REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
M A N I L A

Fifteenth Division

PEOPLE OF THE PHILIPPINES,
Plaintiff-Appellee,

- versus -

CA-G.R. CR – H.C. No. 02587
(Crim. Case No. 06-651)

L.CPL. DANIEL J. SMITH,
Accused-Appellant.
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APPELLANT'S BRIEF

The accused-appellant, (the "appellant"), by counsel, respectfully submits his brief as follows:

Assignment of Errors

I. The lower court erred in finding that the prosecution has presented sufficient evidence to justify the conviction of the appellant of the crime of rape.

a. Prosecution's evidence failed to establish the commission of the crime of rape.

- The prosecution's evidence to support the existence of force or intimidation was not sufficient.

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- The alleged vaginal contusions sustained by complainant are consistent with consensual sexual intercourse.

- In truth, complainant's alleged contusions in her arms and legs were the result of complainant's

struggle with the police officers AFTER she alighted the Starex van

b. Prosecution's evidence tending to show that complainant was unconscious at the time of the alleged rape should not have been admitted by the lower court, for being violative of appellant's constitutional right to due process.

c. Prosecution's evidence failed to support complainant's alleged intoxication, assuming said evidence may be admitted.

d. Complainant consented to having sexual intercourse with appellant.

II. The lower court erred in disregarding appellant's "mistake of fact" defense.

III. The lower court erred in its appreciation of the evidence resulting to erroneous conclusions and findings of facts.

IV. The lower court erred in denying appellant the right to confront the witnesses against him.

V. The lower court erred in ruling that complainant's motive in falsely accusing appellant of having raped her was not established.

Statement of the Case

This is an appeal, under Rules 122 and 124 of the Rules of Court, of the Decision dated December 4, 2007 (the "appealed decision") rendered by the Regional Trial Court of Makati City, Branch 139, (the "lower court") in Criminal Case No. 06-651 entitled "People of the Philippines v. L/Cpl. Daniel J. Smith, et. al." finding the appellant guilty of the crime of rape penalized under Article 266-A, paragraph 1 (a) of the Revised Penal Code, as amended by Republic Act 8353.

On December 27, 2005, Olongapo City Prosecutor Prudencio B. Jalandoni filed an Information for Rape before the Regional Trial Court of Olongapo City, which was docketed as Criminal Case No. 873-2005 and was eventually raffled to Branch 73 of said Court. The Information reads:

"The undersigned accused LCpl. Daniel Smith, SSgt. Chad Brian Carpentier, Dominic Duplantis, Keith Silkwood and Timoteo L. Soriano, Jr. of the crime of Rape under Article 266-A of the Revised Penal Code, as amended by Republic Act 8353, upon a complaint under oath filed by Suzette S. Nicolas, which is attached hereto and made an integral part hereof as Annex "A", committed as follows:

> "That on or about the First (1st) day of November 2005, inside the Subic Bay Freeport Zone, Olongapo City and within the jurisdiction of this Honorable Court, the above-named accused's, being then members of the United States Marine Corps, except Timoteo L. Soriano, Jr., Conspiring, confederating together and mutually helping one another, with lewd design and by means of force, threat and intimidation, with abuse of superior strength and taking advantage of the intoxication of the victim, did then and there willfully, unlawfully and feloniously sexually abuse and have sexual intercourse with or carnal knowledge of one Suzette S. Nicolas, a 22-year old unmarried woman inside a Starex van with Plate No. WKF-162, owned by Starways Travel and Tours, with Office address at 8900 P. Victor St., Guadalupe, Makati City, and driven by accused Timoteo L. Soriano, Jr., against the will and consent of the said Suzette S. Nicolas, to her damage and prejudiced.
>
> CONTRARY TO LAW"

The venue of the case was subsequently transferred to the Regional Trial Court of Makati pursuant to Supreme Court Resolution in A.M. No. 06-3-210-RTC. After the case was docketed and re-numbered as Criminal Case No. 06-651, it was raffled and assigned to Branch 139 of said Court.

On April 28, 2006, appellant, together with then accused Staff Sergeant Chad Brian Carpentier ("Carpentier"), Lance Corporal Dominic Duplantis ("Duplantis") and Lance Corporal Keith Silkwood ("Silkwood"), was arraigned under the above-quoted Information. Appellant refused to enter a plea, and thus, the lower court entered a plea of not guilty for him. Thereafter, the trial ensued on June 2, 2006.

Following the completion of the proceedings in the case, the lower court, in an Order dated October 5, 2006, directed the parties to file their respective Memoranda within thirty (30) days or until November 6, 2006.

On December 4, 2006, the lower court rendered the appealed decision, the pertinent part of which states:

x x x

> "The prosecution having presented sufficient evidence against accused L/CPL. DANIEL J. SMITH, also of the US Marine Corps assigned at the USS Essex, this Court hereby finds him GUILTY BEYOND REASONABLE DOUBT of the crime of RAPE defined under Article 266-A, paragraph 1 (a) of the Revised Penal Code, as amended by R.A. 8353, and, in accordance with Article 266-B, first paragraph thereof, hereby sentences him to suffer the penalty of *reclusion perpetua* together with the accessory penalties provided for under Article 41 of the same Code."

x x x

A copy of the appealed decision is attached hereto as **Annex "A".**

At the outset, it is important to present this case in the light of the peculiar and highly sensationalized circumstances attending the same, especially in the context of appellant's nationality. This case is **not**, although it turned out to be, an indictment and condemnation of United States' foreign policy. It is **not**, although it evolved as such, a platform for anti-American sentiments. Appellant in this case is an American individual, certainly not the US Government. He should have been tried before an impartial tribunal, without regard to the noise created by some 'activist' groups, who insisted on appellant's guilt, not because the prosecution has established his guilt beyond reasonable doubt, but because he is an American and a member of the U.S. Armed Forces whose presence here some sectors of our society detest.

> **For (a)ll experience has shown that a party may be wholly innocent to the offense of which he is accused, although appearances may be against him.** The law, therefore, to guard against injustice, requires that the offense be established by evidence beyond reasonable doubt. **It is a serious matter, not only to a party,**

> **but *to the state as well* to take a person from the ordinary avocations of life, brand him a felon, and deprive him of his liberty, appropriate his labor, and cast a cloud upon his future life, and humiliate his relatives and friends, and to authorize the state in doing this, there should be no reasonable doubt of his guilt.**[1] (Emphasis supplied)

So too, the Supreme Court has held, time and again, that –

> **Accusation is not, according to the fundamental law, synonymous with guilt, the prosecution must overthrow the presumption of innocence with proof of guilt beyond reasonable doubt.** To meet this standard, there is need for the most careful scrutiny of the testimony of the State, both oral and documentary, independently of whatever defense is offered by the accused. Only if the judge below and the appellate tribunal could arrive at a conclusion that the crime had been committed precisely by the person on trial under such an exacting test should the sentence be one of conviction. **It is thus required that every circumstance favoring innocence be duly taken into account. The proof against him must survive the test of reason; the strongest suspicion must not be permitted to sway judgment.**[2] (Emphasis supplied)

Appellant seeks the reversal of the appealed decision, not only on the ground that his guilt was not proven beyond reasonable doubt for failure of the prosecution to present sufficient evidence to establish all the elements of the crime of rape under Article 266-A, paragraph 1 (a) of the Revised Penal Code, but because in arriving at the appealed decision, the trial court all but shifted the burden of proof required in criminal cases, from the prosecution, to the defense, thereby violating the constitutional presumption of innocence accorded to one accused of a crime.

Consider the following excerpts from the appealed decision:

> The claim of accused Smith does not inspire belief. If it were true that the sex between him and the complainant was consensual, why would she resist him, evade his kisses, push, fight him back, and shout? As a

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[1] *Dela Cruz v. People*, G.R. No. 150439, July 29, 2005, *citing* Binkley v. State, 52 N. W. Rep. 708.
[2] *Torralba v. People*, G.R. No. 153699, August 22, 2005

> matter of fact, the complainant categorically said in a straightforward manner that she did all those things because she did not like what accused Smith was doing to her and that she was afraid that he would rape her. If it were true that the sexual congress between accused Smith and the complainant was with the consent of the latter, why would she charge him of raping her? Accused Smith testified during the clarificatory questioning from this Court that he does not know of any reason why the complainant would file this case against him. (*Appealed Decision, at p. 30*)
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> The foregoing testimony of accused Silkwood does not inspire belief considering that, like accused Smith, he did not know of any reason why the complainant would file the present charge of rape against them, if she was not sexually abused. (*Appealed Decision, at p. 32*)
>
> The foregoing testimonies of accused Silkwood and Carpentier were made after they heard accused Smith testified that he does not know of any reason why the complainant filed this case of rape against them despite his claim that the sex between him and the complainant was consensual. Realizing that the answer given by accused Smith may be taken against them, Carpentier and Silkwood tried to think of a reason that would somehow explain the answer of Smith and extricate themselves from its effect. (*Appealed Decision, at pp. 37-38*)
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> Just like the testimony of his co-accused, the testimony of accused Duplantis is not credible. Most of his answers to the questions propounded on him are conjectures and this is not to mention that he was drunk then. He also does not know of any reason why the complainant would file this case despite accused Smith's claim of consensual sex. (*Appealed Decision, at p. 38*)

From the foregoing pronouncements, the lower court, in arriving at a judgment of conviction, basically held that appellant and co-accused's version of events cannot be given credence because (a) their version is different from that of the complainant (which is invariably the case in any litigation); and (b) they cannot categorically impute a motive on the complainant's part to accuse them falsely. In so doing, the lower court shifted the burden of proof from the prosecution to the defense, putting on appellant the onus of proving his innocence, when it is the prosecution's burden to prove appellant's guilt beyond reasonable doubt. Lamentably, this line of reasoning, aggravated by several other crucial errors which will be extensively discussed below, reveals a mindset by the lower court to overturn

the existing rules on burden of proof required in criminal cases, in order to justify a conviction that would otherwise be indefensible on factual and legal grounds.

Worse, in justifying the conviction of the appellant, the trial court disregarded his constitutional right to be informed of the nature and cause of the accusation against him. Evidence tending to show that complainant was deprived of reason or otherwise unconscious were admitted and considered by the trial court despite appellant's timely and continuing objection on the ground that the information charges him with a different mode of commission of the alleged crime---the use of force or intimidation.

Statement of Facts

Private complainant Suzette S. Nicolas (the "complainant") was twenty-two (22) years old at the time of the incident and resides with her family in Zamboanga City. They own a canteen located inside Southern Command, the Military base in Zamboanga City. Complainant co-manages their canteen which sells food, chips, chocolates, sodas and souvenirs to Filipino and American soldiers.[3]

In July 2005, while manning the canteen, the complainant met two (2) US Navy personnel, Carlos Ocacio ("Ocacio") and Chris Mills ("Mills"), who eventually became close family friends.[4]

In September 2005, Ocacio and Mills invited the complainant and her stepsister Anna Liza Franco ("Anna Liza") to take a vacation in Subic. At first, complainant declined the invitation.[5]

Subsequently, however, after Ocacio and Mills offered to pay for the complainant's accommodation in Subic and that of Anna Liza, she accepted the invitation.[6]

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[3] TSN dated 6 July 2006 (S. Nicolas), pp. 7-15; Rollo, pp. 2954-3063.
[4] TSN dated 6 July 2006 (S. Nicolas), pp. 20-21; Rollo, pp. 2954-3063.
[5] TSN dated 6 July 2006 (S. Nicolas), pp. 22-23; Rollo, pp. 2954-3063.

On October 30, 2005, complainant arrived in Subic with her siblings. They checked in at the Grand Leisure Hotel where she, Anna Liza, and their younger sister Carmela had been booked a room by Ocacio.[7]

That night, complainant, Anna Liza, and Ocacio decided to go bar-hopping. They went to Scuba Shack where the complainant sipped rhum and coke.[8] Later, they transferred to Pier 1 where the complainant and Anna Liza drank Vodka Sprite ordered for them by Ocacio.[9]

After a while, Mills arrived and ordered two (2) shots of drink for the complainant and Anna Liza. Complainant did not want to drink the two (2) shots ordered by Mills. Mills then challenged complainant that he would pay the bill if she drinks the two (2) shots.[10] Even if the complainant did not want to drink the two (2) shots of drink ordered by Mills, she decided to drink it so that Mills will pay for their bill.[11]

Afterwards, the complainant and her companions went to the Neptune Club because she wanted to dance. Ocacio introduced the complainant to a friend with whom she could dance with since Ocacio did not want to dance.[12] Thereafter, the complainant and her sister went back to their hotel to sleep.

The following day, October 31, 2005, the complainant and her sisters went to Subic Safari and Ocean Adventure. They also went to Subic Royale. Later that evening, at midnight, complainant and Anna Liza went to the Legenda Casino to meet with Mills. At the Casino, complainant and Anna Liza played black jack and roulette with the money provided by Mills.[13] They lost all the money.[14] They did not

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[6] TSN dated 6 July 2006 (S. Nicolas), p. 24; Rollo, pp. 2954-3063.
[7] TSN dated 6 July 2006 (S. Nicolas), pp. 29-32; Rollo, pp. 2954-3063.
[8] TSN dated 6 July 2006 (S. Nicolas), pp. 33-34; Rollo, pp. 2954-3063.
[9] TSN dated 6 July 2006 (S. Nicolas), p. 37; Rollo, pp. 2954-3063.
[10] TSN dated 23 June 2006 (A. Franco), p. 47; Rollo, pp. 2054-2170.
[11] TSN dated 6 July 2006 (S. Nicolas), p. 41, Rollo, pp. 2954-3063; TSN dated 23 June 2006 (A. Franco), p. 47, Rollo, pp. 2054-2170.
[12] TSN dated 6 July 2006 (S. Nicolas), pp. 44-45; Rollo, pp. 2654-3063.
[13] TSN dated 6 July 2006 (S. Nicolas), pp. 48-57; Rollo, pp. 2654-3063.
[14] TSN dated 27 June 2006 (A. Franco), pp. 94-95; Rollo, pp. 2351-2476.

pay Mills back the money they lost at the casino.[15] After staying at the casino for one (1) hour, complainant and Anna Liza went back to their hotel and slept for the night.

In the early evening of November 1, 2005, Mills and his liberty buddy, Garcia, joined the complainant and her sisters for dinner. After having pizza, Anna Liza asked Carmela to go to their hotel room while the rest of them, the complainant, Anna Liza, Mills, and Garcia, proceeded to the Casino.[16] There, complainant and Anna Liza, again, played black jack and roulette with the money provided by Mills.[17] As before, they did not pay him back the money they lost playing.[18] After staying in the casino for about an hour, they proceeded to the Neptune Club.

At the Neptune Club, a place complainant knew to be a prostitute bar,[19] Mills ordered drinks for her and Anna Liza. Complainant liked the Neptune Club.[20] She had drinks and danced with Mills, Anna Liza and some other members of their group at the club. Mills also saw her dance with a serviceman (not one of the accused) who had asked her to dance.[21]

Earlier that day of November 1, 2005, appellant, with Silkwood, Duplantis, and some other Marines disembarked from their ship, the USS Essex, and proceeded to a restaurant along Waterfront road. They stayed in the restaurant for an hour, after which they went to a makeshift flea market because some of them wanted to buy gifts and souvenirs for their family and friends. Appellant bought souvenirs for his family.[22]

As appellant and his companions wanted to withdraw some money from the Automated Teller Machine (ATM), they looked for one but the ATMs in that area were down. He and his companions then decided to go to a casino which has an

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[15] TSN dated 27 June 2006 (A. Franco), p. 95; Rollo, pp. 2351-2476.
[16] TSN dated 23 June 2006 (A. Franco), p. 63; Rollo, pp. 2351-2476.
[17] TSN dated 27 June 2006 (A. Franco), p. 96; Rollo, pp. 2351-2476.
[18] TSN dated 27 June 2006 (A. Franco), p. 96; Rollo, pp. 2351-2476.
[19] Prosecution's Exhibit "DD-81", Rollo, pp. 707-771.
[20] Prosecution's Exhibit "DD-88", Rollo, pp. 707-771.
[21] TSN dated 20 June 2006 (C. Mills), pp. 112, 139; Rollo, pp. 3825-3972.
[22] TSN dated 11 September 2006 (D. Smith), pp. 18-19; Rollo, pp. 4566-4761.

ATM but the machine in that casino was down too, so they transferred to another casino across the street. While at that casino, appellant and his companions played black jack and poker.[23] After they were done playing, appellant and his companions went back to their ship and dropped off their bags containing gifts and souvenirs purchased at the flea market.[24]

At around 6:00 p.m., appellant and his companions (Silkwood, Duplantis, and other Marines) went back to the casino and played some more games. They stayed there for about forty-five (45) minutes.[25]

Afterwards, appellant and his companions went to a place called Dewey's, a small bar with a dance floor and some tables. There were only a few people inside Dewey's. They did not stay there very long because they got bored.[26]

Appellant and his companions then decided to leave Dewey's. They took a taxi and proceeded to the Neptune Club.[27] The Neptune Club was very crowded at that time.[28] There were over a hundred people dancing inside.[29] When appellant and his companions were able to get a table, they called the waitress and ordered some drinks.[30] After a while, appellant, Silkwood, and Duplantis decided to go to the dance floor to dance.[31] At that time, there were also other marines, including female marines, and some local Filipina girls (complainant was not among them) dancing.[32]

After dancing with the group, appellant started sweating so he went to the bathroom to clean and freshen up.[33] When appellant left the bathroom, and while walking halfway through the bar, appellant saw a Filipina, who appellant later

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[23] TSN dated 11 September 2006 (D. Smith), pp. 20-22; Rollo, pp. 4566-4761.
[24] TSN dated 11 September 2006 (D. Smith), p. 23; Rollo, pp. 4566-4761.
[25] TSN dated 11 September 2006 (D. Smith), p. 24; Rollo, pp. 4566-4761.
[26] TSN dated 11 September 2006 (D. Smith), pp. 25-27; Rollo, pp. 4566-4761.
[27] TSN dated 11 September 2006 (D. Smith), p. 25; Rollo, pp. 4566-4761.
[28] TSN dated 11 September 2006 (D. Smith), p. 28; Rollo, pp. 4566-4761.
[29] TSN dated 11 September 2006 (D. Smith), p. 29; Rollo, pp. 4566-4761.
[30] TSN dated 11 September 2006 (D. Smith), pp. 30-31; Rollo, pp. 4566-4761.
[31] TSN dated 11 September 2006 (D. Smith), p. 32; Rollo, pp. 4566-4761.
[32] TSN dated 11 September 2006 (D. Smith), pp. 32-33; Rollo, pp. 4566-4761.
[33] TSN dated 11 September 2006 (D. Smith), p. 34; Rollo, pp. 4566-4761.

identified as the complainant, smiling and giggling at him. He looked around to make sure if the complainant was really looking at him. [34] Since appellant was not sure if the complainant was looking at him, he just kept on walking towards her direction. Complainant then stepped towards the appellant and said "hello". Appellant said "hi" and introduced himself to her. Complainant, in turn, introduced herself to the appellant.[35]

After introducing themselves to each other, appellant invited the complainant to sit down with him in the table occupied by his group. The complainant accepted the invitation.[36] While at the table, appellant and the complainant talked and tried to get to know each other for about fifteen (15) minutes.[37] Appellant then asked the complainant if she wanted to dance, to which invitation, the complainant agreed. Appellant and the complainant danced to hip-hop and sweet songs[38] for about fifteen (15) minutes before returning to their table. When they reached their table, appellant sat down on his chair while the complainant sat down on appellant's lap.[39]

While the complainant was sitting on appellant's lap, they kissed each other for about ten (10) seconds.[40] After that, appellant and the complainant talked for a little while and then kissed each other again.[41]

At around 11:30 p.m., appellant saw Carpentier over by the door of the Neptune Club. Carpentier was rounding up the other marines because they had to leave.[42]

When appellant told the complainant, who at that time was still sitting on his lap, that he had to leave, she asked him if he could stay a little bit longer. Appellant told the complainant that he must get back to the ship before the 12:00 a.m.

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[34] TSN dated 11 September 2006 (D. Smith), p. 35; Rollo, pp. 4566-4761.
[35] TSN dated 11 September 2006 (D. Smith), pp. 36-37; Rollo, pp. 4566-4761.
[36] TSN dated 11 September 2006 (D. Smith), pp. 37-38; Rollo, pp. 4566-4761.
[37] TSN dated 11 September 2006 (D. Smith), pp. 41-42; Rollo, pp. 4566-4761.
[38] TSN dated 11 September 2006 (D. Smith), p. 43; Rollo, pp. 4566-4761.
[39] TSN dated 11 September 2006 (D. Smith), p. 44; Rollo, pp. 4566-4761.
[40] TSN dated 11 September 2006 (D. Smith), p. 45; Rollo, pp. 4566-4761.
[41] TSN dated 11 September 2006 (D. Smith), p. 49; Rollo, pp. 4566-4761.
[42] TSN dated 11 September 2006 (D. Smith), pp. 50-51; Rollo, pp. 4566-4761.

curfew,[43] but since appellant noticed that complainant was upset when she learned that he had to leave, and that she appeared to be by herself during the entire time he was with her, appellant asked the complainant if she wanted to have a short ride back to the pier with him. Complainant agreed. [44]

Appellant and the complainant went out of the Neptune Club towards the Starex van. When they were already outside the Neptune Club, appellant, the complainant, and the other marines, could not board the van because the doors were locked and the driver, Timoteo Soriano ("Soriano"), was nowhere in sight.[45] Soriano eventually arrived and unlocked the doors of the van. Appellant opened the sliding door, after which the complainant entered the van, walked and sat at the back seat. Appellant followed the complainant and sat down next to her at the back seat. Carpentier sat at the front passenger seat of the van while Duplantis and Silkwood took the middle seats.[46]

Initially, appellant and the complainant did not have any conversation except for a few words, but after the van had started moving, they started kissing again. As there was only a small space at the back seat, appellant and the complainant sat facing forward. Complainant held the knees of the appellant and their knees were towards each other.[47]

The kisses between the appellant and the complainant were passionate. Appellant initiated the kissing; complainant responded to his kisses by kissing him back. She kissed him in the same way appellant was kissing her.[48]

Apparently carried by the passionate kisses they threw at each other, complainant had her hands on appellant's back and she leaned back towards the window and pulled him towards her. Appellant then asked complainant jokingly, "Can

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[43] TSN dated 11 September 2006 (D. Smith), p. 52; Rollo, pp. 4566-4761.
[44] TSN dated 11 September 2006 (D. Smith), p. 53; Rollo, pp. 4566-4761.
[45] TSN dated 11 September 2006 (D. Smith), pp. 55-56; Rollo, pp. 4566-4761.
[46] TSN dated 11 September 2006 (D. Smith), pp. 56-57; Rollo, pp. 4566-4761.
[47] TSN dated 11 September 2006 (D. Smith), p. 58; Rollo, pp. 4566-4761.
[48] TSN dated 11 September 2006 (D. Smith), p. 59; Rollo, pp. 4566-4761.

we have sex right here?" The complainant said, "Yes". Appellant was kind of surprised with complainant's answer.[49]

After the complainant said, "Yes", appellant started to undress. The complainant started to undress as well.[50] They both pulled their pants down to their ankles. Appellant then reached for his back pocket to get his wallet. He took a condom out from his wallet, unwrapped it, and put the same on his penis. While putting on the condom, the complainant assisted the appellant by holding his penis and had her hands on his back. Afterwards, the complainant leaned back on the window, pulled appellant towards her, and they began to have sex. [51]

Appellant was able to have sex with the complainant despite the very small space and lack of room for their movements due to her cooperation, assistance and the way she positioned herself.[52] Appellant was on top of the complainant. Her left leg was hanging and was spread out while her right leg was on the seat.[53]

Not more than three (3) minutes after they began to have sex, the van stopped. Appellant looked up and saw that they were near a pizza parlor. He sensed that somebody opened the door and heard people talking and asking to get a ride. Appellant looked at his watch to see what the time was. He noticed that it was around 11:50 p.m. [54] Appellant then pulled out his penis and told the complainant that he had to stop and that they did not have enough time.[55]

When appellant pulled out his penis, complainant asked, "[a]re you done already?" Appellant was embarrassed by what complainant said.[56]

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[49] TSN dated 11 September 2006 (D. Smith), p. 60; Rollo, pp. 4566-4761.
[50] TSN dated 11 September 2006 (D. Smith), p. 60; Rollo, pp. 4566-4761.
[51] TSN dated 11 September 2006 (D. Smith), p. 61-62; Rollo, pp. 4566-4761.
[52] TSN dated 11 September 2006 (D. Smith), p. 63; Rollo, pp. 4566-4761.
[53] TSN dated 11 September 2006 (D. Smith), p. 64; Rollo, pp. 4566-4761.
[54] TSN dated 11 September 2006 (D. Smith), p. 65; Rollo, pp. 4566-4761.
[55] TSN dated 11 September 2006 (D. Smith), pp. 65-66; Rollo, pp. 4566-4761.
[56] TSN dated 11 September 2006 (D. Smith), pp. 67; Rollo, pp. 4566-4761.

