



Republic of the Philippines  
**Supreme Court**  
Manila

**FIRST DIVISION**

**NORBERTO CRUZ y  
BARTOLOME,**

Petitioner,

- versus -

**PEOPLE OF THE PHILIPPINES,**  
Respondent.

**G.R. No. 166441**

Present:

SERENO, *C.J.*,  
LEONARDO-DE CASTRO,  
BERSAMIN,  
PEREZ, and  
PERLAS-BERNABE, *JJ.*

Promulgated:

**OCT 08 2014**

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**DECISION**

**BERSAMIN, J.:**

The intent of the offender to lie with the female defines the distinction between attempted rape and acts of lasciviousness. The felony of attempted rape requires such intent; the felony of acts of lasciviousness does not. Only the direct overt acts of the offender establish the intent to lie with the female. However, merely 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.

**The Case**

This appeal examines the decision promulgated on July 26, 2004,<sup>1</sup> whereby the Court of Appeals (CA) affirmed the conviction for attempted rape of the petitioner by the Regional Trial Court, Branch 34, in Balaoan, La Union (RTC), and imposing on him the indeterminate penalty of

<sup>1</sup> *Rollo*, pp. 38-49; penned by Associate Justice Eliezer R. Delos Santos (deceased), and concurred in by Associate Justice Delilah Vidallon-Magtolis (retired) and Associate Justice Arturo D. Brion (now a Member of the Court).

imprisonment of four (4) years and two (2) months of *prision correccional*, as minimum, to ten (10) years of *prision mayor*, as maximum, and ordering him to pay moral damages of ₱20,000.00 to AAA,<sup>2</sup> the victim.

### **Antecedents**

The petitioner was charged in the RTC with attempted rape and acts of lasciviousness involving different victims. At arraignment, he pleaded *not guilty* to the respective informations, to wit:

#### **Criminal Case No. 2388 Attempted Rape**

That on or about the 21<sup>st</sup> day of December 1993, at about 2:00 o'clock in the morning, along the Bangar-Luna Road, Barangay Central West No. 2, Municipality of Bangar, Province of La Union, Philippines and within the jurisdiction of this Honorable Court, said accused, did then and there willfully, unlawfully and feloniously and by means of force and intimidation commenced the commission of rape directly by overt acts, to wit: While private complainant AAA, an unmarried woman, **fifteen (15) years** old, was sleeping inside the tent along Bangar-Luna Road, the said accused remove her panty and underwear and lay on top of said AAA embracing and touching her vagina and breast with intent of having carnal knowledge of her by means of force, and if the accused did not accomplish his purpose that is to have carnal knowledge of the said AAA it was not because of his voluntary desistance but because the said offended party succeeded in resisting the criminal attempt of said accused to the damage and prejudice of said offended party.

CONTRARY TO LAW.<sup>3</sup>

#### **Criminal Case No. 2389 Acts of Lasciviousness**

That on or about the 21<sup>st</sup> day of December 1993, at about 3:00 o'clock in the morning, along the Bangar-Luna Road, Barangay Central West No. 2, Municipality of Bangar, Province of La Union, Philippines and within the jurisdiction of this Honorable Court, the above-named accused with lewd design, did then and there willfully, unlawfully and feloniously touch the vagina of [BBB]<sup>4</sup> against the latter's will and with

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<sup>2</sup> The real name of the offended party is withheld pursuant to Republic Act No. 7610 (*Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act*); Republic Act No. 9262 (*Anti-Violence Against Women and Their Children Act of 2004*); and A.M. No. 04-10-11-SC effective November 15, 2004 (*Rule on Violence Against Women and Their Children*). See also *People v. Cabalquinto*, G.R. No. 167693, September 19, 2006, 502 SCRA 419, 421-423.

<sup>3</sup> *Rollo*, p. 51.

<sup>4</sup> The real name of the offended party is also withheld for the reason stated in note 2.

no other purpose but to satisfy his lascivious desire to the damage and prejudice of said offended party.

