REPUBLIC OF THE PHILIPPINES
Supreme Court
Manila

FIRST DIVISION

February 5, 2018

G.R. No. 204061

EDMISAEL C. LUTAP, Petitioner
vs.
PEOPLE OF THE PHILIPPINES, Respondent

D E C I S I O N

TIJAM, *J.:*

Through this petition for review on *certiorari*[1] under Rule 45, petitioner Edmisael C. Lutap seeks the reversal of the Decision[2] dated July 10, 2012 and Resolution[3] dated October 25, 2012 of the Court of Appeals (CA)[4] in CA-G.R. CR No. 33630 finding petitioner guilty of attempted rape. The assailed CA Decision modified the Decision dated August 23, 2010 of the Regional Trial Court (RTC)[5] of Quezon City, Branch 94 which, in turn, found petitioner guilty of rape by sexual assault as charged.

The Antecedents

Petitioner was charged in an Information the accusatory portion of which reads:

That on or about the 27th day of April 2004 in Quezon City, Philippines, the said accused by means of force, threats and intimidation, did then and there willfully, unlawfully and feloniously commit acts of sexual assault upon the person of [AAA],[6] 6 year[s] of age, a minor, by then and [there] inserting his finger into complainant's genital organ against her will and without her consent, to the damage and prejudice of said offended party.

CONTRARY TO LAW.[7]

Upon petitioner's plea of not guilty, pre-trial and trial on the merits ensued.[8]

The prosecution presented as witnesses private complainant AAA, her younger brother BBB, her mother DDD and P/SUPT. Ruby Grace Sabino-Diangson. The evidence for the prosecution tends to establish the following facts:

At the time of the incident, AAA was only six (6) years old having been born on. September 11, 1997.[9] Petitioner, who was also known as "Egay", frequently visits the house of AAA's family, being the best friend of AAA's father. Around 6:30 o'clock in the evening of April 27, 2004, AAA and her younger siblings, BBB and CCC, were watching television in their *sala,* together with petitioner.

Meanwhile, their mother DDD was cooking dinner in the kitchen separated only by a concrete wall from the *sala.*[10]

AAA was then wearing short pants[11] and was sitting on the floor with her legs spread apart while watching television and playing with "text cards." BBB, on the other hand, was seated on a chair beside CCC, some five steps away from AAA. Petitioner was seated on the sofa which was one foot away from AAA.[12]

Petitioner then touched AAA's vagina.[13] AAA reacted by swaying off his hand.[14]

BBB saw petitioner using his middle finger in touching AAA's vagina.[15] Upon seeing this, BBB said *"Kuya Egay, bad iyan, wag mong kinikiliti ang pepe ni Ate."*[16] BBB then went to where DDD was cooking and told her that petitioner is bad because he is tickling AAA's vagina.[17] DDD then called AAA, brought her inside the room and asked her if it were true that petitioner tickled her vagina. AAA answered, "but I swayed his hand, Mama." DDD again asked AAA how many times have petitioner tickled her vagina and AAA answered, "many times in [petitioner's] house" and that he also "let her go on the bed, remove her panty, open her legs and lick her vagina."[18]

As such, DDD confronted petitioner and asked why he did that to AAA. Petitioner said that it was because AAA's panty was wet and that he was sorry.[19]

The next day, or on April 28, 2004, DDD brought AAA to Camp Crame for medical examination but because the doctor was not available, AAA was examined only on April 30, 2004.[20]

In defense, petitioner denied the accusations against him. Petitioner testified that he merely pacified AAA and BBB who were quarreling over the text cards. When petitioner separated the children, BBB then said, *"bad yan, bad."*[21] After which, DDD talked to her two children in the kitchen and when she came out, she asked petitioner if he touched AAA. Petitioner denied having touched AAA and suggested that AAA be examined.[22]

The testimony of Melba Garcia, a Purok Leader, was also presented to the effect that she personally knows petitioner and that the latter enjoys a good reputation. DDD, on the other hand, was the subject of several complaints from the neighbors.[23]

The RTC found petitioner guilty as charged. The RTC gave full credit to AAA's and BBB's candid testimonies that petitioner inserted his finger in the vagina of AAA.[24] The RTC emphasized that BBB graphically demonstrated the act committed by petitioner by moving his middle finger constantly. To prove its point, the RTC cited the following excerpt from BBB's testimony:

COURT: I want to clarify. What was the finger doing?

