive and this Court will not review them on appeal.²⁷

However, this rule is not iron-clad, and is subject to well-known exceptions, such as when (1) the conclusion is grounded on speculations,

²⁰ Id. at 21-24.

²¹ Id. at 26-28.

²² Id. at 28.

²³ Id. at 120-135.

²⁴ Id. at 124-125.

²⁵ Id. at 125-128.

²⁶ Id. at 130-131.

²⁷ *Westmont Investment Corporation v. Francia, Jr.*, 678 Phil. 180, 190-191 (2011).

surmises, or conjectures; (2) the inference is manifestly mistaken, absurd, or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on a misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the findings of absence of facts are contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to those of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties.²⁸ However, this Court finds that petitioner failed to substantiate his claim that the case falls under any of the exceptions.

In any event, the petition must still be denied for lack of merit.

In the present appeal, petitioner points out AAA's alleged lack of credibility as a witness. Well-entrenched is the rule that the trial courts' evaluation of the credibility of witnesses is entitled to the highest respect and will not be disturbed on appeal considering that the trial court was in a better position to decide such question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial. Accordingly, its findings on the issue of credibility of witnesses and the consequent findings of fact must be given great weight and respect on appeal, unless certain facts of substance and value have been overlooked which, if considered, might affect the result of the case.²⁹

Here, both the RTC and the CA found AAA's testimony to be straightforward and candid. This Court sees no cogent reason to depart from the foregoing rule since petitioner failed to demonstrate that the RTC and the CA overlooked, misunderstood, or misapplied facts of weight and substance that would alter the assailed decision. Moreover, this Court, in the past, had given full weight and credence to the testimony of child victims whose "[y]outh and immaturity are generally badges of truth and sincerity."³⁰

Petitioner's lascivious conduct

According to AAA, petitioner placed his penis on top of her vagina.³¹ Petitioner was charged with Acts of Lasciviousness under Sec. 5(b) of R.A. No. 7610 for unlawfully satisfying his bestial desires by placing his penis upon AAA's vagina through coercion. However, the CA changed the

²⁸ *Cabigting v. San Miguel Foods, Inc.*, 620 Phil. 14, 22 (2009).

²⁹ *People v. Bensig*, 437 Phil. 748, 756 (2002).

³⁰ *People v. Francica*, 817 Phil. 972, 989 (2017), citing *People v. Oliva*, 616 Phil. 786, 792 (2009).

³¹ TSN, February 28, 2018, pp. 3-14.

nomenclature of the crime from Acts of Lasciviousness to Lascivious Conduct for the same factual allegations and under the same penal law.

For clarity, this Court deems it proper to determine whether the act of petitioner in placing his penis on top of the victim's vagina constitutes as either consummated rape, attempted rape, acts of lasciviousness, or lascivious conduct under R.A. No. 7610.

In *People v. Puertollano*,³² this Court held that the mere touching by the male's organ of the *labia* of the pudendum of the woman's private parts is sufficient to consummate rape. Full or deep penetration of the victim's vagina is not necessary to consummate sexual intercourse; even the slightest penetration of the male organ into the female sex organ is sufficient to warrant conviction for consummated rape.³³

However, there must be sufficient and convincing proof that the penis indeed touched the *labias* or slid into the female organ, and not merely stroked the external surface thereof, for an accused to be convicted of consummated rape. Since the *labias*, which are required to be "touched" by the penis, are by their natural *situs* or location beneath the *mons pubis* or the vaginal surface, to touch them with the penis is to attain some degree of penetration beneath the surface, hence, the conclusion that touching the *labia majora* or the *labia minora* of the pudendum constitutes consummated rape.³⁴ Accordingly, a grazing of the surface of the female organ or touching the *mons pubis* of the *pudendum* is not sufficient to constitute consummated rape. Absent any showing of the slightest penetration of the female organ, *i.e.*, touching of either *labia* of the *pudendum* by the penis, there can be no consummated rape to speak of; at most, the crime committed can only be attempted rape, if not acts of lasciviousness.³⁵

Under Article 6, in relation to Art. 335, of the Revised Penal Code (*RPC*), rape is attempted when the offender commences the commission of the rape directly by overt acts, and does not perform all the acts of execution which should produce the crime of rape by reason of some cause or accident other than his own spontaneous desistance.