CONTRARY TO LAW.<sup>5</sup>

### **Version of the Prosecution**

The CA summarized the version of the Prosecution as follows:<sup>6</sup>

x x x [Petitioner] Norberto Bartolome and [his wife] Belinda Cruz were engaged in the selling of plastic wares and glass wares in different municipalities around the country. On December 20, 1993, Norberto and Belinda employed AAA and BBB to help them in selling their wares in Bangar, La Union which was then celebrating its fiesta. From Libsong East, Lingayen, Pangasinan to Bangar, La Union, AAA and BBB boarded a passenger jeepney owned by Norberto. The young girls were accompanied by Norberto, Belinda, Ruben Rodriguez (driver) and a sales boy by the name of "Jess".

Upon reaching Bangar, La Union, at around 8:00 in the evening of December 20, 1993, they parked in front of Maroon enterprises. They brought out all the goods and wares for display. Two tents were fixed in order that they will have a place to sleep. Belinda and the driver proceeded to Manila in order to get more goods to be sold.

On December 21, 1993, at around 1:00 o'clock in the morning, AAA and BBB went to sleep. Less than an hour later, AAA was awakened when she felt that somebody was on top of her. Norberto was mashing her breast and touching her private part. AAA realized that she was divested of her clothing and that she was totally naked. Norberto ordered her not to scream or she'll be killed. AAA tried to push Norberto away and pleaded to have pity on her but her pleas fell on deaf ears. She fought back and kicked Norberto twice.

Norberto was not able to pursue his lustful desires. Norberto offered her money and told her not to tell the incident to her mother otherwise, she will be killed. AAA went out of the tent to seek help from Jess (the house boy) but she failed to wake him up.

Thirty minutes later, when AAA returned to their tent, she saw Norberto touching the private parts of BBB. AAA saw her companion awake but her hands were shaking. When she finally entered the tent, Norberto left and went outside.

Later that day, AAA and BBB narrated to Jess the incident that took place that early morning. Later still, while they were on their way to fetch water, AAA and BBB asked the people around where they can find the municipal building. An old woman pointed to them the place.

In the evening of December 21, 1993, AAA and BBB went straight to the municipal hall where they met a policeman by the name of "Sabas".

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<sup>5</sup> *Rollo*, pp. 51-52.

<sup>6</sup> *Supra* note 1, at 39-41.

They told Sabas the sexual advances made to them by Norberto. Norberto was summoned to the police station where he personally confronted his accusers. When Norberto's wife, Belinda, arrived at the police station, an argument ensued between them.

On December 22, 1993, at around 2:20 o'clock in the morning, the police investigator ordered the complainants to return at 6:00 o'clock in the morning. Norberto and Belinda were still able to bring AAA and BBB home with them and worked for them until December 30, 1994, after which they were sent back to Lingayen, Pangasinan.

On January 10, 1994, AAA and BBB went back to La Union and executed their respective sworn statements against Norberto.

### **Version of the Defense**

The petitioner denied the criminal acts imputed to him. His version was presented in the assailed decision of the CA,<sup>7</sup> as follows:

In a bid to exculpate himself, accused-appellant presents a totally different version of the story. The accused maintains that it was not possible for him to commit the crimes hurled against him. On the date of the alleged incident, there were many people around who were preparing for the "timbang gabi". Considering the location of the tents, which were near the road and the municipal hall, he could not possibly do the dastardly acts out in the open, not to mention the fact that once AAA and BBB would scream, the policemen in the municipal hall could hear them. He believes that the reason why the complainants filed these cases against him was solely for the purpose of extorting money from him.

### **Judgment of the RTC**

After the joint trial of the two criminal cases, the RTC rendered its judgment on April 6, 2000 finding the petitioner guilty beyond reasonable doubt of attempted rape in Criminal Case No. 2388 and acts of lasciviousness in Criminal Case No. 2389,<sup>8</sup> to wit:

WHEREFORE, in the light of the foregoing, the Court hereby renders judgment declaring the accused NORBERTO CRUZ Y BARTOLOME guilty beyond reasonable doubt of the crimes of ATTEMPTED RAPE and ACTS OF LASCIVIOUSNESS as defined and penalized in Article 335 in relation with (*sic*) Article 6, par. 3 and Article 336 of the Revised Penal Code respectively.