After the appellant told the complainant that they did not have enough time, and that they are getting back to the gate real soon, she started getting dressed. Appellant too started to put his clothes on. However, considering the small space and the tight jeans that the complainant was wearing, she was not able to pull up her jeans very well.[57]

When the van arrived at the Alava Pier, Carpentier instructed everyone to disembark from the vehicle and to get back to the ship.[58] The complainant followed appellant out of the van. As she was getting off, someone called her a bitch, apparently because the 12 a.m. curfew is drawing near and appellant can't seem to get her off the van quick enough. Complainant was enraged and yelled "I'm not a bitch. Don't call me a bitch."[59] Appellant tried to calm her down, explaining that the person who said it did not mean it that way and that they were just rushing to get back to the ship.[60]

When the complainant was already outside the van, she pulled her pants up while sitting on the curve of the street. Appellant tried to hail a taxicab which complainant could ride on her way back to Neptune Club, but to no avail.[61] He then went to the complainant and told her that since he could not get a cab for her, she would have to find her own way of getting a cab.[62] Complainant nodded her head and agreed. Before rushing back to the ship, appellant told the complainant that he would return to the Neptune Club on the next day.[63]

On November 2, 2005, at around 7:00 p.m., appellant returned to the Neptune Club because that was what he told the complainant the night before.[64]

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[57] TSN dated 11 September 2006 (D.Smith), p. 67; Rollo, pp. 4566-4761.
[58] TSN dated 19 September 2006 (D.Smith), p. 23; Rollo, pp. 4566-4761.
[59] TSN dated 19 September 2006 (D.Smith), p. 24; Rollo, pp. 4566-4761.
[60] TSN dated 11 September 2006 (D.Smith), p. 70; Rollo, pp. 4566-4761.
[61] TSN dated 11 September 2006 (D.Smith), p. 68; Rollo, pp. 4566-4761.
[62] TSN dated 11 September 2006 (D.Smith), p. 71; Rollo, pp. 4566-4761.
[63] TSN dated 11 September 2006 (D.Smith), p. 72; Rollo, pp. 4566-4761.
[64] TSN dated 11 September 2006 (D.Smith), p. 75; Rollo, pp. 4566-4761.

Appellant looked around inside the Neptune Club but he did not see the complainant anywhere.[65] Appellant went back to the ship.[66]

The Issues

1. Whether or not the lower court erred in finding that the prosecution has presented sufficient evidence to justify the conviction of the appellant of the crime of rape.

2. Whether or not the lower court erred in disregarding appellant's "mistake of fact" defense.

3. Whether or not the lower court erred in its appreciation of the evidence resulting to erroneous conclusions and findings of facts.

4 Whether or not the lower court erred in denying appellant the right to confront the witnesses against him.

5. Whether or not the lower court erred in ruling that complainant's motive in falsely accusing appellant of having raped her was not established.

Arguments

I. THE LOWER COURT ERRED IN FINDING THAT THE PROSECUTION HAS PRESENTED SUFFICIENT EVIDENCE TO JUSTIFY THE CONVICTION OF THE APPELLANT OF THE CRIME OF RAPE

a. Prosecution's evidence failed to establish the commission of the crime of rape

[65] TSN dated 11 September 2006 (D. Smith), p. 78; Rollo, pp. 4566-4761.
[66] TSN dated 11 September 2006 (D. Smith), p. 81; Rollo, pp. 4566-4761.

The prosecution's evidence to support the existence of force or intimidation was not sufficient

1. From the very beginning of the proceedings, the complainant has anchored her theory of the case that rape was committed against her through the use of force and intimidation. Thus, in her criminal complaint filed before the City Prosecutor's Office of Olongapo City, she alleged under oath:

> "That on or about 10:30 P.M. 01 November 2005, in Subic Bay Metropolitan Authority and within the jurisdiction of this Honorable Court, inside the Starex van bearing License Plate No. WKF-162 driven by Timoteo Soriano, Jr. y Laroga with accused five (5) US Military Servicemen mentioned above as passengers, while traveling along the Waterfront Road, Subic Bay Freeport Zone and within the jurisdiction of this Honorable Court the above-named accused led by Smith collaborating, conspiring and confederating with each other, entertained by their evil sexual desire, grave abuse of confidence, force and intimidation and with abuse of superior strength committed carnal knowledge against the person of Suzette S. Nicolas, 22 years old, without her consent and against her will.
>
> Contrary to law."

2. Conformably with the afore-quoted allegation of the complainant, as well as the statement she gave to the SBMA investigator, and after conducting a preliminary investigation, the City Prosecutor of Olongapo filed an Information against the appellant, among others, which reads:

> "The undersigned accused LCpl. Daniel Smith, SSgt. Chad Brian Carpentier, Dominic Duplantis, Keith Silkwood and Timoteo L. Soriano, Jr. of the crime of Rape under Article 266-A of the Revised Penal Code, as amended by Republic Act 8353, upon a complaint under oath filed by Suzette S. Nicolas, which is attached hereto and made an integral part hereof as Annex "A", committed as follows:
>
> > "That on or about the First (1st) day of November 2005, inside the Subic Bay Freeport Zone, Olongapo City and within the jurisdiction of this Honorable Court, the above-named accused's, being then members of the

United States Marine Corps, except Timoteo L. Soriano, Jr., Conspiring, confederating together and mutually helping one another, with lewd design and by means of force, threat and intimidation, with abuse of superior strength and taking advantage of the intoxication of the victim, did then and there willfully, unlawfully and feloniously sexually abuse and have sexual intercourse with or carnal knowledge of one Suzette S. Nicolas, a 22-year old unmarried woman inside a Starex van with Plate No. WKF-162, owned by Starways Travel and Tours, with Office address at 8900 P. Victor St., Guadalupe, Makati City, and driven by accused Timoteo L. Soriano, Jr., against the will and consent of the said Suzette S. Nicolas, to her damage and prejudiced.

CONTRARY TO LAW"

3. In support of its finding that appellant used force against complainant to enable him to have sexual intercourse with her, the lower court quoted the testimony of the complainant as follows:

ATTY. URSUA:

Q So, what did you do when you realized that Daniel Smith was lying on top of you?

A Nanlaban po ako. Pinipilit ko s'yang ilayo sa akin.
(I was resisting and I was trying [hard] to push him away from me.)

Q What did you use in resisting and pushing him away?

A My hands, ma'am.

Q Why were you resisting him and pushing him away?

A Ayoko ko po yung ginagawa n'ya sa akin.
(I don't like what he was doing to me.)

Q Were you successful in pushing him away?

A No, ma'am.

Q Why?

A Hinang-hina na po ako at mabigat po s'ya.
(Because I [was feeling] (am very) weak and he's heavy, ma'am.)

Q In the last ---- on what part of your body did you feel his weight?

ANSWER-WITNESS

Hindi ko po alam kasi mabigat po s'ya.
(I don't know, ma'am, but I know he's heavy.)

QUESTION – ATTY. URSUA

You also said that he was kissing you. Please tell us where was he kissing you?

A He was kissing me on my lips, on my neck and on my chest, ma'am.

Q What did you do when he was kissing you on the lips?

A Nanlalaban po ako sa kanya.
(I was [trying to resist him], (fighting) him (back), ma'am.)

Q And how did you do that?

A Gumaganuon po ako.

ATTY. URSUA

The witness, Your Honor, demonstrated by turning her head from left to right.

QUESTION – ATTY. URSUA

Were you successful in evading his kisses by turning your head left to right?

A No, ma'am.

Q How else did you resis his kissing you?

A I was pushing him away from me.

QUESTION – ATTY. URSUA

And what were you using?

A My hands, ma'am.

Q Were you successful in pushing him away?

A No ma'am.

Q Why not?

A Mabigat po s'ya, at saka, nanghihina na rin po ako nuon.
(He's heavy and I was weak, ma'am.)

Q You said that he was kissing you on the lips and you were turning your head to the left and to the right to avoid his kisses and you were pushing him away. What did he do when you were doing those things?

A Pinagpatuloy n'ya pa rin po.
(He continued what he was doing, ma'am.)

Q He continued with what he was dong you said. What was he doing at that time?

QUESTION – ATTY. URSUA

You said he was kissing you also on the neck?
(at this point, the witness cried and atty. Ursua asked for a recess)

xxx xxx xxx

ATTY. FORMOSO

Your Honor, please, when we had a recess and we learned that my client was assaulted by the complainant a few minutes before the start of court session, Your Honor---May we approach the bench, Your Honor?

COURT

Alright, together, with the prosecutors.

xxx xxx xxx

Alright, Atty. Ursua, you can continue

ATTY. URSUA

Thank you, Your Honor.

QUESTION – ATTY. URSUA

Miss Nicolas, you said that the accused, Daniel Smith, was also kissing you on the neck. What did you do while he was doing that?

A I was pushing him away from me, ma'am.

Q And how did you do that?

A By using my hands, ma'am.

Q Were you successful in pushing him away?

A No, ma'am.

Q And what did he do when you were trying to push him away?

A He continued on what he was doing, ma'am.

Q What was that?

A He was kissing me on my neck.

Q Why were you not successful in pushing him away?

A Because I was getting weak and he's heavy, ma'am.

Q You also said that the accused, Smith, was kissing your chest. What did you do while was doing that?

A I was also trying to push him away from me, ma'am.

Q And what were you using?

A My hands, ma'am.

QUESTION – ATTY. URSUA

Were you successful in pushing him away?

A No, ma'am.

Q Why not?

A I was already weak and he's heavy, ma'am.

Q And what did he do when you were trying to push him away?

A He continued on what he was doing, ma'am.

Q Other than kissing you on the lips, on the neck and on the chest, what else did the accused, Daniel Smith, do?

A Hinipuan n'ya po yung breast ko.
(He touched my breast, ma'am.)

ATTY. URSUA

May we ask that the translation for hipo be caressed rather than touched?

ATTY. RODRIGO

Hipo is touch. Caress is something else, yakap. Can we use the Tagalog ward, Your Honor.

COURT

Alright, let use the word hipo.

QUESTION – ATTY. URSUA

So, what did you do when the accused, Daniel Smith, was doing what you described as hipo or panghihipo on your breasts?

A Nanlalaban po ako sa kanya.
(I was fighting back.)

Q And what did you use in fighting back?

A My hands, ma'am.

Q What exactly did you do?

A I was pushing him away from me, ma'am.

Q Were you successful in pushing him away?

A No, ma'am.

Q Why not?

A Because I was already weak and he's heavy, ma'am.

Q Will you be able to describe to us how the accused, Daniel Smith, did the panghihipo that you were referring to?

ATTY. URSUA

I will withdraw that question, Your Honor.

QUESTION –ATTY. URSUA

Will you tell us what he was using while he was dong that panghihipo on your breasts?

A His hands, ma'am.

QUESTION – ATTY. URSUA

You said that when you realized that the accused, Smith, was on top of you and that he was kissing you on the lips, on the neck and on the chest, you tried to push him away. You fought back. Other than fighting back and pushing him away, what else did you do?

A I was shouting, ma'am.

Q And how did you shout?

A All I know is that I was shouting, ma'am.

Q Why were you shouting?

A Because I didn't like what he was doing, ma'am.

xxx xxx xxx

Q When the accused, Daniel Smith, was on top of you and kissing you and touching your breasts, what were you feeling in your body?

ANSWER – WITNESS

Nanghihina na po nuon. Masakit po ang ulo ko. At yung utak ko po parang gusto ng magsara. Gusto ko ng matulog pero pinipilit ko pong magising para labanan si Smith sa binabalak n'ya.
(I was getting weak. I have headache. [As if my brain wants to stop functioning] I fell like I wanted to sleep and I was trying to keep awake to be able to fight Smith back / to prevent him from [doing] what he was (intending) to do[ing].)

ATTY. URSUA

May we have the words of the witness in the dialect be reflected on the record?

COURT

Ms.Stenographer, Rose, just quote the exact words of the witness.

Court Stenographer

Yes, Your Honor.

QUESTION – ATTY. URSUA

And what were the emotions that you were going through you while Smith was on top of you?

A Natatakot po ako na ma-rapen'ya po ako.
(I got scared that he will rape me.)

Q And why did you think that he is going to rape you?

A Kasi nakahiga na po ako nuon. Tapos hinahalikan n'ya po ako. Tapos hinihipuan n'ya po ako sa breasts ko. Tapos nanlalaban po ako sa kanya. Sumisigaw na nga po ako. Nanlalaban na po ako sa kanya. Saan pa hahantong 'to? (Because I was (already) lying [during] that time. [That] he was kissing me. [and] He was touching my breasts. I was fighting [(him) back. I was shouting]. Where will this lead (to).)

QUESTION – ATTY. URSUA

Do you know where you were at that time when Smith was on top of you and you were struggling against him?

COURT

When or where?

ATTY. URSUA

Where?

Witness

No, ma'am.

QUESTION – ATTY. URSUA

Do you know what happened next?

A What I know was that I was fighting back Smith, ma'am.

Q Do you know what happened after that?

A I don't know what happened next but when I regained my consciousness, ma'am, I realized that I was on the ground.

ATTY. RODRIGO

Your Honor, at this point, we reiterate our continuing objection, Your Honor.

COURT

To the answer?

ATTTY. RODRIGO

To this line of questioning, Your Honor, because she is now questioning what is not alleged in the information.

COURT

That was not being specifically asked from the witness but it was the witness who answered that.

ATTY. URSUA

May I proceed, Your Honor?

COURT

Continue.

QUESTION – ATTY. URSUA

So, Miss Nicolas, what was your last recollection of that incident when Smith was on top of you and touching you?

A I was fighting him back, ma'am. (Emphasis and underscoring original)

The lower court then concluded that "(a)s shown by her testimony, the complainant resisted accused Smith, evaded his kisses, fought accused Smith back and even shouted while she was on top of her."[67]

The lower court's conclusion is completely erroneous.

4. Assuming, for argument's sake (though appellant does not concede this), that complainant accurately narrated the events that occurred inside the Starex van on November 1, 2005, the totality of the evidence of the prosecution on the existence of force or intimidation is hardly sufficient to support the lower court's finding of rape.

5. Contrary to the lower court's 'synopsis' of complainant's testimony on appellant's use of force against her, complainant's **actual** testimony, as shown in the excerpts cited by the lower court itself in its Decision, and reproduced above, reveals only the following: (a) complainant tried to push appellant away when the latter was kissing him on the neck, but that appellant was heavy, and complainant was already feeling weak; and (b) that she shouted.

6. As mentioned earlier, the lower court concluded from complainant's testimony that appellant employed force against complainant because the latter resisted appellant, fought him back, and even shouted while appellant was on top of

[67] Appealed Decision, p. 19.

her. To be sure, however, if complainant's account is to be believed, her only act of 'resisting' appellant was manifested through her attempt to push him away. While it is true that complainant made a conclusionary statement in her testimony that *'nanlaban sya'* or that she fought appellant back, the only 'fact' that tends to show that she indeed fought back was that she tried to push appellant away, only that appellant was heavy, and she was already feeling weak and wanted to sleep. No other overt act of this 'fighting back' was ever testified to by complainant.

7. Assuming, for argument, that complainant did try to push appellant away, by her own admission, she was already too weak, and appellant was heavy. If complainant is to be believed, it is entirely possible that appellant did not even feel her pushing him away, for with appellant's weight on top of her, and complainant already feeling so weak and already wanting to sleep, her movements may have hardly been noticeable. Moreover, while complainant said that she shouted, the records are bare as to what words complainant actually uttered. *What did complainant say?* This piece of information is crucial in order for the lower court to determine with moral certainty that force was used against her. To be sure, complainant did not shout for help[68], despite the fact that she heard noises in the background and heard people talking, for if she did, she would have categorically stated the same in her testimony. Considering that she admitted that she did not know who the other people in the van were[69], human experience dictates that if complainant really believed that she was in grave danger, she would at least give these people a cry for help, because they were in a position to help her. Certainly, complainant's purposeful vagueness on her act of shouting is susceptible of various interpretations, one consistent with shouting for help, another consistent with shouting in agreement.

[68] TSN dated 10 July 2006 (S. Nicolas), p. 24; Rollo, pp. 3064-3145.
[69] TSN dated 14 July 2006 (S. Nicolas), p. 58; Rollo, pp. 3530-3597.

8. It is of course well-settled, as cited by the lower court in its Decision (*People v. Savellano,* G.R. No. L-31227, May 31, 1974, at p. 19), and as affirmed in subsequent cases,[70] that --

> *It is not necessary that the force employed against the complaining woman in rape be so great or of such a character as could not be resisted**. It is sufficient that the force used is <u>sufficient to consummate</u> the culprit's purpose of copulating with the offended woman*** (U.S. vs. Villarosa, 4 Phil. 434, 437 cited in 52 C. J. 1018, note 7; Decision of Supreme Court of Spain, dated May 14, 1878, 3 Viada, Codigo Penal 452; II Hidalgo Codigo Penal 302). *The force or violence necessary in rape is naturally a relative term, depending on the age, size and strength of the parties and their relation to each other* (75 C.J.S. 475)." (Emphasis and italics supplied)

9. Thus for instance, in *People v. Plaza,* G.R. No. 17235, March 27, 1995, cited by the lower court in its Decision, (at p. 20) the Supreme Court sustained therein accused's conviction for rape through use of force because of the following established facts: (a) the accused boxed the victim, and threatened to kill her; and (b) while therein victim offered only small resistance, this fact is explained by the following: (1) the victim was young, being only 13 years old; (2) the victim was boxed in the chest; and (3) the accused threatened to kill her.

10. In *People v. Dio,* G.R. No. 106493, September 8, 1993 (cited by the lower court as footnote 8 in its Decision), force was sufficiently shown by the fact that in order for therein accused to consummate the rape, he pointed a knife at the victim's throat. In *People v. Ylarde,* G.R. No. 100521[71], July 5, 1993, (cited by the lower court as footnote 8 in its Decision) the Supreme Court convicted the accused despite the fact that there was no outcry from the offended party because force or

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[70] *People v. Ilao,* G.R. Nos. 152683-84, December 11, 2003: "[F]orce or intimidation is relative and need only be **sufficient to consummate the crime**."; *People v. Bautista,* G.R. No. 140278, June 3, 2004: "The fact that appellant boxed the victim on her thighs when she resisted and struggled against him sufficiently indicated force. The force required in rape cases need not be overpowering or irresistible. Failure to offer tenacious resistance does not make the submission by the complainant to the criminal acts of the accused voluntary. **What is necessary is that the force employed against her be sufficient to consummate the purpose which he has in mind."** (Emphasis supplied)

[71] In the decision, the G.R. No. given is "110521".

intimidation is immaterial in the rape of a child below twelve years of age. In *People v. Codilla,* G.R. Nos. 100720-23, June 30, 1993, (cited by the lower court as footnote 8 in its Decision) the Supreme Court considered several factors in determining that there was rape even if the resistance offered by the victim was only slight: (1) the victim was young – only 15 years old; (2) there were 2 men threatening her and her sister; and (3) both men were armed with bolos.

11. In *People v. Malabago,* G.R. No. 108613, April 18, 1997, cited by the lower court in its Decision, at p. 20, the Supreme Court did not place too much importance in the presence or absence of resistance because: "any resistance private complainant may have wanted to put up was foiled by the strong grip of appellant on her and the danger posed by the knife at her neck." Finally, in *People v. Talaboc,* G.R. No. 103290, April 23, 1996, cited as footnote 10 of the lower court's Decision, unique circumstances obtained that made the Supreme Court disregard the absence of resistance on the victim's: (a) the victim is a young girl (17 years old) from a barrio, and thus is naïve and innocent; (b) the accused was much older, being 41 years old; and (c) the accused was able to make the victim believe that he has supernatural powers with which he can curse the victim and her family to damnation. Thus, it is clear that the victim would have been so frightened of the accused that she would hardly resist the rape.

The above-discussed cases are wholly inapplicable to the case at bar.

12. What is clear in the cases that the lower court cited in its Decision is that, to sustain a conviction for rape under Article 266-A, 1(a) of the Revised Penal Code, **the force employed must be sufficient <u>to consummate</u> the carnal knowledge of the victim. In other words, the force used, though not necessarily irresistible, must have been enough to cow the victim to submission, and to enable the accused to satisfy his desires.** In stark contrast, in the case at bar, by complainant's account, virtually no force was employed by appellant to consummate sexual intercourse with complainant. Complainant did not allege that appellant had any sort of weapon with him at the time that made her fear for her life; neither did complainant allege that appellant, at any time, inflicted

physical harm on her (*e.g.* boxed her, slapped her, kicked her, etc). Complainant did not assert that appellant threatened to take her life or any of her relatives if she did not have sex with him, or uttered any other words that could have led her to think that, if she did not submit to his advances, harm would surely befall her or her family. Instead, complainant's only act of resistance is that she tried to push appellant away, only that she was already weak, and appellant was too heavy. This hardly shows any sort of force or intimidation on appellant's part that left complainant no other choice but to capitulate to his desires.

14. To be sure, the Supreme Court has already held, in similar cases, that the alleged victim's act of resisting the accused by pushing him away, is not sufficient to show (a) that force was employed against the victim; and (b) resistance on the victim's part. Thus, in the case of *People v. Librado,* G.R. No. 141074, October 16, 2003, where the prosecution only endeavored to prove the overt act of therein accused of hugging the victim tightly and kissing her repeatedly, as in the case at bar, the Supreme Court acquitted therein accused, holding:

> Under similar facts in *People v. Gavina* and *People v. Peligro*, the Court held that **the absence of a weapon or anything that could produce sufficient fear in a woman as to render helpless one who would otherwise be deemed strong or worldly enough to put up a fight**, or the failure to show the disparity in strength between the complainant and the accused sufficient to overpower a complainant into acceding to the sexual act is deemed a failure on the part of the prosecution to prove the guilt of the accused "beyond peradventure of doubt."
>
> **From Emilia's testimony, all that is shown is that Norly embraced her tightly and kissed her repeatedly. The appellant was not armed with anything. There was no threat of physical harm upon her or her family. Neither was there any showing of intimidation felt by her or employed by the appellant. In sum, it appears that the only force employed by the appellant was his tight embrace and his kisses.**
>
> **To justify the obvious lack of resistance on her part, Emilia gave the lame excuse that she felt weak. This same argument failed to persuade the Court in People v. Alvarez, and again fails to do so here.**

> Thus, for the inability of the prosecution to prove the guilt of herein appellant Norly Librado beyond reasonable doubt, his acquittal is proper.
>
> Accordingly, there is no need for us to dwell or look into the merits of the evidence presented by the defense because, in the first place, the prosecution failed to discharge its burden of proof. As stated earlier, the third guiding principle in reviewing rape cases is that the "evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence for the defense." (Emphasis supplied)

15. Likewise, in *People v. Gavina,* G.R. No. 143237, October 28, 2002, the only finding made by the trial court concerning the element of force and intimidation is a perfunctory sentence that "she pushed him but accused threatened her." (Note that in the case at bar, complainant does not even in any way suggest that appellant ever threatened her). Said the Supreme Court:

> **Appellant had no weapon with him and used none in the commission of the alleged crime. Nowhere in complainant's testimony do we find such degree of intimidation as to cause her to believe that appellant was at that time capable of harming her or killing her had she refused him. We find absent here the element of force or intimidation to support a charge for rape.** Where the accused raises doubt as to any material element, but the prosecution is unable to overcome such doubt, we must find that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and the accused, now appellant, must be acquitted. (Emphasis supplied)

16. Based on the foregoing, it is evident that the prosecution miserably failed to prove force or intimidation on the part of appellant that warrants his conviction under paragraph 1(a) of Article 266-A of the Revised Penal Code. The lower court, therefore, gravely erred in convicting appellant for the crime of rape.

The alleged vaginal contusions sustained by complainant are consistent with consensual sexual intercourse

17. Relying solely on the testimony of Dr. Rolando G. Ortiz, in respect of the medico-legal examination he conducted on the person of complainant, the lower

court concluded that the contusions suffered by complainant on different parts of her arms and legs and on her *labia minoras* are consistent with sexual assault or non-consensual sex or rape.[72]

This is palpable error, and, the lower court's misrepresentation on this point unmistakably reveals one of the several *indicia* of unfair bias for the prosecution, for it blatantly ignored Dr. Ortiz's, and even the prosecution's expert witness – Dra. Raquel Fortun's, statements, on cross-examination, that complainant's contusions are equally consistent with consensual sexual intercourse.

18. It must be emphasized that Dr. Ortiz never made a definite finding that the contusions suffered by complainant on different parts of her arms and legs and on her *labia minoras* are consistent with sexual assault or non-consensual sex or rape. On the contrary, Dr. Ortiz testified during his cross-examination that the same alleged contusions could have been caused by other causes[73]or sustained as a result of consensual sex,[74] thus:

> Q: Dr. Ortiz, the contusions on both sides of the labia minoras stated in your Medico Legal Certificate you said could have been caused by either a vibrator, penis, beer bottle or any blunt object?
>
> A: Any cylindrical blunt object, sir.
>
> Q: <u>You will agree with me as stated by Solis in his Legal Medicine book that there could have been other causes for this, is that correct?</u>
>
> A: Can you please mention the page, sir.

[72] Appealed Decision, p. 60, 'circumstantial evidence' No. 11.
[73] TSN dated 29 June 2006 (Dr. M. Ortiz II), pp. 158-161; Rollo, pp. 2477-2708.
[74] TSN dated 29 June 2006 (Dr. M. Ortiz II), pp. 163; Rollo, pp. 2477-2708.