WITNESS: Pinaano po sa ano ni Ate.

COURT: Ideretso muna. Pinaano ang ano.

WITNESS: Inilulusot po niya.

COURT: Sa ano?

WITNESS: Dito po.

COURT: Ang ano?

WITNESS: Sa ano ni Ate, dito po.

ACP VILLALON: Ano tawag diyan?

COURT: Huwag kang mahiya, sabihin mo.

WITNESS: Pepets po. xxx[25]

As such, the RTC disposed:

WHEREFORE, finding accused EDMISAEL LUTAP y CUSP AO GUILTY beyond reasonable doubt of the crime of Rape under Article 266-A paragraph 2 in relation to Article 266-B of the Revised Penal Code, taking into consideration the aggravating circumstance that the victim was only six (6) years old at the time of the commission of the offense, he is hereby sentenced to an indeterminate penalty of SIX (6) YEARS and ONE (1) DAY of PRISION MAYOR as minimum to TWELVE YEARS (12) YEARS and ONE (1) DAY of RECLUSION TEMPORAL as maximum and to pay the cost.

Accused is further ordered to pay private complainant [AAA] civil indemnity of ₱50,000.00, moral damages of ₱50,000.00 and exemplary damages of ₱25,000.00.

SO ORDERED.[26]

From this adverse decision, petitioner appealed.

The Ruling of the CA

Revisiting the testimonies of AAA and BBB, the CA found that there was no insertion of petitioner's finger into AAA's vagina as it was merely slightly touched[27] or touched without too much pressure by petitioner.[28] The CA went on to conclude that since petitioner's finger merely touched AAA's vagina and that there was no penetration, petitioner can only be held liable for attempted rape.

The CA thus disposed:

WHEREFORE, premises considered, the assailed August 23, 2010 Decision of the Regional Trial Court of Quezon City, Branch 94, is hereby **MODIFIED.** Accused-appellant Edmisael Lutap y Cuspao is found **GUILTY of Attempted Rape,** and is **SENTENCED** to suffer the indeterminate imprisonment of SIX (6) MONTHS of arresto mayor, as minimum, to FOUR (4) YEARS and TWO (2) MONTHS of prision correccional medium, as maximum.

Also, the accused-appellant is ordered to indemnify the victim in the sum of ₱30,000.00 as civil indemnity, ₱25,000.00 as moral damages and ₱l0,000.00 as exemplary damages, and to pay the costs.

SO ORDERED.[29]

Petitioner's motion for reconsideration was similarly denied by the CA. Hence, the instant recourse.

The Issue

Petitioner questions the CA's finding that the crime of attempted rape was committed considering that there is absolutely no showing in this case that petitioner's sexual organ had ever touched the victim's vagina nor any part of her body.[30] Petitioner likewise argues that there is no clear, competent, convincing and positive evidence that petitioner touched the vagina of the victim with the intention of forcefully inserting his finger inside. Petitioner directs the Court's attention to the fact that at the time of the alleged incident, AAA was wel1 clothed, her vagina fully covered as she was then wearing a panty and a short pants.[31]

Thus, the core issue tendered in this petition is whether or not the CA erred in convicting petitioner for the crime of attempted rape on the basis of the evidence thus presented.

Our Ruling

The petition is partly meritorious.