In *People v. Campuhan*³⁶ (*Campuhan*), this Court ruled that therein accused was guilty only of attempted rape and not consummated rape because the prosecution failed utterly to discharge its onus of proving that the

³² 367 Phil. 636 (1999).

³³ *Id.* at 645.

³⁴ *People v. Campuhan*, 385 Phil. 912, 921 (2000).

³⁵ *Id.* at 922.

³⁶ *Id.*

accused's penis was able to penetrate the victim's vagina however slight. The Court observed that the possibility of penetration is belied by the victim's own assertion that she resisted the accused's advances by putting her legs close together. It is noteworthy that in cases where penetration was not fully established, this Court had anchored its conclusion that rape nevertheless was consummated on the victim's testimony that she felt pain, or the medico-legal finding of discoloration in the inner lips of the vagina, or that the *labia minora* was already gaping with redness, or the hymenal tags were no longer visible.³⁷ None of the foregoing was shown in that case. Thus, in *Campuhan*, the crime committed was only attempted rape.

In *Cruz v. People*,³⁸ this Court explained that "the intent of the offender to lie with the female defines the distinction between attempted rape and acts of lasciviousness. It was clarified that attempted rape requires such intent while acts of lasciviousness does not. Only the direct overt acts of the offender establish the intent to lie with the female. The Court declared, however, that mere climbing on top of a naked female does not constitute attempted rape without proof of his erectile penis being in a position to penetrate the female's vagina."³⁹

In the recent case of *People v. Agao*⁴⁰ (*Agao*), the Court definitely resolved when can the touching of the female organ by the male organ be considered as either consummated rape, attempted rape, or acts of lasciviousness, to wit:

Guided by the foregoing anatomical description, the Court now reiterates, even as it clarifies, that rape of a female victim by a male person through penile penetration reaches the consummated stage as soon as the penis penetrates the cleft of the *labia majora*, also known as the vulval or pudendal cleft, or the fleshy outer lip of the vulva, in even at the slightest degree. Simply put, mere introduction, however slight, into the cleft of the *labia majora* by a penis that is capable of penetration, regardless of whether such penile penetration is thereafter fully achieved, consummates the crime of rape.⁴¹

x x x x

Given the foregoing, for as long as the prosecutorial evidence is able to establish that the penis of the accused penetrated the vulval cleft or the cleft of the *labia majora* (i.e., the cleft of the fleshy outer lip of the victim's vagina), however slight the introduction may be, the commission of rape already crossed the threshold of the attempted stage and into its consummation. On the factual appreciation of whether this minimum

³⁷ Id. at 922, 925-926.

³⁸ 745 Phil. 54 (2014).

³⁹ Id. at 58-59.

⁴⁰ G.R. No. 248049, October 4, 2022.

⁴¹ Id.

threshold genital contact is obtained in an allegation of rape, the same is rightly left to the trial court's astute assessment from the entirety of the body of proof presented in each case.⁴²

X X X X

Further to the instant clarification, in the converse, the Court also clarifies that when there is no touching by the penis of the vulval cleft of the victim's genitalia in a case of rape through penile penetration, there can be no finding of consummated rape but only attempted rape or acts of lasciviousness, as the case may be, with the distinctions determinable based on various indications that may reveal either the absence or presence of "intent to lie" on the part of the accused, which include the presence of an erect penis.⁴³ (Emphases and citations omitted)

Accordingly, pursuant to *Agao*, there is consummated rape when the penis penetrates the cleft of the *labia majora*, also known as the vulval or pudendal cleft, or the fleshy outer lip of the vulva, even in the slightest degree. Upon such slightest penetration of the penis to the cleft of the *labia majora*, the commission of rape already crosses the threshold of the attempted stage into its consummation. In contrast, when there is no touching of the penis of the vulval cleft of the *labia majora* of the victim, there can be no finding of consummated rape. Rather, it is considered either only as attempted rape or acts of lasciviousness, as the case may be, with the distinctions determinable based on various indications that may reveal either the absence or presence of "intent to lie" on the part of the accused.

In other words, when the penis of the offender merely strokes the external surface of the victim's vagina, the same cannot be considered as consummated rape. Rather, it can be classified only as either attempted rape or acts of lasciviousness. It is considered attempted rape if it can be established that the offender had the criminal intent to lie with the victim. If such intent to lie or have carnal knowledge is not established, then the crime committed is only acts of lasciviousness under the RPC, or lascivious conduct, if it falls under Sec. 5(b) of R.A. No. 7610.