With respect to the crime of ATTEMPTED RAPE, the Court hereby sentences the accused to suffer an indeterminate penalty of imprisonment from FOUR (4) YEARS and TWO (2) MONTHS PRISON

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<sup>7</sup> Supra note 1, at 41.

<sup>8</sup> *Rollo*, pp. 51-58.

CORRECCIONAL as Minimum to TEN (10) YEARS PRISION MAYOR as Maximum and the accessory penalties provided for by law and to pay the victim AAA the amount of ₱20,000.00 as moral damages.

With regard to the crime of ACTS OF LASCIVIOUSNESS, the Court hereby sentences the accused to suffer an indeterminate penalty of imprisonment from FOUR (4) MONTHS ARRESTO MAYOR as Minimum to FOUR (4) YEARS and TWO (2) MONTHS PRISION CORRECCIONAL as Maximum and the accessory penalties provided for by law, and to pay the victim BBB the amount of ₱10,000.00 as moral damages.

The preventive imprisonment suffered by the accused by reason of the two cases is counted in his favor.

SO ORDERED.<sup>9</sup>

### Decision of the CA

On appeal, the petitioner contended that the RTC gravely erred in convicting him of attempted rape despite the dubious credibility of AAA, and of acts of lasciviousness despite the fact that BBB did not testify.

On July 26, 2004, the CA promulgated its decision affirming the conviction of the petitioner for attempted rape in Criminal Case No. 2388, but acquitting him of the acts of lasciviousness charged in Criminal Case No. 2389 due to the insufficiency of the evidence,<sup>10</sup> holding thusly:

In sum, the arguments of the accused-appellant are too puerile and inconsequential as to dent, even slightly, the overall integrity and probative value of the prosecution's evidence insofar as AAA is concerned.

Under Article 51 of the Revised Penal Code, the penalty for an attempted felony is the “penalty lower by two (2) degrees” prescribed by law for the consummated felony. In this case, the penalty for rape if it had been consummated would have been *reclusion perpetua* pursuant to Article 335 of the Revised Penal Code, as amended by Republic Act No. 7659. The penalty two degrees lower than *reclusion perpetua* is *prision mayor*.

Applying the Indeterminate Sentence Law, the maximum term of the penalty shall be the medium period of *prision mayor* in the absence of any mitigating or aggravating circumstance and the minimum shall be within the range of the penalty next lower to that prescribed for the offense which in this case is *prision correccional* in any of its periods.

We also find that the trial court correctly assessed the amount of ₱20,000.00 by way of moral damages against the accused-appellant. In a rape case, moral damages may be awarded without the need of proof or

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<sup>9</sup> Id. at 57-58.

<sup>10</sup> Supra note 1.

pleading since it is assumed that the private complainant suffered moral injuries, more so, when the victim is aged 13 to 19.

Insofar as the crime of acts of lasciviousness committed against BBB, the accused argues that there is not enough evidence to support such accusation. BBB did not testify and neither her sworn statement was formally offered in evidence to support the charge for acts of lasciviousness.

In this case, the evidence adduced by the prosecution is insufficient to substantiate the charge of acts of lasciviousness against the accused-appellant. The basis of the complaint for acts of lasciviousness is the sworn statement of BBB to the effect that the accused-appellant likewise molested her by massaging her breast and touching her private part. However, she was not presented to testify. While AAA claims that she personally saw the accused touching the private parts of BBB, there was no testimony to the effect that such lascivious acts were without the consent or against the will of BBB.<sup>11</sup>

### Issues

In this appeal, the petitioner posits that the CA's decision was not in accord with law or with jurisprudence, particularly:

I.

In giving credence to the incredulous and unbelievable testimony of the alleged victim; and

II.

In convicting the accused notwithstanding the failure of the prosecution to prove the guilt of the petitioner beyond reasonable doubt.

