

SECOND DIVISION

[G.R. No. 123164, February 18, 2000]

**NICANOR DULLA, PETITIONER, VS. COURT OF APPEALS AND
ANDREA ORTEGA, REPRESENTED BY ILUMINADA BELTRAN,
RESPONDENTS.**

D E C I S I O N

MENDOZA, J.:

This is a petition for review on *certiorari* of the decision^[1] of the Sixth Division of the Court of Appeals, affirming the conviction of herein petitioner by the Regional Trial Court, Branch 5, Manila, for acts of lasciviousness.

The information against petitioner Nicanor Dulla charged him with rape. It was alleged -

That on or about February 2, 1993, in the city of Manila, Philippines, the said accused, did then and there wilfully, unlawfully and feloniously with lewd designs have carnal knowledge with ANDREA ORTEGA, three years old, by then and there inserting his penis to her vagina, then succeeded in having carnal knowledge of the said ANDREA ORTEGA against her will and consent.

CONTRARY TO LAW.

The facts are as follows:

Andrea Ortega was at birth entrusted to the care of her grandaunt, Iluminada Beltran, by her mother, Leslie Dulla Ortega.

On February 2, 1993, Andrea, who was then three years old, came home crying, with bruises on her right thigh. She told her guardian, Iluminada Beltran, that her uncle, herein petitioner, touched her private part. In her own words, she said, "*Inaano ako ng uncle ko,*" while doing a pumping motion with the lower part of her body to demonstrate what had been done to her. She also said that petitioner showed his penis to her.^[2]

The matter was reported to Barangay Councilor Carlos Lumaban who, with the child, the latter's guardian, and three *barangay tanods*, went to the house of petitioner to confront him. As petitioner's father refused to surrender his son to Lumaban and his party, Lumaban sought assistance from the nearby Western Police District (WPD) Station No. 7. It appears, however, that petitioner took advantage of the situation and ran away.^[3]

On February 8, 1993, Lumaban was informed that petitioner was in the nearby

barangay. Together with some *barangay tanods*, Lumaban went to the place where petitioner was reported to be, but petitioner's employer refused to surrender the latter to the authorities. Later, however, with the aid of two policemen from the WPD Police Station No. 1, Lumaban and his party were able to take petitioner to Precinct 1 and later to Precinct 7.^[4]

Upon arraignment, petitioner pleaded not guilty to the charge of rape, whereupon trial ensued.

In her testimony in court, Andrea said that petitioner fondled her organ and showed her his penis. She said that when petitioner did a pumping motion, she had no panties on and that she was lying down. Petitioner was also lying down, according to her.^[5]

The medical report^[6] on Andrea prepared by Dr. Maximo Reyes, who examined the child on February 3, 1993, showed:

PHYSICAL INJURIES:

Abrasion, brownish, 0.1 x 1.0 cm. bridge of nose, linear, 0.1 x 3.0 cm, antero-medial aspect, middle third, left leg.

Contusion, reddish, blue, 3.0 x 8.0 cm. postero-lateral aspect, lower third, right thigh.

GENITAL EXAMINATION:

Conclusions:

Pubic hair, no growth. Labia majora and labia minora, coaptated. Fourchette, tense. Vestibule, pinkish. Hymen, annular, thin, narrow, and intact. Hymenal orifice, admits a tube 0.5 cm. in diameter. Vaginal walls and rugosities, cannot be reached by the examining finger.

CONCLUSIONS:

1. The above physical injuries were noted on the body of the subject at that time of examination.

2. Hymen, intact.

Petitioner, on the other hand, denied the accusation against him. He said that Andrea was coached by her guardian. He likewise denied that he escaped from Lumaban and his men on February 2, 1993, and said that he only went away to avoid any trouble that time.^[7]

Based on the foregoing evidence, the trial court found petitioner guilty of acts of lasciviousness. It held:

Viewed from the foregoing, the court is convinced that although the accused had a lewd design on the child, and that he had removed his pants, and apparently lain on top of her swaying his hips to and fro, he

never intended to enter her, as clearly shown by the fact that he did not remove her panty. In other words, even if the "big penis" of the accused was erect and he was thrusting it into the private parts of the child, he could not have plunged it inside because of the panty protectively shielding it from such an illegal entry. Because of the panty worn by the child it cannot even be said that the sexual organ of the accused and that of his victim were in close contact, so that rape in its legal conception, would have been committed.

That no crime of rape took place, is further shown by the medical certificate of Dr. Maximo Reyes stating that the victim's hymen (sic) is annular, thin, narrow and intact.

While rape was not committed, this court is nonetheless convinced that the accused had committed an act of lasciviousness on the child. Said act is penalized under Article 336 of the Revised Penal Code. Rape and acts of lasciviousness have the same nature. The difference is that in rape there is an intent to lie with a woman. This element is absent in acts of lasciviousness. Hence, even though the charge is consummated, frustrated or attempted rape, the defendant may still be convicted of acts of lasciviousness (*People vs. Mariano*, 50 Phil. 587, cit. by Aquino, *The Revised Penal Code*, 1968 Ed., Vol III, p. 412.)