In *Agao*, the Court also stated that on the factual appreciation of whether or not this minimum threshold genital contact is obtained in an allegation of rape, the same is left to the trial court's astute and insightful assessment from the entirety of the evidence proffered in each case.⁴⁴

⁴² Id.

⁴³ Id.

⁴⁴ Id.



In the instant case, the testimony of AAA demonstrates that petitioner placed his penis outside her vagina while they were standing up and made a push and pull movement:

Pros. Enage:

x x x x

Q: You mentioned that on that day of September 29, 2016, the accused kissed you and dragged (sic) committed the Acts of Lasciviousness?

A: He kissed me my both cheeks. (Witness pointing to her both cheeks.)

x x x x

Q: You were fetching [water] from the faucet of Kapitana, what happened while fetching water?

A: He followed me that (sic) he removed his clothes and placed his pennis (sic) on my vagina and made [push and pull] movement.

Q: Who were then (sic) at that time?

A: Somebody followed at me and she was caught.

Q: At the time, the accused kissed you, was it only you and the accused who were present?

A: Yes, Sir, only 2 of us.

Q: Where in particular, where did this incident happened? (sic)

A: Above the pen of Kapitana.

x x x x

Q: Did I get you right that the accused removed his garments?

A: He removed his shortpants (sic) and brief and clothes.

Q: How did it (sic) removed, was it totally or just down it? (sic)

A: He removed totally.

Q: Did you see his pennis? (sic)

A: Yes, Sir.

Q: Did you see his whole body?

A: Yes, Sir.

Q: What did you do when the accused undressed himself?

A: He was there because I was already trembling. I was already afraid of him.

Q: Which comes first, the kissing or the removing his (sic) pants?

A: The (sic) first kissed me afterwards he removed his clothes.

Q: How about you, did he undressed? (sic)

A: Yes, he removed my clothes. And my shortpants (sic) and my underwear.

Q: She (sic) did he already removed your panty?

A: Yes, Sir, he removed my panty.

Q: What were you wearing then at that time, shortpants (sic) or long pants?

A: Shortpants (sic).

Q: Did he remove all your shortpant (sic) or he just lowered by him? (sic)

A: He removed all.

Q: You were standing when both of you were naked?

A: He let me standing (sic) and he was standing.

x x x x

Q: So what happened after that (sic) the accused removed your pants and the garments and you were naked?

A: He gave me 2 pcs. of [P]100.00 peso bill and said don't tell your mother. Anyway you are not intimidated.

Q: When did he gave you [P]200.00; was it during the first kissing or what?

A: In that day that he gave me money [P]200.00 and he said just accept it don't tell that to your money (sic).

Q: Was it on the same date or prior to the kissing, the day of kissing?

A: On that very date after he abused me and he gave me money.

Q: So what happened when both of you were naked?

A: He said that "Be" go home ahead and don't just tell your mother that I gave you money.

x x x x

Q: What did he do with his pennis (sic) if any?

A: He placed his pennis (sic) on top of my vagina. And then he made pushed (sic) and pulled (sic) movement.

Q: At that time, both of you were naked?

A: We were both naked.

Q: When he did this when he placed his pennis (sic) outside your vagina, were you both standing or were you lying on the ground?

A: We were both standing.

Q: By the way, did you gave (sic) permission to the accused, to kissed (sic) you?

A: No, Sir. He just kissed me.

- Q: Did he (sic) also gave permission to the accused to removed (sic) your garments?
A: No, Sir, he just undressed me.
- Q: **Did you also gave (sic) permission to the accused to put his pennis (sic) outside the vagina?**
A: **No, Sir. He just placed his pennis (sic) on top of my vagina.**
- Q: In other words, you are saying to the Court that the accused did this all this (sic) without your consent?
A: No, Sir. Without my consent.
- Q: Did you shout?
A: I shouted to Pepe don't do it because my body was already shaking.
- Q: Did [the] accused lessen (sic) to you?
A: Yes, Sir, he lessen (sic) to my shouted. (sic)
- Q: Even [when] you shouted (sic) did the accused continued (sic) from the wrong doing?
A: Yes, Sir.
- Q: What happened after that, after he placed his pennis (sic) outside your vagina, what happened after that?
A: Then he made push and pull movement.⁴⁵ (Emphases supplied)

Nowhere in the statement of AAA does it show, whether expressly or impliedly, that petitioner's penis, although placed on top of her vagina, touched either the *labia majora* or the *labia minora* of the pudendum. AAA was asked thrice regarding how petitioner committed the act of sexual molestation and she consistently answered that petitioner only placed his penis on top of her vagina. Thus, there can be no consummated rape as there was no slightest penetration of the female organ.