Anent the first issue, the petitioner assails the behavior and credibility of AAA. He argues that AAA still continued working for him and his wife until December 30, 1994 despite the alleged attempted rape in the early morning of December 21, 1994, thereby belying his commission of the crime against her; that he could not have undressed her without rousing her if she had gone to sleep only an hour before, because her bra was locked at her back; that her testimony about his having been on top of her for nearly an hour while they struggled was also inconceivable unless she either consented to his act and yielded to his lust, or the incident did not happen at all, being the product only of her fertile imagination; that the record does not indicate if he himself was also naked, or that his penis was poised to penetrate her; and that she and her mother demanded from him ₱80,000.00 as settlement, under threat that she would file a case against him.<sup>12</sup>

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<sup>11</sup> Id. at 47-49.

<sup>12</sup> Id. at 19-23.

On the second issue, the petitioner assails the glaring inconsistencies in the testimony of AAA that cast doubt on her veracity.

### **Ruling of the Court**

The appeal is partly meritorious.

In an appeal under Rule 45 of the *Rules of Court*,<sup>13</sup> the Court reviews only questions of law. No review of the findings of fact by the CA is involved. As a consequence of this rule, the Court accords the highest respect for the factual findings of the trial court, its assessment of the credibility of witnesses and the probative weight of their testimonies and the conclusions drawn from its factual findings, particularly when they are affirmed by the CA. Judicial experience has shown, indeed, that the trial courts are in the best position to decide issues of credibility of witnesses, having themselves heard and seen the witnesses and observed firsthand their demeanor and deportment and the manner of testifying under exacting examination. As such, the contentions of the petitioner on the credibility of AAA as a witness for the State cannot be entertained. He thereby raises questions of fact that are outside the scope of this appeal. Moreover, he thereby proposes to have the Court, which is not a trier of facts, review the entire evidence adduced by the Prosecution and the Defense.

Conformably with this limitation, our review focuses only on determining the question of law of whether or not the petitioner's climbing on top of the undressed AAA such that they faced each other, with him mashing her breasts and touching her genitalia with his hands, constituted attempted rape, the crime for which the RTC and the CA convicted and punished him. Based on the information, *supra*, he committed such acts "with intent of having carnal knowledge of her by means of force, and if the accused did not accomplish his purpose that is to have carnal knowledge of the said AAA it was not because of his voluntary desistance but because the said offended party succeeded in resisting the criminal attempt of said accused to the damage and prejudice of said offended party."

There is an attempt, according to Article 6 of the *Revised Penal Code*, when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than this own

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<sup>13</sup> Section 1 of Rule 45, *Rules of Court* states:

Section 1. *Filing of petition with Supreme Court*.—A party desiring to appeal by *certiorari* from a judgment, final order or resolution of the Court of Appeals, the Sandiganbayan, the Court of Tax Appeals, the Regional Trial Court or other courts, whenever authorized by law, may file with the Supreme Court a verified petition for review on *certiorari*. **The petition may include an application for a writ of preliminary injunction or other provisional remedies and shall raise only questions of law, which must be distinctly set forth. The petitioner may seek the same provisional remedies by verified motion filed in the same action or proceeding at any time during its pendency.**

spontaneous desistance. In *People v. Lamahang*,<sup>14</sup> the Court, speaking through the eminent Justice Claro M. Recto, eruditely expounded on what overt acts would constitute an attempted felony, to wit:

It is our opinion that the attempt to commit an offense which the Penal Code punishes is that which has a logical relation to a particular, concrete offense; that, which is the beginning of the execution of the offense by overt acts of the perpetrator, leading directly to its realization and consummation. The attempt to commit an indeterminate offense, inasmuch as its nature in relation to its objective is ambiguous, is not a juridical fact from the standpoint of the Penal Code. xxxx But it is not sufficient, for the purpose of imposing penal sanction, that an act objectively performed constitute a mere beginning of execution; it is necessary to establish its unavoidable connection, like the logical and natural relation of the cause and its effect, with the deed which, upon its consummation, will develop into one of the offenses defined and punished by the Code; it is necessary to prove that said beginning of execution, if carried to its complete termination following its natural course, without being frustrated by external obstacles nor by the voluntary desistance of the perpetrator, will logically and necessarily ripen into a concrete offense. x x x x.