Q: Yes, page 492. Predisposition causes of vulvo vagina injuries during sexual act and one of the causes, it says, brutality of the male partner during the sexual act, you will agree that that would cause?

A: Yes, sir.

Q: And the next, it says, Excessive active involvement of the female partner, you would also agree with that that could cause have caused a contusion?

A: I have not read on that, sir.

Q: Page 492 of Solis book?

A: Yes, I agree, sir.

Q: And you would also agree that another cause for the contusion would be the position during the sexual act which Solis says dorsal decubitus position, would have caused this also?

A: Yes, sir.

Q: And it could have been caused also by genital disproportion, meaning the male organ is unusually big for female organ infantile in size in spite of adult age? x x x

A: Yes, Sir, the title of these things that you are enumerating is a bolder aspect.

Q: Yes?

A: It is injuries that could happen on the vulvo vagina area but we are talking here of the labia minora.

Q: Could this not have caused – these factors could not have caused contusion on the labia minoras, is that what you are saying?

A: It could be possible, sir.

x x x

Q: Dr. Ortiz, your finding contusion on both sides of the labia minora, is this conclusive of force or consensual sex?

A: You want me Sir, to choose between whether there was force or consensual sex.

Q: Could you have the same findings whether or not the sexual act was consensual or by force. That is your finding of contusion on both sides of the labia minoras?

A: If you want me, Sir, to choose between the two, it is most probable, it is with the use of force.

Q: But it is possible also in consensual sex?

A: Yes, because in consensual sex you can have brutal sexual behavior. (Underscoring supplied)

19. Even the prosecution's expert witness, Dr. Raquel Fortun, testified that the genital injuries found on complainant could also be the result of a consensual sex:[75]

Q: Will you agree with me Doctor, that you can also have consensual sex even if the woman is not yet aroused and her vagina not yet lubricated, is it possible?

x x x

A: If by sexual intercourse initially when the activity is started, perhaps the woman might allow that.

Q: In which case doctor, if the sexual intercourse at the time the woman was not aroused and the vagina not yet lubricated, injury in her vagina might also occur?

A: Yes, Sir.

[75] TSN dated 17 July 2006 (Dr. R. Fortun), pp. 10-15, 36-54; Rollo, pp. 3351-3529.

Q: Now, lets go to reason no. 2. You said doctor, that in addition to the medical report of Dr. Ortiz, and the PNP Crime Laboratory Report, you also read the statement related to this case, am I correct, Doctor?

A: Yes.

Q: And so, would it be correct to state you came across an information that the rape happened inside a Starex van, am I correct?

A; Yes, Sir.

Q: Now, Doctor, have you seen the interior of the starex van?

A: Yes, Sir.

Q: Now, Doctor, you stated that if there was consent, the woman would position her pelvis or body in such a way as to allow the penetration of the penis without experiencing pain, am I correct?

A: Yes.

Q: Now, will you agree with me now that if the space where the intercourse is limited or crammed, the woman may not be able to position her pelvis or body in order to allow the penis to penetrate without experiencing pain, is it possible, Doctor?

A: Yes, that is one consideration (Underscoring supplied).

20. Although Dr. Fortun mentioned literature allegedly supporting her opinion that the sexual intercourse was not consensual, the very same authors of the literature produced and marked as prosecution evidence discuss that contusions and redness in the vagina are brought about, as well, in consensual intercourse. Thus, on cross-examination, Dr. Fortun unequivocally agreed with defense counsel that contusions may equally be sustained in consensual sexual intercourse, thus:[76]

Q: I will call your attention to this portion which reads:

[76] TSN dated 13 July 2006 (Dr. R. Fortun), pp. 36-54; Rollo, pp. 3351-3529.

"x x x Lacerations, abrasions, or bruises at the posterior fourchette have all been described after consensual activity x x x".

do you agree with that statement of the author or this book, Doctor?

x x x

A: Yes, Sir.

Q: Would you also agree with the statement, which says:

"x x x described macroscopically visible hermatoma of the labia with consensual sexual activity"

do you also agree that statement in Exhibit "AAA"?

A: As stated here. This is the observation of one, Nelson, yes.

Q: Now, lets go to page 94 of the same exhibit, Doctor. There is a statement here by the author, authors of the book, its says:

"x x x They found lacerations (tears) with associated bruising at the 3-o'clock, 9-o'clock positions on the hymen of a 14-year old and bruises at the 6-o'clock and 7-o'clock positions on the hymen of two other females (aged 13 and 33 years)."

do you agree with that?

x x x

A: As stated here, the same answer.

Q: Let us not turn to same page, page 96 of the same exhibit, Doctor and I read:

"8.6.2.3 entitled "Vagina"

Lacerations and ruptures, (full-thickness lacerations) of the vagina have been described in the medical literature after consensual sexual acts."

do you have that in front of you, Doctor?

A: Yes, I have.

Q: Do you agree with that?

A: As stated here, yes.

Q: Now, at the bottom of the page, doctor, it says:

"However, one study included "redness" as a vaginal injury when in fact, this is a non-specific finding with numerous causes."

do you agree with that?

A: Yes, but put in the context of the entire paragraph.

x x x

Q: Now, lets go to page 423, and let me call your attention to the paragraph on top of the words, "Tests for semen", and I read:

"Where injury is relatively slight and confined to hyperaemia and oedema of the vaginal or anal entrances – and where abrasions and bruising of the vulva is slight (even including finger-nail scratches), although the presumption is that intercourse was by force, the possibility still exists that it was voluntary thought overenthusiastic, unless, of course, the victim was a small child."

A: Yes. Again, taken in the context of the entire paragraph.

Q: And we all know that the complainant is not a small child?

A: I understand that, yes

Q: Okay, Let us go now to Exhibit "CCC" which is entitled "Quick-Reference Sexual Assault" x x x It says, and I quote:

Vigorous or intense intercourse ("rough sex") has been suggested as an explanation for a victim's injuries. Patients may hesitate to seek medical services which they have sustained injury to the genetalia after episodes of intense sex, unusual positions during sex, or prolonged sexual contact".

That refers to consensual sex, is it not, Doctor?

A: Yes, Sir.

Q: And do you agree on that findings?

x x x

A: It has to be taken in the context of the entire paragraph because the subsequent sentences clarifies what actually the section is all about.

x x x

COURT

Q: Is that paragraph which was read by Atty. Rodrigo. . . But the doctor said it must be taken in the context of the entire paragraph. Does that paragraph only refer to consensual sex, Doctor?

A: No, Your Honor.

ATTY. RODRIGO

Q; So it refers to both?

A: Yes, because another half of the paragraph is reorientation of sexual assault victim contrary to the consensual sex.

Q: <u>Because all these findings which is similar both in consensual and non-consensual sex, that really there is not case control yet as to really determine the injuries caused by consensual sex or non-consensual sex?</u>

A: <u>I agree that there are limitations to existing studies and precisely as cited because it is very difficult with two (2) groups of woman having had the same condition different only in the</u>

fact that one would have consensual sex and the other have non-consensual sex.

Q: That is right, and that is why, the authors of your Exhibit "AAA" made the following statement. x x x

"To date, no case-control study has compared the genital findings in complainants of sexual assault with those in a sexually active control population."

do you agree with that, Doctor?

A: Yes, Sir.

Q: And one of the basis of that, Doctor, the statement prior to that, on the same page, it says:

"Little information is available regarding the incidence and type of genital injuries that result from consensual sexual acts involving the female genitalia."

do you agree with that?

A: Yes, Sir.

Q: And that is also the reason why, Doctor, if you look at our Exhibit "DDD", which is entitled "Patterns of genital injury in female sexual assault victims" x x x it says:

"Further investigation is needed to determine whether there is a finding or group of findings that can distinguish non-consensual and consensual activity."

x x x do you agree with that?

A: Yes, sir (Underscoring supplied).

21. Further bolstering the possibility that the alleged injuries on complainant's vagina was brought about by consensual intercourse is Dr. Teresita Sanchez's, the defense's expert witness, testimony in this regard:[77]

Q: In this medico-legal certificate, one of the findings: "normal looking external genitalia, nulliparous introitus? What do you mean or how do you define "nulliparous introitus, Doctor?

A: It is a small opening because a person has not yet delivered yet and therefore the opening is usually small.

Q: And that is usually present with respect to women who have not yet delivered?

A: Yes, Sir. If the woman has not yet delivered, sometimes, the hymen is what we call canacally. These are things that just by touch, would suggest the presence of the hymen before.

Q: <u>What is the significance of the presence of nulliparous introitus in sexual intercourse?</u>

A: <u>There might be difficulty entering the pelvis because of the small opening because it is not in the ideal conditions.</u>

Q: So, what do you mean by ideal conditions?

A; Usually in bed, for example.

Q: <u>How about if it is done in a confined space?</u>

A: <u>Certainly, in trying to penetrate, so that there will be contusions in that area.</u>

Q: How about if it is done in a moving Starex van, Doctor?
A: I think it is more difficult.

Q: <u>Now, if there is sexual intercourse by penetrating the vagina's small opening, what usually will it cause?</u>

A: What will it cause? <u>It will cause contusion or will cause abrasions or other things. It has been documented in sexual intercourse book on whether it was consensual or non-consensual sex.</u>

[77] TSN dated 18 September 2006 (Dr. T. Sanchez), pp. 54-56; Rollo, pp. 4920-5043.

Q: And would it cause contusion in the labia minora of a woman?

A: Yes, it can be.

x x x

Q: Given the facts that you have stated, Doctor, that there was small opening of the vagina, there was a confined space and it was a moving van, would it be possible that sexual intercourse under that condition may be consensual?

A: Sex? I would rather say that these injuries are certainly not only possible, it is probable (Underscoring supplied).

22. Also in relation to complainant's alleged contusions on her *labia minoras*, the lower court also concluded that the "unusual tenderness" experienced by complainant in her vagina means that the vagina must have been probably traumatized by application of external force.[78] In so concluding, the lower court relied once more on the testimony of Dr. Ortiz.

23. An unbiased scrutiny of Dr. Ortiz's entire testimony, however, would disclose that complainant's vagina was not unusually tender at all. Consider Dr. Ortiz's following testimonies on direct and cross-examination, which reveals an inconsistency that the lower court, if it were truly impartial, could not have but noticed:

During his cross-examination, Dr. Ortiz testified that when he inserted one (1) finger into the complainant's vagina, it 'must have' elicited pain on her part. Defense counsel then asked the following clarificatory questions--

Q: So, how then were you able to determine whether she was negative or positive for wriggling tenderness and adnexal tenderness when to do that you have to insert two fingers, so she must have been crying in pain?[79]

[78] Appealed Decision, p. 28
[79] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 149-150; Rollo, pp. 2477-2708.

--to which the good doctor quickly replied:

A: Yes, at the time I elicited wriggling tenderness she must have been crying in pain.

Q: She must have been crying in pain?

A; Yes, sir.[80]

However, during his direct examination, Dr. Ortiz categorically stated that when he inserted two (2) fingers, there was a negative finding for tenderness or pain whatsoever:

Q: Let us go to the next finding. It says: "negative wriggling tenderness". Can you please explain this?

A: In the internal examination, I tried to insert two fingers. I inserted two fingers with the cervix between my two fingers, nasa pagitan po yong cervix ng dalawang daliri, and then I wriggled, this way, kinakalogkalog. **It is negative for tenderness or pain or whatsoever** (Emphasis and underscoring supplied).[81]

24. Thus, while Dr. Ortiz stated that complainant "must have been crying in pain" (note that "*must have* been crying in pain" is a highly speculative, unsure and conclusionary statement from Dr. Ortiz which may totally be at war with what actually happened during examination) when he inserted one (1) finger into her vagina during the internal examination, he mentioned nothing of this sort when he was discussing his findings on wriggling tenderness and adnexal tenderness. This is probably because complainant was not, in fact, crying out in pain. And this, in turn, is probably because complainant's vagina was not, in fact, so unusually tender at all, for how could Dr. Ortiz insert two of his fingers inside complainant's vagina with relative ease and without tenderness or pain, but when he inserted just one finger, there is unusual tenderness and pain? It just does not make any sense.

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[80] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 149-150; Rollo, pp. 2477-2708.
[81] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 72; Rollo, pp. 2477-2708.

25. From the foregoing, it is evident that in blindly relying on the 'possibility', as articulated by Dr. Ortiz, that complainant's vaginal injuries were consistent with sexual assault, the lower court effectively ignored the other possibility, expressed by no less than Dr. Ortiz himself and the prosecution's expert witness on cross-examination, that these injuries are likewise consistent with consensual sexual intercourse. Clearly, the lower court inexplicably erred in not applying the cardinal rule that where the evidence on an issue of fact is in equipoise or there is doubt on which side the evidence preponderates, the party having the burden of proof, which in this case is the prosecution, loses. As the Supreme Court held in *Bernardino v. People,* G.R. No. 170453, October 30, 2006:

> The equipoise rule finds application if, as in the present case, the inculpatory facts and circumstances are capable of two or more explanations, **one of which is consistent with the innocence of the accused and the other consistent with his guilt, for then the evidence does not fulfill the test of moral certainty, and <u>does not suffice to produce a conviction</u>.** (Emphasis and underscoring supplied)

<u>In truth, complainant's alleged contusions in her arms and legs were the result of complainant's struggle with the police officers AFTER she alighted the Starex van</u>

26. Although the Medico Legal Certificate[82] showed that complainant bore contusions on her forearms and right leg, it was plain error for the lower court to conclude that these contusions indicate that there was rape.[83] What could have caused complainant's alleged contusions, assuming there are any? Interestingly, the answer can be culled from the prosecution's own evidence. <u>As testified to by the prosecution's witnesses, these conclusions were obtained by complainant because of her own actions **after** alighting from the Starex van</u>. **The truth is that,**

[82] Prosecution's Exhibit "U", Rollo, p. 59.
[83] Appealed Decision, p. 60, 'circumstantial evidence' No. 11.

complainant had to be dragged by police officers because complainant vigorously resisted boarding the patrol car.

27. In prosecution witness Joseph D. Khonghun's ("Khonghun's") Affidavit dated May 15, 2006[84] Khonghun narrated as follows:

> "7. After about ten minutes, a mobile car arrived. I related to the uniformed man in the car what happened. He and the driver tried to get the girl into the car but the girl resisted. Finally, they were able to load her into the car. x x x" (Underscoring supplied).

28. During his testimony in court, Khonghun elaborated on how the patrolmen had to grab complainant in order to get her into the car,[85] as follows:

Q: What happened after that?

A: I saw the girl seated at the back of the car stepped out and ran.

Q: You are referring to the private complainant?

A: Yes, she ran again and . . .

Q: What did the officers do?

A: Two officers were able to grab her and tried to help her and they tried to calm her down and led her back to the car.

And on his cross-examination, Khonghun stated that:

Q: You also stated that the SBMA police grabbed the complainant in order to bring her back inside the car?

A: Yes, Sir.

Q: How many SBMA police grabbed the complainant in order to bring her back inside the mobile car?

A: I saw one (1) first and then I saw two (2) after that only one (1) reacted first and the second assisted.[86]

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[84] Prosecution's Exhibit "T", Rollo, pp. 56-58.
[85] TSN dated 8 June 2006 (J. Khonghun), pp. 90-91; Rollo, pp. 537-753.

x x x

Q: And when the police on bike who responded tried to interrogate the complainant, the girl tried to parry the hand of the investigator and in the process she hit the lips of the investigator, did you notice that?

A: I do not know that accident but I know that the lips of the bike officer was hit, Sir[87] (Underscoring supplied).

29. The foregoing is consistent with the narration of Ma. Fe Castro ("Castro") in her Supplemental Affidavit dated November 23, 2006[88] where Castro stated, thus:

> "13 May nakita kaming papadating na nakabisikletang pulis, pinatawag naming ng mobile. Nakapasok na lahat ng servicemen sa barko noon, wala nang tumatakbo papuntang USS ESSEX. Napapaikutan naming ang babae. Maya-maya, dumating and isa pang pulis na nakabisikleta din. Makalipas ang 20 minuto, dumating and mobile. Ang babae histerika pa din. Sa pagpupumiglas niya, nakita ko natamaan ng kanyang kamay ang mukha ng unang pulis na dumating na nakabisikleta at pumutok ang labi nito. Nang dumating ang police mobile, kailangan sapilitan na ipasok ang babae sa loob ng mobile. Nanlalaban ito at ayaw pumasok, humawak ng mahigpit sa pintuan ng sasakyan. Matagal bago naipasok sa loob ng mobile ang babae, patuloy itong nakikipaglaban" (Underscoring supplied).

30. Curiously, the police officer involved in this incident, Noel A. Paule ("Paule"), during his testimony in court, contradicted the prosecution's own evidence and denied that he and the other officer who responded to the scene had to grab complainant in order to get her into the mobile car.[89] He insists that the complainant cooperated with them and voluntarily boarded the mobile car, though hugging and holding on to him the whole time. However, as earlier pointed out, Paule's testimony is completely contradicted by the evidence presented by another prosecution

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[86] TSN dated 8 June 2006 (J. Khonghun), p. 142; Rollo, pp. 537-753.
[87] TSN dated 8 June 2006 (J. Khonghun), p. 176; Rollo, pp. 537-753.
[88] Prosecution's Exhibit "C", Rollo, p. 40.
[89] TSN dated 9 June 2006 (N. Paule), pp. 67-68; Rollo, pp. 754-911.

witness -- Khonghun. As shown above, Khonghun and Castro both related that the officers had to grab complainant in order to get her into the mobile car. Notably, nowhere in Khonghun or Castro's affidavits is it stated that complainant continuously held on to Paule as she boarded the mobile car. Khonghun even elaborated on, in court, the facts as he wrote in his Affidavit. *Appellant asks: what explains the great variance in the testimonies of two witnesses for the prosecution on the issue of whether complainant indeed resisted the police who wanted her to get inside their mobile car, which police had to grab her in the process?* that the ineluctable conclusion is that Paule's testimony, which came after Khonghun's, was intended to sanitize what obviously was confirmation during the testimony of Khonghun that the alleged contusions on complainant's arms and legs came about because of her dramatic display of hysterics long after she alighted from the Starex van. **The lower court, however, did not appear to notice this patent ploy of the prosecution to water down the damaging parts of Khonghun's testimony by presenting Paule's testimony, which factually collides with Khonghun's.**

31. Even Dr. Ortiz, on cross-examination, admitted that the contusions on complainant's arms and legs could have been the result of the struggle that ensued between complainant and the law enforcers who were trying to get the complainant to board the patrol car.[90] Dr. Ortiz stated:

> Q: Earlier there were three witnesses presented by the prosecution, namely: Noel Paule, Avila and Khonghun, who testified that when the complainant or your patient was being loaded inside a patrol car she refused and there was a struggle. Now, my question is: Could that struggle between the complainant and the SBMA Guard Paule and Avila be the cause of the contusions mentioned in 1, 2, 3, 4 and 5?
>
> x x x
>
> A: **Probably, it's the law enforcers who dragged her, sir.**
>
> Q: She was being boarded inside a patrol car, she refused and there was a struggle?
>
> x x x

[90] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 178-184; Rollo, pp. 2477-2708.

A: Well with injury number one, if the law enforcer forced her and loaded her **on the exact location** – the distal third of the lateral of the right forearm and if she applied a pressure, **a digital pressure is enough to cause contusion, she could possibly get it, sir.**

Q: The same is true with injury number two, number three, number four and number five, am I correct, Doctor?

A: Number two and three again with the demonstration I had before, if they applied pressure on the left forearm with the thumb on the anterior portion and the opposing fingers on the posterior portion and the force applied here is enough to produce contusion then it is possible, sir.

Q: Now, according to Paule, Avila and Khonghun, the victim was hysterical at that time, that state of being hysterical plus the struggle be the cause of injury number one, number two, number three, number four and number five?

A: If that struggle with your presumption, if that struggle, as I demonstrated before she herself, if the manner she acquired that injury was when she hit herself and if on that struggle she would hit the lateral aspect of the left forearm, the digital forearm, the left arm and the right leg, it is possible but to be exact of the location also (Emphasis and underscoring supplied).

32. Prosecution expert witness Dr. Fortun, testified in the same vein,[91] thus:

Q: She was held by Paule so that she will be boarded back again inside the van, were the holding of her arms be the probable cause also of the contusions which I mentioned a while ago?

A: Yes, Sir (Underscoring supplied).

33. Worthy of note is Dr. Fortun's statement that some of the contusions are actually non-specific in cause.[92]

[91] TSN dated 13 July 2006 (Dr. R. Fortun), p. 32; Rollo, pp. 3351-3529.
[92] TSN dated 13 July 2006 (Dr. R. Fortun), pp. 34-35; Rollo, pp. 3351-3529.

Q: How about the legs, doctor, if the woman was carried by somebody on her legs, will that act of carrying be the probable cause of contusion which was found by Dr. Ortiz on the woman being carried by two Americans?

A: Based on Dr. Ortiz' description where these contusions just located on one leg actually very near the knee, I find them to be non-specific cause (Underscoring supplied).

34. How then could the lower court conclude that the alleged contusions on complainant's arms and legs were consistent with non-consensual sex when the prosecution's own evidence establishes that these alleged contusions were either sustained after the complainant alighted from the Starex van following complainant's dramatic struggle against the SBMA officers or from non-specific causes? **In turning a blind eye to the more plausible explanation that complainant sustained her leg and arm contusions not in the hands of appellant but in the hands of the police officers, long after she parted ways with appellant, the lower court again exposed its inexcusable bias for the prosecution.**

b. Prosecution's evidence tending to show that complainant was unconscious at the time of the alleged rape should not have been admitted by the lower court, for being violative of appellant's constitutional right to due process

35. Article 266-A of the Revised Penal Code, as amended by Republic Act No. 8353, the governing law in the instant case, provides:

> "ART. 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 machinations or grave abuse of authority;

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

36. It will be recalled that in the Information, Prosecutor Jalandoni charged appellant, along with his co-accused, with:

> xxx conspiring, confederating together and mutually helping one another, with lewd design and **by means of force, threat or intimidation**, with abuse of superior strength and **taking advantage of the intoxication of the victim**, did then and there willfully, unlawfully and feloniously sexually abuse and have sexual intercourse with or carnal knowledge of one Suzette S. Nicolas xxx xxx against the will and consent of the said Suzette S. Nicolas, to her damage and prejudice.
>
> CONTRARY TO LAW. (Emphasis supplied)

That the alleged victim, Suzette S. Nicolas, passed out and was rendered unconscious by reason of her purported drunkenness for the entire duration that the alleged rape was being committed was **not alleged, much less specified**, in the information.

37. It is beyond dispute that appellant is accorded the express Constitutional protection, embodied in Section 14(2), Article III of the 1987 Constitution, "to be informed of the nature and cause of the accusation against him." This right requires that the offense be charged with clearness and all necessary certainty to inform the appellant of the crime of which he stands charged, in sufficient detail to enable him to prepare a defense.[93] As explained by the Supreme Court in *People v. Monteron,* G.R. No. 130709, March 6, 2002, [t]he rationale behind this constitutional guarantee are: First, to furnish the accused with the description of the charge against him as will enable him to make his defense; second, to avail himself

[93] *Teves v. Sandiganbayan*, G.R. No. 154182, December 17, 2004*, citing* 21 Am Jur 2d §325.

of his conviction or acquittal, for protection against a further prosecution for the same cause; and third, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

38. In its bid to prove that force and intimidation was employed by appellant in having sexual intercourse with complainant against the latter's will, the prosecution presented the lone testimony of complainant, the pertinent portions of which are reproduced hereunder for ease of reference:[94]

QUESTION – ATTY. URSUA

> You said that when the accused, Daniel Smith, was lying on top of you and you could feel his weight on you, please describe the weight?

A ***Basta mabigat po s'ya***.

(He's heavy, ma'am.)

Q So, what did you do when you realized that Daniel Smith was lying on top of you?

A ***Nanlaban po ako. Pinipilit ko s'yang ilayo sa akin.***

(I was resisting and I was trying to push him away from me.)

Q What did you use in resisting and pushing him away?

A My hands, ma'am.

Q Why were you resisting him and pushing him away?

A ***Ayoko ko po yung ginagawa n'ya sa akin***.

(I don't like what he was doing to me.)

Q Were you successful in pushing him away?

A No, ma'am.

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[94] TSN dated 10 July 2006 (S. Nicolas), p. 16; Rollo, pp. 3064-3145.

Q Why?

A *Hinang-hina na po ako at mabigat po s'ya*.

(Because I was feeling weak and he's heavy, ma'am.)

Q In the last ---- on what part of your body did you feel his weight?

ANSWER-WITNESS

Hindi ko po alam kasi mabigat po s'ya.

(I don't know, ma'am, but I know he's heavy.)

QUESTION – ATTY. URSUA

You also said that he was kissing you. Please tell us where was he kissing you?

A He was kissing me on my lips, on my neck and on my chest, ma'am.

Q What did you do when he was kissing you on the lips?

A ***Nanlalaban po ako sa kanya.***

(I was trying to resist him, ma'am.)

Q And how did you do that?

A *Gumaganuon po ako.*

ATTY. URSUA

The witness, Your Honor, demonstrated by turning her head from left to right.

QUESTION – ATTY. URSUA

Were you successful in evading his kisses by turning your head left to right?

A No, ma'am.