Further, the jurisprudential guideposts to establish carnal knowledge, which were discussed in *Agao*, do not exist in this case. Pursuant to *Agao*, these jurisprudential guideposts provide that when the necessary genital contact is not explicitly described through the testimony of the victim, whether minor or otherwise, courts can base their appreciation of the genital contact on other aspects that would similarly illustrate the occurrence and circumstance of penile penetration. These guideposts which are appreciable in all rape cases may reasonably find sharper import with respect to cases of rape involving minor victims, especially in view of the inherent limitations of the child witness' testimony. The courts are, therefore, enjoined to exercise circumspection and use the following surrounding or attendant circumstances to aid them in their appreciation of penile penetration: (i) when the victim testifies that she felt pain in her genitals; (ii) when there is bleeding in the

⁴⁵ TSN, February 28, 2014, pp. 3-14.



same; (iii) when the *labia minora* was observed to be gaping or has redness or otherwise discolored; (iv) when the hymenal tags are no longer visible; or (v) when the sex organ of the victim has sustained any other type of injury.⁴⁶

Here, the testimony of AAA does not demonstrate that any of the above-mentioned circumstances were present to imply that petitioner had carnal knowledge of AAA. Again, at best, the evidence established that petitioner placed his penis outside the victim's genitals, without any indication that there was the slightest penetration.

Neither can petitioner's act be considered as attempted rape. The record is bereft of any showing that when petitioner placed his penis on top of the victim's vagina, he had ultimate intent of having carnal knowledge of AAA. As stated in *Agao*, one of the indications that an accused had intent to lie with the victim in the crime of attempted rape is when the perpetrator had an erect penis.⁴⁷

In the case at bench, it does not appear that the direct overt acts of petitioner establish the intent to lie with AAA. Instead, he completed his lustful desire simply by placing his penis on top of the victim's vagina and by doing a push and pull movement without any indication that he had the intent to commit the slightest penetration of the cleft of the *labia majora*.

Undoubtedly, the crime committed by petitioner is Lascivious Conduct under Sec. 5(b) of R.A. No. 7610, which provides:

Section 5. Child Prostitution and Other Sexual Abuse. — Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of *reclusion temporal* in its medium period to *reclusion perpetua* shall be imposed upon the following:

x x x x

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or [subjected] to other sexual abuse; Provided, That when the [victim] is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code; for rape or lascivious conduct, as the case may be: Provided, That the penalty

⁴⁶ *People v. Agao*, supra note 40.

⁴⁷ *Id.*

for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period[.]

The elements of sexual abuse or lascivious conduct under Sec. 5(b) of R.A. No. 7610 are as follows:

- (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.⁴⁸

Under Sec. 2(h) of the Implementing Rules and Regulations (*IRR*) of R.A. No. 7610, lascivious conduct is defined as the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus, or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals, or pubic area of a person.⁴⁹

The prosecution's evidence had sufficiently established the elements of lascivious conduct under Sec. 5(b) of R.A. No. 7610. The evidence confirms that petitioner committed lascivious acts against AAA, who narrated that on September 29, 2016, petitioner dragged her to the unused pigpen of "*Kapitana*" where he kissed her cheeks and thereafter removed both his and AAA's clothes. Petitioner then placed his penis on top of, and rubbed it against, her vagina. The victim even suffered an epileptic seizure during the ordeal. Undoubtedly, the foregoing overt acts of petitioner qualify as lascivious conduct under Sec. 2(h) of the *IRR* of R.A. No. 7610.

Minority of the victim

Lastly, contrary to petitioner's claim, his express and clear admission of the victim's minority during the pre-trial conference before the RTC is conclusive proof of the victim's age.⁵⁰ Such admission by the defense during pre-trial was never raised as an issue during trial. In *People v. XXX*,⁵¹ this

⁴⁸ *People v. Caoili*, 815 Phil. 839, 886 (2017), citing *Roallos v. People*, 723 Phil. 655, 667-668 (2013).