“It must be borne in mind (I Groizard, p. 99) that in offenses not consummated, as the material damage is wanting, the nature of the action intended (*accion fin*) cannot exactly be ascertained, but the same must be inferred from the nature of the acts of execution (*accion medio*). Hence, the necessity that these acts be such that by their very nature, by the facts to which they are related, by the circumstances of the persons performing the same, and by the things connected therewith, they must show without any doubt, that they are aimed at the consummation of a crime. Acts susceptible of double interpretation, that is, in favor as well as against the culprit, and which show an innocent as well as a punishable act, must not and cannot furnish grounds by themselves for attempted or frustrated crimes. The relation existing between the facts submitted for appreciation and the offense of which said facts are supposed to produce must be direct; the intention must be ascertained from the facts and therefore it is necessary, in order to avoid regrettable instance of injustice, that the mind be able to directly infer from them the intention of the perpetrator to cause a particular injury. This must have been the intention of the legislator in requiring that in order for an attempt to exist, the offender must commence the commission of the felony directly by overt acts, that is to say, that the acts performed must be such that, without the intent to commit an offense, they would be meaningless.”<sup>15</sup>

To ascertain whether the acts performed by the petitioner constituted attempted rape, we have to determine the law on rape in effect on December 21, 1993, when the petitioner committed the crime he was convicted of. That law was Article 335 of the *Revised Penal Code*, which pertinently provided as follows:

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<sup>14</sup> 61 Phil. 703 (1935).

<sup>15</sup> Id. at 705-707.



Article 335. *When and how rape is committed.* — Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation;
2. When the woman is deprived of reason or otherwise unconscious; and
3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.

x x x x

The basic element of rape then and now is carnal knowledge of a female. Carnal knowledge is defined simply as “the act of a man having sexual bodily connections with a woman,”<sup>16</sup> which explains why the slightest penetration of the female genitalia consummates the rape. In other words, rape is consummated once the penis *capable of consummating the sexual act* touches the external genitalia of the female.<sup>17</sup> In *People v. Campuhan*,<sup>18</sup> the Court has defined the extent of “touching” by the penis in rape in the following terms:

***[T]ouching when applied to rape cases does not simply mean mere epidermal contact, stroking or grazing of organs, a slight brush or a scrape of the penis on the external layer of the victim’s vagina, or the mons pubis, as in this case. 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. As 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.***

The *pudendum* or *vulva* is the collective term for the female genital organs that are visible in the perineal area, *e.g., mons pubis, labia majora, labia minora*, the hymen, the clitoris, the vaginal orifice, *etc.* The *mons pubis* is the rounded eminence that becomes hairy after puberty, and is instantly visible within the surface. The next layer is the *labia majora* or the outer lips of the female organ composed of the outer convex surface and the inner surface. The skin of the outer convex surface is covered with hair follicles and is pigmented, while the inner surface is a thin skin which does not have any hair but has many sebaceous glands. Directly beneath the *labia majora* is the *labia minora*. Jurisprudence dictates that the *labia majora* must be entered for rape to be consummated, and not merely for the penis to stroke the surface of the female organ. xxxx Thus, **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**

<sup>16</sup> *People v. Orita*, G.R. No. 88724, April 3, 1990, 184 SCRA 105, 113, citing Black’s Law Dictionary, Fifth Edition, p. 193.

<sup>17</sup> *People v. Jalosjos*, G.R. Nos. 132875-876, November 16, 2001, 369 SCRA 179, 202.

<sup>18</sup> G.R. Nos. 129433, March 30, 2000, 329 SCRA 270, 280-282.

**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; at most, it can only be attempted rape, if not acts of lasciviousness.** [Bold emphasis supplied]

It is noteworthy that in *People v. Orita*,<sup>19</sup> the Court clarified that the ruling in *People v. Eriñia*<sup>20</sup> whereby the offender was declared guilty of *frustrated rape* because of lack of conclusive evidence of penetration of the genital organ of the offended party, was a *stray decision* for not having been reiterated in subsequent cases. As the evolving case law on rape stands, therefore, rape in its frustrated stage is a physical impossibility, considering that the requisites of a frustrated felony under Article 6 of the *Revised Penal Code* are that: (1) *the offender has performed all the acts of execution which would produce the felony*; and (2) that the felony is not produced due to causes independent of the perpetrator's will. Obviously, the offender attains his purpose from the moment he has carnal knowledge of his victim, because from that moment all the essential elements of the offense have been accomplished, leaving nothing more to be done by him.<sup>21</sup>

