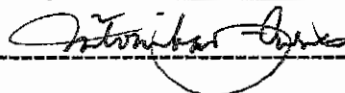


EN BANC

G.R. No. 248049 (*People of the Philippines, plaintiff-appellee vs. Efren Agao y Añonuevo, accused-appellant*).

Promulgated: October 4, 2022



X-----X

CONCURRING OPINION

GESMUNDO, C.J.:

I agree with the *ponencia* of our esteemed colleague Associate Justice Alfredo Benjamin S. Caguioa and commend his efforts at enriching jurisprudence. The *ponencia* sets a fine line between consummated and attempted rape based on a visual presentation and “biologically accurate description of what constitutes the slightest penile contact”¹ to better guide the bench in resolving such cases. The *ponencia* clarifies what jurisprudence means by “the slightest touch” that amounts to consummated rape, to wit:

[R]ape x x x 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.

x x x x

With careful and decisive reference to the anatomical illustration above, the Court clarifies that when jurisprudence refers to “mere touching”, it is not sufficient that the penis grazed over the *pudendum* or the fleshy surface of the *labia majora*. **Instead, what jurisprudence considers as consummated rape when it describes a penis touching the vagina is the penis penetrating the cleft of the labia majora, however minimum or slight.** In other words, the penis’ mere touch of the *pudendum* would not result in any degree of penetration since the *pudendum* is a muscular part located over the *labia majora* and therefore mere touch of or brush upon the same would only constitute attempted rape, not consummated. Similarly, a penis’ mere grazing of the fleshy portion, not the vulval cleft of the *labia majora*, will also constitute only attempted rape and not consummated rape, since the same cannot be considered to have achieved the slightest level of penetration. **Stated**

¹ *Ponencia*, p. 14.



differently, the Court here elucidates that “mere touch” of the penis on the *labia majora* legally contemplates not mere surface touch or skin contact, but the slightest penetration of the cleft of the *labia majora*, however minimum in degree.² (Emphases supplied)

This is consistent with the *En Banc* ruling in *People v. Campuhan*³ (*Campuhan*) that it is necessary to “carefully ascertain whether the penis of the accused in reality entered the labial threshold of the female organ to accurately conclude that rape was consummated. Failing in this, the thin line that separates attempted rape from consummated rape will significantly disappear.”⁴ The visual explanation provided in the *ponencia* further clarifies the delineation.

Indeed, the *labia majora* begins from the walls of the vulva to the cleft of the *labia majora* or major lips.⁵ The cleft between the *labia majora* is called the pudental cleft or “cleft of Venus,” and it contains and protects the other, more delicate structures of the vulva.⁶ When the offender’s penis touches the cleft of the *labia majora*, it already constitutes carnal knowledge because such act shows the consummated effort of the offender to penetrate the more delicate structures of the vulva.

I write this Concurring Opinion to express some of my thoughts on the matter.

First, while a victim’s testimony on the exact point of contact is ideal, to my mind, a witness – especially a child – may find it challenging to accurately point to the anatomical part of the body that the accused’s penis actually touched. Beyond the unfamiliarity of a child with the parts of one’s sexual organ and the correct words to use, the harrowing experience of rape may also hinder the victim from accurately recalling the precise touchpoint. Fortunately, in this case, the child witness was able to pinpoint the body part that the penis had touched.⁷ This may not hold true in all situations. For

² Id. at 24-25.

³ 385 Phil. 912 (2000).

⁴ Id. at 927.