Q How else did you resis his kissing you?

A I was pushing him away from me.

QUESTION – ATTY. URSUA

And what were you using?

A My hands, ma'am.

Q Were you successful in pushing him away?

A No ma'am.

Q Why not?

A *Mabigat po s'ya, at saka, nanghihina na rin po ako nuon.*

(He's heavy and I was weak, ma'am.)

Q You said that he was kissing you on the lips and you were turning your head to the left and to the right to avoid his kisses and you were pushing him away. What did he do when you were doing those things?

A *Pinagpatuloy n'ya pa rin po.*

(He continued what he was doing, ma'am.)

Q He continued with what he was dong you said. What was he doing at that time?

ATTY. RODRIGO

Already answered, Your Honor, kissing her on the lips, on the chest and the neck.

COURT

Already answered.

ATTY. URSUA

Very well, Your Honor.

QUESTION – ATTY. URSUA

You said he was kissing you also on the neck?

(at this point, the witness cried and atty. Ursua asked for a recess)

xxx xxx xxx

ATTY. URSUA

Thank you, Your Honor.

QUESTION – ATTY. URSUA

Miss Nicolas, you said that the accused, Daniel Smith, was also kissing you on the neck. What did you do while he was doing that?

A **I was pushing him away from me, ma'am**.

Q And how did you do that?

A By using my hands, ma'am.

Q Were you successful in pushing him away?

A No, ma'am.

Q And what did he do when you were trying to push him away?

A He continued on what he was doing, ma'am.

Q What was that?

A He was kissing me on my neck.

Q Why were you not successful in pushing him away?

A **Because I was getting weak and he's heavy, ma'am.**

Q You also said that the accused, Smith, was kissing your chest. What did you do while was doing that?

A I was also trying to push him away from me, ma'am.

Q And what were you using?

A My hands, ma'am.

QUESTION – ATTY. URSUA

Were you successful in pushing him away?

A No, ma'am.

Q Why not?

A I was already weak and he's heavy, ma'am.

Q And what did he do when you were trying to push him away?

A He continued on what he was doing, ma'am.

Q Other than kissing you on the lips, on the neck and on the chest, what else did the accused, Daniel Smith, do?

A *Hinipuan n'ya po yung breast ko.*

(He touched my breast, ma'am.)

ATTY. URSUA

May we ask that the translation for *hipo* be caressed rather than touched?

ATTY. RODRIGO

Hipo is touch. Caress is something else, *yakap*. Can we use the Tagalog ward, Your Honor.

COURT

Alright, let use the word *hipo.*

QUESTION – ATTY. URSUA

So, what did you do when the accused, Daniel Smith, was doing what you described as *hipo or panghihipo* on your breasts?

A *Nanlalaban po ako sa kanya.*

(I was fighting back.)

Q And what did you use in fighting back?

A My hands, ma'am.

Q What exactly did you do?

A I was pushing him away from me, ma'am.

Q Were you successful in pushing him away?

A No, ma'am.

Q Why not?

A **Because I was already weak and he's heavy, ma'am.**

Q Will you be able to describe to us how the accused, Daniel Smith, did the *panghihipo* that you were referring to?

ATTY. URSUA

I will withdraw that question, Your Honor.

QUESTION –ATTY. URSUA

Will you tell us what he was using while he was dong that *panghihipo* on your breasts?

A His hands, ma'am.

QUESTION – ATTY. URSUA

You said that when you realized that the accused, Smith, was on top of you and that he was kissing you on the lips, on the neck and on the chest, you tried to push him away. You fought back. Other than fighting back and pushing him away, what else did you do?

A **I was shouting, ma'am.**

Q And how did you shout?

A All I know is that I was shouting, ma'am.

Q Why were you shouting?

A Because I didn't like what he was dong, ma'am.

Q And while the accused, Daniel Smith, was doing what he was doing what did you hear, if any?

A There were people laughing and I thought that there were other people around.

Q Can you tell us how many people, if you know?

A I heard not only one voice, ma'am.

Q What else did you hear?

A And I can hear music.

Q When the accused, Daniel Smith, was on top of you and kissing you and touching your breasts, what were you feeling in your body?

ANSWER – WITNESS

Nanghihina na po nuon. Masakit po ang ulo ko. At yung utak ko po parang gusto ng magsara. Gusto ko ng matulog pero pinipilit ko pong magising para labanan si Smith sa binabalak n'ya.

(I was getting weak. I have headache. I fell like I wanted to sleep and I was trying to keep awake to be able to fight Smith and to prevent him from doing what he was doing.)

ATTY. URSUA

May we have the words of the witness in the dialect be reflected on the record?

COURT

Ms.Stenographer, Rose, just quote the exact words of the witness.

Court Stenographer

Yes, Your Honor.

QUESTION – ATTY. URSUA

And what were the emotions that you were going through you while Smith was on top of you?

A *Natatakot po ako na ma-rapen'ya po ako.*

(**I got scared that he will rape me**.)

Q And why did you think that he is going to rape you?

A *Kasi nakahiga na po ako nuon. Tapos hinahalikan n'ya po ako. Tapos hinihipuan n'ya po ako sa breasts ko. Tapos nanlalaban po ako sa kanya. Sumisigaw na nga po ako. Nanlalaban na po ako sa kanya. Saan pa hahantong 'to?* (Because I was lying during that time that he was kissing me and touching my breasts. I was fighting back and where will this lead.)

QUESTION – ATTY. URSUA

Do you know where you were at that time when Smith was on top of you and you were struggling against him?

COURT

When or where?

ATTY. URSUA

Where?

Witness

No, ma'am.

QUESTION – ATTY. URSUA

Do you know what happened next?

A What I know was that I was fighting back Smith, ma'am.

Q Do you know what happened after that?

A **I don't know what happened next but when I regained my consciousness, ma'am, I realized that I was on the ground.**

ATTY. RODRIGO

Your Honor, at this point, we reiterate our continuing objection, Your Honor.

COURT

To the answer?

ATTTY. RODRIGO

To this line of questioning, **Your Honor, because she is now questioning what is not alleged in the information.**

COURT

That was not being specifically asked from the witness but it was the witness who answered that.

ATTY. URSUA

May I proceed, Your Honor?

COURT

Continue.

QUESTION – ATTY. URSUA

So, Miss Nicolas, what was your last recollection of that incident when Smith was on top of you and touching you?

A I was fighting him back, ma'am.

Q **You said that the next thing you knew was you were on the ground. Do you know how you got to the ground?**

A **No, ma'am.** (Emphasis supplied)

39. The lower court gave full faith and credence to the testimony of complainant. However, and as will be discussed below, even if it were assumed that complainant's version of events is true, and that she was 'dead-drunk' at the time she had sexual intercourse with appellant (which appellant vigorously maintains is not the case), the lower court gravely erred in convicting appellant for the crime of rape, for the reason that, over the continuing objection of appellant, prosecution attempted to prove that the rape was committed not through force or intimidation (the mode of commission of the rape as charged in the information), but when complainant was already unconscious, thereby violating appellant's constitutional right to due process.

40. It must be stressed, at this juncture, that appellant registered his continuing objection to the chain of testimonial evidence presented by the prosecution, specifically with regard to the testimony of complainant, that tend to establish that she was 'dead-drunk', such that she was already unconscious at the time of commission of the alleged rape, this mode of commission not being included

or alleged with certainty in the information.[95] It was thus grave error on the part of the lower court to have allowed, and worse, considered, testimony from complainant which tend to show that she had no recollection of the act of sexual intercourse, she already having passed out from drunkenness at this time. This error, it bears emphasizing, constitutes gross violation of appellant's right to due process.

41. From the testimony of complainant, three things are immediately apparent: (a) that complainant Nicolas' memory of what happened BEFORE the alleged rape occurred stopped at the point where she was pushing appellant away. She was still fully clothed (underwear, shirt and jeans) before she allegedly passed out; (b) that complainant has absolutely no recollection of the events that occurred DURING her sexual intercourse with appellant; and (c) that after having passed out, complainant's next recollection of events AFTER her sexual intercourse with appellant was that she was already on the ground.

42. Evidently, the totality of prosecution's testimonial evidence on the actual commission of the rape alleged to have been perpetrated by appellant hinged only on one "fact": what complainant claims to have happened minutes before she had sexual congress with appellant. This is for the reason that, as complainant declared in her testimony, she was already asleep during the alleged rape, and only regained consciousness when she was already on the ground. **Therefore, crucial, nay, indispensable, is the allegation, left unstated in the information, but attempted to be proven by the prosecution, that appellant had carnal knowledge of complainant while the latter was deprived of reason or otherwise unconscious.** <u>To be sure, that portion of the information which, to paraphrase, alluded to appellant's having taken advantage of the complainant's intoxication, does not, as it cannot, equate to complainant's having been rendered unconscious by reason of drunkenness, for intoxication, in its ordinary meaning, means at most only the impairment of physical and mental faculties, not their total absence.</u> The information was therefore fatally infirm, and the lack of any reference therein to complainant's being unconscious at the time of sexual intercourse with appellant

[95] TSN dated 10 July 2006 (S. Nicolas), pp. 5-6, 27; Rollo, pp. 3064-3145.

failed to furnish appellant with the adequate description of the charge against him as will enable him to make his defense.

43. As will be shown below, the Supreme Court has consistently ruled that where, over the accused's continuing objection[96], the prosecution was allowed to present evidence as to the commission of rape while the victim was deprived of reason or otherwise unconscious (Article 266-A, 1(b), Revised Penal Code) even as the information alleged that the rape was accomplished through the use of force and intimidation (Article 266-A, 1(a), Revised Penal Code), a conviction for rape is violative of the accused's right to due process, meriting his acquittal.

44. In this case, in convicting appellant, the lower court plainly admitted and completely relied on the totality of complainant's testimony, which is to the effect that appellant's carnal knowledge of her was consummated only when she was already passed out and unconscious. However, in similar cases, the Supreme Court has invariably ruled that, in view of the defective information, which alleged commission of rape through force and intimidation, whereas the evidence for the prosecution tended to show commission of the rape while the victim was unconscious, acquittal is proper, for being violative of the constitutional guarantee afforded to the accused to be informed of the nature and cause of the accusation against him.

45. As early as 1989, in *People v. Pailano,* G.R. No. 43602, January 31, 1989, the Supreme Court has had the occasion to interpret Section 14(2), Article III of the 1987 Constitution, as applied to rape cases, thus:

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[96] *See People v. Abiera,* G.R. No. 93947, May 21, 1993 and *People v. Atienza,* G.R. No. 131820, February 29, 2000, where the Supreme Court ruled that an accused charged with rape through one mode of commission may still be convicted of the crime if the evidence shows another mode of commission provided that the accused did not object to such evidence. **This exception to the general rule is obviously not applicable to the case at bar, for, as borne by the records, appellant vigorously objected to the introduction of evidence tending to show that complainant was unconscious.**

> Article 335 of the Revised Penal Code provides that 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.
>
> **The criminal complaint in this case alleged the commission of the crime through the first method although the prosecution sought to establish at the trial that the complainant was a mental retardate**. Its purpose in doing so is not clear. But whatever it was, it has not succeeded.
>
> **If the prosecution was seeking to convict the accused-appellant on the ground that he violated Anita while she was deprived of reason or unconscious, such conviction could not have been possible under the criminal complaint as worded**. This described the offense as having been committed by "Antonio Pailano, being then provided with a scythe, by means of violence and intimidation, (who) did, then and there, wilfully, unlawfully and feloniously have carnal knowledge of the complainant, Anita Ibañez, 15 years of age, against her will." No mention was made of the second circumstance.
>
> Conviction of the accused-appellant on the finding that he had raped Anita while she was unconscious or otherwise deprived of reason — and not through force and intimidation, which was the method alleged — would have violated his right to be informed of the nature and cause of the accusation against him**. This right is safeguarded by the Constitution to every accused so he can prepare an adequate defense against the charge against him. Convicting him of a ground not alleged while he is concentrating his defense against the ground alleged would plainly be unfair and underhanded. This right was, of course, available to the herein accused-appellant.** (Emphasis supplied)

46. The lower court attempted to dilute the magnitude of the harm inflicted on appellant when it admitted and considered proof that complainant was unconscious at the time of the alleged rape, by ratiocinating in this wise:

> In the present case, however, proof of intoxication will definitely not change the crime of rape, as charged in the Information, into another

higher felony or increase the penalty therefor. *(Appealed Decision, at p. 23)*

The lower court totally missed the point.

47. In *People v. Bugtong,* G.R. No. 75853, January 31, 1989, the Supreme Court extensively discussed the exact harm brought upon the accused in view of the variance in the crime as alleged in the information and that which was sought to be proven at the trial, and its constitutional underpinnings:

> Appellant questions next the trial court's finding that he is guilty of the crime of rape as defined in Article 335 (1) and (2) of the Revised Penal Code. *He contends that since it is clear from the allegations in the Information that the offense charged falls under par. 1 of Art. 335, to find him guilty of rape under par. 2 thereof is violative of his constitutional right to be informed of the charges against him*.
>
> **There is merit in this contention. While the conviction of accused-appellant under paragraphs (1) and (2) of Article 335 of the Revised Penal Code appears to be an innocuous error as these paragraphs refer merely to the modes of commission of the same crime of rape punishable by the same penalty of** *reclusion perpetua***, the harm inflicted upon accused-appellant gains considerable proportion when we consider not only the no-win situation in which appellant was placed by reason of such conviction, but more importantly, the surprise attendant to his conviction for a crime under a mode of commission different from that alleged in the information.**
>
> **Having been charged with Rape allegedly committed thru force or intimidation, it is to be expected that appellant should focus his defense on showing that the sexual intercourse complained of was the result of mutual consent, rather than of force or intimidation. This defense, however, has been rendered futile and ineffective by the appellant's further conviction under par. (2) of Art. 335, for even if he should succeed in convincing us that the sexual act under consideration was born out of mutual consent, he nonetheless remains liable under par. (2) of Art. 335, wherein consent of the offended party is not a defense, the latter being considered to be legally incapable of giving her consent.**
>
> **Furthermore, and more importantly, as herein appellant was tried on an information charging him with rape committed thru force and intimidation, his conviction for rape committed when the woman is deprived of reason or otherwise unconscious would be**

> **violative of his constitutional right as an accused to be informed of the nature and cause of the accusation against him.** (Emphasis and underscoring supplied)

48. So too, in *People v. Gavina,* G.R. No. 143237, October 28, 2002, the Supreme Court overturned the conviction of therein appellant, thus:

> Second, **in convicting appellant, the trial court relied upon a finding that complainant was unconscious when the appellant had carnal knowledge of her**. **This contradicts the allegation in the information. Appellant was charged with rape committed by means of force or intimidation**. Otherwise put, his offense fell under Article 266-A (1) (a) of the Revised Penal Code. But in convicting him of rape committed while his victim was supposedly unconscious, the trial court applied Article 266-A (1) (b) of said Code. **The element of unconsciousness on the victim's part was not alleged much less specified in the information**. **It cannot be made the basis of conviction, without violating appellant's right to due process, in particular to be informed of the nature of the accusation against him**. (Emphasis supplied)

49. In another attempt to water down its deliberate violation of appellant's constitutional rights, the lower court held:

> A court may also rule and render judgment on the basis of the evidence before it, even though the relevant pleading has not been previously amended, so long as no surprise or prejudice to the adverse party is thereby caused. (*Appealed Decision, at p. 22*)

The lower court was gravely mistaken, its error bordering on gross ignorance of the law.

50. The lower court obviously had in mind the rule in ***civil*,** not criminal cases, as found in Section 5, Rule 10 of the 1997 Rules of Civil Procedure. This is evident from the cases the lower court itself cited in its Decision, *i.e., Talisay-Silay Milling Co., Inc. v. Asociacion de Agriultores de Talisay-Silay, Inc.,* G.R. No. 91852, August 15, 1995; *Northern Cement Corporation vs. IAC*, G.R. No. L-68636, February 29, 1988; *Jacinto vs. CA,* G.R. No. 80043, June 6, 1991; *Pilapil v. CA*, G.R. No. 97619, November 26, 1992; *Universal Motors Corporation v. CA*, G.R. No. 47432, January 27, 1992. These cases are clearly inapplicable to the case at bar, for the

reasons that (a) all these cited cases are civil cases, governed by the Rules of Civil Procedure; (b) being civil cases, the constitutional guarantee afforded to every accused to be informed of the nature and cause of the accusation against him does not apply; and (c) in most of these cases, the party prejudiced did not object to the presentation of evidence not alleged in the pleadings, while appellant lodged his continuing objection to the presentation of evidence on matters not specified in the information.

51. The lower court's further reliance on the doctrine that in rape cases, moral damages may additionally be awarded to the victim without need for pleading or proof the basis thereof[97] is entirely misplaced. First, what was at issue in the case that the lower court cited is not the conviction or acquittal of the accused and the potential deprivation of his life and liberty, but merely the award of damages. The basis of such an award for moral damages, as held by the Supreme Court, is obvious and of plain view – hence, no proof is required. Second, moral damages may be awarded without need for pleading because in a criminal case, "no appropriate pleadings are filed wherein such allegations can be made."[98] This is certainly not the case when what is at issue is the manner of the commission of the crime, as in the case at bar.

52. The *People* may argue, with some semblance of legitimacy, that since the lower court ultimately convicted appellant under paragraph 1 (a) of Article 266-A of the Revised Penal Code, the mode of commission of the rape as alleged in the information, *i.e.,* though force or intimidation, and not under paragraph 1 (b) of Article 266-A (while the victim is deprived of reason or otherwise unconscious), no violation of appellant's constitutional right intervened in his conviction. (*See* dispositive portion of the Appealed Decision) It bears emphasizing, however, that the lower court ruled that the alleged rape occurred when complainant "was intoxicated <u>and rendered unconscious</u> by the accumulated effects of the different alcoholic drinks she had previously taken in succession",[99] and therefore, "<u>she could not have consented to</u>

[97] Appealed Decision, at p. 22.
[98] *People v. Prades,* G.R. No. 127569, July 30, 1998, cited by the lower court in its Decision, footnote 20.
[99] Appealed Decision, p. 60.

the bestial acts of the said accused". Clearly, the lower court considered complainant's being unconscious as the mode of commission of the crime of rape. Interestingly, however, appellant was neither charged, nor found guilty, of rape under Article 266-A, paragraph 1(b) of the Revised Penal Code – "[w]hen the offended party is deprived of reason or is otherwise unconscious." To appellant's mind, his conviction under paragraph 1(a) of Article 266-A, even as the lower court's factual finding above clearly pointed to paragraph 1(b) as the mode of commission of the rape was merely a disingenuous ruse employed by the lower court in order to forestall due process objections.

Moreover, faced with similar facts, the Supreme Court has already held, in *People v. Mendigurin,* G.R. No. 127128, August 15, 2003 citing *People v. Gavina* (supra), that the violation of the accused's constitutional right to be informed of the nature and cause of the accusation against him occurred at the precise moment that the prosecution was allowed to present evidence at variance with the circumstances alleged in the information, with the lower court considering such evidence in arriving at a conviction, so that it is immaterial that the accused was convicted under the mode of commission of rape as charged in the information:

> **The information herein specifically alleged that appellant succeeded in having sexual intercourse with the complainant "by employing force, threat, and intimidation," thus invoking paragraph 1 of Article 355. It was also on this ground that appellant was convicted by the trial court.** After painstakingly searching through the records, however, we find **no evidence of force, threat, or intimidation used by appellant to consummate the alleged rape.**
>
> xxx xxx
>
> As the prosecution failed to present evidence to substantiate the charge of rape through force, threat, and intimidation, we are duty-bound to uphold appellant's innocence. It is an elementary rule in criminal procedure that an accused cannot be convicted of an offense unless it is clearly charged in the complaint or information. **If the prosecution in this case sought to convict appellant by proving that complainant was violated while in a state of unconsciousness, as provided under the 2nd paragraph of Article 355, the information should have stated so. We find, however, that the element of unconsciousness was not alleged much less specified in the information, which charged appellant for rape under the first circumstance. Hence, it cannot be made the basis**

> **of conviction without violating appellant's right to due process, in particular to be informed of the nature of the accusation against him. We have ruled that this right is accorded by the Constitution so that the accused can prepare an adequate defense against the charge against him. <u>Convicting him of a ground not alleged while he is concentrating his defense against the ground alleged would plainly be unfair and underhanded.</u>**
>
> The trial court, in holding for conviction, relied on the *praesumptio hominis* that no young Filipina would cry rape if it were not true. However, its decision totally disregarded the paramount constitutional presumption that an accused is deemed innocent until proven otherwise. Where the evidence gives rise to two possibilities, one consistent with the accused's innocence and the other indicative of his guilt, that which favors the accused should be properly considered. (Emphasis and underscoring supplied)

53. More importantly, the violation herein of appellant's constitutional right to due process is greatly exacerbated by the fact that standing by itself, complainant's account of appellant's alleged employment of force upon her hardly qualifies as "force and intimidation" that justifies a conviction for rape, as was already extensively discussed in paras. 4 to 16 above.

54. There are cases, to be sure, wherein the Supreme Court found the information for rape adequate even as it only alleged carnal knowledge of the victim through force or intimidation, when in fact, the actual rape happened while the victim was unconscious. Thus, in *People v. Tolentino,* G.R. No. 139834, February 19, 2001, the Supreme Court ruled that conviction under an information for rape through force or intimidation is proper even if the victim was already unconscious while she was being raped, because it was clearly shown that it was the accused's initial act of employing force, *i.e.* pointing a knife at the victim and telling her not to shout, otherwise he would kill her, and his further act of punching the victim in the stomach and legs, that rendered the victim unconscious. So too, in *People v. Quezada*, G.R. Nos. 135557-58, January 30, 2002, the following facts were proven by the prosecution: the victim struggled to free herself from the accused but could not do anything because the accused was pointing a small bolo at her. This caused her to lose consciousness because of fear. When the victim regained her consciousness and woke up the following day, she was completely naked. The Supreme Court held:

> We are not persuaded. True, unconsciousness was not alleged in the Informations. However, force and intimidation were. **Complainant's unconsciousness was the immediate and direct consequence of the force, violence and threats employed by appellant in raping her.**
>
> In similar cases, this Court has already debunked this argument by holding that a duly proven allegation of force and intimidation is sufficient for conviction. It is not necessary for the consequent unconsciousness to be alleged in the information. Indeed, in the present case, **the loss of consciousness was the immediate result of appellant's violence.** (Emphasis supplied)

55. These two cases show that, for an information not to be violative of the accused's right to due process even if only force or intimidation, and not the victim's unconsciousness, was alleged therein, **there must be showing that the accused's initial employment of force,** *e.g.* knocking the victim unconscious by boxing her (as in *People v. Tolentino,* (supra) or causing the victim to faint out of fear because the accused pointed a bolo at her (as in *People v. Quezada,* (supra), **was the immediate and direct cause of the victim's loss of consciousness**. This is consistent with the teaching in *People v. Savellano,* (supra), that the force employed by the accused must at least be sufficient ***to consummate*** the rape. Stated differently, had it not been for the force employed by the accused, the victim would not have been rendered unconscious.

56. This is obviously not the case here. As shown above, appellant did not, at any point, threaten, or actually inflict, physical harm against complainant. Appellant did not knock complainant unconscious or cause her to faint out of fear (again precisely because appellant did not even do anything that can be reasonably inferred as dangerous to complainant's life). Certainly, complainant does not claim to have been drugged by appellant, or that appellant purposely got her drunk, in order for appellant to ensure sexual congress with her. Complainant's drunkenness and ensuing weakness and dizziness, assuming it to be true, was caused solely by her own acts, she having admitted that she voluntarily took the alcoholic drinks she took,

while with Mills and her sister Anna Liza, without the aid or instigation of appellant, and even prior to having met him at the Neptune Club.

57. Premises considered, the exception laid down by the Supreme Court in *People v. Tolentino* (supra), and *People v. Quezada* (supra), are utterly inapplicable to the case at bar. Thus, the lower court's flagrant violation of appellant's due process rights is wholly unjustified.

c. The prosecution's evidence failed to support complainant's alleged intoxication, assuming said evidence may be admitted

58. The lower court held that, at the time of the commission of the alleged rape, complainant was intoxicated and unconscious, and therefore, could not have consented to the alleged bestial acts of the appellant.[100]

The lower court's finding, however, is not supported by, and is, in fact, diametrically opposed to, the evidence on record.

59. Mills testified that the complainant, after consuming five (5) drinks, was still in control of her faculties. In his testimony, he stated that, as late as 11:00 to 11:15 p.m., or only fifteen (15) minutes before complainant boarded the Starex van with appellant, complainant's faculties have not yet been impaired, as follows:[101]

Q: x x x Now you stated that you offered the two (2) sisters drinks. Am I correct?

A: Yes.

x x x

Q: <u>What were those drinks, the drinks which you offered to the 2 sisters?</u>

A: <u>I offered them Long Island Iced-Tea, Vodka-Sprite, and Bullfrog.</u>

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[100] Appealed Decision, p. 60
[101] TSN dated 20 June 2006 (C. Mills), pp. 134, 136; Rollo, pp. 1702-1863.

Q: 4 to 5 orders for each sister, am I correct?

A: Yes.

Q: Ah – during the time that you were at the Neptune Club, did you see anybody among the crowd who offered the 2 sisters drinks?