Nonetheless, rape admits of an attempted stage. In this connection, the character of the *overt acts* for purposes of the attempted stage has been explained in *People v. Lizada*:<sup>22</sup>

An overt or external act is defined as some physical activity or deed, indicating the intention to commit a particular crime, more than a mere planning or preparation, which if carried out to its complete termination following its natural course, without being frustrated by external obstacles nor by the spontaneous desistance of the perpetrator, will logically and necessarily ripen into a concrete offense. **The *raison d'être* for the law requiring a direct overt act is that, in a majority of cases, the conduct of the accused consisting merely of acts of preparation has never ceased to be equivocal; and this is necessarily so, irrespective of his declared intent. It is that quality of being equivocal that must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime, or an overt act or before any fragment of the crime itself has been committed, and this is so for the reason that so long as the equivocal quality remains, no one can say with certainty what the intent of the accused is.** It is necessary that the overt act should have been the ultimate step towards the consummation of the design. It is sufficient if it was the "first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." The act done need not constitute the last proximate one for completion. **It is necessary, however, that the attempt must have a causal relation to the intended crime. In the words of Viada, the overt acts must have an immediate and necessary relation to the offense.** (Bold emphasis supplied)

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<sup>19</sup> Supra note 16.

<sup>20</sup> 50 Phil. 998 (1927).

<sup>21</sup> Id. at 114.

<sup>22</sup> G.R. No. 143468-71, January 24, 2003, 396 SCRA 62, 94-95.

In attempted rape, therefore, the concrete felony is rape, but the offender *does not perform all the acts of execution of having carnal knowledge*. If the slightest penetration of the female genitalia consummates rape, and rape in its attempted stage requires the commencement of the commission of the felony *directly by overt acts* without the offender performing all the acts of execution that should produce the felony, the only means by which the overt acts performed by the accused can be shown to have a causal relation to rape as the intended crime is to make a clear showing of his intent to lie with the female. Accepting that intent, being a mental act, is beyond the sphere of criminal law,<sup>23</sup> that showing must be through his overt acts directly connected with rape. He cannot be held liable for attempted rape without such overt acts demonstrating the intent to lie with the female. In short, the State, to establish attempted rape, must show that his overt acts, should his criminal intent be carried to its complete termination without being thwarted by extraneous matters, would ripen into rape,<sup>24</sup> for, as succinctly put in *People v. Dominguez, Jr.*:<sup>25</sup> “*The gauge in determining whether the crime of attempted rape had been committed is the commencement of the act of sexual intercourse, i.e., penetration of the penis into the vagina, before the interruption.*”

The petitioner climbed on top of the naked victim, and was already touching her genitalia with his hands and mashing her breasts when she freed herself from his clutches and effectively ended his designs on her. Yet, inferring from such circumstances that rape, and no other, was his intended felony would be highly unwarranted. This was so, despite his lust for and lewd designs towards her being fully manifest. Such circumstances remained equivocal, or “susceptible of double interpretation,” as Justice Recto put in *People v. Lamahang, supra*, such that it was not permissible to directly infer from them the intention to cause rape as the particular injury. Verily, his felony would not exclusively be rape had he been allowed by her to continue, and to have sexual congress with her, for some other felony like simple seduction (if he should employ deceit to have her yield to him)<sup>26</sup> could also be ultimate felony.

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<sup>23</sup> I Feria & Gregorio, *Comments on the Revised Penal Code*, First Edition (1958), Central Book Supply, Inc., Manila, p. 29., to wit:

An act is defined as any bodily movement or a process whereby an individual puts his organism into motion. In order to produce some change or effect in the external world, it being unnecessary that the same be actually produced as the possibility of its production is sufficient.

**Mere thoughts and ideas, no matter how immoral or heinous they may be, cannot constitute a felony because the act must be external, and internal acts are beyond the sphere of criminal law.**

<sup>24</sup> Id. at 78-79.

<sup>25</sup> G.R. No. 180914, November 24, 2010, 636 SCRA 134, 158.