We agree with the CA's ruling that the fact of insertion of petitioner's finger into AAA's sexual organ was not established beyond reasonable doubt to support petitioner's conviction of rape by sexual assault. We also agree with the CA that there was sexual molestation by petitioner's established act of touching AAA's vagina. Be that as it may, the act of touching a female's sexual organ, standing alone, is not equivalent to rape, not even an attempted one.[32] At most, therefore, petitioner's act of touching AAA's sexual organ demonstrates his guilt for the crime of acts of lasciviousness, an offense subsumed in the charge of rape by sexual assault.[33]

Rape, under Article 266-A of the Revised Penal Code, as amended by Republic Act No. 8353 or the "Anti-Rape Law of 1997" can be committed in two ways: Article 266-A paragraph 1[34] refers to rape through sexual intercourse, the central element of which is carnal knowledge which must be proven beyond reasonable doubt; and Article 266-A paragraph 2[35] refers to rape by sexual assault which must be attended by any of the circumstances enumerated in sub-paragraphs (a) to (d) of paragraph I.[36]

The direct examination of AAA and BBB, as well as the clarificatory questions interposed by the RTC, while convincingly prove that there was malicious touching of AAA's sexual organ, nevertheless invite doubts as to whether petitioner indeed inserted his finger inside AAA's vagina.

On point is the direct examination of AAA yielding the following:

Q: While you were playing text, what happened, if any?

A: Tito Egay touched my vagina.

Q: What were you wearing during that time?

A: Shorts, ma'am.

Q: Where did he touch you?

A: My vagina, ma'am.

Q: Did you say anything when your Tito Egay touched your vagina?

A: I swayed off his hands.[37] (Emphasis supplied)

That the act done by petitioner was mere "touching" of AAA's sexual organ was further corroborated by BBB whose testimony is as follows:

Q On that particular day, April 27, 2004, you saw the accused and your Ate AAA. What did you see?

A Ginaganyan po.

COURT

The witness is demonstrating by moving his middle finger.

Q According to you, you demonstrated by moving your middle finger constantly. Who was the once [sic] doing that?

A Him, ma'am.

COURT INTERPRETER

Witness pointing to the accused.

COURT

I want to clarify. What was that finger doing?

WITNESS

Pinaano po sa ano ni Ate.

COURT.

Ideretso muna [sic]. Pinaano ang ano.

WITNESS

Inilulusot po niya.

COURT

Sa ano?

WITNESS

Dito po.

COURT

Angano?

WITNESS

Sa ano ni Ate, dito po.

ACP VILLALON

Anong tawag diyan?

COURT

Huwag kang mahiya, sabihin mo.

WITNESS

Pepets po.

ACP VILLALON

Pinapasok.

ATTY. TOPACIO

He did not say pinapasok.

COURT

Ginagalaw.

ACP VILLALON

Ginaganun?

WITNESS

Opo.

COURT

Interpret the answer. Pepets is vagina.

ACP VILLALON

Iyung ginaganun, your honor.

COURT

Touching.

WITNESS (Court Interpreter's interpretation)

The accused was touching by his middle finger the vagina of my sister.

xxx

Okay, we will ask. Was the middle finger touching the pepets (vagina) of your sister?

WITNESS

Not too much. (Hindi po masyado.)

COURT

Hindi masyado. Pero umabot?

WITNESS

Umabot po.

COURT

So umabot. Touching. Umabot pero hindi masyado. Okay, I will. Supposed this is the pepe (vagina) of your sister, hanggang saan umabot? You demonstrate.

COURT INTERPRETER

Hanggang saan diyan sa daliri ni Judge?

WITNESS

Hanggang dito lang po.

COURT

Sa baba. Hindi umabot dito?

WITNESS

Hindi po.

COURT

So below the pepe.

ATTY. TOPACIO

No, your honor, he was only pointing to the thigh area.

COURT

Sige ulitin natin ang tanong. Sa bin ti ba niya ...

ATTY. TOPACIO

Hita po.

COURT

Sa hita ba niya hinawakan o sa pekpek niya?

WITNESS

Sa pepe po.

xxx

COURT

Pero hindi masyadong idiniin?