⁵ Dr. Ananya Mandal, Vulva Structures, News Medical Life Sciences, [https://www.news-medical.net/health/Vulva-Structures.aspx#:~:text=The%20cleft%20between%20the%20%22labia,granular%20layer%20on%20the%20insides](https://www.news-medical.net/health/Vulva-Structures.aspx#:~:text=The%20cleft%20between%20the%20%22labia,granular%20layer%20on%20the%20insides.). [last accessed: July 11, 2022]

⁶ Boundless, Chapter 26.5F: Vulva, Anatomy & Physiology, August 23, 2013 [https://med.libretexts.org/Bookshelves/Anatomy_and_Physiology/Book%3A_Anatomy_and_Physiology_\(Boundless\)/26%3A_The_Reproductive_System/26.5%3A_The_Female_Reproductive_System/26.5F%3A_Vulva](https://med.libretexts.org/Bookshelves/Anatomy_and_Physiology/Book%3A_Anatomy_and_Physiology_(Boundless)/26%3A_The_Reproductive_System/26.5%3A_The_Female_Reproductive_System/26.5F%3A_Vulva). [last accessed: July 11, 2022]

⁷ *Ponencia*, pp. 36-37.

Q: But was he able to fully penetrate your vagina?

A: No, sir.

Q: Using the female doll, at what part of your vagina where his penis was at that time?

A: *Dito po sa may gitna.*

instance, in *People v. Ombreso*,⁸ the Court cautioned that when a victim “is of such age that she cannot be expected to make a distinction between partial and full penile entry, her testimony that the accused’s penis did not enter her sex organ should be taken together with the rest of her testimony and not taken out of context.”⁹ Moreover, in *Campuhan*, the Court acknowledged the limitations of a child witness. In said case, the child witness answered “yes” to the question of whether the penis of the accused *touch*ed her organ, but when further asked if the penis *penetrated* her organ, she replied “no.” The Court recognized that the child “could not have been aware of the finer distinction between touching and penetration,” her “vocabulary is yet as underdeveloped as her sex,” and her “language is bereft of worldly sophistication.” Hence, the Court looked into other circumstances to assess whether the accused “made efforts to penetrate” or “whether the penis was erect” as to consummate the crime.¹⁰

On these scores, I deem it necessary to reiterate jurisprudence stating that when the necessary genital contact is not fully established, courts can anchor their findings on other aspects that could reveal the occurrence of penetration.

In *People v. Gabayron*,¹¹ the witness narrated that she cried in pain as the accused tried to insert his penis. When asked to be specific on how deep the accused was able to insert the organ, the witness simply answered “*I do not know, sir, how far it went, but I felt the pain.*”¹² The Court held that the victim’s testimony established without a doubt that the accused’s organ “managed to come into contact with her vagina, *enough to cause her pain.*”¹³

⁸ 423 Phil. 966, 975 (2001). The testimony went as follows:

Q Was the penis of your uncle entered into your vagina?

A No, just here. (witness pointing to her vagina)

Q Lorlyn, if this is your vagina, where was the penis of your uncle?

A Just here. (witness pointing to the upper part of the vagina opening)

Q Where particularly, can you clearly demonstrate to the court where was the penis of your uncle in relation to your vagina?

A Here. (witness pointing to the same spot)

⁹ Id. at 981.

¹⁰ *People v. Campuhan*, supra at 924-925.

¹¹ 343 Phil. 593 (1997).

¹² Id. at 598. The testimony went as follows:

A It happened during that night he went home drunk and then he went to my bedroom, undressed me, kissed me on my lips and then downward and took off my panty.

Q After doing all those things, what happened next, if anything happened?

A **He tried to insert his organ into mine but it was very painful so, I cried in pain.** Then, he stopped, sir.

Q How far was he able to insert his organ that you felt the pain?

A **I do not know, sir, how far it went, but I felt the pain.**

Q So what you want to tell this Honorable Court was that his organ was able to reach a part of your organ, that’s why you felt the pain?

A Yes, sir. (Emphases supplied)

¹³ Id. at 608.