⁴⁹ *Id.* at 888-889.

⁵⁰ *Rollo*, p. 86.

⁵¹ G.R. No. 241787, March 15, 2021.

Court reiterated the following guidelines in appreciating age either as an element of the crime or as a qualifying circumstance:

The Court laid down the following controlling guidelines in appreciating age, either as an element of the crime or as a qualifying circumstance:

In order to remove any confusion that may be engendered by the foregoing cases, we hereby set the following guidelines in appreciating age either as an element of the crime or as a qualifying circumstance.

1. The best evidence to prove the age of the offended party is an original or certified true copy of the certificate of live birth of such party.

2. In the absence of a certificate of live birth, similar authentic documents, such as baptismal certificate and school records which show the date of birth of the victim, would suffice to prove age.

3. If the certificate of live birth or authentic document is shown to have been lost or destroyed or otherwise unavailable, the testimony, if clear and credible, of the victim's mother or a member of the family either by affinity or consanguinity who is qualified to testify on matters respecting pedigree such as the exact age or date of birth of the offended [party] pursuant to Section 40, Rule 130 of the Rules on Evidence shall be sufficient under the following circumstances:

a. If the victim is alleged to be below 3 years of age and what is sought to be proved is that she is less than 7 years old;

b. If the victim is alleged to be below 7 years of age and what is sought to be proved is that she is less than 12 years old;

c. If the victim is alleged to be below 12 years of age and what is sought to be proved is that she is less than 18 years old.

4. In the absence of a certificate of live birth, authentic document, or the testimony of the victim's mother or relatives concerning the victim's age, the complainant's testimony will suffice provided that it is expressly and clearly admitted by the accused.

5. It is the prosecution that has the burden of proving the age of the offended party. The failure of the accused to object to the testimonial evidence regarding age shall not be taken against him.⁵² (Emphasis supplied)

It is undisputed that AAA was only 15 years old at the time of the sexual molestation. During pre-trial, the defense made an express and clear admission that the victim was only 15 years old at the time of the alleged commission of the crime and for which reason, the presentation of the Local

⁵² Id.

Civil Registrar of Tobango, Leyte was dispensed with.⁵³ This sufficiently constitutes as conclusive proof of AAA's minority and age.

*Coercion or intimidation; denial
and alibi are weak defenses*

There is likewise no dispute that petitioner employed intimidation or coercion in achieving his bestial desires. In *Caballo v. People*,⁵⁴ this Court held that sexual intercourse or lascivious conduct under the coercion or influence of any adult exists when there is some form of compulsion equivalent to intimidation and it subdues the exercise of the offended party's free will.⁵⁵

As correctly observed by the CA, it appears from AAA's testimony that petitioner dragged her to an unused pig pen, where he kissed her and thereafter, removed her clothes; that she was already trembling as she was afraid of him; that she did not give her consent for petitioner to do anything to her and even shouted for petitioner to stop because her body was already shaking due to epilepsy; and that she resisted his sexual advances by pushing him. Still, petitioner simply ignored her plea. Clearly, the lascivious conduct was done through force or coercion.

Petitioner's bare denial and alibi cannot be given greater evidentiary weight than AAA's testimony pointing to petitioner as the person who sexually abused her. Denial, being self-serving, is inherently weak and is looked upon with great disfavor.⁵⁶ Also, while alibi can be considered as a valid defense, the following elements must be alleged and proven for such to be entitled to merit: (a) that the accused was present at another place at the time of the perpetration of the crime, and (b) that it was physically impossible for accused to be at the scene of the crime during its commission. "Physical impossibility refers to distance and the facility of access between the crime scene and the location of the accused when the crime was committed. The accused must demonstrate that he or she was so far away and could not have been physically present at the crime scene and its immediate vicinity when the crime was committed."⁵⁷ Here, petitioner miserably failed to show that it was physically impossible for him to be at the scene of the crime which was only a few meters from his home where he claimed to have been staying when the incident happened.

⁵³ *Rollo*, p. 55.

⁵⁴ 710 Phil. 792 (2013).

⁵⁵ *Id.* at 805.

⁵⁶ *People v. Cabiles*, 810 Phil. 969, 976-977 (2017).

⁵⁷ *People v. Ramos*, 715 Phil. 193, 206 (2013).