WITNESS

Hindi po masyado.[38] (Emphasis supplied)

Thus, absent any showing that there was actual insertion of petitioner's finger into AAA's vagina, petitioner cannot be held liable for consummated rape by sexual assault.

People v. *Mendoza,*[39] explains that for a charge of rape by sexual assault with the use of one's fingers as the assaulting object, as in the instant case, to prosper, there should be evidence of at least the slightest penetration of the sexual organ and not merely a brush or a graze of its surface, being that rape by sexual assault requires that the assault be specifically done through the insertion of the assault object into the genital or anal orifices of the victim.[40]

Applying by analogy the treatment of "touching" and "entering" m penile rape as explained in *People v. Campuhan,*[41] *Mendoza* states:

The touching of a female's sexual organ, standing alone, is not equivalent to rape, not even an attempted one. With regard to penile rape, *People v. Campuhan* explains:

xxx Thus, *touching* 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. xxx

xxx 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. Thus, a grazing of the surface of the female organ or touching the *mans 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; at most, it can only be attempted rape, if not acts of lasciviousness. (Italics in the original.)

What was established beyond reasonable doubt in this case was that petitioner touched, using his middle finger, AAA's sexual organ which was then fully covered by a panty and a short pants. However, such is insufficient to hold petitioner liable for attempted rape by sexual assault. As above intimated, the mere touching of a female's sexual organ, by itself, does not amount to rape nor does it suffice to convict for rape at its attempted stage.[42]

The Court's explanation of attempted penile rape in *Cruz v. People*[43] is instructive:

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 sexual intercourse, i.e., penetration of the penis into the vagina, before the interruption." (Italics and citations omitted.)

Applying by analogy the above pronouncements to attempted rape by sexual assault, petitioner's direct overt act of touching AAA's vagina by constantly moving his middle finger cam1ot convincingly be interpreted as demonstrating an intent to actually insert his finger inside AAA's sexual organ which, to reiterate, was still then protectively covered, much less an intent to have carnal knowledge with the victim. An inference of attempted rape by sexual intercourse or attempted rape by sexual assault cannot therefore be successfully reached based on petitioner's act of touching AAA's genitalia and upon ceasing from doing so when AAA swayed off his hand.

Instead, petitioner's lewd act of fondling AAA's sexual organ consummates the felony of acts of lasciviousness. The slightest penetration into one's sexual organ distinguishes an act of lasciviousness from the crime of rape. *People v. Bonaagua*[44] discussed this distinction:

It must be emphasized, however, that like in the crime of rape whereby the slightest penetration of the male organ or even its slightest contact with the outer lip or the *labia majora* of the vagina already consummates the crime, in like manner, if the tongue, in an act of cunnilingus, touches the outer lip of the vagina, the act should also be considered as already consummating the crime of rape through sexual assault, not the crime of acts of lasciviousness. Notwithstanding, in the present case, such logical interpretation could not be applied. It must be pointed out that the victim testified that Ireno only touched her private part and licked it, but did not insert his finger in her vagina. This testimony of the victim, however, is open to various interpretation, since it cannot be identified what specific part of the vagina was defiled by Ireno. Thus, in conformity with the principle that the guilt of an accused must be proven beyond reasonable doubt, the statement cannot be the basis for convicting Ireno with the crime of rape through sexual assault.[45] (Emphasis supplied)

Since there was neither an insertion nor an attempt to insert petitioner's finger into AAA's genitalia, petitioner can only be held guilty of the lesser crime of acts of lasciviousness following the variance doctrine enunciated under Section 4[46] in relation to Section 5[47] of Rule 120 of the Rules on Criminal Procedure. Acts of lasciviousness, the offense proved, is included in rape, the offense charged.[48]

Pursuant to Article 336 of the RPC, acts of lasciviousness is consummated when the following essential elements are present: (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.[49] As thus used, lewd is defined as obscene, lustful, indecent, lecherous; it signifies that form of immorality that has relation to moral impurity; or that which is carried on a wanton manner.[50] All of these elements are present in the instant case.