A: Not that I know.

x x x

Q: About what time did that incident happen when she looked at you as if asking for permission if she can dance with another?

A: That would be around 11:00 – 11:15.

Q: Between **11:00 to 11:15** and at the time when Suzette looked at you, would it be correct to state that she did not appear to be drunk?

A: No. She didn't appear drunk to me. Yes, we had a drink.

Q: **But she did not appear to be drunk?**

A: **No.**

x x x

Q: Let us go to this interview in Singapore which was conducted by a certain Brian Curley.

x x x

Q: And in that interview, do you remember having told the investigator, Curley, that and I quote – **"After Nicolas consumed her 5 drinks, Mills said she was drunk but was still in control of her faculties." Do you remember having said that to Curley?**

A: Well, speaking of him saying that she had 5 drinks in an hour, myself, I would know that, **yes, she is drunk, but that doesn't mean that she is not in control.**

Q: And the reaons why you said that she was still in control of her faculties was because she was dancing with a US Serviceman at that time? Is that correct?

A: Yes. She was dancing (Emphasis and underscoring supplied).

60. Even the testimony of complainant's own stepsister, Anna Liza, establishes that the complainant was in control of her faculties inasmuch as complainant was fully able to walk by herself,[102] thus:

Q: Did you at any time assist her in walking?

A: When we were already outside the Neptune Club, I did not assist her anymore in walking, Sir.

Q: Did anybody assist her at that time?

A: It was the first time that when I looked back at her I did not notice anybody assisting her, Sir (Underscoring supplied).

61. The lower court inexplicably brushed aside these categorical statements from Mills and even complainant's own sister who were undoubtedly in a much better position to gauge complainant's level of intoxication, they being complainant's companions on the night of the incident. Instead, for reasons known only to it, the lower court mainly relied on the testimonies of the prosecution's *other* witnesses, Paule, Tomas Corpuz, Jr. ("Corpuz") and Gerald Muyot ("Muyot"), in holding that complainant was so intoxicated to the point that she could no longer control her physical and mental faculties. However, as will be shown below, said testimonies are bereft of any credence, and the lower court's reliance on them is yet another *indicium* of its flagrant bias for the prosecution.

Corpuz's testimony

62. Corpuz, during his testimony in court, repeatedly emphasized that complainant was walking *"pasuray-suray"* when he saw her inside the Neptune Club. Curiously, though, Corpuz did not, in either his *Sinumpaang Salaysay* dated 5 November 2005[103] or in his Voluntary Statement dated 2 November 2005,[104] mention this "fact". What Corpuz only mentioned in his previous written statements was that he saw complainant roaming or *"pa-ikot-ikot"* around the Neptune Club. It is

[102] TSN dated 3 July 2006 (A. Franco), p. 22; Rollo, pp. 2891-2963.
[103] Prosecution's Exhibit "J", Rollo, p. 47.
[104] Prosecution's Exhibit "K", Rollo, p. 48.

interesting to note, thus, that while Corpuz felt it important to repeatedly state in court that complainant was indeed so intoxicated that she could no longer walk straight, Corpuz chose to withhold this information when he was being investigated by the SBMA investigators. One could not help but wonder, then, if Corpuz's testimony in this regard was based on what he actually saw or if it was embellishment meant to accentuate an otherwise inconsequential fact?

63. Though denied by Corpuz, one cannot discount the reasonable possibility that what Corpuz deemed to be *"pasuray-suray"* was nothing more than mere swaying to the beat of the music then being played inside the club. As prosecution witness Mills himself said, with some dances, it was difficult to tell whether the person was dancing or staggering.[105] Considering, further, that the Neptune Club was dark and illuminated only by flashing disco lights, it is not impossible to perceive a person to be walking *"pasuray-suray"* when in fact that same person is doing nothing more than dancing or swaying to the music while walking.

64. Corpuz additionally claimed that when complainant passed by him, he noticed that the complainant reeked of liquor.[106] It should be noted, however, that one of the evidence marked by the prosecution disproves this alleged fact. In the Supplemental Affidavit dated 23 November 2005 of Ma. Fe Castro,[107] Castro testified that:

> "10. x x x Habang sumisigaw siya, napalapit ako sa kanyang mukha, at **wala akong naamoy na alak"** (Emphasis supplied).

65. The foregoing statement of Castro effectively negates, as well, the statement of Paule who also claimed to have smelled the breath of complainant in coming to the conclusion that complainant was drunk. For how could Paule, who came into close contact with complainant well after Castro did, have smelled liquor if

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[105] TSN dated 20 June 2006 (C. Mills), p. 150; Rollo, pp. 1702-1863.
[106] TSN dated 2 June 2006 (T. Corpuz), pp. 28-229; Rollo, pp. 1-215.
[107] Prosecution's Exhibit "G".

Castro, earlier, did not? Notably, Khonghun, who also came into close proximity with the complainant never mentioned in his Affidavit dated 15 May 2006 or during his testimony that complainant smelled of liquor.

Muyot's testimony

66. Let us now go to the testimony of Muyot. The prosecution presented Muyot, a security guard assigned to man the external perimeter of Neptune Club. He claimed that at around 11:30 in the evening of November 1, 2005, he saw a Filipina, subsequently identified by him to be complainant, being carried or *"bakay-bakay"* by an American whom he identified as appellant.

This is pure fiction.

67. Contrary to the assertions of Muyot, the evidence on record proves that complainant was not carried out of the Neptune Club and loaded into the van by appellant. Rather, complainant voluntarily walked out of the club and boarded the van with appellant. During his testimony in court, appellant testified on this incident[108], as follows:

> Q: When you told Suzette about that, rather when Suzette agreed that she go with you, what did you and Suzette do next, if any?
>
> A: Then <u>we walked towards the door.</u> Everybody started walking towards the door, <u>walked down to the outside hallway and boarded the van</u> which was parked then.
>
> Q: How far were you and Suzette while you were walking towards the van, please describe to us, Mr. Witness?
>
> A: The same way when we walked from the bar to the table, <u>shoulder to shoulder</u> and I guided her through the crowd.
>
> Q: How far was the van from the Neptune Club, Mr. Witness?
>
> A: It was parked right at the front door, Sir.

[108] TSN dated 11 September 2006 (D. Smith), pp. 54-57; Rollo, pp. 4566-4761.

Q: Who, if any, did you see near the van, Mr. Witness?

A: Near the van was S/Sgt. Chad Carpenter, Duplantis and Silkwood who were standing outside because the door of the van was locked at that time, Sir.

Q: What happened when the doorn of the van was opened because it was locked?

A: We waited until the driver Timoteo Soriano came out and unlocked the door and I opened the door and Suzette stepped up into the van, Sir.

Q: Where did Timoteo Soriano come from?

A: From the inside of the Neptune Club, Sir.

Q: You said that after Timoteo Soriano unlocked the door, you opened the door of the van and Suzette got inside, where did Suzette sit inside the van?

A: When she stepped up inside the van, she walked and sat down at the back seat, Sir.

Q: And how about you, what die you do when Suzette set at the back seat of the van?

A: I followed and sat down next to her at the back seat (Underscoring supplied).

68. The same incident as testified to by appellant was narrated by then accused Carpentier[109] and Silkwood.[110] Accordingly, appellant and complainant walked out of the Neptune Club side by side and stood by the van with the rest of the marines while waiting for the driver Soriano to unlock the doors of the van. After Soriano arrived and unlocked the doors, complainant voluntarily boarded the van, getting in through the side passenger door, and seated herself at the back seat of the van.

[109] TSN dated 19 September 2006 (C. Carpentier), pp. 18-19; Rollo, pp. 5044-5160.
[110] TSN dated 21 September 2006 (K. Silkwood), pp. 26-30; Rollo, pp. 5161-5314.

69. Soriano himself stated as much in the NCIS Results of Interview dated 21 November 2005.[111] Soriano said:

> "20. SORIANO stated that at exactly 2325, he looked at his cell phone and remembered the time. He then went directly to the restroom in the club. He stated he was in the restroom only 2-3 minutes, and then returned to where he had been standing. When he returned, he noticed that all the Marines had left the club and he did not see them. He looked around for a moment, and then CARPENTIER came from the area of the entrance of the club and told him that they were leaving. SORIANO stated he exited the club behind CARPENTIER and as he exited he observed several people standing outside his locked van near the sliding passenger door. He stated he observed SMITH and the female he'd seen SMITH dancing with that night standing by the van, holding hands together. x x x
>
> 21. SORIANO stated he unlocked the van's sliding door and pulled it open. He said the female was the first to get into the van, and she sat in the middle seat. At this point, SORIANO clarified that the rear most seat of the van contained several boxes, luggage, and some of SORIANO's personal belongings. It was completely full, and no one could sit in that seat. The middle seat that the female sat in was now the rear most seat in the van." (Emphasis supplied).

70. **Moreover, the implausibility of the alleged "*bakay-bakay*" incident is made even more glaring by Muyot's own testimony.** As described and demonstrated by him, the alleged carrying or *"bakay-bakay"* of complainant and subsequent loading into the van by appellant is nothing more than a malicious concoction that proved most difficult to execute.

71. Muyot testified as to how complainant was loaded into the van[112], as follows:

> Q: Now, how was he able to load the lady to the van. How?
>
> A: He opened the door using his left hand and slowly he lowered down the lady using his left hand. He then placed his left hand at the thigh of the lady while his right hand was holding the back of the girl, and then he loaded the girl inside the van. (Underscoring supplied).

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[111] Prosecution's Exhibit "DD-9", Rollo, pp. 651-700.
[112] TSN dated 2 June 2006 (G. Muyot), pp. 148-149; Rollo, pp. 1-215.

And on cross-examination, he further explained the process and the position of the complainant with respect to the van, [113] thus:

Q: When the American opened the side of the starex van, did he bring down the woman who was bakay-bakay at his back?

A: No, Sir.

Q: So, all the time when the American was opening the side door, the woman was naka-bakay at his back, is that what you mean?

A; Yes, Sir, naka-bakay with his right hand supporting the buttocks of the woman.

Q: How long did it take for the American to open the side door, Mr. Witness?

A: Seconds only but I cannot recall.

Q: After the American was able to open the door, was the woman still naka-bakay at his back?

A: Yes, Sir.

x x x

Q: Now, did you notice who got inside the van first, the American or the woman?

A: Of course, he first loaded the woman before he got inside the van, Sir.

x x x

Q: When the door was opened, you stated that the American loaded the woman inside the van, do you recall having said that? In what position, how did the American load the woman inside the van?

A: <u>Sitting position facing the front of the van</u> (Underscoring supplied)

72. The foregoing testimony at once reveals the implausibility of Muyot's claim. Consider, specifically, Muyot's claim that after appellant opened the door, he lowered the complainant, placed his left hand on her left thigh and his right hand on

[113] TSN dated 5 June 2006 (G. Muyot), pp. 85-88; Rollo, pp. 216-465.

her back, and then proceeded to lift her onto the van in a sitting position facing the front of the van. This whole scenario does not add up. There is absolutely no way that appellant could have loaded complainant in a sitting or any position facing the front of the van if his position with respect to complainant was such that he had his left hand at her thigh and his right hand on her back. This position will not allow the procedure of loading that Muyot described. The only way that this could have been done was if appellant, while lifting the complainant in the manner described by Muyot (left hand on left thigh; right hand on back) boarded the van backwards, thereafter putting down complainant in a sitting position facing the front of the van. But then, Muyot did allege that appellant loaded complainant onto the van first before going himself. Moreover, it would have been impossible for appellant to have boarded the van backwards while lifting complainant considering the weight appellant was carrying and also in view of the confined access to third row area of the van. Verily, there could be no other conclusion but that the allegations of Muyot were merely concocted in a desperate attempt to prove that complainant was so intoxicated that she had to be carried into the van. Theatrical as it was, the concocted scenario was, clearly, not well thought out so as to have even just a semblance of plausibility.

73. Indeed, during the demonstration of the alleged loading, the manner by which the court personnel, as guided by Muyot, demonstrated the loading was far from faithful to the manner that was earlier testified to by Muyot. Muyot, obviously realizing the impossibility of his allegations, gave instructions as to the manner of loading different than that on record in order to show a successful, albeit contrived, loading of complainant into the van. This was manifested by defense counsel Atty. Jose Justiniano during the demonstration,[114] thus:

PROS. VALDEZ:

> At this point, the male court personnel opened the sliding door of the van with his left hand and both arms were assisting the hands of the complainant and slowly lowering her feet on the ground while still in standing position and now loading the lady into the van with her head first.

[114] TSN dated 9 June 2006, pp. 34-35; Rollo, pp. 754-911.

ATTY. JUSTINIANO:

> May I just make a manifestation? According to the testimony of the witness –

PROS. VALDEZ:

> That is already on record, your honor.

ATTY. JUSTINIANO:

> His left hand is holding the thigh and his right hand is supporting the head. So the head of the woman should be here. It is very obvious.

74. Much more can be said about Muyot's credibility or, rather, the lack thereof. According to Muyot, at that time that he allegedly saw complainant being carried *"bakay-bakay"* by appellant, appellant allegedly addressed him and said "She's with me, gotta go now". This statement of the appellant allegedly made him suspicious so much so that he allegedly wrote down the plate number of the Starex van in a piece of paper he had in his wallet. He produced this during his testimony in court and explained that he purposely wrote on the shaded portion of the paper because he considered the information confidential. When asked, however, whether he, as part of his duties as security guard, noted the incident and the Starex van's plate number in the security logbook of Neptune Club, he said that he did not and was not able to properly state the reason why. He was not even able to properly say where the logbook was at that time.[115] Subsequently, though, while being asked clarificatory questions by the lower court, Muyot unwittingly admitted that the log book was in fact in his possession at that time of the alleged incident when he stated that he was able to log two (2) entries in the log book during his tour of duty that night.[116] Still, none of these two (2) entries referred to the alleged *"bakay-bakay"* incident and the remark allegedly made to him by appellant that made him suspicious. And as Muyot, likewise, admitted, he never gave the information he claims to have had in his possession – the plate number of the Starex van – to complainant's sister Anna Liza and friend Mills when the latter were inquiring about

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[115] TSN dated 5 June 2006 (G. Muyot), pp. 93-98; Rollo, pp. 216-465.
[116] TSN dated 5 June 2006 (G. Muyot), pp. 152-158; Rollo, pp. 216-465.

her.[117] Neither did he volunteer this information when he was first questioned by an SBMA investigator in the early morning of November 2, 2005.[118] It is quite baffling: (1) how Muyot, a security guard with ten (10) years experience in his occupation, failed to record what to him was a suspicious incident in the security log book when he admitted that the very purpose of this log book is for the recording of unusual events and the status and other conditions of his area of responsibility,[119] as in fact Muyot did enter other events in the logbook, such as the arrival of the police at 4:15 a.m., and more mundane events, such as the arrival of the supervisor of Legend International Reso[rts] Limited;[120] (2) why Muyot opted, instead, to write down vital

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[117] TSN dated 5 June 2006 (G. Muyot), p. 115; Rollo, pp. 216-465.
[118] TSN dated 5 June 2006 (G. Muyot), pp. 105-106; Rollo, pp. 216-465.
[119] TSN dated 5 June 2006 (G. Muyot), p. 63; Rollo, pp. 216-465.
[120] COURT

Q: Did you made an entry into the logbook regarding the event that happened on that day, November 1, 2005 to November 2, 2005?
A: I made some entry in the logbook, Your Honor.

Q: Was that entry regarding this case?
A: When the police arrived already.

Q: What exactly did you place in the logbook, Mr. Witness?
A: I remember the police arrived at 4:15 in the morning, Your Honor.

Q: So you did not enter in the logbook what you noticed from the time the accused Smith was carrying the complainant bakay-bakay on his back up to the time they left the parking area, you did not place that in the logbook?

WITNESS
A: I did not place it in the logbook.

x x x x x x x x x

Q: So, the only matters stated are matter which happened at Neptune Club starting from 4:15 in the morning of November 2, 2005?
A: I also have an entry at 11:00 o'clock, Your Honor.

Q: I thought you said your entry starts at 4:14?
A: Yes, I was also able to record at 4:5, Your Honor.

Q: So, aside from the 4:15 entry, you also made some other entries?
A: Yes, Your Honor.

Q: What are these other entries?
A: After 11:30, the supervisor of Legend International Resource Limited arrived.

COURT

information about the alleged suspicious incident in a piece of paper available only to him when he could have – rather, should have – recorded this in the security log book (which piece of paper Muyot produced ***for the first time*** in court six months after he allegedly wrote the suspicious incident in it, and could have been entirely manufactured just minutes before he testified in court); and (3) why Muyot did not volunteer this vital information to complainant's sister and the SBMA investigator, knowing, as he should with his decade-long experience as a security guard, that this information would have helped complainant's sister and the investigator. **Could it be because Muyot, in truth and in fact, did not actually witness any *"bakay-bakay"* incident that would have otherwise made him suspicious? That he did not, in truth and in fact, write down the plate number of the van that evening of November 1, 2005 and only did so belatedly to bolster his vicious and false allegations? These questions, at the very least, manifest "doubt", which the lower court failed to consider in favor of appellant.**

75. It is worth remembering the teaching of the Supreme Court, that:

> **Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself — such as the common experience and observation of mankind can approve as probable under the circumstances.** We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. **Whatever is repugnant to these belongs to the miraculous and is outside judicial cognizance.**[121]

Q: Regarding this incident, from the time you saw accused Smith with the complainant, did you have an entry regarding that?
A: Yes, about the Starex van, Your Honor.

Q: What matters regarding the van you placed there?
A: About the, what is that again?

Q: The Court is asking you, what entries did you place in the logbook regarding this case from 11:00 o'clock in the evening up to time the van left the parking space?
A: The entry was only regarding the police, Your Honor.

(TSN, G. Muyot – cross, 6-5-06, p. 152 – 158 [TST No. 2])

[121] *Safeguard Security Agency, Inc. v. Tangco,* G.R. No. 165732, December 14, 2006.

76. As amply demonstrated above, the testimonies of Paule, Corpuz and Muyot, if juxtaposed against those of other prosecution witnesses (Mills, Anna Liza, Khonghun), reveal a deliberate attempt on the part of the prosecution at some 'damage control', in order to neutralize the effects of the testimonies of its other witnesses, and in order to succeed in its claim that complainant was so intoxicated as to be utterly unable to give valid consent to her sexual intercourse with appellant. In so doing, however, the prosecution only succeeded at highlighting the inconsistent, and at times, highly incredible testimonies of its various witnesses. How the lower court failed to take note of these circumstances, escapes reason and simple logic – yet another *indicium* of the lower court's determination to convict appellant, regardless of what the evidence actually shows.

77. In another vain attempt to prove complainant's claim of intoxication, the prosecution presented Dr. Kenneth Go, a Clinical Pharmacologist and Medical Toxicologist who testified that he prepared a written opinion relating to the alleged level of intoxication of complainant. Although Dr. Go admitted that the most reliable test to determine the Blood Alcohol Level of a person is through a Blood Test[122], which was not done here, he proceeded to make a computation of the supposed Blood Alcohol Level of the complainant using as materials the information provided by the bartender of Neptune Club[123] on alcohol proof of each drink comprising the cocktail drinks allegedly consumed by the complainant. After coming up with a computation, Dr. Go made the following conclusion:

> "Based on the reported presenting manifestations of the complainant on November 1 and November 2, 2005 and the calculated blood alcohol concentrations, Suzette Nicolas was intoxicated and her cognitive and physical faculties were impaired."[124]

78. In his report, Dr. Go assessed that complainant's signs and symptoms of intoxication worsened **at around 11:00 to 11:30 pm** of November 1, 2005 as she was, during this period, seen almost unconscious. Dr. Go noted it was at this time

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[122] TSN dated 25 July 2006 (Dr. K. Go), pp. 197-198; Rollo, pp. 3973-4202.
[123] TSN dated 27 June 2006 (R. Sanidad), pp. 5-65; Rollo, pp. 2351-2476.
[124] Prosecution's Exhibit "LLL-8", Rollo, pp. 304-315.

that the estimated blood alcohol concentration of complainant was at its peak. Allegedly, at this stage, complainant could already be unconscious or in coma or even near-death. Unfortunately, Dr. Go failed to consider that **during this same period**, complainant was still able to dance. Prosecution witness Mills, himself, stated that shortly before leaving the Neptune Club at 11:15 pm[125] of November 1, 2005, complainant was dancing with a US Marine. Prior to that, complainant was dancing with him:[126]

> Q: x x x What time did you leave the Neptune Club?
>
> A: I left the Neptune Club to got the Shore Patrol, that was then – ah, about 11:15.
>
> x x x
>
> Q: You also testified during the direct examination that Suzette asked your permission if its OK to dance with another person. Am I correct?
>
> A: She didn't ask my permission. She looked at me scared, nervous, frightened, with a questioning look, Is it okay, because she was at the club with me and my liberty buddy and her sister.
>
> Q: About what time did that incident happen when she looked at you as if asking for permission if she can dance with another?
>
> A: <u>That would be around 11:00-11:15</u>.
>
> x x x
>
> Q: And she was dancing not only with one but with several US Serviceman?
>
> x x x
>
> A: I only saw her dancing with one.
>
> Q: And who is this person?

[125] TSN dated 20 June 2006 (C. Mills), p. 135; Rollo, pp. 1702-1863.
[126] TSN dated 20 June 2006 (C. Mills), p. 113; Rollo, pp. 1702-1863.

A: Well, she was at the club with myself and Garcia. She danced with us in a group and then a Serviceman had asked her dance and that's the last person I've seen her dancing with (Underscoring supplied).

79. **At that specified time of 11:15 pm, Mills said that complainant did not appear to be drunk.[127] Neither did Mills see her fall off.[128] In fact, to reiterate, Mills testified that complainant was in control of her faculties and was dancing.[129]**

Q: Between 11:00 to 11:15 and at the time when Suzette looked at you, would it be correct to state that she did not appear to be drunk?

A: No. She didn't appear drunk to me. Yes, we had a drink.

Q: **But she did not appear to be drunk?**

A: **No.**

x x x

Q: So you cannot for sure say that you saw Suzette staggering inside the Neptune Club during your stay there?

A: While I was there, **I didn't see her fall off** (Emphasis and underscoring supplied)

x x x

Q: And in that interview, do you remember having told the investigator, Curley, that and I quote – **"After Nicolas consumed her 5 drinks, Mills said she was drunk but was still in control of her faculties." Do you remember having said that to Curley?**

A: Well, speaking of him saying that she had 5 drinks in an hour, myself, I would know that, **yes, she is drunk, but that doesn't mean that she is not in control.**

[127] TSN dated 20 June 2006 (C. Mills), p. 136; Rollo, pp. 1702-1863.
[128] TSN dated 20 June 2006 (C. Mills), p. 150; Rollo, pp. 1702-1863.
[129] TSN dated 20 June 2006 (C. Mills), p. 138; Rollo, pp. 1702-1863.

Q: And the reaons why you said that she was still in control of her faculties was because she was dancing with a US Serviceman at that time? Is that correct?

A: Yes. She was dancing (Emphasis and underscoring supplied).

80. If it was during this period that the estimated blood alcohol concentration of complainant was at its peak, how was she able to keep herself from falling off while dancing? How come Mills categorically said that at around this time (11:15 p.m.), complainant was still in control of her faculties? The inescapable conclusion is that complainant was not most intoxicated, much less unconscious, at that period. This conclusion, too, is manifest in complainant's statement when she was first investigated:[130]

22. T: Pagkatapos mong makipagsayaw sa kanya ay ano pa ang naaalala mong mga pangyayari?
S: Tinanong niya po ako kung okey daw po kaming lumabas sa Neptune Club dahil mainit daw po sa loob.

23. T: Ano naman ang naisagot mo sa kanya?
S: Sabi ko ay ayaw ko po dahil hinihintay ko pa po ang kapatid ko.

24. T: Pagkatapos ay ano pa ang nangyari?
S: Pinilit po ako nilang lumabas.

26. T: Ginawaan mo ba ng paraan para makilala mo sila o malaman ang tunay nilang pagkatao?
S: Pilit ko pong tinatanong sa kanila ang pangalan nila at tingnan ang identification nila. Pinakita po nila ang ID nila pero dahil madilim po ang lugar ay hindi ko matandaan ang mga nakalagay doon.

27. T: Ano pa ang mga natatandaan mong pangyayari pagkatapos noon?
S: Isinakay po ako sa sasakyan. Pinaghahalikan ako. Hinipuan po ako sa aking maseselan na parte ng katawan. Hinubad po ang aking suot at pwersahang ginahasa. Samantalang ako'y nanglalaban at sumisigaw. Naririnig ko po ang kanyang mga kasamahan na tuwang-tuwa.

[130] Prosecution's Exhibit "B", Rollo, pp. 15-17.