In *People v. Orande*,¹⁴ “the victim testified that she felt pain and her vagina bled,” which the Court found to be “indisputable indications of slight penetration or, at the very least, that the penis indeed touched the *labia*.”¹⁵

In another case, the Court held that “pain could be nothing but the result of penile penetration, sufficient to constitute rape.”¹⁶ Indeed, when the victim “[feels] pain inside her vagina,” that indicates penetration.¹⁷ I hasten to add, however, that the absence of pain or even bleeding does not necessarily mean lack of penetration, as shown in *People v. Deliola*,¹⁸ where the accused tried to dispute that rape occurred based on the victim’s testimony that she “felt no pain and her vagina did not bleed.” The Court disagreed, and in affirming the conviction, held that it is “carnal knowledge, not pain nor bleeding, which is essential to consummate rape.” The Court recognized that it is “possible for physiological manifestations of rape, such as pain, to appear only after the incident.”¹⁹

To stress, where the victim did not specifically state in her testimony that the offender’s penis penetrated her vagina, whether fully or partially, or that the offender’s penis distinctively touched the cleft of her *labia majora*, there may still be a conclusion that rape was consummated based on any of the following circumstances:

1. The victim’s testimony showed that she felt pain in her genitals;²⁰
2. Bleeding occurred in the victim’s genitalia;²¹
3. The *labia minora* was gaping with redness;²²
4. Discoloration in the inner lips of the vagina;²³
5. The hymenal tags were no longer visible;²⁴ or
6. Injury to the sex organ of the victim.²⁵

¹⁴ 461 Phil. 403 (2003).

¹⁵ Id. at 420.

¹⁶ *People v. Sanchez*, 320 Phil. 60, 72 (1995).

¹⁷ Id.; see also *People v. Gabayron*, supra at 608. But see *People v. Brios*, 600 Phil. 530, 541-544 (2009), which cautions against convicting an accused for rape “solely on the basis of the pain experienced by the victim as a result of efforts to insert the penis into the vagina,” explaining that pain “is subjective and so easy to feign.” While the Court stated that “consummated rape can still be anchored on the victim’s testimony that she felt pain in the attempt at penetration,” it stressed that “penile penetration cannot be presumed from pain alone.” However, in *People v. Banzuela* (723 Phil. 797, 818 [2013]), the Court held that pain suffered by the victim “is, in itself, an indicator of the commission of rape.”

¹⁸ 794 Phil. 194 (2016).

¹⁹ Id. at 206.

²⁰ *People v. Campuhan*, supra note 3 at 925-926; see also *People v. Castillo*, 727 Phil. 556, 574 (2014).

²¹ *People v. Orande*, supra at 420.

²² *People v. De la Peña*, 342 Phil. 526, 529 (1997).

²³ *People v. Lazaro*, 319 Phil. 352, 363 (1995).

²⁴ *People v. Campuhan*, supra at 926.

²⁵ *People v. Talan*, 591 Phil. 812, 822 (2008).

Verily, the fact of the offender's penis touching the cleft of the *labia majora* of the victim may be gathered from the totality of evidence aside from the victim specifically pinpointing the precise part of the vulva touched or penetrated by the penis.

Second, I deem it necessary to discuss the effects of the *ponencia's* pronouncement to crimes closely related to consummated rape, particularly, attempted rape and acts of lasciviousness. The *ponencia's* disquisition demarcates between consummated rape and attempted rape by clarifying the minimum physical contact needed to consummate the crime, thus: "**as soon as the penis penetrates the cleft of the *labia majora***" even at the slightest degree.²⁶ Prescinding from this, there is no consummated rape when there is a failure of the penis to touch the cleft of the *labia majora*. Again, the *labia majora* begins from the walls of the vulva to the cleft of the *labia majora*. Accordingly, if the penis of the offender only touched the extreme external portion of the *labia majora*, which is far from the pudendal cleft, then such act cannot be considered as consummated rape. Absent any showing of at least this minimal level of penetration, the crime can only be attempted rape, if not acts of lasciviousness.²⁷

As regards the difference, case law provides that "the intent of the offender to lie with the female defines the distinction between attempted rape and acts of lasciviousness."²⁸ The Court has explained attempted rape to wit:

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, 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, for, as succinctly put in *People v. Dominguez, Jr.*: "*The gauge in determining whether the crime of attempted rape had been committed is the commencement of the act of*

²⁶ *Ponencia*, p. 24.

²⁷ *Cruz v. People*, 745 Phil. 54, 69 (2014).