<sup>26</sup> Article 338 of the *Revised Penal Code* defines simple seduction as the seduction of a woman who is single or a widow of good reputation, over twelve but under eighteen years of age, committed by means of deceit.

We clarify that the direct overt acts of the petitioner that would have produced attempted rape did not include equivocal preparatory acts. The former would have related to his acts directly connected to rape as the intended crime, but the latter, whether external or internal, had no connection with rape as the intended crime. Perforce, his perpetration of the preparatory acts would not render him guilty of an attempt to commit such felony.<sup>27</sup> His preparatory acts could include his putting up of the separate tents, with one being for the use of AAA and BBB, and the other for himself and his assistant, and his allowing his wife to leave for Manila earlier that evening to buy more wares. Such acts, being equivocal, had no direct connection to rape. As a rule, preparatory acts are not punishable under the *Revised Penal Code* for as long as they remained equivocal or of uncertain significance, because by their equivocality no one could determine with certainty what the perpetrator's intent really was.<sup>28</sup>

If the acts of the petitioner did not constitute attempted rape, did they constitute acts of lasciviousness?

It is obvious that the fundamental difference between attempted rape and acts of lasciviousness is the offender's intent to lie with the female. In rape, intent to lie with the female is indispensable, but this element is not required in acts of lasciviousness.<sup>29</sup> Attempted rape is committed, therefore, when the "touching" of the vagina by the penis *is coupled with the intent to penetrate*. The intent to penetrate is manifest only through the showing of the penis capable of consummating the sexual act touching the external genitalia of the female.<sup>30</sup> Without such showing, only the felony of acts of lasciviousness is committed.<sup>31</sup>

Based on Article 336 of the *Revised Penal Code*, the felony of acts of lasciviousness is consummated when the following essential elements concur, namely: (a) the offender commits any act of lasciviousness or lewdness upon another person of either sex; and (b) the act of lasciviousness or lewdness is committed either (i) by using force or intimidation; or (ii) when the offended party is deprived of reason or is otherwise unconscious; or (iii) when the offended party is under 12 years of age.<sup>32</sup> In that regard, *lewd* is defined as obscene, lustful, indecent, lecherous; it signifies that form

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<sup>27</sup> *People v. Lizada*, supra note 22 at 95.

<sup>28</sup> I Feria & Gregorio, supra note 23, at 78-79, which opines that equivocal preparatory acts remain unpunished unless the *Revised Penal Code* penalizes them (e.g., conspiracy and proposal to commit a felony in certain cases (Article 8, *Revised Penal Code*); mere possession with intent to use of instruments or implements adaptable for the commission of counterfeiting (Article 176, paragraph 2, *Revised Penal Code*); and possession of picklocks or similar tools adapted to the commission of robbery (Article 304, *Revised Penal Code*).

<sup>29</sup> *People v. Mendoza*, G.R. Nos. 152589 and 152758, January 31, 2005, 450 SCRA 328, 333.

<sup>30</sup> *People v. Jalosjos*, supra, note 17.

<sup>31</sup> *People v. Dadulla*, G.R. No. 172321, February 9, 2011, 642 SCRA 432, 443; citing *People v. Collado*, G.R. Nos. 135667-70, March 1, 2001, 353 SCRA 381, 392.

<sup>32</sup> *People v. Lizada*, supra note 22 at 93.

of immorality that has relation to moral impurity; or that which is carried on a wanton manner.<sup>33</sup>

The information charged that the petitioner “remove[d] her panty and underwear and la[id] on top of said AAA embracing and touching her vagina and breast.” With such allegation of the information being competently and satisfactorily proven beyond a reasonable doubt, he was guilty only of acts of lasciviousness, not attempted rape. His embracing her and touching her vagina and breasts did not directly manifest his intent to lie with her. The lack of evidence showing his erectile penis being in the position to penetrate her when he was on top of her deterred any inference about his intent to lie with her. At most, his acts reflected lewdness and lust for her.