81. It is important to also consider the testimonies of complainant and her step sister Anna Liza, which strongly indicate that complainant was still in full control of her faculties, even after she had allegedly drunk half a pitcher of bullfrog, thus:

Complainant's direct testimony: (1) she remembers that she drank half a pitcher of bullfrog, that the drink was in a transparent pitcher, that she drank it directly from the pitcher, that she drank it straight and that while drinking there were three men in front of her;[131] (2) she remembers that, after drinking the bullfrog, somebody invited her to go out because it was hot inside the club, although she declined;[132] (3) she remembers that appellant was pulling her right wrist;[133] (4) she remembers that, while someone was pulling her wrist in order for them to go out, seeing an ID although she was not able to see or read what was written on it;[134] (5) she remembers that she did not vomit;[135] and (6) she remembers that somebody was on top of her while she was lying down at the back of the van, that she was trying to resist him by pushing him away, that he touched her breast, that she shouted, that she heard music, and that there were people around laughing.[136]

Anna Liza's direct testimony: (1) that complainant danced with an American three times, the third time was after she drank the bullfrog;[137] (2) that complainant was dancing without indecent movements;[138] (3) that complainant walked past her at least twice;[139] (4) that complainant walked out of the Neptune Club with her;[140] (5) that she saw complainant along the pathway of Neptune Club;[141] and (6) that complainant was walking slowly.[142]

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[131] TSN dated 6 July 2006 (S. Nicolas), p. 99-101; Rollo, pp. 2954-3063.
[132] TSN dated 6 July 2006 (S. Nicolas), p. 105; Rollo, pp. 2954-3063.
[133] TSN dated 6 July 2006 (S. Nicolas), p. 106; Rollo, pp. 2954-3063.
[134] TSN dated 6 July 2006 (S. Nicolas), p. 107; Rollo, pp. 2954-3063.
[135] TSN dated 10 July 2006 (S. Nicolas), p. 10; Rollo, pp. 3064-3145.
[136] TSN dated 10 July 2006 (S. Nicolas), p. 16-24; Rollo, pp. 3064-3145.
[137] TSN dated 23 June 2006 (A. Franco), p. 81-82; Rollo, pp. 2054-2170.
[138] TSN dated 23 June 2006 (A. Franco), p. 88; Rollo, pp. 2054-2170.
[139] TSN dated 23 June 2006 (A. Franco), p. 91; Rollo, pp. 2054-2170.
[140] TSN dated 23 June 2006 (A. Franco), p. 94; Rollo, pp. 2054-2170.
[141] TSN dated 23 June 2006 (A. Franco), p. 98; Rollo, pp. 2054-2170.
[142] TSN dated 23 June 2006 (A. Franco), p. 98; Rollo, pp. 2054-2170.

82. It may not be proper for a layman to dispute the conclusion of a supposed expert witness on toxicology, but the testimony of Dr. Go really taxes one's imagination. One need not be a doctor of medicine to know that when a person is unconscious or near coma, he or she could not have acted the way the complainant did between 11:00 p.m. and 11:30 p.m. of November 1, 2005. Worse, despite this clear impossibility, Dr. Go tailored fit his findings to suit the proposition that complainant was so intoxicated such that she was deprived of her capacity to consent to the sexual intercourse. Dr. Go's conclusions, which were, it must be stressed, based exclusively on the testimony of the bartender on the alcohol levels of the liquor that complainant supposedly drank, obviously do not match with the actual events, as recounted by Mills and Anna Liza, complainant's companions on November 1, 2005. To be sure, the more logical conclusion is that complainant, at about the time she boarded the Starex van (around 11:30 p.m.), was, as Mills and Anna Liza testified, still in full control of her faculties.

It is interesting to note that in the appealed decision, the lower court made no reference whatsoever to Dr. Go's findings. Could it be because Dr. Go's findings are so irreconcilable with the statements of the other prosecution witnesses that the lower court deemed it better not to include the findings anymore? Whatever may be the lower court's purpose in suppressing Dr. Go's findings in the appealed decision, one thing is self-evident – that complainant was far from being 'dead-drunk' at around 11:30 p.m. (the time she entered the Starex van), as in fact she was in full control of her faculties and required no assistance from anyone in walking, and certainly in boarding the Starex van.

d. Complainant consented to having sexual intercourse with appellant.

83. If there is one issue where both the prosecution and the defense are in agreement, it is the fact that the incident, *i.e.,* complainant's and appellant's sexual intercourse, happened in a moving Starex van. What really happened inside the van?

84. The only evidence presented by the prosecution on this issue is the testimony of the complainant. However, because the prosecution changed its theory – from sexual assault committed through the use of force, threat and intimidation to sexual intercourse because of the state of unconsciousness of the complainant – not much account on what happened inside the van was testified to by her, other than her claim that appellant was on top of her, trying to kiss her, and holding her breast.[143]

85. Appellant, however, gave a clear account of the event inside the van:[144]

> Q: Now, when you and Suzette were sitting side by side at the back seat of the van, what did you and Suzette do, Mr. Witness?
>
> A: There was no conversation except for a few words and then we started kissing again.
>
> x x x
>
> Q: What happened next, if any?
>
> A: When the van started moving, we were still kissing passionately.
>
> Q: By the way, who initiated the kiss?
>
> A: I, Sir.
>
> Q: How did Suzette respond to your kisses, Mr. Witness?
>
> A: She kissed back towards me.
>
> Q: And how could you describe to us how she kissed you, Mr. Witness?
>
> A: Same way that I was kissing her, Sir.
>
> Q: Then, what happened next?

[143] TSN dated July 10, 2006 (S. Nicolas), pp.17-26; Rollo, pp. 3064-3145.
[144] TSN dated September 11, 2006 (D. Smith), pp. 58-67; Rollo, pp. 4566-4761.

A: Then she had her hands on my back and herself leaning back towards the window and pulling me towards her.

Q: Now, when she started pulling you towards her, what if any did you do?

A: Then I asked her jokingly, “Can we have sex right here?

Q: And what if any, did Suzette tell you?

A: She said “yes”, and I was kind of surprised, Sir.

Q: After Suzette said “yes”, what happened next, if any?

A: Then I started to get undress and she did the same, sir.

Q: And while she started to get undress, what did Suzette do, if any?

A: She did the same, she was getting undressed as well.

Q: And what happened while she was getting undressed?

A: While she was getting undressed, we both pulled our pants down towards our ankles and I was reaching my back pocket to my wallet with the condom in there.

Q: And you said that you had a condom which in your words was in your pocket, what happened after you pulled out that condom?

A: I took it out and took its wrapper and put it on.

Q: While you were putting on that condom, what did Suzette do, if any?

A: She kind of somewhat assisting me by holding my penis while I was putting on the condom and start her hands on my back.

Q: How did she assist you in putting on that condom?

A: She had her hands on my penis, Sir.

Q: After that, what did the two (2) of you do next, Mr. Witness?

A: She leaned back to the window of the van and started pulling me and we begin to have sex.

Q: How did she assist you in having sex with her?

A: Like I said, it was a tight space, Sir, I tried to be on top of her, she positioned herself for me to enter her, Sir.

Q: Now, you said Sir, that the space at the back seat where you were was very small and there was no room for you movements and you said also that the pants of Suzette was pulled down to her ankle, now, my question is, please tell the Honorable Court how you were able to enter Suzette under this condition?

A: Like I said before, with her assistance with that kind of position so that I can enter her.

Q: And where were you in relation to Suzette?

A: I was on top position, Sir.
Q: And where was the left leg of Suzette positioned, Mr. Witness?

A: Somewhat hanging up and it was spread out, Sir.

Q: How about her right leg, Mr. Witness?

A: It was on the seat.

Q: While you were having sex, what happened at the back?

A: Not more than three (3) minutes, once we started, then the van stopped.

Q: And do you know the reason why the van came to a stop?

A: I looked up and saw that we were in the pizza place and then I heard the door opened, people were talking asking to get a ride.

x x x

Q: When the van stopped, what were you and Suzette's position inside the back seat of the van, Mr. Witness?

A: Still in the same position but once the van stopped, I came to stop and we stoped having sex.

Q: When you stopped having sex, where was you male organ?

A: When the van came to stop, I looked at my watch to see what the time was and I pulled out and said that I had to stop and that we don't have enough time.

Q: What did Suzette do when you pulled out from her, Mr. Witness?

A: She said, "Are you done already?" I kind of looked around, embarrassed of what she said.

Q: After you pulled out of Suzette, what happened next?

A: I said or told her that we had no time. We area getting back to the gate real soon and she started getting dressed and I was getting dressed as well, Sir.

Q: Were you able to get dressed up, Mr. Witness?

A: Yes, Sir.

Q: How about Suzette?

A: She had her panties and pulled her pants up but because of the small space and she had a tight jeans on, so she could not pull up her jeans very well.

Silkwood corroborated appellant's testimony, thus:[145]

Q: Now, while all of you were already inside the van did you have an opportunity to observe if Smith and his companion were doing something?

A: Yes sir.

Q: Will you describe to us?

A: I could tell that they were kissing and they were flirtatious and…

Q: Why do you say that they were flirtatious, what is your basis in saying that?

A: On my own, I could hear sounds and I know what was going on.

Q: What sound if any did you hear?

[145] TSN dated September 21, 2006 (K. Silkwood), pp. 34-36; Rollo, pp. 5161-5314.

A: Well, I could hear they were kissing, the sound, giggling, something I like that.

x x x

Q: Now, after the door of the van was closed, do you recall if any utterance or utterances was or were made between Smith and his companion?

A: Yes sir.

Q: Please tell us?

A: I remember LCPL Smith said something about, he's not gonna have time to finish.

Q: And was there any remark made by any of the passenger in relation to what Smith said that he would not have time to finish?

A: Yes sir.

Q: What was the remark, please tell us?

A: I remember his companion say, "are you done already"?

Q: And was there a response to that remark by the companion of Smith that, are you done already?

A: I just knew he just continued to explain to her that there was no time.

Duplantis, having the same observations, stated:

Q: What about Lance Corporal Daniel Smith, what was he doing during the trip from Neptune Club to the dock?

A: I am not sure but Lance Corporal Daniel Smith and the Filipina lady were actively involved with each other at the back seat, Sir.

Q: What do you mean by "actively involved"?

A: Because I can hear kissing, moaning and laughter coming from the back, Sir.

86. Appellant's clear and up-front testimony, taken in conjunction with that of Silkwood and Duplantis, regarding the events that transpired inside the Starex van far outweigh the blurred, uncertain and just plain dubious testimony of complainant. An extensive examination of the records show that the prosecution, despite its best efforts, utterly failed to demolish the factual assertions of the appellant and his co-accused in their testimony, who were consistent and straightforward in giving their account. Put differently, the prosecution valiantly tried, but failed, to assail the appellant's and his co-accused's credibility. In *People vs. Castillon,*[146] the Supreme Court, discussing the principles to be considered in appreciating the testimony of a rape victim, ruled that:

> To warrant a conviction in a rape charge, the victim's testimony must be clear and free from contradictions. In prosecuting offenses of this nature, conviction or acquittal virtually depends entirely on the credibility of complainant's testimony because of the fact that usually only the participants can testify as to its occurrences. It is a fundamental principle in rape cases that the evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw its strength from the weakness of the defense evidence. The seriousness with which the State rightfully views the matter with the corresponding imposition of the punishment that fits the crime calls for extreme care on the part of the judiciary to avoid an injustice from being done to an accused.

87. By itself, the uncertain and blurry manner by which complainant testified utterly fails to establish the degree of credibility required by the standards set by the Supreme Court so as to warrant a conviction of appellant. Thus, the lower court erred in upholding complainant's version, instead of appellant's candid, sincere and frank testimony.

88. Noteworthy here are the facts that (a) neither the pants nor the underwear of the complainant were torn; (b) there was an absence of injuries on the inner thighs of the complainant; (c) the alleged incident happened at the back of a moving Starex van, a very cramped location; and (d) there was simply not enough time to consummate the alleged rape.

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[146] G.R. No. 100586, January 15, 1993.

89. That no force was employed on the complainant is demonstrated by the fact that all her items of clothing bear no tears or other marks of struggle that would otherwise signify that complainant was forcibly raped by appellant. Genevieve Puno, Evidence Cutodian of the IIO of SBMA, admitted as follows:[147]

> Q: Ms. Puno, will you please look at Exhibit W-1 and tell us when you received that maong pants mentioned in that exhibit, did you examine that pair of maong pants mentioned in that exhibit?
>
> A; Yes, Sir.
>
> Q: Did you see any tear in the maong pants when you received it?
>
> x x x
>
> A: None, sir.
>
> Q: Did you examine the underwear mentioned in that same exhibit when you received it?
>
> A: Yes, Sir.
>
> Q: Did you find any tear in the underwear?
>
> A: No, Sir, None (Underscoring supplied).

90. Likewise, complainant does not bear any injuries that would otherwise indicate that force was employed on her. The testimony of Dr. Teresita Sanchez, expert witness for the defense, is very enlightening. She commented on the conspicuous absence of injuries on the inner knee and thighs of complainant, as follows:[148]

> Q: And what is the significance now, Doctor, of the absence of contusions, bruises or other signs of injuries in the inner thigh of Suzette Nicolas?

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[147] TSN dated 16 June 2006 (G. Puno), p. 24-25; Rollo, pp. 1336-1534.
[148] TSN dated 18 September 2006 (Dr. T. Sanchez), p. 38, 40-42, 44-45, 47, 50; Rollo, pp. 4920-5043.

A: I just want to clarify**. This per se, is a rape case. This is supposed to be the victim of rape <u>but I did not find any injury significant to suggest that there was rape or force on the person.</u>**

Q: What is your basis in saying so, Doctor?

A: **<u>My basis is the absence of contusion in the inner thigh and inner knees.</u>** <u>I have a book here to support this findings.</u>

x x x

"<u>Evidence of extra-genital injury is not essential to the successful prosecution of a rapist but it is easily voidable in collaborating lack of consent in intercourse. The classic (sic) those abrasions on the inside of the knees or lower thighs due to forcible separation of the legs during rape or attempted rape as shown here that 16 year old who survived the experience.</u>

x x x

Q: What are your comments on what you read in that book, Doctor?

A: <u>While it is true that in rape cases, you have sometimes to observe the genital or extra-genital. In this particular case, the victim showed that she is prone to easy brusibility. So, that means, we expect of course that if she refuses intercourse or she refrains, the legs are so heavy and so you have to apply force in order to open the legs, you have to apply force to penetrate.</u>

x x x

Q: **Now, you mentioned, Doctor, that if the witness was dead drunk, her legs are heavy,** what is the basis?

A: From experience and the fact that she is not moving, she is uncooperative, definitely, the legs are very heavy like persons who are under anesthesia.

x x x

Q: Now, Doctor, I am asking you why do you say or what is your basis in saying that when a person is dead drunk, her legs or body would be heavy?

A: **This is also from experience and also from literature that a person who is not cooperative and because she is dead drunk and not aware of what is happening around her, she will have a heavy legs just like a person who is under anesthesia. And therefore, to be able to penetrate, we have to use force to open up the legs.** (Emphasis and underscoring supplied)

91. Under American Jurisprudence[149], it is held that:

> In prosecution for forcible rape, the prosecutrix must relate the very acts done on her part to resist, and mere general statements, involving her conclusions, that she did her utmost and the like, will not suffice to establish the fact of resistance. <u>That there is no indication of violence is a strong circumstance showing lack of resistance, and where there is no evidence of yielding through fear, the absence of any injury to the assailant or tearing or disarray of the clothing is strong evidence of willingness and lack of resistance.</u> (Underscoring supplied)

92. Again, there is no dispute that the alleged incident occurred inside a Starex van. Measurements[150], among others, were made of the dimension of the back seat occupied by the complainant and accused Smith, the space between the back seat and the second row seat where accused Silkwood and Duplantis were seated and the height of ceiling of the van from its floor. From the result of the measurements, <u>it cannot be disputed that the incident took place in a very limited space where sexual intercourse could not have happened without the active cooperation of complainant</u>.

Incidentally, in a similar case, *People of the Philippines vs. Macapanpan*[151], the Supreme Court held:

> "the implausibility of the commission of the felony [of rape] is further underscored by the fact that the hut [where the alleged rape occurred] has a dimension of only 4.97 by 3.14 square meters and the room

[149] Section 92, 65 Am Jur 2d.
[150] Third row seat measures: 93 centimeters (length), 47 centimeters (width), 43 centimeters (distance of the jump seat to the edge of the door), 51 centimeters (height of the jump seat to the floor). TSN dated 9 June 2006, pp. 46-51; Rollo, pp. 754-911.
[151] G.R. No. 133003, April 9, 2003.

where the crime was allegedly committed measures around 3.14 by 3.14 square meters."

93. The impossibility of committing the alleged rape was made more manifest considering the amount of time that appellant had in order to consummate the alleged deed. It is not disputed that appellant and complainant left the Neptune Club, aboard the Starex van, at approximately 11:30 pm, [152] and that appellant was able to get back to the ship at exactly 12:03 pm.[153] How could appellant have possibly perpetrated the alleged rape in such a short period of time? It must be emphasized that the sexual intercourse did not immediately happen after appellant and complainant boarded the van; that appellant even had to get a condom from his wallet, unwrap it, and put in on his penis, before penetrating complainant. Certainly, the sexual act would not have happened in such a short period of time without the active or passive cooperation of the complainant.

94. Finally, if it were true that appellant raped complainant, appellant's actions after the alleged rape are inconsistent with that of a criminal. First, it is undisputed that the Starex van had, for its destination, the Alava Pier, which pier, appellant, his co-accused and complainant, alighted from. This pier was shown to be a well-lit area, where a lot of people were walking to and from at the time that complainant went down from the van.[154] It is absolutely contrary to normal criminal behavior for a criminal to deposit his victim at the side of the road in plain view of many people, reveal his identity to many by-standers and possibly expose himself to identification. Second, prosecution offered no evidence to dispute the fact that, as appellant promised complainant after he failed to get a taxi for her[155], he went back to the Neptune Club the next day to meet up with her[156]. If indeed, appellant ravished complainant without her consent and against her will, it is certainly contrary to normal human behavior for the criminal to seek out his victim at a public place, and risk identification by people who saw him there with the victim just the night before.

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[152] TSN dated 11 September (D. Smith), p. 50; Rollo, pp. 4566-4761
[153] TSN dated 11 September (D. Smith), p. 73; Rollo, pp. 4566-4761
[154] TSN dated 11 September 2006 (D. Smith), p. 68, Rollo, pp. 4566-4761; TSN dated 8 June 2006 (J. Khonghun), pp. 48-59, Rollo, pp. 537-753.
[155] TSN dated 11 September 2006 (D. Smith), pp. 71-72; Rollo, pp. 4566-4761.
[156] TSN dated 11 September 2006 (D. Smith), pp. 75-76; Rollo, pp. 4566-4761.

Premises considered, it is readily apparent that complainant was NOT raped by appellant.

II. The lower court erred in disregarding appellant's "mistake of fact" defense.

95. Our jurisdiction recognizes the mistake of fact defense.[157] As applied to an acquaintance-rape case, this generally means that the accused may mount a defense claiming that even if the complainant did not consent, the accused had no reason to know, and did not actually know, that the sex was non-consensual. In this case, there is a distinct possibility that if, in fact, complainant was an unwilling participant in the sex, appellant did not know that she was unwilling because, in her allegedly intoxicated state, complainant gave appellant a number of signs that she was attracted to him.

96. There are a number of key facts that indicate that appellant had reason to believe that complainant was a willing participant in the sexual intercourse, and much of that evidence was undisputed. And even where the evidence was subject to dispute, there are strong reasons to believe that the evidence in appellant's favor were more reliable. In spite of this, the lower court handled this issue – "mistake of fact" – as though it were clear-cut and there was only one conclusion that could possibly be drawn from the evidence before it.

97. Some of the evidence in appellant's favor include the fact that at the Neptune Club, appellant and complainant danced together in a highly suggestive manner, and appellant was the last person to dance with complainant before they (complainant and appellant) left the Neptune Club. Three (3) prosecution witnesses,

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[157] *U.S. v. Ah Chong,* G.R. No 5272, March 19, 1910, 15 Phil. 488; *U.S. v. Apego*, G.R. No. 7929, November 8, 1912; *People v. De la Cruz*, G.R. No. 41674, March 30, 1935; 61 Phil. 344; *People v. Oanis, et al.,* G.R. No. 47722, July 27, 1943; 74 Phil 257.

Mills, Anna Liza, and complainant herself, testified that complainant danced with appellant at least three times, and for as much as fifteen minutes in each instance.

98. Defense witnesses elaborated on this testimony, noting that while at the Neptune Club, appellant and complainant had interacted in a flirtatious way that indicated a mutual attraction. Appellant testified that while he was walking inside the Neptune Club and first saw complainant "she was smiling and giggling at [him]."[158] "[S]he [then] stepped toward [him] and said hello, [He] also said hi and introduced [himself] to her."[159] After "she sat down at the table with [him]"[160] and they were "talking for a little while and [getting] to know each other,"[161] appellant "asked her if she want to go and dance in the dance floor."[162] After complainant said "yes,"[163] they "walked to the dance floor and [they] danced."[164] After "[a]bout three songs, maybe fifteen (15) minutes," they went to sit down and "Suzette came and sat down on [his] lap."[165] After some time, they "kissed each other"[166] for "[m]aybe ten (10) seconds."[167] "After [they] talked for a little while longer, [they] kissed again"[168] while she was on his lap.

99. Silkwood testified that while at the Neptune Club he "approached LCPL Smith."[169] At that time, "LCPL Smith, he had with him a Filipina sitting on his lap, and they were talking."[170] Carpentier also testified that he saw appellant inside the Neptune Club.[171] "He was seated in a chair with a Filipino girl on his lap."[172]

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[158] TSN dated 11 September 2006 (D. Smith), p. 35; Rollo, pp. 4566-4761.
[159] TSN dated 11 September 2006 (D. Smith), p. 36; Rollo, pp. 4566-4761.
[160] TSN dated 11 September 2006 (D. Smith), p. 38; Rollo, pp. 4566-4761.
[161] TSN dated 11 September 2006 (D. Smith), p. 41; Rollo, pp. 4566-4761.
[162] TSN dated 11 September 2006 (D. Smith), p. 42; Rollo, pp. 4566-4761.
[163] TSN dated 11 September 2006 (D. Smith), p. 42; Rollo, pp. 4566-4761.
[164] TSN dated 11 September 2006 (D. Smith), p. 43; Rollo, pp. 4566-4761.
[165] TSN dated 11 September 2006 (D. Smith), p. 44; Rollo, pp. 4566-4761.
[166] TSN dated 11 September 2006 (D. Smith), p. 45; Rollo, pp. 4566-4761.
[167] TSN dated 11 September 2006 (D. Smith), p. 46; Rollo, pp. 4566-4761.
[168] TSN dated 11 September 2006 (D. Smith), p. 49; Rollo, pp. 4566-4761.
[169] TSN dated 21 September 2006 (K. Silkwood), p. 25; Rollo, pp. 5161-5314.
[170] TSN dated 21 September 2006 (K. Silkwood), p. 25; Rollo, pp. 5161-5314.
[171] TSN dated 19 September 2006 (C. Carpentier), p. 15; Rollo, pp. 5044-5160.
[172] TSN dated 19 September 2006 (C. Carpentier), p. 15; Rollo, pp. 5044-5160.

"From [Carpentier's] observation, it appeared they were being aggressively, flirtatiously, kind of kissing each other and things of that nature."[173]

100. Finally, Soriano, who made himself unavailable to testify at trial, told NCIS that appellant and complainant had behaved in a manner strongly suggesting a mutual attraction. NCIS reported:

> "Soriano stated that he observed a Filipina dancing with Smith on the dance floor of the club. When asked how they were dancing Soriano said they were 'Dirty dancing' and 'grinding.' When asked to further describe this, he said that the female was dancing close to Smith and that she was rubbing her crotch area on one of his legs as they danced to the music. He further indicated that at one point he saw the female turn around and rub her buttocks area into Smith's groin area and it appeared to Soriano that they were simulating sexual intercourse."[174]

101. All of the evidence set forth above paint a picture of a typical encounter between a young man and a young woman at a nightclub and none of the prosecution witnesses disputed the defense portrayal of a mutual attraction between appellant and complainant.

102. The lower court, however, perfunctorily rejected the idea that appellant was unaware, and had no reason to be aware, that complainant was an unwilling participant in the sexual intercourse and did so based largely on the strongly disputed claim that appellant had carried an unconscious complainant out of the Neptune Club and forcibly loaded her into the van. The lower court responded to the defense' assertion of the "mistake of fact" defense by finding:

> [T]hat accused Smith did not know the physical, emotional and medical condition of the complainant immediately before the latter had carnal knowledge of her cannot be sustained. The evidence on record clearly showed that accused Smith was fully aware of the intoxicated condition of the complainant even before he and his co-accused boarded their van on the way to the pier. As a matter of fact, accused Smith carried the complainant on his back in order to bring her out

[173] TSN dated 19 September 2006 (C. Carpentier), p. 15; Rollo, pp. 5044-5160.
[174] TSN dated 14 June 2006 (G. Papageorge), pp. 99-100; Rollo, pp. 912-1087-A.

> from the club. He also carried her with his arms, after opening the sliding door of the van, to load her into the said vehicle. He even used his right leg by placing it first on the van to support the weight of the complainant.
>
> **On the basis of said circumstances alone, it is clear that there was no mistake of fact on the part of accused Smith insofar as the physical condition of the complainant. The aforementioned circumstances were clearly and categorically testified to by prosecution witness Gerald Muyot**.[175] (Emphasis supplied)

103. In addition to those previously discussed (please refer to **paragraphs 66 to 74** of this Brief), there are a number of significant problems with the lower court's reliance on Muyot's testimony with regard to the "mistake of fact" defense and with the conclusions that the lower court drew from said testimony.