²⁸ *Id.* at 58.

sexual intercourse, i.e., penetration of the penis into the vagina, before the interruption."²⁹ (Emphasis supplied; italics in the original)

For clarity, "intent to lie with the female" should be read simply as "intent to penetrate" her genital organ. Attempted rape is committed when the touching of the "cleft of the *labia majora*," as discussed by the *ponencia*, is "coupled with the intent to penetrate."³⁰

The distinction between attempted rape and acts of lasciviousness is somewhat clear when the penis does not touch the external surface of the vagina. In borderline cases, however, where there is a "grazing of the surface of the female organ," courts have to assess the character of the other overt acts if they reveal an intention to penetrate the victim's vagina, rather than to just satisfy lewd desires. This begs the question: **How is this intent to penetrate manifested, or what overt acts reveal such intent?**

In *People v. Manuel*,³¹ the "intent to penetrate" was found to have been manifested through these overt acts: "forcibly removing AAA's shorts and underwear, lying on top of her, mounting and restraining her hands and feet, and holding his penis with his left hand trying to insert it into her vagina." The Court held that the totality of these acts clearly demonstrates the accused's objective to insert his penis into her vagina, and thus, was guilty of attempted rape. The accused was unsuccessful in penetrating AAA's vagina due to her desistance.

In *Cruz v. People*,³² however, the Court emphasized the need for an erect penis. It stated that "[t]he 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." It was held that the act of embracing and touching the 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."³³

In *People v. Banzuela*,³⁴ the Court held that the act of laying on the ground, along with undressing and kissing the victim, does not constitute attempted rape, "absent any showing that [the accused] actually commenced to force his penis" into the victim's sexual organ. It was found that the

²⁹ Id. at 71-72.

³⁰ *People v. Banzuela*, supra note 17 at 820.

³¹ G.R. No. 242278, December 9, 2020.

³² Supra.

³³ Id. at 73-74.

³⁴ Supra.

accused was not able to commence the act of intercourse “as he still had his pants on.”³⁵

In *People v. Pareja*,³⁶ the accused was found to have “commenced the commission of rape by the following overt acts: kissing [the victim’s] nape and neck; undressing her; removing his clothes and briefs; lying on top of her; holding her hands and parting her legs; and trying to insert his penis into her vagina.”³⁷

In instances where intent to penetrate is not discernible from the accused’s external acts, the crime will only fall under acts of lasciviousness. Notable is the case of *People v. Dadulla*³⁸ wherein the accused opened the zipper and buttons of the victim’s shorts and touched her, but when the latter hid under the bed, the accused employed force by pulling her out. The Court held that the accused’s overt acts manifested lewd designs but not an intent to penetrate. Hence, the accused was found liable only for acts of lasciviousness.³⁹ In *People v. Bugarin*,⁴⁰ the accused was also found guilty only of acts of lasciviousness because his act of kissing the victim’s genitalia was not considered as revealing an intent to commit rape and the former was not even shown to have at least placed himself on top of the victim.⁴¹ It has been held that “perpetration of the preparatory acts” would not render an accused guilty of an attempt to commit such felony.⁴² The Court has held that “[s]uch acts, being equivocal, had no direct connection to rape. As a rule, preparatory acts are not punishable under the Revised Penal Code (RPC) 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.”⁴³

Third, the pronouncement of the *ponencia* regarding the point of reference when there is carnal knowledge – the offender’s penis touching the cleft of the *labia majora* of the victim – may equally be applied in the crime of rape by sexual assault. Rape by sexual assault is defined under paragraph 2 of Article 266-A of the RPC, as follows:

2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person’s mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

³⁵ Id. at 820.

³⁶ 694 Phil. 338 (2012).

³⁷ Id. at 349.

³⁸ 657 Phil. 442 (2011).

³⁹ Id. at 455.

⁴⁰ 339 Phil. 570 (1997).

⁴¹ Id. at 588.

⁴² *Cruz v. People*, supra at 72.

⁴³ Id. at 72-73.