Viewed in the light of the foregoing, there is no reason to deviate from the similar findings of the RTC and the CA that the prosecution had successfully established all the elements of Lascivious Conduct under Sec. 5(b) of R.A. No. 7610.

Proper penalty

This Court, however, deems it proper to modify the impossible penalty because the CA failed to apply the Indeterminate Sentence Law.

Considering that AAA was only 15 years old at the time of the incident, the prescribed penalty is *reclusion temporal* in its medium period to *reclusion perpetua*. In the absence of mitigating or aggravating circumstances, the maximum term of the sentence shall be taken from the medium period thereof, which is *reclusion temporal* maximum. Moreover, notwithstanding the fact that R.A. No. 7610 is a special law, the Indeterminate Sentence Law shall still be applied. In applying its provisions, the minimum term shall be taken from within the range of the penalty next lower in degree, which is *prision mayor* in its medium period to *reclusion temporal* in its minimum period.⁵⁸ Thus, petitioner shall suffer the indeterminate sentence of eight (8) years and one (1) day of *prision mayor*, as minimum, to seventeen (17) years, four (4) months, and one (1) day of *reclusion temporal*, as maximum, for violation of Sec. 5(b) of R.A. No. 7610.

As correctly applied by the CA, pursuant to *People v. Tulagan*,⁵⁹ the amount of civil indemnity, moral damages, and exemplary damages awarded for "Lascivious Conduct under Section 5(b) of R.A. No. 7610," where the victim is a child below 18 years of age and the penalty imposed is within the range of *reclusion temporal* medium, is Fifty Thousand Pesos (₱50,000.00) each. Further, as correctly held by the CA, an interest at the rate of six percent (6%) *per annum* on the monetary awards should be imposed and reckoned from the finality of the judgment until said amounts are fully paid.

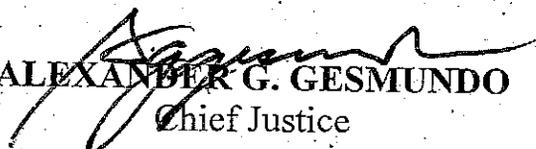
WHEREFORE, the August 28, 2020 Decision and July 21, 2021 Resolution of the Court of Appeals in CA-G.R. CEB CR No. 03427 are **AFFIRMED with MODIFICATION**. Petitioner Pedro "Pepe" Talisay is **GUILTY** beyond reasonable doubt of the offense of Lascivious Conduct under Section 5(b) of R.A. No. 7610, and is **SENTENCED** to suffer the indeterminate penalty of eight (8) years and one (1) day of *prision mayor*, as minimum, to seventeen (17) years, four (4) months and one (1) day of *reclusion temporal*, as maximum. He is likewise **ORDERED** to **PAY** AAA

⁵⁸ *People v. Basa, Jr.*, 848 Phil. 111, 139 (2019).

⁵⁹ *Supra* note 17 at 287-288.

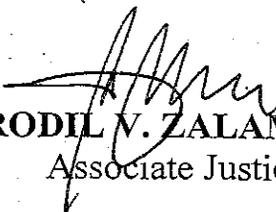
the amounts of Fifty Thousand Pesos (₱50,000.00) as civil indemnity, Fifty Thousand Pesos (₱50,000.00) as moral damages, and Fifty Thousand Pesos (₱50,000.00) by way of exemplary damages. Interest at the rate of six percent (6%) *per annum* is imposed on all the damages awarded from the date of finality of this Decision until fully paid.

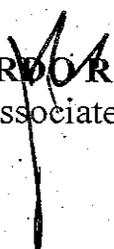
SO ORDERED.”

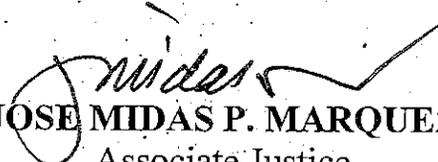

ALEXANDER G. GESMUNDO
Chief Justice

WE CONCUR:


RAMON PAUL L. HERNANDO
Associate Justice

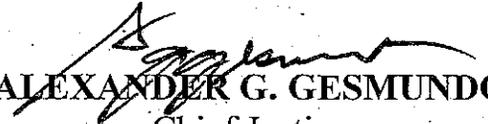

RODIL V. ZALAMEDA
Associate Justice


RICARDO R. ROSARIO
Associate Justice


JOSE MIDAS P. MARQUEZ
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.


ALEXANDER G. GESMUNDO
Chief Justice