104. Muyot's testimony was directly contradicted by every other witness who had direct knowledge of the manner in which complainant left the club. Tellingly, this list of witnesses includes complainant herself, who testified that at most appellant "pulled [her] wrist",[176] but it did not hurt.[177] Complainant did not testify that she was carried out of the Neptune Club on appellant's back.[178]

105. Similarly, when Mills and Anna Liza were looking for complainant, they asked Muyot if he had seen a young woman matching complainant's description. In response to those questions, Muyot <u>never</u> said that he had seen a group of Marines abduct a young woman who was dressed exactly as Mills and Anna Liza described. Muyot told Mills that "there's a <u>girl who have gotten into a van</u> but he is not sure who she was."[179] Notably, Muyot did not say that the "girl" was carried out of the club on the American's back or that she was unconscious.[180]

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[175] Appealed Decision, pp. 44-45.
[176] TSN dated 10 July 2006 (S. Nicolas), pp. 11-12; Rollo, pp. 3064-3145.
[177] TSN dated 14 July 2006 (S. Nicolas), p. 39; Rollo, pp. 3530-3597.
[178] TSN dated 10 July 2006 (S. Nicolas), pp. 11-12; Rollo, pp. 3064-3145.
[179] TSN dated 20 June 2006 (C. Mills), pp. 117-18, 132; Rollo, pp. 1702-186.
[180] TSN dated 20 June 2006 (C. Mills), pp. 117-18; Rollo, pp. 1702-186.

106. Additionally, Muyot claimed to have recognized complainant when she returned to the Neptune Club with the police. At that time, complainant apparently told Muyot that "something bad" had happened to her. However, when he spoke with her, Muyot never made any reference to her having been carried off by four Marines less than an hour earlier, nor did he tell her or the police that none of the Marines in question had returned to the Neptune Club. One would think that both pieces of information would have been of great interest to complainant and the police at the time, and for Muyot to remain silent seems completely inconsistent with his later claim that he has seen complainant being abducted. The lower court, however, allowed these issues to pass without comment or scrutiny.

107. Moreover, and as discussed above, Muyot's fellow Neptune Club Security Guard, Corpuz, and the complainant's step-sister, Anna Liza, both testified that complainant could walk without assistance after dancing,[181] although they both stated that at times complainant was staggering and off-balance.[182] At one point late in the evening, "[complainant and Anna Liza] decided to leave the club."[183] Complainant even followed Anna Liza outside the club unassisted.[184] Anna Liza admitted on cross-examination, that "Suzette was also walking beside [her] while [Franco was] holding [complainant's] hands."[185] After they stopped holding hands, Anna Liza also testified that she "saw Suzette walking behind [her]."[186] According to Anna Liza, "I did not notice anybody assisted her" walking.[187]

108. Although, according to Anna Liza, complainant was "walking out of balance,"[188] Anna Liza did not feel that complainant's level of intoxication was so

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[181] TSN dated 2 June 2006 (T. Corpuz), pp. 75, Rollo, pp. 1-215; TSN dated 26 June 2006 (A. Franco), p. 118, 160, Rollo, pp. 2171-2350; TSN dated 27 June 2006 (A. Franco), pp. 116-118, Rollo, pp. 2351-2476.
[182] TSN dated 26 June 2006 (A. Franco), p. 160; Rollo, pp. 2171-2350.
[183] TSN dated 26 June 2006 (A. Franco), p. 166; Rollo, pp. 2171-2350.
[184] TSN dated 27 June 2006 (A. Franco), p. 71; Rollo, pp. 2351-2476.
[185] TSN dated 26 June 2006 (A. Franco), pp. 166-167, Rollo, pp. 2171-2350; TSN dated 27 June 2006 (A. Franco), p. 71; Rollo, pp. 2171-2350.
[186] TSN dated 26 June 2006 (A. Franco), p. 168, Rollo, pp. 2171-2350; TSN dated 27 June 2006 (A. Franco), p. 71, Rollo, pp. 2351-2476.
[187] TSN dated 3 July 2006 (A. Franco), p. 22; Rollo, pp. 2891-2953.
[188] TSN dated 27 June 2006 (A. Franco), p. 72-73; Rollo, pp. 2351-2476.

great that Anna Liza needed to stay with her.[189] After Anna Liza left the Neptune Club, Anna Liza also did not feel that complainant's level of intoxication was so great that she needed to call complainant on the latter's cell phone to find her, even though she could have called using Mills' cell phone or the hotel's phone.[190]

109. Needless to say, the defense also presented a number of witnesses who contradicted Muyot's testimony. Appellant testified:

> Q: When you told Suzette that you have to leave, what was the reaction of Suzette, Mr. Witness?
>
> A: Suzette just asked me if I could stay a little bit longer and I told her that I had to be back before 12:00 o'clock, Sir.
>
> Q: After you told her, what happened next, Mr. Witness?
>
> A: She still was upset about me leaving at that time. She appeared to be by herself. I did not see anybody with her at all time that we were together. So, I asked her if she wants to have a short ride back to the pier with me.
>
> Q: And what was her reply if any to your invitation if she would like to go with you on a short ride to the gate back to the ship?
>
> A: She said "yes," she wants to go with me, Sir.
>
> Q: And by the way, why is it important for you to reach the ship by midnight?
>
> A: That's the curfew that was set for us. And that If [sic] we don't get there at midnight, that will be a big trouble for us.
>
> Q: What kind of trouble would that be, Mr. Witness?
>
> A: It was a case to case basis, Sir. Sometimes it would be up to losing the rank, something like that.
>
> Q: When you told Suzette about that, rather when Suzette agreed that she go with you, what did you and Suzette do next, if any?

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[189] TSN dated 23 June 2006 (A. Franco), pp. 93-99, Rollo, pp. 2054-2170; TSN dated 27 June 2006 (A. Franco), pp. 71-73; Rollo, pp. 2351-2476.
[190] TSN dated 27 June 2006 (A. Franco), p. 74; Rollo, pp. 2351-2476.

> A: Then we walked towards the door. Everybody else started walking towards the door, walked down to the outside hallway and boarded the van which was parked then.
>
> Q: How far were you and Suzette while you were walking towards the van, please describe to us, Mr. Witness?
>
> A: The same way when we walked from the bar to the table, shoulder to shoulder and I guided her through the crowd.[191]

110. Silkwood testified that, "when I approached LCPL Smith, I just had him to know that we had to go back to the ship, so they stood together and I walked after them."[192] When walking out, "[f]irst it was Sgt. [sic] Carpentier," then it was "[m]yself and Duplantis," and "[LCpl Smith and Ms. Nicolas] were close behind the same group and then we walked towards the van."[193]

111. Clearly, Muyot's testimony concerning how complainant left the Neptune Club is inconsistent with the testimony of Anna Liza and Mills, who were both prosecution witnesses, and is also inconsistent with the version of events that Muyot gave to Mills on the night in question. Mills and Anna Liza's testimony, as well as Muyot's comments to Mills and complainant after the alleged abduction are far more consistent with the descriptions offered by the defense witnesses than with the idea that complainant was taken against her will.

112. There are times where a fact-finder may credit the testimony of one witness over the testimony of many others who appear to have had an equal opportunity to observe the same events, although one would think that those occasions are rare. What is most striking about the lower court's findings, however, is that the lower court does not even mention that there were witnesses – including those called by the prosecution – who offered strikingly different testimony than Muyot's. At a minimum, the lower court should have offered an explanation as to why it credited Muyot's testimony over all of the other witnesses. For this reason, the lower court's reference to Muyot having testified "clearly and categorically" on

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[191] TSN dated 11 September 2006 (D. Smith), pp. 51-55; Rollo, pp. 4566-4761.
[192] TSN dated 21 September 2006 (K. Silkwood), p. 26-27; Rollo, pp. 5161-5314.
[193] TSN dated 21 September 2006 (K. Silkwood), p. 28; Rollo, pp. 5161-5314.

this issue is simply misleading and betrays the lower court's fierce resolve to convict appellant at all costs.

III. The lower court erred in its appreciation of the evidence resulting to erroneous conclusions and findings of facts.

113. Other than those already discussed above, the lower court erred in its appreciation of the evidence resulting in erroneous conclusions and findings of facts, findings which the lower court considered sufficient circumstantial evidence that collectively prove that appellant raped complainant. Lamentably, these 'findings of facts' are not supported by, and are patently contrary to, the evidence on record. It bears stressing that these errors cannot be considered harmless, for as the lower court itself admitted, there is no direct evidence of rape, and therefore, a scrutiny of the circumstantial evidence is indispensable.

Complainant's alleged revelation of the sexual assault

112. After conceding that there was no direct evidence of rape,[194] the lower court enumerated fourteen (14) findings of circumstantial evidence, including a formal finding of fact that, "The complainant revealed the sexual assault on her, although not immediately, to the guard at Neptune Club when she tried to find accused Smith after her violation, to her step-sister Annaliza [sic], to her boyfriend Brian Goodrich; [sic] to her mother, and to the doctor who first examined her."[195]

This finding of fact is incorrect on many grounds and does not deal with important evidence to the contrary.

113. Complainant did not reveal the sexual assault in the manner that the lower court has stated. With respect to the security guard at the Neptune Club, the

[194] Appealed Decision, p. 59.
[195] Appealed Decision, p. 60, 'circumstantial evidence' No. 10.

only thing that complainant said was "something bad" had happened to her.[196] It is possible for "something bad" to refer to rape or sexual assault, but it is also entirely possible that this comment refers to the shabby way that the Marines had treated complainant, including leaving her at the side of the road with her jeans around her knees while allegedly referring to her as a "bitch" when she did not get out of the Starex van fast enough.[197] With respect to her step-sister, Anna Liza, complainant did not answer Anna Liza's questions about what had happened to her.[198] Anna Liza was under the impression that "something bad" had happened to complainant because that is what the *police* told Anna Liza, not complainant.[199] Similarly, complainant did not reveal a sexual assault to the doctor who first examined her. When he asked her questions about what had occurred with the Marines, complainant burst into tears and said that "[she] did not like what happened to [her]."[200] Again, it is certainly possible for this response to have been triggered by rape or sexual assault, but it is also possible that complainant simply did not like the insulting treatment she had received from the Marines.

114. With respect to complainant's boyfriend, Goodrich, the lower court completely disregarded her actual testimony. At the trial, complainant testified that she spoke to "Brian" on November 2, 2005, thus:

Q: And what did you talk about?

A: I told him something bad happened to me.

Q: Did you tell him exactly what happened to you?

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[196] TSN dated 10 July 2006 (S. Nicolas), p. 32, Rollo, pp. 3064-3145; TSN dated 19 June 2006 (R. Paje), p. 139, Rollo, pp. 1535-1701; TSN dated 2 June 2006 (G. Muyot), pp. 172-175, Rollo, pp. 1-215.
[197] TSN dated 11 September 2006 (D. Smith), pp. 69-71,107; Rollo, pp. 4566-4761.
[198] TSN dated 23 June 2006 (A. Franco), p. 116, Rollo, pp. 2054-2170; TSN dated 10 July 2006 (S. Nicolas), p. 34; Rollo, pp. 3064-3145.
[199] TSN dated. 26 June 2006 (A. Franco), p. 11; Rollo, pp. 2171-2350.
[200] TSN dated 10 July 2006 (S. Nicolas), p. 38, Rollo, pp. 3064-3145; see also TSN dated 26 June 2006 (A. Franco), p. 18, Rollo, pp. 2171-2350.

A: Not at that point. Ma'am because I am ashame[d].[201]

115. It is plainly incorrect to say that "the Complainant revealed the sexual assault on her" to the security guard, her step-sister, the doctor, or her boyfriend. Sexual assault is one possibility for complainant's comments, but certainly not the only one.

116. More crucially, however, the lower court took no account of – and did not even mention – complainant's statements made to others that either directly contradict her subsequent claim that she was raped or do not make sense when considered in light of that claim. For instance, L.Cpl. Bamberger, a friend of complainant, was text messaging with complainant on November 2, 2005. During this exchange, he sent her a text message saying that rumors were swirling that Marines had raped a Filipina and that she had been the victim. In response, complainant sent Bamberger a message saying that this was only a "stupid rumor."[202]

117. Similarly, the lower court ignored Mills's testimony that once complainant finally got back to the hotel after her initial trip to the hospital, "Suzette was crying and she said she didn't know what happened."[203] The lower court never accounted for why, if complainant had been raped, she would tell Mills that she did not know what had happened to her.

118. There may be reasons to believe that when complainant said that "something bad" had happened to her she meant that she had been raped. Similarly, there may be reasons to credit complainant's current story even though shortly after the supposed assault took place she told a friend that the idea that she had been raped was just a "stupid rumor" and told people she encountered immediately after the supposed assault that "she didn't know what happened."[204]

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[201] TSN dated 10 July 2006 (S. Nicolas), p. 43; Rollo, pp. 3064-3145.
[202] TSN dated 12 September 2006 (J. Bamberger), pp. 21-22, 27; Rollo, pp. 4762-4831.
[203] TSN dated 20 June 2006 (C. Mills), p. 123; Rollo, pp. 1702-1863.
[204] TSN dated 20 June 2006 (C. Mills), p. 123; Rollo, pp. 1702-1863.

The lower court, however, took none of these questions into account and pretended as though these issues simply do not exist. Perhaps even more seriously, the lower court mischaracterized much of the evidence by saying that complainant made comments about being sexually assaulted when she clearly made no such comments. As discussed more fully below, this cavalier treatment of the evidence leaves a very strong impression that the lower court was determined to reach a certain result, regardless of the specific evidence before it.

Appellant's alleged semen on the condom and complainant's panties

119. One of the lower court's formal findings of fact was that "[complainant's] panty had seminal stains of Smith; the condom used by Smith had his seminal stains."[205] This was an important issue because Smith claimed that the van had reached the ship before he had ejaculated.[206] If it could be shown that he had left semen in the condom and on complainant's panties, it would undermine appellant's credibility, which was of obvious import in a case of this nature.

120. The lower court's finding, however, is not only baseless but is directly contradicted by the evidence on record. The Philippine National Police ("PNP") Crime Laboratory formally reported[207] that "Specimen A referring to the condom and specimen B referring to the lady's underwear reveal the absence of seminal stains."[208] Dr. Supe, the prosecution's expert from the PNP Crime Laboratory, later definitively confirmed that seminal stain examination by the PNP crime laboratory on the panties and condom "turned out negative on the [seminal stain test]."[209] The test also showed that "no spermatozoa were seen under the microscope."[210]

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[205] Appealed Decision, p. 60, 'circumstantial evidence' No. 13.
[206] TSN dated 11 September 2006 (D. Smith), pp. 132-33; Rollo, pp. 4566-4761.
[207] TSN dated 22 June 2006 (R. Paje), pp. 38-39; Rollo, pp. 1864-2053.
[208] TSN dated 22 June 2006 (R. Paje), pp. 44; Rollo, pp. 1864-2053.
[209] TSN dated 18 July 2006 (Dr. F. Supe, Jr.), pp. 146, Rollo, pp. 3598-3824, (emphasis added); TSN dated 20 July 2006 (Dr. F. Supe, Jr.), pp. 35, 84; Rollo, pp. 3825-3972.
[210] TSN dated 11 July 2006 (Dr. R. Fortun), pp. 59; Rollo, pp. 3146-3350.

121. In order to counter this evidence, the prosecution called an expert witness, Dr. Fortun, in the hope of showing that the PNP test results were inaccurate. Dr. Fortun's testimony, however, showed that the most likely false results from the test performed on the condom and complainant's panties would be false positives not false negatives. In order for the lower court to make its findings, the lower court needed to conclude that the PNP result was falsely negative, a proposition for which there was no evidentiary basis.

Appellant's DNA on the condom

122. The lower court also issued a formal finding of fact that "When the . . . condom . . . [was] examined using DNA evidence, it was found that male DNA profile on the . . . condom matched those of Smith."[211] Similarly, this finding is also not only baseless but is directly contradicted by the evidence on record. The DNA test for the condom was totally negative for appellant.[212] The lower court, however, issued a factual finding in the exact opposite, without ever discussing the basis for that conclusion.

Complainant was allegedly carried out of the van by appellant

123. The lower court relied on the testimony of Khonghun in concluding that complainant was carried out of the van and onto the pavement by appellant and Silkwood.[213]

124. Foremost, Khonghun's allegation is belied by the testimony of appellant[214], Carpentier[215] and Silkwood[216]. All of them assert that complainant alighted from the van by herself.

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[211] Appealed Decision, p. 60, 'circumstantial evidence' No. 14.
[212] TSN dated 20 July 2006 (Dr. F. Supe, Jr.), p. 81; Rollo, pp. 3825-3972.
[213] Appealed Decision, p. 60, 'circumstantial evidence' No. 6.
[214] TSN dated 11 September 2006 (D. Smith), pp. 68-71; Rollo, pp. 4566-4761.
[215] TSN dated 19 September 2006 (C. Carpentier), p. 24; Rollo, pp. 5044-5160.
[216] TSN dated 21 September 2006 (K. Silkwood), pp. 44-45, 47-48; Rollo, pp. 5161-5314.

125. Secondly, it is interesting to note that while Khonghun admits to the fact that he is personally acquainted with most of the SBMA officials and IIO officers, he did not, during the time that the instant case was being investigated by the IIO, give any statement relating to what he allegedly witnessed. Despite the fact that he allegedly recounted the events to some SBMA officials, he was not, at any time, asked to execute a voluntary statement or affidavit in support of the complaint filed by complainant. It was only in May 2006 – or six (6) months after the alleged crime – that Khonghun, upon the instance and in the presence (if not with the assistance) of one of the private prosecutors, Atty. Honorato Aquino[217], finally executed an affidavit. The belated execution of Khonghun's affidavit and the fact that none of the officials in the SBMA deemed him a crucial witness so much so that he was not at all previously asked to execute an affidavit or voluntary statement lends doubt on the truth and veracity of Khonghun's claims. Further, the fact that his affidavit was, as admitted by Khonghun himself, prepared with the assistance of one of complainant's private prosecutors adds bias to his allegations. Indeed, Khonghun is an "eleventh-hour witness" whose testimony could not be given credence.

126. Prior to the execution of his overly delayed affidavit, Khonghun featured in two (2) television interviews – one with GMA 7 and one with *The Probe Team* – in order to refute Soriano's allegations that he was coerced into signing his first statement by IIO Investigator Pyke Torres – no doubt, also another one of Khonghun's extensive network of personal acquaintance in Subic. What additionally casts doubt on Khonghun's allegations is his admission to the lower court that he agreed to give an interview ABS-CBN only upon the approval of private prosecutor, Atty. Evalyn Ursua.[218] Khonghun's admission, in this regard, shows an even greater bias that does not speak well of his credibility. For if he were indeed a disinterested witness concerned only with the truth, there would be no need to consult with the lawyer of complainant herself.

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[217] TSN dated 8 June 2006 (J. Khonghun), pp. 184-188; Rollo, pp. 537-753.
[218] TSN dated 8 June 2006 (J. Khonghun), p. 203; Rollo, pp. 537-753.

127. Additionally, Khonghun contended that at the time he allegedly witnessed the complainant being carried out of the van and dumped on the sidewalk, he was with seven (7) other people, including Ma. Fe Castro. If indeed complainant was carried and dumped in the manner that Khonghun claims, one cannot help but wonder why these seven (7) other people did not come before the lower court to state under oath that they witnessed the same thing that Khonghun said he witnessed. The prosecution could have easily subpoenaed these witnesses to bolster the allegations made by Khonghun. Curiously, the prosecution did not. Worse, as afore-stated, the prosecution suppressed the affidavit of one of them, that of Ma. Fe Castro, which the prosecution marked as Exhibit "G". The foregoing suggests the obvious conclusion that Khonghun and his companions, did not, in fact, witness the complainant being carried out of the van and dumped on the sidewalk and that it was only Khonghun who was willing to state under oath his contrived version of the events that transpired.

128. But even assuming Khonghun's testimony to be true, such alleged fact fails to prove, much less, indicate that complainant was raped. That complainant Nicolas was allegedly unceremoniously carried out of the van does not prove that she was ravaged. Such alleged fact shows nothing more than that the accused were, as asserted by them, really in a hurry to get back to the ship in time for curfew, so much so, that complainant and appellant did not have the time nor opportunity for the more sentimental and romantic parting that complainant hoped for.

Alleged settlement offer made to complainant

129. In support of its conclusion that complainant was allegedly so steadfast in her resolve to seek justice, the lower court ruled as follows:

> More importantly, the complainant is so steadfast in her resolve to seek justice. She testified that despite the fact that offers of settlement were made to her, she refused the same and decided to pursue the present case if only to vindicate the wrong done to her and show to all

> those who had prejudged her as bad person that they are all mistake.[219]

This is misleading. A painstaking review of the records would reveal that complainant never testified to this effect, or ever made mention of any settlement offer in her testimony. Where did the lower court base this particular finding of fact? The lower court obviously got this 'fact' from thin air. **As with the lower court's finding that the rape was proven by the prosecution beyond reasonable doubt (which as shown above, is utterly false) its blatant misappreciation of the evidence and deliberate distortion of the actual facts on record to favor the prosecution demonstrates the lower court's resolve to convict appellant.**

IV. The lower court erred in denying the appellant the right to confront the witnesses against him

130. Under the Visiting Forces Agreement between the governments of the United States and the Philippines, American servicemen tried in Philippine courts, like appellant, have the right to confront the witnesses against them.[220] The lower court denied appellant this right in at least two significant ways.

Soriano's out-of-court statements

131. At the trial, the lower court considered a number of Soriano's out-of-court statements as part of the prosecution's case. The lower court refused, however, to admit any of Soriano's statements as part of the defense case.

132. Soriano never testified in open court. The lower court, however, considered the testimony of Khonghun about what the latter claimed that Soriano told him. Specifically, Khonghun testified that Soriano told him that the Marines were

[219] Appealed Decision, p. 42.
[220] VFA, Section 9, Article V.

cheering "go Smith go," "Fuck, fuck!," and "Coming, coming!" while appellant had sex with complainant in the Starex van.[221]

133. In the appealed decision, the lower court repeatedly referred to who in the Starex van may have uttered the words, "go Smith go," "Fuck, fuck!," and "Coming, coming!," the statements that Khonghun claims he heard from Soriano.[222] Appellant, however, never had the chance to confront and cross-examine Soriano.

134. Notably, even though the lower court considered Soriano's out-of-court statements offered by the prosecution, the lower court did not consider Soriano's statements offered by the defense. On November 16, 2005, during an interview with NCIS, Soriano disowned and retracted his earlier statement taken by Chief Investigator Torres, asserting that he had never said that a 'gang rape' had occurred, or even that there had been any type of forcible sex at all. "Soriano stated that he felt pressured to give his initial statement to SBMA on 2 November 2005, and that the words in the statement were not his own."[223]

> "[A]fter I said that I did not witness a rape inside the van, Torres punched me twice in the back. This was witnessed by one official and one Filipino from the U.S. Embassy who was in the office, I was told to tell the truth because a complaint and that my trip ticket was seen with the panty of the girl . . . Torres took my statement with a type writer [sic] while I was questioned afterward, the statement prepared by Torres was shown and read to me and I objected because when I read the statement he prepared, it was indicated in the document that I was a witness to a 'gang rape' . . . I told Torres that I did not say 'Gang Rape,' but he told me that if the words 'Gang Rape' were deleted, I would be added to the accused. . . I did not say 'Gang Rape.' They told me to sign so I can go home. I was very tired and had no sleep, and out of fear that I would be included, coupled with my desire to go home, I was forced to sign. After signing, I was allowed to go home with the Starex."[224]

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[221] TSN dated 8 June 2006 (J. Khonghun), pp. 112-27; Rollo, pp. 537-753.
[222] Appealed Decision, pp. 43-44.
[223] TSN dated 7 June 2006, p. 48; Rollo, pp. 466-536.
[224] TSN dated 7 June 2006, pp. 52-55; Rollo, pp. 466-536.

135. Soriano's retraction seems reliable because even according to complainant's version of events, she was neither "gang raped," nor was there any indication that anyone had sex with her besides appellant. As a result, why would Soriano ever have told Chief Inspector Torres that a 'gang rape' had occurred?

136. In addition, Soriano's retraction included a wealth of evidence highly favorable to the defendants, including:

> "Soriano stated that he observed a Filipina dancing with Smith on the dance floor of the club. When asked how they were dancing Soriano said they were 'Dirty dancing' and 'grinding.' When asked to further describe this, he said that the female was dancing close to Smith and that she was rubbing her crotch area on one of his legs as they danced to the music. He further indicated that at one point he saw the female turn around and rub her buttocks area into Smith's groin area and it appeared to Soriano that they were simulating sexual intercourse."[225]

Later in the same statement, NCIS recorded that:

> "Soriano stated that at exactly 2325, he looked at his cell phone and remember the time. He then went directly to the restroom in the club. He stated he was in the restroom only 2-3 minutes, and then returned to where he had been standing. When he returned, he noticed that all the Marines had left the club and he did not see them. He looked around for a moment, and then Carpentier came from the area of the entrance of the club and told him that they were leaving. Soriano stated he exited the club behind Carpentier and as he exited he observed several people standing outside his locked van near the sliding passenger door. He stated he observed Smith and the female he'd seen Smith dancing with that night standing by the van, holding hands together."[226]
>
> "Soriano stated he unlocked the van's sliding door, and pulled it open. He said the female was the first to get into the van and she sat in the middle seat. At this point, Soriano clarified that the rear most seat of the van contained several boxes, luggage, and some of Soriano's personal belongings. It was completely full, and no one could sit in

[225] TSN dated 14 June 2006 (G. Papageorge), pp. 99-100; Rollo, pp. 912-1087-A.
[226] TSN dated 7 June 2006, pp. 39-40, Rollo, pp. 466-536; TSN dated 14 June 2006 (G. Papageorge), p. 101; Rollo, pp. 912-1087-A.

that seat. The middle seat that the female sat in was now the rear most seat in the van."[227]

137. Obviously, this evidence is strongly favorable to appellant because it establishes that complainant was behaving in a manner that would give appellant every reason to believe that she was a willing participant in any subsequent sexual activity, and that she entered the van willingly and under her own steam.