In *Lutap v. People*,⁴⁴ the Court held that the treatment of “touching” and “entering” in penile rape may be applied in analogy when there is a crime of rape by sexual assault. It was clarified therein that the mere touching of a female’s sexual organ, by itself, does not amount to consummated rape by sexual assault. At the very least, there must be an act of insertion or an attempt to insert offender’s finger before it can be considered as rape by sexual assault, whether consummated or attempted. Absent such acts, the crime committed may only be acts of lasciviousness.⁴⁵

Applying the doctrine laid down by the *ponencia*, when any instrument or object, such as a finger, touches the cleft of the *labia majora*, then such act is now considered as a consummated crime of rape by sexual assault because it completes the act of penetration of the genitalia of the female victim. If there is no touching of the cleft of the *labia majora*, then it can either be attempted rape by sexual assault or acts of lasciviousness, as the case may be.

Lastly, it is necessary to stress that the disposition in the *ponencia* is relevant as regards rape by sexual intercourse or through penile penetration **against a woman**, pursuant to Art. 266(a) of the RPC, as amended by the Anti-Rape Law of 1997,⁴⁶ which then defined rape by sexual intercourse as committed by a “man” having “carnal knowledge of a woman.”

Notably, Republic Act No. 11648⁴⁷ has recently amended this RPC provision and has redefined this first type of rape as that committed “by a **person** who shall have carnal knowledge of **another person**.” The legislative deliberations show that the shift in language was done to make the crime gender-neutral or “gender-friendly.”⁴⁸ While this is a welcome development in the nation’s criminal law, it opens a new dimension to develop in jurisprudence, thus: what would legally constitute carnal knowledge between non-heterosexual individuals? In the meantime, suffice

⁴⁴ 825 Phil. 10 (2018).

⁴⁵ Id. at 18.

⁴⁶ Republic Act No. 8353.

⁴⁷ An Act Providing for Stronger Protection Against Rape and Sexual Exploitation and Abuse, Increasing the Age for Determining the Commission of Statutory Rape, amending for the Purpose Act No. 3815, as amended, otherwise known as “The Revised Penal Code,” Republic Act No. 8353, also known as “The Anti-Rape Law of 1997,” and Republic Act No. 7610, as amended, otherwise known as the “Special Protection of Children Against Abuse, Exploitation and Discrimination Act,” approved on March 4, 2022.

⁴⁸ Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2332 and House Bill No. 7836 (Increasing the Age for Statutory Rape), November 24, 2021, pp. 32-33.

The Chairperson (Sen. Zubiri): Yes, we’d like to put the amendment, for the record, on Article 266-A. Rape; When and How It is Committed. “Rape is committed by a **person**. We **changed it from ‘man’ to ‘person.’** Actually, these are all Risa Hontiveros’ amendments where we reiterated also that we just made it **gender-friendly** x x x. For record purposes lang, all mention of ‘man’ becomes a ‘person’ and a ‘woman’ a ‘person’ as well – another ‘person’ – if that’s all right.

The Chairperson (Rep. Deloso-Montalla). Thank you, Mr. Chair. We have **no objection from the House.**


it to say that the disposition in this case relates only to penile penetration against a woman. The repercussions of these statutory changes, *i.e.*, of the accused from “man” to “person” and of the victim from “woman” to “another person,” can be scrutinized in proper future cases.

As a final note, “the prosecution bears the primary duty to present its case with clarity and persuasion, to the end that conviction becomes the only logical and inevitable conclusion.”⁴⁹ It is for this purpose that the clarification in the *ponencia* is important. The visual clarification in the *ponencia* will enable our prosecutors to present their cases with sufficient clarity. It will also provide our magistrates with definitive and anatomically precise guidance when deciding rape cases.

WHEREFORE, I vote to **DENY** the appeal and **CONCUR** with the *ponencia*.


ALEXANDER G. GESMUNDO
Chief Justice

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MARIA LUISA M. SANTILLA
Deputy Clerk of Court and
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⁴⁹ *People v. Manuel*, supra note 31; *People v. Pareja*, supra note 36 at 352.