. . .

WHEREFORE, premises considered, judgment is rendered finding the accused Nicanor Dulla y Cunanan GUILTY beyond reasonable doubt of the crime of acts of lasciviousness and hereby sentences him to serve the indeterminate penalty of not less than SIX (6) YEARS of *Prison Correctional* as minimum and not more than TWELVE (12) YEARS of *Prison Mayor* as maximum and all the accessory penalties provided by law and to pay the costs.^[8]

SO ORDERED.

On appeal, the Court of Appeals affirmed the findings of the trial court but modified the decision, to wit:

THE FOREGOING CONSIDERED, the appealed decision is hereby AFFIRMED, but the penalty is modified to twelve (12) years and one (1) day of *reclusion temporal*, as the minimum, to not more than fourteen (14) years, eight (8) months and one (1) day also of *reclusion temporal*, as the maximum, with costs, together with all the accessory penalties.

SO ORDERED.

Petitioner now makes the following assignment of errors:

- I. The court *a quo* erred in affirming the decision of the RTC finding the petitioner guilty of the crime of Acts of Lasciviousness.
- II. The court *a quo* erred in considering and giving credence to the testimony of Andrea Ortega.

III. The court *a quo* erred in not ruling that the guilt of the accused-petitioner was not proven beyond reasonable doubt of any offense.

IV. The court *a quo* erred in not ruling that the case for rape should be dismissed by the Regional Trial Court.

First. Petitioner questions the competence of Andrea as a witness. He argues that Andrea is not capable of understanding the questions propounded to her. Moreover, she did not take an oath and the fact that she was asked purely leading questions shows that she was only coached by her guardian.^[9]

The contention has no merit. As a general rule, all persons who can perceive, and perceiving, can make known their perception to others, may be witnesses.^[10] Under Rule 130, §21 of the Rules of Court, only children who, on account of immaturity, are incapable of perceiving the facts respecting which they are examined and of relating them truthfully are disqualified from being witnesses. In *People v. Mendoza*,^[11] the Court held:

It is thus clear that any child, regardless of age, can be a competent witness if he can perceive, and perceiving, can make known his perception to others and of relating truthfully facts respecting which he is examined. In the 1913 decision in *United States vs. Buncad*, this Court stated:

Professor Wigmore, after referring to the common-law precedents upon this point, says: "But this much may be taken as settled, that no rule defines *any particular age* as conclusive of incapacity; in each instance the capacity of the particular child is to be investigated." (Wigmore on Evidence, vol. I, p. 638)

...

The requirements then of a child's competency as a witness are the: (a) capacity of observation, (b) capacity of recollection, and (c) capacity of communication. And in ascertaining whether a child is of sufficient intelligence according to the foregoing, it is settled that the trial court is called upon to make such determination.

In the case at bar, Andrea was three years and 10 months old at the time she testified. Despite her young age, however, she was able to respond to the questions put to her. She answered "yes" and "no" to questions and, when unable to articulate what was done to her by petitioner, Andrea demonstrated what she meant. During her interrogation, she showed an understanding of what was being asked. She was consistent in her answers to the questions asked by the prosecutor, the defense counsel, and even by the judge. Thus:

FISCAL:

Q Do you know Nic?

A Yes, sir.

Q Do you see him around?

A Yes, sir. (Witness pointed to a person who identified himself as Nicanor Dulla).

Nic is of unsound mind.

.....

Q Did you see his penis?

A Yes, sir. (She is nodding).

Q Is it big?

A Yes, sir.

Q What did Nicanor Dulla do?

A The child is making a pumping motion to and fro.

Q What was he doing?

A A big penis, sir.

Q You saw it?

A Yes, sir.

Q What did Nicanor Dulla do with his penis with you?

A The child answered by showing a pumping motion to and fro.

COURT:

Q What was your position when Nicanor Dulla was making a push and pull motion?

A He was lying down, sir.

Q He was touching your vagina?

A Yes, sir.

Q What did you feel with your vagina?

A Nothing, sir.

.....

Q When you were lying down, what was Nicanor Dulla doing?

A Witness answered by pumping motion.

Q Were you wearing your panty at that time?

A None, sir.

.....

CROSS-EXAMINATION BY ATTY. ORTICIO:

Q You said Nicanor Dulla has a big penis, how big was it?

A Witness extended her two arms showing a big size.

.....

Q Did he touch it to yourself?

A No, sir.

.....

COURT:

Q When you said [you saw] the big penis of accused Nicanor Dulla, was he wearing his pants?

A None, sir.

Q You mean that he was not wearing any pants nor brief?

A Yes, sir.

ATTY. ORTICIO:

Q When you said that Nicanor Dulla has a large penis did he touch [it to] your vagina?

A No, sir.

Court:

Q Did the penis of the accused touch your vagina while the accused was doing the pumping motion?

A No, sir.

ATTY. ORTICIO:

No further question, Your Honor.

COURT:

Any redirect?

FISCAL:

Q Did your vagina ache?

A No, sir.