138. At the trial, however, the lower court refused defense's request to consider Soriano's statement to the NCIS. The lower court made this decision even though it had already admitted Soriano's initial statement to Chief Inspector Torres and allowed Khonghun to testify that Soriano had told him that the Marines were cheering while appellant had sex with complainant in the van. **It is unclear why Soriano's out-of-court statements were admissible for use <u>against</u> appellant when they favored the prosecution's theory, but not admissible for use <u>by</u> appellant when they strongly corroborated the defense's theory that complainant was a willing participant in having sex with appellant, and that she was not too drunk to have consented.**

Dr. Ortiz's cross-examination

139. Dr. Ortiz testified about the examination he performed on complainant the day after the alleged rape. The lower court specifically denied Dr. Ortiz status as an expert witness.[228]

140. Dr. Ortiz's lack of status as an expert witness, however, did not stop the prosecution from repeatedly asking him questions more typically found in examinations of experts. First, Dr. Ortiz was allowed to give his opinion on the probable cause of the 1.5 x 1.5 cm bruise "two inches above [complainant's] wrist,"[229] including that it could have come from "force by using a finger."[230] Second,

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[227] TSN dated 14 June 2006 (G. Papageorge), p. 102; Rollo, pp. 912-1087-A.
[228] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp.15-16, 20-21; Rollo, pp. 2477-2708.
[229] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 42-43; Rollo, pp. 2477-2708.
[230] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 43; Rollo, pp. 2477-2708.

Dr. Ortiz was allowed to give his opinion, over the objection of the defense, on the probable cause of the 1.5 x 1.5 cm bruise in the middle of complainant's left arm, including that it could have come from the force of a finger.[231] Third, Dr. Ortiz was allowed to give his opinion on the probable cause of the 1.5 x 2 cm bruise on the back of the middle of complainant's left arm.[232] He was further allowed to speculate about how the two bruises on complainant's left arm might be related, by testifying that "probably contusion number two and three could have been probably holding the left arm with the thumb on the anterior and the opposing fingers on the posterior."[233] The lower court even allowed the doctor to demonstrate "the position of the hand that [he was] referring to," with the lower court noting for the record that "[t]he Doctor demonstrated how the upper arm was properly held."[234] Fourth, Dr. Ortiz was allowed to give his opinion on the probable cause of the 3 x 2 cm bruise on complainant's lower right thigh, again including that it could have come from the force of a finger.[235] Finally, Dr. Ortiz was allowed to give his opinion on the probable cause of the 4 x 4 cm bruise on complainant's upper right thigh, again including that it could have come from the force of a finger.[236]

141. When time came for the defense to confront the doctor about the opinions he had offered during direct examination, however, the lower court applied a different standard. For instance, defense counsel, Atty. Rebosa asked Dr. Ortiz "if for instance because to due to [sic] digital pressure would it be also caused some other contusions perhaps because if there are five fingers, so would it be possible that there should be at least five markings?" After the prosecution objected stating that her witness "was testifying specifically on his finding and interpreting his findings. . . . [and] [w]hat [Atty. Rebosa was] doing now asking the doctor hypothetical question that would be asked on an expert witness," the lower court ruled in favor of the prosecution and told Atty. Rebosa to "address [his] question to an expert witness," rather than Dr. Ortiz.

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[231] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 43-48; Rollo, pp. 2477-2708.
[232] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 49-51; Rollo, pp. 2477-2708.
[233] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 51; Rollo, pp. 2477-2708.
[234] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 51; Rollo, pp. 2477-2708.
[235] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 53; Rollo, pp. 2477-2708.
[236] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 55; Rollo, pp. 2477-2708.

142. Dr. Ortiz also testified that complainant had bruises on both sides of her labia minoras (a part of her vagina).[237] "There was a redish [sic] on the middle portion of labia minora and this is a [bruise]."[238] Beyond the claim that the reddish color was, in fact, a bruise – which is itself an expert opinion – the lower court further allowed Dr. Ortiz to testify about "what caused that [bruise] on those sides of the labia minora."[239] Dr. Ortiz opined that the bruise was caused by "blunt injury upon forcible entry of a blunt object from the vagina"[240] that could have been a "vibrator," "a vase," or "a beer bottle,"[241] or even just a lack of lubrication."[242] Over the objection of the defense, Dr. Ortiz offered the opinion that "it is consistent" with "sexual assault or non-consensual sex or rape."[243]

143. Again, on cross-examination, defense counsel, Atty. Rebosa, tried to confront Dr. Ortiz and test the credibility of his opinion about the cause of complainant's vaginal bruising.

ATTY. REBOSA

Q: Mr. Witness, how do you perform your examination on the genitalia, did you note any contusion on the most pubis?

A: There was not contusion on the most pubis, sir.
[Identifying where the most pubis is located in an exhibit that shows an anatomical sketch of the human body]

Q: So, the most pubis is just above the vagina?

A: Yes, sir.

Q: And it is a soft tissue?

A: Yes, sir.

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[237] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 58; Rollo, pp. 2477-2708.
[238] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 59; Rollo, pp. 2477-2708.
[239] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 61; Rollo, pp. 2477-2708.
[240] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 61; Rollo, pp. 2477-2708.
[241] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 62; Rollo, pp. 2477-2708.
[242] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 62-63; Rollo, pp. 2477-2708.
[243] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 65; Rollo, pp. 2477-2708.

Q: So, Mr. Witness, if there is force, if force is inflected [sic] on that portion, will it produce a contusion?

PROSECUTOR

Objection, Your Honor, hypothetical again, Your Honor.

COURT

Sustained.[244]

144. At a different point, a defense counsel tried to confront and test the credibility of Dr. Ortiz on his opinion, offered during direct examination, that complainant's bruise "is consistent" with "sexual assault or non-consensual sex or rape,"[245] a statement that appears to be classic expert testimony.

ATTY. RODRIGO

Q: Let me just ask a general question from you, Doctor, would you have the same findings from one to five if the alleged sexual act was consensual, is that possible?

A: These contusions number one to five would not occur if it is a consensual sex with no brutal sexual behavior applied.

Q: But if it was a passionate sexual act could this occur?

PROSECUTOR

Objection, Your Honor, hypothetical.

COURT

Sustained.[246]

145. On direct-examination, Dr. Ortiz was allowed to give an opinion that lack of lubrication was the cause of the bruise on both sides of complainant's labia minoras:

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[244] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 138-40; Rollo, pp. 2477-2708.
[245] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 65; Rollo, pp. 2477-2708.
[246] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 165; Rollo, pp. 2477-2708.

PROSECUTOR

Q: Based on medical studies, Doctor, when does lubrication occur?

A: Lubrication occurred if there is an adequate physical response to a sexual stimuli and that would start as a lubrication of the vagina area to make it slippery and then there will be a relaxation of the vagina canal so it will enlarge the size probably it will enlarge its opening and also with sexual stimuli the partner would aid in inserting the penis in the vagina.

Q: Now, you said the injury was produced because most likely or there was no lubrication?

A: Yes, maam.[247]

. . . .

A: Because if you will not lubricate the vagina, if you will not relax the vagina, if the woman would not aid the penis in inserting into her vagina and then if her thighs are closed so the tip of the, the object, the cylindrical blunt object, it could be a penis, it could be a beer bottle, it could be a vase, would produce an injury by continuously thrusting of the penis into the vagina.[248]

On cross-examination, on the other hand, Atty. Rebosa tried the following approach to confront Dr. Ortiz:

ATTY REBOSA

Q: Mr. Witness, would you agree with me that non-lubrication on the vagina does not necessarily – even if a person is sexually aroused there may not be any lubrication?

A: I have not seen or experience or heard that there was no lubrication except when they are senile or matanda na sila.

Q: Mr. Witness, let us say if there is a woman who is fund [sic] of washing her genitalia, would that also bring a problem of lubrication later on?

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[247] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 63; Rollo, pp. 2477-2708.
[248] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 66; Rollo, pp. 2477-2708.

PROSECUTOR

Objection, Your Honor, hypothetical.

COURT

Sustained.[249]

146. Dr. Ortiz testified that "[he] tried to insert [his] finger using gloves with lubricants of course and I was able to insert only one finger on the first place and this elicit an unusual tenderness from the vagina wall."[250] Again, the lower court allowed Dr. Ortiz to opine that "[t]he vagina here must have been probably traumatized" and that "[a]n application of external force was done here."[251] Even more surprisingly, the lower court allowed Dr. Ortiz to further opine that "[u]sually, a teenager or lady could only admit only one finger but if she had several sexual intercourse, many times, this would also enlarge the diameter of the vagina canal and would admit two fingers."[252]

147. Again, on cross-examination, Atty. Rebosa tried to confront Dr. Ortiz and test his opinion that complainant "had been traumatized," as opposed to suffering tenderness from a non-violent cause.

ATTY. REBOSA

Q: Mr. Witness, if there is an infection in the genitalia area would it produce also tenderness?

PROSECUTOR

Hypothetical, Your Honor.

COURT

Sustained.[253]

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[249] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 150-51; Rollo, pp. 2477-2708.
[250] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 68; Rollo, pp. 2477-2708.
[251] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 68-69; Rollo, pp. 2477-2708.
[252] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 69-70; Rollo, pp. 2477-2708.
[253] TSN dated 29 June 2006 (Dr. R. Ortiz II), p. 154; Rollo, pp. 2477-2708.

148. It is also clear that the lower court's unwillingness to let the defense confront Dr. Ortiz was not an inadvertent mistake. During Dr. Ortiz's testimony, one of the defense counsel specifically told the lower court why the defense should be allowed to confront and cross-examine Dr. Ortiz on these opinions.

> "Your Honor, during the direct examination the doctor was asked what could have caused the contusion on the labia minora and he gave his opinion. Now, if he was not presented as an expert witness how could he have given that opinion on the possible cause of the contusion on the labia minora is the insertion of the penis and such other matters, Your Honor?"[254]

149. The lower court remained resolute in its refusal to allow the defense to cross-examine Dr. Ortiz on the opinions he had expressed during direct examination, all of which favored the prosecution's theory.

150. The lower court's approach to both Soriano's out-of-court statements and Dr. Ortiz's ability to offer opinions seems a categorical violation of "the gander rule", *i.e.,* the sauce for the poor goose should be the same sauce for the rich gander – that is simple, equal justice for all.[255] Succinctly put, the defense was forced to labor under a far more stringent regime than the prosecution. This is downright unfair, and **reveals, yet again, a dogged effort on the part of the lower court, not only to reject, wholesale, the defense of appellant, but to accept, piecemeal (*i.e.* only the favorable parts) the evidence of the prosecution.** This, to say the least, not only violates the fundamental rule of evidence that in criminal cases, the prosecution's cases must rise and fall on the strength of its own evidence, never on the weakness of the defense,[256] but also disregards an absolute principle of evidence by shifting the burden of proof, from prosecution, to the defense.

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[254] TSN dated 29 June 2006 (Dr. R. Ortiz II), pp. 136-137; Rollo, pp. 2477-2708.
[255] *Firestone Ceramics v. Court of Appeals,* G.R. No. 127022, June 28, 2000, *C.J. Panganiban.*
[256] *Vergara v. People,* G.R. No. 160328, February 4, 2005.

V. The lower court erred in ruling that complainant's motive to falsely accuse appellant of having raped her was not established.

151. At the outset, it must be emphasized that complainant's motive to falsely accuse appellant becomes irrelevant when the testimonies of the complainant and her witnesses are inherently insufficient to establish appellant's guilt beyond reasonable doubt. This is in accord with a cardinal dictum laid down by the Supreme Court that "[e]vidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself."[257]

Extensive discussions have been presented above to show that the evidence presented by the prosecution on the accusation of rape is insufficient to support a finding of guilt beyond reasonable doubt. Thus, even on the assumption that the complainant and her witnesses had no discernible motive to falsely accuse appellant, still, taken together with the other factual circumstances of the case, the evidence presented by the prosecution will not prove the guilt of the appellant beyond reasonable doubt. Accordingly, the motive of the complainant to fabricate charges becomes irrelevant.

As a matter of fact, the lower court conceded that "there may be no direct evidence to show that the crime of rape was committed" though it relied on fourteen (14) circumstantial evidences which according to it taken together, sufficiently overcomes the presumption of innocence. However, a careful analysis of these circumstances would reveal that, in the light of the admission of the appellant that he had consensual sex with complainant, the only remaining issue to be resolved was whether the latter consented to the act or resisted it. But as pointed out above, the evidence offered by the prosecution on the alleged resistance put up by the complainant in her supposed state of intoxication, although legally inadmissible, are not enough to establish the guilt of the appellant beyond reasonable doubt. Hence,

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[257] *Safeguard Security Agency, Inc. v. Tangco,* Supra.

following the pronouncement of the Supreme Court in *People v. Ibay*[258], it matters not that complainant is credible, or lacks a motive to falsify the truth, since her evidence on the charge of rape is incredible in itself and do not establish the guilt of the appellant beyond reasonable doubt:

> It is a legal truism that in criminal prosecutions, the State has the burden of proving the guilt of the accused beyond reasonable doubt. It has to prove the identity of the accused as the malefactor, as well as the fact of the commission of the crime for which he is alleged to be responsible. x x x
>
> Because the prosecution was not able to prove its case sufficiently, appellant's alibi assumes importance. Thus, even though the witnesses he presented were related to him, it cannot be denied that their testimonies were consistent, cohesive and, more important, believable.
>
> That Cordero did not seem to have any ill motive in accusing appellant of rape does not negate the fact that her testimony did not prove his guilt beyond reasonable doubt. x x x Consequently, appellant must be acquitted.

At any rate, the evidence on record clearly established complainant's motives, but the lower court simply ignored them.

Complainant falsely accused appellant to avoid being stigmatized as a woman of loose morals

152. On the evening of November 1, 2005, complainant alighted from a Starex van in a state of partial undress – her pants undone and pulled down below her knees – along with three (3) US Marines, appellant, Duplantis and Silkwood – one of which referred to her as a "bitch", as bystanders in the area looked on. Complainant thought of her mother. She would get angry if she found out what happened. She wanted complainant and her stepsister to head for home already that morning. They did not heed her bidding. Instead, they stayed on in Subic, went out that evening, left their young sister alone in their hotel room and went to the

[258] G.R. No. 132690, August 10, 1999.

casino, then went clubbing, drank alcohol, and danced the night away. As for complainant, she met appellant, danced and flirted with him, sat on his lap and kissed him, and ultimately, had sex with him. Her mother would get angry if she found out. Her boyfriend/fiancée would get angry if he found out. No wonder complainant cried rape.

153. In *People vs. Castillon,*[259] the Supreme Court, ruling in this regard, said:

> We take judicial cognizance of the fact that in rural areas in the Philippines, like Albor, Surigao del Norte, young ladies are strictly required to act with circumspection and prudence. Great caution is observed so that their reputations shall remain untainted. Any breath of scandal which brings dishonor to their character humiliates their entire families. The fact that Arlene agreed to engage in pre-marital sex is already a disgrace to her family, what more of her acquiescence to have sexual intercourse on a stage near the vicinity where the JS program was being held and prying eyes and ears abound. Thus, she must have reasoned that it is better to cry "rape" and bring suit thereon to salvage her honor in part than to have her reputation sullied in the community by being bruited around and stigmatized as a woman of loose morals.

154. As in the above case, complainant did not want to humiliate herself, given the telling and compromising situation by which she was seen by the bystanders on Alava Pier, and feared grievously for the ire of her mother if she would ever find out what complainant had done that night. Fortunately for her, the bystanders came to the worst of conclusions and erroneously assumed that she had been sexually assaulted by the Marines. Realizing a way to salvage herself, complainant has, since then, conveniently played the part. And that complainant is desperately trying to salvage her reputation is demonstrated in the way she obsesses over how other people perceive her. Complainant stated, thus:

> "A: I wanted to do something but I could not do it. I wanted to work but I could not because I am afraid and ashamed what people will say about me if they know that I am the rape victim.

[259] G.R. No. 100586, January 15, 1993.

x x x

A: As I have said, after this incident happened, I did not go back to Zamboanga City because I am ashamed what my friends, what they would tell me about what happened and I am afraid to see what would be their reaction.

x x x

A: I am afraid that they might say something about what they read in the newspaper about me. I had been good to my friends in Zamboanga that is why I prefer not to return to Zamboanga. They might be surprised on the write ups about me in the newspapers. I was good to my friends and why this thing happened to me."

155. Interestingly, literature referred to by the prosecution's own expert witness, Dr. Fortun, support the forgoing proposition regarding complainant's contrived story of rape, as follows:

Q: Now, you also identified a paper or book entitled "Color Atlas of Sexual Assault" marked as Exhibit "BBB", do you have that in front of you, Doctor?

A: Yes, Sir.

Q: On page 24, it says, and I quote:

x x x

"False allegation of sexual assault may be motivated by the need to conceal consensual intercourse, the need for nurturance, the need for antibiotics to avert possible sexually transmitted deseases (STDs), and in hopes to be tested for acquired immunodeficiency syndrome (AIDS) following unknown exposure. xxx"

do you agree with that statement, Doctor?

A: Yes, that seemed to be valid, Sir.

Q: And the next sentence, I read and I quote:

"x x x Anger toward the accused perpetrator is another motivation for false allegation. x x x"

do you agree to that, Doctor?

A: It is the observation of some of the authors here.

Q: Doctor, lets go to this portion of Exhibit "AAA", which says:

"x x x Patients with a false allegation of sexual assault typically report within 24 hours of the reported incident. x x x"

do you agree with that, Doctor?

x x x

do you agree with that the false allegation of sexual assault typically reports it within 24 hours of the reported incident?

A: That is the observation of some of the authors. I cannot question that.

Q: And in your study of the record of this case, did not the complainant report this alleged incident within 24 hours after the time she was allegedly raped or allegedly happened, do you know?

A; I think, the circumstances, yes it was immediately reported, Sir.

x x x

Q: But do you know a certain Bernard Knight which you consider an authority of Forensic Medicine?

A: Yes, Sir.

Q: Did you come across his book entitled, "Simpson's Forensic Medicine, Eleventh Edition?

A: Yes, I have it with me.

x x x

Q: Under the title, "Genuineness of allegations of sexual assault", do you have that?

A: Yes, Sir.

Q: Let me read it:

> "The fact is that the significant proportion of allegations of rape and sexual assault reported to the police are found to be untrue, this is often wholly denied by women's (group) but is an undisputable fact, proven by many subsequent admissions by girls that no such attack took place."

x x x

Q: At a little bit lower of the same page, Doctor, it says:

> "Another more common reason is where a girl consent to intercourse and later denies that she agreed and accuses the man of rape or other sexual misbehavior. This may be due to fear of pregnancy, veneral infection but more often to a breakdown in the relationship such as being shielded where motives of revenge or mischief are present." (Underscoring supplied)

do you agree with that?

A: Again, these are statements of the author. I would not dispute it. It could be true."

Once this case was set in motion it would have been difficult to stop.

156. Somehow, somewhere along the way, complainant lost her grip on what was intended merely as an excuse for her brazen conduct in the evening of November 1, 2005 – no thanks to the various organizations who have hailed the complainant as a 'hero and a beacon of light to Filipina women who have suffered in the hands of oppressive American men' and other things to that effect – not realizing that the concern of these organizations are political and not particularly that they want justice for the complainant. The more interesting issue for these organizations is not the alleged rape committed against complainant but, rather, the Visiting Forces Agreement ("VFA"). They have found a catalyst in complainant to set in motion the abrogation of the VFA. Hail the hero complainant! Thus, she continued, and still continues to play the part.

Complainant was scared of her mother.

157. Testimony was offered at the trial that when complainant was dropped off by the Marines, "her companions asked [complainant] (who was crying) what happened, to which she responded, "I do not know. I will be punished by my mother."[260] Bicycle Policeman Paule, a prosecution witness and the first police officer to encounter complainant that evening, testified that complainant repeatedly told police that "[i]f my mother will learn about this, she will kill me."[261]

158. In fact, complainant did not specifically allege that she had been sexually assaulted by the appellant until more than twelve hours after the encounter had occurred, despite the fact that she was with family, friends, law enforcement and medical personnel nearly the entire time. The catalyst for her specific allegation appears to have been succumbing to the assumptions of others and out of fear of her mother finding out that her daughter was found drunk, with her pants down, after having been left at the side of the road by several Marines.

159. It also seems highly unlikely that if complainant had actually been sexually assaulted her first reaction would be to fear her mother's anger. Surely, it would be far more likely that a daughter who had been raped would look to her mother for support and comfort. On the other hand, the logical response of a woman who had just had sex in the back of a crowded van with a man she had met hours before and had then been dumped only partially dressed in front of a crowd of onlookers, might well be to fear her mother's (justifiable) wrath. Once her mother was involved, she had to propose a version of events that differed from the unflattering portrait of a promiscuous young woman who had allowed herself to be treated poorly by a group of men she barely knew.

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[260] TSN dated 20 June 2006 (B. Warshawsky), p. 57; Rollo, pp. 1702-1863.
[261] TSN dated 9 June 2006 (N. Paule), p. 23; Rollo, pp. 754-911.

Complainant had an American boyfriend, in whom she had an interest beyond the merely romantic.

160. One little discussed aspect of the events of November 1, 2005 is that complainant was, at the time, romantically involved with another U.S. Marine, L.Cpl. Brian Goodrich ("Goodrich"). Goodrich and complainant had been trying to process her immigration papers to join Goodrich in the United States.[262]

161. It is not hard to guess what Goodrich's reaction would have been had he learned that complainant had been engaged in the type of untoward behavior set forth above. This relationship therefore provided yet another reason for complainant to create a story in which she had been an unwilling participant.

162. It is certainly possible to imagine a manner in which the lower court could have discounted the possible motivations listed above and still found complainant to be a credible witness, just as it is possible to imagine a scenario under which he could have credited Muyot's testimony over the more voluminous contrary testimony. What is telling – in both instances – is the nearly complete absence from the lower court's findings of any discussion of even the possible relevance of these factors.

163. The lower court discounted embarrassment as a possible motivation because the complainant had testified that she was not embarrassed about having had a number of drinks.[263] But the issue in this case is not whether the complainant was embarrassed about having had a few drinks – it is whether she was embarrassed about what she did AFTER having those drinks, something that the lower court never addressed. The lower court similarly noted that simply being called a 'bitch' is not enough to cause someone to file a false claim.[264] This response

[262] TSN dated 10 July 2006 (S. Nicolas), p. 43, Rollo, pp. 3064-3145; TSN dated 13 July 2006 (S. Nicolas), p. 169, Rollo, pp. 3351-3529; TSN dated 14 July 2006 (S. Nicolas), pp. 50-51, Rollo, pp. 3530-3597.
[263] Appealed Decision, p. 42.
[264] Appealed Decision, p. 42.

is another straw man: the issue is not whether being called a 'bitch' would cause someone to file a false rape claim, it is whether all of the shabby treatment, particularly the manner in which the Marines left complainant behind (of which the 'bitch' comment was only a part), could provide a motivation to make a false accusation.

164. Finally, and most tellingly, the lower court concludes that "[t]here was no evidence at all that [complainant] was fearful of her mother."[265] The lower court made this claim despite Bicycle Policeman Paule's, a prosecution witness, testimony that complainant repeatedly said "[i]f my mother will learn about this, she will kill me."[266] The lower court credited every aspect of Paule's testimony *except* the fact that complainant told Paule that her mother would "kill" her. If this misrepresentation of the record and approach to the evidence were isolated, they could be written off as errors; the fact, however, that lower court made so many similar "errors" and all of them accrued to appellant's detriment leaves the indelible impression that the lower court made up its mind first and then forced the evidence to conform to that view.

Relief

The foregoing discussion clearly shows that appellant's guilt was not proven beyond reasonable doubt. Accordingly, the appealed decision should be reversed and the appellant should be acquitted.

WHEREFORE, it is respectfully prayed that the Honorable Court render judgment setting aside the appealed decision of the lower court and enter a new judgment acquitting the appellant.

Other just and equitable reliefs are also prayed for.

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[265] Appealed Decision, p. 42.
[266] TSN dated 9 June 2006 (N. Paule), p. 23; Rollo, pp. 754-911.

Makati City for Manila, May 18, 2007.

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Explanation for Service by Registered Mail

Due to time constraints, the distances involved, and the lack of adequate messengerial services, this Appellant's Brief shall be served by registered mail.

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