The intent to commit rape should not easily be inferred against the petitioner, even from his own declaration of it, if any, unless he committed overt acts directly leading to rape. A good illustration of this can be seen in *People v. Bugarin*,<sup>34</sup> where the accused was charged with attempted rape through an information alleging that he, by means of force and intimidation, “*did then and there willfully, unlawfully and feloniously commence the commission of the crime of Rape directly by overt acts, by then and there kissing the nipples and the vagina of the undersigned [complainant], a minor, and about to lay on top of her, all against her will, however, [he] did not perform all the acts of execution which would have produced the crime of Rape by reason of some causes other than his own spontaneous desistance, that is, undersigned complainant push[ed] him away.*” The accused was held liable only for acts of lasciviousness because the intent to commit rape “is not apparent from the act described,” and the intent to have sexual intercourse with her was not inferable from the act of licking her genitalia. The Court also pointed out that the “act imputed to him cannot be considered a preparatory act to sexual intercourse.”<sup>35</sup>

Pursuant to Article 336 of the *Revised Penal Code*, the petitioner, being guilty of acts of lasciviousness, is punished with *prision correccional*. In the absence of modifying circumstances, *prision correccional* is imposed in its medium period, which ranges from two (2) years, four (4) months and one day to four (4) years and two (2) months. Applying the *Indeterminate Sentence Law*, the minimum of the penalty should come from *arresto mayor*, the penalty next lower than *prision correccional* which ranges from one (1) month to six (6) months. Accordingly, the Court fixes the indeterminate sentence of three (3) months of *arresto mayor*, as the minimum, to two (2) years, four (4) months and one day of *prision correccional*, as the maximum.

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<sup>33</sup> Id. at 94.

<sup>34</sup> G.R. Nos. 110817-22, June 13, 1997, 273 SCRA 384, 401.

<sup>35</sup> Id.

In acts of lasciviousness, the victim suffers moral injuries because the offender violates her chastity by his lewdness. “Moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission.”<sup>36</sup> Indeed, Article 2219, (3), of the *Civil Code* expressly recognizes the right of the victim in acts of lasciviousness to recover moral damages.<sup>37</sup> Towards that end, the Court, upon its appreciation of the record, decrees that ₱30,000.00 is a reasonable award of moral damages.<sup>38</sup> In addition, AAA was entitled to recover civil indemnity of ₱20,000.00.<sup>39</sup>

Under Article 2211 of the *Civil Code*, the courts are vested with the discretion to impose interest as a part of the damages in crimes and quasi-delicts. In that regard, the moral damages of ₱20,000.00 shall earn interest of 6% *per annum* reckoned from the finality of this decision until full payment.<sup>40</sup>

**WHEREFORE**, the Court **FINDS** and **PRONOUNCES** petitioner **NORBERTO CRUZ y BARTOLOME** guilty of **ACTS OF LASCIVIOUSNESS**, and, **ACCORDINGLY, PENALIZES** him with the indeterminate sentence of three (3) months of *arresto mayor*, as the minimum, to two (2) years, four (4) months and one day of *prision correccional*, as the maximum; **ORDERS** him to pay moral damages of ₱30,000.00 and civil indemnity of ₱20,000.00 to the complainant, with interest of 6% *per annum* on such awards reckoned from the finality of this decision until full payment; and **DIRECTS** him to pay the costs of suit.

**SO ORDERED.**

  
LUCAS P. BERSAMIN  
Associate Justice

<sup>36</sup> Article 2217, *Civil Code*.

<sup>37</sup> Article 2219. Moral damages may be recovered in the following and analogous cases:

XXXX

(3) Seduction, abduction, rape, or other lascivious acts;

XXXX

<sup>38</sup> *People v. Dominguez, Jr.*, supra, note 25, at 164-165.

<sup>39</sup> *Id.*

<sup>40</sup> *People v. Maglente*, G.R. No. 201445, November 27, 2013, 711 SCRA 142, 161; *People v. Domingo*, G.R. No. 184343, March 2, 2009, 580 SCRA 436, 459.

**WE CONCUR:**



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

*Teresita Leonardo de Castro*  
**TÉRESITA J. LEONARDO-DE CASTRO**  
Associate Justice



**JOSE PORTUGAL PEREZ**  
Associate Justice

*Ma. Nell*  
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

**CERTIFICATION**

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



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