It is likewise undisputed that at the time of the commission of the lascivious act, AAA was six (6) years old which calls for the application of Section 5(b) of Republic Act No. 7610 defining sexual abuse of children and prescribing the penalty therefor, as follows:

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:

xx xx

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject 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 for lascivious conduct when the victim is· under twelve (12) years of age shall be reclusion temporal in its medium period; xxx

Apropos, Section 2(h) of the rules implementing R.A. 7610 defines lascivious conduct as:

[T]he **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. (Emphasis supplied)

In *Quimvel v. People*[51]*,* the Court *En Banc* pronounced that Section 5(b) covers not only a situation where a child is abused for profit but also one in which a child, through coercion, intimidation or influence, engages in sexual intercourse or lascivious conduct. Further, *Quimvel* instructs that the term "coercion and influence" as appearing under the law is broad enough to cover "force and intimidation".

In this case, the Information specifically stated that: (a) AAA was a 6- year old minor at the time of the commission of the offense; (b) that petitioner inserted his finger into AAA's genitalia; and (c) petitioner employed force, threats and intimidation. At the trial it was established that petitioner committed a lewd act by fondling AAA's vagina who, at the time of the incident, was alleged and proved to be only 6 years old. Here, it was also established that AAA, being of tender age, knew and trusted petitioner who frequents their house being the best friend of her father, thus, satisfying the element of "influence" exerted by an adult which led AAA to indulge in lascivious conduct.

Petitioner's defense of denial, apart from being inherently weak,[52] is demolished by AAA's and BBB's testimonies which the RTC and the CA unanimously regarded as straightforward and credible.

Conclusively, the elements of acts of lasciviousness under Article 336 of the RPC and of lascivious conduct under R.A. 7610 were established in the present case. Following *People v. Caoili*[53] *,* petitioner should be convicted of the offense designated as acts of lasciviousness under Article 336 of the RPC in relation to Section 5 of R.A. 7610 since the minor victim in this case is below 12 years old and the imposable penalty is *reclusion temporal* in its medium period.

Applying the Indeterminate Sentence Law (ISL), and in the absence of mitigating or aggravating circumstances, the minimum term shall be taken from the penalty next lower to *reclusion temporal* medium, which is *reclusion temporal* minimum, which ranges from twelve (12) years and one (1) day to fourteen (14) years and eight (8) months. The maximum term shall be taken from the medium period of the imposable penalty, *i.e., reclusion temporal* in its medium period, which ranges from fifteen (15) years, six (6) months and twenty (20) days to sixteen (16) years, five (5) months and nine (9) days.[54]

Accordingly, the prison term is modified to twelve (12) years and one (1) day of *reclusion temporal* in its minimum period as minimum, to fifteen (15) years, six (6) months and twenty (20) days of *reclusion temporal* in its medium period as maximum.

Further, in line with recent jurisprudence, petitioner is ordered to pay AAA moral damages, exemplary damages and fine in the amount of PhP15,000.00 each and civil indemnity in the amount of PhP20,000.00.[55]

WHEREFORE, the petition is **PARTLY GRANTED.** The Decision dated July 10, 2012 and Resolution dated October 25, 2012 of the Court of Appeals (CA) in CA-G.R. CR No. 33630 finding petitioner Edmisael Lutap guilty of attempted rape is **REVERSED.** The Court finds herein petitioner Edmisael Lutap **GUILTY** beyond reasonable doubt of the crime of acts of lasciviousness under Article 336 of the Revised Penal Code in relation to Section 5 of R.A. 7610 and hereby sentences him to suffer the indeterminate penalty of twelve (12) years and one (1) day of *reclusion temporal* in its minimum period as minimum, to fifteen (15) years, six (6) months and twenty (20) days of *reclusion temporal* in ·its medium period as maximum. Petitioner is **ORDERED to PAY** private complainant moral damages, exemplary damages and fine in the amount of PhP15,000.00 each and civil indemnity in the amount of PhP20,000.00.

Petitioner is also **ORDERED to PAY** interest at the rate of six percent (6%) *per annum* from the finality of this decision until fully paid, to be imposed on the damages and civil indemnity.[56]

SO ORDERED.

NOEL GIMENEZ TIJAM
Associate Justice

WE CONCUR:

MARIA LOURDES P.A. SERENO
Chief Justice
Chairperson

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

ANDRES B. REYES, JR.[*]
Associate Justice

C E R T I F I C A T I O N

Pursuant to the 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

Footnotes

[*] Designated additional Member as per Raffle dated November 29, 2017.

[1] *Rollo,* pp. 8-33.

[2] *Id.* at 35-52.

[3] *Id.* at 54.

[4] Penned by Associate Justice Danton Q. Bueser and concurred in by Associate Justices Amelita G. Tolentino and Ramon R. Garcia.

[5] Penned by Presiding Judge Roslyn M. Rabara-Tria. *Id.* at 55-64.

[6] The real name of the victim, her personal circumstances and other information which tend to establish or compromise her identity, as well as those of her immediate family or household members, shall not be disclosed to protect her privacy and fictitious initials shall, instead, be used pursuant to the ruling of the Court in *People v Cabalquinto* (533 Phil. 703 [2006] and A.M. No. 04-11-09-SC dated September 19, 2006).

[7] *Rollo,* p. 55.

[8] *Id.* at 56.

[9] *Id.* at 60.

[10] *Id.* at 57.

[11] *Id.* at 45.

[12] *Id.* at 57.

[13] Id.

[14] Id.

[15] *Id.* at 41.

[16] *Id.* at 57.

[17] Id.

[18] *Id.* at 57- 58.

[19] *Id.* at 58.

[20] Id;

[21] Id.

[22] Id.

[23] Id at 59.

[24] *Id.* at 60.

[25] *Id.* at 62.

[26] *Id.* at 64.

[27] *Id.* at 43.

[28] *Id.* at 45.

[29] *Id.* at 51.

[30] *Id.* at 22.

[31] *Id.* at 24.

[32] *People v. Mendoza,* 595Phil.1197, 1211 (2008).

[33] Id.

[34] Article 266-A. Rape, When and How Committed. Rape is committed -

> 1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

(a) Through force, threat, or intimidation;

(b) When the offended party is deprived of reason or otherwise unconscious;

(c) By means of fraudulent machination or grave abuse of authority; and

(d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

[35] Article 266-A. Rape, When and How Committed. Rape is committed –

xxxx

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.

[36] See *People v. Caoili,* G.R. No. 196342, August 8, 2017.

[37] *Rollo,* p. 45.

[38] *Id.* at 41-45.

[39] *People v. Mendoza,* supra note 32.

[40] *Id.* at 1211-1212.

[41] 385 Phil. 912, 920-922 (2000). *People v. Mendoza,* supra note 32, id. at 1211.

[42] *Id.* See also, *People v. Garcia,* 695 Phil. 576 (2012).

[43] 745 Phil. 54, 71-72 (2014).

[44] 665 Phil. 750, 769 (2011).

[45] Id.

[46] SEC. 4. Judgment in case of variance between allegation and proof.-When there is variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.

[47] SEC. 5. When an offense includes or is included in another.-An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter.

[48] *People* v. *Caoili,* supra note 36.

[49] *People v. Lizada,* 444 Phil. 67, 97 (2003).

[50] Id.

[51] G.R. No. 214497, April 18, 2017, citing *Malto v. People,* 560 Phil 119 (2007).

[52] *People v. Candaza,* 524 Phil. 589 (2006).

[53] *People v. Caoili,* supra note 36.

[54] *Quimvel v. People,* supra note 51.

[55] *People v. Pad/an,* G.R. No. 214880, September 6, 2017.

[56] *People v. Veloso,* 703 phil. 541, 544, 556 (2013).